Facilitating Compliance and Coercive Enforcement of Foreign Investment Arbitration Awards

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Declaration

The candidate confirms that the work submitted is her own and that appropriate credit has been given where reference has been made to the work of others.

Abbreviation

BIT	Bilateral Investment Treaty
BRICS	Brazil, the Russian Federation, India, China and South Africa
CAFTA	Central American Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
CIL	Customary International Law
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and
ECJ	European Court of Justice
ECSI	European Convention on State Immunity
EU	European Union
FCN	Treaty of Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment
ITLOS	International Tribunal for the Law of the Sea
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nation
ILC	International Law Commission
ILR	International Law Report
IMF	International Monetary Fund
ISDS	Investor – State Disputes Settlement System
ITLOS	International Tribunal of the Law of the Sea
ITO	International Trade Organisation
MAI	Multilateral Agreement on Investment
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
NT	National Treatment
NY Convention	New York Convention on Recognition and Enforcement of Foreign awards of otl

	States
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PICJ	Permanent International Court of Justice
TRIMS	Agreement on Trade Related Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property
UK	United Kingdom
UKSIA	United Kingdom Sovereign Immunity Act
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	UNCITRAL Model Law on International Commercial Arbitration
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNSCI	United Nations Convention on Jurisdictional Immunities of States and their Property
US/USA	United States/ United States of America
USD	United States Dollar
USFSIA	United States Foreign Sovereign Immunity Act
VCCR	Vienna Convention on Consular Relations
VCDR	Vienna Convention on Diplomatic Relations
VLCT	Vienna Convention on the Law of Treaties
WB	World Bank
WTO	World Trade Organisation
WWI	World War One
WWII	World War Two

Abstract

The overall integrity of the investor-state arbitration regime pivots, ultimately on parties' ability to secure voluntary compliance or enforcement of the resulting arbitral awards. A significant proportion of cases where States have been instructed to pay investors damages have required enforcement proceedings in national courts due to a lack of voluntary compliance. Conversely, these enforcement proceedings unavoidably raise public international law issues of State immunity, precisely immunity from execution. Consequently, instances of investors' home State intervention – and unavoidably, re-politicisation of the investment dispute – have resurged. Yet, the current discussion about the regime's future has rarely focused on compliance, enforcement and, more generally, their effectiveness. This thesis fills this gap by investigating the challenges and limitations hindering awards' implementation under the regime, focusing primarily on proffering alternative solutions to enhance effectiveness.

The main legal hindrance to awards' implementation against States – State immunity - is explored from theoretical and practical perspectives, including the viability of solutions addressing immunity from execution. It argues that although immunity from execution is seemingly well perforated with exceptions to facilitate awards' enforcement when voluntary compliance fails, the actual application follows difficulties with predominant deference towards States' interests. Thus, unless a State willingly complies with an award rendered, executing against its assets is almost impossible. Alternative solutions, therefore, are necessary. Since immunity-related restraints only come into play when voluntary compliance fails, the thesis advances the importance of engaging solutions that encourage voluntary compliance from the very onset. Therefore, with analysis framed in international relations theoretical approaches to compliance in conjunction with some seminal State compliance behaviour under the regime, the thesis also inquired into factors impacting States' willingness to (not)comply with their obligations to draw workable solutions.

Ultimately, the thesis concludes by suggesting engaging a waiver of immunity from execution and fostering voluntary compliance by increasing transparency and introducing an appellate mechanism under the regime. The latter proposal is partly necessitated by the observation that the absence of an effective review mechanism under the regime makes awards susceptible to post-award attacks. Arguably, non-compliance and subsequent utility of immunity-related defences are sometimes tactical measures States adopt to savage perceived errors in adverse outcomes. However, to be successful for the purpose and guide against abuse of use, an appellate mechanism should come with well-defined conditions that induce voluntary compliance and, ultimately, the awards' enforcement.

Chapter 1: Introduction

1.1 The Research Problem – Awards' Implementation

The past two decades have seen the increased participation of States and their instrumentalities in trans-border investment activities with foreign investors in spheres as such hydrocarbon exploration, mining and infrastructure. Corresponding to this increase is the unprecedented proliferation of signed bilateral investment treaties (BITs), regional free trade agreements (FTAs) and plurilateral investment treaties[1] providing foreign investors with beneficiary rights primarily aimed at protecting their investments in host States. In this network of International Investment Agreements (IIAs) are comparable standards of protection[2] and, most importantly, Investor-State dispute settlement mechanisms (ISDS), notably Investor-State arbitration (ISA) to resolve inevitable investment disputes between host States and foreign investors.[3]

ISA is a compelling alternative to the traditional court system and a catalyst for protecting the rule of law in a State-dominated system of international law.[4] It aims to balance the parties' conflicting interests by guaranteeing a depoliticised unequivocal and independent rule-based redress of their grievances in a neutral forum.[5] Importantly, ISA also aims to facilitate the implementation of the resulting arbitral awards in multiple jurisdictions.[6] With the establishment of some powerful and specialised arbitral institutions like

[1] Currently, 2,815 BITs and 421 Treaties with Investment Provisions (TIPs) are signed between States. Available at https://investmentpolicy.unctad.org/international-investment-agreements. Accessed 23/01/21. For plurilateral treaties see for example, Energy Charter Treaty (ETC) 1994, 2080 UNTS 95; North American Free Trade Agreement (NAFTA) 1992, 32 ILM 289, 605 (1993); Association of South-East Asian Nations Comprehensive Investment Agreement, Central American-Dominican Republic Free Trade Agreement (DR-CAFTA) 2004, 43 ILM 514 (2004).

[2] Substantive obligations include fair and equitable treatment (FET), national treatment (NT), most favoured nation treatment (FNT), the prohibition against expropriation without compensation, full protection and security.

[3] A Reinisch and L Malintoppi, 'Methods of Dispute Resolution' in P Muchlinksi et al., (eds) *The Oxford Handbook of International Investment Law* (2008), 691 – 714.

[4] JHH Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004), 64 ZaoRV 547.

[5] TS John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP 2018).

[6] Ibid; G Coop et al., 'Sovereign Immunities and Investor-State Awards: Specificities of Enforcing Awards based on Investment Treaties' in J Fouret (eds), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Global Law & Bus. 2015).

the International Centre for Settlement of Investment Disputes (ICSID)[7] providing self-contained enforcement supports, investment disputes between host States and foreign investors have likewise increased and claims are resolved almost daily.[8] As of June, 2022, a total of 1,104 publicly known cases have been initiated since the regime's inception in the 1980s,[9] of which 838 have been decided under the ICSID edifice and Additional Facility Rules.[10]

Despite its popularity, the ISA regime suffers from a series of weaknesses that have attracted critical backlashes that seemingly threaten its integrity and effectiveness.[11] Concerns include rising arbitral costs and delays, asymmetry in parties' interests, lack of transparency, inconsistency in arbitral decisions and lack of effective mechanisms to address and correct errors in arbitral outcomes.[12] It is also argued that the regime lacks adequate and effective mechanisms to facilitate the successful implementation of arbitral awards after lengthy and costly arbitral proceedings.[13] At the heart of such criticisms is therefore significant literature discussing ways to make the regime more effective and acceptable.[14] However, not all areas of

[7] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159. [Hereafter, The ICSID Convention]

[8] *Reinisch and Malintoppi*, (n 3) 692.

[9] UNCTAD, Investor–State Dispute Settlement Cases: Facts and Figures 2020 (Sept. 2021 [online] Available at: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf> Accessed 25/01/21.

[10] See The ICSID Caseload – Statistics (Issue 2021-2) 7 – 8. Available at https://icsid.worldbank.org/sites/default/files/Caseload%20Statistics%20Charts/The%20ICSID%20Caseload%20Statistics%202021-2%20Edition%20ENG.pdf> Accessed 13/09/21.

[11] M Waibel et al., *The Backlash against Investment Arbitration: Perception and Reality* (Kluwer Int'l, 2010), at xxxvviii—xiv; SI Strong, 'Contractual Waivers of Investment Arbitration: Waive of the Future?' (2014), 29 ICSID REV. 690; CN Brower and SW Schill, (2009) 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?', (2009) 471 Chicago J. Int'l Law 5.

[12] Ibid. See also M Langford et al., 'The Revolving Door in International Investment Arbitration' (2017) 20 J. Int'l Eco. Law 301; S Puig, 'Blinding International Justice' (2017) 56 VA. J. Int'l Law 647, 661, 672–75.

[13] AK Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' (2010) 21 Am. Rev. Int'l Arb. 211, at 233. [Hereafter Bjorklund, *The Re-Politicization of Disputes*].

[14] See ICSID, 'ICSID Rules and Regulations Amendment Process' <https://icsid.worldbank.org/en/amendments>. Accessed 19/06/20; UNCITRAL Working Group III, 'Investor-State Dispute Settlement Reform' https://uncitral.un.org/en/working_groups/3/investor-state. Accessed 19/06/20. See A Roberts, 'Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 AJIL, at http://dx.doi.org/10.2139/ssrn.3189984. Accessed 12/09/20; For critical analyses of the ongoing reform efforts,

these concerns have received sustained critique in the extant literature. In particular, concerns relating to award implementation, such as compliance with and coercive enforcement of arbitral awards, have received little attention. Indeed, as Meg Kinnear, ICSID's Secretary-General, recently acknowledged, most intellectual works concerning the investment arbitration regime focus on substantive obligations, procedural requirements and treaty interpretation, leaving aside critical issues arising in the post-award implementation phase.[15] This research contributes to the extant body of literature by focusing on this under-examined but equally important aspect of the ISA regime. It probes into the challenges and limitations that seemingly threaten awards' implementation under the regime to develop an understanding and proffer solutions for improvement.

Unsurprisingly, a crucial question in the minds of disputants engaging arbitration as an alternative method of settlement disputes is whether the resulting arbitral award can be implemented, be it voluntary compliance or (where necessary) coercive enforcement of the arbitral award.[16] Such a question undoubtedly cuts into the heart of the utility of the ISA system and thus impacts its overall effectiveness. Admittedly, without the availability of reliable, fair and effective means of implementing resulting arbitral awards, actioning arbitration clauses in IIAs or engaging in a long arbitral resolution serves no purpose.[17]

As recently as a decade ago, commentators observed that States generally complied voluntarily with investment awards,[18] whether such awards were rendered through ICSID arbitration or in an *ad hoc* context.

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see D Caron and E Shirlow, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences' in A Follesdal and G Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (OUP, 2018).

[15] M Kinnear, 'Forward' to J Fouret (eds) *Enforcement of Investment Treaty Arbitration Awards* (Global Law and Bus., 2015), at 1-7.

[16] Ibid. See also LA Mistelis, 'Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement' (2013) 28(1) ICSID Review 64, [hereafter Mistelis, *Award as an Investment*].

[17] HM Holtzmann, *Commentary: International Arbitration in 60 Years of ICC Arbitration: A Look at the Future* (ICC Publ., 1984), at 362.

[18] See for example, E Baldwin et al., 'Limits of Enforcement of ICSID Awards' (2006) 23(1) J Intl Arb. 1 [noting lack of compliance issues during the period of writing, but highlighting possible change as States become increasingly subject to litigation]; A Blane, 'Sovereign Immunity as a Bar to the Execution of International Arbitral Award*s'* (2008), 41(2) N.Y.U. J. Int'l L. & Pol. 453, 464–5; CF Dugan, *Investor–State Arbitration* (OUP, 2008), at 675-676; AS Alexandrov, 'Enforcement of ICSID awards: Article 53 and 54 of the ICSID Convention'

Today, the trend is increasingly moving towards "resistance" as illustrated by a recent study showing States initiating annulment proceedings in 83 per cent of adverse awards rendered against them.[19] Thus, the instances of non-compliance or substantially delayed compliance by States are significant.[20] Indeed, a considerable percentage of the cases where States have been instructed to pay damages has required coercive enforcement proceedings in national courts. Conversely, these proceedings also inevitably raise public international law (PIL) problems, precisely issues of State immunity and, consequently, instances of home-State intervention – and unavoidably re-politicisation of the dispute – have resurged.[21]

Under the ISA system, award implementation is primarily facilitated by the International Convention for Settlement of Investment Disputes (ICSID Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[22] As an alternative means to secure the

(2009) 1 Transnat'l Disp. Mgt., at 10. https://www.transnational-dispute-management.com/article.asp?key=1345. Accessed 02/11/2020. AS Alexandrov and IA Laird, 'Compliance and Enforcement', in P Muchlinski et al., , (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008), 1171, 1185 ("[A]necdotal evidence would suggest that state respondents . . . have . . . abid[ed] by final awards"); P Lalive, 'Enforcing Awards', in *Sixty Years of ICC Arbitration* (ICC Publ., 1984), at 317, 319 (noting that voluntary compliance with ICC awards exceeds 90 per cent); L Nelson, 'International Joint Ventures' (1990), 2 Int'l Legal Perspectives 75, 78 ("In any case, it is estimated that approximately 95% of international arbitration and conciliation awards are complied with voluntarily"); LE Peterson, 'How Many States Are not Paying Awards under Investment Treaties?' (IA Reporter, 7 May 2010) <www.iareporter.com/articles/how-many-states-are-not-paying awards-under-investment-treaties/>; ST Tonova, 'Compliance and Enforcement of Awards: Is there a Practical Difference between ICSID and Non-ICSID Awards' in IA Laird and TJ Weiler (eds), *Investment Treaty Arbitration and International Law*, vol. 5 (Juris Publ., 2012), at 235 ("highlighting the general view that non-compliance hardly occurs and recognising exceptions); JE Vinuales and D Bentolila, 'The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States' in LB Chazournes et al. (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Brill Nijhoff, 2012); CB Rosenberg, 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards' (2013) 44 Geo. J Int'l L 503, at 507. For current analyses, see JA Kuipers, 'Too Big to Nail: Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards' (2016) 39(2) Boston Coll Int'l and Comp L Rev 417, at 420 ("highlighting that investment awards enforcement against States problems 'have only rarely surfaced because states by and large comply with awards rendered against them"); A Joubin-Bret, 'The Effectiveness of the ICSID mechanism regarding the enforcement of arbitral awards' in J Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards* (Globe Law and Bus., 2015) [providing an sceptical view as to whether States usually comply with investment awards rendered against them.]

[19] E Gaillard and IM Penushliski, 'State Compliance with Investment Awards' (2020), 35(3) ICSID Rev.-FILJ, 540, at 1, 48, at https://doi.org/10.1093/icsidreview/siaa034. Accessed 13/12/21.

[20] Ibid.

[21] Ibid.

[22] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (signed 18 March 1965, entered into force 14 October 1966) 575 UNTS 159. [hereafter ICSID Convention]; The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (Hereafter, New York Convention).

effectiveness of arbitral awards when voluntary compliance fails, contracting State parties to these Conventions are obliged to recognise arbitral awards as binding and to enforce them.[23] However, arbitral awards under both Conventions are coercively enforceable only to ensure that the States' domestic immunity law is not violated.[24] Of course, restrictive immunity theory is currently observed wherein a State's engagement in commercial activity (*acta iure gestionis*) automatically removes immunity in favour of adjudication, including immunity covering commercial assets marked for satisfying judicial judgments.[25] However, in practice, the criteria and conditions under which immunity would be lifted in favour of enforcement (actual attachment) are still unclear.[26] Consequently, as in numerous notable cases including *Sedelmeyer* and *Yukos v The Russian Federation*,[27] if a State party to ISA does not voluntarily comply with an arbitral award rendered against it, there is a high possibility that the foreign investor may not effectively and spontaneously recoup remedy after a long and costly arbitral endeavour.[28] As Bjorklund correctly assesses the situation,

[23] Articles 53 – 54, ICSID Convention and Article III, New York Convention, ibid.

[24] Article V, New York Convention and Article 55, ICISD Convention, ibid.

[25] Bjorklund, *Re-Politicization of Investment Disputes*, (n 13) at 27; X Yang, *State Immunity in International Law* (CUP, 2012), at 461; JR Profaizer, *Emerging Issues in the Enforcement* (Investing 2009), at 163.

[26] *Bjorklund*, ibid; H Fox, 'The Restrictive Rule of State Immunity The 1970s Enactment and Its Contemporary Status' in T Ruy et al., (eds) *The Cambridge Handbook of Immunities and International Law* (CUP, 2018) [Hereafter, Fox, *The Restrictive Rule of State Immunity The 1970s*], at 21- 39.

[26] Ibid.

[27] *Sedelmayer v Russian Federation*, Arbitration Award (*ad hoc* arbitration under the Stockholm Chamber of Commerce arbitration rules July 7, 1998), *http://italaw.com/documents/investment_sedelmayer_v_ru.pdf*. accessed on 21 August 2019; *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (PCA Case No. AA 226); *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227); *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (PCA Case No. AA 228) [Also known as 'The Yukos Awards.']

[28] A van Aaken, 'Blurring Boundaries between Sovereign Acts and Commercial Activities. A Functional View on Regulatory Immunity and Immunity from Execution*'* in A Peters et al., (eds), *Immunities in The Age of Global Constitutionalism* (M Nijhoff Publ., 2014); H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP, 2013).

> The international community has created an elaborate international architecture with respect to investment protection but at the back end – the stage of actual collection – the edifice is built on shaky ground.[29]

This is damaging, not least because the viability of implementing arbitral outcomes cuts into the heart of the utility of the ISA system and thus impacts its overall effectiveness. It is also harmful because the current discussion about (reimaging) the future of ISA scarcely focuses on award implementation issues, i.e. compliance and enforcement of arbitral awards, and, more generally, their effectiveness.[30] Simply put, the current scholarly works of relevance rarely focus on scenarios in which States voluntarily comply with awards or probe deeper into the challenges and limitations that foreign investors encounter during coercive enforcement of awards when voluntary compliance fails.[31] As a result of this lack of comprehensiveness, efforts at addressing the issues generally lack effectiveness. Therefore, this thesis will fill the gap in the extant literature. Mainly, it aims to analyse the legal challenges and limitations that State immunity poses to coercive enforcement of awards with a view to examining alternative solutions that could facilitate and enhance both voluntary compliance and coercive enforcement of arbitral awards under the regime.

1.2 Research Objectives

A key purpose of this thesis is to examine the theoretical underpinnings of the doctrine of State immunity, particularly from measures of constraint and execution, and the extent to which it impacts award coercive enforcement under the regime. However, since immunity and related challenges only come into

[29] Ibid, at 229- 238; See also VO Nmehielle, 'Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes' (2011) 7 Ann. Surv. Int'l & Comp. L. 21; V Živković, 'Pursuing and Reimagining the International Rule of Law Through International Investment Law' (2019) Hague J. Rule of Law, at 1-27 [noting non-compliance impact on the overall effectiveness of the regime].

[30] Gaillard and Penusliski (n 19); AB Mansour, 'Enforcement of Investment Treaty Arbitration Awards' in J Fouret (eds), *The Law and Practice of International Courts and Tribunals* (2015), at 563-565; See Bjorklund, *Re-Politicization of Investment Disputes*, (n 13), at 229- 238; AS Alexandrov and IA Laird, 'Compliance and enforcement' in P Muchlinski et al., (eds), *The Oxford handbook of international investment law* (2008), at 1171-1187; AK 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* (2009), at 302. [Hereafter Bjorklund, *State Immunity*.]

[31] See CS Young 'Enforcement of Investor-State Arbitral Awards against the Assets of State-Owned Enterprises' 29 (2019), J. Arb. Stud., at 71; Bjorklund, *The Re-Politicization of Investment Disputes*, (n 13), at 240.

play when voluntary compliance fails, it is necessary, particularly in the context of proffering (alternative) solutions, to question what impacts States' willingness to comply or not to comply with their arbitral obligations. This inquiry, framed in international relations (IR) theoretical approaches to compliance, will enable the examination into the regime's processes and current state in order to suggest potential solutions that look to facilitate voluntary compliance as an alternative measure for curbing immunity and related challenges, and improving award implementation, generally. To this end, the introduction of an appellate mechanism in the regime and other solutions will be critically analysed, synthesizing their viability for improving award implementation. The following are the key objectives of the thesis research:

i. To explore the extent to which the governing legal frameworks for implementing investment arbitral awards under the current ISA system actually facilitate award implementation;

ii. To assess the legal criteria for determining immunity from measures of constraint and execution under the restrictive immunity theory and their viability in bridging the chasms between States' claim to immunity and foreign investors' ability to enforce arbitral awards when voluntary compliance fails;

iii. To identify and analyse critically the factors impacting States' voluntary compliance and;

iv. To propose alternative measures to improve voluntary compliance and successfully aid the coercive enforcement of arbitral awards under the regime.

1.3 Research Questions

Various issues in ISA, presented at the surface as simply technical challenges, may in reality be outcomes of more profound inherent uncertainties. The increasing trend toward "resistance", marked by an increase in annulment proceedings against arbitral awards, as well as enforcement proceedings targeting States' assets and the State immunity challenge thereof, and most importantly the surge in home States' intervention, raise questions about the regime's adequacy in protecting investment engagements that require thorough investigation. It is not proposed to examine in detail the regime's processes in regulating investment engagements, but to investigate and discuss shortcomings at the remedial stage as they pertain

specifically to award implementation in order to suggest ways of improvement. Accordingly, the thesis asks whether the current system of ISA functions adequately and effectively in facilitating successful implementation – compliance with and ultimately coercive enforcement – of arbitral awards. To provide context, the following key questions are necessary:

i. To what extent does the governing legal framework for implementing arbitral awards actually facilitate successful implementation of arbitral awards under the current ISA system?

ii. What are the criteria for determining immunity from measures of constraint and execution under the restrictive immunity theory and their viability in bridging the chasms between States' right to immunity and foreign investors' ability to enforce arbitral awards when voluntary compliance fails?

iii. What factors impact States' voluntary compliance with their arbitral obligation?

iv. What alternative measures can facilitate and improve voluntary compliance and successfully aid the coercive enforcement of arbitral awards under the regime? For example, how viable is an appellate mechanism for the purpose?

1.4 Research Methodology

In considering the nature of the questions above, doctrinal methodology appears appropriate to ensure that each section of the work is discussed from theoretical and practical perspectives.[32] An essential component of a doctrinal methodology is that it entails a critical conceptual analysis and synthesis of relevant legislation and case law to expose a statement of the law relevant to the issue under examination.[33] This work adopts this methodology because it identifies and analyses the relevant current ISA law on award implementation with a view to proffering alternative measures for improvement. It transcends the discussions and critiques of the current issues around award implementation under the ISA regime to

[32] See M McConville and WH Chui, *Research Methods for Law*, (Edinburgh Univ. Press, 2010), at 4.

[33] T Hutchinson 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015), 8 Erasmus L. Rev. 130, at 131.

suggest ways in which the relevant rules of engagement can be altered or improved, which is a fundamental characteristic of good doctrinal research.

Doctrinal methodology draws comprehensively from diverse primary and secondary legal sources to build a problem-solving scheme.[34] In addition, it entails drawing a nexus between seemingly unrelated doctrinal fibres and the challenge of extracting and separating general doctrines from an inchoate body of primary sources. It implicates a distinctive combination of inductive and deductive reasoning and analogy, common law tools, aiding and enabling legal practitioners to make sense of complex legal problems.[35]

The main question as to whether the current system of ISA functions adequately and effectively in facilitating successful implementation – compliance and ultimately coercive enforcement – of arbitral awards are explored from theoretical and practical perspectives. Therefore, texts, articles and esteemed academics and professional legal commentaries are examined in conjunction with arbitral determinations, domestic cases and statutes, as well as treaties law developed by international public bodies. The legal frameworks governing the implementation of ISA awards – namely, the ICISD and New York Conventions – are examined. This entails exploring implementation obligations of parties under the Conventions, first to abide and comply with awards once rendered relating to disputing parties and, second, the obligation of States parties to recognise and enforce awards in the event of delayed compliance or non-compliance. Under the Conventions, the specificity of arbitral awards (including post-award remedial measures) are examined in this context, with a view to comparing the Conventions and related rules to draw common strands of limitations and challenges that pertain to award implementation. While ICSID is commended for its self-contained nature, it internal review procedures can hamper the voluntary compliance and coercive enforcement of awards, in much the same way that (like the New York Convention) it also leaves the effectiveness of the coercive enforcement of awards to national law, particularly the law on State immunity.

[34] T Hutchinson, 'Doctrinal Research' in W Dawn and M Burton (eds), *Research Methods in Law* (2nd edn, Abingdon Oxon: Routledge, 2017), at 16.

[35] *Ibid*, at 19.

On this basis, both Conventions harbour common limitations, including limitations relating to State immunity, which deserve in-depth analysis to understand the impact on award coercive enforcement under the regime.

Although anchored in international law, the essence of the international jurisprudence of State immunity is not the creation of a comprehensive international treaty of universal applicability; instead, it is of domestic courts' creation. Efforts to promulgate an international rule of universal applicability have been unsuccessful, yet two Conventions are significant: The European Convention on State Immunity (ECSI)[36] and the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI).[37] The ECSI's significance is marginal given its low ratification by States. The UNSCI is not yet in force but has significant currency due to its notable customary international law (CIL) status. Some applicable (treaties) *lex specialis* regimes of immunity governing certain categories of States assets are of equal significance.[38] Most implead of immunity under international law continue to rise before national courts which, through their specific national rules/legislations and comparative determinations of CIL and treaty law, continue to contour and develop the rule.

Against this mixture of sources of law, determining the actual corpus of the doctrine, including the specific immunity issues under examination will warrant a comparative approach. This means comparing rules under the sources above and judicial determinations across various national and international jurisdictions. Immunity rules from many major civil law and common law jurisdictions where the pertinent issues under examination have arisen are explored, noting divergence or convergence in the law and/or judicial interpretations to draw common practical considerations that pertain to award coercive

[36] May 16, 1972, 1495 U.N.T.S 181 [Hereafter, The ESCI]

[37] GA Res 59/38, U.N. GAOR, 59th Sess, U.N. Doc A/RES/59/38 2004. [Draft Articles on Jurisdictional Immunities of States and Their Property with commentaries, in *Report of the International Law Commission on the work of its forty-third session*, U.N UN Doc A/46/10, *reprinted* in [1991] 2(2) Y.B. Int'l Law COMM'N., 13, 56 U.N. Doc A/CN.4/SER.A/1991/Add.1 (Part 2).] [Hereafter UNSCI]

[38] See for example, The Vienna Convention of Diplomatic Relation (VCDR) of 1961, April 24, 1963 [1970], 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (in force for the US December 24, 1969); The Vienna Convention on Consular Relations (VCCR) of 196324, April 1963, (in force on 19 March 1967). UN, Treaty Series, Vo1. 596.

enforcement. Predominate attention will, however, be given to the rules from the jurisdictions like the United States of America, the United Kingdom, Germany, France, Switzerland and the Netherlands. These jurisdictions are specifically selected for the research because the most recorded and notable ISA coercive enforcement proceedings against recalcitrant States are initiated here due to the availability and prevalence of attachable foreign States assets in these jurisdictions.[39] Second, these jurisdictions' immunity rules are advanced and currently serve as a model law and/or precedence to other States, therefore, the likelihood of the rules' representativeness is robust for generalisation.[40] Lastly, immunity rules under these jurisdictions present the current state of the doctrine in its restrictive immunity state and represent the distinction between common and civil law jurisdictions, in terms of the development, application and current interpretation of the rules.[41]

By also raising issues regarding voluntary compliance, recourse is made to theories and legal rules covering the obligation to comply with IIAs (with a focus only on the obligations post ISA determinations/outcomes) as well as stakeholders' discussions and criticisms of the current ISA regime, albeit to some extent. States' responses to some arbitral determinations, particularly determinations impacting or relating to award implementation under the seminal arbitral frameworks, especially ICSID, are gleaned and analysed. To this end, Argentina's compliance behaviour *vis-a-vis* ICSID awards following the State's economic meltdown of 2002 will be case analysed, drawing on, factors identified by

[39] Some of these States are notable epic banking centres which make them attractive spot for fishing assets. The US, UK and Switzerland for example, hold significant foreign reserves for foreign States. For instance, the US Federal Reserve Bank of New York (Federal Reserve) alone is said to hold about two hundred and fifty foreign central banks and governments assets which is worth approximately $3.3 trillion USD. See IB Wuerth, 'Immunity from Execution of Central Bank Assets' in T Ruy et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP, 2018). LG Goldberg and R Grosse, 'Location choice of foreign banks in the United States' (1994), 46(5) J. Econ. & Bus. 367-379. See PD Trooboff, 'Foreign State Immunity: Emerging Consensus on Principles' (1986), 200 Recueil des Cours: Collected Courses of the Hague Academy of International Law (1986-V) 235, in Yang, (n 25), at 401; CH Schreuer, *State Immunity: Some Recent Developments* (Cam. Grotius Publ. Ltd, 1988, in Yang (n 25), at 401 [noting the prevalence of enforcement actions in the Switzerland and the peculiarity of the Swiss immunity rules and its implication on the effectiveness of coercive enforcement of ISA awards].

[40] Both the United States Foreign Sovereign Immunity Act of 1976 (US FSIA) and United Kingdom State Immunity Act of 1978 (UK SIA) are the earliest immunity codifications on the restrictive immunity approach and has influenced the codifications as well as the interpretative approach adopted by many major States in the Common Law region; Australia, Canada and South Africa been notable examples.

[41] See Chapter 3, section 3.2.

international relations theories of compliance as impacting State compliance behaviour. Here, factors such as direct sanctions, reputational loss and the normative factor of legitimacy are assessed against Argentina's compliance behaviour at two different periods: the period of the initial non-compliance from 2008 to 2013 and from mid-2013 to the present day. This comprehensive analysis will highlight the factor that best influences State compliance behaviour from onset against which recommendations will be made toward enhancing award implementation under the regime.

1.4.1. Research Methodological Limitation

The main methodological limitation of the research relates to the availability of seminal arbitral outcomes and accessibility of internally documented State reactions following certain adverse arbitral rulings. This is because either there is limited empirical data, lack of access to relevant public information, perhaps due to the cloak of confidentiality or the newspaper/government sites documenting the relevant State reactions following certain adverse rulings, are inaccessible due to internet protocol (IP) reasons. Of course, recourse to empirical works of eminent scholars like Gaillard and Penusliski and online databases[42] coupled with doctrinal analysis complements the research in achieving its objectives, including forming conclusions for the recommendations put forth for improvement. However, recourse to more and directly sourced empirical data into compliance and/or coercive enforcement of ISA awards is advantageous in assessing the full extent of effectiveness of award implementation under the regime. While advantageous, engaging this approach would, undoubtedly exceed the thesis' scope and makes its intended objectives difficult to achieve within the limited time allowed.

1.5 Research Contribution and Scope

Aside from the general implementation issues lacking a sustained critique or attention in the relevant literature currently discussing the regime's ongoing shortcomings and ways to ameliorate them,[43] existing

[42] For example, Gaillard and Penusliski (n 19) [This is the most current and comprehensive empirical data to date on State compliance with ISA award, including some sampled State reactions following certain arbitral determinations]; Investment Arbitration Reporter https://www.iareporter.com/ [provide a general detail of awards rendered by ISA tribunals].

[43] Gaillard and Penusliski (n 19).

scholarly works of relevance to award implementation are general and lack comprehensiveness. Indeed, while the doctrine of State immunity draws much scrutiny in academia, examination of its utility in resistance to ISA dispute resolution seems relatively sparse. However, as a compelling litigation tactic, the immunity claim is an invaluable tool of the State, if only to cause considerable expense to a foreign investor which then impedes pursuit of a legitimate claim. Furthermore, the current scholarly works of relevance to award implementation challenges rarely focus on issues of compliance with investment obligations undertaken by States, particularly, the circumstances in which States voluntarily comply or refuse to comply with awards,[44] despite this being a precursor to the former, i.e. coercive enforcement challenges.

By having recourse to the regime's processes in the context of implementing awards, the research focuses not only on examining coercive enforcement challenges, which implicate immunity and related challenges, setting its theoretical and practical underpinnings and engaging it systematically. But also, focuses on compliance issues, identifying inherent strengths and weaknesses under the regime that impact voluntary compliance. Through this synthesizing approach, the thesis provides a comprehensive analysis and adopts a proactive approach to investigating award implementation challenges that look to identify [and treat] the cause rather than the symptoms, thereby proffering viable measures for improvement. To this end, not only does the thesis bring award implementation under ISA to the forefront of legal scholarships from a new perspective, but it also aims to contribute to a range of contemporary research. In particular, this research addresses itself to three notable discussions in the public international law scholarship.

[44] See for example, Young (n 31), at 71; Bjorklund, *The Re-Politicization of Investment Disputes*, (n 13), at 240.

First, to the international law compliance calculus[45] and States' compliance with IIAs,[46] critically analysing compliance inducing factors, making normative arguments on how compliance can be achieved voluntarily without economic and related coercive sanctions. Second, it contributes to the international investment treaty arbitration regime's ongoing legitimacy debates and stakeholders' discussions to enhance its effectiveness for users.[47] Perceptions of legitimacy and its influence on State compliance behaviour are not only critically analysed but juxtaposed against the recent trend of non-compliance with ISA awards - using Argentina's compliance behaviour vis-a-vis ISCID awards - to highlight the current weaknesses in the regime's legal processes and their impact on award implementation. Thirdly, it aims to contribute and response to the wider call to formulate solutions to address the regime's challenges albeit from the context of enhancing award implementation. In the context of awards' coercive enforcement challenges, it will critically examine why certain proposed immunity-specific legal solutions (for example, a treaty-based waiver of immunity from execution[48]) are not viable for possible adoption and implementation. Most importantly, what (and how) alternative legal solutions could ameliorate and enhance awards' compliance and coercive enforcement will be put forth for possible policy consideration.

To this end, the research engages two new solutions, herein increased transparency, and the introduction of an appellate mechanism. The basis of these proposed alternative solutions, including

[45] See for example, HJ Morgenthau et al., *Politics Among Nations: The Struggle for Power and Peace* (6th edn., Knopf, 1985); L Henkin, *How Nations Behave* (2nd edn, Col. Univ. Press, 1979); A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard Univ. Press, 1995); HH Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale L. J., 2599; B Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998), 19 M J Int'l L., 345; BA Simmons, 'International Law and State Behaviour: Commitment and Compliance in International Monetary Affairs' (2000), 94 Am. Pol. Sci. Rev., 819.

[46] See for example, M Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' (2016), 19 J Int'l Econ. L., 681; CM Ryan, 'Discerning the Compliance Calculus: Why States Comply with International Investment Law' (2009) 38 Ga J Intl & Comp L 63.

[47] See for example, M Waibel et al (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law Int'l, 2010); SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005), 73 Fordham Law Rev., 1521; M Sornarajah, 'International Investment Law as Development Law: The Obsolescence of a Fraudulent System' in M Bungenberg et al (eds), EYBIEL 2016, vol. 7 (Springer, 2016).

[48] See for example, Blane, (n 18); Bjorklund, *Repolitization* (n 13); N Pengelley, 'Waiver of Sovereign Immunity from Execution: Arbitration is Not Enough' (2009), 26(6) J. Int'l. Arb. 859.

measures to secure their effectiveness for award implementation within the regime's current reform efforts, will be made. The latter proposal is currently under consideration by the UNICTRAL Working Group III as a seminal antidote for many of the regime's legitimacy shortcomings.[49] While the engagement here, is limited in scope to examining the mechanism from the context of award implementation, it will attempt to inform how the mechanism in its current policy formative stage could be reinforced with certain measures to induce voluntary compliance and aid coercive enforcement of awards. This is a significant gap in the scholarly and policy consideration of the mechanism. Thus, the sustainability and promotion of ISA will be set out and made robust from a new perspective to inform the regime's current policy decisions.

A study analysing award implementation in this manner and in such depth has yet to be undertaken. There is scope for valuable original contributions to the advancement of investment arbitration scholarship and without doubt, the measures recommended will inform policy decisions in the subject field. Further, it hopes to guide practitioners and prospective claimants to ISA, informing and cautioning them of pending challenges ahead and ways to circumvent them in advance through the measures recommended.

1.6 Research Structure

This thesis is divided into seven chapters. Chapter One captures the background of the thesis, including the research problem, questions, contribution, the methodology adopted to conduct the study and its structure.

Chapter Two focuses on investment arbitral awards and the legal frameworks governing their implementation under the ISA system: the ICSID Convention and New York Convention. Due attention will be paid to the specificities of arbitral awards, including their susceptibility to post-award challenges, while treaty obligations attached to their implementation are also explored under these Conventions. A comparison of the conventions will be made to identify the common conditions and legal challenges and their impact on award implementation under the ISA regime.

[49] UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, detailed works of the Group are available at https://uncitral.un.org/en/working_groups/3/investor-state. Accessed 12/02/22.

Chapters Three and Four will be devoted to analysing the main legal challenges and limitations to the coercive implementation of awards, i.e. the doctrine of State immunity. Chapter three commences with the doctrine's development from the absolute immunity approach to the current restrictive immunity approach. It will also explore the event necessitating the shift, the increased commerciality of States' acts and, hence, the commercial activity exception and its relevance to the investment arbitration process. It will show the extent to which the restrictive immunity approach has developed to bridge the gap between foreign investors and host States in their investment relationship. Remaining cognisant of dual regimes of immunity under state practice, i.e. immunity from jurisdiction and immunity from measures of constraint and execution, it will examine the criteria for determining the former, which defer from immunity from jurisdiction, drawing on viability and effectiveness in bridging the gap between States' right and claim to immunity and investors' right to remedy in coercive enforcement actions. The chapter will show that, while immunity from measures of constraint and execution is unavailable as a plead in respect of States' assets 'in use for commercial purpose' (*iure gestionis*) and thus, reminiscent of the respective immunity approach purportedly. In practice, a significant difficulty lies in characterising the scope of assets not considered 'in use for sovereign/non-commercial purpose' and thus, available for taking enforcement actions. Therefore, state practice fosters different connotations that predominantly favour States' interests.

Chapter Four clarifies further difficulties of enforcing arbitral awards against States. The chapter identifies that certain category of States' assets enjoy more robust protections in enforcement actions, aside from the general immunity restraints under ISA proceedings. Those assets usually encompass States' assets of central banks, diplomatic and consular (including bank accounts), assets forming part of the cultural heritage of the State and military assets. Thus, whether these assets are 'in use for commercial purpose' (i.e. the general immunity exception) is irrelevant to the initial immunity determinations during awards' coercive enforcement actions. Additionally, having a waiver from the relevant State in favour of enforcement actions may not always suffice to invalidate immunity from measures of constraint and execution in respect of these assets.

Moreover, the thesis identified that some practice state adds a further requirement of jurisdictional nexus in order to institute coercive enforcement actions against States' assets. Therefore, these difficulties have caused potential challenges and limitations to foreign investors taking coercive enforcement in national courts against foreign States' assets. It concludes that the restrictive immunity approach and its hallmark, commercial activity exception is a quasi-misnomer: if a State party to an ISA proceeding does not voluntarily comply with awards rendered against it, taking coercive enforcement against its assets to enforce the award will be difficult, if not impossible. This conclusion highlights the importance of engaging additional solutions (beyond the restrictive immunity approach) for facilitating award implementation under the regime.

Chapter Five relates to issues surrounding voluntary compliance, probing into factors that impact State compliance with a view to suggesting alternative solutions. The enquiry starts by exploring the three main international relations (IR) theoretical approaches to State compliance behaviour: realism, liberalism and constructivism. Factors such as sanctions, reputational loss and the normative factor of legitimacy are assessed against Argentina's compliance behaviour at two different stages: the period of the initial non-compliance from 2008 to 2013 and from mid-October 2013 to date. Ultimately, the normative factor of legitimacy, being a proactive measure to States' initial compliance as Argentina's case will show, will be further explored against the regime's processes and the State reactions thereof, while drawing up practical considerations for improving award implementation. Here the thesis will argue that sometimes non-compliance and subsequent attacks on arbitral awards are borne out of certain perceived inadequacies in the regime's processes.

Chapter Six explores various solutions, including those targeted specifically at addressing immunity from measures of constraint and execution and related challenges, as well as those with the potential to facilitate voluntary compliance and/or coercive enforcement of awards. Engaging an express waiver of immunity (contractually), increased transparency and introducing an appellate mechanism are some of the

viable ways to facilitate award implementation under the regime. Chapter Seven will provide general concluding remarks.

Chapter 2: Arbitral Awards and Governing Frameworks for Implementation

2.1 Introduction

This chapter examines the investment arbitral award and the main international legal frameworks governing its implementation under the investor-state treaty arbitration (ISA) system. The chapter is divided into five main sections. The first section highlights the essential specificities relating to ISA arbitral awards, noting their enforceability and susceptibility to post-award challenges. Sections two and three provide an overview of the main international legal frameworks governing the awards' implementation under the system. Here, the focus will be on the ICSID Convention and the New York Convention. Parties' obligations to the Conventions are thoroughly examined, i.e. the obligation to comply with and recognise and enforce arbitral awards.

Section Four will compare the Conventions to identify the common conditions, challenges, and limitations under each while examining the extent to which they impact awards' implementation under the ISA regime. The ICSID framework is known for its autonomous nature, which works predominantly to safeguard the finality of awards subject to its control, i.e. ICISD awards. Hence, ICSID awards are protected against post-award challenges that are common to all final awards in domestic courts during coercive enforcement proceedings, including awards subject to the New York Convention. It is, therefore, necessary to examine the extent to which this autonomous nature facilitates award implementation. The primary purpose of the chapter is to scope the limitations and challenges under the current frameworks governing awards' implementation and the extent they both actually facilitate the successful implementation of arbitral awards under the current ISA.

2.2 Features of an Arbitral Award

Not every decision rendered by arbitral tribunals can form rights and obligations pertaining to implementation.[50] Except where the tribunal's decision is considered sufficiently final, i.e. disposing of the disputants' respective rights,[51] the right to review (challenge) and/or the obligation to abide, comply, recognise and execute cannot be implemented.[52] An arbitral award is therefore a decision of arbitral tribunals that "concludes the dispute as to the specific issue determined in the award so that it has *res judicata* effect on parties' rights."[53] The *res judicata* effect here denotes not only the award's binding effect but the final effect implicating the bar against the same issues being relitigated under new labels after the final award has been rendered or vacated, following the requirements of natural justice and legality.[54] There is an element of logic to this, as a dispute must not subsist infinitely, no matter how long the resolution takes. It is trite to say that any dispute settlement process that seems to have no definite end period is not working effectively. The final outcome must not only be rendered fairly and efficiently following the requirements of natural justice and legality, but ~~and~~ enforceability, which implicates both voluntary compliance with and coercive enforcement of the award, must be guaranteed and secured spontaneously.

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[50] ML Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, 2017) [Hereafter Moses, *The Principle*], at 201 – 203; CH Schreuer et al., *The ICSID Convention: A Commentary* (CUP, 2009) [Hereafter, Schreuer, *A Commentary*], at 519, 805.

[51] Schreuer, *A Commentary*, Ibid, a decision refusing jurisdiction is an award and can be subject to review challenges like annulment, meanwhile, preliminary decisions affirming jurisdiction could not be subject to such review challenge until it has become part or incorporated into a final award.

[52] Ibid, at 811-812 [Rights and obligations under awards in Articles 49, 50, 51, 52, and 53, 54 and 55 of the ICSID Convention. At 819 citing cases where arbitral decisions were not awards for implementation purposes ['*LG&E v Argentine Republic*, the Tribunal issued a Decision on Jurisdiction on 30 April 2004, and a Decision on Liability on 3 October 2006. Decision on liability could not be considered an award as it did not bring finality to the issues before the arbitration.']; See N Blackaby et al., Redfern and Hunter on International Arbitration (6th edn., OUP, 2009), at 127

[53] JDM Lew et al., *Comparative International Commercial Arbitration* (Kluwer Law Int'l, 2003), para. 24-13.

[54] GB Born, *International Arbitration: Cases and Materials* (Kluwer Law Int'l, 2011), at 1048–52; B Hanotiau, *The Res Judicata Effect of Arbitral Awards, The International Courts of Arbitration Bullentin*: Complex Arbitrations – Special Supplement 2003, at 47 in Moses, *The Principles* (n 50).

Arbitral awards carry a globally recognisable effect. As Mistelis rightly states, "an award is *de facto* and *de jure* a judgment with transnational effect."[55] Both ICSID and the New York Conventions impose an international obligation on their respective Contracting States parties to recognise and enforce (execute) arbitral awards as if they were final judgements of their local courts.[56] Imputing this obligation not only reinforces the award's binding and final effect, against which the obligation to comply rises first, but also secures the award creditors' right to remedy through coercive measures when voluntary compliance fails. This brings to bear a final and perhaps crucial feature of arbitral awards: their susceptibility to post-award challenges.

Despite having a binding and final and globally enforceable effect, arbitral awards can be susceptible to post-award challenges which can arise at two stages.[57] For simplicity's sake, *'pre-enforcement review challenges'* and *'coercive enforcement challenges'* are used to differentiate between the stages. The former depends wholly upon the derivation of the arbitral award. Therefore, arbitral awards rendered under the auspices of the ICSID Convention, i.e. ICSID awards, are subject to an autonomous review procedure, notably, the annulment under Article 52 of the ICSID Rules.[58] Non-ICSID arbitral awards, i.e. awards rendered outside the ICSID system, are subject to vacatur/set aside challenges under national law, especially the law of the seat of arbitration (*lex arbitra*) as qualified by New York Convention/UNCITRAL Model Rules.[59] The latter follows the awards' coercive implementation in national courts against States under ICSID and New York Conventions when voluntary compliance fails

[55] Mistelis, *Award as an Investment*, (n 16) at 67.

[56] Articles 54, ICSID Convention and Article III, NY Convention, respectively.

[57] Lew et al., (n 53); For details about the nature see SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004), 73 Fordham L. Rev. 1521 at 1546-7; ND Rubins, 'Judicial Review of Investment Arbitration Awards' in T Weiler (edn), *NAFTA Investment Law & Arbitration: Past Issues, Current Practice, Future Prospects* (Transn'l Publ., 2004), at 354; B Hanotiau and O Caprasse, 'The Review of Arbitral Awards by Domestic Courts: Introductory Report' in E Gaillard (ed), *The Review of International Arbitral Awards* (Juris Publ., 2010), at 18.

[58] See Articles 50 - 52, of the ICSID Convention.

[59] See Article V, of the New York Convention; Article 34 (2)(a)(i)–(iv) of the UNCITRAL ML.

and could implicate the public international law defence of State immunity. It must be highlighted that these implementation challenges implicate procedures purposefully incorporated into the arbitral process to effect fair and efficient outcomes and protect parties' fundamental rights. However, they can arguably rob rendered awards of their enforceability and thus impair the effectiveness of the entire investment arbitral process.[60]

These implementation challenges are inherently linked to the operation of the governing legal frameworks of both ICSID and New York Conventions and shall be examined as such. First, it is necessary to scope what is understood as enforceability (used to mean, award implementation). Doing so will further highlight the essential specificities of arbitral awards, particularly what makes them so susceptible to the post-award challenges mentioned above. The primary purpose of this thesis is to examine the legal challenges and limitations associated with implementing investment arbitral awards under the regime, with a view primarily to proffering alternative solutions for improving the effectiveness of the process. While coercive enforcement challenges (those associated with State immunity) are the primal focus, examining pre-enforcement review challenges (a precursor to the latter) is necessary for exploring potential avenues to ameliorate fostering voluntary compliance and coercive enforcement of awards.

2.2.1 Enforceability of Arbitral Awards

A crucial question in the minds of disputants utilising arbitration as an alternative method of settling disputes is whether the resulting arbitral award can be enforced or implemented.[61] Enforceability is an essential concept of international arbitration, 'the *raison d'etre*'[62] and the 'ultimate goal of an arbitral process', without which the process is nothing but a façade for the engaging disputants.[63] It determines the effectiveness of any arbitral process because it justifies the energy, time and cost invested. Holtzmann observes that, "there will be little or no arbitration" if potential disputants are not guaranteed the

[60] Schreuer, *A Commentary*, (n 42), at 902 – 906, 912 - 915; Bjorklund, *State Immunity* (n 30), at 532.

[61] Ibid. See also Mistelis, *Award as an Investment* (n 16).

[62] Y Derains and E Schwamz, *A Guide to The New ICC Rules of Arbitration* (Kluwer Law Int'l,2005), at 353.

[63] WL Craig, 'International Ambition and National Restraint in ICC Arbitration' (1985), 1 Arb. Int'l, at 49.

enforceability of the resulting awards.[64] Lew, Mistelis and Kröll assert that "[u]nless parties can be sure that at the end of arbitration proceedings they will be able to enforce the award, if not complied with voluntarily, an award in their favour will be only a pyrrhic victory."[65] It suffices to say that without reliable, fair and effective means of effecting its result, actioning the arbitration clause in a contract serves no purpose.

Beyond the typical traditional key desirable attributes of efficiency, one study has identified that a desirable and effective arbitration for disputants is one that promises the fairness and justice (here correctness arguably) of the process[66] at the end of which spontaneous voluntary compliance and subsequently coercive enforcement of the resulting award, is likely without any challenge. It implies the award's propensity to draw voluntary compliance from the non-successful party and that it is capable of being validly accepted for instituting coercive enforcement in national courts when voluntary compliance is delayed or fails.[67] If one considers this important arbitral concept, then one may also consider Lew's accurate assessment that "[t]he ultimate purpose of an arbitration tribunal is to render an enforceable award."[68] Thus, an award that has the propensity to be complied with voluntarily and/or involuntarily enforceable. Proponents support legal duty based on ICC Rules Article 35 and LCIA Rules Article 32.2, which states the "[a]rbitral Tribunal […] shall make every effort to make sure that the Award is

[64] HM Holtzmann, *Commentary: International Arbitration in 60 Years of ICC Arbitration: A Look at the Future* (ICC Publis., 1984), at 362.

[65] JMD Lew, LA Mistelis and SKröll, *Comparative International Commercial Arbitration* (Kluwer Law Int'l, 2003), at 688.

[66] See SE Keer and RW Naimark, 'International Private Commercial Arbitration: Expectations and Perceptions of Attorneys and Businesspeople' (2002), 30 Int'l Bus. Law, at 203, cited in Q Tannock 'Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards' (2005), 21(1) Arb. Int'l, at 71 - 90.

[67] JP Carver, 'The strengths and weaknesses of international arbitration involving a State as a party: practical implications, in *Contemporary Problems in International Arbitration*' (Springer, Dordrecht, 1987), at 268 - 271.

[68] J Lew, 'The Law Applicable to the Form and Substance of the Arbitration Clause' in AJV den Berg (eds), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, 9 ICCA Congress Series, Paris (Kluwer Law Int'l, 1999), at 114-145.

enforceable at law."[69] Boog et al. see such imputations as a mere 'conceptual leap' as several clues suggest otherwise.[70] Imputing such duty on arbitrators will have practical consequences of making them "timid and conventional, rejecting bold decisions that could […] lead to a more effective resolution of the dispute", the authors argued.[71] Platter concurs, asserting that this will occasion absurdity as arbitral tribunals have to consider all the laws of the likely places of enforcement, which is practically impossible.[72]

Since such obligation finds no explicit expression under the ICSID and New York Conventions, being the most utilised governing frameworks for implementing investment arbitral awards, it can be reasoned that no *ipso facto* duty exists to render an enforceable award. That said, Blackaby et al. make an important observation:

> whether or not there is a legal obligation the arbitral tribunal will want to do its best, as a matter of professional pride, to ensure that the award is enforceable; having been entrusted with the duty of determining a dispute for the parties, it will naturally want to ensure that its duty is properly discharged.[73]

In this connection, Moses entreats arbitral tribunals to make "every effort" to ensure that awards are "validly" made.[74] The award must conform to the necessary formal requirements surrounding the arbitral

[69] International Chamber of Commerce Rules of Arbitration 1998; See also Article 32.2 of the London Court of International Arbitration 1998

[70] C Boog et al., 'The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award,' *Kluwer Arbitration Blog* (January 28, 2013) <http://kluwerarbitrationblog.com/2013/01/28/the-lazy-myth-of-the-arbitral-tribunals-duty-to-render-an-enforceable-award/>. Accessed 29/01/19. [highlighting the following to supports non-existence of such duty: ''(i) the provisions are placed at the very end of the Rules among other "miscellaneous" provisions; (ii) their applicability is limited to "all matters not expressly provided for in the[se] Rules"; and (iii) they merely impose a "best efforts" duty on the arbitral tribunal, a qualifier that does not sit well with the supposedly fundamental nature of the duty.'']

[71] Ibid.

[72] M Platte, 'An Arbitrator's Duty to Render Enforceable Awards' (003), J. Int'l Arb. 20, at 312. [Noting this specifically in respect of non-ICSID awards]

[73] N Blackaby et al., (n 52).

[74] Moses, *The Principles* (n 50), at 202

agreement and the conduct of the arbitral proceedings, including the requirement about the award itself.[75] The awards must be made, as Hunter elucidates, 'by a competent and rightly appointed arbitrator(s) unaffected by corruption or undue influence; must be based upon issues arising from a valid arbitration agreement and in accordance with the laws applicable as agreed by the parties; must address, exhaust and resolve in an all-surrounding decree of settlement, all questions and issues raised.'[76]

Failure to engage the requirements may only lessen arbitrators' chances of future arbitral endeavours, given their immunity against legal action.[77] Evidentially, though, in the context of investment arbitration, the highest consequence is borne by the parties or at least by the award creditor (usually, the foreign investor), who will soon come to realise that it has won a hollow victory as the rendered award becomes susceptible to various post-award challenges instituted by the award debtor (usually, the host-State) to correct the perceived error in the award. Indeed, recent research sampling States' compliance behaviour with ISA awards highlights perceived erroneous or unjust arbitral outcomes as a potential reason behind the lack of voluntary compliance and subsequent 'attacks' on the awards by debtor-States. In this research, States with adverse arbitral awards against them initiated post-award proceedings in 83 per cent of them.[78] This figure is troubling and highlights the vulnerability of ISA awards in terms of enforceability/implementation.

Nonetheless, it could be inferred that the presence and *effective* working of remedial review procedures under both the New York Convention (and its related arbitral rules) and ICSID Convention, pursuant to Article V and Articles 49–52, respectively, will correct inevitable errors in awards, promote the sense of justice and fairness, and motivate good compliance behaviour per the Conventions' obligation

[75] Ibid. See JMD Lew et al., *Comparative International Commercial Arbitration (*Kluwer Law Int'l, 2003), at 24-13; Mistelis, *Award as an Investment* (n 16).

[76] R Hunter, *The Law of Arbitration in Scotland* (2nd edn. Butterworths, 2002), at 277-278. For ICSID Arbitration, which is similar to non- ICSID Arbitrations, this will include but not limited to requirements under Articles 42 – 49 involving *lex fori*, mandatory, substantive and procedural rules of engagement.

[77] For more, See SD Franck, 'The Liability of International Arbitrators: A Comparative Analysis & Proposal for Qualified Immunity' (2000), 1 NYL Sch. J. Int'l & Comp. L., 20.

[78] Gaillard and Penusliski (n 19), at 47.

to abide and comply with awards' terms and thus, guard awards against such eventualities. Or, better, the obligation to 'recognise and enforce' pursuant to Articles 54 and III under the same Conventions will aid coercive enforcement of the award against the State asset(s) in domestic courts when voluntary compliance fails after the utility of the remedial review procedures. The next sections will explore these procedures and their effectiveness in protecting awards' enforceability/implementation under the two legal governing frameworks. Before this, it is necessary to lay out some terminology related to awards' coercive enforcement proceedings.

Demystifying Terminologies

The terms *recognition*, *enforcement*, and *execution*, as they pertain to coercive enforcement/implementation of arbitral awards when voluntary compliance fails, often create terminological confusion among commentators. Although used interchangeably under both the ICSID convention and New York conventions, they denote and relate to different stages of the coercive enforcement process and are assigned specific governing laws, a conflation of which could lead to the incorrect application of the governing rules, particularly under the ICSID Convention.[79] The ICSID Convention explicitly formulates this difference, thus it designates the terms to specific governing law. Ironically, however, it fails to provide a clear demarcation between the terms.[80] For this reason, different connotations ensue in scholarly works, hence making this terminological note essential.

There are two stages that relate to the award's coercive implementation process in domestic courts. The first is the verification stage. This stage involves the formal authentication by State's court before whom an award's coercive implementation is sought; confirming and upholding the award's official legal status as having a *res judicata* effect similar to a final judgment of the State's courts. The second stage

[79] Moses, *The Principles* (n 50) at 226.

[80] O Gerlich, 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?' Am. Rev. Int'l Arb. 26, no. 1 (2015).

relates to how relief under an award is obtained (coercive attachment action) in accordance with the rules and procedures of the State before whom an award's implementation is sought.[81]

Under the ICSID Convention, the terms *recognition* and *enforcement* appear to have the same meaning and relate to the first stage of the implementation process because the stage falls within the Convention's governing rules of engagement instead of the rules and procedures of the implementing State. Secondly, the ICSID Convention contrasts the first stage (recognition/enforcement) with the second stage (execution) by putting the latter under the control of the rules and procedures of the implementing State. In contrast, although the New York Convention also identifies with both terms – *recognition* and *enforcement,* the first stage will be covered by a single term – *recognition,* whereas *enforcement* will cover the second.[82] A further complication arises because, as Schreuer highlights, adopted versions of the ICSID Convention in national laws sometimes use both (the English version, for example) or use one or the other term (French and Spanish versions, for example) to cover the entire process.[83]

Against Schreuer's formulation, it appears that recognition is independently used to connote the first stage, which is verification, while enforcement and execution are used interchangeably to connote the second stage.[84] At the same time, the works of other eminent scholars, including Broaches and Choi, will show their inclination toward the term enforcement, which will cover both stages.[85] Referring to the New York Convention, Moses observed that both terms - recognition and enforcement - could be used interchangeably for the first stage. However, the author adds that execution is frequently used to denote the second stage, where 'execution' denotes how relief under an award (coercive attachment action) is obtained in accordance with the law and arbitral procedure of the implementing State.[86]

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[81] Moses, *The Principles* (n 50), at 226; see also GB Born, International Commercial Arbitration (2nd Edn., Kluwer 2014), at 3732 – 3733

[82] Ibid.

[83] Schreuer, *A Commentary*, (n 42), at 1134 paras. 64 – 71.

[84] Ibid, at 1135 2009

[85] Ibid.

[86] Moses, *The Principles* (n 50), at 226.

For convenience's sake, this thesis combines all the approaches mentioned above and engages them as follows. *Recognition* is used for verification of the arbitral award, the first stage. *Enforcement* or *execution* will be used to cover how relief under an award (coercive attachment action) is obtained, the second stage. Where necessary, *implementation* or, as Broaches and Choi, *enforcement* will be used to cover both stages.

2.3 The General Framework for Implementing Arbitral Awards

Depending on the derivation of the arbitral award, two main distinct legal regimes govern implementation of award under the ISA system. As established, ICSID awards, i.e. arbitral awards issued under the auspices of the ICSID system, are governed by the ICSID Convention. Adjudicatory outcomes under the auspices of other arbitral regimes (e.g., the Permanent Court Arbitration (PCA), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce (SCC) and/or under the UNCITRAL Rules, as well as ICSID Additional Facility Rules), i.e. non-ICSID awards, will be governed by the New York Convention.

These two main Conventions encompass provisions intended to facilitate the effective implementation of arbitral awards in terms of review and coercive enforcement measures.

2.3.1 Implementation of Arbitral Awards Under the ICISD Convention

2.3.1.1 A Brief Overview

The ICSID Convention's core purpose is to "promot[e] private foreign investment by improving the investment climate for investors and host States alike."[87] ICSID system (in conjunction with bilateral investment treaties (BITs) and related international investment agreements (IIAs)) was developed primarily because Customary International Law (CIL) means of protecting foreign investment were considered inadequate.[88] Indeed, under the CIL, as Bubb and Rose-Ackerman rightly summarised,

[87] A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972), 136 Recueil des Cours 331, at 348.

[88] TS John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP, 2018), at 54 -108. [Providing a conventional account to the rise of investment arbitration system] See Chapter 3 – 6.

"contracts between private investors and States are of dubious enforceability."[89] The obligation to protect foreign investment was non-existent under international law not least because the substantive standards of protection were inadequate but also the procedural mechanism for the enforcement of the standards. Investment protection looks to the general principle of the law of 'state responsibility for injuries to aliens', which is an inherently diplomatic measure. To invoke this measure, an aggrieved foreign investor must first pursue and exhaust all means of redress under the host State's judicial system (the local remedy rule). Following that, the foreign investor must be able to lobby the home State successfully to espouse an investment claim on its behalf at the inter-state level before International Court of Justice (ICJ).[90] The home State might not take up the claim due to many political considerations. However, where the home State ultimately decides to take up the claim, the remedy sought for might not be satisfactory or adequate in quantum to the wrongs suffered by the foreign investor. In short, as Chernykh rightly puts it,

> [t]he law fell short of procedural mechanisms for the enforcement of existent principles, most importantly as regards direct recourse and remedies for private investors against the conduct of a foreign government."[91]

Of course, this mechanism of investment protection not only failed to protect foreign investors' interests. It also failed to create a conducive environment for investment flow to developing nations, a

[89] RJ Bubb and S Rose-Ackerman, 'BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment' (2007), 27(1) Int'l Rev. L. & Econ., at 292 -300.

[90] Ibid. ["Traditionally, [under] the general law on state responsibility for injuries to aliens [o]nly the home state of an expropriated foreign investor, could seek redress by espousing the foreign investor's claim. Furthermore, a simple breach of contract between the host state and a foreign investor did not give rise to a claim under the law of state responsibility; rather, a host state was only liable to the home state for egregious treatment of a foreign investor that amounted to a breach of the "minimum standard" for the treatment of the foreigner." The measure to quantify compensation was also in contention as developed nations recourse to international minimum standard was rejected by developing nations (Latin American nations, specifically) in favour national minimum standard. The contention between the two fashions, the weaknesses that ensue investment protection saw the "beginning of a regime of bilateral treaties which often have investor–state disputes mechanism pointing to ICSID as a prerequisite to conclusion of a BIT"].

[91] Y Chernykh, 'The gust of wind: The unknown role of Sir Elihu Lauterpacht in the drafting of the Abs-Shawcross Draft Convention' in SW Schill et al., (eds) *International Investment Law and History* (Edward Elgar Publishing, 2018), at 247.

quest the World Bank highlights as a catalyst for reducing the progressively notable rate of poverty globally.[92] Therefore, to bridge the gaps and "maintain a careful balance between the interests of foreign investors and those of host States", the Executive Directors of the World Bank were of the view that a dispute settlement mechanism was necessary.[93] As Salacuse's passage below rightly summarises:

> [t]he Bank came to believe the problem of unfavourable investment climates in many poor countries might be attacked *procedurally* by creating international machinery that would be voluntarily available for the conciliation and arbitration of investment disputes.[94]

Whether poor host States have benefitted from the intended investment flow is debatable for empirical considerations.[95] However, the establishment of the ICSID system does ensure that foreign investors have the necessary procedural means to enforce directly their substantive rights contained in IIAs under international law. The innovativeness of today's investment dispute settlement mechanism as contained in treaties, including the ICSID Convention, goes without mentioning the impact of the Abs-Shawcross Draft Convention, whose critical and valuable part, i.e. the dispute settlement provision, Chernykh credits to the work of eminent scholar, Sir Elihu Lauterpacht.[96]

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[92] TS John (n 5); L Harhay, 'The Argentine Annulment: The Uneasy Application of ICSID Article 52 in Parallel Claims' in Karl Sauvant (eds) *Yearbook on International Investment Law & Policy* (OUP, 2013), at 440-450.

[93] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, available at <www.worldbank.org/icsid> Accessed 21/11/21. ["Accession by each party to the Convention is now often a prerequisite to conclusion of a BIT."]

[94] JW Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUPress 2013), at 343.

[95] JW Yackee, 'Do BITs Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment' in (KP Sauvant and LE Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, And Investment Flows,* (CUP, 2009), at 379.

[96] Chernykh, (n 83), at 256 - 258. [noting the real procedural novelty contained in Article VII paragraph two of the Abs-Shawcross Draft Convention, which provides "a national of one of the parties the possibility to commence proceedings against a state for breach of the Abs-Shawcross Draft Convention before an arbitral tribunal […], provided that the state gave its specific consent to such an arbitration." Although, "[a]rbitration between a private entity and a state on the basis of a contractual arrangement [i.e. specific consent to arbitrate] was not new. It was novel, however, to recognize this right in an international treaty, thus 'enabling the private investor himself to pursue an international remedy'" without necessarily applying for diplomatic protection.]

With a membership of 155 States as of June 2022,[97] the ICSID Convention aims to "promote much-needed international investment by offering a neutral dispute resolution forum both to investors that are (rightly or wrongly) wary of nationalistic decisions by local courts and to host States that are (rightly or wrongly) wary of self-interested actions by foreign investors."[98] Once 'consent of parties' to ICSID's jurisdiction is established in accordance with Article 25(1) of the Convention, which is deemed unilaterally irrevocable, recourse to local remedy or diplomatic protection hitherto associated with CIL means of settling the investment disputes is abrogated, or at least retreated (as may be reserved by the parties under Article 26) to, when it becomes necessary to invoke.[99] The exclusion of other remedies under Article 26 is a corollary to the parties' consent and thus highlights the ICSID jurisdiction's exclusive or self-contained nature. This initiative accordingly *depoliticised* as well as *delocalised* investment arbitration and it represents a significant paradigm shift under the traditional international law practice.[100] Lauterpacht highlights the phenomena:

> [f]or the first time, a system was instituted under which non-state entities - corporations or individuals - could sue states directly; in which state immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host state; in which the operation of the local remedies rule was excluded; and in which the tribunal's award would be directly enforceable within the territories of the state parties.[101]

This initiative gives the foreign investor the unfettered right to international adjudication. Most importantly, it ousts potential interference from States, i.e. the host State and its judiciary, the home State

[97] Database of ICSID Member States Available at, https://icsid.worldbank.org/about/member-states/database-of-member-states. Accessed 23/04/22.

[98] L Reed et al., 'Recognition, Enforcement and Execution of ICSID Awards' in *Guide to ICSID Arbitration*, (Kluwer Law Int'l, 2004), at 2 – 5; John (n 5).

[99] Currently some IIAs include the local remedy rule as a pre-condition to initiating international arbitration - Indian BITs exemplified. Article 27 allows diplomatic protect as a last resort when compliance fails.

[100] TS John (n 5).

[101] 'Foreworded' by Professor Sir Elihu Lauterpacht, CBE, OQ in C Schreuer, *A Commentary* (n 42), at xi.

of the foreign investor and the third State (enforcing forum) when disputes arise between the foreign investor and host State. The ICSID system governs the sole settlement of investment disputes between the parties, including providing limited internal remedial review measures pursuant to Articles 49–52 of the Convention. The remedial measures aim mainly to correct inevitable errors in the rendered awards, seemingly securing and protecting the awards' legitimacy and finality toward aiding voluntary compliance. More importantly, the remedial measures work to oust potential external review interference from contracting State courts, having secured the awards' finality towards a seemingly effective coercive enforcement of the awards when voluntary compliance fails.[102] In this regard, the ICSID system offers a comprehensive and autonomous adjudicatory process isolated from national law and arbitral practices, thereby aiding implementation in the investor-state dispute settlement domain.[103] The development stands in contrast to other arbitral systems, notably the New York Convention and UNCITRAL Rules, given their predominant deference to national laws and arbitral practice during the entire arbitral process.[104]

Ironically, however, the Convention's internal remedial review measures, particularly the annulment measure under Article 52 of the Convention (the degree of scrutiny engaged), can sometimes negatively impact the legitimacy and finality of the rendered awards and thus obstruct their effective implementation. Furthermore, to some extent, according to Article 55, the Convention defers awards' actual coercive enforcement to the governing law of States, particularly in matters relating to State immunity when voluntary compliance fails. Against this, it could be argued that ICSID awards have the same limitations as non-ICSID awards, which are governed primarily by the New York Convention and

[102] The ICSID Convention, Articles 51 – 55.

[103] AJV Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions' (1987), 2 ICSID Rev.– FILJ, 439, at 441. [Hereafter Berg, Some Recent Problems]

[104] Schreuer, *A Commentary*, (n 42); see also, KP Berger, 'The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective' (1989), 12 Fordham Int'l L.J., 605; Moses, *The Principles* (n 50); GR Delaume, 'Reflections on the Effectiveness of International Arbitral Awards' (1995), 12 J. Int'l Arb. 5.

related rules. The primary provisions governing awards' implementation and their implication are discussed in the following section.

2.3.1.2 Implementing Awards Under the ICSID Convention

The essential provisions governing the implementation of ICSID arbitral awards are contained in Articles 49–55 of Section 6, Chapter IV of the ICSID Convention. Article 53(1) covers the award's binding and final nature, highlighting its non-susceptibility to review measures outside the Convention (qualified by Articles 49 – 52) and the overarching obligation of disputants to abide and comply with the award's terms.[105] Articles 54–55 relate to coercive enforcement measures in domestic courts and highlight the obligation of all contracting State parties to the Convention to respect the award's binding and final nature and to implement it as their court's final judgement.[106] At the same time, there is an obligation for contracting State parties to the Convention not to derogate from their respective national law in force in relation to States' immunity, while awards go through coercive enforcement measures when voluntary compliance fails.[107] The scope of the Articles are detailed below.

Article 53 in Form

Article 53(1) provides that an arbitral award rendered under the ICSID Convention

> shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.[108]

As formulated, an award carries both a final and binding force. Except for when a stay of enforcement shall be permitted within the Convention's governing framework, rights and obligations pertaining to the

[105] The ICSID Convention.

[106] Ibid, Articles 54 (1) and (3).

[107] Ibid, Article 55.

[108] Ibid.

award's implementation arise immediately once an outcome is declared, following the necessary rules of engagement under the Convention. Thus, it is incumbent on all parties to act accordingly.

As far as State parties to the Convention are concerned, the binding force connotation implicates or reiterates the CIL principle of *pacta sunt servanda*: the obligation to honour the terms of any treaty agreement voluntarily undertaken.[109] To the State debtor, i.e. the non-successful disputant, the binding force is reinforced by the second line and implicates the obligation to 'abide and comply,' with the terms of the award rendered against it as prescribed behaviour under the Convention and international law generally. Compliance will be deemed to occur when the debtor takes specific ordered action (for example to pay damages or costs) to satisfy its obligations in accordance with the terms of the award. Thus, except where the award is stayed in accordance with the Convention, the award must be abided and complied with immediately.[110] While failure to abide and comply constitutes a violation of the Convention's (treaty) obligation,[111] the award creditor's right to coercive enforcement in the national court to implement the award arises immediately.

The term finality in the formulation of Article 53 is core to the ICSID machinery, and it highlights ICSID jurisdiction's exclusive or self-contained nature with two main implications which relate to the award's *res judicata* effect. First, parties cannot remit the same dispute to another forum for resolution once a final declaration is made following the necessary rules of engagement, including post-award review measures to correct necessary errors under Article 49 – 52 of the Convention.[112] The second relates to the

[109] A Broches, 'Awards rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Recognition' (1987), 2(2) ICSID Rev.-FILJ, 287, at 289. (This principle also finds an expression in most arbitral regimes. See GR Delaume, 'Reflections on the Effectiveness of International Arbitral Awards' (995), 12 J. Int'l Arb. 5.

[110] ICSID Arbitration Rule 54: Stay of Enforcement of the Award, 1968.

[111] Non-compliance could result in the taking of measures to implement under Articles 27 and 64 of the ICSID Convention. For how the Articles are linked to the States obligation to comply, recognise and enforce award under the Convention, See Schreuer, *A Commentary*, (n 42), at 1261, paras. 14 – 15 and 423 paras. 27 – 38.

[112] Ibid, at paras. 17 - 27

limited scope of the review measures under the Convention and highlights awards' non-susceptibility to domestic review measures. The ad hoc Committee in *MINE v Guinea* captures the implication as follows:

> 4.02 Article 53 of the Convention provides that 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*" [emphasis added]. The post-award procedures (remedies) provided for in the Convention, namely, addition to, and correction of, the award (Art. 49), and interpretation (Art. 50), revision (Art. 51) and annulment (Art. 52) of the award are to be exercised within the framework of the Convention and in accordance with its provisions. *It appears from these provisions that the Convention excludes any attack on the award in national courts. The award is final in that sense* [emphasis added]. It is also final in the sense that even within the framework of the Convention it is not subject to review on the merits.[113]

Indeed, except as formulated within the confines of Articles 49 – 52, which is exhaustive (details provided later), ICSID awards are not amenable to any other review and appeal measures, whether exercisable within or without the Convention. This bar relates to potential judicial activism under national law and extends equally to possible judicial intervention by the International Court of Justice (ICJ) under Article 64 of the ICSID Convention.[114] Against this, it appears that ICSID awards are shielded from potential review challenges outside the Convention. The Convention's drafters intended for it to depart from other arbitral systems like the New York Convention, which often give predominant deference to national law and arbitral processes, including giving the law of the place of arbitration credence to the validity of the non-ICSID rendered awards.[115] Therefore, the law of the place of arbitration has no bearing on the validity of ICSID-rendered awards.

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[113] *MINE v Guinea*, Decision on Annulment, 22 December 1989, para. 4.02. Cf. also loc. cit., paras. 4.04 and 5.08 cited in Schrueue, at 1103, para. 21.

[114] Schrueue, ibid, at 1104, para. 23 - 27; Article 64, ICISD Convention.

[115] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, ¶ 35 (Nov.4 2008) [Hereafter, Vivendi, Stay of Enforcement]. See also, Schreuer, *A Commentary*, (n 42), at 1118.

Article 54 in Form

Although the obligation under Article 53 stands firm against the award debtor, non-compliance or delayed voluntary compliance, for whatever reason, does not degrade the award's binding and final integrity. However, it does secure the award creditor's right to coercive action in national courts against the debtor's assets in satisfaction of the award. In this instance, Article 54(1) entreats all the Courts of the contracting States parties to the Convention to

> recognise 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.

In this regard, it suffices to say that Article 54 reinforces Article 53 and vice versa by (i) obligating the enforcing States' Courts to act in sync to safeguard the award's integrity and ICSID's autonomous nature; (ii) making it possible for award creditors to recoup damages through coercive enforcement action in cases of non/delayed voluntary compliance; and (iii) possibly encouraging voluntary compliance from the award debtors since Article 54 makes coercive enforcement of the award possible against its assets. The implication is different in respect of the implementation of non-ICSID. As shall be seen, Article V of the New York Convention creates justifiable grounds against which a domestic court can refuse coercive enforcement of awards when voluntary compliance fails.[116]

However, as Baldwin et al. assert, the phrase to treat 'awards as if it were the final judgement of a court' (Article 54(1)) could make ICSID awards susceptible to challenges common to non-ICSID or final judgements in some jurisdictions.[117] In *Micula and others v Romania*[118] the Supreme Court of the United

[116] See Article V, New York Convention. It should be noted that similar ground for refusing implementation is provided for under Article 52 of the ICSID Convention.

[117] E Baldwin et al., 'Limits to Enforcement of ICSID Awards' (2006) 23(1) J. Int'l Arb., at 9-14.

[118] [2020] UKSC at 5 Para. 78; For more details see, AK Bjorklund et al., 'State Immunity as a Defense to Resist the Enforcement of ICSID Awards' (2020), 35(3) ICSID Rev.- FILJ, 506, at 510 - 512; A Battisson and T Mills, 'Enforcement and Recovery: Theory Norton Rose Fulbright' (2022) at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/enforcement-and-recovery-theory#footnote-077-backlink. Accessed 15/01/22.

Kingdom considered this possibility. In this ICSID award enforcement case, the Court was asked to consider whether Article 54(1) obligation conserves a window for the application of defences to enforcement that is available under national law in regard to a final judgment in that particular State. This question arose because a decision on the award's validity (merit) was pending before the Court of Justice of the European Union (CJEU), of which the outcome will carry a binding force on all European Union (EU) members.[119] Romania sought to stay enforcement of the award before the United Kingdom Court, pending the decision of the CJEU on the award's merit. Having comprehensively examined the wording of the ICSID Convention and the *travaux préparatoires* to find possible defences to enforcement, the Supreme Court did not rule out the possibility, holding instead that:

> there is scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs.[120]

While acknowledging this possibility, the Court also acknowledged that Article 54 anticipated limited local defences during awards' coercive enforcement and that anything contrary will fail to take proper account of ICSID's autonomous nature.[121] The Court, therefore, refused the stay of enforcement, which it considered would amount to "an unlawful measure in international law and unjustified and unlawful in domestic law."[122] Indeed, granting a stay of enforcement in this respect would have amounted to the Court subjecting the ICSID award to appeal which is prohibited under Article 53(1) of the Convention: the "award shall not be subject to any appeal or any other remedy".[123] Any deviation will be a manifest

[119] Micula, General Court of the European Union; *Viorel Micula and others v Romania and European Commission* (Intervener) [2019] EWHC 2401 (Comm).

[120] Ibid para 78.

[121] Ibid at para. 81,

[122] ibid para 118.

[123] The ICSID Convention

disregard of the Convention and, ultimately, its object and purpose, notwithstanding that the relevant State could incur liability for breach of treaty obligation pursuant to Articles 49–54 of the ILC's Articles on State Responsibility for Internationally Wrongful Acts.[124] Besides, Article 54(1) is reinforced by Article 54(2)[125] where Schreuer elucidates the courts' roles:

> [a] domestic court or authority before which recognition and enforcement is sought is restricted to ascertaining the award's authenticity. *It may not re-examine the ICSID tribunal's jurisdiction. It may not re-examine the award on the merits. Nor may it examine the fairness and propriety of the proceedings before the ICSID tribunal* [emphasis added].[126]

Therefore, whether it be jurisdictional, public policy, procedural or merits-based defences by which final judgements in local courts are subjected, Articles 53(1) and 54(2) combined insulate ICSID awards from such possible defences or challenges.[127] The French *Cour de cassation* in *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal*[128] took cognisance of this limitation and reminded the Lower Court, *Cour d'appel,* the limit placed on their power to review, including providing remedial measures to awards under the French Code of Civil Procedure.[129]

Nonetheless, the actual execution of the ICSID awards against the recalcitrant State's asset(s) is subject to the governing law of the enforcing States. Article 54(3) of the Convention provides that

> [e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

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[124] See J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2005).

[125] Article 54 (2), ICSID Convention provides that "[a] party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority […] a copy of the award certified by the Secretary-General."

[126] Schreuer, *A Commentary*, (n 42), at 1139 para. 81 [emphasises added].

[127] GJ Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001), 18(2) J. of Int'l Arb. (2001), 135 – 158.

[128] Ibid, but see *SOABI v Senegal, Cour de cassation*, Judgment, 11 June 1991, 2 ICSID Reports 341-343.

[129] Ibid., see *infra,* Article 55 section.

By subjecting the awards' actual execution to the governing laws of State, Article 54(3) appears to vitiate the obligations under Articles 53(1) and 54(2) of the Convention or put the powers of the national court in full gear. However, as Schreuer identifies, this deference is procedural in nature; the obligation not to subject ICSID awards "to any appeal or any other remedy" holds firm.[130] In this regard, the deference to national laws for the awards' actual execution makes the ICSID system hybrid rather than self-contained system. The Report of the Executive Directors of the ICSID Convention explains the logic of the approach:

> because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other nonunitary states, Article 54 does not prescribe any particular method to be followed in its domestic implementation but requires each contracting state to meet the requirements of the Article in accordance with its own legal system.[131]

Thus, Article 54(3) was intended to ease procedural rigidity given the variation in the legal cultures and practices among States, which affirms ICSID's position as contained in Article 53(1) in terms of the awards' unwavering binding and final nature. In this connection, Article 55 of the Convention contains an interpretative guideline specifying what should be considered within the ambit of deference allowed by Article 54 during the execution of ICSID awards:

> [n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.[132]

Consequently, the obligation under Article 54(1) to enforce an ICSID award "as if it were a final judgment of a court in that State" makes State immunity considerations applicable to ICSID awards, as it would to

[130] Schreuer, *A Commentary*, (n 42), at 1148 -1149.

[131] See A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationalsof Other States' (1972) 136 Recueil des Cours 331, at 401.

[132] Article 55, of the ICSID Convention.

any other final judgment of the local court.[133] In this context, not only does Article 55 clarify the scope of Article 54, but ~~it~~ also the relationship between Article 54 and Article 53(1). In other words, unless an objection relates to Article 55 (State immunity which is procedural in nature), the obligation under Article 53(1) (to uphold the award's finality) and/or the obligation under Article 54 (to implement the award) must be adhered to by States without objection.

The relationship between Articles 53 and 54 of the ICSID Convention was at the centre of contention about a series of arbitral awards rendered against Argentina under the ICSID system.[134] In what would be a non-compliant and an attempt to challenge awards' validity (finality) under national rules, Argentina argued that its obligation under Article 53(1) is subject to the general mechanism to enforce the awards under Article 54. The State's position here requires some background information as it also forms the background information necessary for subsequent discussions in Chapter 6 about the State's compliance behaviour.

Relationship between Articles 53 and 55: Argentina's contention

Argentina was among the most recent surge of signatories to the Convention, signing the Convention in May of 1991 with the instrument of ratification deposited in October 1994.[135] Ratifying the Convention embodies a significant departure from prior economic investment policy for the many Latin American States where there was the widespread adoption of the Calvo Doctrine.[136] Indeed, for much of

[133] Schreuer, *A Commentary*, (n 42), at para. 2.

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

[135] News from ICSID 'Argentina and Nicaragua Ratify the ICSID Convention' (1994), 12(1) https://icsid.worldbank.org/sites/default/files/publications/Newsletter/vol-12-winter-1995.pdf. Accessed 08/05/20.

[136] The Doctrine states that legal disputes involving private person engaging business in a foreign State must be resolved by local remedies rather than by international legal remedies. The doctrine was aimed at preventing abuses from invocations of diplomatic protection. The Calvo Clause was inserted in many documents to ensure that all chance of diplomatic intervention was eliminated and that an alien was truly on an equal legal stance as a

the twentieth century, Argentina like many Latin American States inserted Calvo Clause into contractual documents which require all investors to submit contractual disputes to local courts for remedy.[137] To promote economic development, in the early 1990s Argentina opened its doors to foreign investment opportunities signing the ICSID Convention and entering a number of BITs with the United States and thirty-seven other States,[138] all of which allow the use of ISA without first recourse to domestic courts.

As part of this initiative, the State agreed to stabilise its local currency, the Peso, against the United States Dollar by collecting taxes in United States Dollars and readjusting the tax rate twice a year. This led to enormous gains for its foreign investors who were mainly United States nationals.[139] Between 1999 and 2002, however, Argentina began experiencing "an economic meltdown of cataclysmic proportion, precipitated by an exploding budget deficit, a balance of payments crisis, and mounting foreign debt."[140] The economic meltdown led, *inter alia*, to remarkable unemployment and poverty. To mitigate the crisis Argentina responded by enacting an emergency law, including the Corralito Decree of December 2001, which significantly suspended all the favourable conversion ratios as well as the semi-annual adjustments incentives.[141] In particular, Argentina revalued its Peso significantly by "terminating the currency board that pegged the Peso to the US Dollar, the *pesification* of all financial obligations, and the effective freezing of all bank accounts."[142]

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national. For details, see DR Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (NED-New edn, UMP, 1955).

[137] CL Goodman, 'Uncharted waters: Financial crisis and enforcement of ICSID awards in Argentina' (2007) 28 U. Pa. J. Int'l Econ. L., 449, at 451 - 452.

[138] Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.- Argentina, Nov. 14, 1991, S. TREATY DOC. NO. 103-2 (1993). See also International Investment Agreements Navigator; UNCTAD INVESTMNET POLICY HUB, at https://investmentpolicy.unctad.org/international-investment-agreements/countries/8/argentina. Accessed 12/10/20. [setting forth BITs Argentina has entered into].

[139] AS Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010), 4 Law & Ethics Hum. Rts. 47, at 69 – 74.

[140] Ibid.

[141] Ibid.

[142] Ibid; WW Burke-White and A von Staden, 'Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations' (2010), 35 Yale J. Int'l L. 283, 290. See also D Schneiderman, 'Judicial Politics

A total of forty investor-state arbitration proceedings were instituted against the State by foreign investors affected by the adopted governmental measures, most of which were instituted under ICSID and the UNCITRAL arbitration rules. The foreign investors' arguments are that Argentina violated several obligations provisions under the BITs, particularly those relating to expropriation, fair and equitable treatment (FET), full protection and security and umbrella clause.[143] Argentina contended any wrongdoing arguing that the global economic meltdown allowed the State to use emergency clauses under the BITs.[144] The ICSID claims, in particular, led to a number of arbitral awards, including *CMS Gas Transmission Co. v Argentine Republic* (CMS v Argentina),[145] *Azurix Corp. v Argentine Republic* (Azurix),[146] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Republic Argentine* (Vivendi I),[147] *Continental Casualty Company v Argentine Republic* (Continental Casualty),[148] *Enron Corp. and Ponderosa Assets, L.P. v Argentine Republic* [149] and *Sempra Energy Int'l v Argentine Republic*.[150] In most of these awards, Argentina was ordered by the tribunals to pay more than $100 million USD in damages.[151] In particular,

and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010), 30 NW. J. Int'l L. & BUS. 383, at 387.

[143] See DA Desierto, 'ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model During Financial Crises' (2012), 44 Geo. Wash. Int'l L. Rev 473, at 479 [providing details of all the cases brought against Argentina by the investors.]; see also, World Bank, List of ICSID Cases, available at https://icsid.worldbank.org/ICSID/FrontServlet. Accessed 24/03/21.

[144] Ibid.

[145] ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007).

[146] ICSID Case No ARB/01/12 Award (14 July 2006).

[147] ICSID Case No ARB/97/3 Award (20 August 2007) [The claimant was formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux*]

[148] ICSID Case No ARB/03/9 Award (5 September 2008).

[149] *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No. ARB/01/3 Decision on the Argentine's Request for a Continued Stay of Enforcement of the Award (October 7, 2008).

[150] *Sempra Energy Int'l v. The Argentine Republic*, ICSID Case No. ARB/02/06, Decision on Annulment (June 29, 2010),

[151] See *CMS Gas Transmission Co. v Argentine Republic*, ICSID Case No. ARB/01/8, Award 139, para.2-4 (May 12, 2005), 44 ILM 1205 (2005); *Sempra Energy Int'l v Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 47 (June 29, 2010), *Cont'l Cas. Co. v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 140 (Sept.5, 2008); *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/03, Decision on the Application for Annulment of the Argentine Republic, 169 (July 30, 2010), cited in AK Schneider, 'Error Correction and Dispute System Design in Investor-State Arbitration' (2013), Yearbook on Arbitration and Mediation 5;194, at 199.

Argentina was ordered by the arbitral tribunals to pay $133.2 million USD, plus ownership transfer of shares at an additional sum of $2,148,000 USD, $128.3 million USD and $106.2 million USD in damages to claimants, *CMS*, *Sempra* and *Enron*, respectively.[152] Argentina proceeded to institute annulment proceedings against the awards pursuant to Article 52 of the Convention.

In a number of proceedings to stay enforcement of the awards pending the annulment proceedings, Argentina argued that its obligation to abide and comply with the awards under Article 53(1) of the Convention does not become operative until the award creditors have initiated coercive enforcement proceedings under Article 54 and after it has reviewed the awards under its domestic rules.[153] The State's inference was procured and justified on the basis of the wording in Article 53(1) "as if it were a final judgment of a court in that State."[154] Although this interpretation was opposed by leading scholars[155] and some ICSID annulment decisions,[156] Argentine officials argued that "[t]he ICSID mechanism […] does not provide ICSID's award holders with a super-right that renders meaningless all administrative requirements under the local law of the recipient country."[157] Accordingly, a decision of a tribunal cannot have higher legal importance than the basic Argentinian Constitutional principle.[158] Against this, the non-

[152] Schneider, ibid.

[153] See specifically, *Enron Corporation*, ibid, at ¶5 and *Siemens AG v Argentine Republic*, ICSID Case No. ARB/02/8, Argentina's Response to the Submission by the USA to the *ad hoc* Annulment Committee (June 2, 2008), at ¶57, For more details; see also GS Tawil, 'Binding Force and Enforcement of ICSID Awards: Untying Articles 53 and 54 of the ICSID Convention' in AJV Berg (eds) *50 Years of the New York Convention: ICCA International Arbitration Conference*, ICCA Congress Series No. 14, (Kluwer Law Int'l, 2009), at 327.

[154] Article 53 (1) of the UNSCI Convention.

[155] R Dolzer and C Schreuer, Principles of International Investment Law (2nd edn, OUP, 2012), at 310 – 11; see also Schreuer, *A Commentary* (n 42), at 1141, at para 87; C Titi, 'Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas' (2014) 30 Arb. Int'l 357, at 373 and the references therein.

[156] See *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No. ARB/01/3 Decision on the Argentine's Request for a Continued Stay of Enforcement of the Award (October 7, 2008); *Vivendi*, Stay of Enforcement.

[157] Argentina Embassy in Washington DC, Hearings of the International Monetary Policy and Trade Subcommittee of the House Financial Services Committee: The Role of the United States in The World Bank and Multilateral Development Banks (2011) (the section on 'Issues before the International Centre for Settlement of Investment Disputes ("ICSID")' at para 2) http://embassyofargentina.us/embassyofargentina.us/files/110729tohousefinancialservicesandforeignaffairscommittees.pdf. Accessed 19/09/20.

[158] Goodman (n 129), at 453.

compliance with the awards did not constitute a violation of the ICSID Convention, the State contends. Of course, the award creditors never complied with the State's requirement.

The annulment committee in *Eron* rejected Argentina's interpretation, emphasising the two Articles' separate and independent nature.[159] Accordingly, the obligation to comply with the award pursuant to Article 53 is unconditional. It comes into effect immediately after an award is issued and remains unaffected by any domestic arbitral procedural rules that govern coercive enforcement under Article 54.[160] Explaining the basis for rejecting the State's inference, the Committee detailed the relationship between the two Articles. First, the Articles are directed at two different parties. Article 53, the obligation to comply with the award, is directed to the parties to the dispute (the award debtor in particular), whereas Article 54, the obligation to recognize and enforce the award, is directed to contracting State parties to the Convention where awards' coercive enforcement is sought.[161]

Second, pursuant to Article 54, the Committee stated that contracting States parties are only obligated to enforce pecuniary damages.[162] Argentina's reasoning implied that ICSID makes it possible to implement non-pecuniary damages, which is not the case under Article 54.[163] Besides, the awards' coercive enforcement was sought against Argentina in a third State and as highlighted above, the third States' obligation are limited. Lastly, the Committee emphasised that had Argentina's argument been strong, it would have been backed by state practice following Article 31(3)(b) of the Vienna Convention

[159] *Enron Corporation,* Para. 62.

[160] Ibid.

[161] Para. 62.

[162] Para 66.

[163] Ibid. See detailed discussion on enforcing pecuniary and non-pecuniary obligation in A Broches, Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application, Yearbook Commercial Arbitration (1993), 627, 703/4 at 990 – 991; see also Schreuer, *A Convention,* (n 42).

on the Law of Treaties (VCLT).[164] Subsequently, the Committee's reasoning was applied in *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (Vivendi II).[165]

As the *Vivendi II* annulment committee rightly posits, upholding Argentina's inference would have accorded local courts unfettered discretion in determining the validity of ICSID awards and, therefore, measures regarding their implementation.[166] This would have defeated the object and purpose of the ICSID Convention, which is to provide an independent and delocalised adjudication. Further, engaging in such policy would have defeated the Convention's aims to secure and protect awards' finality. Such this would have undoubtedly placed the Convention on the same footing as the New York Convention and related regimes in the context of implementing awards.[167]

The point made here reinforces the fact that the obligation not to subject ICSID awards to review or other remedial measures outside the Convention, applies to all States. The obligation implicates third States before whom awards' coercive enforcement is sought and the States against whom the obligation to abide and comply is necessitated.

Article 55 in Form

The final provision governing awards' coercive implementation under the ICSID system is Article 55. The purpose of this Article, as highlighted above, is to clarify the deference that Article 54 of the Convention accords national law during awards' actual implementation against the foreign States' assets. The Article subjects ICSID award coercive enforcement measures explicitly only to the State immunity law of the implementing State. Regrettably, as shall be seen in the succeeding chapters of the thesis, State

[164] According to Article 31 (3) (b) in order to engage in the good faith interpretation of a Treaty,

''There shall be taken into account, together with the context: … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.'' Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[165] Vivendi, Stay of Enforcement, at paras 31 - 36.

[166] Ibid. Respondent's Letter, at para 5.

[167] RB Musa and M Polasek, 'The Origins and Specificities of the ICSID Enforcement Mechanism' in J Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards: A Global Guide* (Globe Law and Bus., 2015), at 12 – 14.

immunity has proven to be the principal legal obstacle to successful implementation under the ICSID system.[168]

Schreuer observed that "[t]he drafting history of Article 55 reveals no controversy. The earlier drafts did not include a provision on State immunity" because non-compliance was never in the contemplation of the Convention's architects.[169] Indeed, the thought of a foreign investor with an award against a host State failing compliance and necessitating coercive enforcement measures to recoup the remedy was far off. Broches, a leading architect's report in 1968, highlighted this:

> [s]ince any State against which an award was granted would have undertaken in advance a solemn international obligation to comply with the award, the question of enforcement against a State was somewhat academic.[170]

Unfortunately, recourse to coercive enforcement measures to recoup remedy under arbitral awards seems to be commonplace as non-compliance and frequent attacks on awards are on the rise and projected to increase.[171] The Report of the Convention's Executive Directors, however, make an important point about the applicability of Article 55:

> [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. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed. In order to leave no doubt on this point Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force

[168] I Uchkunova and O Temnikov, 'Enforcement of Awards under the ICSID Convention: What Solutions to the Problem of State Immunity?' (2014), 29(1) ICSID Rev.- FILJ, at 187-211.

[169] Schreuer, *A Commentary*, (n 42), at 1152 para. 3 citing A Broches, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution (1987), 2 ICSID Rev.– FILJ, at 329 - 31.

[170] See e.g., ICSID, 'History of the ICSID Convention: Document Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (ICSID Publication 1968) vol 2-1, at 304.

[171] Gaillard and Penusliski (n 19), 47.

> in any Contracting State relating to immunity of that State or of any foreign State from execution.[172]

While absolute compliance by States was envisaged, the rationale for incorporating State immunity was not to bar the courts' assumption of jurisdiction during coercive enforcement proceedings against States in domestic courts. Indeed, as an essential principle protecting the fundament rights of States and maintaining peaceful co-existence among them, State immunity was reserved only to prevent 'forced execution' against foreign States' assets, as it would ordinarily apply to a final judgment of the forum State's own courts.[173] In fact, as is highlighted below, States courts have rightly stayed within the confines of Articles 53, 54 and 55 obligations, engaging immunity considerations mostly in the actual execution of the awards. In this regard, a distinction has been drawn between States' assets serving sovereign/public purpose (*acta jure imperii*) and commercial/private purpose (*activity acta jure gestionis*), of which any proceedings instituted against the latter to satisfy arbitral awards is permissible.[174] However, the distinction is not so clear to navigate, and often State immunity has shown to be the main obstacle to awards' implementation under the ICSID system as these cases exemplify; *Benvenuti & Bonfant Co v People's Republic of Congo,*[175] *Société Ouest Africaine des Bétons Industriels (SOABI) v Senegal,*[176] *Liberian Eastern Timber Corp. (LETCO) v Liberia,*[177] and *AIG Partners v Kazakhstan*.[178]

In *Benvenuti,* the Paris Tribunal de grande instance had initially granted the award creditor an exequatur to enforce the award. However, the exequatur order contains the following constraint terms: "[n]o measure of execution, or even a conservatory measure, shall be taken pursuant to the said award, on

[172] Ibid.

[173] X Yang, (n 25), at 86 – 102; Fox and Webb, (n 28), at 119 -121.

[174] Ibid.

[175] Decision of Jan. 13, 1981, of the Tribunal de Grande Instance, Paris, 108 Journal du droit international 365.

[176] Decision of December 5. 1989 of the Court of Appeal, Paris 117 Journal du droit int'l 141 (1990), para. 25

[177] ICSID Case No. ARB/83/2, Award, 31 March 1986, (1994) 2 ICSID Rep 346 ['LETCO'].

[178] *AIG Capital Partners Inc and another v Republic of Kazakhstan*, EWHC Comm 2239 (2005). 20 October 2005, available at <http://www.bailii.org/ew/cases/EWHC/Comm/2005/2239.html>.

any assets located in France, without the prior authorization of this Court."[179] On appeal, the Cour d'appel of Paris distinguished between an order granting exequatur in accordance with Article 54 and execution in accordance with Article 55 of the ICSID Convention. It highlighted the following:

> [t]he judge at first instance, acting on a request pursuant to Article 54 of the Convention of Washington, *could not therefore*, without exceeding his competence, become involved in the second stage, that of execution, to which the question of immunity from execution of foreign States relates.[180]

Therefore, in compliance with Article 54, the part of the order granted by the Tribunal de grande instance dated 23 December 1980, which is the object of this appeal, was quashed.[181] However, the subsequent effort to execute the same award in France against the foreign State's assets in Banque Commerciale Congolaise (BCC) failed because of State immunity constraints.[182] The French courts reached the same conclusion in respect of the *SOABI v Senegal* award; an exequatur order was granted to the award creditor, but the order was quashed on appeal on state immunity grounds. [183] Indeed, the Cour d'appel of Paris indicated that allowing execution against Senegal's assets would be contrary to its public policy since it would violate the State's right of immunity.[184]

In *LETCO* the award creditor applied to have the award recognised and enforced in the US District Court for the Southern District of New York. The Court issued an *ex parte* order stating:

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[179] ICSID Reports 1 (1993): 370, 372 (unpublished decision dated December 23, 1980) aff'd ICSID Reports 1 (1993): 369 (by the same court), in ST Tonova and BS Vasani, 'Enforcement of Investment Treaty Awards Against Assets of States, State Entities and State-Owned Companies' in J Fouret (eds), *Enforcement of Investment Treaty Arbitration Awards* (London: Globe Bus., Publ., 2015), at 83.

[180] Cour d'appel, Paris, June 26, 1981, ICSID Reports 1 (1993): 369, 371, in Schreuer, *A Commentary* (n 42) op cit (note 2), at 1130, in Tonova and Vasani, ibid.

[181] Ibid.

[182] *Benvenuti & Bonfant v Banque Commerciale Congolaise*, Cour de cassation, July 21, 1987, ICSID Reports 1 (1993): 373. See also Schreuer, op cit (note 2), 1131, in Tonova and Vasani, ibid.

[183] *SOABI v Senegal*, Court d'appel, Paris, December 5, 1989, ICSID Reports 2 (1994), at 337, 340-41, in Tonova and Vasani, ibid.

[184] Ibid.

> [I]t is ordered that the annexed arbitration award, as rectified, in favour of LETCO be docketed and filed by the Clerk of this Court in the same manner and with the same force and effect as if it were a final judgment of this Court; and it is further ordered, adjudged and declared that, in accordance with the provisions of the aforementioned arbitration award, as rectified, the applicant Liberian Eastern Timber Corporation recover from the Government of the Republic of Liberia the sum of [...] . ($ 9,076,857.25), and that the applicant have execution therefore.[185]

While the State's request to vacate the *ex parte* order was denied by the same court, it was observed that per Article 55 of the ICSID Convention and the relevant provisions of the US Foreign Sovereign Immunities Act 1976, the assets against which execution was sought was protected by immunity and therefore the execution was refused.[186] A second effort to execute the award against the State's assets in the US District Court for the District of Columbia was unsuccessful on the same immunity ground.[187]

In *AIG v Kazakhstan*, the award creditor succeeded in having the award recognised in the United Kingdom.[188] However, an effort to execute was met with immunity constraints. The High Court reckoned that the assets in question (money held by the National Bank of Kazakhstan in a private commercial bank in London) were protected by the United Kingdom State Immunity Act of 1978 and were therefore unattachable in satisfaction of the award.[189] The award creditors in *Enron v Argentine Republic*[190] and *Sempra Energy International v Argentine Republic*[191] in the US District Court for the Southern District of

[185] *LETCO v Liberia*, US District Court, SDNY, Order, September 5, 1986, ICSID Reports 2 (1994), at 384, in Tonova and Vasani, ibid.

[186] *LETCO v Liberia*, ICSID Reports 2 (1994): 388-389, in Tonova and Vasani, ibid.

[187] *LETCO v Liberia*, US District Court for the District of Columbia, April 16, 1987, ICSID Reports 2 (1994), at 390. See also Schreuer, op cit (note 2), at 1133, in Tonova and Vasani, ibid.

[188] *AIG Capital Partners Inc v Republic of Kazakhstan* (National Bank of Kazakhstan Intervening), HCQB Div. Comm. Ct, [2005] EWHC 2239 (Comm); ICSID Reports 11 (2007): 118. See also Schreuer, op cit (note 2),1134

[189] *AIG Capital Partners*, ICSID Reports 11 (2007): 119.

[190] Tonova and Vasani, ibid 6.

[191] Ibid.

New York obtained a certified copy of the ICSID awards on an *ex parte* basis, with judgments entered accordingly:

> [I]t appearing [sic] that Arbitration Award Creditors […] are entitled to immediate recognition and enforcement of the pecuniary obligations of the Award in their favour in accordance with the provisions of Article 53 and 54 of Section 6 of the ICSID Convention, as enabled by 22 U.S.C. §1650a […] it is ORDERED that the annexed pecuniary obligations in the Award […] be recognized and entered as a judgment by the Clerk of this Court in the same manner and with the same force and effect as if the Award were a final judgment of this Court[.][192]

The same District Court also entered judgment based upon an ICSID award in *Siag and Vecchi v Egypt* on an ex parte basis.[193] The court noted that, pursuant to the US implementing legislation, "[t]he pecuniary obligations imposed by such 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."[194] However, the creditor must comply with New York's Civil Practice Law and Rules (CPLR) requirements applicable to the recognition and enforcement of sister-state judgments.[195]

The above case examples show that ICSID award creditors have successfully obtained recognition of their awards in States courts in accordance with terms of Articles 53 and 54 of the ICSID Convention. However, as Article 55 of the Convention allows, the actual execution of the award against the relevant States' assets, are permissible only where the State's immunity laws are not violated.[196] For this reason,

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[192] New York City Bar, Recommended Procedures for Recognition and Enforcement of International Arbitration Awards Rendered Under the ICSID Convention, www.nycbar.org, July 2012, at 21 (quoting from *Enron Corp v Argentine Republic*, M-82 (SDNY November 20, 2007), in Tonova and Vasani, ibid.

[193] *Siag & Vecchi v Egypt* (June 19, 2009), Transn'l Disp. Mgt. 7, 1 (April 2010).

[194] Ibid.

[195] Ibid at 2. Similar approach was adopted in *Funnekotter v Republic of Zimbabwe*, Case 1:09-cv-8168 (CM) (SDNY 2010).

[196] Aaken, *Blurring Boundaries* (n 28), at 131; Fox and Webb, (n 28).

State immunity has been termed 'the Achilles heel' of the ICSID system.[197] In short, the flattering self-contained or autonomous nature of the ICSID machinery system seems to have its weaknesses embedded in the actual execution of its awards. State immunity implications ensue investment awards' implementation under the New York Convention, which the discussion turns to next. The actual execution of the awards and issues of state immunity, form the core analysis of this thesis and shall be examined in detail in succeeding chapters of the thesis.

2.3.2 Implementation of Arbitral Awards Under the New York Convention

2.3.2.1 A Brief Overview

Aside from the ICSID Convention, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention provides governing rules for implementing international commercial arbitration awards.[198] The Convention has contributed enormously to the growth and success of international commercial arbitration by providing the Contracting States with rules both for giving recognition to their arbitration agreements and for implementing the outcomes of arbitration agreements.[199] The Convention came into force by the adoption of the United Nations on 7 June 1959 and, as of June 2022, had 169 Contracting States signatories.[200]

Although it provides governing rules for enforcing arbitration agreements, the Convention's primary aim is to facilitate the implementation of 'foreign' commercial arbitration awards between 'private parties.'[201] The Convention was not designed to govern the implementation of awards pursuant to foreign investor-state engagements. The lack of explicit reference to 'State party' and State immunity

[197] Schreuer, *A Commentary* (n 42), at 1154; Bjorklund, *State Immunity* (n 30).

[198] 21 U.S.T. 2517, 330 U.N.I.T.S (1958)

[199] S Balthasar, *International Commercial Arbitration: International Conventions, Country Reports and Comparative Analysis* (Bloomsbury Publis., 2016.), at 95- 97.

[200] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Accessed 12/04/20.

[201] Balthasar (n 191); Moses, *The Principles* (n 50), at 225.

provides a strong argument in support of this assertion. [202] However, several cues point to the fact that the Convention makes room for investor-state engagements. For example, NAFTA and ETC expressly provide for the application of the Convention in the implementation of their awards. Likewise, as shall be seen, the public policy grounds under Article V of the Convention upon which awards may be refused implementation have mostly been interpreted expansively in many jurisdictions to include State immunity considerations. This is not to mention the extensive membership of the Convention, including non-ICSID members.[203] Categorically, the New York Convention applies to investor-State arbitration engagements as much as it does to those between private parties.[204] The Convention differentiates between and stipulates for the recognition and enforcement among its contracting State parties of: (i) 'foreign' arbitral awards issued within other States that are Parties to the Convention and (ii) the awards that are not considered domestic awards in the State where implementation is sought.

The UNCITRAL Model Law on International Commercial Arbitration is designed to assist countries in reforming arbitral procedures. It reflects universal consensus on many critical aspects of international arbitration practice, including implementation of the award covered by the New York Convention. Regarding arbitral procedural rules on the implementation of arbitral awards, the Model Law (ML) and New York Convention set forth nearly identical grounds for review and coercive enforcement measures. Therefore, though the current discussion considers rules under the New York Convention, where necessary reference will be made to the ML, as well as some national law that implements the ML.

2.3.2.2 Implementing Awards Under the New York Convention and Related Rules

The main rules governing the implementation of arbitral awards under the New York Convention are contained in Articles III-VI. Identical provisions can be found in Articles 35–36 of Chapter VIII of the ML.

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[202] Moses, ibid.

[203] Ibid.

[204] Bjorklund, *State Immunity* (n 30), at 303; Berg, *Some Recent Problems* (n 95) at 447–448.

Article III provides that:

> each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.[205]

Thus, it is incumbent on all Contracting State Parties to the Convention to recognise an arbitral award as *binding* and implement it in accordance with their national arbitral law and procedure (*lex fori*).[206] One should note that although Article III subjects the awards' implementation to national arbitral law and procedure, it nonetheless leaves them with a blank cheque to fill in as desired. As Scherer posits,

> Article III […] contains important limitations regarding the application of the *lex fori* to the recognition or enforcement procedure. The *lex fori* may not be used to circumvent "the conditions laid down in the following articles [IV, V and VII]" of the NYC, i.e., in particular the limited prerequisites for recognition and enforcement listed in Article IV, and the exclusive grounds for refusal set out in Article V.[207]

This appears to be a formidable limitation that upholds and enhances the Convention's pro-enforcement preference. Sentence two of Article III of the Convention reinforces this notion further by obliging the enforcing State authority not to impose more onerous requirements or conditions on the award beyond those applicable to domestic awards under their respective law.[208] This notion is also manifested in Article VII (1), otherwise known as the 'more favourable right' provision.[209]

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[205] Article III of the New York Convention.

[206] Ibid; See also E Gallard and GA Bermann, *Guide On Convention On The Recognition And Enforcement Of Foreign Arbitral Awards New York*, (Brill Nijhoff, 2017), at 123 – 141.

[207] M Scherer, 'Article III: Formal Requirements for Recognition and Enforcement of Arbitral Awards' in R Worlff (edn.), *New York Convention: Article-by-Article Commentary* (2012), at 200.

[208] Balthasar (n 191), at 97; see also Moses, *The Principles* (n 50), at 225.

[209] Pursuant to Article VII (1), a party seeking recognition and enforcement shall not be deprived of the right to rely, in addition to the Convention, on a more favourable domestic law or treaty.

This general obligation to implement the award, which implicates both the recognition (awards' authentication) and actual execution, is subject to certain formal requirements laid out in Articles IV to VI of the Convention. First, the award creditor must furnish a proper copy of the award and arbitration agreement for verification by the enforcing State authority/court (Article IV (1)(a) – (b), which qualifies the authentication stage). Upon that, qualifying the actual execution stage, it must be established by the enforcing State authority that no ground(s) to refuse implementation exist (Article V (1)(a) - (e) and (2)(a) (b)) or possible consideration to suspend or continue implementation pending a vacatur proceeding at the seat of the arbitration (Article VI).[210]

The initial conditions for the award's recognition are straightforward and make the award's implementation under the New York Convention attractive to award creditors, particularly those enforcing investment awards against State parties. As Gaillard and Bermann explain, the obligation to 'recognise as binding' applies regardless of the procedural context in which implementation is sought.[211] Indeed, the conditions outlined in sentence two of Article III in conjunction with the conditions under Article IV can supersede any prevailing restrictive requirements under national law and other applicable third instruments, recourse to which will amount to breach of the Convention.[212]

That said, the actual execution stage of the awards' implementation process, is subject in scope to the arbitral law and practices (*lex fori*) of the enforcing State, which on a more substantial note, vary considerably among States. The seat of arbitration or the law of the seat, *lex arbitra*, is also vital during this stage. The *lex arbitra* determines not only the form and validity of the arbitral award and the award's finality, including any right to challenge it in the courts of the seat of arbitration, but ultimately determines whether the award is enforceable or not.[213] As aforementioned, this approach is contrary to the ICSID

[210] Articles IV(1)(a) and IV (1)(b), New York Convention respectively.

[211] Ibid; E Gaillard and GA Bermann, (n 198), at 133.

[212] Ibid. See also, Scherer, 'Article III: Formal Requirements for Recognition and Enforcement of Arbitral Awards' in R Worlff (edn.), *New York Convention: Article-by-Article Commentary* (2012), at 201; *Kronke*, in Kronke et al., (eds), *Recognition and Enforcement of Foreign Arbitral Awards* (Kluw Law Int'l BV, 2010), at 15.

[213] GB Born, *International Commercial Arbitration* (2nd Edn. Kluwer, 2014), Volume III, 3409 *et seq.*

Convention, where the award's recognition and actual execution and review are confined to the Convention's governance. In other words, the New York Convention does not establish a 'closed-loop' or 'self-contained' system like the ICSID. Therefore, under the New York Convention, whether an award's implementation will be successful will wholly depend on the enforcing States' rules of procedure and the degree of flexibility incorporated into the rules, including the degree of unfettered discretion that the relevant enforcing State authority exercises.[214]

Article V of the Convention contains limited and exhaustive grounds upon which an award may be set-aside or refused implementation, including who may request/raise the ground(s) for the purpose, while Article VI highlights the possible implication for the award's future when a challenge against the award is entertained at the seat of arbitration. According to Article V (1), "the party against whom an award is invoked" may initiate a proceeding to set aside or object to the award's implementation upon proof of the following exhaustive grounds (paraphrased):

a. incapacity or invalidity of the agreement to arbitrate under the applicable law;
b. absence of the proper notice of the appointment of the arbitrator or the arbitration proceedings or otherwise inability to present one's case;
c. the tribunal's incompliance with the mandate conferred to it by the parties;
d. the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or the law of the place of arbitration; or
e. the award has not become binding or is not final.[215]

Article V (1) of the Convention protects the award debtor's interest and reinforces the fundamentals of protecting the integrity of the arbitral process. Therefore, a challenge to the award's implementation is thus, well entertained by relevant State authorities, even in States with pro-arbitration bias. The consideration becomes even more pronounced when such a challenge to the awards' implementation implicates the ground under Article V (1) (e) of the Convention, which may take into account the matters

[214] Ibid. See also Balthasar (n 191) at 97; E Gaillard and GA Bermann, (n 198).

[215] See also Article V(1)(a) – (e), of the NY Convention; Article 34 (2)(a)(i)–(iv) of the ML.

at the seat of the arbitration. The importance of the seat of arbitration during the awards' implementation under the New York Convention is highlighted by the fact that under Article VI, the enforcing State authority, having given prior leave to enforce, has the discretion to suspend or continue to implement an award that is also at the centre of a set-aside proceeding at the seat of arbitration.[216] Article VI provides that

> [i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award.

The language of Article VI (via the words "may, if it considers proper") would suggest that the award's binding force remains intact (and, thus, the obligation to enforce) regardless of a pending set aside proceeding instituted at the seat of arbitration.[217] However, as opposed to a definite imposition of an obligation to enforce, the discretionary nature of Article VI of the Convention may render awards susceptible to implementation challenges under the *lex fori* of enforcing States even in States with pro-arbitration bias. The enforcement of the *Yukos awards* against Russia is an excellent example of this.[218] The Yukos awards' binding nature was not vitiated, nor was the obligation to enforce under Article III nullified when Russia sought to set aside the award under Article V(1) at the seat. However, Article VI, in conjunction with Article V (1) (e) of the Convention, allowed the relevant enforcing States (despite a prior leave to enforce) to suspend the process.[219] Thus, aside from the other grounds under Article V, the

[216] Article VI, of the New York Convention.

[217] Scherer, (n 199), at 204

[218] *The Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited* (C/09/477160 / HA ZA 15-1, 15-2 and 15-112).

[219] The majority shareholders of OAO Yukos Oil Company ('Yukos'), a Russian oil exploration company, in February 2005, following the sale of Yukos, initiated arbitration proceedings against the Defendant, Russia in the Permanent Court of Arbitration (PCA) under the Energy Charter Treaty (the "ECT"). In July 2014, the claimants were awarded over USD50 billion in compensation (together with the interim awards, the 'Awards'). In November 2014, Russia initiated proceedings in the Dutch courts, as the courts of the seat of arbitration, to set aside the Awards for reasons, including lack of jurisdiction under Article V of the New York Convention. While the set

discretionary nature of Article VI allows the enforcing States' courts much leverage to determine awards' execution.

Further, Article V (2) allows the courts on their own initiative to challenge the award on two additional grounds that tend to protect their fundamental interests: non-arbitrability of the subject matter of the dispute and public policy.[220] The scope of these grounds, especially the public policy ground, varies significantly among jurisdictions. Both narrow and extensive interpretation is a constant reality in interpreting the ground under national rules and procedures that take into account international treaties, CIL and general principles of law, including rules on State immunity.[221]

Although State immunity finds no explicit mention under the Convention, the deference to national arbitral law and practices via Article V (2) (b) means that awards are implementable through a State party to the Convention to the extent that its immunity law (public policy) is not violated. It must be emphasised that a "State's entering into an agreement to arbitrate will be deemed to constitute consent to judicial jurisdiction over actions relating to the enforcement of the agreement or of the resulting award."[222] Therefore, State immunity may not bar the assumption of jurisdiction to enforce awards that result from an arbitration agreement between a foreign investor and a host State, but it may bar actual execution in respect of its assets. State immunity has proven to be an obstacle to awards' implementation against States under the Convention when voluntary compliance fails, as exemplified by these cases: *HoFG Hemisphere v The Democratic Republic of Congo*[223] and *Intraline v The Incorporated Owners of the Vessel Hua Tian*

aside proceedings were ongoing, in January 2015, the shareholders started proceedings to enforce the Awards in many jurisdictions, including UK pursuant to Article III of the Convention. Russia applied to stay or object to the enforcement of the awards in accordance with Article V (2) in September 2015. The UK court effectively suspended the enforcement proceeding in June 2016 as the set aside proceeding before the seat of arbitration was successful in April 2016 with an appeal pending. Courts in Belgium, France, Germany, the UK and the US enabled similar outcome either suspended or refused to enforce the award.

[220] WLK Wai, 'Exercise of Residual Discretion under Article V of the New York Convention by Enforcement Court When Award Is Alive, Dead, and Undead in Seat' (2019), 7 China Legal Sci., at 123.

[221] Bjorklund, *State Immunity* (n 30).

[222] GA Bermann, Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts (2017), 1 Springer, Cham, at 70.

[223] [2009] 43 CACV.

Long.[224] In a sense, the New York Convention entertains State immunity considerations, much like the ICSID Convention does during awards' implementation against the State when voluntary compliance fails.

Having identified the governing legal rules under which investment awards' implementation are facilitated, it is necessary to juxtapose the two Conventions to draw common limitations while establishing whether one facilitates implementation better than the other.

2.4 The New York Convention versus The ICSID Convention

As already observed, a core feature of international arbitration and the one that gives it teeth is the likelihood of implementing the resulting final arbitral award. For this reason, disputants tend to equate "effectiveness of arbitration with enforceability/implementation of the award."[225] This is not far-fetched, as Carver explains:

> When clients face the prospect of, often, years of efforts and expense in pursuing a dispute referred to arbitration, they need assurance that the 'piece of paper' they hope to receive at the end will be valuable.[226]

Given the above, it is safe to say that the ultimate test of success of the investment arbitration proceedings is whether the resulting award(s) can successfully be implemented without challenge. Since arbitral awards can be subject to post-awards challenges, their enforceability, therefore, is a matter of concern.[227] With a recent surge in arbitral recalcitrancy under the ISA system,[228] it is trite that parties will seek an arbitral framework or institution that fosters their interest. This prompts enquiry into the two Conventions and their effectiveness in ensuring enforceability. As noted earlier, enforceability does not only implicate

[224] [2010] HKCFI 361 (Apr. 23, 2010).

[225] Ibid, at 268.

[226] JP Carver, 'The Strengths and Weaknesses of International Arbitration involving a State as a Party: Practical Implications' in *Contemporary Problems in International Arbitration* (Springer, Dordrecht 1987), at 264-272.

[227] JW Jun, 'The Integrity of Finality of International Arbitral Awards: International Commercial and ICSID Arbitration Awards' (2018) 28 *J. Arb. Stud*., at 137.

[228] Gaillard and Penusliski (n 19).

an award's capacity to be accepted as valid for instituting coercive enforcement in national courts, but also its propensity to command voluntary compliance having been rendered fairly and efficiently following the requirements of natural justice and legality.[229] An award may be 'validly' made but not voluntarily complied with, for instance because it lacks the necessary legitimacy in the eyes of the party against whom it is rendered to command voluntary compliance. In this instance, coercive enforcement measures are essential to recouping remedy under the awards if such a measure does not violate the State immunity law of the enforcing States, which, as identified above, serves as the main limitation to the arbitral process under the governing frameworks of both the New York and ICSID Conventions.

It is necessary to assess and juxtapose the Conventions in the light of other limitations. The remedial review procedures and their impact on awards' finality under both Conventions will be a benchmark from which to begin this inquiry.

2.4.1 Review of Awards and Finality: Autonomous Procedure and Courts' Involvement

Both Conventions have identical obligations. They oblige the disputants to "abide by and comply with" the award and their Contracting States parties to recognise the award as final and implement it as if it were a final judgement of their courts (Article III of the New York Convention and Articles 53 and 54 of the ICSID). Both leave the awards' actual execution to the control of national rules of procedure which give consideration to State immunity (Articles 55 ICSID and Article V(2)(b) of the New York Convention. However, an essential point of departure lies in reviewing their awards and particularly the route to engaging the measures, the impact they have on awards' finality and hence their enforceability seemingly.

International arbitration is known as an independent adjudicatory process in the sense that it exists in a distinct and autonomous sphere from national law and jurisdictions.[230] Therefore, by opting for arbitration, it is believed that parties have expressed their willingness to pursue dispute settlements other

[229] Carver (n 59).

[230] JDM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006), 22(2) Arb. Int'l, 179; D Roebuck, 'Sources for the History of Arbitration' (1998), 3 Arb. Int'l., at 237.

than the national courts' system.[231] Although courts have shield away from delving into the substance of arbitral awards, Schmitthoff notes that

> [t]he courts of all countries exercise a judicial review over arbitrations on questions of natural justice and legality because they consider it a precondition of the reference to arbitration by the parties that these requirements are observed.[232]

A unique feature of the ICSID machinery is its autonomy. Often identified as a self-contained or de-localised system, the ICSID system contains the substantive and procedural rules necessary for carrying out independent dispute settlement proceedings, including rules addressing the parties' dispute, the award, post-award remedies and enforcement of the outcome. This removes the adjudicatory process under the ICSID Convention from the domain of the national law and the influence of their courts, thereby seemingly safeguarding the awards' enforceability.[233] Under the New York Convention, substantive and procedural rules surrounding the process, particularly those relating to the form and validity of the award and finality, including review and coercive enforcement, would mainly be governed by the law of both the place of arbitration (*lex arbitri*) and that in which enforcement is sought (*lex fori*).[234]

Recourse against ICSID awards is contained within the ICSID system itself. It is confined to an exhaustive list of remedial measures pursuant to Chapter IV of the ICSID, which covers supplication and rectification - Article 49(2); interpretation - Article 50(1); revision - Article 51(1) and annulment – Article 52(1), of which merit-based or substantial review of correctness is impermissible (detailed below).[235] The

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[231] E Gaillard and J Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law, 2001), at 8.

[232] CM Schmitthoff, 'Finality of Arbitral Awards and Judicial Review', in Lew (Edn) *Contemporary Problems in International Arbitration* (Queen Mary College, London 1986), at 232.

[233] Article 44 of the ICSID Convention; see also C Brown, 'Procedure on Investment Treaty Arbitration and the Relevance of Comparative Public Law' in S Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, 2010), at 658 -660.

[234] Moses, *The Principle* (n 50); Wai, (n 220), at 123 -124.

[235] Article 49 – rectification; Article 49 supplementary decision; Article 50 – interpretation; Article 51- revision and Article 52 – annulment.

autonomous remedial measures are reinforced by the Convention's other provisions, particularly Article 53, which obligates State parties to enforce the award as if it were a final judgment of their court. It follows, therefore, that not only are internal reviews against ICSID awards curtailed (because it prohibits merit-based or substantial review of correctness), but also external reviews during the award's implementation in domestic courts when voluntary compliance fails, thereby protecting and safeguarding the awards' finality and hence their enforceability.[236]

Equating ICSID awards, however, to final judgments of national courts expresses the possibility of the awards being challenged under national law where some exceptional remedial measures are available for final judgments.[237] This, of course, is the case of awards subject to the New York Convention. As observed above, in *Micula* the Supreme Court of the United Kingdom "acknowledged the prospect of other defences in this regard in certain 'exceptional circumstances' if (1) national law recognises such defences in respect of final judgments of domestic courts and (2) they do not directly overlap with the grounds of challenge under Articles 50–52 of the ICSID Convention."[238] Further, the United States Federal Rules of Civil Procedure contains both substantive and procedural grounds upon which all final judgements, including arbitral awards, may be challenged before its courts. For example, Rule 60 (b) of the Federal Rules allows challenge or provides relief from final judgements for allegations, including negligence, fraud, lack of impartiality, inaccurate methods of determining damages, mistakes and omissions in issued judgments. [239] France, Belgium, Switzerland, and Venezuela's Codes of Civil Procedure formulate similar

[236] M Bungenberg and A Reinisch, 'Recognition and Enforcement of Decisions' in *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (Springer Cham., 2018), at 147-156.

[237] Baldwin et al., (n 19).

[238] [2020] UKSC 5 at Para. 78, in See Battisson and Mills, (n 110). In Dallah Real Estate & Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46, [2011] 1 AC 763, paras 26, 159–60. [In this case, the Court held that ''whether or not a party's challenge to jurisdiction has been decided by the tribunal, a party is entitled to a full judicial determination on an issue of jurisdiction and the court should undertake an 'independent investigation''' as available to all other judgements.]

[239] Baldwin et al., (n 19) highlighting Rule 60(b); Fraud, partiality, mistakes, errors and omissions in the awards etc.

grounds for review.[240] The judgement of the Court of Justice of the European Union (CJEU) in the recent case of *Slovakia v Achmea* bears on this possibility as well as the Court proclaimed an arbitration clause included in an intra-EU BIT to be incompatible with European Union (EU) law.[241] The Court's proclamation holds the supremacy of law over other supranational laws, including the arbitral regime of international investment law and arbitration.[242] This decision not only exacerbates the growing instances of non-compliance by States with adverse awards rendered against them, but it also poses a real danger to the recognition and enforcement of such awards.[243] Indeed, in January 2019, a group of EU Member States issued a declaration pursuant to which

> defending Member States will request the courts, including in any third country, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent.[244]

[240] Ibid: Article 1480 French Code of Civil Procedure; Article 1704 Belgian Code of Civil Procedure; Article 190(2) Swiss Federal Code on Private International Law; Article 244 Venezuelan Code of Civil Procedure.

[241] Case C-284/16, para. 184.

[242] Ibid. paras. 58 and 60. ['constitutionally designated as the apex judicial authority on questions of EU law in accordance with the Treaty on the Functioning of the European Union (TFEU) [the CJEU] declar[ed] that the arbitral dispute resolution provision contained within a bilateral investment treaty (BIT) between two EU Member States was contrary to EU law. Specifically, in the case of Achmea BV v. Slovak Republic (Achmea), the CJEU ruled that agreement to arbitrate contained within 1991 bilateral investment treaty between The Netherlands and Slovakia (Netherlands–Slovakia BIT) was invalid because it did not provide a mechanism by which the CJEU could provide preliminary rulings on matters of EU law in accordance with Article 267 of the TFEU.']: see TK Sprange and TC Childs, 'The Investment Treaty Arbitration Review: Enforcement of Awards', at https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/enforcement-of-awards#footnote-019-backlink. Accessed 20/06/22.

[243] The decision has led to a number of non-compliance with inter EU investment adverse award by EU States, including, Spain, Romania, Moldovia, Hungary and Slovakia. There are currently eleven Energy Charter Treaty awards been challenged on the basis of the Achmea decision. See Sprange and Childs, ibid.

[244] Financial Stability, Financial Services and Capital Markets Union, 'Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union', EC (15 Jan 2019). In May 2020, 23 out of the 27 European Union Member States signed a plurilateral agreement to terminate all BITs in force among them, which is approximately, 130 BITs. See Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union, signed on 5 May 2020, available at https://ec.europa.eu/info/publications/200505-bilateral-investment-treaties-agreement_en. Accessed 03/12/21.

However, the recent decision of the US District Court for the District of Columbia in *Micula and Others v Romania*[245] appeared to show that courts outside the EU Member States could pay little to no attention to the *Achmea* decision during proceedings to enforce intra-EU investment treaty awards. In this ICSID enforcement case, the Court confirmed as enforceable in the United States the award rendered in favour of the creditors (Swedish investors) against Romania, despite Romania claiming incompatibility with EU law.[246] A similar outcome was produced by the Federal Court of Australia as it recognises intra-EU two ICSID awards as enforceable, despite the State, Spain, claiming incompatibility with EU law.[247]

The *Achmea* decision provides a cogent possibility for the review of ICSID awards within the EU Member States. As explicitly stated in Article 55 of the Convention, state immunity forms the grounds upon which ICSID awards can be challenged, and as it applies only as a procedural bar to execution, and not grounds for merit-based review of the award,[248] creditors' right in the award itself will be unaffected.[249] Any measures falling outside the confines of Article 55 will constitute a violation of the Convention's obligations. As the ICSID ad hoc committee in *Up and CD Holding Internationale v Hungary* reiterates (reacting to the *Achmea* decision), a State's obligation(s) under the Convention, including the obligation to abide, comply and enforce awards, are unaffected by other obligations that the State may have under national, regional or sectorial instruments.[250] Perhaps, States and their courts find credence in these implications and therefore, while Article 54(1) alludes to the possibility of review under national law,

[245] *Micula and others v Romania,* Order and Final Judgment of the United States District Court for the District of Columbia - 20 Sept 2019 at usmundi.com/en/document/decision/en-ioan-micula-viorel-micula-and-others-v-romania-i-order-and-final-judgment-of-the-united-states-district-court-for-the-district-of-columbia-friday-20th-september-2019#decision_18211. Accessed 03/12/21.

[246] Ibid.

[247] *Eiser Infrastructure Ltd v Spain* [2020] FCA 157; *Infrastructure Services v Spain*, ICSID Case No. ARB/13/31; See also *Spain v Infrastructure Services Luxembourg S.A.R.L.* [2021] FCAFC 3, para. 111.

[248] Fox and Webb, (n 28).

[249] Ibid; *MINE v Guinea,* Interim Order No. 1 on Guinea's application for Stay of Enforcement of the Award,12 August 1988, 4 ICSID Rep. 111, ¶25.

[250] *UP (formerly Le Cheque Dejeuner) and CD Holding Internationale v Hungary*, ICSID Case No. ARB/13/35 at paras. 253, 258 [*Up v Hungary*].

current practices show deference to the Convention, as the States in the *Micula* case exemplifies, and so the possibility remains just that.

The same observation cannot be made of implementing arbitral awards under the New York Convention. As aforementioned, although Article III of the Convention entreats all States to "recognise arbitral awards as binding and enforce them", the Convention also subjects the awards to the full control of domestic courts and their respective laws on a range of grounds (substantive and procedural) contained in Article V of the Convention.[251] This would implicate the law and any directives, regulations and decisions of the EU as applicable within member States; it may be problematic for domestic courts to avoid the Achmea decision in respect of intra-EU awards subject to the enforcement under the New York Convention. Further, as highlighted earlier, under Article VI, an enforcing State court have enormous leverage over whether to enforce arbitral awards that have been set aside or suspended by a competent authority.[252] As important as set aside proceedings are to the finality and enforceability of awards, the Convention contains no rules regarding the procedure that must be followed during such proceedings. In the absence of this, international arbitral practice expects that "the courts of the seat of arbitration oversee the proper functioning of the procedural aspects of the arbitration and, at the end of the process, confirm or set aside the award", Gaillard explains.[253] This implies that the competent court at the seat of the arbitration not only has the power to review on substance and merits and, if possible, amend its terms. But also, the power to determine the likelihood of the award's enforceability in the State where coercive enforcement measures will be sought when voluntary compliance fails.[254] In this regard, both the State where the award is rendered

[251] See DH Freyer and HG Gharavi, 'Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity' (1998), 13 ICSID Review – FILJ 101.

[252] Ibid. See Articles VI and V of the Convention.

[253] E Gaillard, 'Enforcement of Foreign Arbitral Awards in the Country of Origin' (1999), 14 ICSID - FILJ, 17 cited in Kronke, Kronke et al., at 325.

[254] D Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010), 30 Nw. J. Int'l L. & Bus. 383, at 387.

and where the award will ultimately be enforced have more considerable discretion in determining the ultimate success when it comes to investment awards implementation under the New York Convention.[255]

The ICSID Convention was adopted to provide an autonomous procedure in the investor-state relationship and Articles 54 and 55 were purposefully worded to exclude the potential intervention of State courts and their laws. The ICSID Convention has so far been denounced by three States: Venezuela, Ecuador and Bolivia. Major economic States like India and Brazil are yet to join the ICSID Convention. In addition, the implementation regime established by the ICSID Convention does not apply to awards rendered under other arbitral regimes, including the ICSID Additional Facility Rules. Investment arbitration awards have to be implemented under the New York Convention. It may thus be questioned whether a foreign investor or a claimant with an ICSID award against a host State may rely on the New York Convention to implement it in the territory of the States mentioned above. The question lacks a definite answer, but Schreuer notes the following:

> Since enforcement under the ICSID Convention is easier to obtain than under the New York Convention, the question of the applicability of the New York Convention to ICSID awards is not likely to arise. But this issue may become relevant in exceptional circumstances like the enforcement of an ICSID award in a State that is a party to the New York Convention but not to the ICSID Convention.[256]

Since that arbitration sought to limit the involvement of States courts, it suffices to say that the autonomous nature of the ICSID system works better in safeguarding awards' finality and enforceability than the New York Convention.[257] The Convention's internal remedial measures pursuant to Articles 49–52 work in tandem with the obligation to recognise as final and enforce awards under Articles 54 and 55 to oust any external roles of courts in the arbitral process, thereby aiding the awards' finality.

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[255] Wai, (n 220), at 123 -124; Berg, Some Recent Problems (n 95), at 442.

[256] Schreuer, *A Commentary* (n 42), at 1118 para. 5, cited in Uchkunova1 and Temnikov (n 160), at 192.

[257] See generally CH Schreuer, 'Three Generations of ICSID Annulment Proceedings', in E Gaillard and Y Banifatemi (eds), *IAI Series on Int'l Arbitration No. 1, Annulment of ICSID Awards*, (Juris Publis. 2004), at 17.

Ironically, however, the review measures under the ICSID Convention, particularly the annulment measure pursuant to Article 52 of the Convention, sometimes mirror the review measures under the New York Convention and related arbitral rules.[258] As Schneider notes, awards are sometimes annulled, which should otherwise be retained or attacked with criticisms that make their implementation against the non-successful party challenging.[259] This practice questions the overall effectiveness of the ICSID system and has conventional wisdom supporting the view that:

> [a] party who wins an ICSID award is more likely to see that victory extinguished in annulment proceedings than a party who prevails in a non-ICSID arbitration seated in […] [some] jurisdiction[s] that [are] "friendly" towards arbitration.[260]

It is necessary to look further into the review measures within this context.

2.4.2 The Scope of the Review Measures

Errors are an inevitable part of dispute settlement processes. Erroneous outcomes impact finality and raise issues relating to fairness and legitimacy, especially if the outcomes carry final and binding effects, as is the case for international arbitration. Therefore, founded on the assumption to remove errors to ensure fair and efficient adjudication,[261] remedial review measures are common in all arbitral systems.[262] Typically, using the ICSID as an example, they include supplication and rectification,

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[258] Y Banifatemi, 'Defending Investment Treaty Awards: Is There an ICSID Advantage?' in AJV den Berg (ed), *50 Years of The New York Convention*, ICCA Congress Series No 14 (Kluwer, 2009) 318, at 326. see also P Friedland and P Brumpton, 'Rabid Redux: The Second Wave of Abusive ICSID Annulments' (2011), Am. U. Int'l L. Rev. 27, at 737 – 736. [noting that,"The drafting history suggests that annulments were intended to be exceptional events and that the grounds for annulment in Article 52(1) were to be more restrictive than the grounds laid down in the New York Convention"], at 731 –732.

[259] AK Schneider, 'Error Correction and Dispute System Design in Investor-State Arbitration' (2013), 5 Y.B. Arb. & Mediation 194 [highlighting *CMS* Award against Argentina).

[260] KB Reisenfeld and JM Robbins, 'Finality under the Washington and New York Conventions: Another Swing of the Pendulum?' (2017), 32 (2) ICSID Review-FILJ, 371-384, at 372.

[261] Schreuer, *A Commentary*, (n 42), at 901 – 907.

[262] ICSID Rules Articles 49(2) – 51; ICC Rules Art. 36; LCIA Rules Art. 27; 1997 International Arbitration Rules of the American Arbitration Association ("AAA International Rules") Art. 30; See GJ Horvath, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18(2) J. Int'l Arb., at 145.

interpretation, revision and annulment/vacatur.[263] Comparatively, the first three are less spectacular as they are primarily limited to correcting minor errors and are generally within the reviewable control of the tribunal that rendered the original award.[264] Annulment is broader but different from appeal in that "annulment is only concerned with the legitimacy of the process of decision: it is not concerned with its substantive correctness of the outcomes. Appeal is concerned with both."[265] In other words, merit-based or substantive reviews of the outcome's correctness are not permissible under the review measure of annulment.

While the limit drawn serves to protect the finality of the award, the reality is that substantial errors that may impact the award's correctness or legitimacy, and hence parties' rights to justice, are not entertained.[266] Indeed, a recent study surveying State compliance with ISA awards found that States sought an annulment in 83 per cent of awards issued against them for predictive reasons, including injustice or errors in the rendered awards.[267] Yet, as identified by Bondar,

> annulment will be ordered if one of the grounds for annulment is established and the annullable error has a material and practical impact on the outcome (i.e., material impact on one or both parties). Therefore, only a material violation justifies an annulment.[268]

Finding a balance between the award's finality and its correctness or legitimacy, alongside the entire arbitration process, must be subjectively engaged. On the one hand, there is the necessity to ensure efficient dispute settlement and legal security; on the other, we must take into account the significance of the fairness and correctness of the dispute settlement process. The varying weights given to the two

[263] See ICSID Convention, Article 49(2) - supplementation and rectification, Article 50 - Interpretation, Article 51 – Revision.

[264] Schreuer, *A Commentary*, (n 42), at 901 – 907.

[265] Ibid at 901, para. 11.

[266] JC Thomas and HK Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards' (2017), ICSID Rev. - FILJ, 32(3), at 459-502

[267] Gaillard and Penusliski (n 19), at 46.

[268] K Bondar, 'Annulment of ICSID and Non-ICSID Investment Awards: Differences in the Extent of Review' (2015) 32 J Int'l Arb 621, at at 629.

principles must be assessed, taking into consideration the nature and scope of this arbitration process. Put differently, it must be assessed whether or not the arbitral proceedings relate to investment arbitration or commercial arbitration. Of course, both types of proceedings must effectively engage integrity, fairness and finality. However, it could be argued that finality takes primacy over correctness or legitimacy in commercial arbitration. In investment arbitration, where one of the disputants exercises public authority and, out of public coffers, is usually required to pay a hefty sum in monetary damages, legitimacy or correctness must be prioritised if not balanced against finality.[269]

The current ISA framework works primarily to foster finality, and annulment constitutes a minimal exception to the principle of finality. As highlighted above, merit-based or substantive reviews of the outcomes' correctness are not permissible under annulment. Authorities charged with reviewing investment awards under both Conventions have frequently acknowledged this limit:[270]

> Both ICSID annulment committees and national courts consistently state that they are not courts of appeal and they are not reviewing the merits *de novo*. It is well accepted that the ICSID annulment review does not comprise a review on the merits, whether it concerns facts or law. In ICSID annulment procedures, the interpretation of the grounds for annulment should be 'neither extensive, nor restrictive, but merely reasonable'. The same should hold true for national courts.[271]

That said, as shown below, there are instances in which both courts and annulment committees have engaged a merit-based or substantive review of the award.[272]

The grounds for annulment under the ICSID system are limited to cases where:

(a) the tribunal was not duly constituted (Article 52(1)(a);

[269] Regarding the issue of legitimacy, it is submitted that an arbitral decision that affects more than just two private parties and ultimately impacts the public at large, the content of that decision and the procedure leading to it should be subjected to a higher level of scrutiny.

[270] Ibid; C Schreuer, 'From ICSID Annulment to Appeal Halfway Down to Slippery Slope' (2011), 10 Int'l Courts and Tribunals, at 211; E Baldwin et al., (n 19), at 3-5; See also, Bondar, (n 268), at 672.

[271] Bondar, Ibid, at 636.

[272] Schreuer, *A Commentary*, (n 42), at 901, para. 11.

(b) the tribunal has manifestly exceeded its powers (Article 52(1)(b);
(c) there was corruption on the part of a member of the tribunal (Article 52(1)(c);
(d) there has been a serious departure from a fundamental rule of procedure (Article 52(1)(d); and
(e) the award failed to state the reasons on which it is based (Article 52(1)(e).[273]

These grounds essentially correspond to the grounds for setting aside awards contained in Article V of the New York Convention, the scope of which is primarily determined by national law with a significant degree of variation.[274] The positive side of such variations is that award creditors might potentially seek the most beneficial jurisdiction to institute their arbitration disputes, in France and Brazil for instance, which have been noted as pro-arbitration friendly.[275]

A detailed discussion of the grounds for annulment is beyond this chapter's scope, though there are overlaps and so a consolidation of the most invoked grounds is highlighted below, including instances where the review authority, courts and annulment committees alike, have exceeded the powers to engage substantive review of the awards and thereby undermined their finality.

a. Manifest Excess of Powers and Errors of Jurisdiction

Non-exercise of jurisdiction and lack or access of jurisdiction are frequently invoked grounds under ICSID and non-ICSID review proceedings.[276] Under non-ICSID proceedings, this ground implicates Article V (1)(c) and (d) of the New York Convention, which allows States courts to refuse to implement an

[273] Article 52(1)(a) – (e), respectively ICSID Convention.

[274] Similar ground is contained in Article 34(2) of the UNCITRAL Model Law. Both rules implicate public policy and non-arbitrability as additional grounds under the *lex fori* which finds no mention as grounds under Article 52 of the ICSID, which means that both rules are broader in scope than the ICSID. It could also be said that the ground on 'corruption on the part of a member of the tribunal' and 'faiure to state the reasons on which it is based' which is contained in ISCID Convention find no explicit menion under the New York Convention or ML. However, the ground of 'corruption' can be construed to implicate 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties [...], or, failing such agreement, [lex arbitri].' It can also fall under the public policy of the New York Convention and ML: see A Nilsson and O Englesson, 'Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?' (2013), 30 J Intl. Arb., 561, at 570–571; Bondar, (n 268), at 635.

[275] In France, Art 1520 of the French Arbitration Law limits the grounds for annulment similarly-French New Code of Civil Procedure 2011 Book IV—Arbitration, Title II—International Arbitration, Art 1520. S*ee generally*, J Paulsson (ed) *International Handbook on Commercial Arbitration* (Kluwer Law, 2004), at 33–36.

[276] See L Reed et al., *Guide to ICSID Arbitration* (2nd edn. Kluwer Law Int'l, 2011).

award when it deals with a difference falling outside the terms of the submission to arbitration or when it contains verdicts on matters that exceed the scope of the arbitration application.[277] The ground is seemingly identical to Article 52(1)(b) of the ICSID - "manifest excess of power", which has been construed to include non-exercise of jurisdiction, lack or excess of jurisdiction and failure to apply proper law.[278] The only difference is that the word 'manifest' finds no expression under the New York Convention and related rules. Ironically, the misadventures of the ICSID annulment committees also stem from the word "manifest." It is not what annulment committees recount that they should do in applying the term "manifest" that is problematic. Indeed, all annulment committees are careful to highlight that the excess must be "manifest" to allow annulment. However, while some annulment committees have faithfully applied the professed standard, others have narrated what is required and suitable, and then ignored the ordinary prudence in the meaning of the word "manifest."[279]

The interpretation of "manifest" only becomes contentious when the question becomes whether the word "manifest" concerns the ease with which the excess is observed and or the severity of the excess. In *Wena Hotels v Egypt*, the annulment Committee noted that "the excess of power must be self-evident rather than the product of elaborate interpretations one way or the other," thus, determining that "[w]hen the latter happens, the excess of power is no longer manifest."[280] Others give credence to the extent and seriousness

[277] Article V(1)(d) of the New York Convention:

> "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

Similar ground Art. 34(2)(a)(iii) of the UNCITRAL Model Law; Section 10(a)(4) of the FAA, sections 67(1), 68(2)(b) of the English Arbitration Act 1996 etc. Under the New York Convention, this ground implicates procedural ground under Article V(1)(c) and V(2)(b) of the New York Convention. Article V(1)(c), provides:

> Recognition and enforcement of the award may be refused . . . [if] [t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . .

[278] Schreuer, *A Commentary* (n 42), at 908, para.187 – 196.

[279] Friedland and Brumpton, (n 258) at 737 – 736.

[280] *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 25 (Feb. 5, 2002), 6 ICSID REP. 67 (2004), cited in Friedland and Brumpton, ibid.

of the excess instead of its clarity.[281] In *MINE v Guinea,* "manifest" is considered serious if it is "substantial and [is] such as to deprive a party of the benefit or protection which the rule was intended to provide."[282] The annulment Committee in *Soufraki v United Arab Emirates* rightly brings together these approaches:

> the Committee believes that a strict opposition between two different meanings of "manifest" – either "obvious" or "serious" – is an unnecessary debate. It seems to this Committee that a manifest excess of power implies that the excess of power should at once be textually obvious and substantively serious.[283]

Consequently, annulment committees are conscious that arbitral tribunals' decisions would only be annulled where a severe error has occurred and where such error is apparent. For example, a failure to apply the proper law will only amount to a manifest excess of power under the ICSID system where an arbitral tribunal completely fails to apply the law directed to it or be guided by the law specifically under Article 42(1) of the Convention. As Schreuer highlights, an annulment will be refused as long as the arbitral tribunals apply the right applicable law; in other words, tribunals are allowed to be wrong.[284] Against this, a manifest error in the application of the applicable law in *MINE v Guinea* was not found severe enough to constitute grounds for annulment.[285] However, not all annulment committees have shown that deference to arbitral tribunal decisions against the standard set. The *Amco Asia v Indonesia* (Amco I),[286] *Sempra*

[281] See *Vivendi Universal S.A. v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 Jul. 2002, pra. 115. (stating that excess of power "manifest" due to "the clear and serious implications of decision [of the Tribunla]").

[282] *MINE v Guinea*, ICSID Case No. ARB/84/4, Decision on Annulment, 22 Dec. 1989, para. 5.05.

[283] *Soufraki v United Arab Emmirates*, ICSID Case No. ARB/02/7, Decision on Annulment, ¶40 (June 5, 2007), cited in Friedland and Brumpton, (n 258), at 738.

[284] Schreuer, *A Commentary* (n 42), at 187 – 196.

[285] *Maritime International Nominees Establishment v Republic of Guinea* ICSID Case No ARB/84/4, Decision on Annulment (22 December 1989) para 5.04.

[286] *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983. In the "Amco I, the *ad hoc* Committee went beyond a prima facie examination and undertook an extensive substantive analysis. This analysis led to the result that the Tribunal had not just erred in applying Indonesian law but had, in fact, failed to apply it. This, in turn, constituted a manifest excess of powers." Cited in Schreuer, *The Commentary*, (n 42), at 153.

Energy International Argentina,[287] *Enron v Argentine Republic*[288] and *CMS v Argentine Republic*[289] are telling examples.

In *Amco I*, the annulment committee started with what appears to show deference to the tribunal's decision regarding the application of the law:

> The law applied by the Tribunal will be examined by the ad hoc Committee, not for the purpose of scrutinizing whether the Tribunal committed errors in the interpretation of the requirements of applicable law or in the ascertainment or evaluation of the relevant facts to which such law has been applied. Such scrutiny is properly the task of a court of appeals, which the ad hoc committee is not. The ad hoc Committee will limit itself to determining whether the Tribunal did, in fact, apply the law it was bound to apply to the dispute. Failure to apply such law, as distinguished from a mere misconstruction of that law, would constitute a manifest excess of powers on the part of the Tribunal.[290]

Having acknowledged this, it proceeded to do the exact opposite by scrutinising how the *Amco I* Tribunal had considered factual evidence and the conclusions it reached. The Tribunal had considered that Amco had invested nearly $2.5 million USD in Indonesia following the requirements of Indonesia's Foreign Investment Law No.1/1967.[291] The Committee engaged in a detailed analysis of the Tribunal's appreciation of the figure, highlighting its incorrectness.[292] Lacking in the Committee's reasoning was any finding that the Tribunal had failed to apply or had not sought to apply the relevant Law. In fact, it was indisputable that the Tribunal had applied Indonesian law; it had even quoted Article 1 of Indonesia's Foreign

[287] *Sempra Energy International v Argentine Republic,* ICSID Case No. ARB/02/16, Award, ¶ 378 (Sept. 28, 2007)

[288] *Enron v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, ¶ 219 (July 30, 2010).

[289] *CMS Gas Transmission Co. v Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 Sep. 2007.

[290] *Amco v Indonesia*, Decision on Annulment, 16 May 1986, para. 23, cited in Schreuer, *The Commentary*, (n 42), at 960 para. 212, cited in Friedland and Brumpton, (n 258) at, 743 – 747.

[291] Ibid., at 4.

[292] Ibid, at 90–98.

Investment Law No.1/1967.[293] However, the Committee concluded that the Tribunal had failed to apply the proper law, having misapplied the proper law while trying to apply it, hence, the Tribunal has "manifestly exceeded its powers".[294]

In *Sempra,*[295] the Tribunal considered Argentina's arguments that its actions were substantiated by Article XI of the United States-Argentina BIT[296] (measures necessary to deal with emergency situations) and/or the CIL defence of necessity[297] Having analysed the BIT, the Tribunal noted that "the Treaty itself did not deal with the legal elements necessary for the legitimate invocation of a state of necessity"[298] but identified that "the Treaty provision is inseparable from the customary law standard insofar as the definition of necessity and the conditions for its operation are concerned."[299] Following this, the Tribunal devoted an extensive space examining expert evidence on whether Article XI of the BIT was self-judging, of which it concluded affirmatively. The Committee found otherwise, holding that CIL trumps the relevant provision of the BITs. Therefore, the Tribunal has not only erred but failed to apply the proper law, and hence has "manifestly exceeded powers."[300] The *Sempra* approach is no different to the *Amco I* decision – professing to uphold deference to tribunals' decisions but doing otherwise.

Enron's[301] decision surrounds the same issue of the treatment of necessity. The Committee found that the Tribunal applied the proper law by equating Article XI of the BIT with the CIL standard of necessity with findings that "the only way for the State to safeguard an essential interest against a grave and imminent

[293] Ibid, at 95–96.

[294] Ibid.

[295] *Sempra Energy International v Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 378 (Sept. 28, 2007),

[296] Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124 (1992).

[297] Article 25 of the ILC Draft Articles on Responsibility of States for Intentionally Wrongful Acts, with commentaries, 2001 Y.B. INT'L L. COMM'N, 80, art. 25.

[298] Ibid, at 378, cited in Friedland and Brumpton, (n 258) at, 743 – 747.

[299] Ibid, at 376.

[300] Ibid, at 208.

[301] See *Enron v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, ¶ 219 (July 30, 2010).

peril."[302] However, the Committee questioned the Tribunal's acceptance of the Claimant's expert evidence that Argentina had not satisfied the "only way" requirement, and found that the Tribunal:

> did not in fact, apply Article 25(1)(a) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue. In all the circumstances, the Committee finds that this amounts to a failure to apply the applicable law as a ground of annulment under Article 52(1)(b) of the ICSID Convention.[303]

The irony of this case is that it contains a declaration on the opening page of the award document stating that an award will only be annulled where a tribunal has manifestly exceeded its power.[304] In all three cases examined, despite professing to the contrary, the Committees have effectively ignored the requirement that an excess of power must be "manifest" and employed an appellate jurisdiction based on supposed errors of law or reasoning, thereby annulling the awards. There are instances in which the requirement has been duly followed, thereby retaining the award. However, criticisms passed of the tribunal's reasoning have an effect similar to engaging in substantive review of the Tribunals' decision. The *CMS Gas Transmission Company v Argentine Republic* [305] is a telling example.

In *CMS* (also on the issue of necessity), while conceding manifest errors of law the Committee correctly declined to annul the award on the basis of lack of manifest excess of powers. Pertaining to the issue of whether necessity prevented the wrongfulness of Argentina's actions, the Committee criticised the Tribunal's approach for depending on the CIL standard instead of "examin[ing] whether the conditions laid down by [the provision of the BIT] were fulfilled." The Committee even said that "the Award contained manifest errors of law [...] "that could have had a decisive impact on the operative part", and also that it "suffered from lacunae and elisions".[306] Nonetheless, the Committee went ahead to distinguish between

[302] Ibd, at 349.

[303] Ibid, at 377.

[304] Ibid, at 69.

[305] *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 Sep. 2007.

[306] Ibid, at paras 135, 158 cited in Bondar, (268), at 654.

failure to apply the law and misapplication of the law while highlighting its limited mandate under the ICSID annulment procedure. The Committee also duly acknowledged as falling outside its mandate for annulment, the tribunal's admission of evidence and appreciation of its probative value.[307] In all, the Committee concluded that manifest errors did not amount to manifest excesses of power. Although the Committee arguably reached the right decision, it has been heavily criticised for extensively reviewing the tribunal's reasoning in the award smearing the line between appeal and annulment. At the end, although the award was retained, the criticisms gave the State political and moral reason not to comply with the ward immediately. The impact of this is discussed below.

The treatment by national courts shows a similar effect, albeit with some variation. In Switzerland, a failure to apply the proper law is challengeable only at a high threshold of public policy.[308] In the United States, the Federal Arbitration Act (FAA) permits courts to review awards on the grounds of a 'manifest disregard of the law'.[309] However, the District Court of Columbia emphasised in *International Thunderbird Gaming v the United Mexican States* that to qualify as such, this would have to be a manifest disregard for the law rather than error or misapplication of the law.[310] These largely correspond to the standard under the ICSID system. In the Canadian case of *United Mexican States v Metalclad Corporation*, the court determined that the arbitral tribunal's misstatement of the applicable law, by including transparency obligations in a NAFTA chapter over which the tribunal lacked jurisdiction, constituted failure to apply the proper law.[311]

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[307] Ibid.

[308] *Swiss Federal Tribunal*, BGE 116, II, 634 (11 November 1990) [In *CME v Czech Republic*, the Swedish Court of Appeal was careful to differentiate between an error of law and the total failure to apply the proper law: *CME v Czech Republic*, Case No T8735-01, Svea Court of Appeal Decision (15 May 2003).

[309] Section 10 of the Federal Arbitration Act (FAA) U.S.C. §§ 1 *et seq*.

[310] *International Thunderbird Gaming Corporation v Mexico*, District Court of Columbia 473 F Supp 2d 80.

[311] *United Mexican States v Metalclad Corporation*, Reasons for Judgment (2 May 2001) (2001) BCSC 664, Supplementary Reasons for Judgment (31 October 2001) (2001) BCSC 1529, paras 72–76.

Despite consistently upholding deference to arbitral decisions regarding the substantive correctness of tribunals' decisions and thus, upholding awards' finality, there are instances in which such deference has been less evidenced, thereby annulling arbitral awards that should otherwise be retained had review on correctness or merit not been engaged. In the seminal case of *Yukos*, although the Hague District Court did not explicitly specify the standard of review applied, the Court appeared to view the issue brought before it as one of correctness, thereby annulling the awards.[312] Both reviewing authorities have at times stepped outside their power to annul awards that should otherwise have stayed.

b. Due Process and Insufficiency of Reason

Although ICSID and Non-ICSID award review authorities cannot review the substantive correctness of determinations on the facts or law, they do concentrate on the process's legitimacy.[313] Consequently, where an arbitral tribunal has failed to abide by a fundamental rule of procedure, the authorities will intervene. Under the ICSID, this ground implicates Article 52(1)(d).[314] For example, failure to allow one party to respond to evidence produced by the other party in the *Fraport v Philippines* case resulted in the annulment of the award in question.[315] Similarly, the award was subject to review due to an arbitrator's failure to disclose a conflict of interest in a tribunal's decision in *Compania de Aguas del Aconquija and Vivendi Universal v the Argentine Republic*.[316] Some deference would still be accorded to tribunals'

[312] *Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited*, Hague District Court (C/ 09/477160/HA ZA 15-1, 15-2 and 15-112) (20 April 2016) paras 5.51 and 5.73

[313] Schreuer, *A Commentary* (n 42), at

[314] Broches stated that the term fundamental rules of procedure "would comprise, for instance, the so-called principles of natural justice e.g., that both parties must be heard and that there must be adequate opportunity for rebuttal."30 The preparatory works thus "make it clear that only procedural principles of special importance would qualify as 'fundamental rules'" but they "do not give guidance as to the serious nature of a violation.", Icsid, 2 History Of The Icsid Convention: Documents Concerning The Origin And The Formulation Of The Convention Pt. 1, At 423 (1968) [Hereafter History Of Icsid Vol. 2, Pt. 1], at 340.

[315] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Decision on the Application for Annulment (23 December 2010) paras 244–46. See similar example: In *Victor PeyCasado v Chile*, [The Annulment Committee examined the transcripts and record to determine whether there was a violation of the right to be heard] ICSID Case No ARB/98/2, Decision on the Application for Annulment (18 December 2012) paras 72–74.

[316] *Compan˜ı´a de Aguas del Aconquija and Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on Annulment (10 August 2010) paras. 236–38.

decisions even where there has been a clear breach of due process. In *Wena v Egypt*, for example, the tribunal emphasised that, unless a serious departure from a fundamental rule of the procedure goes to the root of a tribunal decision substantially different from what it would otherwise reach correctly, an annulment will not be effected.[317]

Allegations of breach of due process due to failure to state reason or insufficiency of reasoning for an award would appear not to cause either reviewing body to alter its deference to tribunals' decisions in awards.[318] In England, serious irregularities in section 69 will only apply to claims submitted to arbitral tribunals and not to their failure to state the correct reasoning on which an award is based.[319] In France, the court of appeal decision in *Société Isover-Saint-Gobain v Sociétés Dow Chemical* reflects the judicial attitude that it would decline to review an award so long as there was coherent reasoning.[320] In Canada, failure to deal with every question before an arbitral tribunal will not be sufficient to constitute a severe defeat of the procedure and warrant awards to be set aside, as in *United Mexican States v Metalclad Corporation*.[321]

However, some decisions of arbitral tribunals have been subjected to unnecessary review, resulting in the award being attacked. A typical example in the ICSID context is found in the recent decision in 2015 in *Tidewater v Velencial*.[322] The Committee annulled a portion of the award for reasons that the arbitral tribunal failed to state the reasons on which that part was based. This act has been criticised as the Tribunal overreached the scope of review allowed under Article 52. In the Non-ICSID context, the 2012 UNCITRAL

[317] *Wena Hotels*, Decision on Annulment, paras. 59–61, 66–70.

[318] *Vivendi Decision on Annulment*, paras 64, 91. 216; *Amco Asia Corporation and others v Republic of Indonesia*, ICSID Case No ARB/81/1, Decision on Annulment (16 May 1986) para. 58.

[319] Section of 69 of the English Arbitration Law.

[320] *Société´ Isover-Saint-Gobain v Socie´te´s Dow Chemical France, Cour d'Appel Paris* (21 October 1983); P Mayer, 'Arbitration and National Courts: Conflict and Cooperation: The Second Look Doctrine: The European Perspective' (2010), 21 Am Rev. Int'l. Arb. 201, at 203–04.

[321] *United Mexican States v Metalclad*, Reasons for Judgment (2 May 2001) (2001) BCSC 664, Supplementary Reasons for Judgment (31 October 2001) BCSC 1529, para 126.

[322] *Tidewater Investment SRL and Tidewater Caribe, CA v Bovarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment (27 December 2015).

Digest of Case Law on International Commercial Arbitration indicated that a court had gone as far as setting aside the award for supposed contradictory reasoning.[323]

2.4.3 The Effects of Review on Awards' Implementation

While review under both Conventions can sometimes implicate substantive correctness leading to awards being annulled or set aside,[324] their implication varies based on the award's derivation. For ICSID awards, an annulment has the effect of bringing the parties back to the drawing board to restart the entire arbitral proceeding. This includes instances where part of the award is annulled, as it was in the cases of *Sempra Energy International v The Argentine Republic* and *Enron Corp. and Ponderosa Assets, L.P. v The Argentine Republic.* [325] The decision of the annulment committee is not subject to appeal, nor is it binding on a new tribunal hearing the case again. Therefore, as Bondar rightly puts it,

> ICSID annulment is a 'drastic' or 'radical' remedy in that the decision to annul in full invalidates the award completely. In the event of both full and partial annulment, the annulment committee cannot amend parts of the award or substitute the award of the original tribunal by issuing its own decision on the merits. There is also no remedy of remission to the original tribunal under the ICSID Convention.[326]

An unsuccessful attempt at annulment means the award becomes binding on the parties and must be acted upon in accordance with the obligation under Articles 53(1) and 54(1) of the ICSID Convention. This applies regardless of whether 'justice' has prevailed or not; the award may contain severe errors impacting the legitimacy and integrity of the process but are otherwise non-annullable within the existing grounds for annulment. In this regard, ambiguity looms if the annulment committee makes critical comments regarding the award's correctness (merit-based review), i.e. questioning the original tribunal's reasoning for the

[323] UNCITRAL 2012 Digest of Case Law on *International Commercial Arbitration*, ¶ 29.

[324] Schreuer, *A Commentary*, (n 42), at 103, para. 14

[325] Ibid; *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16), Annulment Decision, 29 June 2010; *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v Argentine Republic* (ICSID Case No. ARB/01/3) Annulment Decision, 30 July 2010.

[326] Bondar, (n 268), at 628.

award.[327] Technically, such criticism could be similar to annulling the award because the losing party may be empowered to refuse voluntary compliance and/or attack the award by deploying various tactical measures to frustrate coercive enforcement in domestic courts.

Such ambiguity was created in the *CMS v Argentine Republic* annulment case.[328] The annulment committee, although constantly critiquing the tribunal's misinterpretation and misapplication of the law, could nevertheless annul the award:

> Notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it. There is accordingly no manifest excess of powers.[329]

The committee's critique generated intense debate, giving Argentina the moral justification to refuse compliance with the award. Ultimately, the outcome was unsatisfactory for both parties. Indeed, as Baetens elaborates, the foreign investor (*CMS*) won a hollow legal victory because although the award was retained, it carries minimal legitimacy to invoke voluntary compliance from Argentina. Conversely, "the host State (Argentina) had won a hollow moral victory (the recognition that the original case had been wrongly decided) but was nevertheless still under the obligation (less willing than ever) to comply with the original award because it was not formally annulled."[330] Indeed, Argentina faced reputational damage and pressure from the international community due to failing to comply with the award. Although Argentina currently has arrangements in place to settle the *CMS* award, for seven years, the State refused compliance and used various tactical measures, including the defence of State immunity, to frustrate the award's coercive

[327] Baetens, (n 1201), at 4 - 6.

[328] *CMS Gas Transmission Company v Argentine Republic* (ICSID Case No. ARB/01/8) Annulment Decision, 25 September 2007, ¶¶119-136.

[329] Ibid, at 136.

[330] Baetens, (n 1201), 4 - 6.

enforcement.[331] Ultimately, this increases the length and cost of the whole arbitral endeavour, thereby undermining the principle of finality. The outcome in the *CMS* case could have been avoided were there a balance between correctness and finality effectively engaged. This is not to mention the many instances in which ICSID awards were annulled, which should otherwise remain under the explicitly limited scope of review allowed under the system. Currently (considering that ICSID could be operating a de facto appeal procedure), perhaps the balance between correctness and finality in ISA should be re-appraised, and it is time to institute a de jure appeal procedure for the purpose. Indeed, many commentators agree that an appellate mechanism is needful under the regime, whether in respect of ICSID or non-ICSID arbitration.[332]

Indeed, having examined the full range of review measures in operation for non-ICSID awards, Dimsey concludes that the presence of the "various and diverse review mechanisms available under domestic legal systems […] certainly give reason to examine the viability of a central appellate mechanism in investment dispute resolution."[333] The author believes that

> an abridged and much more concise version of the current review possibilities in state courts could be the development of an appellate body specifically intended to deal with investment arbitration appeals. This would certainly do much to […] avoid the haphazard domestic frameworks that currently come into play in investment arbitration practice.[334]

Admittedly, while the court of the seat of arbitration is primarily responsible for reviewing a non-ICSID award and possible set it aside, such a measure can be entertained by any State court. As noted earlier, although the grounds for challenging the award tend to be narrow, there is a tendency for the courts to

[331] See Tonova and Vasani, (n 179), at 83. The CMS award assigned to Blue Ridge to enforce failing Argentina's non-compliance. Argentina moved to dismiss the petition to enforce the award in the US on several grounds, including State immunity, lack of standing of assignees to seek confirmation of an ICSID award and the statute of limitations. See *Blue Ridge Investments LLC v Argentine Republic*, Memorandum of Opinion & Order, 10 Civ 153 (SDNY September 30 2012), http://italaw.com/awards/enforcement-decisions. Accessed 24/04/21.

[332] See Chapter 6.3.2.

[333] M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven Int'l Publ., 2008).

[334] Ibid, at 177.

review the award on merit.[335] This is not to mention that "a decision of the first instance court confirming or setting aside an award may be subject to appeal, which may involve several instances. This may result in increased length and cost and a risk that the court's decision to confirm the award may be reversed on appeal. On the other hand, it may result in a reversal of a decision to annul."[336] A set aside non-ICSID award has a similar effect to an annulled ICSID award in that the parties will have to start a new arbitral proceeding: the award ceases to have legal effect under the laws of the State where it was set aside.[337] However, the court may ask the original tribunal to resume the arbitral proceeding to eradicate defects evidenced in the award, a point which differs from the ICSID procedure.

The likely recognition and enforcement of a set aside non-ICSID award in third States have been the centre of long academic debate, which stems from the residual discretionary power that enforcing State courts have in Article VI of the New York Convention.[338] The debate mainly queries whether or not an enforcing State court should refuse to recognise and enforce an award that has been set aside at the seat of arbitration. The English Court considered the issue in the recent case of *Yukos Capital Sarl v OJSC Oil Co Rosneft*,[339] where the claimant sought to enforce an award that had been set aside at the seat of arbitration. The Court rejected a plea by the defendant that, due to the set-aside order at the seat, the award was invalid for the purpose based on the *ex nihilo nil fit* principle. The Court held that its power to enforce the award is based on the common law and not on the law of the seat of arbitration or where the award was vacated. The reasoning in the *Yokus* case was affirmed in *Malicorp Ltd v Government of the Arab Republic of Egypt*.[340] The United States Courts adopt a similar approach and would enforce a set-aside award unless doing so would offend public policy, i.e. it is "repugnant to fundamental notions of what is decent and just" under

[335] Bondar, (n 268), at 657.

[336] Ibid, at 632.

[337] GB Born, *International Commercial Arbitration* (2d Edn., Kluwer, 2014), at 390.

[338] Wai, (n 220), at 123 -124.

[339] *Yukos Capiral Sarl v OJSC Oil Co Rosneft* [2014] EWHC 2188 (Comm).

[340] *MaliCorp Ltd. v Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm).

their law.[341] In this regard, a set aside non-ICSID award, unlike an annulled award in the ICSID context, is likely to be enforced in over 169 Member States of the New York Convention, so where one State refuses to enforce the award, it will be rewarding for the claimant to try another. This is notwithstanding that the award creditor will have to defeat other arbitral procedural and substantive grounds, including State immunity, at the forum where the award's enforcement will be sought when voluntary compliance fails.

At this point, it can safely be said that while both Conventions aim to facilitate effective implementation of awards, they also harbour major weaknesses that impact their effectiveness for the purpose, i.e. review procedures.

2.5 Conclusion

This chapter inquired into investment arbitral awards and the main international legal frameworks regulating their implementation under the ISA system. The primary purpose was to explore the extent to which the current legal frameworks, i.e. the ICSID Convention and the New York Convention facilitate voluntary compliance with and coercive enforcement of arbitral awards under the ISA system. A detailed analysis has revealed many points of strength but also weaknesses under the two governing legal frameworks. Post-award remedial measures, particularly annulment or set aside procedures, are instituted under both Conventions to ensure the award's validity by providing necessary changes in erroneous outcomes to ensure the delivery of justice, toward aiding voluntary compliance with and coercive enforcement of awards ultimately. Although voluntary compliance is expected, the various rules under the Conventions support coercive enforcement of the award in domestic courts in the event that voluntary compliance fails, seemingly providing remedy for the award creditor. To this end, both Conventions have strands of similarities in rules governing the coercive enforcement of the awards as well as the remedial measures, albeit at different stages of the arbitral process.

[341] *Pemex, Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v PemexExploración Y roducción,* 2016 WL 4087215 (2d Cir., Aug..2, 2016).

Review measures are limited to procedural irregularities.[342] Given their explicitly limited scope, review measures do not always serve the parties' interests in the dispute, partly because the authorities charged with reviewing awards under both Conventions sometimes overstep the boundaries of their powers to engage in merit-based reviews.[343] The effect can be annulled awards which, under the ICSID Convention, have the same effect as if the award never existed. Where the award is made to stand, the criticisms alone, as in the *CMS* case,[344] have the effect of empowering non-compliance, opening the award up for attack at the enforcement stage. While under the New York Convention a vacated award can still be enforced given the discretionary nature of Article VI obligation, grounds under Article V, most importantly public policy grounds under the Article V(2)(b), which also implicate State immunity considerations, could allow enforcing States to refuse enforcement. Article 55 of the ICSID Convention also makes state immunity consideration formidable constraints to award enforcement. In this respect, it appears that State immunity may bar the implementation of the award under both governing legal frameworks as awards are implementable through a State party to the Conventions only to the extent that that State's immunity laws are not violated.[345]

The next chapter examines in greater depth the rule of State immunity and how it impacts the implementation of arbitral awards under the ISA system.

[342] Schreuer, *A Commentary*, (n 42); Thomas and Dhillon, (n 266).

[343] Ibid. See also Thomas and Dhillon (n 266); Baetens, (n 1201).

[344] *CMS, Decision on Annulment*.

[345] Aaken, *Blurring Boundaries* (n 28); see also, Fox and Webb, (n 28).

Chapter 3: Restrictive Doctrine of State Immunity and Investor-State Arbitration: The Development

3.1 Introduction

The preceding chapter of the thesis explored the legal frameworks governing the implementation of investment arbitral awards under the investor-State arbitration (ISA) regime: the ICSID Convention and the New York Convention. The analysis led to the identification of potential impediments. Most importantly, an impediment to coercive enforcement of arbitral awards caused by the doctrine of state immunity, which is the core subject matter of this thesis. State immunity concerns States' exemption or protection from being sued in the courts of other States.[346] Although restrictive immunity doctrine is presently widely observed whereby foreign States may be sued in the courts of other States for their commercial transactions, immunity remains controversial.[347]

In the 2012 Jurisdictional Immunities of the State (*Germany v Italy*) case, the International Court of Justice (ICJ) reiterated the existence of two regimes of immunity under international law: one for determining exceptions from the adjudicative jurisdiction of courts and tribunals (immunity from (suit) jurisdiction) and one for immunity from measures of constraint (immunity from execution).[348] The Court recognised that the former "goes further than immunity from [jurisdiction]."[349] Under the investment arbitration system, a State's immunity from jurisdiction is *waived* when it engages in commercial activity and/or agrees to arbitrate resulting disputes. Immunity from measures of constraint and execution, by contrast, is left unscathed. Thus, it is available for the State to invoke, and hence has earned the name "[t]he last bastion of state immunity" under the system.[350] Despite the characterisation, as Reinisch notes, courts

[346] Fox and Webb (n 28), at 1.

[347] Ibid.

[348] *Jurisdictional Immunities of the State, (Germany v Italy)*, ICJ Reports (2012) 99, para. 117.

[349] Ibid., para. 113.

[350] ILC Report on Jurisdictional Immunities of States and their Property 1991 in Yearbook Int'l Commission (YBILC), ii, Part Two, 1, at 56.

have consistently stated that immunity is no longer absolute.[351] Accordingly, the commercial activity exception provides conditions and criteria under and by which immunity from measures of constraint and execution would be granted or denied and is thus reminiscent of the restrictive immunity approach. This makes the criteria for determining the commercial activity exception, as it corresponds to immunity from measures of constraint and execution, an imperative enquiry. Specifically, the chapter explores the criteria for determining immunity from measures of constraint and execution and their viability in bridging the chasms between States' claim to immunity and foreign investors' ability to enforce arbitral awards when voluntary compliance fails.

The first section of the chapter will map the general framework under which immunity is engaged under international law. Section Two follows a brief historical development of the doctrine from the absolute immunity doctrine to the restrictive immunity doctrine that most States currently recognise. What necessitated this shift is linked predominantly to the increased descent of States and their instrumentalities into transborder commercial activity, hence the commercial activity exception. In the light of this formulation, under Section Three, the commercial activity exception and its relevance to the investment protection regime are examined. This section includes an analysis of the criteria for determining the commerciality of the relevant State acts and how such aid the execution of arbitral awards when voluntary compliance. Section Four concludes the discussion. This chapter and the next contribute to the understanding of how the ISA regime protects the interests of the Host-state and foreign investors in the context of coercive implementation of arbitral awards.

3.2 State Immunity under International Law: The Sources and Governing Frameworks

State immunity presupposes the existence of juridically equal States whose interaction is overseen by international law. State immunity has progressed through several distinct periods over the last centuries.

[351] A Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 EJIL 803, at 804.

Generally, the rule oscillates between law, comity and politics.[352] Although it turns to resonate with the old basis for the grant, entertainment of the rule as "a matter of mere grace, comity, and usage"[353] – an inter-state *act of courtesy* – is still prevalent among some States despite them also giving their courts exclusive legal basis for engagement through legislations.[354] The legal nature of the rule under international law cannot be overlooked, however. This is reiterated in the 2012 judgement of the ICJ:

> whether in claiming immunity for themselves or according it to others, States generally proceed on the basis that there is a right to immunity under international law, together with a corresponding obligation on the part of other States to respect and give effect to that immunity.[355]

Thus, in conformity to "a general rule of CIL rooted in the current practice of States",[356] immunity applies as of right and must be duly accorded. Generally, immunity simply means a State's exemption from the jurisdiction of other States, including measures of constraint against its assets.[357] The conceptual rationale is justified on the basis of practical courtesy to facilitate the orderly conduct of inter-state relations in a global legal order dominated by States and their interests.[358]

Although anchored in international law, the essence of the international jurisprudence of State immunity is not through the aid of international treaties of universal applicability, but instead through the creation of domestic courts and cases brought before them in legal proceedings against foreign States.[359]

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[352] A Peters, 'Immune against Constitutionalisation?' in A Peters et al., (eds) *Immunities in The Age of Global Constitutionalism*, (Martinus Nijhoff Publ., 2015), at 1-3

[353] Ibid.

[354] Ibid, [noting that despite giving their courts exclusive legal basis to engage the doctrine some major Common Law jurisdictions like the UK and US still see immunity as matter of ''mere grace and comity''']; See also Lori Damrosch, 'Changing International Law of Sovereign Immunity Through National Decisions' (2001), 44 Vanderbilt J. of Transn'l L, at 1185–1200.

[355] *Germany v Italy*: [Greece Intervening] (n 3) para. 56.

[356] Peters (n 351).

[357] Yang, (n 25), at 51-55.

[358] Fox and Webb, (n 28).

[359] Yang (n 25), at 6, 438,

Numerous efforts to conventionalise international rules of universal applicability have been made. Some have resulted in the treatification of some applicable *lex specialis* regimes of immunity, which are a classic enumeration of sources of international law according to Article 38(1)(a) of the Statute of International Court of Justice.[360] These include the Brussels Convention on Immunity of State-Owned Vessels,[361] the Vienna Convention on Diplomatic Relations (VCDR),[362] the United Nations Convention on The Law of The Sea (UNCLOS)[363] and the Vienna Convention on Consular Relations (VCCR).[364] However, the only conventions that *seemingly* provide international rules of 'general' applicability are the European Convention on State Immunity (ECSI)[365] and the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI).[366] Though in force, the significance of the former is relatively marginal as presently only eight out of the requisite 47 members of the Council of Europe have acceded to the convention.[367] Further, the drafters of the ECSI never intended it to serve as a universal rule except as

[360] UN, Statute of the International Court of Justice, 18 Apr. 1946. Article 38(1)(a)-(d) provides:

> (a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> (b) International custom, as evidence of a general practice accepted as law;
> (c) The general principles of law recognized by civilized nations;
> (d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

[Hereafter, The ICJ Statute], at https://www.icj-cij.org/en/statute. Accessed 8/12/21.

[361] April 10, 1926, 179, L.N.T.S. 1999 [Hereafter Brussels Convention].

[362] April 18, 1961, 500 U.N.T.S. 95. ARTICLE 22(3) [Hereafter, The VCDR].

[363] December 10, 1982, 1833 U.N.T.S. 3 Article 32 [Hereafter, The UNCLOS].

[364] In force on 19 March 1967, at https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf. Accessed 23/10/21 [Hereafter, The VCCR].

[365] May 16, 1972, 1495 U.N.T.S 181 [Hereafter, The ESCI]

[366] GA Res 59/38, U.N. GAOR, 59TH Sess, U.N. Doc A/RES/59/38 2004. [Draft Articles on Jurisdictional Immunities of States and Their Property with commentaries, in *Report of the International Law Commission on the work of its forty-third session*, UN Doc A/46/10, *reprinted* in [1991] 2(2) Y.B. Int'l Law Comm'n., 13, 56 U.N. Doc A/CN.4/SER.A/1991/Add.1 (Part 2).] [Hereafter UNSCI]

[367] ECSI, Chart of Signatories and Ratification at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=&DF=&ENG. Accessed 12/04/21.

evidence of the limits within which immunity could be validly claimed among certain groups of European States.[368]

The UNSCI is not yet in force. Thirty State instruments of ratification, approval and accession are requisite for entry into force. As of June 2022, twenty-two States (representing two thirds of the requisite number) have been recorded,[369] among which are the major European States and commercially developed parts of Middle Eastern States.[370] Despite the relatively low ratification, its influence as a source of law of state immunity cannot be belied or understated. In fact, Fox "rank[s] the UNCSI as a significant source of international law on the subject."[371] Some of its provisions have been held by international and national courts to reflect CIL, and reference to the Convention has become routine in proceedings involving immunity issues[372] even where its customary status is in doubt.[373] States such as France, Japan, Russia, Spain and Sweden have enacted the Convention's provisions as primary immunity laws, giving their courts a more robust legal basis for the application.[374]

The UNCSI reflects the current state of the restrictive immunity approach and seemingly provides clarification in some hitherto grey areas of the law. For example, the scope of immunity from jurisdiction

[368] IM Sinclair, 'The Law of Sovereign Immunity, Recent Development' (1980), 167 Hague Recueil 113, at 132.

[369] LF Damrsoch, 'The Sources of Law of State Immunity' in T Ruys, et al., (eds), *The Cambridge Handbook of Immunities and International Law* (2019), at 46 - 50.

[370] France, Japan and Spain, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en. Accessed 11/04/22.

[371] H Fox, *The Restrictive Rule 1970s Enactment* (n 26), at 30 -31.

[372] *AIG Capital Partners Inc. v The Republic of Kazakhstan*, [2005], EWHC 2239 (Comm), 80; *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, 8; *NML Capital Limited v Argentine Republic*, Decision of Mar. 28, 2014, Cass civ 1re (Fr.); *Jurisdictional Immunities of The State (Germany v. Italy)* 2012 ICJ 99 123 (Feb. 3); *Oleykinov v Russia*, app. no. 36703/04, 14 March 2013, esp. paras 66–72 ECTHR [The Court upheld the "customary law" nature of UNSCI despite Russia lacks of ratification].

[373] For instance, it's been questioned whether all aspect of Article 19(c) is reflective of CIL.

[374] See Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation (Federal Law No. 297-FZ (Nov. 3, 2015), PRAVO.GOV: The Russian immunity Act follows UNSCI'S restrictive immunity doctrine; French Sapin No. II Law of 2016 follows Part IV of the UNCSI. Japan, Spain and Sweden just replicated all aspects of the UNSCI.

has been elaborated upon by scoping the transactions or activities under which immunity will be denied.[375] The exactness for the purpose remains questionable, however, because many gaps and uncertainties still remains owing partly to the generality of its wording. In fact, there is a lack of specificity and uncertainties regarding immunity from measures of constraint and execution as contained in Part IV.[376] As Fox critiques, the Convention enshrines pre-existing CIL and makes no room for modern practices.[377] Despite these, the Convention is an authoritative source of the law of State immunity in terms of providing a "comprehensive code for the immunity of a State and its property."[378]

Parallel to the above *treatification* efforts, a distinct academic discourse has also emerged providing formative techniques for further engaging and refining the law, "all of which are amenable in principle to analysis in terms of the classic enumeration of sources [of law] in the ICJ Statute."[379] However, as Higgins declares, "the greatest source material of [immunity] is to be found in the case-law of States and their domestic enactments."[380] Most implead of immunity under international law and continue to rise before national courts who, through their national rules and comparative determinations of CIL and treaty law, continue to contour and develop the rule.[381] Some States have primary immunity codifications for this purpose, most importantly the United States Foreign Sovereign Immunity Act of 1976 (US FSIA) and United Kingdom State Immunity Act of 1978 (UK SIA). Others include immunity codifications of Australia, Canada and South Africa. States without primary immunity codification rely on international customs to formulate the scope of immunity on a case-by-case basis, all of which are cogent sources of the law of immunity under international law.

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[375] R O'Keefe, et al., *The United Nations convention on jurisdictional immunities of states and their property: A commentary* (OUP, 2013).

[376] Fox, *The Restrictive Rule 1970s Enactment* (n 26), at 36.

[377] Ibid., [noting for example, post-award discovery mechanism to aid coercive enforcement actions in the United States of America.]

[378] Fox and Webb (28), at 284.

[379] Damrsoch, (n 356), at 40.

[380] R Higgins, 'Certain unresolved Aspects of the Law of State Immunity' (1982), 29 NILR 265, at 265.

[381] Article 38(1) of the International Court of Justice Statue.

Owing to the substantial diversity of sources, ascertaining the precise corpus of the doctrine under international law, including the pertinent immunity issues under the thesis, will warrant a comparative approach, comparing many national and international case law, legislations and treaties. This will include but is not limited to the UNSCI, legislations and case law of major common law and civil law jurisdictions including the United States, United Kingdom, France, Germany and Switzerland.

3.3 Historical Development of the Contemporary Doctrine of State Immunity

3.3.1 The Conceptual Foundation of State Immunity: Notion of Sovereignty and Absolute Immunity Doctrine

As subjects of the international legal domain, all States, regardless of size, power, or wealth, are juridical equals as a consequence of their sovereignty.[382] Kelsen defines sovereignty under international law as a "State's legal independence from other States."[383] Famously embraced in the United Nations Charter, sovereignty originated from Jean Bodin's famous dictum *par in parem non-habet imperium.*[384] The principle can be deduced simultaneously from affiliated concepts like independence, equality, dignity and reciprocity.[385] Although developed in the Westphalian era or classic periods of international law where sovereigns were generally conceived as having distinctive personalities and entitled to specific fundamental

[382] H Heller, *Sovereignty: A Contribution to the Theory of Public and International Law,* (OUP, 2019).

[383] H Kelsen, 'The Principle of Sovereign Equality of States as a Basis for International Organization,' (1944), 53 Yale Law Journal, 207–20, at 208.

[384] Meaning an equal has no power or authority over another equal (verbatim). BLACK'S LAW DICTIONARY 1673 (7th ed. 1999); GM Badr, *State immunity: An Analytical and Prognostic View* 5 (Martinus Nijhoff Publ., 1984); For detailed history of the principle, see EK Bankas, *The State Immunity Controversy: Private Suits against Sovereign States in Domestic Courts* (Heidelberg: Springer, 2010), 1–31, on Bodin 1 et seq.; Yang, (n 25) at 6–32.

[385] Yang, ibid. (On a reciprocity connotation, Yang notes that as far as State practice is concern, reciprocal basis forms decisions as to whether immunity granted or denied. See also See H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 BRIT. Y.B. INT'L L. 220, 220-21 [Hereafter, Lauterpacht, *The Problem of Jurisdictional Immunities*] [reciprocal nature of state immunity is clear from his comments: "Reciprocity of treatment, comity of nations and *courtoisie internationale* are very closely allied notions, which may be said to have afforded a subsidiary or additional basis for the doctrine of sovereign immunity.", at 119].

rights,[386] the principle remains fundamental to the global legal domain. As Professor Tomuschat explains, the "principal is a 'Grundnorm' of the present-day international legal order."[387] The concept entails the comprehensive and unfettered exercise of jurisdiction of a sovereign within its territory. A corollary is one of non-interference, which bars States from asserting jurisdiction within their territory over each other. The principle forms the intellectual foundation for the doctrine of *absolute* State immunity against which the restrictive immunity doctrine was developed. The doctrine of absolute immunity grants States unfettered immunity from the legislative, administrative or judicial exercise of authority over each other. By *fortiori*, regardless of the legal nature of an activity engaged, a foreign State (and its assets) is unamenable to suits, including measures of constraint against its assets in the territory of another State. This applies equally to the State's diplomatic representatives and other political divisions and their assets.[388]

The doctrine of absolute immunity was famously articulated by Chief Justice (CJ) Marshall in the case of *The Schooner Exchange v McFaddon*.[389] In 1812 a US citizen sought to lay a claim to a vessel that had entered Philadelphia's shores due to poor weather conditions. The vessel belonged to the plaintiff but earlier in 1810 it had been seized and converted into a public war ship under a decree from Emperor Napoleon of France.[390] Writing the judgement of the unanimous Court, CJ Marshall held that the French government was entitled to immunity and should therefore retain the vessel.[391] The Court reasoned that although the US by the sovereignty principle had the power to assert adjudicative jurisdiction over events

[386] Giuttari states that "[i]n this period, the state was generally conceived of as a juristic entity having a distinctive personality and entitled to specific fundamental rights, such as the rights of absolute sovereignty, complete and exclusive territorial jurisdiction, absolute independence and legal equality within the family of nations." TR Giuttari, 'The American Law of Sovereign Immunity: An Analysis of Legal Interpretation' (1970), Praeger, 26–102, at 5.

[387] C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century' (1999) Recueil des Cours 281 161.

[388] Yang, (n 25), at 51-55

[389] *The Schooner Exchange v McFaddon (1812*) 11 U.S. 116, at 135-137

[390] Ibid, 117

[391] Ibid.

and persons within its territory, that power could be invalidated or curtailed by the immunity of a foreign sovereign by reason of the same principle:[392]

> while the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. […] [it] would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another: and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.[393]

According to the CJ, the principle prohibits one State from standing in judgment of another State's conduct.[394] Thus, if the *Exchange* had been converted, then the US as France's co-equal would be remiss in adjudicating the vessel's ownership through its Court. Therefore, the CJ's articulation had no exception, meaning the grant was *absolute*. There is theoretical and practical policy justification behind the rule as formulated of which Lauterpacht highlights as surrounding comity and reciprocity in facilitating peaceful inter-state relations.[395] Thus, it is of practical courtesy that States freely enter and operate in each other's territory without fear of arrest, detention, or adverse legal proceedings.[396] Undoubtedly, anything contrary could adversely interfere with the basic governmental activities of States within each other's territory, thereby generating tensions that could hinder the conduct of international relations.

[392] Ibid, at 137 [''This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects.'']

[393] Ibid, at 135-137.

[394] Ibid, at 136–37.

[395] See Lauterpacht, *The Problem of Jurisdictional Immunities*, (n 384).

[396] Ibid at 137.

Marshall CJ's 'practical courtesy' formulation was reiterated in 1847 in the French Court's decision in *Spanish Government v Lambege et Pujol*:[397]

> the reciprocal independence of states is one of the most universally respected principles of international law, and it follows as a result therefrom that a government cannot be subjected to the jurisdiction of one another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations.[398]

A similar observation was made in 1880 by the United Kingdom (UK) House of Lords in *The Parlement Belge*[399] case:

> as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and the dignity of every other state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.[400]

These cases echo the traditional tenets of the absolute immunity doctrine as emanating from the sovereign equality principle. In essence, regardless of the character of the legal relationship and the nature of the legal proceedings involved, for instance whether in relation to proceedings in matters relating to private rights and obligations (commercial activity), absolute immunity applies without exception.

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[397] *Spanish Gov't v Lambège et Pujol,* Court of Cassation (France), D. 1849 1, 5, 9 (translated and excerpted in BE.Carter and PRTrimble, *International Law* 588 (2d ed. Boston, 1995*)*

[398] Ibid.

[399]*The Parlement Belge* (1880) 5 P.D. 197.

[400] Ibid, at 214-215.

Today, the absolute immunity doctrine might sound archaic and could trigger queries of suitability. Of course, such queries are justifiable given the predominance of the rule of law in the contemporary era, coupled with changing personality of States who are now less confined to the traditional and distinctive areas of legislation, administration, national defence and inter-state political exchanges. While from a practical standpoint the absolute doctrine still holds relevance to the international legal domain,[401] under CIL as it presently stands, State immunity is no longer absolute, at least theoretically. The restrictive immunity doctrine is currently the predominant approach to grant of immunity. States are amenable to suit, and measures of constraint and execution can be instituted against their assets in another State's courts. An observable phenomenon necessitating this development is the progressively increased participation of States in transborder economic activities.[402] Essentially, the economic activities altered the distinctive traditional functions of States and, as the activities implicate private rights and obligations in an emerging global economy where stability, equity and fairness in the marketplace is required for survival, it was reasonable that adherence to the absolutist approach began to diminish in favour of a restrictive immunity approach.[403] The development has led to encroachment on the traditional notions of sovereignty and a redefinition of States activities to cater to other equally important rights.

3.3.2 Changing Face of State Immunity: The Economic Role of States and Development of the Restrictive Immunity Doctrine

State immunity has undergone fundamental changes compared to the doctrine's encapsulations in the classic period of international law. The once unfettered or unqualified exemptions of States from the

[401] J Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010), 21(4) EJIL, 872-878; See also E Bankas (n 383), [Some authors including Bankas see absolute immunity as a general ground upon which exception, the restrictive immunity is drawn].

[402] Yang, (n 25), at 8.

[403] Ibid.

jurisdiction of another has shifted to what is now assumed to be the current legal doctrine: the restrictive doctrine of State immunity.[404] Orakhelashvili captures the difference between the two doctrines:

> the absolute immunity doctrine refers to the identity of the defendant in litigation and proposes to grant all- encompassing immunity to the State, its departments, its property and its officials alike. The restrictive doctrine, on the other hand, proposes to look at the precise nature of the act or transaction impleaded, on which factor the immunity of the State or its officials should turn.[405]

It may be difficult, if not impossible, to pinpoint when the predominant practice of the absolute immunity theory moved to restrictive immunity theory, given its piecemeal development. However, one thing marks this shift and serves as the overarching basis for the curtailed immunity: the phenomenal increase in transborder economic (commercial) activities by States after World War Two (WWII). As Oeter notes,

> [t]he evolution of an explicit exception from traditional sovereign immunity in the field of commercial activities historically was the result of a fundamental change in modern statehood. The state of the twentieth century was characterised by a strong tendency towards interventionism, with the state taking over a lot of economic activities that used to be operated by market actors.[406]

Indeed, after WWII States' transborder economic activities became an ever-increasing global phenomenon. At this point, States owned and disposed of assets, entered contracts and engaged in various economic activities that were considered purely within private rights and obligations.[407] Unsurprisingly, this phenomenon came with an exponential increase in inevitable disputes between States and private persons brought before courts that implicate immunity issues. As the courts regularly dealt with the issues of State immunity and the visible impediments caused to private parties engaged with States and their entities, so

[404] Ibid.

[405] A Orakhelashvili, 'Explaining the Gestionis v Jus Imperii' in T Ruy et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019), at 107.

[406] Ibid; S Oeter, 'The Law of Immunities as a Focal Point of the Evolution of International Law' in A Peters et al., (eds) *Immunities in The Age of Global Constitutionalism*, (Martinus Nijhoff Publishers, 2015), at 360.

[407] Yang, (n 25), at 19 – 23.

did doctrinal justification for the absolute immunity doctrine become increasingly contested, and gradually it shifted in favour of restrictive immunity doctrine.[408] The *Philippian Admiral* case captures this:

> There is no doubt […] that since the Second World War there has been […] a movement away from the absolute theory of sovereign immunity […] towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a state which are done jure imperii and acts done by its jure gestionis and accords the foreign state no immunity either in actions in personam or in actions in rem in respect of transactions falling under the second head.[409]

Indeed, the courts recognised the consortium of activities in which States could engage in and therefore resolved that immunity considerations should not cloak all. Therefore, a State with dual functional capacity was duly recognised: acting in sovereign/public capacity where immunity was accordingly granted (*acts iure imperii*) and also acting in a private/commercial capacity where immunity will be impleaded before courts (*acts iure gemstones*). To apply this distinction the "fundamental question courts asked was whether the acts of a state in question the traditional public acts of sovereigns or those private acts generally performed by individuals alone."[410] The Belgium Court in 1903 in *Societe Anonyme des Chemins de Fer Liegeois Luxembourgeois v The Netherlands*,[411] delineate the contours of the doctrine as follows:

> Sovereignty is involved only when political acts are accomplished by the state […]. However, the state is not bound to confine itself to a political role, and can, for the needs of the collectively, buy, own, contract, become creditor or debtor, and engage in commerce […]. In the discharge of these functions, the state is not acting as public power, but does what private persons do, and as such, is acting in a civil and private capacity. When after bargaining on a footing of equality with a person or incurring a responsibility in no way connected with the political order, the state is drawn in

[408] Ibid.

[409] Ibid, at 11 (quoting '*The Philippine Admiral, England*, 1975, [1977] AC 373, 397, see also 402; 64 ILR 90, 103).

[410] Nagan and Root (n 388), at 411.

[411] See *Société anonyme des chems de fer liégeois-luxembourgeois c. Etat néerlandais (Ministère du Waterstaat*), Pasicrisie 1903, I, 294–303, Base de données de CAHDI "Les Immunités des État et des organistions international"—contribution de Belgique—Jurisprudence du 11/06/1903.

> litigation, the litigation concerns a civil right, within the sole jurisdiction of the courts […] and the foreign state as civil person is like any other foreign person amendable to the Belgian courts.[412]

Thus, by voluntarily undertaking a business of the same kind carried on by a private person, the State is taken to have consented to the removal of immunity before the courts. There are elements of logic connected with this line of approach. First, to make a State answerable to claims of private law nature is not a challenge or inquest into the State's sovereign governmental act and does not therefore interfere with its sovereign functions nor directly threaten the State's dignity. Secondly, it is to promote justice and tranquillity in the marketplace, including facilitating fair and equitable dispute settlements between States and private parties.[413] Against this justification, Lauterpacht notes that "international practice shows no frequent instances of protests against the assumption of jurisdiction, including execution against foreign States' assets."[414] By this approach, the proponents and particularly the courts pursued a wider goal for the benefit of all and sundry, including States and private investors, thus, bridging the gap between the two toward to facilitating justice and equality in an emerging global market in the aftermath of WWII.

Judicial attempts to assume jurisdiction on account of the consortium of State acts predate WWII. Indeed, in mid-1800s queries constantly arose regarding the type of activity, parties involved and whether the activities engaged in are critical to the public orientation of sovereign competence. However, no eminent classification of what sovereign activity is and is not evidenced, nor did the queries automatically displace the essential strength of the prevailing absolute immunity approach as articulated in the *Schooner Exchange* case.[415] Nevertheless, as Sir Phillimore's dicta in the *Charkieh* case evidenced, any consideration of

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[412] JM Sweeney, 'US Dept of State, The International Law of Sovereign Immunity' (1963), Policy Research Study 20 at, 20-21 [quoting *Société anonyme des Chems de Fer Liégeois-luxembourgeois v Netherland,* Pasicrisie I, 294–301 (1903)].

[413] Fox and Webb (n 28), quoting Lord Wilberforce in I Congreso del Partido [1983] 1 A.C. 244, 1981 2 All ER at 1070, HL, 64 ILR 307; See also J Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981), 75 AJIL 820, at 855.

[414] Lauterpacht, *The Problem of Jurisdictional Immunities*, (n 384), at 227.

[415] The queries only place the issue in a milieu of actual inter-State affairs.

immunity followed careful reviews of appropriateness or legitimacy.[416] This reviews soon resulted in the earliest successful assumption of jurisdiction based on the restrictive immunity approach and delineation of its boundaries. The first successful assumption of jurisdiction was in 1873 by the Belgian Court of Appeal in *The Havre* case.[417] This was successfully extended in the same jurisdiction in 1889 in the case of *Société pour la Fabrication de Cartouches c. Col M. Ministre de la Guerre de Bulgarie.*[418] In what the Courts recognised as acts implicating pure rules of private right and obligation, immunity was denied and the relevant States were held to comply with the obligation undertaken without reservation. The Italian courts took the same approach as the judgement of Corte di Cessazione de Torino in 1886 in *Morellet c. Governo Danese* provides:[419]

> it being incumbent upon the State to provide for the administrations of the public body and for the material interests of the individual citizens, it must "acquire and own property, it must contract, it must sue and be sued, and in a word, it must exercise civil rights in like manner as 'un altro corpo morale o private individuo qualunque'.[420]

In both jurisdictions, the loss of immunity was attributable to the consent of the State voluntarily undertaking a business of the same kind as carried on by a private person.[421] The Belgian and Italian practices were highly consistent and doubtless pivotal in establishing the restrictive immunity doctrine, including the rules governing the enforcement of arbitral awards against States' assets.[422] Further, the

[416] *The Charkieh*, 4 High Court of Admiralty & Ecc. 59, 59 (1873), at http://uniset.ca/other/cs2/LR4AE59.html

[417] S Sucharitkul, 'Immunities of Foreign States before National Authorities' (1976), 149 Recueil Des Cours 87, at 243 (PB, 1876-11175) [French].

[418] Jud 1889, Col 383; PB 1889-111-62, cf. Sucharitkul, ibid, op. cit., at 244

[419] Giu. It. 1883-I-125, at 130 -131; Sucharitkul, ibid, at 127.

[420] Badr, (n 383), at 24.

[421] Sucharitkul, (n 416); See similar ruling in *Guttieres v Elmilik, Italy, Giurisprudenza Italiana*, 1886-I-1-486, 487, in Yang, (n 25), at 19. Accordingly, accession into marketplace must play accordingly to the rules of private act and obligation. A State's voluntary undertaking of a business of the same kind as carried on by a private person was seen a consent and as a basis for the removal of immunity.

[422] Badr, (n 383), at 26-27; Bankas (383) at 24.

Courts' jurisprudence can be credited to the wide 19th century adoption of the restriction immunity approach.[423] For instance, the jurisprudence of the Mixed Court of Egypt[424] followed keenly after the Belgian and Italian Courts' jurisprudence, despite having what Badr described as a peculiar composition of judges from "countries including England, the United States and France whose courts were counted at the time among the more articulate proponents of the absolute doctrine of state immunity".[425] Sucharitkul explains that:

> The Mixed Courts have adopted every possible limitation of immunity as evolved through the practice of Italian and Belgium courts. These limitations include the various distinctions between state acts, commercial exploitation, implied submission and execution of judgment against foreign governments.[426]

Despite this admirable feat, the most far-reaching change in the practice of the restrictive immunity approach occurred after WWII, particularly after a significant policy change by some major Western States.[427] The reason was that although the Socialist States like the Soviet Union and States with a socialist economy like China commanded the dominant global trading activities, these States also strongly adhered to the absolute immunity doctrine based on political, economic and ideological grounds.[428] Boguslavsky explained that "in the Socialist State, a sovereign is vested not only with political, but also with economic power, and because of this unity of political and economic leadership, the socialist state itself fulfils

[423] Ibid.

[424] 'The Mixed Courts of Egypt were a system of Mixed Courts of the Colonial Era which operated from 1876 to 1949. Their creation was the result of a judicial reform adopted in 1875 by Egypt in agreement with 14 Western powers benefitting from extraterritoriality as part of the capitulations regime.' For more details, see https://opil.ouplaw.com/view/10.1093/law-mpeipro/e2711.013.2711/law-mpeipro-e2711.Accessed 20/12/21.

[425] Badr, (n 383), at 72.

[426] Sacharitkul, (n 406).

[427] Yang, (n 25), at 11 (quoting '*The Philippine Admiral, England*, 1975, [1977] AC 373, 397; See also 402; 64 ILR 90, 103.).

[428] C Osakwe, 'A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice' (1983), 23 Va. J. Int'l L.,13, at 18-20.

economic activities."[429] In this respect, the harmful consequences of such an adherence (the threat to justice to private persons, mostly Westerners, engaged with these States in the marketplace) are readily apparent and require change. In what is known as the Tate Letter the US declared that "it would follow the restrictive theory of immunity in the consideration of requests of foreign governments for a grant of sovereign immunity"[430] The 'Tate Letter' noted widespread adoption of restrictive immunity to support its decision,[431] which is affirmatively conclusive of the evolving contemporary jurisprudence of major civil law jurisdictions including Austria, France, Switzerland and Germany.[432] The Tate Letter resulted in the first national legislation on the doctrine of State immunity qua the restrictive immunity approach: United States Foreign Immunity Act 1976 (US FSIA).[433]

The United Kingdom followed this practice by enacting the United Kingdom State Immunity Act 1977 (UK SIA).[434] This was also instrumental in their decisions to assent to sectorial treaties[435] like the Brussels Convention[436] and the ECSI.[437] Prior to the enactment of the UK SIA, the United Kingdom was an ardent follower of the absolute immunity doctrine. An authoritative grounding for this approach finds

[429] MM Boguslavsky, 'Foreign State Immunity: Soviet Doctrine and Practice' (1979), 10 Neth. Y.B. Int'l L. 167, at 169-170; see also J Khanapoj, 'Enforcing Arbitral Awards Against Sovereign States: The Validity of Sovereign Immunity Defence in Investor-State Arbitration' (PhD diss., SOAS University of London 2015).

[430] Ibid; [Named after its addresser Jack B. Tate, the then Acting Legal Advisor to the then-Acting Attorney-General Letter from Jack B. Tate, Acting Legal Adviser to the Secretary of State, to Acting Attorney General Philip B. Perlman (May 19,1952), 26 Dept of State Bull. 984.

[431] Department of State Bull. 984 (1952), cited in P Trooboff, 'Foreign State Immunity: Emerging Consensus on Principles' (1986), 200 Recueil Des Cours V 235, at 268; Reprinted in WW Bishop, 'New United States Policy Limiting Sovereign Immunity' (1953), 93 American Journal of International Law 47, 93–94.

[432] In 1950, the Austrian Supreme Court in *Dralle v the Republic of Czechoslovakia* specifically emphasised on a "survey show[ing] that today, it can no longer be said that jurisprudence […] generally recognises the principle of exemption of foreign states insofar as it concerns claims of a private character, because the majority of courts of different civilised countries deny the immunity", (1950), INT'L.REP. 155.

[433] US Foreign State Immunity Act (US FSIA) 1976.

[434] UK Sovereign Immunity Act (UK SIA) 1978

[435] Brownlie, 337 in EK Bankas, (n 383), at 73.

[436] Ibid.

[437] ESCI, (n 37).

expression in the classical case of *The Parlement Belge.*[438] Although in this case a commercial activity was legitimately pursued, against which immunity was initially contested, absolute immunity was conversely restored on appeal on the grounds of sovereignty.[439] The absolute immunity doctrine was successfully challenged in *Phillippine Admiral*[440] and later in *Trendtex v The Central Bank of Nigeria.*[441] The Court in *Trendex* particularly reiterated that "international law now recognised no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a government nature."[442] Both positions were affirmed in *I Congreso del Partido*.[443] In these cases, the Courts firmly denied immunity, establishing that the relevant acts in question were commercial act under the restrictive immunity approach. The US FSIA and the UK SIA were influential and served as model statutes for other Common Law countries.[444] Most Civil Law countries adhere to principles of international law developed on a case-by-case basis.[445]

In short, the pendulum of absolute immunity appears to have swung to a restrictive immunity approach. Although some States, including major trading States adhere to the absolute immunity approach,[446] most States recognise that immunity would be impleaded when a State acts in a private/commercial capacity, *acta jure gestionis*, as against acting in a sovereign/public capacity, *actus jure imperii*. This sovereign/commercial divide is pivotal in developing State immunity law in general and

[438] *The Parlement Beige* (1880) LR 5 PD 197.

[439] The Parlement Belge was a commercial vessel for carrying mails and other commercial merchandise. Ibid, See also the ruling in Charkieh 873 LR4 & E59 (n 415).

[440] *The Phillippine Admiral* [1976] 2 W.L.R. 214.

[441] *Trendtex Trading Corporation Ltd. v The Central Bank of Nigeria* [1977] QB 529.

[442] Ibid.

[443] *I Congreso del Partido*.

[444] See South Africa Foreign States Immunities Act of 1987; The Australia Foreign States Immunities Act of 1985; The Canada State Immunity Act of 1985; The Singapore State Immunity Act of 1979 etc.

[445] Fox and Webb, (n 28).

[446] The ILC Report (2018) identifies that the following state still adhere to the absolutist approach to immunity: Brazil, Bulgaria, Czechoslovakia, China, Ecuador, Hungary, Japan, Portugal, Poland, Syria, Sudan, Tobago Thailand and Venezuela.

developing international law on arbitration, particularly arbitration between host States and foreign investors pursuant to IIAs.[447] Known today as the 'commercial activity exception' in the quarters of foreign investment engagements, a State's immunity from the jurisdiction of courts and arbitral tribunals will be deemed waived when the State engages in a commercial activity with a foreign investor and/or agrees to arbitrate resulting disputes under the supporting framework, like the ICSID. This is to promote justice, fairness and equitable dispute settlement between the parties in the marketplace of the global economy. Whether this formulation has translated effectively in the context of enforcing arbitral awards against the assets of recalcitrant States when voluntary compliance fails is a question to be considered based on analysis of the commercial activity exception. The following section looks at the commercial activity exception in relation to the investor-state engagements.

3.4 The Commercial Activity Exception and Investor-State Arbitration

Since States have become important economic actors that engage in various trans-border economic activities with private persons, investor-state arbitration (ISA) founded on IIAs has become a powerful method of resolving disputes between the parties. However, as Delaume rightly observes,

> From the date of execution of the arbitration agreement throughout the proceedings and, ultimately, at the time of enforcement an award, the presence of a State party to the dispute gives a particular colouration to the arbitration process.[448]

That "particular colouration" implicates the doctrine of State immunity. It is at the point of ISA that the unwanted harsh consequences of the plea of State immunity become apparent.[449] The plea of State immunity as a bar to suit can arise at any point, disrupting the arbitral process, ultimately frustrating or

[447] R Brazil-David, 'International Commercial Arbitration Involving a State Party and the Defense of State Immunity' (2011), 22 Am. Rev. Int'l Arb. 241, at 250.

[448] GR Delaume, 'Sovereign Immunity and Transnational Arbitration, International Arbitration' (1987), 3(1) Arb. Int'l, at 28-45. https://doi.org/10.1093/arbitration/3.1.28. Accessed 16/11/20.

[449] KH Bockstiegel, 'States in the International Arbitral Process', in JD Lew (eds), Contemporary Problems in International Arbitration, (Queen Mary College, UK 1996), at 47.

denying the aggrieved private person the necessary remedy.[450] But such occurrences may seldom be problematic given the *actus jure imperii* and *acta jure gestionis* divides, which prelude the restrictive immunity doctrine. In what is commonly called 'commercial activity exception' under the restrictive immunity approach, a State is taken to have consented to the removal of immunity when it engages in commercial activity with a private person. Fox and Webb note that such consent to an assumption of jurisdiction is construed by three combined legal techniques:

> consent of the State to the local jurisdiction construed by its engaging in a transaction; conduct of a business the commerciality of which distinguishes it from the more usual activity of a State for the public benefit, and engagement in that business with and in the manner of a private person, the private law nature of the transaction engaged in supplying additional evidence that the State voluntarily intended to subject itself to the court.[451]

The commerciality and private law nature of the relevant act *prima facie* determines the State's implead of immunity before the jurisdiction of courts or tribunals. By implication, such consent operates by way of conduct: an implied waiver. However, taken from an investment arbitration proceedings perspective, which exists *prima facie* on the consent of parties as expressed usually through IIAs or a separate arbitration agreement,[452] we could state that the State having consented in such a manner as contractually expressed, also explicitly forfeits or waives its immunity from the jurisdiction of courts and tribunals.[453] It is extensively accepted that once a State party voluntarily enters into IIAs and/or signs an arbitration agreement to resolve investment-related disputes under arbitral frameworks or the auspices of an agreed-upon regime like the ICSID, that State's right to immunity from the jurisdiction of courts and tribunals

[450] GR Delaume, 'State Contracts and Transnational Arbitration' (1981), 75.4 AJIL, 784-819, at https://doi.org/10.2307/2201354. Accessed 16/11/20.

[451] Fox and Webb (n 28) [noting that this was used by the Italian, Belgian, and the mixed courts of Egypt as to the removal of immunity].

[452] H Fox, 'Sovereign Immunity and Arbitration' in JD Lew (eds), *Contemporary Problems in International Arbitration* (Queen Mary College, London 1986), at 323.

[453] See generally, I Brownlie, *Principles of Public International Law*, (7th edn, OUP, 2008), at 323-345.

aiding the arbitration proceedings is deemed waived.[454] Both forms of consent operate effectively to waive the State's immunity and, as Crawford explains, "subject to the doctrine of non-justiciability, no fundamental principle prohibits the exercise of jurisdiction, and immunity may be waived by the State concerned either expressly or by conduct".[455] Curtailing immunity in this way without doubt provides a firm grounding for the restrictive immunity doctrine and makes good the obligations willingly entered into by parties to be performed in good faith.

3.4.1 The Separate Regimes of State immunity

Against the above formulation, however, two distinct immunity regimes are recognised in state practice: immunity from jurisdiction and immunity from measures of constraint and execution. Immunity from jurisdiction preludes the prohibition of courts and tribunals from assuming jurisdiction over a claim brought against another State. Conversely, immunity from measures of constraint and execution preludes the protection granted to foreign State's assets from being used to satisfy the judicial liabilities of that State to third parties.[456] In this respect, as the ICJ in the *jurisdictional immunity* case affirms, immunity from measures of constraint and execution "goes further than immunity from [jurisdiction]."[457] The reason for treating immunity from measures of constraint and execution less restrictively is anchored back to reciprocity considerations under the absolute immunity doctrine. Accordingly, implementing coercive measures of constraint against a foreign State asset is considered more difficult, invasive and politically sensitive, and thus likely to damage diplomatic relations.[458]

Although immunity from jurisdiction is effectively waived and reminiscent of the restrictive immunity doctrine, immunity from measures of constraint and execution is available to States to plead. It

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[454] G Bernini and AJV Berg, 'The Enforcement of Arbitral Awards against a State: The Problem of Immunity from Execution' in JDM Lew (eds), *Contemporary Problems in International Arbitration* (Queen Mary College, UK 1996), at 359.

[455] J Crawford, *Brownlie's Principles of Public International Law*, (8th ed.) (OUP, New York 2012), at 501.

[456] Yang, (n 25), at 343.

[457] *Jurisdictional Immunities of the State, (Germany v Italy)*, ICJ Reports (2012), at 99, para. 113.

[458] Fox and Webb, (n 28), at 341.

has been thought to be unscathed from the general development of the law of immunity and investment arbitration and, for this reason, it has earned the title "the last bastion of the state of immunity" in the ISA system generally,[459] and the 'Achilles heel' of the ICSID system, specifically.[460] Despite this characterisation, Reiniche notes that many domestic courts have categorically expressed that immunity from measures of constraint and execution no longer applies in conformity to the absolute immunity doctrine.[461] Accordingly, the *commercial activity exception* purportedly dictates whether immunity from measures of constraint and execution is granted or not.

However, intellectual conceptualisations of this commercial activity exception regularly encounter difficulties in actual practice.[462] As shall be seen, the exception is "applied so divergently that it is hard to concede more than very abstract conformity in state practice."[463] Discrepancy starts with the appropriate test for determining the act's character as commercial (private) or sovereign (public) act; is it the *purpose test* or the *nature* test? Even though one can observe a predominant leaning towards the *nature test*, Article 2(2) of UNCSI clearly still reflects continuing uncertainties about the tests.[464] To this end, as Orahkelashvili states, the "professed adherence to the absolute or restrictive immunity approach may be less crucial than its characterisation of a particular act. Only this characterisation can expose which of the two doctrines that in fact applies."[465] Indeed, in distinguishing a commercial act from a sovereign act, and by what criteria

[459] ILC Report on Jurisdictional Immunities of States and their Property 1991, in Yearbook Int'l Law Commission (YBILC), ii, Part Two, 1, at 56.

[460] Schreuer, *A commentary* (n 42), at 1154.

[461] Reinisch, (n 350).

[462] ILC Report, (n 458).

[463] J Finke, 'Sovereign Immunity: Rule, Comity or Something Else?' (2010), 21(4) EJIL, 853, at 859.

[464] Article 2(2) of UNCSI states:

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

[465] A Orakhelashvili, 'Explaining the Gestionis v Jus Imperii' in T Ruy et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019), at 108.

applicable to immunity from execution specifically, will determine whether the restrictive immunity approach effectively facilitate coercive enforcement of awards against host States when voluntary compliance fails. The following sections examine this.

3.4.2 The Criteria for Determining the Commerciality of States' Acts

3.4.2.1 Immunity from Jurisdiction

Under the restrictive immunity approach, "the plea of sovereign immunity in the sense of a procedural bar to jurisdiction based on the personal capacity of the litigant, has little immediate relevance in" in ISA proceedings.[466] As indicated above, such proceedings operate on parties' consent as expressed through arbitration agreements or IIAs and will usually involve a commercial activity/transaction.[467] This approach ensures that parties act in good faith in the performance of the obligation they have willingly undertaken. Therefore, as Article 10 of the UNSCI captures:

> [i]f a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transactions fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.[468]

A similar connotation finds expression under the US FSIA under section 1605(a)(2) where immunity from jurisdiction will be denied in any "action based upon a commercial activity carried on […] or performed in the United States in connection with a commercial activity of the foreign state elsewhere."[469] The UK SIA section 3(1)(a) also provides that "a State is not immune with respect to proceedings relating to a

[466] H Fox, 'Sovereign Immunity' in JD Lew (eds), *Contemporary Problems in International Arbitration* (Queen Mary College, UK 1996), at 323.

[467] J Yackee, 'PACTA SUNT SERVANDA and State Promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality' (2009), 32 Fordham Int'l L. J. 1550; W Park and A Yanos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration' (2006), 58 Hastings Law. Rev. 251; Article 26 VCLT captions: Observance of Treaties Pacta Sunt Servanda state that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[468] Article 10 of the UNCSI.

[469] Section 1605 (a)(2), of the US FSIA.

commercial transaction entered into by the State."[470] The case-law of States including France,[471] Germany,[472] Switzerland[473] and the Netherlands[474] is formulated in a similar manner to the US and UK with the use of either 'commercial activity' or 'commercial transaction.' Once an act which constitutes the legitimation falls within the domain of private rights and obligations (and not sovereign act), jurisdiction shall be assumed accordingly.[475] Commercial activity or non-sovereign activity has been defined.

The ESCI defines it as an "industrial, commercial or financial activity" which a State undertakes "in the same manner as a private person."[476] The definition here is narrow and implicates a proposition that a State could engage in the three listed commercial activities but not in the same manner as a private person would, i.e. with a profit motive. Under Article 2(1)(c), the UNSCI identifies commercial activity by three broad categories of engagements that are not immune when undertaken by a State:

> (i) any commercial contract or transaction for the sale of goods or supply of services;
> (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;
> (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.[477]

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[470] Section 3 (1) (a), of the UK SIA.

[471] *Societe Eurodif v Republiquc Islamique d'Iran (Eurodif v. Islamic Republic of Iran*), Judgment of March 14, 1984, Cour de Cassation, France, 1984, R. CDIP 1984. 1065; *Sonatrach v. Migeon, Cour de cassation*, (1st Civil Chamber), 1 Oct. 1985. 77 I.R.L. 525.527.

[472] *Empire of Iran Case*, German Federal Constitutional Court, 30 April 1963, 45 ILR 57.

[473] *United Arab Republic v Mrs. X*, Judgement of Feb. 10, 1960, Federal Tribunal, 65. I.L.R. 385, 391-93 (Switzerland).

[474] Yang, (n 25), at 369, 393.

[475] Sovereign acts are premised on the exercise of legal authority that is available to States and not to private entities. A generically sovereign activity will includes legislative activities and regulatory measures. For example, any measure or activity relating to "regulating external trade, decreeing measures for the protection of the currency, concluding trade or payments agreements with foreign countries, ordering or forbidding transfers of currency" will "constitute acts of executive power." See *Société Anonyme "Dhellemes et Masurel" v Banque Centrale de la République de Turquie*, 4 December 1963, 45 ILR 85, 87; Also see Orakhelashvili, (n 404), at 114.

[476] ESCI, (n 37).

[477] Article 2(1)(c) of the UNCSI; The ESCI (ibid) also defines 'commercial activity' - commerciality as 'industrial, commercial and financial activity' engaged by the foreign state 'in the manner as private person', see Articles 7(1) and 26.

Here, the scope is broad: the word 'transaction' encompasses a broader meaning than the word 'contract' in that the former even extends to non-contractual activities such as business negotiations. That said, both words are used interchangeably by primary domestic immunity rules to define commerciality and are, to a large extent, similar in approach.[478] Moreover, what comes within the meaning of commerciality is relatively identical among States; they either provide a single criterion for identifying the relevant act's commercial nature (the criterion approach) or set forth a list of acts constituting a commercial activity (the list approach).[479]

The criterion approach would aim to determine the commerciality of the act based on something abstract such as the *nature* or *purpose* underlying the relevant act. The US FSIA employs this approach. Section 1603 (d) states

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the *nature* of the course of conduct or particular transaction or act, rather than by reference to its *purpose*.[480]

Commerciality here is narrow, left undefined, and references the *nature test*. Indeed, as was noted by the US Supreme Court in *Weltover v Argentine Republic* Congress left the term 'commercial activity' undefined, leaving the courts with the ultimate discretion in determining it[481] and giving them the capacity to expand or limit the scope as desired. A similar connotation can be found under the Canadian State Immunity Act of 1985[482] and immunity practices of most Civil Law countries, including Belgium, Italy,

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[478] For more see, Y Banifatemi, Jurisdictional Immunity: Commercial Transaction' in T Ruys et al., (eds), *Cambridge Handbook of Immunities and International Law* (CUP, 2019), at 125-6.

[479] Yang, (n 25), at 78.

[480] Section 1603 (d) and (e) of the US FSIA.

[481] *Argentine Republic v Weltover Inc*., 12 June 1992, 504 US607 (1192).

[482] Definitions section "commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its *nature* is of a commercial character; (activité commerciale)" Canada SIA at https://laws-lois.justice.gc.ca/eng/acts/s-18/FullText.html. Accessed 14/02/21.

Switzerland and Germany.[483] Conversely, the list approach aims to establish a fixed range of specific activities or transactions which, if undertaken by a State, will cause immunity from jurisdiction to be denied. The UK SIA (and legislations fashioned after it) follow this, as Section 3(3) formulates:

> (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligations; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.[484]

The list approach is broader and clarifies the scope of the 'acts' better than the criterion approach. In this context, the courts' discretion appears curtailed and certainty to both courts and claimants are fosters. However, the difficulty of exhaustively categorising all types of commercial activities is reinforced by a residual category under section 3(3)(c).[485] In this regard, in novel cases falling outside the formulated list, the courts have the ultimate decision to determine the relevant act's commerciality. In doing so, the list approach ultimately collapses into the criterion approach. Since, in both instances, the pre-existing categories cannot exhaustively accommodate all lists, the courts have much flexibility in determining the commerciality of the relevant act. However, difficulty ensues as to whether it is the *nature test* or the *purpose test* that should be investigated.

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[483] Fox, *The Restrictive Rule 1970s Enactment* (n 26), at 567 –569 ["the German Federal Constitutional Court, in declaring non-immune a contract to repair embassy premises of a foreign State, pronounced that: 'The distinction between *acts jure imperii* and *acts jures gestionis* can only be based on the *nature* of the act of the State or of the resulting legal relationship, not on the motive or purpose of the State activity."] *Empire of Iran case*, German Federal Constitutional Court, 30 April 1963, UN Legal Materials, 282; 45 ILR 57, at 80]; See also Belgium, Court of Appeal (Brussels) decision in *Société Anonyme "Dhellemes et Masurel" v. Banque Centrale de la République de Turquie*, 4 December 1963, 45 ILR 85.

[484] Section 3(3)(c), UK SIA provides:

> "any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual."

[485] Banifatemi, (n 464).

The nature test deals with purely private law concerns and makes enquiries into whether the legal activity is one a private individual could or could not perform. In contrast, the purpose test looks at the reason or motivation behind the relevant act. All "thus depends on whether the foreign State has acted in the exercise of its sovereign authority, that is in public law, or like a private person, that is in private law."[486] Determination solely in line with the nature test has been shown to be oversimplified when applied. This is because immunity could be refused to the benefit of a private person in a simple sale transaction like a "purchase of boots or the more modern instance of cigarettes for the army."[487] Nevertheless, the peculiar nature of a State's activity will mean that recourse to 'the purpose of the act' in such transaction, will be detrimental to the interests of the private person because, as the German Federal Constitutional Court in *Empire of Iran* case highlights, "ultimately, activities of the State, if not wholly, then to the widest degree, serve sovereign purposes and stand in a still recognisable relationship to them."[488] Thus, "[f]or instance, the fact that property for diplomatic purposes was acquired through a commercial contract does not mean that the property should henceforth be treated as commercial in other context such as property tax", writes Schreuer.[489] Yet, it will be that "an approach that regards an act as sovereign merely because it is done by the State, or its officials, in the State interest, for State motives and using State resources or facilities, [will] inevitably results in the doctrine of absolute immunity."[490]

Against this state of affairs, state practice formulates different connotations, including an approach that looks to the 'whole context' in determining an act's commerciality. For example, the UK court in *I Congreso del Partido* held that "while not decisive", reference to the purpose of the relevant State transaction should be examined to help engage the act's nature.[491] While making the act's nature (the form)

[486] Orakhelashvili, (n 404), at 114.

[487] Fox and Webb (n 28), at 406.

[488] See *Empire of Iran* case, German Federal Constitutional Court (30 April 1963), 45 ILR 57.

[489] CH Schreuer, *State immunity: Some recent developments* (Cambridge: Grotius Pub., 1988), at 21 -22.

[490] Orakhelashvili, (n 404), at 113.

[491] *I Congreso del Partido CA* ([1978] QB 500), at 272; see also *Trendtex Corp. v Central Bank of Nigeria*, 13 Jna 1977, [1977] QB5 29. See also Belgium practice. For more see Brazil-David, (n 446).

a key criterion, the act's purpose (the substance) is considered simultaneously to determine the act's commerciality.[492]An approach as this is flexible and makes seemingly workable, an unworkable dual test. Other courts show a predominant inclination toward the *nature test* by simply enumerating the relevant act by reference to its form rather than the substance, as exemplified by the decisions of the US Court in *Weltover*[493] and the German Court in *Church of Scientology* case.[494] Nevertheless, some practices, such as France's[495] Canada's[496] and Italy's,[497] have endorsed or made reference to the purpose test. The latter approach finds expression under Article 2(2) of the UNCSI, albeit in a subsidiary function and in a conditional way which covers its general application:

> [i]n determining whether a contract or transaction is a 'commercial transaction' under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction. [498]

The above provision and the broader leeway domestic courts have under their respective primary immunity instruments show that both the nature and purpose of the relevant acts can be scrutinised to determine an

[492] See the approach in, *Baccus SRL v Servicio Nacional del Trigo*, 31 October 1956, [1957] UKCA 1 QB 438, 466 (per Jenkins LJ).

[493] *Weltover Inc*, (n 480).

[494] *Church of Scientology*, Case No. VI ZR 267/ 76, 26 Sep. 1978, 65 ILR 193, at 197. [A non-investment case but provides a general rule to the effect that the act's nature was a decisive criterion for distinguishing between non-immune and immune acts.] See also *Empire of Iran* case (n 469).

[495] The French court although expressly rely on both nature and purpose of the act in the determination of the State act, the approach predominantly focuses on the purpose of the transaction. See *Société Levant Express Transport. Chemins de Fer du Gouvernement Iranien,* Appeal No. 67-10243, 25, February 1969, 52 ILR 315. For more see Banifatemi (n 464), at 138.

[496] See Canadian, Courts' ruling in *USA v The PSA of Canada, the AG of Canada, and the Canada Labour Relations Board* (*Re Canada Labour Code*), Case No. 21641, 21 May 1992, 86 ILR 626, 630, 634 and 638. See Banifatemi, ibid.

[497] See Italian Courts' ruling in *Borri v Argentine Republic*, Case no. 11225, 27 May 2005 88 Rivista di Dirito Internationale 856, cited in Banifatemi (n 464), at 137.

[498] Article 2(2), The UNSCI.

acts' commerciality.[499] Nonetheless, Schreuer notes that the *nature test* ranks predominately in state practice when determining the acts' commerciality for purposes of determining a foreign State's immunity from jurisdiction during ISA proceedings.[500] This is logical given that the State would have already willingly consented to such assumption of jurisdiction since the subject matter that precipitates ISA suits is usually 'commercial in nature' as expressed through IIAs and accompanying arbitration agreements. Nevertheless, as noted earlier, immunity from measures of constraint and execution has evolved to be treated separately from immunity from jurisdiction under state practice.

3.4.2.2 Immunity from Measures of Constraint and Execution: The Criteria Differ

Immunity from measures of constraint and execution implicates "coercive or enforcement measures taken by the court either to restrain the foreign State in the disposition of its property, normally in the form of interlocutory injunctions, or otherwise to attach, arrest or seize the property of the foreign State." [501] It "encompasses the full variety of pre and post-judgment measures available in national legal systems" covering injunction, recognition, enforcement and execution.[502] The bar of immunity usually arises at the execution stage – attacking, arresting or seizing the foreign States' relevant asset(s) in satisfaction of the rendered award.[503] This is because, theoretically, the others are certification stages implicating rules of immunity from jurisdiction, which would have mostly been waived by reason of the State's engagement in commercial activity and agreeing to arbitrate precipitating disputes. As Lew, Mistelis and Kröll note,

> [t]he fact that a state cannot claim immunity from jurisdiction does not necessarily mean that the state is not immune from the actual execution of the

[499] Schreuer, *State Immunity: Some Recent Developments* (n 472), at 25.

[500] Ibid, at 15.

[501] Yang, (n 25), at 343 [""Measures of constraint" is a generic term covering both interlocutory, interim or pre-trial measures prior to final judgments and the execution or enforcement of judgments. In the context of State immunity, these are coercive, or enforcement measures taken by the court either to restrain the foreign State in the disposition of its property, normally in the form of interlocutory injunctions, or otherwise to attach, arrest or seize the property of the foreign State."]; see also Crawford, *Brownlie's Principles* (n 454), at 502 -504.

[502] Crawford, ibid, at 502 -504; Yang, at 343.

[503] Brazil-David, (n 446), at 260.

> award. In most laws the exceptions to immunity from execution are narrower than the exceptions to immunity from jurisdiction.[504]

The evolution of restrictive immunity is less prevalent with respect to immunity from measures of constraint and execution[505] because it is considered more intrusive and directly detrimental to the dignity of the foreign State, and it should therefore be exercised with more precaution.[506] Therefore, as Yang highlights

> [e]ven though, as a general rule, […] measures of forced execution against foreign States and their property are permitted, such measures are subject to a number of conditions and limitations. […] the 'purpose' test, much discredited in the context of adjudicative jurisdiction, resurfaces as a determinative factor in the context of measures of constraint. Generally speaking, the property of a foreign State enjoys immunity from attachment, arrest and execution when it is used for sovereign or public purposes, but not when it is used for commercial purposes.[507]

Corresponding to the sovereign and private acts divide are two distinct categories of States' assets: sovereign/non-governmental purpose and commercial purpose assets[508] where state practice only makes permissible, execution against the latter. Article 26 of the ECSI allows measures of constraint against assets serving "industrial or commercial activity […] against which judgment has been given, used exclusively in connection with such an activity."[509] Article 19(c) of the UNCSI allows measures of constraints against assets "in use or intended for use by the State for […] government non-commercial purposes" located "in the territory of the State of the forum".[510] Section 13(4) of the UK SIA permits execution against assets

[504] JDM Lew, LA Mistelis and S Kröll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law Int'l, 2003), at 750.

[505] Fox and Webb, (n 28), at 341 [noting that the rationale harks back to reciprocity and diplomacy considerations, which are reminiscent of the absolute immunity doctrine.

[506] Ibid. Crawford, *Brownlie's Principles* (n 454), at 501.

[507] Yang, (n 25) at 343.

[508] EC Okeke, *Jurisdictional Immunities of States and International Organizations* (OUP, 2018), at 99 - 122.

[509] Article 26 of the ESCI.

[510] Article 19(C) of the UNSCI.

which "is for the time being in use or intended for use for commercial purposes".[511] The US FSIA allows execution against assets "used for commercial activity" in the United States' territory.[512] The decisional laws of States, including France,[513] Germany,[514] Spain,[515] Switzerland[516] and Italy,[517] adopt a similar approach.

The terminology and even precise application may differ,[518] however, these connotations show that the current law looks to the 'purpose' underlying the use or intended use of the relevant State asset rather than to its 'nature'.[519] In other words, State's assets serving a commercial purpose is not immune from execution measures. The main concern is what is entailed by the phrase 'commercial purpose'. It is, of course, not always clear what use an asset is put to; what, for example, is the use of a bank account, particularly in a commercial bank. In other words, what is a non-governmental/commercial purpose, and how does one differentiate it from a sovereign purpose for the purposes of allowing actual execution against States' assets? This is an unsurmountable task left to domestic courts as there are no set criteria for

[511] Section 13(4) of the UK SIA.

[512] Section 1610(a)(6) of the US FSIA.

[513] *Eurodif v. Islamic Republic of Iran*, Judgment of March 14, 1984, Cour de Cassation, France, 1984, R. CDIP 1984, at 1066, at 1065; *Société Sonatrach v. Migeon*, Decision of Oct. 1, 1985, Cass civ 1re, 77 I.L.R. 525, 527 (English translation). But, see also *NML Capital Ltd. v Argentine Republic*, French Cour de cassation's decision on March 28, 2013 where 'nature test' instead of the 'purpose test' was applied to void execution against the State assets (Labour, Tax, and Oil royalties) of Argentina by NML Capital Ltd. The Assets were held to be "necessarily connected to the exercise by the Argentine state of powers linked to its sovereignty." Nos. 11-10.450, 11-13.323, 10-25.938, at, http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/. Accessed 16/11/19; A Blumrosen and F Malet-Deraedt. 'NML Capital Ltd. v Republic of Argentina' (2013), 107(3) AJIL, 638 - 44.

[514] *Philippine Embassy Bank Account Case*, Judgment of Dec. 13, 1977, Constitutional Court, 65 I.L.R. 146, 155 (Germ) (English translation) *Empire of Iran case*, German Federal Constitutional Court, 30 April 1963, UN Legal Materials, 282, 45 ILR 57.

[515] See also J-M Thouvenin and V Grandauber, 'The Material Scope of State Immunity from execution' in T Ruy et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019), 255 – 259.

[516] *United Arab Republic v Mrs X*, Judgment of 10, 1960, Federal Tribunal, 65 ILR 385, 391-392 (Switzerland).

[517] *Condor and Filvem v National Shipping Company of Nigeria*, 2-15 July 1992, 33 ILM 393.

[518] Yang, (n 25), at 369.

[519] Ibid, at 393.

establishing the distinction,[520] and in most instances, as shall be revealed below, engagement tends to favour foreign States.

The commercial purpose will require the determination of two elements. The first element is the commerciality of the relevant act. This is reminiscent of commerciality under jurisdictional immunity, which, as identified above, looks to the 'nature test' in state practice.[521] For example, the term "government non-commercial purposes" under Article 19(c) of the UNSCI is reinforced by the three broad categories of non-immune commercial transactions under Article 2(1)(c). Similarly, under the UK SIA, section 17 defines "commercial purpose" by reference to section 3(3),[522] meaning commercial activity has been formulated as analogous to an activity conducted by private persons.[523] By assumption, once a State's utility of the relevant asset(s) by its *nature* falls within the uses common to private persons, the bar of immunity would be lifted in favour of execution. This appears simply in favour of execution, as a bank account in a commercial bank will by nature constitute such a commercial asset against which actual execution should be permissible. However, substantial barriers to execution still remain.

The second element regarding the 'commercial purpose' has been problematic, i.e. whether it is the past, present or future use of the relevant asset(s) is determinative in establishing the exception. In many

[520] The difficulty in construing this was came to bare in Lord Diplock's in statement in Alcom:

> "[t]o speak of a debt as 'being used or intended for use' for any purposes by the creditor to whom the debt is owed involves employing ordinary English words in what is not their natural sense, even if the phrase 'commercial purposes' is given the ordinary meaning of *jure gestionis* in contrast to *jure imperii* that is generally attributed to it in the context of rights to sovereign immunity in public international law; though it might be permissible to apply the phrase intelligibly to the credit balance in a bank account that was earmarked by the state for exclusive use for transactions into which it entered *jure gestionis*."

Similar frustration can be seen of the LETCO decision.

[521] German court in Jurisdictional immunity case stated that Courts should look to their respective immunity practice to determine the commerciality of the relevant State act.

[522] Section 3(3) of the US FSIA.

[523] *Weltover* (n 480); See also, DP Stewart, 'The Foreign Sovereign Immunities Act, A Guide for Judges', (2nd edn. Federal Judicial Center, 2018); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, US, Supreme Court, 425 US 682 (1976); 66 ILR 212; *Trandex v Tradding Corp. v Central Bank of Nigeria*, Jan.13, 1977, [1977] QB 529. England and Wales, CA.

jurisdictions, different contestation applies, further exacerbating the already chaotic state of the criteria and, most importantly, fostering outcomes that are deferential to States' interests. Section 1610 of the FSIA lays emphasise is on the phrase "is or was used for" for commercial purpose. As Yang emphasises "so long as the property has at some point in the past been used for the commercial activity", the phrase 'is or was used' for commercial purpose, should "allow enforcement measures regardless of the current use".[524] This is a simple solution to ease the process, assuming the State asset's commercial purpose is identifiable. But the phrase has been subjected to strict and narrow interpretations in that "at the time the writ of attachment or execution is issued", the relevant assets must be in use (currently) for commercial purpose to levy execution successfully.[525] According to ILC "to specify an earlier time could unduly fetter States' freedom to dispose their property."[526] In *EM Ltd. v The Argentine Republic,* the plain language of the Statute was held to suggest an actual, not hypothetical, use of the relevant asset.[527] Consequently, in *Aurelius Capital Partners LP v The Argentine Republic*, "bonds issued by Argentina to execute judgments against certain investment accounts administered in the United States by private corporations for the benefit of Argentine pensioners"[528], while used for commercial activity, were unattachable as the asset was not in 'actual use' for a commercial purpose at the time execution was levied.[529] It is not only a problematic (or if not an impossible) task to determine the use a State put its assets to, but to show its actual use at the time of the relevant enforcement action is extremely unworkable and undesirable from a policy perspective. Courts have formulated a similar approach under the UK SIA.

[524] Yang, (n 25) at 364.

[525] See *Aurelius Capital Partners, LP v Argentine Republic*, 584 F.3d 120, 130 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1691 (2010). See also Fox and Webb, (n 28), at 627.

[526] See Article 18 of the Draft Articles on Jurisdictional Immunity of States and their Property, ILC Report on the Works of Its 43rd Section (29th April -19 July 1991), 58, para. 11.

[527] *EM Ltd. v Argentine Republic*, 695 F.3d 201 (2d Cir. 2012).

[528] *Aurelius Capital Partners, LP v Argentine Republic*, 584 F.3d 120, 130 (2d Cir. 2009), cert. denied, 130 S. Ct. 1691 (2010). See also EM Ltd., 473 F.3d at 484.

[529] Ibid, at 132.

Under UK SIA, the expression "in use for commercial purposes" (above) refers to the *present* or *past use* of the relevant foreign States' assets.[530] In *Alcom v Republic Colombia*[531]and *SerVass v Rafidan* , the "expression "in use for commercial purposes" was said "to be given its ordinary and natural meaning having regard to its context."[532] In this regard, although not in the Statute, words such as 'solely' and 'currently' have been used to further narrow the commercial purpose test in section 13(4) of the UK SIA. As noted earlier, under the UNSCI as the ILC Commentary indicates, the sovereign assets must be used or intended to be used for commercial purposes "at the time the proceeding for attachment or execution is instituted".[533] Similarly, the German Constitutional Court provides that it is the "actual use" of the relevant assets that is decisive.[534] The French take it a step further by taking into consideration "simultaneously the origin and use of the property."[535] By considering the 'origin', the France Court appears to deviate from the predominant state practice, as the UK and the US practices show. In the *Connecticut Bank of Commerce v Republic of Congo*, the US Fifth Circuit reiteration of "used for commercial activity" in Section 1610(a) highlighted that "[what] matters, under the statute, is not how [the foreign state] made its money, it is how it spends it."[536] A similar conclusion was reached in the recent case of *SerVass v Rafidan*, where the English Court emphatically referred to the origin of the relevant assets as irrelevant in the determination of

[530] UK SIA section 13 (4); see also *SerVass Incorporated v Rafidian Bank & Others*, [2012] UKSC 40; Bradley CA (ed.), The Oxford Handbook of Comparative Foreign Relations Law, (Oxford Handbooks, 2019), at 654.

[531] *Alcom Ltd v Republic of Colombia* [1984] AC 580.

[532] TK Reece, 'Enforcing Against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used "Context" When Applying The "Commercial Purposes" Test' (2015), Journal of International and Comparative Law, 2(1).

[533] ILC Draft Articles on Jurisdictional Immunities of States and Their Property, (2) YBILC 58 (1991), UN-Doc. A/46/10, at 58.

[534] *Philippine Embassy Bank Account Case*, Judgment of Dec. 13, 1977, Constitutional Court, 65 I.L.R. 146, 155 (Germ) (English translation), at 184.

[535] *Eurodif v. Islamic Republic of Iran*, Judgment of March 14, 1984, Cour de Cassation, France, 1984, R. CDIP 1984, at 1066.

[536] Connecticut Bank of Commerce v Republic of Congo, 309 F.3d 240 (2002) at 251. See also more recent case of *Export-Import Bank of the Republic of China v Grenada*, F 3d WL 4773451 C.A.2 (2014) relied on in *Firebird Global Master Fund II Ltd v Republic of Nauru* [2014] NSWCA 360, para. 175.

commercial use" under section 13(4) of the UK SIA.[537] Of course, entertaining the origin of the relevant assets can aid in establishing the commercial use of the relevant asset, thereby easing execution in favour of claimants, given that most States' assets are sourced directly from a commercial activity.

The above connotations not only lack uniformity across state practice. But the application of the various contextualisation turns out to be deferential to States' interests owing to the cautious approach adopted in respect of immunity from measures of constraint and execution under the restrictive immunity doctrine. Even though "national courts have clearly expressed their opinion that enforcement immunity is also no longer absolute", Orahkelashvili is correct in saying that the characterisation of the relevant State act determines whether immunity applies restrictively or not.[538] The difficulty that ensues the characterisation of the State act, the predominant approach toward narrow interpretation and consequently, the predominant leaning toward States' interests, has shown that the immunity from measures of constraint and execution, is indeed, reminiscent of the absolute immunity approach in actual practice.

3.5 Conclusion

The doctrine of State immunity has moved from the absolute immunity approach to the restrictive immunity approach. The development of the restrictive immunity approach works concomitantly with the development of the investment arbitration regime to protect and balance the rights of host States and foreign investors engaged in investment activities. An observable phenomenon necessitating this development is the increased decern of States and their political instrumentalities in transborder economic activities in an emerging global market after WWII. Of course, the demands for equity and fairness in the marketplace made the courts question the rationale behind the doctrine. This gradually leads to most States adopting limitations to the doctrine. Under the restrictive immunity approach, marked by the commercial activity exception, immunity is granted when a State acts in a sovereign public capacity (*acta jure imperii*). In

[537] *SerVaas Inc v Rafidain Bank*, 17 August 2012, [2013] 1 AC 595, [2012] UKSC 40, para. 16.

[538] Orakhelashvili, (n 404), at 108.

contrast, immunity is denied when it acts privately or as a private person (*acta jure gestionis*).[539] Therefore, it is unreasonable for a State to plead or be granted immunity before arbitral tribunals and domestic courts when the relevant activity is commercial in the manner of private persons.

The criteria for establishing the *commerciality* of the relevant State act are not always easy to discern due to variations in state practice. The situation is exacerbated by the fact that state practice also recognises dual regimes of immunity: immunity from jurisdiction and immunity from execution and measures of constraint. Against these dual regimes of immunity, as Schreuer summarises, "for immunity [from] jurisdiction, the overwhelming authority points towards a test that looks at the nature of the activity and not its purpose. Nevertheless, the test for immunity from measures of constraint and execution is usually the purpose of the property that is to be seized."[540] The purpose test is formulated on the condition that the relevant State asset(s) marked for actual execution are 'in use' for commercial purpose. Of course, this condition may lead to difficult questions of interpretation and application, as it is not always apparent what 'use' a State asset is put to or what State activity has a "commercial purpose".[541] It must be ascertained (a prove to be discharged by the creditor) that a foreign State actually use, exclusively use or intended exclusively to use the relevant assets for purpose other than sovereign purpose, to allow execution. The issue is compelling because what may be deemed to have a commercial character may also have an undertone of governmental policy.[542] By making it virtually impossible for investors to prove what a State's asset is, or may be, used for a commercial activity, "these decisions restore, for all practical purposes and

[539] M Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity', 31 ICLQ 661 (1982), at 661.

[540] Schreuer, *A Commentary* (n 42).

[541] TK Reece, 'Enforcing Against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used "Context" When Applying The "Commercial Purposes" Test' (2015), 2(1) Journal of Int'l and Comp. Law, at 7.

[542] Sornarajah, (n 532), at 665.

for the benefit of foreign States, the absolute doctrine of immunity that modern immunity rules are intended to supersede".[543]

The next chapter further examines these challenges because some fundamental limitations still follow awards' implementation beyond the general limitations already discussed. At this point, it is also necessary to examine the other exceptions to permitting actual execution against the foreign States' assets when voluntary compliance fails.

[543] GR Delaume, 'Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration' (1987) 2 ICSID Rev – FILJ 403; at 253.

Chapter 4: Key Outstanding Challenges and Limitations to Execution of Arbitral Awards: Immunity from Measures of Constraint

4.1 Introduction

While the predominant state practice clearly expresses the view that immunity from measures of constraint and execution is no longer absolute under the restrictive immunity doctrine, difficulties ensue the precise conditions and criteria under and by which immunity from measures of constraint and execution would be granted or refused.[544] Indeed, as the preceding chapter notes, the commercial activity exception, or 'in use for commercial purpose', which serves as an overarching measure for allowing actual measures of execution against foreign States' assets, is not easy to navigate.[545] As rightly articulated by Reece, "It is not […] always clear what the 'use' of a state asset is and what state activities have 'commercial purposes'."[546] Worse still, state practice requires that the moment an actual execution proceeding is instituted becomes the very crucial moment that the relevant asset's use or intended use for commercial purpose must be determined.[547] This approach is premised on justification (as ILC provides) that identifying "an earlier time could unduly fetter States' freedom to dispose of their property."[548] As Fox notes

> unlike the immunity from jurisdiction where there is […] clarification of the scope […] by defining the […] exceptions to which immunity from jurisdiction no longer applies, [there is] a lack of […] detailed provision relating to the scope of immunity from enforcement. *Where any regulation is provided, the safeguards of the foreign-State debtor's interests is given priority.* In consequence, additional safeguards apply and bar attachment […] against state [assets]. [549]

[544] A Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 EJIL, at 803, (see footnote 64).

[545] Ibid.

[546] TK Reece, 'Enforcing Against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used "Context" When Applying The "Commercial Purposes" Test' (2015), 2(1) Journal of Int'l and Comp. Law, at 7. Article 19(c) UNSCI exemplified.

[547] The US FSIA and UK SIA and decisional law of many States formulates similar outcome.

[548] ILC Draft Articles on Jurisdictional Immunities of States and Their Property, (2) YBILC 58 (1991), UN-Doc. A/46/10.

[549] Fox, *The Restrictive Rule 1970s Enactment* (n 26), at 36 [emphasise added].

Indeed, aside from the general connotations above, additional safeguards apply and bar execution against a certain category of foreign States' assets as these assets are deemed *not* specifically "in use or intended for use other than for governmental non-commercial purposes."[550] These include States' assets in the central bank and embassy and consular mission assets, including their bank account, military, and cultural and heritage assets. Further, some practices formulate additional safeguards in the form of nexus requirements. Meanwhile, state practice formulates alternative conditions against which actual measures of execution can be undertaken, thus purportedly balancing the foreign investor's right to remedy against the recalcitrant State's right to immunity during proceedings, in order to implement awards when voluntary compliance fails.

The purpose of this chapter is to analyse, in the light of treaties, primary immunity statutes, and arbitral determinations from national and international courts, the limitations and challenges associated with executing against this special category of States' assets. It also analyses the effectiveness of the conditions under which immunity from measures of constraint and execution can be lifted in favour of actual attachment of these assets under the restrictive immunity approach. The chapter is divided into four main sections. Section one is devoted to engaging the four main assets of the States within the category as exempt. Section two will look at the alternative conditions under which immunity from measures of constraint and execution can be lifted in respect of executing against these special categories of States' assets and the effectiveness for the purpose. Here, a waiver exception is of particular interest as it transcends the general waiver under the commercial activity approach. Section three will analyse the challenges associated with executing against the State entity, and section four is devoted to the additional challenge of nexus requirements.

The analysis here, in conjunction with the analysis of the preceding chapter, contributes to answering the query regarding the criteria for determining immunity from measures of constraint and execution and viability in bridging the chasms between States' right to immunity and foreign investors' ability to enforce

[550] See Article 21 of the UNCSI.

arbitral awards when voluntary compliance fails. The chapter will serve as grounds for formulating workable solutions in the succeeding chapter.

4.2 Specially Protected Assets of Foreign States

4.2.1 Central Bank Assets and Immunity from Execution Measures

Central banks[551] are one of the surest places States have assets. Therefore, they serve as an attractive spot for taking measures of constraint against recalcitrant States.[552] At the same time, their peculiar characteristics (namely, aiding foreign States in their sovereign functions[553] as well as providing economic boosts to other States, notably States housing major financial centres) make issues of immunity loom large to the detriment of claimants seeking execution against foreign States' assets located in central banks. Indeed, while some exceptions are generally entertained to aid execution,[554] the unmistakable trend toward stronger immunity through legislative intervention is currently the predominant approach under state practice. Many factors account for this trend, including the need to attract and maintain foreign central bank assets and investments. For instance, the Federal Reserve Bank of New York (Federal Reserve) alone is said to hold about 250 foreign central banks and governments' assets which cost approximately $3.3 trillion

[551] The term "central bank" for the purposes of state immunity, means, at least a central bank or other monetary authority of the State. For definitional authority, see e.g., Art. 21(c)(3) UNSCI; § 1611(b)(1) US FSIA; Art. 2 of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures 2005, at http://english.www.gov.cn/services/investment/202102/24/content_WS6035ab7bc6d0719374af960d.html, Accessed 21/07/21. Article 19(1) of the Art L. 153-1, Monetary and Financial Code-Legislative Section France.

[552] Central banks establish accounts with foreign banks, including foreign central banks, hence central banks hold significant assets in place for foreign States which could satisfy creditors. The Federal Reserve Bank of New York (Federal Reserve) alone is said to hold about two hundred and fifty foreign central banks and governments assets with approximately $3.3 trillion UDS worth. See IB Wuerth, 'Immunity from Execution of Central Bank Assets' in T Ruy et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP, 2018),

[553] Sovereign functions of central banks include but not limited to issuance of currencies; management of short-term interest rates; supervising the national banking operations and provision of banking services to the government; managing gold and foreign exchange reserves. The general policy aim of central banks is to stabilize prices through managing inflation and economic fluctuations. Against this, Central banks' activities are also akin to activities undertaken by private parties even though their purpose may be different; purchasing foreign currency or government debt from commercial banks and engagement in sovereign wealth funds are examples. See, ibid; See also See W Blair, 'The legal status of central bank investments under English law' (1998), 57 Cambridge Law Journal, 374, at 375.

[554] See GK Foster, 'Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements Against States and their Instrumentalities, and Some Proposals for its Reform' (2008), 25 Ariz. J. Int'l & Comp. L. 665, at 687.

USD, comparable to half of the world's official dollar reserves.[555] The need to protect central bank assets as an economical approach to attract and maintain such assets was highlighted in the history of the US FSIA, particularly in Article 11611(b)(1) of the United States Congress House Report:

> if execution could be levied against such funds without an explicit waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems.[556]

Another dominant factor, often mired by technicalities in the face of most legislative and decisional measures, is the maintenance of diplomatic relations.[557] Immunity has deep roots in policy and diplomacy.[558] As Peters rightly notes, granting immunity among States is "replete with considerations of opportuneness and foreign politics."[559] The sensitivity of allowing an 'attack against a friend in your house' makes immunity from measures of constraint and execution more likely to be concealed by a partially false appearance of technicality.[560] It is not only friendly diplomatic exchange but fear of avoiding conflict or incurring the wrath of another, of retaliation, that informs States' decisions in matters of actual execution against their assets. Russia's threat of retaliation and the responses thereof in *Yukos* awards implementation provides an excellent example to reinforce this point. In June 2015, the shareholders in the *Yukos* awards execution attempt in numerous jurisdictions finally paid off when dozens of assets belonging to Russia

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[555] Federal Reserve Bank of New York, 'International Services, Seminars and Training', ttps://www.newyorkfed.org/banking/international.html; J Spicer, 'Special Report: How the Federal Reserve serves U.S. foreign intelligence,' Reuters, 26 June 2017, https://www.reuters.com/article/us-fed-accounts-intelligence-specialrepo/special-report-how-thefederal-reserve-serves-u-s-foreign-intelligence-dUSKBN19H19, cited in Wuerth, (n 551) at 267 -268.

[556] The US Congress House Report HR. REP. NO. 94-1487, at 31 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, at 6630.

[557] Ibid.

[558] See Chapter 3 section 2 – historical development of the restrictive immunity approach.

[559] Peters (n 351).

[560] Aaken, *Blurring Boundaries* (n 28), at 135 – 139.

were frozen by Belgian and French courts to satisfy the awards.[561] Russia threatened 'tit-for-tat' confiscations of foreign assets in retaliation against Belgium and France and warned any State allowing similar action. The threat was reinforced by a legislative measure in November 2015.[562] Not long has this threat resulted in broad promulgation of new enforcement rules among States, as one commentator observes:

> [t]he latest round of legislative amendments in Belgium and France were apparently triggered at least in part by efforts to enforce the Yukos arbitration award against Russian property and by the 2015 Russian law, which added a reciprocity condition for immunity from attachment.[563]

Indeed, to avoid retaliation, France unfroze the Russian assets and amended its rule (Sapin No. II Law) by extending stronger immunity to foreign assets targeted for enforcement in its territory.[564] As Wuerth has also provided, "efforts by creditors to recover against Russia based on the Yukos awards, and by 'vulture

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[561] See EURACTIV.com 'France, Belgium seize Russian assets to compensate Yukos shareholders' https://www.euractiv.com/section/europe-s-east/news/france-belgium-seize-russian-assets-to-compensate-yukos-shareholders/. Accessed on 13/07/2020.

[562] Federal Law "On jurisdictional immunities of a foreign state and property of a foreign state in the Russian Federation" dated 03.11.2015 No. 297-ФЗ. at http://publication.pravo.gov.ru/Document/View/0001201511040006?index=0&rangeSize=1. Accessed 12/09/20. According to the new law, the immunities of a foreign state and its property could be limited on the territory of Russia on the principle of mutuality, in the case that the jurisdictional immunity of Russia has been found to be suffering limitations on the sovereign territory of that country.

[563] Wuerth, (n 551) citing E Glucksmann, '*Commisimpex v. Republic of Congo'* (2017), 111 AJIL 453, at 455.

[564] Article L. 111-1-1: "Provisional or enforcement measures cannot be applied to the property of a foreign State unless there is prior authorisation from a judge in an *ex parte* order." Code of Civil Enforcement Procedures; Law no. 2016-1691 dated 9 December 2016. This new Law reinforced the stronger protection afforded central bank assets under Article L.153-1 of the Monetary and Financial Code which states: "[a]ssets of whatever kind, including exchange-reserve assets, which foreign central banks or foreign monetary authorities hold or manage for their own account or on behalf of the foreign State(s) that govern them cannot be attached."

The threat is also believed to have caused the termination of subsequent enforcement action against Russia in the UK, USA, India, Germany, France and Belgium in the year 2017. See Time.Com 'Why a Win in a Dutch Court Is Making Vladimir Putin So Happy' https://time.com/4301475/russia-appeal-case-yukos-the-hague/. Accessed 13/07/2020.

funds' to enforce judgments against Argentina, have led European countries to enact measures making it more difficult in general to execute against the property of foreign sovereigns."[565]

These actions reinforce the position that reciprocity considerations, aside from economic considerations, are often behind the predominant trend towards stronger immunity protection for States' assets during actual execution measures, including (as shall be seen) the near-absolute immunity in respect of States' assets in central banks. The immunity rules start with a general presumption of immunity and are accompanied by additional limitations, as shown below.

The UNSCI under Article 19 bars measures of constraint and execution *except* in respect of a foreign State's assets used 'for commercial purposes.' However, under Article 21, specific categories of States' assets, including "property of the central bank or other monetary authority of the State", are designated as assets specifically in use for sovereign non-commercial purposes and, therefore, fall outside the Article 19 exception.[566] The UK SIA engages a similar connotation where measures of constraint are barred *except* as section 13(4) provides: the relevant "property […] is for the time being in use or intended for use for commercial purposes."[567] However, Section 14(4) continues by categorically stating that the "[p]roperty of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes."[568] By implication, immunity completely prohibits *ab initio* actual execution measures against foreign States' assets in the central bank, regardless of whether they are 'in use or intended for use for commercial purposes.' In *AIG Capital Partners Inc. and Another v The Republic of Kazakhstan*, a foreign investor's attempt to execute an ICSID award against a fund held in a central bank in the United Kingdom on behalf of the Government of Kazakhstan was rejected because the targeted fund under the UK SIA serves a sovereign purpose and was therefore

[565] Wuerth, ibid.

[566] Articles 19 and 21 of the UNSCI.

[567] Section 13(4) of the UK SIA.

[568] Section 14(4) of the UK SIA.

utterly immune from such measures.[569] Indeed, under both UNSCI and UK SIA, whether assets in central banks relate to the commercial purpose or not, immunity from measures of constraint and execution applies completely.

Although the US FSIA allows constraint against central bank assets, which by comparison seems to depart from the approach taken by UK SIA and UNSCI, the phrase 'held for its own account', pursuant to 1611(b)(1) of the US FSIA,[570] is primarily determinative of whether or not execution is permissible. The House Report (legislative history of the US FSIA) defines funds of a foreign central bank "held for its own account" as "funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or foreign states."[571] Partly drawn from this language, some case law suggests that assets used for commercial activity are not to be considered as assets held for the central bank's own account.[572] This reasoning takes cognisance that some functions performed by central banks can be analogous to those undertaken by private parties acting with for-profit motives, albeit not clarifying what such banking activities/functions are. Providing a leading interpretation of the phrase, the Court in *NML Capital, Ltd. v Banco Cent De La República Argentina* reasoned, however, that "held for its own account" must involve States' assets used for commercial activities since assets used

[569] *AIG Capital Partners Inc and Another v Republic of Kazakhstan* [2005] EWHC 2239 (Comm), ¶80; *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya* (the Kingdom of Saudi Arabia) & Others [2006] UKHL 26, ¶8; *NML Capital v Argentine Republic*, et al., Decision of Mar. 28, 2014, Cass civ 1re (France).

[570] Section (1610 CA); exception is 1611(b)(1) provides:

> "Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if [. . .] the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver."

[571] The House Report describes funds of a foreign central bank "held for its own account" as "funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or foreign states." H.Rep. No. 1487, 94th Cong., 2d Sess. 31 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6630.

[572] This reasoning stems partly from the language in the legislative history of US FSIA. See for example, USCA for the Ninth Circuit, *Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v Cubic Defense Systems*, 385 F.3d 1206, 1223-24, 7 October 2004, vacated on other grounds sub nom., *Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v Elahi*, 546 U.S. 450, 21 February 2006, cited in Wuerth, (n 551).

for a sovereign activity are already immune from execution measures, whether owned by a central bank or not.[573] The Court concludes that foreign States' assets held in an account in the name of a central bank are therefore, presumptively immune from execution.[574] Apparently, claimants must show with specificity that the assets are not being used for central banking functions as usually assumed, regardless of whether or not those functions are avidly 'commercial' in nature.[575]

In this respect, not only will actual execution against foreign States' assets in central bank assets be refused if the condition is not fulfilled but, as was further elucidated in *Weston*, "property used for commercial activity and property of a central bank held for its own account *are not mutually exclusive categories.*"[576] Thus, the whole asset cannot be executable by virtue of identifying evidence of some commercial usage.[577] Therefore, in the *NML Capital* case, funds held in the Federal Reserve Bank of New York under the ownership of the Central Bank of Argentina ("BCRA") were barred from execution because the funds were partly to "pay Argentine banks that sought to reduce the amount of their US dollar reserves;" and also partly to buy US dollars so as to gain control over the changing value of the Peso. The relevant asset was held to serve some sovereign functions, hence it was not "held for its own account".[578]

As two approaches can be entertained the law stands unclear on the matter. The *NML* Court's application of the presumptive immunity and central banking test, otherwise, the rejection of commercial activity approach will mean that the numerous functions performed by the central bank which can be characterized as commercial activity will be overlooked thereby providing a stronger immunity protection

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[573] See US Court of Appeals for the Second Circuit, *NML Capital, Ltd. v Banco Central de la República Argentina*, 652 F.3d 172, 193-94, 5 July 2011 [Hereafter, *NML Capital*], cited in Wuerth, (n 551).

[574] Ibid.

[575] Wuerth, ibid, at 7.

[576] *Weston Compagnie de Finance et d'Investissement, S.A. v La Republica del Ecuador*, 823 F. Supp 1106 (SDNY 1993) at 1112.

[577] Ibid, at 1113.

[578] Ibid. The monies were planned partly to "pay Argentine banks that sought to reduce the amount of their US dollar reserves;" and also partly to buy US dollars so as to gain control over the changing value of the peso. *Weston*, at 1112.

to States' assets used for all such functions; an outcome evidenced by the *NML* case. An alternative approach to aid execution will be to construe the phrase "held for its own account" in the plain meaning of the language.[579] However, doing so could arguably lead to a grant of absolute immunity similar to that accorded under the UK SIA and the UNSCI, as highlighted above.

Germany, Switzerland, and France's approach, by implication, uphold similar outcomes. Using the purpose test connotation, recent German case law designates certain States' assets (funds), mainly those intended to back currency and to fund the State's foreign travel expenses, as assets serving a sovereign purpose and, therefore, as completely immune from execution measures.[580] What is unclear is whether, beyond the designated 'sovereign purpose serving assets', other central bank assets not mentioned can be amenable to execution measures. That said, given that States' engagements generally have a sovereign purpose underlying them, it can be argued that a broad reading of the 'sovereign purpose', thus use of the purpose test, will undoubtedly lead to a similar level of protection offered under the UNSCI and UK SIA.

Switzerland departs from the general presumption of sovereign use accorded to central bank assets. In fact, the inapplicability of presumption was well expressed in the Swiss Federal Tribunal case of *Lybian Arab Socialist People' Jamahiriya v Actimon SA*.[581] The case reiterated the Swiss relevant immunity statute, - *Federal Debt Collection and Bankruptcy Act of 1898*, which indicates that only assets "assigned to tasks which are part of [the State's] duty as a public authority" will be afforded immunity from measures of constraint and execution.[582] A recent Swiss case further adds that the relevant assets must be earmarked for concrete public/sovereign purposes to qualify for immunity under the Statute.[583] Laudably, unlike other

[579] Wuerth, ibid, at 9.

[580] See *Federal Court of Germany*, Decision of 4 July 2013 (Bundesgerichtshof Beschluss vom 4. Juli 2013), VII ZB 63/12.

[581] Judgement of April 24, 1985, Federal Tribunal, 82 I.L.R. 30. 31. (English versions).

[582] See Article 92(1) of the Federal Debt Collection and Bankruptcy Act of April 11, 1889 (Status January 1, 2016) the Federal Assembly of the Swiss Confederation, at https://www.global-regulation.com/translation/switzerland/2974432/rs-281.1-federal-law-of-april-11%252c-1889%252c-on-debt-collection-and-bankruptcy-%2528lp%2529.html. Accessed 12/09/20.

[583] See Swiss Federal Supreme Court Decision 5A_681/2011, dated 23 October 2011.

States' rules, the burden of proving the contrary use of the relevant asset shifts to the recalcitrant State *ab initio*. However, the Swiss law exclusively (not as a matter of CIL) requires a sufficient connection to the Swiss territory to apply the rule. Thus, a claim must have originated or been performed in Switzerland to satisfy this connection. As discussed below, a mere location of assets in Switzerland (or the existence of a claim based on an award rendered by an arbitral tribunal seated in Switzerland) would not create such a connection to allow execution measures.[584] Arguably, the Swiss rule secures even a higher level of protection against execution measures than other States' rules. Besides, by ratifying the UNSCI, Switzerland commits to providing immunity pursuant to Article 21 of the UNSCI when the Convention comes into force.[585]

Like Switzerland, France also departs from the presumption of immunity accorded to central bank assets. The position might be changed since the new Sapin No. II Law borrows significantly from the UNSCI. Besides, the new law is backed by more robust protection under Article L.153-1 of the Monetary and Financial Code, which states that "[a]ssets of whatever kind, including exchange-reserve assets, which foreign central banks or foreign monetary authorities hold or manage for their own account or on behalf of the foreign State(s) that govern them, cannot be attached."[586] By implication, the French rule resembles the general approach in state practice in offering more robust protection (near absolute immunity) to foreign States' assets in the central bank against any measures of constraint and execution in respect of satisfying arbitral judgements when voluntary compliance fails.

[584] Infra, Section 5.3.2.

[585] S Giroud and N Leroux, 'Switzerland ratifies the United Nations Convention on Jurisdictional Immunities of States and Their Property' (2010), IBA Int'l Litigation News, at 39-41.

[586] Article L.153-1 of the Monetary and Financial Code, Law no. 2019-486, 22 May 2019.

At this point, it is instructive to highlight that besides the sovereign purpose connotation or presumptive, some States, including Russia,[587] China,[588] and Argentina,[589] formulate an additional critical safeguard, namely, *reciprocity*. Although often obscured by a false appearance of technicality (discussed above), reciprocity finds explicit expression under the rules of engagement of the States mentioned. Russia's approach is general as it cuts into other States' assets aimed for execution.[590] China's State Immunity Act of 2005 though primarily modelled on the UNSCI in respect of immunity of central banks' assets, comes with a reciprocity rule attached. As "Article 3 of the 2005 Act provides […] countries that do not provide immunity to the Central Bank of the People's Republic of China and to the financial organs of the Special Administrative Regions"[591] Argentina formulates similar connotations as China. However, it provides absolute immunity from execution measures against central bank assets first on the condition of the principle of reciprocity.[592] This reciprocity approach seemingly removes other conditions/exceptions commonly recognised in state practice, including a waiver exception which is common to all State rules as grounds for allowing execution measures against States' assets in the special category, including assets located in central banks. To this end, since reciprocity (fear of retaliation) works best in taming and restraining States from taking unfavourable action against each other, we could conclude that execution measures instituted against foreign States' assets in central banks will be prohibited or frustrated, like how

[587] Article 4, and Article 16 lists States' assets subject to Article 4: Law on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation, signed on November 3, 2015, at http://en.kremlin.ru/acts/news/50624. Accessed 13/03/20.

[588] Articles 1 and 3, China Immunity Act of (CIA) 2005.

[589] Jurisdiction Immunity of Foreign Central Banks 2014 (Argentina Law No. 26,961).

[590] See (n 586).

[591] Wuerth, (n 551), Article 3, CIA [The Act also applies to Hong Kong and mainland China and the Macao Special Administrative Regions.] For more, see also, L Zhu, 'State Immunity from Measures of Constraints for the Property of Foreign Central Banks: The Chinese Perspective' (2007) 6(1) Chinese J. Int'l Law, at 67-81.

[592] Ibid, See also, AR Laborías, 'Immunity of Foreign Central Banks: A Comparison Between the Legislations in Argentina and China' (2016) Âmbito Jurídico at http://ambitouridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=17050. Accessed 15/05/20

Russia's threat of retaliation in *Yukos* awards led to legislative changes and termination of execution measures in many States.

In short, central banks' assets may be readily available assets to seize to satisfy investment arbitral awards against States when voluntary compliance fails. However, as shown, reciprocity considerations and the quest to attract investment from foreign central banks both contribute to the formulations of protection strong enough to frustrate such efforts, if not render them fruitless. It instructive to highlight that there are some exceptions purportedly devised to aid execution measures against this and related assets of States in the special category of protection, which shall be examined later.

4.2.2 Embassy and Consular Assets and Immunity from Execution Measures

Another popular target for claimants instituting measures of constraint in satisfaction arbitral judgment lies in diplomatic and consular missions' assets. Such assets can be movable (tangible or intangible) or immovable assets. Their popularity stems from the fact that there are functional foreign representative missions in almost all nations.[593] There is, however, a well-established principle and consistent state practice of protecting such assets, particularly their bank accounts, against possible measures of execution. The underlying ideology for such protection is "protecting the uninterrupted functioning" of the missions.[594] Accordingly, instituting measures of constraint against the missions' assets will interfere with and hinder the effective discharge of their sovereign diplomatic functions and engagements. Therefore, like the other foreign States' assets, immunity applies *ab initio* presumptively under relevant immunity instruments, including the ECSI, UNSCI, and domestic primary immunity rules.

[593] For general information of diplomatic missions abroad see, E Neumayer, 'Distance, Power and Ideology: Diplomatic Representation in a World of Nation-States' (2008) 40(2) Area, at 228-236 [Holding that, while not all countries have diplomatic "representation in all other countries of the world […] one third of all possible directed country pairs show evidence of diplomatic representation"]

[594] The Preamble to the Vienna Convention on Consular Relations (VCDR) of 1961 provides that provision of protection for such assets is "to ensure the efficient performance of the functions of diplomatic missions as representing states." April 18, 1961 [1972], 23 U.S.T. 3227, T.I.A.S. No. 7502 (entered into force for the US Dec. 13, 1972); See also Reinisch, (n 350), 827.

The Vienna Convention of Diplomatic Relation (VCDR) of 1961[595] and the Vienna Convention on Consular Relations (VCCR) of 1963[596] formulate a *lex specialis* regime providing further reinforcement for their engagement.

Of course, Article 19 of the UNCSI allows execution measures against all foreign States' assets if they are "in use or intended for use for commercial purpose." Nevertheless, Article 21 (1)(a) goes further to expressly exclude embassy and consular assets from the ambit of Article 19 and its general connotations, thus setting forth a presumption of sovereign use/purpose:

> property including any bank account, which is used or intended for use for the purposes 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 [. . .] shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes.[597]

Similar in connotation to domestic primary immunity rules (below), courts have increasingly interpreted Article 21 (1)(a) in conjunction with rules under the VCDR and VCCR. The VCDR prohibits execution measures against States' assets on the "premises of the mission"[598] so as "to ensure the efficient performance of the functions of diplomatic missions as representing States."[599] The Convention further obligates the "receiving state [to] accord full facilities for the performance of the functions of the mission."[600] The VCCR formulates similar rules, with emphasis on the "consular premises, their

[595] April 24, 1963 [1970], 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261 (entered into force for the US December 24, 1969).

[596] 24 April 1963, (entered into force on 19 March 1967). United Nations, Treaty Series, vo1. 596, at 261, at https://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf. Accessed 14/07/2019.

[597] Article 21 (1)(a), UNSCI.

[598] Article 22, VCDR of 1961.

[599] The Preamble, *Ibid*.

[600] Article 25, *Ibid*.

furnishings, the property of the consular post and its means of transport".[601] Under these *lex specialis* formulations and their respective domestic primary immunity rules, courts have found a commanding obligation to shield embassy and consular assets, especially their bank accounts, from possible measures of constraints and execution in aid of satisfying arbitral awards when voluntary compliance fails.

Reliance on the VCDR and VCCR has been contentious, particularly given that the Conventions only mentioned assets on the premises of the mission categorically failing to mention bank accounts held in commercial banks.[602] Indeed, Ryngaert contends that "immunity from execution should only be governed by relevant immunity law, the UNSCI, at least in part, as codified by Article 19 of the UNSCI."[603] However, will the UNSCI better aid execution, particularly regarding the missions' bank accounts, as put forth? This is doubtful, at least theoretically. Article 21(1)(a) of the UNSCI, in categorical terms, excludes "property

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[601] Article 31, VCCR captioned, 'Inviolability of the Consular premises', provides:

(1) Consular premises shall be inviolable to the extent provided in this article.

(2) The authorities of the receiving State shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending State. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

(3) Subject to the provisions of paragraph 2 of this article, the receiving State is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

(4) The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending State.

[602] Article 22(3), VCDR states:

> "the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." [Clearly embassy accounts held at a private bank are not located on the premises of the mission].

See C Ryngaert, 'Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors' (2013), 26 Leiden J. of Int'l l Law 73; P-T Stoll, 'State Immunity', Max Planck Encyclopedia of International Law (online), para. 63 cited in Ryngaert, ibid, [arguing against Articles 30(2) of the 1961 VCDR and Article 31(4) of the 1963 VCCR as legal bases for the attachment of bank accounts).

[603] Ryngaert, *ibid*, at 76 -77.

including any bank account" from execution measures upholding them presumptively 'in use or intended for use […] for government non-commercial purposes." It also adds, in categorical terms, under Article 3 that the principles enshrined in the Convention are without prejudice to other rights to "immunities enjoyed by a state under international law in relation to the exercise of the functions of […] diplomatic law." Thus, even where the UNSCI's presumptive "in use or intended for sovereign purposes" bar is negated by a solid proof of commercial purpose/use, which is often a condition preceding the presumption, municipal courts can, in reliance on Article 3, inevitably consider the VCDR and VCCR to block execution measures. Indeed, the predominant state practice or rules follow the relevant articles of the UNSCI, including connotations of Articles 3 and 21(1)(a), taking into account the VCDR and VCCR rules.

In this regard, like foreign States' assets in central banks, embassy and consular missions' assets are accorded a presumption of sovereign purpose ("in use or intended for sovereign purposes"), with an accompanying duty for claimants to prove their contrary commercial purpose/use to allow execution measures. Admittedly, success is rare, as hardly any unwilling recalcitrant State will leave commercial purpose assets, particularly bank accounts, in plain sight for possible execution measures. Further complication looms where an account for meeting the day-to-day expenditure, e.g. paying goods or services (commercial purpose), is the same account drawn upon to meet other expenditures relative to missions' sovereign functions.[604] The predominant state practice shows that the balance of such accounts to the credit of the foreign State is unattachable due to its sovereign non-commercial character.[605] In other words, an account with a dual purpose is considered one and indivisible, and cannot be subject to execution measures in satisfaction of awards.

[604] Refers to an account kept for meeting the day-to-day expenditure e.g., paying goods or services is the same account drawn upon to meet other expenditure relative to missions' sovereign functions.

[605] Ryngaert, *ibid* at 59. Ideally, earmarking the account's relevant parts in order of 'sovereign purpose' and 'commercial purpose' will help determine scope and aid execution. Alternatively, provision of waiver of immunity from execution may suffice, arguably. However, with States becoming increasingly indebted to foreign investors in billions of dollars in judgements spiking a surge in recalcitrant behaviours, these options are improbable.

The UK SIA fosters the above approach by the combined effects of sections 3 (3), 13(4), (5) and (17). In *Alcom Ltd v Republic of Colombia,* the Colombian embassy's current bank account in a London bank was held unattachable because the account was not "solely in use for commercial purposes."[606] Here, although the word 'solely' is not in the relevant provisions of the UK SIA, it was 'imported' so as to give effect to wider state practice. The provisions of the UK SIA, as Lord Diplock expressly highlighted in *Alcom*, "fall to be construed [in the light of] principles of public international law as are generally recognised by the family of nations."[607] Consequently, in line with the condition to prove the relevant assets' commercial purpose, section 13(5) of the UK SIA provides that a certificate by the foreign Head of Mission that "property is not in use or intended for use by or on behalf of the state for commercial purposes" is sufficient evidence to bar execution measures. Therefore, in *Alcom,* a certificate by the Head of Mission was conclusive evidence to affirm the assets' sovereign purpose/use and hence execution was refused in accordance with section 13(4) of the UK SIA. A similar implication was followed in *SerVaas Incorporated v Rafidain Bank and Others*.[608] In this case, although the relevant assets had no current use, a historical track to commercial use was insufficient to allow execution measures because the Head of Mission of the Embassy of Iraq in London's certification (to the intended future sovereign use of the relevant assets to pay the dividends to the Development Fund for Iraq, the DFI) was sufficient to uphold immunity in accordance with Section 13(5) of the UK SIA.[609]

The US FSIA aligns with the UNSCI and UK SIA approach where section 1609 provides that, except as provided by sections 1610 and 1611, the foreign State shall be immune from execution measures in respect of their property in the United States.[610] Affirming the presumption in *Rubin v The Islamic Republic*

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[606] *Alcom Ltd v Republic of Colombia*: HL 1984, 2 Lloyds Rep 24, [1984] 2 All ER 6 at 604.

[607] Ibid, at 597.

[608] *SerVaas Incorporated v Rafidain Bank and Others*, [2011] EWCA Civ 1256 and [2012] UKSC 40. [Although this case is not in connection with mission assets (bank account) it provides a good example to highlight extent to which States are protected in execution measures aimed at their assets].

[609] Ibid.

[610] See US FSIA, sections 1609, 1610 and 1611.

of Iran, the Court of Appeal adds conditions for rebuttal.[611] In this respect, like the UK SIA, the 'whole' of the relevant account is looked at where commercial use of a portion will not deprive the whole account of its immunity.[612] Equally, the Head of Mission can simply produce a certificate where contention arises regarding the relevant assets' purpose.[613] France and Germany adopted a similar approach. The recent French Law primarily mirrors the UNSCI.[614] In *Sedelmayer*, the German Court refused execution against the account of the Russian Embassy because it serves a sovereign purpose despite also being used for a commercial purpose.[615] Here, the Head of Mission's statement sufficed to block execution measures.[616] It is submitted that the rebuttal given to the claimant is ineffective and serves no purpose; it is practically impossible to discharge and works for the greater good of the States.

Despite this predominant approach, it is important to highlight here that a contrary approach exists and does not contravene CIL. Indeed, as argued by Ryngaert, by enshrining in UNSCI the predominant approach, the ILC recognises that grey areas exist in the law of immunity in "which opinions and existing case law and, indeed, legislations still vary."[617] In such instances, as Judge Gaja emphasised, a State "may take different positions without necessarily departing from what is required by general international law."[618] Attachment of mission bank accounts arguably constitutes such a grey area and, by implication, other

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[611] *Rubin v Islamic Republic of Iran*,637 F.3d 783 (7th Cir. 2011) [A personal injury case]

[612] *Walker Int'l Holdings Ltd. v Republic of Congo*, 395 F.3d 229, 233–34 (5th Cir. 2004); *Liberian E Timber Corp. v Government of the Republic of Liberia*, 659 F. Supp. 606, 610 (D.D.C. 1987); See also *Peterson v Islamic Republic of Iran*, 627 F.3d 1117, 1125 (9th Cir. 2010); For more on the US FSIA, see The Foreign Sovereign Immunities Act a Guide for Judges Second Edition, (Federal Judicial Centre 2018) available at

https://www.fjc.gov/sites/default/files/materials/41/FSIA_Guide_2d_ed_2018.pdf accessed on 03/08/2020.

[613] Ibid.

[614] Sapin No. II Law at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000029593949/2014-10-15. Accessed 12/02/20.

[615] German Federal Supreme Court, at 4.

[616] Ibid.

[617] See International Law Commission (ILC), Introductory remarks, 1991 YILC, vol. II (2), at 23; see also, Ryngaert, (n 586) at 77.

[618] ICJ, *Jurisdictional Immunities of the State* (Germany v Italy), Judgment of 3 February 2012, dissenting opinion of Gaja, J., para. 9.

approaches can be entertained without breaching CIL. Therefore, although an avid follower of the predominant approach traditionally,[619] the Belgian Court of Appeal, in the recent case of *M v Democratic Republic of the Congo,*[620] took a contrary stance by denying Congo complete immunity by placing on the State the partial burden of proving the non-commercial use of the relevant account.[621] Demanding that Congo bears a partial burden in proving the account's purpose, the Court exemplifies that taking a contrary approach is possible (does not contravene CIL) and that it was just and fair to do in favour of the rule of law.

Perhaps the above development could serve to encourage other courts to act in line and possibly work towards custom development. In this respect, the degree of evidence required of the State to discharge the burden is a determinant of effectiveness. It is submitted that more robust evidence, for example requesting a statement of account showing activity, will serve the purpose. However, as Denza suggests, such *may* be considered inadmissible under VCDR.[622] Article 24 of the VCDR stipulates that "[t]he archives and documents of the mission shall be inviolable at any time."[623] Further, Article 31 (2) of the same Convention provides that "[a] diplomatic agent is not obliged to give evidence as a witness."[624] A combined effect of

[619] See for example cases like: *Etat d'Irak v Vinci Constructions Grands Projets SA de droit franc¸ais, Cour d'appel*, Brussels, 4 October 2002, JT (2003) 318; *Re´ publique du Zai¨re vd'Hoop et crts, Cour d'appel*, Brussels, 8 October 1996, JT (1997) 100, cited in Rengaert, at 77 -79 [Rulings in line with the current predominant. See also cases where contrary approach was taken by lower courts but were repealed by the higher courts; *Zaire v d'Hoop and Another*, Tribunal civil, Brussels, 9March 1995, JT (1995) 567, 106 ILR 294; *Irak v SADumez*, Tribunal civil, Brussels, 27 February 1995, JT (1995) 565; 106 ILR 284, at 290.

[620] *M v The Democratic Republic of Congo*, Fortis Bank SA, The State of Belgium and the French Community, Appeal Judgment, 2008/AR/2441; Oxford Reports ILDC 1623 (BE 2010), 26 April 2010, cited in Ryngaert, ibid.

[621] The favourable ruling was procured by reference to Article 1 of the First Protocol (Peaceful enjoyment of Property): First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (20 March 1952), 213 UNTS 262. And Article 6 (Fair Trial) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950), 213 UNTS 222; 312 ETS 5, cited in Ryngaert, ibid.

[622] E Denza, *Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations* (3rd Ed OUP, UK 2007), at 156-157.

[623] Article 24 of the VCDR.

[624] Ibid, Article 31 (2).

these provisions could foster further restriction even when a court is willing to go against the predominant approach.

In sum, although embassy assets, particularly bank accounts, are foreign States' assets readily available to levy execution against when voluntary compliance fails, the protection provided by *lex specialis* and related primary rules of immunity make execution against them difficult, if not impossible. Lack of security that creditors can have their awards effectively recoup when voluntary compliance fails to undermine the whole ISA process. As shall be seen later, like the States' assets in the same category, state practice entertains some exceptions, purportedly formulated in favour of execution measures. Before engaging the exceptions, it is essential to look at military, cultural, and heritage assets. They form part of the State's assets in the special category to which additional protection is provided beyond that generally accorded.

4.2.3 Military and Cultural Assets and Immunity from Execution Measures

States' military and cultural assets appear to be two separate categories of assets without much in common. Legally, however, they formulate together for one specific purpose: both assets generally enjoy 'absolute' immunity from execution measures.[625] Like the assets identified earlier, targeting these assets for execution measures when voluntary compliance fails can be considered difficult, if not impossible, as they enjoy an enormous measure of protection under general immunity rules and *lex specialis* regimes. The protections are formulated primarily because of the vital role these assets play within the State and in the lives of citizens.[626] Nevertheless, award creditors have increasingly attempted to seize these assets, including State armament aircraft and warships, as well as state-owned artworks loaned and exhibited abroad, in satisfaction of investment arbitration awards.[627] The overarching protection provisions against

[625] M Happold, 'Immunity from Execution of Military and Cultural Property' in Tom Ruys et al., (eds), *Cambridge Handbook of Immunities and International Law* (CUP 2020), at 307 – 326.

[626] Ibid.

[627] Ibid.

execution measures can be found under the ECSI,[628] and UNSCI[629] and under some *lex specialis* and domestic primary rules.

UNSCI Article 21(1)(b) sets forth a presumption of immunity from measures of constraint and execution by explicitly stating that "property of a military character or used or intended for use in the performance of military function" is "property specifically in use or intended for use for by the state for *other than government non-commercial purpose*."[630] Article 21(1)(d) and (e) also presumed immunity by explicitly stating that "property forming part of the cultural heritage of the State"[631] and "property forming part of an exhibition of objects of scientific, cultural or historical interest"[632] is "property specifically in use or intended for use for by the state for *other than government non-commercial purpose*."[633] It will be reminisced, however, that in general, Article 19 of the UNSCI makes execution measures against States' assets possible under three exceptions. At least, as the ICJ, in *Jurisdictional Immunity* case reiterates, one of the conditions must be satisfied for the purpose: that "the property in question [. . .] [is] in use for activity not pursuing government non-commercial purposes [Article 19(a)], or that the state has expressly consented to the taking of a measure of constraint [Article 19(b)] or that that state has allocated the property in question for the satisfaction of judicial claim [19(c))]".[634] By the very presumption of immunity set forth under Article 21(1)(b), (d) and (e) of the UNSCI, execution against military and cultural assets of foreign States are automatically prohibited except where at least one of the Article 19 conditions is present. Similar

[628] Article 23 of the ECSI

[629] Article 21(1) (b), (d) and (e) of the UNSCI.

[630] Ibid, Article 21 (1) (b). Some domestic primary immunity rules formulate similar outcome, for example, section 1611(b)(2) of the US FSIA.

[631] Ibid, Article 21 (1) (d) and (e).

[632] Ibid.

[633] Ibid; Domestic primary immunity rules formulate similar outcome, for example, section 1611(b)(2) of the US FSIA; section.

[634] *Jurisdictional Immunity* case (n 444), para. 18 [emphasis added].

connotations can found under primary immunity rules of States.[635] Assuming Article 21 is non-existent (or simply impleaded because it has been (im)possible to satisfy the conditions under Article 19 (a) and (b) (discussed later)), how likely is it that both military and cultural assets, given their peculiar nature, would be considered assets "in use or intended for use for commercial purpose" against which execution measures pursuant to Article 19(c) can be taken.

By their very peculiar nature, military assets will clearly be considered assets specially "in use or intended for use for government non-commercial purpose." Indeed, the *Schooner Exchange* and *Parlement Belge* cases provide good examples; both vessels were considered 'assets of the armed forces' of the relevant foreign States and, therefore, were absolutely immune from execution measures.[636] The latter vessel even implicates commercial activity/purpose being a public vessel for delivering mail packets and carrying merchandise and passengers.[637] Nevertheless, the English Court ruled against its attachment in satisfaction action of judicial judgement against the State having refused assuming jurisdiction over what it termed "public property of any [. . .] destined for its public use".[638] Of course, these cases date to the era of absolute immunity, where immunity from execution was subsumed in jurisdictional immunity bars. Under the restrictive immunity approach, however, the practice of taking measures of constraints and execution against warships and related military assets of foreign States remains relatively unscathed.

Indeed, aside from its consideration as an asset except "in use or intended for use for government non-commercial purpose" under Article 21(1)(b) of the UNSCI, an additional limitation is created by the *lex specialis* regime, which is permissible under Article 3(3) of the UNSCI.[639] Conventions like the 1926

[635] See for example, s. 1611 of the US FSIA; s. 13 of the UKSIA and other State immunity rules fashioned after the it; South Africa SIA 1981, Canadian SIA 1985.

[636] The *Schooner Exchange v McFadden*, 24 Feb. 1812, 11 US 116 (1812); The *Parlement Belge*, (1880) LR 5 PD 197. See case brief in Chapter 3 section 3.

[637] *Parlement Belge*, ibid, at 203.

[638] Ibid, at 217.

[639] Article 3(3) of the UNSCI States:

> "The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State."

International Convention for the *Unification of Certain Rules Relating to the Immunity of State-Owned Vessels*,[640] 1958 *Geneva Convention on the High Seas*,[641] and 1982 *United Nations Convention of the Law of the Sea* (UNCLOS)[642] generally bar execution against all military apparatus, including warships.[643] For example, Article 32 of the UNCLOS notes that "nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."[644] As Oxman explains, Article 32 preserves the immunities of warships and other public vessels of States regardless of their purpose.[645] This not any different from other governmental or military aircrafts and space objects. In fact, Article 3(3) of the UNSCI does not make reference to such States' assets, meaning they are removed from

By not making reference to military aircraft and space objects, this Article appears to remove such assets from the ambit of Article 19 of the UNCSI. However, a number earlier *lex specialis* treaty regimes provide the relevant protection for governmental aircrafts and state practice shows that, such assets, remains immune from execution measures.

[640] April 10th, 1926, in force February 8th, 1937, LNTS 198 [Hereafter, The Brussels Convention], specifically Article 3. See Happold (n 624), at 311 [noting, "this Convention was adopted specifically to address the issue that has risen in *Parlement Belge*: the use of State own or operated ship for commercial purposes. But although the Convention was first treaty to derogate from the States' absolute immunity from execution, it provided that warship and other public vessels retained their immunity so long as they were employed "exclusively [. . .] on Government and non-commercial service'."

[641] See Articles 8(1) and 9 covers similar connotation to Article 3 of the Brussel Convention, ibid. April 29,1958, in force September 30, 1962, 540 UNTS 11 [Hereafter, The Geneva Convention].

[642] See Articles 95 – 96, also echoing Article 3 of the Brussel Convention. December 10, 1982, in force November 11, 1994, 1833 UNTS 329 [Hereafter, The UNCLOS].

[643] Article 3 of UNCLOAS defines warship:

> For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline.

[644] UNCLOS, *ibid*.

[645] B Oxman, "The Regime of Warship under the United Nations Convention on the Law of the Seas" (1984) *24 VJIL* 809, 816 – 18 in Happold (n 624), at 312 [noting that, "given its location in section 3 of the Convention innocent passage in the territorial sea, together with the preservation of exclusive flag state jurisdictions of warship under high seas and article 95, Article 32 was general considered to preserve the immunities of warships and other public vessel while in other States' territorial sea."]. It is said that some of these domestic immunity legislations and decisional rules provides more protection going beyond what is provided under CIL.

the ambit of Article 19 of the UNCSI. However, a number of earlier *lex specialis* treaty regimes[646] provide the relevant protection for governmental aircrafts, and state practice shows that, such assets, remains immune from execution measures.

Despite such limitations, some attempts to execute against military assets, most commonly aircraft and warships, are evidenced, albeit unsuccessful. In 2012, the Argentinian warship *ARA Liberdad* docked in Tema, Ghana, and was targeted by creditor NML Capital Investment to satisfy a judgment issued by the New York District Court.[647] A local judge granted NML seizure of the vessel in what was construed as a valid waiver of immunity from execution by Argentina (Article 19(a) discussed below).[648] A release order was subsequently issued by the International Tribunal of the Law of Sea, and the vessel's immunity on the grounds of sovereign use was ultimately affirmed.[649] Earlier cases include the seizure and subsequent release of the Argentinian presidential aeroplane in the US by creditors.[650] The British Royal Navy military aircraft is also another typical example where a seizure order was subsequently followed by an 'order to release' by the Spanish Central Maritime Court.[651] In these attempts, States' primary immunity rules were applied in conjunction with rules under the *lex specialis* regime to provide more robust protection against execution. In this regard, it appears that executing against military assets will be difficult if not possible, even where the relevant exception(s) appears present.

Like military assets, cultural and heritage assets also enjoy special protection by presumptive immunity from execution pursuant to Articles 21(1)(d), (e) and 19 of the UNSCI, with the latter provision

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[646] Paris Convention relating to the Regulation of Aerial Navigation, 13th Oct. 1919, 122 BFSP 931; Rome Convention for the Unification of Certain Rules relating to Precautionary Attachments of Aircraft, 29th May 1933, entered into enforce on 12 January 1937, 192 LNTS, cited in Happold, ibid, at 312.

[647] *NML Capital Ltd. v Argentine Republic* not published (N.Y.S.D. 2006).

[648] *NML Capital Limited v Argentine Republic*, Accra HC Comm. Div., October 11, 2012, suit No RPC/343/12.

[649] *ARA Liberdad* (*Argentine Republic v Ghana*), ITLOF, Case No. 20 Order for prescription of provisional measures, (Dec.15), in Happold (n 624).

[650] *Colella v Argentine Republic*, May 29th, 2007, 2007 WL 1545204 (N.D.Cal. 2007) [claim not investment related].

[651] Argentina presidential aircraft was also declared immune from execution measures instituted against it in US. M Happold, (n 624), at 308.

proving a general exception to their executability. Similar rules are found in many primary domestic immunity rules.[652] Although States have collected and displayed their artistic and cultural pieces for centuries for prestigious purposes, in the past decades (earliest evidence dates 1930's) these have also become objects sourced for revenues—loaned and exhibited in foreign museums and art centres for fees and royalties—which is a commercial activity within the meaning of Article 19 (c) of the UNSCI and the related domestic immunity rules. Indeed, the commerciality of the act of loaning and exhibiting such objects/assets was affirmed in US District Court in the *Malewicz v City of Amsterdam*, a case involving attachment proceedings against some 14 artworks on loan to the Guggenheim Museum in the US.[653] The act's commercial manner would mean that execution measures can be instituted in accordance with the commercial activity/purpose exception.

However, that is not the case, at least as has been shown in *Malewicz.* It will be reminisced, however, that the US FSIA prohibits reference to the purpose instead of the nature of the act.[654] In this case commerciality was determined by reference to both the nature and purpose of the act. Therefore, while the relevant acts were deemed commercial by nature, they were found to be for "purely educational and cultural purposes" and therefore immune from execution.[655] Determining the commerciality of a State's act by reference to both nature and purpose in this regard is in synch with the predominant state practice as captured by Article 2(2) of the UNSCI.[656] Although loaning and exhibiting cultural and historical artworks are commercial activities, the purpose underlying such activities will determine their attachability.

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[652] Ibid, at 316 – 321.

[653] *Malewicz v City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005).

[654] The US FSIA, s. 1603(d).

[655] *Malewicz* (n 638), at 314.

[656] The commerciality under UNSCI means:

> (i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

See Chapter 3 for more on this; Also see generally, Yang, (n 25), at 87 – 98.

Considering that sovereign engagements always have some justifiable underlying sovereign purpose, resorting to the acts' nature and purpose will ultimately result in the grant of absolute immunity. In *NOGA v Russia*, an attempt to seize some 54 artworks owned by Russia exhibited (sourced for revenue) in a Museum in Martigny, Switzerland, in satisfaction of an investment award rendered against the State failed. Against its commercial nature, the Court also recognises that "[i]n accordance with Public international law, the cultural property of a state forms part of the public matrimony, which is, on principle, not subject to seizure."[657] A similar ruling occurred at an enforcement proceeding against the Czech Republic's artworks, exhibited at Belvedere Gallery in Vienna, Austria.[658]

In recent times, the belt and braces approach has been adopted to strengthen further the protections offered to such assets.[659] Indeed, some states have taken legislative interventions through special anti-seizure laws, creating formidable structures against their attachment.[660] Such interventions operate so that prior governmental approval is required. Once the approval is granted, protection from seizures becomes effected beyond the protection offered under CIL. The US *Immunity from Judicial Seizure Act of 1965*[661] and the more recent *Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016*[662] are among such purposefully created instruments to ensure better protection for foreign States' artworks loaned and exhibited in the US. The UK, Austria, France, Germany, Belgium, Switzerland, and many more States have taken such legislative intervention.[663] At the regional level, instruments like the Council of European

[657] Switzerland, Department of Culture.

[658] District Court (Vienna), *Diag Human v. Czech Republic*, Case No. 72 E 1855/11 z-20, 21 June 2011. [Note that, the CIL nature applies even when expressly adopts it or not].

[659] Happold, (n 624).

[660] For details see A Gattini, 'The International Customary Law Nature of Immunity from Measures of Constraint for State Cultural Property on Loan' In *International Law between Universalism and Fragmentation*, (Brill Nijhoff, 2008), at 421-440; See also, Happold, ibid, at 318.

[661] See https://www.govinfo.gov/app/details/USCODE-2011-title22/USCODE-2011-title22-chap33-sec2459/context. Accessed at 09/09/20.

[662] See https://www.congress.gov/bill/114th-congress/house-bill/6477. Accessed at 09/09/20.

[663] See in the UK context, LM Kaye, 'Art Loans and Immunity from Seizure in the United States and the United Kingdom' (2010) *17 Int'l Journal of Cultural Property* 335. But see generally, Happold, (n 624), at 311 – 320.

Declaration on Jurisdiction Immunities of State-Owned Cultural Property (JISCP)[664] have also been put in place to ensure maximum protection of these assets while ensuring that rules are applied in accordance with CIL practices across the European Union.[665] These legislative interventions seemingly create a *lex specialis* regime for protecting these assets from being targeted for measures of constraint and execution. In this regard, it can be argued that targeting cultural and heritage artwork loaned and exhibited abroad for satisfying investment arbitral awards will be difficult, if not impossible.

Again, like the rest of the specially protected assets under Article 21 of the UNSCI and related primary immunity rules, some exceptions apply aside from the general commerciality exception under Article 19(c)—namely, a waiver of immunity from execution or allocation of such assets by the relevant State purposefully for satisfying awards, Article 19 (a) and 19 (b), respectively. Next, the discussion turns to how the exceptions apply in practice and their effectiveness in aiding execution measures against the recalcitrant State's assets when voluntary compliance fails.

4.3 Alternative Conditions for Execution Measures: Waiver and Allocated Assets

4.3.1 Allocated/Earmarked Assets as A Waiver

Generally, two exceptions can be seen in most national immunity laws and UNSCI regarding the circumstances under which execution against foreign assets can be allowed, aside from the general commercial activity exception. Article 19 of the UNSCI expressly provides that "unless and except to the extent that" the relevant State "*has expressly consented to the taking of such measures*" or "has *allocated* or *earmarked* property for the satisfaction of the claim", post-judgement attachment can be taken against its assets.[666] It also states that the protection offered to the specific categories of assets under Article 21 (a)

[664] 'Declaration on Declaration on Jurisdiction Immunities of State-Owned Cultural Property', March 23, 2017 at https://www.coe.int/en/web/cahdi/news-cahdi/-/asset_publisher/FL6bNvghtkKV/content/declaration-on-jurisdictional-immunities-of-state-owned-cultural-property?_101_INSTANCE_FL6bNvghtkKV_viewMode=view/. Accessed 07/09/20.

[665] Happold, (n 624).

[666] Article 19 (a) and (b) UNSCI; See Article 18 for pre-judgment attachment.

to (d) is "without prejudice to […] article 19"' of the Convention. This means that immunity will not apply where a State has *allocated/earmarked* or waived immunity to satisfy judicial judgements.

Most national immunity rules follow the UNSCI approach even if they are not apparent at face value. For example, the US FSIA under section 1610 (a)(1) provides that a State "shall not be immune from attachment […] or from execution if the foreign State has waived its immunity from attachment […] either *explicitly* or by *implication*."[667] Although the relevant section does not use either the word 'allocate' or 'earmark', the phrase 'by implication' is akin to such, even though it implies a waiver of immunity from execution in respect of States' assets in use for commercial purposes, in accordance with section 1610(a)(1).[668] The UK SIA, albeit requiring an explicit waiver, neither contains 'allocate/earmark' as found under UNSCI nor fosters an implicit waiver as contained in US FSIA. However, the dictum of Lord Roskill in the *Alcom* case indicates that the phrase "for the time being in use or intended for use for commercial purposes" under section 13(4) of the UK SIA is akin to allocating or earmarking the asset(s) for the relevant purpose.[669] Although the new French law facilitates the same approach under the UNSCI, the Court of Cassation in the case of *Eurodif* seemingly followed the United Kingdom's and the United States' reasoning.[670] Thus, it engages both implicit and implied waiver connotations, with the implication that an implicit waiver could amount to an asset allocation.

While these connotations seemingly blur the line between the two types of exceptions, one could argue that *allocating* or *earmarking* an asset(s) is a kind of grant of consent in favour of attachment, which would otherwise be an unlawful act under international as far as the rules on immunity from measures of constraint and execution are concerned. Indeed, the Swiss rule allows execution against foreign States'

[667] US FSIA, Article 1610(a)(1).

[668] O Gerlich, (n 72).

[669] *Alcom v Colombia*, 1984] 2 Lloyds Rep 24, [1984] 2 All ER 6, Lord Roskill dictum.

[670] *Republic of Iran v Eurodif, French Cour de Cassation* (14 March 1984), 77 ILR 513, cited in Reinisch, (n 350).

assets that are not *specifically* earmarked or allocated for sovereign purposes.[671] Thus, a lack of indicative sovereign use of State asset(s) would be taken to mean consent to execute, and thus, a waiver of immunity from execution measures. Should this reasoning hold valid, then apart from the explicit waiver requirements, it could be implied that earmarking or allocating assets is a waiver of immunity from execution measures, albeit an implicit one. On this note, although the general tenor remains persistent, the manner in which the waiver is engaged in actual attachment proceedings becomes relevant in determining its effectiveness as an exception.

4.3.2 Waiver: Scope and Effectiveness in Aiding Execution Measures

A waiver can either be granted before, during, or after the commencement of an investment and related dispute.[672] Although the question of who is eligible to grant it rarely becomes contentious, a 2017 case shows that an established authority is necessary for identifying the validity of a waiver.[673] In this respect, an established authority is the State or competent representative of the State in order of the relevant State's internal rules. Alternatively, by making reference to general rules of international law governing States' *will* where the internal rules of the State are unavailable or unclear.[674] In this case, heads of State, heads of departments, and ministers of foreign affairs possess the necessary authority to sanction a valid waiver.[675] In this connection, as noted above, the US FSIA requires an explicit or implicit waiver from

[671] See Swiss Federal Supreme Court Decision 5A_681/2011, dated 23 October 2011.

[672] C Amirfar, 'Waivers of Jurisdictional Immunity' in T Ruy et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2018), at 172

[673] The Netherlands, Court of Appeal ('s-Hertogenbosch), *Supreme site Services GmbH and Other v Supreme HQs Allied Powers Europe (SHAPE)*, Case No. 200.217.388/01, June 27th, 2017.

[674] In most instances, these will be the options as international law and instruments regulating immunity of States, do not usually regulate the issues of authority to waive. See F Dopagne, 'Waivers of Immunity from Execution' in Tom Ruys et al., (eds.), *Cambridge Handbook of Immunities and International Law* (CUP 2019), at 391-92.

[675] Article 7(2)(a) of the Vienna Convention on the Law of Treaties 1969. See also ILC, Report of the 58th Session (May 1 – June 9th and July 3rd – August 11th, 2006) – Guiding Principles Applicable to Unilateral Declaration States Capable of Creating Obligations Adopted by the Commission' UN Doc. A/61/10, Art. 4.

execution.[676] A similar approach is found under the Canada SIA.[677] Although Australia SIA provides a waiver without specifying whether it should be explicit or implicit, the legislative intent demands a written agreement accordingly.[678] The UK SIA requires an explicit waiver (i.e. 'written consent of the State concerned') for the purpose,[679] which is similar to the stipulations under both ESCI and the UNSCI, notwithstanding these provisos also acknowledge implicit waiver connotations.[680]

Under such provisions, a waiver of immunity from execution (actual attachment) must be *express/explicit* and specific to be valid. Indeed, it must be in writing, clear, complete, free from any unambiguity, and it must manifestly reflect the intent of the giving State.[681] The stringent nature of construing such a waiver finds expression in state practice. Noting whether a text of language constitutes a valid waiver from actual execution measures under the US FSIA, the District Court in *Universal Trading and Investment Co v Bureau for Representing Ukrainian Interest in International and Foreign Courts* provides that "[a] waiver must be 'unequivocally expressed' and 'must be strictly construed in favour of the sovereign,' with ambiguities construed against waiver."[682] It further adds, "[a] foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so."[683] To the

[676] US FSIA, Sections 1610(a)(1) and (b)(1); but requires explicit waiver for prejudgment attachment - s. 1610(d)(1) and for execution on foreign central bank property - s. 1611(b)(1).

[677] Canada SIA, Section 12(1)(a), but demands 'consent in writing' in respect of pre-judgment attachment, at Section 11(1).

[678] Australia SIA, 31(1).

[679] UK SIA, Section 13(3); similar to states with immunity law fashioned after the UK [e.g., South Africa FSIA Section 14(2), Pakistan SIO Section 14(3); Singapore SIA Section 15(5) etc.]

[680] Article 23 of the ESCI use the words "[…] expressly consented thereto in writing in any particular case"; Articles 19(a) which state "[…] expressly consented to the taking of such measures." (n 37). See also Articles 18(a). See Dopagne (n 674), at 393 and Yang, (n 25), at 390 - 92, for array of domestic immunity legislations with similar "explicit/Express" connotations.

[681] Dopagne, ibid; Yang, ibid.

[682] US, September 19th, 2012, 898 F.Supp.2d 301 (D. Mass. 2012), at 310 [citing in reference *in re Rivera Torres*, 432 F.3d 20, 23–24 (1st Cir.2005); *Worldwide Minerals, Ltd. v Republic of Kazakhstan*, 296 F.3d 1154, at 1161–62 (D.C.Cir.2002)]. Affirmed in US Court of Appeals, *Universal Trading and Investment Co v Bureau for Representing Ukrainian Interest in International and Foreign Courts*, August 12th, 2013, 727 F.3d 10 (1st Cir. 2013).

[683] Ibid.

French courts, a waiver must be specific and expressed unequivocally (*certaine, expresse, et non equivoque*) to be valid.[684] In *GIE La Reunion Aerienne v Libyan Arab Jamahiriya*, a waiver (previously deemed specific and unequivocally expressed) was ruled ambiguous mainly because the State failed to revisit the waiver in an appeal brief later submitted in respect of the same case.[685] Given that this ruling was reached when the French jurisprudence recognised implicit waiver arguments (e.g. the *Creighton* decision of 2000),[686] the position gains yet more strength with the *Commissions Import Export SA (Commisimpex) v Republic of Congo* decision of 2015[687] and the coming into force of the new Sapin No. II Law,[688] which follows the UNSCI approach for an express waiver requirement.

In this context, demand for *specificity* becomes even more pronounced in respect of a mixed purpose account or assets within the special category under Article 21, namely, the central bank, embassy, military, and cultural assets. As the ILC commentary on the Draft Articles of the UNSCI emphasised, a waiver without specific mention of the relevant asset(s) will not suffice to vitiate immunity under Article 21.[689] In other words, a waiver that targets assets not 'exclusively in use for commercial purpose' must be expressed clearly and with specificity that relates to the relevant assets to suffice for actual execution. Even so, the extra protection offered under *lex specialis* regimes can apply to frustrate execution. For example, in *NOGA I,* an express waiver that extends to Russian Federation Embassy bank accounts was held

[684] See Tribunal de Grante Instace, September 12th, 1978, [1979] Clunet 857, 65 ILR 75, 77; See also Court of Appeal (Paris), *Laforest v Office Commercial de l'Ambassade d'Espagne,* June 5th, 1959, (1960) 87 Journal du Droit Int'l, 467, 482. Note that the French requirement is now contained in Article L. 111-1-2(1°) of the Code des Procédures Civiles d'Exécution (France), inserted by the Loi n° 2016-16g, du q Décembre 2016 relative à la Transparence, à la Lutte contre la Corruption et à la Modernisation de la Vie Économique, JORF No. 0287, 10 December 2016., cited in Dopagne (n 674).

[685] *GIE La Reunion Aerienne v Libyan Arab Jamahiriya* Case No. 09 – 14743, March 9th, 2011, Bulletin 2011 I No. 49.

[686] *Creighton v The Government of Qatar*, Case No. 98-19.068, 6 July 2000; See also Chapter 4 For more on the cases.

[687] *Commisimpex v Congo Case* Nos. 16 – 22.494 and 16 – 16.511, January 10th and 24th, 2018 Journal du Droit Int'l, 570

[688] See (n 669).

[689] ILC Draft Articles on Jurisdictional Immunities of States and Their Property, (2) YBILC 58 (1991), UN-Doc. A/46/10, at 58 -59.

insufficient to allow execution measures because it lacks specificity and the assets in question come under VCDR, which provides extra protection against their execution.[690] The JISCP (above) allows execution against States' assets of a cultural and heritage nature "if immunity is expressly waived for a *clearly specific property* by the […] State owning the property".[691] According to Happold, "The phrase 'clearly specified property' appears to imply that reference to a particular category of State-owned property alone would not suffice to meet the criterion."[692] Thus, a waiver must clearly specify (and, if possible, name) the particular asset(s) for it to be validly effective.

This ties into execution against military assets and waivers. In the aforementioned *ARA Liberdad*, although the protection offered to military assets under state practice was duly acknowledged, the local judge ordered the seizure of the warship because the claimant had obtained what the local Court considered to be a valid waiver from immunity from execution.[693] However, arbitration proceedings instituted by Argentina against Ghana under Annex VII of the UNCLOS resulted in the International Tribunal ordering the release of the warship.[694] Although the Tribunal reached the decision on some jurisdictional grounds,[695] it is perhaps thought that it might have accepted the argument put forward by Argentina that the waiver was general, i.e. not specific to the warship to sanction its execution.[696] If this argument holds valid, then a waiver must clearly specify (if possible, name) the particular military asset for it to be validly effective for execution measures.

The final submission in respect of the waiver exception is that it is tightly construed and in favour of States. Indeed, a waiver may only be effective if the providing State categorically and unambiguously

[690] Article 22 and 23 VCDR; See also, Article 3(1) UNCSI making allowance for such interventions.

[691] Dopagne, (n 674).

[692] Happold, (n 624), at 323.

[693] Ibid, See also *ARA Lybertad* case, (n 647).

[694] Ibid.

[695] Ibid, on which jurisdictional grounds, see Separate Opinion of Judge Chandersekhara Rao, paras. 3 - 4.

[696] Ibid.

designates the relevant asset(s) as one covered by the waiver (special waiver). Even the final submission, however, lies with domestic courts in light of the numerous stringent rules of engagement. A significant measure of certainty can be created by the relevant State where assets can be explicitly earmarked as 'commercial assets' for the purpose. However, as stated above, this is unlikely to occur under the current dispensation where States are becoming increasingly indebted to foreign investors, purposefully refusing voluntary compliance, and attacking awards through various defences.

Aside from these limitations, other specific limitations to execution may apply related to the problem of executing against separate creations and appendages of foreign States and to the issues of nexus requirement.

4.4 Additional Limitations

4.4.1 Assets of the States' Creations and Appendages

States often engage in commercial activity through their entities, instrumentalities, agencies, or separate juridical bodies they own and control.[697] Since executing against States directly is deemed offensive (the justified rationale for upholding immunity from execution under the restrictive immunity approach), executing against the entity's assets should, in theory, be less offensive and straightforward, particularly since such entities hold substantial, easily identifiable assets and are usually engaged in commercial activities.[698] However, under the general rules of engagement, a State's entity, "incorporated or otherwise, [is] separate from the State and [has] an independent legal personality, can possess and dispose of property and [is] capable of suing and being sued."[699] This separate legal personality doctrine means that (subject to certain qualifications like the State exercising some level of control over the entity warranting

[697] Aaken, (n 28), at 135 – 139, see also A Sinclair and D Stranger-Jones, 'Execution of Judgments or Awards Against the Assets of State Entities (2010), 4:1 Disp Resol Int'l 95 (on liberalization and deregulation trend of State business).

[698] Ibid.

[699] Yang, (n 25), at 394; [A State-owned enterprise (SOEs), especially bodies set up to manage sovereign Wealth Funds (SWFs) among others are the typical examples of state entities]. See, Van Aaken, (n 28).

the piercing of the veil) no measures of constraint can be instituted against the entity's assets to satisfy a judicial judgment against the State, and vice versa.

In this connection, the question becomes how to distinguish between the State and its entity for the purpose of applying immunity and, further, considering the general presumption of separability, whether immunity from execution measures would apply to an entity's assets, in the same manner as it would to the State.

The US FSIA defines a foreign State in section 1603(a) as including the State's entities and goes further to define the entities under section 1603 (b).[700] By including the State's entities in the definition of a foreign State, the US FSIA sets up a presumptive immunity that accords the entities with the same level of sovereign protection as the foreign State itself, regardless of the activity performed.[701] At the same time, a closer read of section 1610(b) in conjunction with section 1603(b) shows that consideration of a foreign State should be taken to exclude its entities in matters of attachment and execution.[702] By this, the US FSIA also appears to reflect a fundamental policy of distinguishing between the State itself and its entities, with the implication that the foreign States' assets cannot be used to satisfy judicial judgements against the entity and vice versa, whether the asset "is or was used for the commercial activity upon which the claim is based".[703] As explained by the US Supreme Court in *First National City Bank v Banco Para El Comercio Exterior de Cuba* (Bancec), Congress intended that "duly created instrumentalities of a foreign State are to be accorded a presumption of independent status."[704] But the Court further explained that this presumption

[700] Defines the term "agency or instrumentality of a foreign state" as: "1. is a separate legal person, corporate or otherwise; and 2. is an organ of a foreign state or political subdivision thereof, or a majority of its ownership interest is owned by a foreign state or political subdivision thereof; and 3. is neither a citizen of a state of the United States nor created under the laws of a third country."

[701] This intent is evidenced by the legislative history. See, The US House of Representatives, Report No. 94-1487, 1976, at 28 and 30; 1976 USCCAN 6604, at 6627, 6629.

[702] Yang, (n 25), at 395 – 396.

[703] Ibid. S. 1610(a)(2) of the USFSIA.

[704] *First National City Bank v Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 626, 629 (1983). [Note that the Airline was wholly owned by Argentina as it owns 100 per cent of Aerolineas' stock, a basis upon which the initial juridical separateness was disregarded in favour of execution by a District Court, *Hercaire Intern., Inc. v Argentine Republic*, U.S.D.Ct., S.D. Florida, Miami Div., May 7, 1986, 642 F. Supp., 126 (S.D. Fla. 1986)].

could be defeated where the entity is "so extensively controlled by its owner that a relationship of principal and agent is created," or where identifying its separate status would "work fraud or injustice."[705]

The US Courts has been applying the Bancec standard and the outcomes, as Foster rightly notes, "generally turns on the available evidence of the relationship between the State and the entity in question and of any injustice that would result from treating the two as distinct-matters with regard to which the creditor may be allowed discovery."[706] In most cases, however, the tendency to upheld separateness is more pronounced due to policy considerations.[707] Indeed, *Hercaire*, an order to attach assets belonging to a State's entity, the national airline of Argentina (*Aerolineas*) in satisfaction of a judicial judgement against the State itself was quashed by the Court of Appeal as the entity was held to be independent of the State.[708] Though cases of successful 'veil' piercing in the US continue to be exceptionally unusual, Crystallex's victory against Petroleos de Venezuela, SA (PDVSA), a noted alter ego of Venezuela,[709] in recent times is encouraging and, if emulated, could lead to successful execution measures against the State when voluntary compliance fails.

[705] Ibid. Other considerations include the level of economic control and entitlement to interests over the entity's assets as well as whether by virtue of separate protection allows the state itself to avoid legal obligation in the US. These are additional vital considerations to piercing the corporate veil in favour execution. US FSIA s. 1610(g)(1).

[706] GK Foster, 'Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments against States and Their Instrumentalities, and Some Proposals for Its Reform' (2008), 25 Ariz. J. Int'l & Comp. L. 665, at 683.

[707] In Bancec, the Court noted that the "distinctive features" of State entities allow them "to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies." The Court also noted that these features "frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large scale national investments." Therefore, an entity's "assets and liabilities must be treated as distinct from those of its sovereign in order to facilitate credit transactions with third parties." *Bancec*, (n 689), at 624-626, 103 S.Ct. at 2599.

[708] *Hercaire v Argentine Republic*, US, 821 F.2d 559, 565 (11th Cir. 1987); 98 ILR 48 [Note that the Airline was wholly owned by Argentina as it owns 100 per cent of Aerolineas' stock, a basis upon which the initial juridical separateness was disregarded in favour of execution by a District Court: *Hercaire Intern., Inc. v Argentine Republic*, U.S.D.Ct., S.D. Florida, Miami Div., May 7, 1986, 642 F. Supp., 126 (S.D. Fla. 1986)]; See also, *Letelier v Chile*, US, 748 F.2d 790, 794–795 (2nd Cir. 1984).

[709] Order, *Crystallex Int'l Corp. v Bolivarian Republic of Venezuela*, No 1:17-mc-00151-LPS, (D Del Aug 9, 2018).

The UK SIA and legislation fashioned after it also accord State entities separate legal personality status but do not include the entity in the definition of a foreign State.[710] Therefore, it does not foster the presumption of immunity from measures of constraint as the US FSIA does. According to section 14(2), entities of the foreign State are only immune in respect of "anything done by it in the exercise of sovereign authority." It adds in section 14(3) that if an entity of a foreign State is immune from the jurisdictions of the courts, then it enjoys the same level of immunity as the foreign State itself. Conversely, if immunity is unavailable, by virtue of the entity engaging in commercial activity, then measures of constraint can be instituted against its assets.[711] In the recent case of *Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq (SOMO)*, an argument put forth by an entity (SOMO) that it is an 'emanation of the State', and therefore immune from attachment, was rejected.[712] The Court upheld SOMO's separate legal status and identified that the relevant activity engaged and the assets it held had underlying commercial purposes and were therefore amenable to attachment by SOMO's debtor. By this, the UK SIA adopts a functional approach to distinguishing between the State and its entity for the purposes of applying immunity from execution. Nevertheless, like the US FSIA, an entity's assets can be treated as the State's. Thus, the veil of protection can be pierced in favour of execution where it can be identified that a principal-agent relationship exists between the two and that the entity was created as a sham or façade to avoid liability.[713] The case of *Walker International v Republique Populaire du Congo* shows instances where the corporate personality was disregarded in favour of successful attachment measures in satisfaction of awards.[714]

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[710] UK SIA, Section 14(1).

[711] *Kuwait Airways Corp v Iraqi Airways Co* [1995] 1 WLR 1147, 1158E-1160F.

[712] *Taurus Petroleum Limited v SOMO, Republic of Iraq* [2015] [2017] UKSC 64, at https://www.supremecourt.uk/cases/uksc-2015-0199.html. Accessed 14/10/20.

[713] Foster, (n 691), at 685.

[714] [2005] EWHC 2813 (Comm). see also *Walker of Kensington International Ltd v Republic of Congo* [2005] EWHC 2684 (Comm).

The French allow execution against the assets of the entity of the State in satisfaction of a debt owned by the State itself and vice versa if the entity is an emanation of the State and the relevant activity or assets are for a commercial purpose.[715] Engaging this successfully will require the determination that the entity derives its budget from the contributions of the State or the State exercises extensive control over its finances.[716] In *Benvenuti & Bonfant*, an argument to disregard separateness failed because the State was not found to exercise extensive control over the entity's (central bank) engagements.[717] This decision follows after the old law, where no special status was granted to the central bank and its assets. The new law follows the UNSCI and is in line with the predominant state practice.[718] Therefore, unless the separateness can be disregarded by satisfying some qualified exceptions, piercing the veil (like *Crystallex* and *Walker International* examples above), an entity's more visible and plentiful assets can be unamenable to satisfy a judicial judgment against the State.

In sum, the separateness between a foreign State and its entities means that a judgment against a State cannot be enforced against its entity and vice versa. So, while the difficulty associated with ascertaining the commercial/sovereign purpose served by a foreign State's assets would have been alleviated by simply attaching the commercial assets of its entity for the purpose, this may be hindered in the light of their separateness. The irony of the rule is that they can open the door to moral hazard on the part of the States, whereby they might structure their commercial activities to ensure that they are immune from any measures of constraint against them. As Fox once highlighted, some States, especially developing States, are known to be hiding assets in the accounts of their entity by taking advantage of their separateness.[719] However,

[715] Yang, (n 25), at 398 – 399.

[716] Foster, (n 691), at 686; See also, NIOC Revenues Case, Germany, (1983) 65 ILR 215, 219, Ground A.I. ILR 144, at 146–147.

[717] *Benvenuti & Bonfant v Banque Commerciale Congolaise*, Judgment of July 26, 1987, Cour d'Appel de Paris, 108 Journal Du Droit Int' 843 (1981).

[718] Article 2(1)(b) adds instrumentalities or other entity of the state to the definition of a state. But under 'Annex to the Convention' 'With respect to article 19', separateness is accorded to the creations or appendages of the state.

[719] H Fox QC, *The Law of State Immunity* (2nd Edn. OUP, New York 2008), at 423.

with more judicial curiosity and activism geared toward fostering protection for private persons engaged with States, the veil of separateness can be pierced to aid awards' execution, like it occurred in the few examples noted above.

4.4.2 Nexus or Connection Requirements

An additional hurdle ensues in executing awards against the assets of foreign States and their entities in that some major States require some connection either to the 'subject-matter', 'territory', or 'person'[720] in order to allow execution measures against assets located in the jurisdictions. The primary rationale for upholding these requirements can be traced back to the rules surrounding jurisdictional immunity, where a forum State will refuse to assume jurisdiction in a matter that involves a foreign State unless some exceptions apply. These include the foreign State waiving immunity explicitly or satisfying other requirements, such as engaging in commercial activity, agreeing to arbitrate matters precipitating from such engagement, and making a contract in or acting connected to that forum State and connections relative to the party's nationality.[721] It was thought that before immunity could be pleaded, a foreign State would have been "exposed to litigation in unexpected fora in one or a number of countries" and hence caused harassment with repercussions implicating damage to diplomatic relations.[722] Indeed, claimants could overcome any jurisdictional and related bars and limitations by simply looking for favourable jurisdictions without such requirements to institute their claim on the basis of an agreement to arbitrate, as illustrated by the cases of *Libyan American Oil Co. v Socialist People's Libyan Arab Jamahiriya* (LIAMCO) and *Ipitrade International, SA v the Federal Republic of Nigeria*.[723]

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[720] Yang, (n 25).

[721] GR Delaume, 'Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration' (1987), 2(2) ICSID Review, 403, at 418.

[722] Ibid; JR Sternlight, 'Forum shopping for arbitration decisions: Federal courts' use of antisuit injunctions against state courts' (1998), *U. Pa. L. Rev.* 147:91

[723] *Ipitrade International, S.A. v Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978), at 826; *Libyan American Oil Co. v Socialist People's Libyan Arab Jamahriya* (LIAMCO), 482 F. Supp. 1175 (D.D.C. 1980).

To avoid this, aside from the generally applicable immunity exceptions like commercial activity and waivers, some treaty law and some primary domestic rules strictly require some minimum connection between the jurisdiction of the forum court and the subject matter of the activity/claim in order to exercise jurisdiction leading to execution measures against a foreign State's assets. An impediment is placed on the foreign investors' ability to effectively execute against the foreign States' assets when voluntary compliance fails by engaging such additional requirements. However, not all States require such a connection requirement. For instance, in reference to the European States' practices, Reinisch notes that "[m]any decisions seem to distance themselves from any such requirement."[724] Reinisch reinforces the rationale behind this lenient approach with an example of an Italian court's decision:

> [t]he Italian Constitutional Court characterized a 'specific link with the subject matter of the request, namely the specific allocation of the property for the commercial transaction from which the dispute arose' as a 'further restriction [which] is not generally recognized, and in particular is rejected in Western Europe, including the United Kingdom.'[725]

The United Kingdom departs from such a connection requirement having only execution measures permissible against States' assets that are "for the time being in use or intended for use for commercial purposes."[726] That said, the States or approaches with such a connection requirement create an additional impediment that could undermine the effectiveness of the ISA system. This is because there is a possibility that foreign investors with awards against foreign States could be left with no remedy during execution measures. Indeed, it has been argued by Chamlongrasdr that

> by imposing the requirement of the connection between the property and the underlying claim, not only does it cause difficulties for courts in determining the

[724] Reinisch, (n 350), at 822 – 823.

[725] Ibid, at 822.

[726] The UK make no reference to any linkages as Section 13(4) UK SIA of the permits execution against state property which "is for the time being in use or intended for use for commercial purposes."

> attachable property, but also private parties seeking execution against the property of a foreign state have to face with unnecessary burdens.[727]

It is necessary to look into the extent of the connection requirements that find expression under both national and international immunity rules in order to assess how they impact measures of constraint and execution against States and their entities' assets when voluntary compliance fails.

The United States is among the jurisdictions with such connection requirements. Article 1610(a)(2) of the US FSIA allows execution measures of constraint against foreign States' assets if it "is or was used for the commercial activity *upon which the claim is based*".[728] The Article creates dual criteria to be established by the foreign investors before execution measures can be instituted, which implicates the foreign investor satisfying that the relevant assets(s) of the foreign State serve a commercial purpose: a requirement in the phrase "is or was used for the […]" and that that relevant asset(s) has a minimum link with the underlying claim in the United States: a jurisdictional connection requirement in the phrase "upon which the claim is based." The importance of the latter is reinforced by Yang below:

> [i]n the overwhelming majority of U.S. cases, the courts' attention was focused, not on the nature or purpose of the act in question [commercial purpose exception], but on whether there existed a connection between the U.S. territory and the act upon which the claim was based. Absence of such a connection would lead to a rejection of the claim.[729]

Thus, establishing other exceptions alone will not suffice to allow execution measures if there is an inadequate connection between the US jurisdiction and the act upon which the claim is based.[730] Consequently, this provision limits the availability of attachable commercial States' assets located in the United States as not all assets used for a commercial purpose or activity have a connection with the

[727] D Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, 2007), at 318.

[728] See *Crystallex Int'l Corp. v Bolivarian Republic of Venezuela*, No. 17-mc-151-LPS, 2018 WL 3812153 (D. Del. Aug. 10, 2018).

[729] Yang, (n 25), at 108.

[730] Ibid.

underlying claim. Nevertheless, it is worth noting that this connection requirement only applies to the foreign State; it does not apply to the foreign State entities. In a sense, execution measures targeted at the entities' assets are permissible, subject to the requirement of the commercial purpose/activity exception only.[731] In this respect, it could be argued that instituting execution measures against the assets of the foreign State's entity provides a good alternative. Notably, it would be beneficial in cases where the separate legal personality principle is inapplicable, thereby allowing attachment of an entity's assets in satisfaction of the State's debt resulting from an arbitration proceeding, as occurred in the case of *Crystallex v Venezuela* (PDVSA).[732]

Indeed, in arbitration proceedings, the United States has often construed the commercial activity exception, together with an agreement to arbitrate provision, as an implied waiver of immunity to assume jurisdiction wherein, based on such a waiver, the requirement to establish a jurisdictional connection becomes inapplicable in accordance with section 1610(a)(1).[733] Thus, US courts may assume jurisdiction without regard for the connection requirement or where the arbitration took place. The basis of this assumption will implicate the obligations under both the New York and ICSID Conventions to recognise

[731] See Section 1610(b)(2) of the US FSIA:

> "(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if— (2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605 (a)(2), (3), or (5) or 1605 (b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based."

[732] Order, *Crystallex Int'l Corp. v Bolivarian Republic of Venezuela*, No 1:17-mc-00151-LPS, (D Del Aug 9, 2018).

[733] Section 1610(a)(1) of the US FISA:

> "[t]he property in the United States of a foreign state ... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution [...] *if the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication*."

The State is also known to refuse the assumption of jurisdiction without the nexus connection.

See for example, *Verlinden B.V. v Central Bank of Nigeria,* 488 F. Supp. 1284 (S.D.N.Y. 1980), where court held that:

> "[…] where a foreign state agrees to submit its disputes with another, non-American private party to the laws of a third country, or to answer in the tribunals of such country, it does not implicitly waive its immunity to jurisdiction of the courts of the United States.", at 1302.

and enforce awards that give effect to the parties' arbitration. As mentioned elsewhere, the approach of recognising an arbitration agreement as an implied waiver to immunity is predominant with engagements under the New York Convention, with success mainly depending on the forum State law, i.e. the *lex fori*. While such an approach is possible under the ICSID Convention in light of the obligation under Article 54, Article 55 of the Convention subjects execution to the domestic law on State immunity which, as clarified in the *LETCO v Liberia*, implicates only a bar on actual execution of awards against foreign State assets.[734] By implication, the Convention arguably, satisfies the jurisdictional connection requirement necessary in those States to assume jurisdiction in respect of execution measures.

To this end, it is worth noting that an amendment introduced to the US FSIA in 1988 takes into account the effectiveness of arbitration. Section 1610 (a) (6), which is set forth purposefully to ease execution measures in the United States, removes from the ambit of the US FSIA any such requirement as jurisdiction or subject-matter wherein the judgement is based on an order confirming an arbitral judgement rendered against a foreign State. In this light, it could be said that the US FSIA provides foreign investors with the necessary means to enforce an award against a foreign State's asset located in the US, although the commercial purpose exception still applies.

The French also adopt a connection between the targeted assets and the underlying claim in order to action execution measures against States. Indeed, in *Republic of Iran v Eurodif*, the Court of Cassation emphatically stated that

> property of a foreign State could be subject to measures of execution provided that the property sought to be executed had been allocated for an economic or commercial activity of a private law nature, which had given rise to the subject matter of the claim at issue. [735]

[734] Schreuer, *A Commentary* (n 42), at 1173.

[735] *Republic of Iran v Eurodif, French Cour de Cassation* (14 March 1984), 77 ILR 513, at 515, cited in Chamlongrasdr, (n 712), at 323 and also cited in Reinisch, (n 350), at 823.

The same reasoning was followed in *Sonatrach v Migeon.*[736] In both cases, a lack of such connection prevented execution measures being instituted in the jurisdiction. Like the United States, France also distinguishes between the assets of the foreign States and that of the States' instrumentalities, wherein such connection requirement will not apply to execution measures against the latter. However, the Paris Court of Appeal's recent decision in *Creighton* appears to have renounced any such connection requirement, having provided that "goods destined by a State for the satisfaction of the claim in question or reserved by it to this end may be seized, instead of all other goods of the foreign State situated in the forum State or intended to be used for commercial purposes".[737]

The Swiss rule fosters jurisdictional nexus and is more pronounced in respect of measures of constraint and execution. As previously noted, the seemingly relaxed rule of the Swiss (observing single immunity instead of dual immunities recognised by States) is reinforced by two stringent limitations: namely, commercial activity/purpose and territorial connection (also known as *Binnenbeziehung).* Thus, measures of constraint against a foreign State's assets are permissible only to the extent that such a measure (i) arises out of private right and obligation, and (ii) the place of performance is in Switzerland or there otherwise exists a connection with the Swiss territory. In the case of LIAMCO, the Swiss Federal Tribunal refused enforcement of an ICSID award against the assets of the State of Libya as the Tribunal found that there was not a close connection between the subject matter and Switzerland.[738] The irony of the ruling is that the arbitral proceeding took place in Geneva, which qualifies the existence of a legal relationship and also satisfies the commercial activity/purpose exception. However, a *sufficient* legal relationship was not established because the decision to arbitrate in Switzerland was made by a sole arbitrator. According to the Tribunal "the legal relationship [should] involve […] a sufficient domestic relationship to the territory of

[736] *Société Sonatrach v Migeon*, France, (1985) 77 ILR 525., wherein the court states: "immunity from execution enjoyed by a foreign State or public entity acting on its account can be set aside only exceptionally if the attached debt had been destined for a private activity which gave rise to the claim", cited in Reinisch, (n 350), at 823.

[737] *Creighton v Qatar,* Paris Cour de Appeal, 12 December 2002 [2003] *Revue de I'arbitrage* 417, at 527, cited in Reinisch, ibid, at 823.

[738] *Libya v LIAMCO, Switzerland,* (1980) BGE 106 IA 142, 148, Ground 3b; 62 ILR 228, at 234.

Switzerland" which is clarified to mean "when the underlying claim arose in Switzerland, when it has been performed there, or when the foreign State has performed an act through which a place of performance has been created there".[739]

Although the rule is of antiquity, the precise rationale is seemingly unknown. Perhaps, being an epic banking centre, the underlying rationale upholding the rule relates to practical considerations motivated by the need to attract and maintain the investment of foreign bank reserves[740] and the need to prevent the Swiss Courts from being marked as a 'collecting agency' for engaging execution globally.[741] Whatever the rationale is, the rule applies strictly and serves as an additional impediment to claimants seeking to implement investment arbitral awards against recalcitrant States under the ISA system, as exemplified in the LIAMCO cases.[742]

The question is whether *Binnenbeziehung* could pass as an infringement of the enforcement frameworks like the ICSID and the New York Convention. Knoll and Snieder noted that such would not be the case under the ICSID Convention.[743] The Convention's deference to domestic rules of engagement in enforcement measures - Article 54 of the ICSID Convention - accordingly, subjects awards' coercive execution to the whims of domestic rules like *Binnenbeziehung*.[744] The authors hold a contrary view in respect of the New York Convention. Accordingly, *Binnenbeziehung* is not included among the specific

[739] *Moscow Centre for Automated Traffic Control v Geneva Supervisory Commission of the Debt Office*, Judgement of August 15, 2007, cited in, M Sneider and J Knoll, 'Enforcement of Foreign Arbitral Award Against Sovereigns -Switzerland' in R D Bishop (eds), *Enforcement Arbitral Awards Against Sovereigns*, (Juris Publishing, 2009), at 340 – 41.

[740] PD Trooboff, 'Foreign State Immunity: Emerging Consensus on Principles' (1986), 200 Recueil des Cours: Collected Courses of the Hague Academy of International Law (1986-V) 235, in Yang, (n 25), at 401.

[741] CH Schreuer, State Immunity: Some Recent Developments, Cambridge: Grotius Publications Ltd, 1988, in Yang, (n 25), at 401.

[742] *Socialist Libyan Arab Popular-Jamahiriya v Libyan American Oil Company* (LIAMCO), Swiss Federal Tribunal (19 June 1980), 62 ILR 228, at 142, para. 4. *Cf NOGA v Office des Poursuite de Gebeve*: BGE 134 III 122 paras. 5.2-5.3

[743] M Sneider and J Knoll, 'Enforcement of Foreign Arbitral Award Against Sovereigns -Switzerland' in R D Bishop (eds), *Enforcement Arbitral Awards Against Sovereigns*, (Juris Publishing, 2009), at 344.

[744] While Article 54(2) subjects execution to the modalities of the law of the State of the enforcement forum. recognition, by contrast, is not subjected to local law but only to the requirements of the Convention.

grounds upon which enforcement may be refused.[745] The opinion expressed loses sight of the fact that the public policy exception under Article V(2)(b) of the Convention is subject to domestic and international policy considerations and so, could implicate many policy matters, including *Binnenbeziehung,* as the State deems fit. In this regard, it could be said that, under both enforcement Conventions, the *Binnenbeziehung* rule stands strong under the Swiss jurisdiction during execution measures.

The UNSCI contains some nexus requirement but only to the entity of the State against whom execution measures are directed, wherein a connection between the assets and the defendant State entity must be established. The initial ILC draft contained in Article 18(c) of the Convention specified that one of two main forms of connections should be present, demanding that the asset "has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed."[746] A modified version now contained in Article 19(c) only requires a connection between the assets and the State entity against whom execution measures are directed, omitting a connection to the claim requirement.[747] As stated above, a definition of an 'entity' is contained in an annexe to the Convention, and the expression stipulates a separateness approach between the State and its creations.[748] In this respect, the Convention allows execution measures against the assets of the entity that serve a commercial purpose. It also provides the following:

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[745] Ibid.

[746] Article 18(1)(c) ILC Draft Articles, provided:

> "[n]o measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that ... the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed."

[747] Article 19 (c) of the UNSCI:

> "[i]t has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, *provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed*."

[748] Annexe to the UNSCI provides:

> "[t]he State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality."

> the words 'property that has a connection with the entity' in subparagraph (c) are to be understood as broader than ownership or possession. Article 19 does not prejudge the question of 'piercing the corporate veil'.

Thus, while the Convention shields the entity's assets from being attached in satisfaction of the State's debt and vice versa, the Convention conveys within the exception all assets owned or possessed by the entity. The broader construction of the Article could imply that some less specific rights and interests held by the entity in the assets are subject to execution measures.[749] Thus, "[i]t constitutes a tentative and somewhat elusive enlargement of the exception so as to render the assets of the State agency engaged solely in commercial activities subject to attachment and execution in respect of judgments rendered against it."[750] In these connections, the approach could be said to mirror those taken by States without such connections like Australia,[751] Canada,[752] and the UK.[753]

In sum, while not all state practice demands the connection requirement, the few that entertain the requirement cannot be overlooked. Indeed, with foreign States becoming increasingly indebted to foreign investors in billions of dollars, thus spiking recalcitrant behaviours, entertaining such a requirement further worsens claimants' chances of successful execution because assets targeted for execution may be located in jurisdictions with such requirement.

4.5 Conclusion

This chapter set out to examine the key limitations and challenges associated with taking measures of constraint against foreign States' assets when voluntary compliance fails. It identified many rules under the restrictive immunity approach that further hinder awards coercive implementation under the investment arbitration system. Though the advantage of immunity from measures of constraint and execution under

[749] Fox and Webb, (n 28), at 512.

[750] Ibid.

[751] See, Section 32(3)(a) of the Australian SIA.

[752] See, Section 12(1)(b) of the Canadian SIA.

[753] See, Section 13 (4) of the UK SIA.

the restrictive immunity approach relies principally on purpose test, in practice, however, such a criterion is problematic to engage. As the previous chapter identified, which this chapter further highlighted, legally and politically, the boundaries are enormously difficult to ascertain. Resort to the term 'use', represents an unsurmountable challenge as the claimant must prove that the foreign State actually use, specifically use or intended specifically to use the marked asset(s) for a commercial purpose to rebut their presumptive sovereign use. Further, proving a mere link to a commercial use will be insufficient, and neither it is permissible to resort to the origin of the asset(s) to prove that they are not immune. Moreover, the claimant must satisfy that the asset(s) is used for commercial purpose at the time of the proceedings: as the ILC says that to satisfy "an earlier time could unduly fetter States' freedom to dispose of their property."[754] This nuance applies to all States' assets.

Exacerbating this state of affairs, however, is the fact that, certain categories of States' assets are afforded special immunity status under state practice. As the chapter identifies, these States' assets (central banks, embassy, cultural and heritage and military assets) are considered assets specifically in use for sovereign purpose. Talking execution measures against these States' assets will mostly be permitted under some additional condition, i.e. a specific consent provided by the relevant State. However, this waiver condition is tightly construed in that it could be invalidated if it harbours any ambiguity. Furthermore, some States require additional territorial nexus links in order to execute against assets belonging to foreign States. Switzerland is one such State. Although noted among central States that house enormous foreign assets, for a claimant investor to attach located assets in satisfaction of an award successfully within the jurisdiction, there must be a 'sufficient' link between the claim and the Swiss territory. Also, state practice considers States and their entities separate from each other and, therefore, their assets unamenable to attachment in respect of the debts of the other.

[754] ILC Draft Articles on Jurisdictional Immunities of States and Their Property, (2) YBILC 58 (1991), UN-Doc. A/46/10.

To this end, immunity from measures of constraint and execution provides a strong bar against the successful implementation of awards under the investment arbitration system. Claimant investors could be left without remedy if the State does not voluntarily comply with arbitral awards in their favour. An additional solution is required.

Since the international community cannot effectively function without due protection granted to States, the question becomes how to aid foreign investors effectively in obtaining a remedy while also protecting the interests of the States under the system. Undoubtedly, clear and specific rules dealing specifically with immunity from execution will be a viable step in the right direction to mitigate immunity-related challenges. However, an additional viable solution can be harnessed by encouraging voluntary compliance from the onset. The next chapter investigates what factors impact States' willingness to comply voluntarily with their arbitral awards and vice versa.

Chapter 5: Voluntary and Spontaneous Compliance with Arbitral Awards

5.1 Introduction

Having examined in Chapters 3 and 4 the significant legal challenges and limitations associated with the application of State immunity at the coercive implementation stage of the investor-State arbitration (ISA) process, this chapter will consider the question of voluntary compliance. Commentators have consistently observed that the States always comply voluntarily with adverse awards rendered against them.[755] However, a recent study shows significant instances of non-compliance and projects the phenomenon to increase exponentially under the ISA system.[756] This reinforces Brower et al's earlier statement that "voluntary compliance with the majority of awards, which previously looked fairly predictable, is now increasingly in question."[757] Indeed, what had begun with a few notable isolated and somewhat anecdotal cases, such as the *Sedelmayer* saga,[758] is now a looming concern under the ISA system as an increasing number of States have refused or delayed voluntary compliance with awards

[755] See for example, Blane, (n 18) at 464–5; CF Dugan, *Investor–state arbitration* (OUP, 2008), at 675-676; SA Alexandrov, 'Enforcement of ICSID awards: Article 53 and 54 of the ICSID Convention' (2009) 1 Transnat'l Disp. Mgt., at 10. https://www.transnational-dispute-management.com/article.asp?key=1345. Accessed 02/11/2020.

[756] Gaillard and Penusliski (n 19), [Highlighting the number of States known to have publicly refused to honour investment awards rendered against them – see *infra* footnote 743.]

[757] CN Brower et al., 'The Coming Crisis in the Global Adjudication System' (2003), 19(4) Arb. Int'l, at 418; See also AS Alexandrov, 'Compliance and Enforcement' in P Muchlinski (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008); C Trevino et al., 'Award Compliance: Updates on Two Awards against Democratic Republic of Congo, and a Third against Turkmenistan' (2015), 8(2) Invest. Arb. Rep.24 at 25.

[758] *Sedelmayer v Russian Federation*, Arbitration Award (*ad hoc* arbitration under the Stockholm Chamber of Commerce arbitration rules July 7, 1998), *http://italaw.com/documents/investment_sedelmayer_v_ru.pdf.* Accessed 21/08/2019. Early commonly discussed non-compliance cases include, *SARL Benvenuti & Bonfant (B&B) v People's Republic of the Congo*, ICSID Case No ARB/77/2; *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, ICSID Case No ARB/83/231; *Socie´te´ Ouest Africaine des Be´tons Industriels(SOABI) v Senegal ICSID*, Case No ARB/82/1; *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v The Republic of Kazakhstan*, ICSID Case No. ARB/01/6; *Petrobart Limited v The Kyrgyz Republic*, SCC Case No 126/2003; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6; *Walter Bau Ag (In Liquidation) v The Kingdom of Thailand*, UNCITRAL, all cited in E Gaillard and Penusliski (n 19), at 5 - 7.

rendered against them.[759] This represents a significant problem, not least because dependence on domestic courts for all coercive enforcement measures to recoup remedy would be too expensive for any legal system to bear. But also, because such coercive enforcement measures may ultimately be defeated by States' immunity from measures of constraint and execution.[760] Regardless, there is no doubt as to the outcome of a given arbitral proceeding when the resulting award has fully been complied with (voluntarily and on time) or where challenges to the legitimacy of such awards are unlikely.

This chapter seeks to understand what factors impact States' decision to comply or not comply with their international obligation, and particularly, States' decisions regarding their arbitral obligation under the ISA system. This quest will help identify potential avenues for engaging workable solutions to improve voluntary compliance from the outset and ultimately aid coercive enforcement measures under the regime, too often hindered by immunity-related challenges. The chapter starts by exploring the three main international relations (IR) theoretical approaches to explaining State compliance behaviour: realism, liberalism and constructivism, to understand factors identified as impacting States' compliance behaviour more generally. The subsequent part analyses the factors in-depth under a classical ISA compliance behaviour - Argentina behaviour vis-à-vis ICSID awards[761] - to identify which theoretical approach or factor provides a more practical and stable way of explaining the State's compliance behaviour. Argentina's compliance behaviour span two main periods: the first period (2007 to 2013) is marked by blatant refusal to honour four ICSID award rendered against it, and the second period (mid-

[759] Ibid, at 10 - 45. [Publicly known data on States who have failed to honour arbitral awards rendered against them include Romania, Poland, Moldavia, Egypt, Serbia, Hungary, Italy, Nigeria, Argentina, Russia, Kyrgyzstan, Spain, Kazakhstan, Libya and Ukraine. Some of these States have more than one award render against them.]

[760] See Chapter 3 and 4 for more on the impact State Immunity has on awards' coercive implementation.

[761] Argentina provides a very good case example to engage this analysis from three main perspectives. Firstly, the States has the most investment awards rendered against it since the inception of the ISA regime. Secondly, the State past reluctance to comply with the awards rendered against it (between 2007 -2013) is relatable in analysis to understanding what is impacting States currently refusing to comply with award rendered against them. Lastly, the Argentina since mid-October 2013 has arranged to settle the awards creditors after having gone through what will be considered a diplomatic pressure; this is also relatable in analysis to understanding States who have gone through similar measures and how their compliance with awards have been impacted. Most importantly, the State's case will help understand what measures are generally necessary to enhance compliance under the regime.

2013 to October 2013) is characterized by a willingness to comply with these ICSID awards substantially. The remainder of the chapter will devote to examining the approach that appears fit for explaining the State's compliance at the relevant stage of the procedure.

5.2 Theories of Compliance: Three Theoretical Approaches

The recent increase in non-compliance by States with their investment awards under the ISA system highlights the need to look into what impact on State compliance behaviour. As doing so may highlight the areas for improvement. This is not to establish a theory of compliance; it only intends to glean from the extant literature factors relevant to States' compliance behaviour under international law. Slaughter and Raustiala define compliance as a "state of conformity or identity between an actor's behaviour and a specified rule."[762] The literature on States' compliance behaviour has generally been dominated by International Relations (IR) literature. This field of international law has observed the increasing role of formal international agreements (IAs) and supranational authority (SA) in ordering inter-state relations. Since World War II, evidence of the growing range of authoritative obligations is demonstrated by the crusade to codify customary practices into express international legal rules.[763] Sixty decades after, the rules that regulate State behaviours in many spheres of the environment, economy, and human rights have metamorphosised to envelope international organisations (further seeing its proliferation) and, most extraordinarily, the development and advancement of legally binding systems of third-party dispute resolutions.[764] The evolution of the GATT's dispute resolution mechanisms into a more formal edifice of the WTO and the establishment of ICSID (to handle investment-related disputes between States and

[762] K Raustiala and A Slaughter, 'International Law, International Relations and Compliance:: International Relations and Compliance' (2002), Princeton Law & Public Affairs Paper 02-2 (2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=347260. Accessed 21/09/20/. This is the working definition adopted for the study.

[763] HH Koh, 'Why Do Nations Obey International Law?' (1997), 106(8), Yale L. J, 2599, at 2614 - 24.

[764] Ibid, See RW Mansbach et al., *The Web of World Politics, Non-State Actors and The Transformation of International Relations* (Englewood Cliffs, NJ 1976), at 20 -37.

foreign investors away from politics and diplomacy), to name but a few, evidences States voluntarily agreeing to shed a portion of their sovereignty to authoritative international institutions.[765]

This, of course, is an enigma to traditional IR scholars who traditionally assume that States generally yearn to preserve their legal sovereignty and the sole authority to judge the appropriateness of their policies in the international domain.[766] Many IR scholars' once rather sceptical attitude regarding State compliance with IA's has primarily shifted to a more favourable appraisal today.[767] The prevalent view in the current literature[768] embraces Louis Henkin's famous statement that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[769] The scholars have become less preoccupied with how much States comply, instead of to posing more intriguing questions about why States comply with or breach IAs.[770] The debate is often framed under three core theoretical approaches: realism, liberalism, and constructivism.[771]

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[765] BA Simmons, 'Compliance with international agreements' (1998), Ann. Rev. Pol Sci., at 67 -77.

[766] The predominant view of the Realist assumes that States engage commitments – specific formal legal commitments - either carefully or suspiciously and are typically hesitant to delegate their decision-making powers to supranational bodies. See KN Waltz, *Theory of international politics*, (Waveland Press, 2010), cited in Simmons (ibid).

[767] Ibid. Until recently much of the literature was devoted to explaining why States have voluntarily entered into IIAs agreements. Rather than why they actually comply with IIAs (recent focus) given that they can be costly and cannot be centrally enforced.

[768] See AT Guzman, 'A Compliance-Based Theory of International Law' (2002), 90 Cal. L Rev., at 1826; K Raustiala and AM Slaughter, 'International Law, International Relations and Compliance' in W Carlsnaes et al., (eds) *Handbook of International Relations* (London; Thousand Oaks, 2002), at 540; J Von Stein, 'The Engines of Compliance' in JL Dunoff et al., (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP, 2013), at 477–501; A Chayes and AH Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (HUP, 1995), at 3; D Pulkowski, 'Testing Compliance Theories: Towards US Obedience of International Law in the Avena Case' (2006), 19 Leiden J. Int'l Law, 511, at 514 [all cited in M Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' (2016), 19(3) J Int'l Eco. Law, 681-706].

[769] L Henkin, *How Nations Behave* (Col. Univ. Press, 1979), at 47.

[770] T Börzel et al., 'Obstinate and Inefficient: Why Member States Do Not Comply with European Law' (2010), 43(11) Compar. Pol. Stud., at 1363-1390; Simmons, (n 765); See also B Whitaker, 'Compliance Among Weak States: Africa and the counter-terrorism regime' (2010), 36 Rev. Int'l Stud., at 639–662.

[771] Morrow's analysis strands namely, Realism, Liberalism and Constructivism, JD Morrow, 'When do states follow the laws of war?' (2007), 101(3) Am. Pol. Sci. Rev., 559-572. Simmons (n 765) analysis a fourth strand – Functionalism.

5.2.1 Realists' Perspective on States' Compliance Behaviour

Realism is a central theory in IR literature. Realists' prime assumptions are that States are the central actors of the international legal system and their principal interests are power and security.[772] States are, accordingly, self-centred, rational entities with a fundamental focus on maximising self-interest. The assumptions are derivative of the predominant traditional view that power, rather than law, is the principal determinant of the course of interstate relations, including individual States' willingness to comply or be bound by international 'law'. To most Realists, international 'law' is anarchistic (conflictual and lacks an overarching authority) and has minimal capacity to bind States. While this formulation would have left unexplained compliance with treaties and other formal agreements, thus seemingly making the point baseless, instances where States have observed international law has been acknowledged. Such behaviour, however, has been attributable to convergent interests and prevailing power relations. Accordingly, States will abide by international law because it is beneficial to their interest, and such behaviour will occur needlessly in the absence of a relevant treaty or formal agreement. As Morgenthau posits, States make legal commitments cynically and "are always anxious to shake off the restraining influence that international law might have upon their foreign policies, to use international law instead for the promotion of their national interests."[773] It suggests that whatever restraints international law commands have little bearing on States' actual behaviour, apart from as offered by "a coincidence of law and national interest."[774]

Deeply rooted in the Realist view is the work of the rational choice theorists. They assume that States are instrumentally purposeful utility maximisers and calculative seekers of preference satisfaction. They have certain preferences (goals) which they endeavour to attain through their behaviour. They have

[772] Simmons, (n 765), at 79 - 80.

[773] HJ Morgenthau et al., *Politics Among Nations: The Struggle for Power and Peace* (6th edn., Knopf, 1985) at 688 in Simmons, ibid; KN Waltz, *Theory of international politics* (Waveland Press, 2010); KN Waltz, *Theory of International Politics* (NY: McGraw-Hill, Inc., 1979); JJ Mearsheimer, 'The False Promise of International Institutions' (1994) 19(3) Int'l Sect'y, 5 - 49.

[774] Simmons, (n 765).

coherent preferences-ordering over the goals, including alternative options, and behave strategically to maximise self-interest.[775] By implication, compliance with IAs is contingent on their consequences. As Henkins words this, "barring an infrequent non-rational act, nations will observe international obligations unless violation promises an important balance of advantage over cost."[776] In other words, States strategically weigh the cost of compliance against the potential costs of non-compliance to order behaviour.[777] In this respect, factors such as sanctions and reputational consideration are noted to influence State compliance behaviour. Reminiscent of the investment regime as explained below with the Argentina case, a coercive communal response such as the removal of economic benefit from benefactor-States and international bodies, and potentially decreases investment flows are attributable to dictating States' compliance behaviour.[778] Therefore, it can be argued that compliance with arbitral awards will occur unless doing so promises an essential balance of advantage over the cost of compliance. This cost-benefit approach means that compliance will occur where compliance benefits exceed the costs of non-compliance and vice versa.

In short, under the Realists' perspectives, compliance is primarily contingent on the presence of *effective* sanctions or the desire of the States to preserve and strengthen mutually beneficial economic positions, which is a reputational factor. For the most part, Realists are fixated on the fundamental variables of power and interest, rarely feeling compelled to explore further into States' compliance behaviour. To rational choice theorists, individual preferences are considered as predetermined goals: the

[775] See for example, JA Oppenheimer, *Rational Choice Theory* (London Sage Publi., 2008); M Hollis, *The Philosophy of Social Science* (CUP, 2011), at 116–18; M Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' (2016), 19(3) J Int'l Eco. Law, 681-706.

[776] Henkins, ibid, at 47.

[777] C Reus-Smit, 'Politics and international legal obligation' (2003), 9(40) EJIL, 591, at 597.

[778] See generally, ME O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (OUP, 2008); O Hathaway and S Shapiro, 'Outcasting: Enforcement in Domestic and International Law' (2011), 121 Yale LJ, at 252; AT Guzman, 'The Design of International Agreements' (2005), 16 EJIL 579, at 595; AC Blandford, 'Reputational Costs Beyond Treaty Exclusion: International Law Violations as Security Threat Focal Points' (2011), 10 Wash. Univ. Glob. Stud. Law Rev., 669, at 674–80.

factors motivating a State to accept a specific aim and how preferences are altered over time are left unexplained by them. As Hirsch puts it about the rational choice theorists, "[t]he processes of emergence and change of preferences thereof is exogenous."[779]

5.2.2 Liberalists' Perspective on States' Compliance Behaviour

The Liberalists generally hold that States comply with IAs based on self-interest and preference calculations, thus reiterating the Realists' approach. However, unlike Realists who view international law as fundamentally conflictual, Liberal theorists view cooperation as the normal state of affairs under the global system and see war as generally unnatural and irrational.[780] For instance, in reaction to Realism, Slaughter argues that State preferences (not power and capacity) are the principal motivators of State compliance behaviour, and States endorse and promote particular value preferences even when power and capacity would have had these overlooked.[781]

Despite Liberalists generally agreeing that States' conduct is dictated by their self-interest, they also argue this is significantly shaped by the preferences of domestic groups and individual audiences *within* individual States, noting that other States and political institutions represent some subset of the domestic society. Noting the significant role played by non-State actors, the Neoliberalists — specifically the Institutionalist strand — emphasise the peculiar role international institutions constantly play by aiding and implementing functions that States are incapable of implementing themselves. Such institutions, for example, ICSID on the investment parlour, provide a clear focal point for acceptable conduct as they facilitate the convergence of expectations and reduce uncertainty about States' future conduct.[782]

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[779] Hirsch, (n 46) quoting Henkin, at 47.

[780] See e.g., RO Keohane Jr., International Institutions: Two Approaches (1988), 32(4) Int'l Stud. Q., cited in RO Keohane, International Institutions and State Power (2008), at 159; OR Young, 'The Politics of International Regime Formation: Managing Natural Resources and the Environment' (1989), 43 Int'l Org., at 349.

[781] AM Slaughter, 'International Law in a World of Liberal States' (1995), 6 EJIL 503, at 508.

[782] Ibid; G Garrett and BR Weingast, 'Ideas, interests, and institutions: constructing the EC's internal Market' (1993) in J Goldstein and RO Keohane (eds), *Ideas and Foreign Policy*, (Cornell Univ. Press 1997, 499–500).

The Liberalists also argue that States' behaviour is significantly influenced by the type of political regime under which they exist.[783] In fact, a substantial body of the liberal literature explores links between democratic governance and peaceful relations, and between the rule of law within States and the prospects of compliance with IAs.[784] Non-liberal governments are generally considered a major cause of global conflict and insecurity.[785] Conversely, liberal States "have representative governments, independent and professional judiciaries dedicated to fostering the rule of law, and they secure civil and political rights."[786] Indeed, the increasing translation of liberal-democratic ideologies into the global sphere is seen as desirable given its unsurpassed prospects for fostering a peaceful world order.[787] In this context, compliance is contingent on preferences/ideologies as shaped by domestic audiences and the type of regime practised by the relevant State. Consequently, democratic/liberal governments, also known as States within the 'zone of law' (governed by international law), generally have a high inclination towards compliance, whereas autocratic non-liberal States (States within the 'zone of politics', are more prone to political considerations) have a low inclination towards compliance with IAs.[788]

Transparency, therefore, becomes a significant element of compliance. Because democratic States' engagements are more transparent - open, and exposed to public scrutiny - IA breaches are more likely to encounter costly backlash and criticism from domestic actors and other States. In other words, domestic groups in democratic States are more equipped to exert pressure on their government towards compliance with IAs, including outcomes therein. The government can also be pressured into breaching IAs (e.g. by

[783] Ibid.

[784] WJ Dixon, 'Democracy and the Management of International Conflict' (1993), 37(1) J Confl. Resol., 42-68; See also MW Doyle, 'Liberalism and World Politics' (1986), 80 Amer. Pol. Sci. Rev., at 1151-69; GA Raymond, 'Democracies, Disputes, and Third-party Intermediaries' (1994), 38(1) J. Confl. Resol., 24 - 42.

[785] Dixon, ibid. Raymond, ibid.

[786] See Hirsch, (n 46) and footnotes therein; FW Scharpf, 'Games Real Actors Play: Actor-Centered Institutionalism in Policy Research' (2018), Routledge.

[787] For detailed liberal perspective in IR see Slaughter, *International Relations* (n 752), 29–32; AM Slaughter, 'International Law in a World of Liberal States' (1995), 6 Euro. J. Int'l Rel., 503; Pulkowski, (n 752), at 519–20.

[788] Slaughter, *World of Liberal*, ibid, at 532–34.

discriminating against foreign investors or even refusing obligations relating to honouring outcomes) where the relevant IAs or outcomes in the perception of the relevant domestic audience are, for example, repugnant to the rule of law.[789] In this regard, the weight or legitimacy of the IAs (or enabling institutions) may be crucial in directing the conduct of domestic audiences and hence the conduct of governments themselves.[790]

In short, like the Realists, Liberalists see compliance with IAs as motivated by instrumental factors such as sanctions and reputational cost. Indeed, both the sources of and solutions to, compliance or non-compliance stem from incentive structure.[791] However, the distinctive features of the Liberalist approach to compliance are the focus on the link between State compliance and domestic groups, as well as the enhanced prospects for compliance by liberal-democratic States.

5.2.3 Constructivists' Perspective on States' Compliance Behaviour

Significantly influenced by sociological scholarships, the Constructivists tradition developed as a critique of the Realists' tradition. While the Constructivist shares observations with Liberalists that democratic norms influence States' compliance behaviour,[792] the predominant and growing school of thought places normative considerations above States' compliance behaviour. Constructivists' central assumption is that the fundamental structure of international politics is social by nature, and social structures shape actors' identities and interests and motivate them towards compliance.[793] While acknowledging that international social structure comprises both material and non-material elements, they consider material elements like identity and power auxiliary. Shared intersubjective knowledge, understandings and expectations are the key elements infusing the structure with purpose, plan and

[789] See, e.g, *Beer Creep Mining Corp. v Republic of Peru ICSID* Case No. ARB/14/2 December 4, 2017; *S.D. Myers v Canada* (Partial Award of 13 November 2000) UNCITRAL, para 9 and paras 118–24 in Hersch.

[790] R Fisher, Improving Compliance with International Law (Charlottesville: Univ. of Virginia Press, 1981).

[791] J Tallberg, 'Paths to Compliance: Enforcement, Management, and the European Union' (2002), 56(3) Int'l Org., at 609-643, at doi:10.1162/002081802760199908. Accessed 09/03/20.

[792] Reus-Smit (n 777), at 601.

[793] Simmons, (n 765) at 85 - 88.

continual subsistence.[794] In other words, the international structure and States are not exogenously given and do not exist autonomously from the thoughts and ideas of the actors involved; both are constructs of diverse historical exchanges.[795] International politics and associated ideas are man-made and therefore occur as intersubjective beliefs which are broadly shared among actors.

It follows that the global structure is a structure of human awareness that encompasses the identity, signals, language and understandings shared between actors, including State-actors.[796] Therefore, unlike rational choice theorists who emphasise the individual State-actors, sociological theorists emphasise the social environment in which State-actors live and engage, as well as the interactions between State-actors and social groups.[797] But the assumption is not made that individual State-actors' preferences and alternative paths of conduct are 'given'; they are rather created by exchanges between actors and society. In this formulation, the classic sociological central assumption is that individual actors' preferences are substantially influenced by social factors and processes like identity, socialisation or collective memories, so their behaviour is not governed by individual preferences alone.[798] Despite this ardent general view, divergence ensues among proponents regarding the restricting impact such social factors (including norms) have on the individual actors' behaviour.[799] That said, norms are crucial to the Constructivists' constructs. Finnemore stresses that norms influence the creation of interests and changing norms can alter

[794] See Koh (n 763) - general view; Fisher, *Improving Compliance* (n 790) - specific view.

[795] H Bull, *The Anarchical Society: A Study of Order in World* Politics (Col. Univ. Press 1977), at 19.

[796] A Wendt, 'Anarchy is what States make of it: The Social Construction of Power Politics' (1992), 46 Int'l Org., at 391- 425; M Finnemore, 'The Purpose of Intervention: Changing Beliefs about the Use of Force' (2004); M Finnemore, 'Constructing Norms of Humanitarian Intervention' in Peter J Katzenstein (eds), *The Culture of National Security: Norms and Identity in World Politics* (NY: Col. Univ. Press, 1996), at 157 – 159.

[797] Ibid.

[798] Bull (n 795), at 137. See also RT Schaefer, *Sociology Matters* (McGraw Hill, 5th edn., 2012), at 2–3.

[799] see M Hirsch, 'The Sociology of International Law' (2005), 55 Univ. of Toronto Law J. 891, at 896–97.

States' interests.[800] Although norms do not always determine behaviour, the author adds that they create permissive conditions for actions.[801]

Regarding compliance with IAs, Constructivists consider State-actors to be motivated by impersonal social factors such as identities, values and legitimacy, rather than by some self-interested material calculations.[802] Legal obligations are recognised as social standards of appropriate behaviour which result from a process of 'interaction, interpretation, and internalization.'[803] In this perspective, a critical question to the Constructivists is whether the specific legal obligation(s) represents a social norm internalised by the specific State-actor. Relating also to the question of the legitimacy of the specific legal obligation, the extent to which the relevant State-actor accepts the authority of the relevant rule or specific institution is of first importance. Here, compliance is seen as a function of perceived legitimacy, and States comply with IAs "because they perceive the rule and its institutional penumbra to have a high degree of legitimacy."[804] Accordingly, subjects' perception of the legitimacy of rule or authority heightens their sense of obligation to bring behaviour into compliance.[805] It implies that compliance becomes challenged where an authority's legitimacy is in question.[806]

Franck notes a missing comparable domestic-style enforcement mechanism at the global level to highlight how important perception of legitimacy is to securing compliance with IAs. The author highlights rules attributes such as determinacy and degree of coherence as fostering the perception

[800] Finnemore, *Constructing Norms* (n 796).

[801] Ibid.

[802] K Raustiala and AM Slaughter, *International Relations* (n 762), at 538 – 540.

[803] HH Koh, 'Transnational Legal Process' (1996), 75 Neb L. Rev. 181, at 199 -205.

[804] See TM Franck, *The Power of Legitimacy Among Nations* (OUP, 1990), at 24 [Hereafter, Franck, *The Power*]

[805] Ibid, at 3; CA Thomas, 'The Concept of Legitimacy and International Law' (2013), LSE Law Society and Economy Working Papers, at 14-16; D Pulkowski, (n 751), at 526–27; Simmons (n 765), at 87–89.

[806] FV Kratochwil and JG Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986), 40(4) Int'l Org., at 753–75. This assertion dovetailed with legal and sociological attempts to understand voluntary law compliance for individuals, groups, and organizations as a function of the perceived legitimacy of the law and legal processes themselves. See T Tyler, *Why People Obey the Law* (Princeton Univ. Press, 2006), at 273.

legitimacy for compliance pull.[807] Other rules attributes such as specificity, durability and concordance are noted, so the more clear, robust and generally endorsed a prescription is, the greater the compliance pull.[808] In short, the perception of legitimacy is central to Constructivists' view of what impacts States' compliance behaviour. Criticisms often centres around measuring legitimacy. Keohane calls the theory circular because legitimacy "is difficult to measure independently of the compliance that it is supposed to explain."[809] The theory, however, finds empirical support by way of opinion surveys and discourse analysis from political science and psychosocial parlance, as well as emerging support from international law and provides a useful perspective on State compliance behaviour.[810]

5.3 Examining the Perspectives Against Classic ISA Compliance Behaviour

The preceding section explored the three main theoretical perspectives in IR literature to understand what factors are identified as impacting States' behaviour regarding compliance or non-compliance with their international obligations, including the obligations relating to investment arbitral awards. The examination shows not only overlap but also divergences in factors that provide a valuable guide to understanding State compliance behaviour under the investment protection system. Indeed, as Simmons rightly posits, "these perspectives are not mutually exclusive, and the less one is willing to strawman the arguments of the major proponents, the clearer become the numerous points of overlap."[811] For instance,

[807] TM Franck, *Fairness in International Law and Institution* (Oxford: Clarendon Press, 1995), at 44-46; See also Franck, *The Power* (n 788).

[808] Fisher, *Improving Compliance* (n 790), at 370.

[809] See RO Keohane Jr., International Relations and International Law Two Optics 9 (Sherril Lecture, Yale Law School, transcript on file with author).

[810] See details in D Bodansky et al., Legitimacy in international law and international relations in *Interdisciplinary perspectives on international law and international relations: The state of the art* (2013), at 335; TR Tyler, *Why People Obey the Law* (Princeton Univ. Press, 2006); TR Tyler, 'Psychological Perspectives on Legitimacy and Legitimation' (2006), 57 Ann Rev. Psych., at 375-400; Gibson and AC Gregory, 'The Legitimacy of Transnational Institutions: Compliance, Support and the European Court of Justice' (1995), 39(2) Am J Pol Sci., at 459–89; JGS Koppell, *World Rule: Accountability, Legitimacy, and the Design of Global Governance* (UCP, 2010). For more see T Sommerer and H Agné, *Consequences of Legitimacy in Global Governance: Sources, Processes, and Consequences* (J Tallberg et al., (trs), OUP, 2018), at 153 – 161.

[811] Simmons, (n 765).

while the Realists hardly regard international law as having any serious restraint on States' behaviour, some of its key proponents would acknowledge that international law compliance is fairly prevalent and identifies factors such as sanctions in inducing compliance.[812] Equally, scholars who emphasise normative compliance factors consider factors such as sanctions to encourage such convergence.[813] Additionally, the approaches that link domestic regime type and compliance with international law often engage factors that relate to the role of liberal values and beliefs that secure international behaviour consistent with the rule of law.[814]

Regarding inducing compliance, the dominant factors identified can be summed up as follows: reputational considerations and sanctions (primarily espoused by the realists and liberalists) and the perception of legitimacy (espoused by constructivists). Sanctions implicate direct diplomatic measures such as membership exclusion and withholding of financial or related economic benefits (coercive economic sanctions) or even freezing of the recalcitrant State's assets. It can also implicate more aggressive self-help countermeasures that are otherwise unlawful and subject to strict requirements under international law.[815] Reputational considerations (reputational sanctions as Guzman terms it)[816] and sanctions are linked inherently, where the latter is an indirect sanctions, which may be generated by a direct sanction or threat thereof, in dictating a State's compliance behaviour.[817] In this context, the factors identified by the three theoretical perspectives find expression in some notable State compliance behaviours under the ISA regime. To avoid repetition, a classic example of compliance behaviour,

[812] Ibid, citing Morgenthau (1985).

[813] Ibid, citing Bull (n 795) [mainly in line with the Constructivists' view.]

[814] Ibid. [mainly in line with the Liberalists and Constructivsts views.]

[815] Articles 49, 50 and 51 of the ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in Report of the International Law Commission to the General Assembly on the work of its fifty-eight session, UN Doc A/56/10 (2006).

[816] AT Guzman, 'A Compliance-Based Theory of International Law' (2002), 90 Calif. L. Rev. 1823.

[817] For instance, economic sanctions (diplomatic measures) taken by States individually or collectively, with or without the help of some influential non-State actors like the World Bank could lead to reputational considerations in dictating a State's compliance behaviour, much like the fear of potential backlash or losing investment opportunities.

Argentina's behaviour vis-à-vis compliance with ICSID arbitral awards after the State's 2001–02 financial crisis,[818] will now be examined. The State's behaviour is classified into two stages: a blatant refusal to comply spanning the period from 2007 to 2013, and an agreement to (settle) comply from mid-2013 to October 2013. Between 2000 and 2008, over 40 ISA proceedings were initiated against Argentina under ICSID and other arbitral rules for breach of numerous obligations under BITs and related IIAs due to emergency measures taken by the State following its 2001–02 financial crises. These proceedings resulted in several arbitral awards issued against the State.[819] The awards rendered under the ISCID rule include *CMS Gas Transmission Co. v Argentine Republic* (CMS v Argentina),[820] *Azurix Corp. v Argentine Republic* (Azurix),[821] *Vivendi Universal S.A. v Argentine Republic* (Vivendi I),[822] *Continental Casualty Co. v Argentine Republic*.[823] Some of these awards were more than $100 million USD.[824] For example,

[818] See a brief discussion about Argentina's economic crises in Chapter 2.3.1; 'Relationship between Article 53 and 54'. However, for more details about Argentina's economic crises, see specifically, WW Burke-White, 'The Argentine financial crisis: state liability under bits and the legitimacy of the ICSID system' (2008), 3 Asian J WTO & Int'l Health L & Pol'y, 199.

[819] Nineteen (19) arbitral awards were noted to have been issued against Argentina: "*SAUR International v Argentine Republic*, ICSID Case No ARB/04/4, Award (22 May 2014); *Total SA v Argentine Republic*, ICSID Case No ARB/04/1, Decision on Liability (27 December 2010); *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, ICSID Case No ARB/03/23, Award (11 June 2012); *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA) v Argentine Republic (II)*, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010); *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15, Award (31 October 2011); *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award (5 September 2008); *National Grid Plc v The Argentine Republic*, UNCITRAL, Award (3 November 2008); *BG Group Plc v Argentine Republic*, UNCITRAL, Award (24 December 2007); *LG&E Energy Corp, LG&E Capital Corp. and LG&E International Inc v Argentine Republic*, ICSID Case No ARB/02/1, Award (25 July 2007); *Azurix Corp v The Argentine Republic* (I), ICSID Case No ARB/01/12, Award (14 July 2006); *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005); *Compañía de Aguas del Aconquija SA and Vivendi Universal SA (formerly Compañía de Aguas del Aconquija, SA and Compagnie Générale des Eaux) v Argentine Republic (I)*, ICSID Case No ARB/97/3, Award (21 November 2000); *Suez, Sociedad General de Aguas de Barcelona, SA and Interagua Servicios Integrales de Agua, SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability (30 July 2010); *AWG Group Ltd v The Argentine Republic*, UNCITRAL, Decision on Liability (30 July 2010)" cited in Gaillard and Penusliski (n 19).

[820] ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007).

[821] ICSID Case No ARB/01/12 Award (14 July 2006).

[822] ICSID Case No ARB/97/3 Award (20 August 2007) [The claimant was formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux*]

[823] Ibid. ICSID Case No ARB/03/9 Award (5 September 2008). Note that, the rights in the CMS Gas, Vivendi Universal, Continental Casualty and National Grid awards were subsequently acquired by US creditors.

[824] Schneider, (n 143), at 199.

Argentina was ordered to pay $133.2 million USD, plus transfer ownership of shares at an additional sum of $2,148,000 USD in compensation to *CMS*.[825]

From 2007 to mid-2013, Argentina refused compliance with the awards. It maintained that its obligation to comply with the awards under Article 54(1) of the ICSID Convention only arose after its local court had reviewed the awards in accordance with the basic Argentinian Constitutional principle.[826] Unsurprisingly, the State's interpretation of the Article was not only rejected by scholars and arbitral tribunals, but the creditors never complied with such a condition.[827] In response to the States' recalcitrance, several diplomatic measures, including economic sanctions, were taken against Argentina which, by October 2013, had forced it into settlement agreements with the four awards by sovereign bonds at a 25 per cent discount.[828] Argentina later also settled the awards in *BG Group Plc v Argentine Republic*, *El Paso Energy International Company v Argentine Republic*, *Total SA v Argentine Republic* and *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA (formerly Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA) v Argentine Republic (II)* [829] by sovereign bonds at a 25 per cent discount. Although these awards were issued in 2007, 2011, 2013 and 2015 respectively, the settlement agreements were attained only between 2016 and 2019.[830]

The following examination will reveal that, while (economic) sanctions and reputational considerations (dominant factors espoused by the realists and liberalists) secured compliance at the second

[825] Ibid.

[826] Goodman (n 129), at 453.

[827] Ibid. See Chapter 2.3.1 for more on this.

[828] D Thomson, 'Argentina agrees to settle treaty awards' (Global Arb. Rev., 11 October 2013), at<https://globalarbitrationreview.com/article/1032713/argentina-agrees-to-settle-treaty-awards>Accessed 23/09/2021; CB Rosenberg, 'The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards' (2013), 44 Geo. J Int'l L., at 503; P Fox and CB Rosenberg, 'The Hidden Tool in a Foreign Investor's Toolbox: The Trade Preference Program as a "Carrot and Stick" to Secure Compliance with International Law Obligations' (2013), 34 NW J. Int'l Law & Bus., at 53–80.

[829] See n 819.

[830] Gaillard and Penushliski, (n 19).

stage, the constructivists' legitimacy factor explains the State's initially hostile approach towards compliance with the awards and also serves as a precursive factor.

5.3.1 Argentina's (non)Compliance Behaviour - 2007 to 2013

While Argentina's *initial* non-compliance can be explained by legitimacy factors espoused by the constructivists, core factors highlighted by both realists and liberalists—reputational considerations and sanctions—also find expression in the State's compliance behaviour during this period. Both perspectives identify States as seekers of preference satisfaction, carefully engaging cost/benefit analysis to maximise self-interest.[831] Here, faced with 42 ICSID arbitral claims, some already rendered in hundreds of millions of USD, it could be argued that the desire to maximise self-interest indeed becomes the State's focus. The cost of compliance, for example, making massive sums out to claimants, undoubtedly outweighs the cost of non-compliance (e.g., potential sanctions and reputational loss, particularly from the international community). Rational choice theorists will argue that the State's interpretation of Article 54(1) "constituted a rational strategy aimed at increasing the effective costs of ICSID claims, and reducing the prospects that further claims would be lodged against [it] in such forums".[832] The liberal theorist may arrive at a similar conclusion but will highlight the State's behaviour as largely influenced by the preferences of individuals and groups within it, as well as the type of regime exercised by the government.

Indeed, although Argentina's national identity is a combination of nationalism and internationalism, the collective narratives formed among most Argentinians following the financial crisis were nationalist, as influenced by Peronist economic ideology, which is traditionally characterised by government intervention in the market and economic independence.[833] The ideology created hostility toward the neo-

[831] See Section 5.2. & 3.

[832] Hirsch (n 46), at 697.

[833] Ibid, 704; see also, M Hirsch, *Invitation to the sociology of international law* (OUP, 2015), at 76 – 87.

liberal ideology which is associated with the World Bank and the investment regime.[834] The previous government, led by President Menem, whose policy was influenced by the neo-liberal ideology, was often blamed for the State's financial crisis. President Kirchner's government, although known Peronists, acted mainly to appease the preferences of the domestic audience to avoid costly political backlash, and reputational damage.[835] Further, linking greater liberal governance and increased compliance with IAs, Kirchner's government was marked by executive control; the relative weakness of the legislative and judicial arms over the policy-making process was pronounced.[836] This reinforces what liberalists put forth as a link between reduced liberal governance and non-compliance with international law (here, the ICSID awards) and vice versa. As Hirsch argues, "if the more liberal party and the primary opposition to Peronists—the Radical Civic Union (UCR) party—had been in power at that time, its attitude towards the ICSID could have reasonably been expected to differ from that adopted by [Kirchner's government]".[837] In short, in line with the realists and liberalists, Argentina's behaviour from 2007 to 2013 was influenced by deductions aimed at maximising self-interest. At this point, it can be said that the cost of compliance with the numerous hefty ICSID awards outweighs the cost of non-compliance, such as potential sanctions or reputational losses that the State may incur from the international community.

The constructivists' main identification with social factors such as legitimacy finds expression in Argentina's behaviour from 2007 to 2013. Constructivists postulate that when legitimacy is in question, compliance is also changed, and vice versa. Indeed, many stakeholders, both States and non-State actors have doubts regarding the legitimacy of the ICSID arbitral system and that of the entire investment regime. The regime has been criticised for lacking certain fundamental elements of effective adjudication, such as transparency, consistency, independence, and impartiality, the absence of an appeal process, and having

[834] Ibid. [The World Bank and the investment regime favour or yield toward export-oriented, market friendly policies.] For more on Peronist, see specifically, R Di Tella and J Dubra, 'Some Elements of Peronist Beliefs and Tastes' (2018), 6 Lat. Am. Econ. Rev., 27, at https://doi.org/10.1007/s40503-017-0046-5. Accessed 21/09/20.

[835] Ibid.

[836] Ibid.

[837] Ibid, at 698.

only a limited annulment procedure (discussed later), among others.[838] Thus, Argentina's initial hostility vis-à-vis non-compliance with ICSID awards was influenced predominantly by the legitimacy deficits of the institution. The local newspapers, particularly the daily *Pagina/12*, regularly stressed ICSID's dependence on the World Bank, which is believed to be controlled by the United States and other powerful States.[839] Arbitral tribunals were also constantly criticised for being biased in favour of foreign investors and failing to consider situations of massive economic downturns.[840] Though arising from the same economic measure, some of the awards rendered against Argentina contain conflicting outcomes from both tribunals and annulment decisions,[841] and given that these conflicting awards are binding regardless, worsen the State's and observers' confidence in the regime.

Refusing compliance based on perceived legitimacy may be argued to be a rational strategy undertaken by Argentina because the cost of compliance is high. However, as noted above, many stakeholders have also expressed concern about the regime's legitimacy, and these concerns have resulted in various reactions and efforts to reimage the regime, as shall be seen later.

5.3.2 Argentina's Compliance Behaviour: Mid-October 2013

The State's behaviour by mid-October 2013 would, to both rational choice and liberal theorists, constitute another strategy aimed at preserving and maximising self-interest against a cost-benefit analysis. Argentina's non-compliance incurred severe economic sanctions and reputational losses during

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[838] M Waibel et al., (eds) *The Backlash against Investment Arbitration: Perception and Reality* (London: Kluwer Law Int'l, 2010); JE Kalicki and A Joubin-Bret (eds) *Reshaping the Investor-State Dispute Settlement System* (Brill Leiden, 2015). See also N Butler and S Subedi, 'The Future of International Investment Regulation: Towards a World Investment Organisation?' (2017) 64 Neth Int'l Law Rev, 43–72. [highlighting the regime's procedural and substantive shortcoming and stakeholders' reactions.]

[839] See, e.g., M Wainfeld, 'Qué Difícil es Ser Normal' (Página/12 Online, 3 April 2005) <http://www.pagina12.com.ar/diario/elpais/1-49263.html> Accessed 12/04/21; 'La que Rompe no Sería Argentina, sino Ellos' (Página/12 Online, 26 April 2005) <http://www.pagina12.com.ar/diario/elpais/1-50265.html> Accessed 12/04/21; F Krakowiak, 'ArbitroBombero' (Página/12 Online, 2 May 2005) <http://www.pagina12.com.ar/diario/suplementos/cash/35-1898-2005-05-29.html> accessed 27 March 2015; 'Qué Reclaman y Quién lo Resuelve' (Página/12 Online, 27 March 2012) <http://www.pagina12.com.ar/diario/economia/subnotas/2-58392-2012-03-27.html>, cited in M Hirsch, *Invitation to the Sociology of International Law* (OUP, 2015), at 76 - 87.

[840] Hirsch, ibid.

[841] AK Schneider, 'Error Correction and Dispute System Design in Investor-State Arbitration' (2013), Yearbook on Arbitration and Mediation 5;194, at 197 -200.

this period, both domestically and internationally. Indeed, due to the culmination of an intense lobbying effort by the United States awards creditors, the United States Government suspended trade incentives (Generalized System of Preferences, GSP) previously extended to Argentina.[842] On March 26, 2012, then US President Obama declared that:

> it is appropriate to suspend Argentina's designation as a GSP beneficiary developing country because it has not acted in good faith in enforcing arbitral awards in favour of United States citizens or a corporation, partnership, or association that is 50 per cent or more beneficially owned by United States [citizens].[843]

The total benefit of the trade incentive to the State's economy is highlighted by the fact that "Argentina was the ninth-largest GSP beneficiary in 2011 with $477 million USD in exports of duty-free products to the United States, which amounted to $17 million USD in exempted import duties."[844] The costs to the State from this trade sanction were mostly borne by domestic exporters of sugar confections, strawberries, grapes wine, cheese, leather, and lithium, as the additional cost of exporting without a duty-free incentive gives other exporters of the same products an unfair competitive advantage over them.[845]

Aside from redrawing the trade incentive, the United States, together with other powerful States including the United Kingdom, stopped the international monetary institutions like the World Bank, Inter-America Development Bank, and Paris Club of Creditors from extending loans and related financial benefits to Argentina.[846] Indeed, "the combined approach exposes Argentina to substantial risks, such as limiting its access to credit, altering its credit rating, constricting its export market, and discouraging

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[842] Rosenberg and Fox, (n 828); See also R Minder, 'Spain Cautions Argentina on Takeover of Energy Firm' *The New York Times* (NY, 13 April 2012), at <www.nytimes.com/2012/04/14/business/global/spain-warns-argentina-aboutypf-takeover.html> Accessed 23/09/20.

[843] See Presidential Proclamation—To Modify Duty-free Treatment Under the Generalized System of Preferences and for Other Purposes, THE WHITE HOUSE (Mar. 26, 2012), http://www.whitehouse.gov/the-press-office/2012/03/26/presidential-proclamation-modify-duty-free-treatment-under-generalized-s. Accessed12/09/19.

[844] Rosenberg and Fox, (n 828), at 524.

[845] Ibid.

[846] Ibid.

foreign investment."[847] With a failing economy, the desire to receive support (including loans from the World Bank) and to project an investor-friendly reputation globally was confirmed to motivate the State into concluding settlement agreements with creditors by bonds at a 25 per cent discount in mid-October 2013.[848]

The preferences of domestic audiences also bear on States' conduct. Indeed, aside from the motivation to improve inter-State relations, and project an investor-friendly reputation, the Kirchner government was pressurised to settle with creditors for fear of losing domestic support because domestic businesses and interest groups feared the government's actions were driving away foreign capital.[849] The sanctions and reputational considerations, both within and outside the State, were majorly linked in terms of inducing and altering the State's compliance behaviour. Here, the State's behaviour also reinforces the link between a liberal-democratic State and compliance with IAs, as postulated by liberalists. As Hirsch explains,

> [a]lthough Argentina's national identity presents a contested dualism of nationalism and internationalism, it is clear that significant elements of its identity reflect the aspiration to avoid isolation and play a role in the community of nations. In light of the wave of investment awards rendered against Argentina and the various economic sanctions, the internationalist features in the Argentine collective identity and the aspiration to avoid isolation apparently contributed to the decision to reach the settlement agreement in October 2013.[850]

While the legitimacy deficits which triggered the State's initial non-compliance behaviour had not receded completely, the State's ongoing financial crisis, the numerous economic restraints caused by the sanctions,

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[847] RP Alford, The Convergence of International Trade and Investment Arbitration (2014), 12 Santa Clara J. Int'l L. 35, at 52 – 53. <https://digitalcommons.law.scu.edu/scujil/vol12/iss1/3>. Accessed 06/09/20

[848] El Banco Mundial aprueba el financiamiento para Argentina de alrededor de mil millones de dólares por ano hasta 2018', Télam (9 September 2014), <http://www.telam.com.ar/notas/201409/77539-el-banco-mundial-financiamiento-argentina-mil-millones-de-dolares.html> Accessed 23/09/20.

[849]See Tomás Lukin, 'Fallo contra la Argentina en el Ciadi' May 9, 2017, Pagina 12, <www.pagina12.com.ar/36547-fallo-contra-la-argentina-en-el-ciadi> Accessed 23/09/20.

[850] Hirsch, (n 46).

and isolation from the global business community compelled Argentina into reaching settlement agreements with the creditors by bonds. The settlement is said to have eased the bilateral relationship between Argentina and the United States and the global business community.[851] Indeed, as soon as the settlement arrangement was initiated, the World Bank decided to grant Argentina loans worth $3 billion USD to finance the State's infrastructure projects.[852] Equally, in May 2014, the Paris Club of Creditors (of which the United States is a notable member) arranged with Argentina to clear debt worth over $9 billion USD.[853] Clearly, the economic sanctions and reputational damage have led to positive changes in the State's compliance behaviour as postulated majorly by the rational choice and liberalists.

One must not, however, lose sight of the fact that defaults are not uncommon with settlement agreements. In fact, sanctions do work but, by and large, they are good at obtaining only temporary compliance.[854] In other words, sanctions do not create a long-lasting obligation; they only, and temporarily, alter behaviour. Where the incentive to hold the obligation to the settlement agreement becomes insufficient, behaviour could change. Indeed, Argentina is a known serial defaulter,[855] and further defaults are therefore likely. This statement is reinforced by default settlement agreements by States like Venezuela, as seen below.

5.3.3 Why Sanctions and Reputational Considerations are Unsustainable

The aforementioned theoretical approaches provide valid factors in explaining what motivates and compels States to comply, or not, with IAs. That said, the constructivists' legitimacy factor arguably

[851] Rosenberg and Fox, (n 828).

[852] World Bank Press Release, 'Argentina/BM: New Strategic Partnership 2014-16' (10 October 2013) www.worldbank.org/en/news/press-release/2013/10/10/anuncian-alianza-estrategica-2014-16> in Gaillard and Penusliski, (n 19), at 14.

[853] Paris Club Press Release, 'The Paris Club and the Argentine Republic Agree to a Resumption of Payments and to Clearance of All Arrears' (29 May 2014) www.clubdeparis.org/en/communications/article/the-paris-club-and-the-argentine-republic-agree-to-a-resumption-of-payments in Gaillard and Penusliski (n 19), at 14.

[854] RA Pape, 'Why Economic Sanctions Do Not Work' (1997), 22(1) Int'l Security 90-136, at 106 -111. A Kohn, 'Why Incentive Plans Cannot Work' (1993) 17(5) Harvard Bus. Rev. 54-60. [specific to the employment section]

[855] See B Bartenshire et al., 'One Country, Nine Defaults: Argentina Is Caught in a Vicious Cycle' Bloomberg.com Sept.11, 2019, at <www.bloomberg.com/news/photo-essays/2021-11-12/the-fight-for-the-planet-s-future> Accessed 23/09/20.

provides a more meaningful and viable explanation for States' conduct, not only because it highlights the ISA regime's ongoing crisis and the backlash therein, but it is also less dramatic and more economically viable, stable, and sustainable. Admittedly, reputational considerations and coercive sanctions can induce compliance, as exemplified by Argentina's case. However, such measures, particularly economic sanctions, carry a substantial social and economic cost and are not stable or sustainable over time.[856]

First, these measures are inherently political in a manner that only comes into play or effect after a prolonged period of wilful non-compliance by the State and unsuccessful coercive enforcement attempts by the award creditors. For instance, it took Argentina between approximately 5–13 years of persistent non-compliance and resisting coercive enforcement from the date the five awards were issued to agree on post-award settlements.[857] But being a serial defaulter means Argentina can easily renege on these settlement agreements, thereby taking claimants back into a long battle in search of a remedy. Indeed, economic sanction, as Gaillard and Penusliski affirm, can force "a State to settle, [but] it might not comply with the terms of the settlement at a later stage."[858] Venezuela provides a good example to reiterate this point. Venezuela presents the second largest State respondent with 58 investment arbitration proceedings instituted against it under BITs and related IIAs. Most of these arbitration proceedings arose from measures adopted by "Chavez-led Government in 2007 to nationalize oil, gold and agricultural projects. The State settled some of the arbitrations prior to an award being rendered in the form of cash payments, debt relief and other financially related settlement agreements.[859] Twenty arbitral awards have been

[856] AO Hathaway Hathaway, 'Do Human Rights Treaties Make a Difference? (2002) Yale Law School Legal Scholarship Repository, Vol. 111(1), at 1935-1981.

[857] Gaillard and Penusliski, (n 19), at 13 -14, 49. [the five ICSID awards were issued between 2000 and 2008 and settlement arrangement came after October 2013; it took the State between 5 – 13 years approximately to settle. Subsequent awards in BG Group, El Paso, Total and Suez rendered in 2007, 2011, 2013 and 2015 respectively, settlement agreements were reached between 2016 and 2019" thus, approximately, between 2 – 12 years.]

[858] Gaillard and Penusliski, (n 19), at 49.

[859] Ibid, at 16, citing cases: *Ternium SA and Consorcio Siderurgia Amazonia SL v Venezuela*, ICSID Case No ARB/12/19; *The Williams Companies, International Holdings BV, WilPro Energy Services (El Furrial) Limited and WilPro Energy Services (Pigap II) Limited v Venezuela (I)*, ICSID Case No ARB/11/10; Universal Compression International Holdings, SLU v, ICSID Case No ARB/ 10/9; *Holcim Limited, Holderfin BV and Caricement BV v Venezuela*, ICSID Case No ARB/09/3; *CEMEX Caracas Investments BVand CEMEX Caracas*

rendered against Venezuela: five are currently under annulment review[860] while three have been paid voluntarily.[861] Twelve awards remain unpaid and ongoing coercive enforcement efforts by award creditors are yet to produce success. In the specific cases of *Crystallex v Venezuela*[862] and *Rusoro v Venezuela*[863] while settlement agreements came through in 2018 after a long wilful non-compliance and resisting enforcement, in December 2019 the National Assembly of Venezuela:

> passed a Resolution declaring the 2018 settlement agreements with Crystallex and Rusoro respectively as null and void. Therefore, in addition to many awards rendered against Venezuela not having been paid, there are important instances where the country has not complied with settlement agreements or has even rescinded them.[864]

Thus, notwithstanding the compliance/settlement-inducing power carried by sanctions, compliance is not always guaranteed as the terms agreed upon can be easily altered, rescinded, or later not complied with. In other words, there is no finality or predictability to the outcome. By and large, sanctions only guarantee temporary compliance. In the end, the creditors may be back to a fruitless chase for remedies, including resorting to cumbersome coercive enforcement actions in domestic courts, which adds to the time and cost of the remedial process. Cumulatively, these measures carry increasingly substantial social and financial costs. Moreover, most settlement agreements have involved significant discounts on the initial

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II Investments BV v Venezuela, ICSID Case No ARB/08/15; and *Eni Dacio´n BV v Venezuela*, ICSID Case No ARB/07/4.

[860] Ibid, at 16 ["*Blue Bank International*, *Koch Minerals*, *Sa`rl, ConocoPhillips et al*, *Longreef*, and *Rusoro*."]

[861] Ibid: Awards rendered in *Autopista Concesionada de Venezuela, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (23 Sept. 2003) and *FEDAX NV v Bolivarian Republic of Venezuela*, ICSID Case No ARB/96/3, Award (9 March 1998); *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 Sept. 2014); this is settlement agreement after resisting enforcement in domestic courts severally.

[862] *Crystallex International Corporation v Bolivarian Republic of Venezuela,* ICSID Case No. ARB(AF)/11/2.

[863] *Rusoro Mining v Venezuela Rusoro Mining Ltd. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5); Gold Reserve Inc Press Release, 'Gold Reserve Enters into Amendment to Settlement Agreement with Venezuela, Establishes Mixed Company and to Develop Brisas-Cristinas Project' (4 Nov., 2016) www.goldreserveinc.com/wp-content/uploads/2016/11/16-14.pdf. Ibid.

[864] Ibid, at 20.

amount payable; in Argentina's case, settlement arrangements with the five awards came with a 25 per cent discount.

Second, although economic sanctions like the withdrawal of economic benefits in Argentina's case led to settlement arrangements, requests to implement such diplomatic measures against certain recalcitrant States may be unsuccessful for reasoning including fear of retaliation. Reciprocity considerations dictate States' behaviours toward each other under international law, and post-award power struggles are framed in that light. The *Yukos*' awards' enforcement reinforces this as Russia's threat of retaliation, or reciprocal seizures of foreign States' assets within its territory, halted all coercive enforcement at that time in France and Belgium, followed by new law enacted on coercive enforcement actions.[865] Besides, as Pape notes, "modern states can adjust to minimize their vulnerability to economic sanctions, because administrative capabilities allow States to mitigate the economic damage of sanctions through substitution and other techniques."[866] Indeed, as Alford notes in Argentina's case, the withdrawal of trade benefits alone would have proven to be an insufficient incentive to force settlement from the State as the annual cost in additional duties of the State alone presents only 6 per cent of one arbitral award.[867] In Argentina's case, the quest to attract the support of the Paris Club of Creditors, for example, was an essential addition that weighed on the State's cost-benefit analysis toward settlement agreements.[868] In a sense, more significant incentives would be required for sanctions to secure compliance from States and, where associated or relevant incentives are unavailable or inapplicable, sanctions may be less effective. Arguably, it may be effectively implemented against developing States but not against States with strong economic and political prowess.

[865] See Chapter 4.2.1.

[866] RA Pape, 'Why Economic Sanctions Do Not Work' (1997), 22(1) Int'l Security, at 93.

[867] RP Alford, The Convergence of International Trade and Investment Arbitration (2014), 12 Santa Clara J. Int'l L. 35, at 52 – 53, at <https://digitalcommons.law.scu.edu/scujil/vol12/iss1/3>. Accessed 06/09/20

[868] Ibid.

Third, coercive sanctions or reputational loss may not deter non-compliance in instances where injustice is perceived. This is currently the sentiments largely expressed against the regime; i.e. not only in relation to lack of asymmetry in the substantive rights found in investment treaties but also in relation to the procedural mechanism in the application and the resulting outcomes.[869] In Gaillard and Penusliski's work, "earnest convictions that award is incorrect or unjust" were cited as a possible reason for frequent non-compliance and the use of annulment/vacatur procedures in 83 per cent of cases examined.[870] Given the enormity of some arbitral awards, coupled with the limited scope of review procedures available to parties in perceived or actual erroneous outcomes, there is potential that justice may not be delivered. To this end, it could be argued that the cost of non-compliance in instances of erroneous but non-annullable and high-stake outcomes may significantly outweigh the benefits of compliance. Indeed, some States have stated that complying with an unjust and unfair award is equivalent to fostering injustice.[871] In Argentina's case, particularly in respect of the *CMS* case, the apparent but non-annullable error in the award, coupled with the extensive scrutiny engaged by the annulment committee,[872] was not only a concern to the State but all observers. The criticisms that ensued gave the already unwilling State moral and political justifications (stronger incentive) to refuse compliance at the time.

Fourth, repetitive use of coercive sanctions involves high costs to the sanctioning and sanctioned as well as third States and can raise severe questions of legitimacy. The costs to the recalcitrant State of comprehensive economic sanctions are always borne by the poorest and most vulnerable, those least responsible for the recalcitrant behaviour. This may lead to pressure to relax the sanctions.[873] To the sanctioning State or even a third State, economic sanctions may lead to economic deterioration, making

[869] N Butler and S Subedi, 'The Future of International Investment Regulation: Towards a World Investment Organisation?' (2017) 64 Neth Int'l Law Rev., 43.

[870] Gaillard and Penusliski, (n 19).

[871] Russia is exemplified so is Argentina with similar notion, see J Calvert, 'Constructing investor rights? Why some States (fail to) Terminate Bilateral Investment Treaties' (2018), 25(1) Rev. Int'l Pol. Eco., 75-97.

[872] *CMS*, (n 137).

[873] A Chayes and AH Chayes, *The New Sovereignty Compliance with International Regulatory Agreements* (HUP, 1998), at 65 – 67.

the cost of living hard for the ordinary citizens of the States.[874] Moreover, sanctions are mostly imposed by powerful or wealthy States against weaker or poorer States.[875] It is axiomatic that both rich and poor can be equally sanctioned for unlawful actions or omissions in the domestic legal context. However, in the international context, it is improbable that powerful States like the United States or the United Kingdom would ever face sanctions for unlawful acts or omissions under international law no matter how egregious or the context in which they appear, be it investment-related or human rights violations. Russia's senseless attack on Ukraine, and the adequacy of international interventions and penalties imposed on Russia, not to talk about their impact on the global economic of States, further shows the limits to sanctions.[876]

The highest yet less apparent cost is the considerable political investment necessary to continually mobilise and sustain such sanctions amidst the absence of an established hierarchically superior body under the regime. As the political cost is high, attempts to impose sanctions are normally sporadic and on an ad hoc basis in response to political demands in the sanctioning States. While nothing is inherently wrong with these attributes, efforts that are essentially *ad hoc* cannot be systematic and even-handed, so the possibility of like cases not being treated alike is high.[877] Therefore, for such a measure to guarantee compliance is fatally deficient in legitimacy and, therefore, undesirable. Additionally, for such a measure to be effective, the support and participation of the most powerful States are required. Indeed, in practice, active support, if not directed and policed by major States like the United States and the United Kingdom,

[874] Ibid [noting that Jordan sustained billions of dollars in trade losses because of the economic sanctions taken against Iraq by the UN in the 1990's.]

[875] Ibid, at 66 - 68.

[876] The European Union, together with powerful States like the United Kingdom and the United States have taken certain measures to weaken major sectors of the Russian economy, such as its financial and energy sectors. Yet the war has continued. Indeed, Russia has taken several measures in retaliation to the sanctions imposed. For example, Russia has blocked interest payments to foreign investors with government bonds and banned local firms from making payments out to their foreign shareholders. Also, Russia has stopped foreign investors with billions of dollars' worth of Russian bonds and stocks from selling them. See What sanctions are being imposed on Russia over Ukraine invasion? See https://www.bbc.co.uk/news/world-europe-60125659. Accessed 31/04/22.

[877] Ibid.

is not decisive for the success of any crucial sanctioning measure,[878] Argentina's case being one such example.[879] Even if major States put sanctions on or cut ties with the recalcitrant State, leakages elsewhere can defeat the measure.[880] That said, a system in which only the weak and poor can be made to comply with their obligations is unlikely to achieve the legitimacy that is essential to the trustworthy enforcement of obligations.[881]

Last, and perhaps most importantly, the use of sanctions (diplomatic measures) as a means of securing compliance makes ineffective the fundamental objective of the ICSID system—and the modern international investment protection regime, more generally—which is to depoliticise investment-related disputes, thereby removing weaknesses associated diplomatic protection and related CIL means of investment protection. The ICSID Convention prohibits contracting States parties from offering diplomatic protection to their citizens concerning disputes that the parties have consented to submit to ICSID. There is one exception to this, however, which is a State's failure to abide and comply with an ICSID award:[882]

> No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting state shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.[883]

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[878] Ibid, at 67, 107.

[879] Argentina's sanction was primarily engineered by powerful States like the US and UK and their influence on international institutions as highlighted above.

[880] Chayes and Chayes, ibid [Noting that the defection of South Africa and Portugal undermined the sanctions taken against Rhodesia (Zimbabwe). And Romania's opening of their border thwarted the full-scale economic embargo placed on Serbia and Montenegro for inhumane atrocities.]

[881] Ibid.

[882] Article 27 of the ICSID Convention; See also A Joubin-Bret, 'The Effectiveness of the ICSID mechanism regarding the enforcement of arbitral awards' in J Fouret (eds), *Enforcement of Investment Treaty Arbitration Awards* (Globe Law and Business, 2015).

[883] Article 27, ICSID Convention; See also A Joubin-Bret, 'The Effectiveness of the ICSID mechanism regarding the enforcement of arbitral awards' in J Fouret (eds), *Enforcement of Investment Treaty Arbitration Awards* (Globe Law and Business, 2015).

Given that absolute compliance was anticipated, diplomatic protection was included as a measure of 'last resort' for when compliance strictly fails. However, as Gaillard and Penusliski rightly identify, the use of diplomatic measures "is not a very infrequent reality and is sometimes used prior to an award".[884] Indeed, apart from Argentina, *AIG* and *Chevron* award creditors have had to seek the United States Government's intervention in claims against Kazakhstan and Ecuador. The award creditors, Fuchs and Georgia post-award settlement implicate diplomatic enrolment by Israel. The award creditor, Valle Esina, secured compliance with its award from Russia after the Italian Government intervened. Likewise, it has been documented that on several occasions the award creditor Aucoven, sought the backing of Mexico (its home State) to compel Venezuela to make payment.[885]

It must be noted that diplomatic intervention is not automatic. The foreign investor has no right vis-à-vis its home State to a grant of diplomatic protection. The latter has no duty to render it either, consideration of which is driven by many factors the State thinks relevant, including politics. Such decisions can be driven by factors such as the reputations of the citizens seeking protection and the relative power and relationship between the two States. [886] Further, the home State has exclusive control over the rights of its citizens on the inter-State level and therefore is permitted to settle, waive, or alter the award by agreement with the host State. In practice, this has resulted in the settlement of international claims regarding the breach of the rights of foreign claimants by lumpsum settlements.[887] In addition, the right to receive compensation for the breach is vested in the home state and not in the foreign claimant, and the former is under no obligation to reimburse the latter.[888]

While diplomatic protection may involve peaceful bilateral negotiations or inter-States dispute settlements, it can also implicate more aggressive self-help countermeasures (e.g. freezing the debtor

[884] Gaillard and Penusliski (n 19), at 52 -54.

[885] Ibid.

[886] Ibid.

[887] CN Brower and SW Schill, 'Is arbitration a threat or a boom to the legitimacy of international investment law' (2008), 9 Chi. J. Int'l L. 471, at 479 - 481.

[888] Ibid.

State's assets) that are otherwise unlawful and subject to strict requirements under international law.[889] In this context, countermeasures can be bidirectional; the freezing of Russia's assets by France and Belgium in the enforcement of the *Yukos* awards and the threat of retaliation by Russia provide a good example.[890] Historically, States have feared that countermeasures would result in abuse of retaliatory measures and even resort to gunboats or military measures as countermeasures.[891] Indeed, it was due to these precise weaknesses that a system like the ICSID was created, to provide a depoliticised and neutral forum of international adjudication for investor-state investment engagements. Therefore, to resort to

> diplomatic protection and the use of countermeasures themselves [in enforcing awards] bring[s] back—through the back door, as it were—problems that the modern investment protection regime sought to preclude in the first place.[892]

Thus, reverting to diplomatic measures to secure compliance with awards against States under the regime appears to show inherent weaknesses which need addressing.

These reasons bear on the need to look further into the legitimacy factor, which is firstly, arguably, a proactive and sustainable measure. The system should engage measures that foster voluntary compliance at the initial stage and with less resort to coercive diplomatic interventions. Further, with the current backlash against the ISA regime, it is only prudent to explore this factor to identify areas of improvement so that, as the regime matures and external forces continue to shape its contours, the baby will not be thrown away with the proverbial bathwater. The following section considers in depth the legitimacy factor.

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[889] Articles 49, 50 and 51 of the ILC 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' in Report of the International Law Commission to the General Assembly on the work of its fifty-eight session, UN Doc A/56/10 (2006).

[890] See Chapter 4.2.1. See also footnote 849 highlighting the retaliative measures taken by Russia in response to the sanctions imposed on it by States for the senseless invasion of Ukraine.

[891] Gaillard and Penusliski (n 19), at 53.

[892] Ibid, at 54.

5.4 Legitimacy: Meaning, Significance and Indicators

Suchman defined legitimacy as "a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions."[893] It is premised upon the idea that law should be good for and justly serve the people.[894] As the constructivists claim, subjects' perceptions of legitimacy impact their compliance behaviour, including willingness to submit to authority and any judgements rendered.[895] The perception of legitimacy in the international legal domain, particularly of institutions of adjudication, is of utmost importance not only because the domestic style of enforcement is largely limited, but resources, including mandates and participation of political actors, are also vital for their continued survival.[896] This chapter will examine the indicators of legitimacy and whether the ISA regime adequately fosters such indicators in assisting effective implementation of arbitral awards.

5.4.1 Indicators of Legitimacy

For an adjudicative system to be perceived as legitimate, certain values must be present, though these values differ from scholar to scholar.[897] For Grossman, an institution's legitimacy is derived from it being perceived as 'justified' by its stakeholders.[898] Two distinct yet interconnected stages comprise the justification (legitimating). The first stage entails consent (treaty ratification) and is crucial for

[893] MC Suchman, 'Managing legitimacy: Strategic and institutional approaches' (1995), 20(3) AM Rev. at 574.

[894] JW Hurst 'Problem of Legitimacy in the contemporary legal order' (1971), 24 Okla. L Rev. 224 at 225; See also A Buchanan and RO Keohane, 'The legitimacy of global governance institutions' (2003), 20(4) Ethics & Int'l Affairs, at 405-437; D Bodansky et al., *The State of the Art* (810), at 321-41.

[895] See GV Harten 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Stephan Schill (eds) *International Investment Law and Comparative Public Law* (OUP, 2010), at 627 – 658; K Murphy, 'Regulating more Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance' (2005), 32(4) J Law and Society, at 562-589.

[896] J Tallberg et al., *Legitimacy in Global Governance: Sources, Processes, and Consequences,* (OUP, 2018), at 231; Sommerer and Agné, (n 810).

[897] See DD Caron, 'The Legitimacy of the Collective Authority of the Security Council' (1993), 87 AJIL 552, at 566-67; TM Franck, 'Fairness in the International Legal and Institutional System' (1993), 240 Hague Academy of Int'l L. 9, at 26. [Hereafter, Franck, Fairness 1993]; TM Franck, 'Legitimacy in the International System' (1988), 82 AJIL, at 705-06 [Hereafter, Franck, Legitimacy 1988]. See also OC Okafor, 'The Global Process of Legitimation and the Legitimacy of Global Governance' (1997), 14 Ariz. J. Int'l & Comp. L., at 117, 127.

[898] N Grossman, 'Legitimacy and International Adjudicative Bodies' (2009), 41 Geo. Wash. Int'l Law Rev. 107.

establishing the institution's validity and delineating its jurisdiction, but it does not guarantee going perceptions of legitimacy.[899] The second and most significant stage, which develops after the relevant institution has started acting out its powers per the specified mandates, is performance focused. It entails wider stakeholders' evaluation of, *inter alia*, whether the institution is acting within the specified mandates, as Grossman indicates.[900] Perceptions of legitimacy are dynamic and change over time so, based on performance, an institution can either gain or lose legitimacy over time.[901] Against this, the author identified three crucial values as *justifying* or holding an institution's legitimacy: the fair and unbiased nature of the adjudicative process; commitment to interpreting the law consistently and upholding 'currency' in the perception of subjects; and last, observance of transparency and related democratic values such as accountability, certainty, and predictability.[902] In the absence of such values, justifiable authority will be lost, including the power to secure compliance, and ultimately this leads to the institution's demise.[903] The author adds that opening the institution's processes to stakeholders (transparency), including making available and accessible resulting outcomes and decisions, helps build and restore its legitimacy.[904]

Thomas Franck defines legitimacy[905] using four values as indicators: determinacy, symbolic validation, coherence, and adherence to rules.[906] 'Determinacy' refers to the institution's transmission of clear signals about required standards of conduct.[907] Such "clarity encourages predictable behaviour by

[899] Ibid, at 116 -117.

[900] Ibid, stakeholders include, domestic political actors, policy influencers, practitioners, experts and NGOs, with the role of evaluating the legitimacy of the relevant institution.

[901] Ibid.

[902] Ibid, at 110.

[903] Ibid, at 144.

[904] Ibid, at 152, 155.

[905] Defines is as "the perception of those addressed by a rule or a rule – making institution that the rule or institution has come into being and operates in accordance with generally accepted legal process", Franck, *The Power* (n 788), at 19.

[906] Ibid, at 49.

[907] Ibid, at 52; see also Franck, *Fairness* (1995, n 897), at 30 – 31.

providing States with a roadmap and by limiting their capacity to avoid non-compliance through elastic interpretations."[908] 'Coherence', by contrast, means the potential to transmit consistent signals about required standards of conduct.[909] It requires like cases to be treated alike, leaving no room for conflicting outcomes. To the extent that conflicting results do occur, the institutions earn the reputation of arbitrariness, unpredictability, and hence the perception of illegitimacy, notes Franck.[910] Symbolic validation involves subjects' willingness to accept and comply with the institution and decisions rendered. This, Franck contends, flows from the authentic belief in the institution and its decisions, which are drawn from signals and cues of its authority. The presence of unbiased and impartial adjudication and transparency is essential. [911] The last indicator, adherence, requires the respective institution to operate within the specified mandates.[912] In short, Franck considers that transparency and consistency in the application of the rules within a fair procedural framework play a significant role in legitimating an institution. Like Grossman, Franck also noted that justifiable authority would be lost in the absence of these values, including the power to secure compliance, and ultimately the system would collapse.[913]

Daniel Bodansky defines legitimacy as a justification of authority and identifies both normative and sociological dimensions to legitimacy, highlighting values such as democracy, rationality, tradition, and legality.[914] The sociological dimension ensues when the institution's work is accepted by relevant audiences (stakeholders), especially those affected by its decisions, because it is socially sanctioned and

[908] Ibid, at 52-54, 57; Franck, *Fairness*, ibid.

[909] Ibid, at 142.

[910] Ibid, [explaining that "a high degree of textual determinacy goes together with a high degree of rule-conforming state behaviour"], at 142 [stating that "coherence is essential to legitimacy"); at 716 (observing that the "degree of determinacy of a rule directly affects the degree of its perceived legitimacy"), at 741 (describing coherence as "a key factor in explaining why rules compel").

[911] Franck, *The Power of* (n 804), at 91.

[912] Ibid, at 184.

[913] Franck, *Fairness* (1995), at 30 – 31.

[914] D Bodansky 'The Legitimacy of International Governance: A coming Challenge for International Environmental Law' (1999), AJIL 592, at 596; See also D Bodansky et al., *The State of the Art* (n 810), at 323.

commands a positive image in an audience's eyes.[915] Regarding the normative dimension, an institution founded and operating on values such as impartiality, predictability, legality, and fairness will automatically gain justifiable authority.[916] In short, like other authors, Bodansky considers that the embodiment of normative values such as transparency, impartiality, and predictability by international systems of adjudication are essential to creating the perception of legitimacy.

Hefter and Slaughter's work[917] is vital in this context. They see legitimacy as a tool that grants an adjudicative system the power to command acceptance and support within a given community without coercive mechanisms.[918] Though the authors affirm that the list is inexhaustive, they assert that impartiality, ethical and coherent decision-making, and the consistency of judicial rulings over a sustained period are the necessary minimum values that ensure systems' legitimacy and gather compliance pull.[919] The voices of non-State actors, including individuals, groups, corporations, and voluntary organisations, play a crucial role in enhancing the legitimacy of the system.[920]

5.4.2 Assessment of Authors' Legitimacy Values

Although different terminologies are used, the values discussed by scholars are similar and can be summed up as follows: transparency, independence and impartiality, and consistency. And in terms of their impact, a common denominator is observed: a pull toward compliance with rules and decisions emanating from the institution. However, a few differences are noted, particularly relating to the legitimating process and its scope. Grossman cited a two-stage process in the attainment of legitimacy: the consent stage and operations of the institution(s) within specific mandates and, ultimately, a subjects'

[915] Ibid, at 597 – 603.

[916] Ibid, at 601.

[917] LR Hefter and A Slaughter 'Towards a Theory of Effective Supranational Adjudication' (1997) Yale LJ., 273, at 391.

[918] Ibid, at 284.

[919] Ibid.

[920] Ibid, at 288.

willingness to accept and comply with its rules and decisions.[921] Franck narrows the values to the clarity, consistency, and fairness of the process.[922] Like Grossmann, Bodansky bases finite legitimacy on the reasonableness of the rules and the performance of the relevant institution of authority, but firmly holds that the behaviour of the broader stakeholders, primarily formed by the institutions' proper application of the values, plays a crucial role in legitimacy.[923] Hefter and Slaughter's arguments follow both Bodansky and Grossmann's arguments to a significant extent, so the presence of values and the performance of the relevant institution over time are central to the process of attaining legitimacy. Hefter and Slaughter, however, go further to add that impartiality, reasoned decision-making, and consistency of rulings over a sustained period are the necessary minimum values that foster compliance. Further, the authors intimate that the values are not exhaustive by nature, meaning other values can be drawn into the equation and effectively expanded to ensure the full scope of the legitimacy values.[924]

In this regard, the discussion of the values is not exhaustive and therefore insufficient to adequately accommodate other concerns linked to the legitimacy debate as other important values are excluded. For the current purposes, it is submitted that efficiency considerations constitute a further legitimacy value in addition to the aforementioned values. Thus, the thesis argues that efficiency, in terms of time spent in the adjudication process and time spent in implementing the final judgements, can also impact subjects' perceptions of legitimacy and ultimately impact compliance behaviour. As the adage goes, justice delayed is justice denied. When justice is delayed, fairness is affected, which could leads to a lack of confidence. However, the need to have the adjudicative process efficiently engaged in a timely manner should not be sacrificed for the correctness of the outcome or quality of the decisions (due process), these being two

[921] Grossman (n 898).

[922] Franck (n 875).

[923] Bodansky (n 914).

[924] Hefter and Slaughter (n 917).

sides of the same coin. The consideration of both will demand the presence of an effective review or appellate mechanism.[925]

In short, the above discussion has shown that for an adjudicative system to be regard as legitimate, it necessitates the possess of certain fundamental values such as transparency, consistency, impartiality, and efficiency. These fundamental values of legitimacy also stand for justice and the rule of law. The correlation finds expression in some international instruments. For instance, the Preamble to the Vienna Convention on the Law of Treaties (VCLT) demands for an adjudicative system to act in accordance with the "minimum standard of justice"[926]: although what constitutes "minimum standard of justice" was left undefined thereof. The United Nations Charter also demands that an adjudicative system follow the principles of justice, wherein Article 1(1) of the Charter demands cooperative actions from State members to ensure that disputes are settled in accordance with the "principles of justice". Further, Article 2 (3) demands that international disputes are settled in ways that promote (and not endanger) international peace, security and justice.[927] Both the "minimum standard of justice" and the "principles of justice" involve observance of the rule of law principles,[928] namely that parties have equal hearing opportunity, have their disputes presided over by impartial and independence adjudicators, ensuring certainty and

[925] C Newmark, 'Controlling Time and Costs in Arbitration' in C Newmark (eds), *Leading Arbitrators Guide* (Juris Publis. NY, 2006), at 81; J Risse, 'Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings' (2013), 23(3) Arb. Int'l, at 4 - 5 [considers the quality as an alternative to saving time and costs].

[926] 1969 UNTS Vol., 1155/2005.

[927] Articles 1(1) and 2(3) of the United Nations Charter, at https://www.icj-cij.org/en/charter-of-the-united-nations. Accessed 06/12/21.

[928] For example, The UN Security Council refers to the law refers as:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparence.

See United Nations Security Council, the Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies S /2004/616 of 23/08/2004 at http://www.un.org/en/ruleoflaw/. Accessed 06/12/21. See also J Cosmos, 'A Critical Assessment of The Legitimacy of The International Investment Arbitration System: A Call for Reform' (PhD diss., University of the Western Cape 2015).

consistency in the application of rules in similar cases in a transparent, fair and efficient manner. Accordingly, these crucial legitimacy and justice values are parallel and complementary to each other, as well as originate from the rule of law tenets.[929] The next section discusses in depth the legitimacy values and analyses whether the current ISA regime adequately engages these indicators for effective adjudication that serves justice and the rule of law.

5.4.3 Legitimacy Values and the Current ISA Regime

5.4.3.1 Transparency

Transparency is an important value in any democratic system of corporative relations, whether economic or social, domestic or international. It facilitates stakeholder participation and/or engagement with legal regimes and also supports the legitimacy of the authority or norms operating therein.[930] Generally, it aids in assessing the fairness and effectiveness of adjudicatory processes and in incentivising systems' decision-makers towards effectiveness.[931] For assessing good governance and accountability, transparency is "a precondition of both accountability and independence in adjudication".[932] Transparency is a principle that requires open access to adjudicative proceedings that involve public law or regulatory powers.[933] In the ISA context, transparency connotes "the adequacy, accuracy, availability, and accessibility of knowledge and information about the policies and activities of [the ISA regime and its participants], and of the central organizations [functioning within] it on matters relevant to compliance

[929] Cosmos, ibid.

[930] LE Peterson, 'Amicus Curiae Interventions: The Tail That Wags the Transparency Dog' (2003), at http://kluwerarbitrationblog.com/2010/04/27/amicus-curiaeinterventions-the-tail-that-wags-the-transparency-dog/. Accessed 18/12/20.

[931] Ibid, see also Grossman, (n 898), at 156.

[932] Grossman, ibid at 155; GV Harten, *Investment Treaty Arbitration and Public Law* (OUP Catalogue, 2007), at 159; see also T Meron 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005), AJIL 359, at 360.

[933] C Knahr, 'Transparency, third party participation and access to documents in international investment arbitration' (2007), 23(2) Arb. Int'l, at 327-356.

and effectiveness, and about the operation of the norms, rules, and procedures [underlying the regime].”’[934]

Demand for transparency in ISA and other adjudicative system has been recurring. As early as the 1700s, Bentham writes “Where there is no publicity, there is no justice. Publicity is the very soul of justice.”[935] The Chief Justice of England reiterated in 1924 that “Justice should not only be done but should manifestly and undoubtedly be seen to be done.”[936] Although structurally fashioned after traditional arbitration to which confidentiality is a core valuable attribute, demand for transparency in ISA is profound and sometimes comes with mixed reactions.[937] The reactions are wrapped up in Lord Neuberger’s words: “too much openness will kill off arbitration, but unnecessary privacy is a real concern.”[938] Accordingly, a ‘healthy balance’ is necessary. While transparency is invaluable for parties who wish to resolve their disputes discretely or to preserve their commercial secrets, it has an impact on the overall effectiveness of problem-solving institutions and, unless absurdity will be produced, transparency should override confidentiality in ISA.

The peculiar character of the disputing parties and the subject matter underlying such disputes implicate unusual public interest concerns which demand openness.[939] State parties to ISA proceedings

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[934] A Chayes et al., ‘Managing Compliance: A Comparative Perspective’, in EB Weiss et al., (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords 39* (MIT Press, 1998), at 41.

[935] B Juratowitch QC, Seminar in London on Difficult Issues in Commercial, Investor-State, and State-State Dispute Resolution: Differences and Commonalities, Departing from Confidentiality in International Dispute Resolution 1 (June 8, 2017), https://www.biicl.org/documents/1676_201 7.pdf (citing Bentham as quoted in Rt Hon Beverley McLachlin PC, Chief Justice of Can., Lecture at Annual International Rule of Law, London: Openness and the Rule of Law (Jan. 8, 2014).

[936] *Rex v Sussex* (1924) 1KB 256, at 259.

[937] See, De Palma ‘NAFTA Powerful Little Secrets: Obscure Tribunal Settle Dispute but Go Too Far Critics Say’, in AD Mestral (ed), *Second Thoughts: Investor State Arbitration Between Developed Democracies* (MQUP, 2017).

[938] Lord Neuberger of Abbotsbury, Speech at Chartered Institute of Arbitrators Centenary Celebration, Hong Kong: Arbitration and the Rule of Law ¶ 22 (Mar. 20, 2015), https://w ww.supremecourt.uk/docs/speech-150320.pdf>. Accessed 07/09/20.

[939] G Ruscalla, ‘Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?’ (2015) 3(1) Groningen J. Int’l L., at 3.

exercise accountable regulatory powers, which are also the subject matter for such disputes. Admittedly, the relevant public has the right to know the claims and the reasonings behind arbitral decisions that sometimes run into millions and billions of dollars of their taxes. The public needs to evaluate their government's conduct through submissions and pleadings and, where possible, engage in the disputes themselves through *amicus curiae* submissions. Besides, as Franck notes, increased transparency can aid State parties in conducting their affairs more appropriately to limit or avoid liability.[940] Investors are better placed through transparency in weighing claims to guard against frivolous submissions. Further, in times where inconsistency and incoherency in arbitral decision-making looms, transparency can aid the creation of a precedent to ensure consistency in future cases.[941] In both instances, transparency can boost parties' confidence and yield a stronger pull toward voluntary compliance with the resulting arbitral awards, and ultimately aid in effective coercive enforcement to offset awards when voluntary compliance fails.

Additionally, ISA, as a public international law regime, needs to develop systematically. This requires that the system be precise and predictable, and both elements are by-products of engaging transparency.[942] Transparency can be enhanced through measures such as open or public access to arbitral submissions, decisions, documents, and *amicus curiae* participation.[943]

a. Legal Instrument towards Increased Transparency in ISA

Critics of ISA have long condemned the lack of transparency at all stages of ISA proceedings. Traditional arbitration favours confidentiality over transparency and the ISA framework, in all respects, is modelled after it. Articles 28(3) and 34(5) of the UNCITRAL Arbitration Rules of 2010, for instance, require confidentiality in both the hearing and publication of awards unless otherwise agreed by parties.[944]

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[940] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev., 1521, 1616.

[941] Ibid.

[942] Ibid.

[943] Ibid

[944] See Article 28(3) and 34(5), The UNCITRAL Arbitration Rules, 2010 at <cerislaw.com/wp-content/uploads/2018/08/2013-UNCITRAL-Arbitration-Rules.pdf>. Accessed 18/11/19.

Similar requirements can be identified under other arbitral rules and institutions.[945] Filing of documents, hearings, pleadings, and final judgements—the contents and outcomes of arbitral awards, including implementation—are mostly confidential.[946] Therefore, the UNCITRAL Rules and related legal instruments are counter-productive in achieving transparency.

However, with recent widespread demands for increased transparency covering major areas of proceedings, including hearings, documents (and awards), third-party 'amicus' participation, and third-party funding disclosure,[947] some changes in treaty practice and institutional arbitral rules are noted. The adoption of the 2013 Transparency Rules by UNCITRAL is an example of these changes. The new Rule, which applies to treaties signed after April 1, 2014,[948] requires open public hearings and access to a range of arbitral documents, including arbitral awards. This 'presumed and compulsory' approach implies that disputing parties cannot withhold consent to open hearings as arbitral tribunals have sole authority to decide the extent of hearing allowed.[949] The Mauritius Convention[950] (which came into effect on October

[945] For example, ICSID, see Rule 48 of the ICISD Arbitration Rule and Additional Arbitration Rule 48.

[946] Ibid, ICISD. Except coercive enforcement has covered State immunity, rarely any information on implementation.

[947] The Survey questionnaire developed by the 2014 Subcommittee explored a variety of perspectives regarding transparency in investment arbitration. Survey questions revealed respondents' opinions on the appointment of arbitrators, third-party funding, and general transparency and accessibility in international investment arbitration. While responded were in favour of maintaining the current status in respect of hearings, publication of pleadings and third-party participation. Most respondents were strongly in favour of the mandatory publication of partial and final awards. See IBA Subcommittee on Investment Treaty Arbitration, Report on the Subcommittee's Investment Treaty Arbitration Survey (May 2016).

[948] The Rules apply to ISA's initiated under the UNCITRAL pursuant to treaties concluded on or after April 1, 2014. Some treaties have been concluded since with 46 of them incorporating the Rule. Further, 50 per cent of all concluded incorporated some elements of transparency, even when the Rules were not fully adopted. Only 14 treaties out of the 61 treaties excluded transparency rule. See Report of the UN Commission in International Trade Law, Official Records of the General Assembly, Seventy-second Session, Supplement No 17 (A/72/17), para 37 www.uncitral.org/pdf/english/commissionsessions/unc-50/A-72-17-E.pdf. Accessed 21/06/20.

[949] L Johnson and N Bernasconi-Osterwalder, 'New UNCITRAL Arbitration Rules on Transparency: Application, Content and Next Steps' (September 2013) www.iisd.org/itn/2013/09/18/new-uncitral-arbitration-rules-on-transparency-application-content-and-next-steps-2. Accessed 21/06/20.

[950] Adopted by General Assembly Resolution A/Res/69/116 (2014) https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/686/64/PDF/N1468664.pdf?OpenElement. 21/06/20. See UN Treaty Collection, 'Status of Treaties: United Nations Convention on Transparency in Treaty-based Investor-State Arbitration'https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-3&chapter=22&lang=en> 21/06/20.

18, 2017) provides an effective mechanism to enable States to apply the UNICTRAL Transparency Rules.[951] Since coming into force, the Rule has been applied for the first time in two investor-state arbitration cases: *Iberdrola, S.A. and Iberdrola Energia. S.A.U. v. Bolivia* [952]and *BSG Resources Limited v Republic of Guinea.*[953] The application of the Rules in these cases signifies not only a substantial shift in the way ISA proceedings are resolved, but the agreement of the parties to their application also suggests a shift in the way States and foreign investors see the public interest in the proceedings.

Though the new Rule provides greater transparency in the ISA context, its application is limited only to treaties signed post-April 1, 2014, and, unless agreed by the disputing parties, the Rules are inapplicable to prior treaties in circulation, which cover over 3,400 IIAs.

The ICSID last revised its transparency rules in 2006. A new amendment proposal initiated in August 2018 is currently ongoing.[954] Though the substance appears to closely align with the UNCITRAL Rule, the amendment, from a completely substantive rule-based perspective shows lower standards of transparency for information disclosures and non-party access to proceedings.[955] However, the limitation of this more robust transparency policy of the UNCITRAL Rules is only beneficial if the parties have opted for their applicability, save for eligible treaties under the Mauritius Convention. The ICSID's proposed new rules, by contrast, "apply by default in ICSID arbitration, guaranteeing at least a minimum

[951] Ibid. Meaning, the Rules stands to be applied on a unilateral basis by all contracting states subject to claimants' agreement to have the rules applied.

[952] *Iberdrola, S.A. and Iberdrola Energia. S.A.U. v Bolivia* [PCA Case No. 2015-05].

[953] *BSG Resources Limited v Republic of Guinea* [ICSID Case No. ARB/14/22].

[954] See https://icsid.worldbank.org/resources/rules-amendments. Accessed 24/09/21 [it intends to come into effect in July 1st, 2022.]

[955] S Martinez, 'Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation' Kluwer Arbitration Blog, April 8, 2021 http://arbitrationblog.kluwerarbitration.com/2021/04/08/transparency-rules-in-investment-arbitration> Accessed 21/06/20. [The UNCITRAL uses "presumed and compulsory" approach: "By using the word "shall" in various provisions, the UNCITRAL rules "impose an absolute duty on the tribunal to deliver its transparency policy". By contrast, the ICSID uses party-led and consent-based approach to public disclosure of documents, in that the ICSID rules allow the extent of the disclosure of information to be guided by party consent. This effectively means that the ICSID regime leaves room for parties to agree to a largely confidential procedure."].

level of transparency, however basic."[956] The ICSID new amendment which comes into force by July 1, 2022, will bring greater transparency in the conduct and outcome of proceedings. The most significant are: (i) affording for the publication of a final award by default, absent objection by any party within 60 days (proposed Rule 62); (ii) the publication of orders and decisions with redactions agreed upon by the parties (proposed Rule 63); (iii) the publication of written submissions or supporting documents upon parties' consent, with redactions to be agreed upon by the parties (proposed Rule 64); and (v) observation of hearings by third parties, unless either party objects (proposed Rule 65).[957]

Under the current Rule (2006 amendment), Arbitral Rule 32 provides (subject to affirmative party consent) for public hearings of all proceedings and publication of arbitral awards,[958] while Arbitration Rule 48 requires the Centre to publish excerpts of tribunals' reasoning where consent for full publication of the final decision is refused.[959] Prior to the 2006 amendment, affirmative party consent was required for both actions to be effected.[960] Several notable proceedings have been held in public following the 2006 amendment.[961] The 2006 Rules under Rule 37 also allow for third-party or amicus participation in the proceedings. In the *Biwater Gauff Ltd v United Republic of Tanzania*[962] and *Philip Morris v Uruguay*,[963] amici successfully invoked Amended Rule 37 as the arbitral tribunal enabled five NGOs to make a written

[956] Ibid.

[957] Detail available at https://icsid.worldbank.org/rules-regulations. Accessed 03/07/22.

[958] ICSID, Arbitration Rules, rule 32 (April 2006).

[959] ICSID, Arbitration Rules, Rule 48(4) dated April 2006.

[960] ICSID, Arbitration Rules, rule 32 (January 2003); A Antonietti, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules (2006) 21 (2) ICSID Rev.- FILJ, 427–448.

[961] See *The Renco Group Inc v Republic of Peru*, Procedural Order No 1 (ICSID Case No UNCT/13/1) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3004/DC3712_En.pdf> Accessed 23/06/19*; Bear Creek Mining Corporation v Republic of Peru*, Procedural Order No 1, para 21.6 (ICSID Case No ARB/14/21) http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C3745/DC5432_En.pdf accessed 23 June 2019. In both cases the parties agreed to publish all documents and hold open hearings and made all documents public subject to the redaction of confidential information.

[962] *Biwater Gauff (Tanz) Ltd v United Republic of Tanzania*, Procedural Order No 5, para. 55 (ICSID Case No ARB/05/22) (Feb. 2007) www.italaw.com/sites/default/files/case-documents/ita0091_0.pdf. Accessed 23/06/20.

[963] *Philip Morris v Uruguay*, ICSID Case No ARB/10/7, Award of 8 July 2016.

submission. Despite this, party autonomy with regards to full publication of arbitral awards is unaffected, as Rule 48(5) observes.[964] Therefore, while the 2006 Amendment is a major leap from the previous provision, it is insufficient for wider benefit under the regime given its party-led and consent-based approach, and the proposed new rule also adopts this approach.

A similar observation can be made under treaties and related legal instruments. For example, both NAFTA[965] and CETA[966] provisions make room for increased transparency. While these are applaudable, full transparency in certain areas is absent without the parties' affirmative consent.[967] Further, these legal instruments are limited to contracting State parties; among these, however, only a few States have taken the step to rectify these anomalies. Online databases like Investment Treaty Arbitration (ITA) Law, Investment Arbitration Reporter, and UNCTAD Investment Dispute Settlement Navigator, to name but a few, do provide information on arbitral engagements but rarely engage data on the state of final arbitral awards in the context of implementation. In sum, more transparency is required given its benefits, such as strengthening the perception of legitimacy toward greater compliance pull.

[964] Rule 48, ICSID 2006; A Antonietti, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules (2006) 21 (2) ICSID Rev.- FILJ, 427–448.

[965] Having been silent on issues of transparency for long, NAFTA' FTC in 2001 elucidated that "[n]othing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and… nothing in the NAFTA precludes the parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal". Having clarify this, the FTC went ahead to detail rule applicable to transparency of NAFTA proceedings regarding access to document by pledging to, (subject to party affirmative consent) "make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal' subject." See Office of the United States Trade Representative, 'Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations' (October 2003),3 https://ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf. Accessed 23/06/20. See also Meg Kinnear, 'Transparency and Third-party Participation in Investor-State Dispute Settlement', www.oecd.org/investment/internationalinvestmentagreements/36979626.pdf.

[966] NAFTA, ibid; CETA Rule on transparency is modelled after The UNCITRAL Transparency Rule 2013 (see Article 8.36 of CETA).

[967] See Article 8.36.5 CETA (open public access to proceedings is decided by the disputants and the tribunal). See also other IIAs incorporative of UNICTRAL Rules.

5.4.3.2 Independence and Impartiality

In the parlance of adjudication, independence denotes the absence of an improper connection between the adjudicator(s) and disputing parties. Impartiality means the absence of prejudgement on the part of the adjudicator regarding the dispute at hand.[968] Impartiality and independence are the chief cornerstones of any adjudicatory system; this duo is the *raison d'être* in recognition of the rule of law. The requirement for independent and impartial adjudication originates from one of the fundamental rules of fairness and justice, the rule against bias, which states that no one should sit over a matter in which he/she has an interest.[969] Undoubtedly, it would be illogical to think that an 'independent adjudicator' with interest in the matter before them will be impartial in their submissions. The essence of the rule is to eliminate all possible doubts in the adjudicatory process. This is reminiscent of the old adage "not only must justice be done, but it must also be seen to be done."[970]

The threshold is very low, so the appearance of bias—without actual bias—will suffice. As Lord Denning in *Metropolitan Properties Co (FGC) Ltd v Lannon* elucidates,

> The court will not inquire whether [a judge] did in fact favour one side unfairly. Suffice in that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'[971]

The appearance of bias can be drawn by applying two tests: the real probability test and the reasonable suspicion test.[972] The former is concerned with the appearance of bias regarding public perception, while the latter is concerned with whether bias is possible considering all the circumstances.[973] The two tests combined imply that the slightest public perception of bias in the light of all circumstances will suffice to

[968] See WW Park 'Arbitrator Integrity' in M Waibel et al., (eds) The Backlash against Investment Arbitration: Perception and Reality (London: Kluwer Law Int'l, 2010), 189 -251, at 194.

[969] *Dimes v Proprietors of Grand Junction Canal* (1852) 3 H.L. Cas. 759.

[970] *R v Sussex Justices, Ex parte McCarthy* [1924] EWHC 1 KB 256, at 259.

[971] *Metropolitan Properties Co (FGC) Ltd v Lannon* [I969] 1 Q.B. 577.

[972] J Alder, et al., *General principles of constitutional and administrative law* (NY: Palgrave Mac., 2002), at 395.

[973] Ibid.

brand any adjudicator unfit to adjudicate.[974] It follows, therefore, that the slightest personal interest—be it personal financial interest, connection to one of the parties, or prior expression of an opinion on the relevant matter or conduct of one of the parties—will stand to convey a perception of bias. This rule aims to build confidence in the integrity of the decision-making process. The appearance of bias will undoubtedly impact subjects' confidence and hence their perception of legitimacy.[975] Therefore, any adjudicative system that lacks independence and impartiality will likely be seen as illegitimate and compliant with rules, and the final outcome may be hampered.

Independence and impartiality are fostered by the transparency rules already highlighted and, importantly, by safeguards that guarantee the independence of the judiciary.[976] Independence is achieved when the adjudicator has no ties with the counsels, co-arbitrators, or the disputants. Guarantee of tenure and fixed remunerations of adjudicators, for example, are safeguards to aid in the administration of justice with less hindrance. With the security of tenure, adjudicators are anticipated to adjudicate without fear because their employment is secured. Similarly, it is anticipated that because fees and remuneration are fixed and not subjected to change by or control of others, they will be impartial in the discharge of their duty.

Neutrality may be challenging to achieve, but some safeguards from the IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines) are worthy of note. IBA Guidelines were formulated in response to the cry for impartiality in international arbitration. The Guidelines formulate general standards intended to offer uniformity in the approach when arbitrators are confronted with actual or potential conflict. The aim is to ensure that arbitrators presiding over international arbitral

[974] Ibid. In *Porter v McGill,* [2001] UKHL 67 the test was adopted and held as follow "whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased", at 102.

[975] JR Brubaker, 'The Judge Who Knew Too Much: Issue Conflicts in International Adjudication' (2008), 26 Berkeley J Int'l L 111; Park (n 936), at 195.

[976] GV Harten 'Investment Treaty Arbitration, (n 901) at 640; see also. JD Fry and GR Odysseas, 'Towards a New World for Investor-State Arbitration Through Transparency' (2015) 48 NY J Int'l L & Pol., at 795. See also DM Howard, 'Creating consistency through a world investment court' (2017), 41(1) Fordham Int'l L J.

disputes are as ethical and neutral as possible. The Guidelines have a persuasive influence, but they are suggestive and not binding. The Guidelines come in two main parts, "General Standards Regarding Impartiality, Independence and Disclosure" and "Practical Application of the General Standards", which offer examples of specific circumstances whether or not a disclosure by an arbitrator or the disqualification of an arbitrator is warranted.

Regarding the first part, General standard 1 stipulates arbitrators' duty to disclose potential conflicts of interest and inform the disputants of any situations that arise in the arbitral proceedings that might give rise to doubts over their independence or impartiality.[977] This obligation subsists throughout the entire arbitral proceeding, meaning that the arbitrator is obliged to ensure that he/she remains conflict-free to the end.[978] This is a duty of self-assessment that protects the process's integrity, given that the arbitrator must not only guard against conflict but must disclose it should any arise.[979] Failure to disclose will lead to severe consequences such as disqualification or even annulment of the rendered award; therefore, it implies that the duty to disclose is absolute. General Standards contained in 4–7 further underscore the significance of disclosure and the implications that follow failure to disclose. Overall, the General Standards illustrate the significance of the rule that adjudicators must be as independent and impartial as possible.

The 'Practical Application of the General Standards', the second part of the Guidelines, implicates specific situations or scenarios in which conflict might arise. It comes in four primary categories: red, waivable red, orange, and green. The categories consider that not all conflict or potential conflict must be treated the same. Indeed, the red category implicates situations that objectively show a conflict of interest and in which an arbitrator must not act, even where all disputants have consented.[980]

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[977] IBA Guidelines on Conflicts of Interest in International Arbitration 2014, at https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918. Accessed 12/2/21.

[978] Ibid, See General Standard 2 (a).

[979] Ibid, See General Standard 3 (a) & (d).

[980] See, C Giorgetti and M Abdel Wahab, 'A Code of Conduct for Arbitrators and Judges' (14 October 2019) Academic Forum on ISDS Concept Paper, 2019/8. Application of the General Standards, at 5

The waivable red category implies a level of objective severity but not severe circumstances in that the disputants can deliberately concur to waive the conflict.[981] The orange relates to concerns that, depending on the facts, may lead to reasonable doubts about the arbitrator's independence and impartiality. The waivable red and the orange category have similar outcomes.[982] The main difference is that the former requires the disputants to make an explicit waiver while the latter grants them the right to object to an appointment of the relevant arbitrator(s) within 30 days. A green list involves concerns where there is, objectively, no apparent or actual conflict of interest and, thus, no duty to disclose. [983] These categories cover concerns that not only relate to arbitrators but their law firm and tribunals' secretaries and third-party funders.[984]

In conclusion, although the IBA Guidelines are not binding, they can be an essential apparatus in safeguarding the impartiality and independence of adjudicators if they are borrowed and applied. They can curb the problem of the dual role played by arbitrators.

a. Legal Instrument for Independence and Impartiality under ISA

Like transparency, the independence and impartiality of arbitral tribunals require improvement. As aforementioned, the current ISA system is modelled after the traditional arbitration model. It operates on an *ad hoc* basis, including the convening of arbitral tribunals and the appointment of arbitrators. Further, arbitrators are party appointees, and this implicates another major concern which is "multiple appointments of the same person by the same party, the same law-firm (in successive or parallel ISA arbitrations), or in proceedings against the same host State."[985] Consequently, there is a tendency for arbitrators to lean towards their appointers (party-biased) to secure future appointments. Indeed, research

[981] Ibid.

[982] Ibid.

[983] Ibid.

[984] General Standard 6(a) and (b).

[985] C Giorgetti 'Independence and Impartiality of Arbitrators in Investor-State Arbitration: Perceived Problems and Possible Solutions' (2019) at https://www.ejiltalk.org/independence-and-impartiality-of-arbitrators-in-investor-state-arbitration-perceived-problems-and-possible-solutions/> Accessed 02/09/21.

conducted around 250 international arbitrators shows that arbitrators are more likely to choose outcomes favourable to their appointees' interests.[986] A related concern is that "some arbitrators may develop 'issue conflict' – which may arise from holding a known general opinion on issues under dispute, expressed via previous awards, proceedings, publications, or conference presentations."[987]

This is not to mention an additional concern common to ISA proceedings, i.e. double hatting, where arbitrators can serve concurrently as arbitrators and counsel in ISA claims, even if under separate procedural rules.[988] Indeed, a recent study on double hatting shows that "a total 47% of cases (509 in total) involve at least one arbitrator simultaneously acting as legal counsel in 190 of the cases in this arbitrator-focused category, there are also legal counsel double hatting elsewhere as arbitrator."[989] These institutional anomalies undoubtedly impact independence and impartiality under the regime as they create the appearance of bias, if not actual bias, thus raising a legitimate concern.

There are currently no rules to correct or prevent anomalies in these scenarios. The Additional Facility Rules of the ICSID Convention and UNCITRAL Rules both provide for *ad hoc* appointment of adjudicators and have no provisions preventing arbitrators from switching roles as indicated.[990] Moreover, there is a high burden of proof imputed on claims of impartiality when raised. Article 57 of the ICSID rules does empower the parties to challenge (an) appointment of arbitrator(s)[991] that fall(s) short of qualities specified under Article 14(1) of the Convention,[992] but demands a high threshold for 'a manifest

[986] S Puig and S Anton, 'Affiliation bias in arbitration: An experimental approach' (2017), 46(2) The J. of Leg. Stud. 371-398.

[987] Giorgetti, (n 953).

[988] A Sheppard, 'Arbitrator independence in ICSID arbitration' in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 131 (OUP, 2009), at 132.

[989] M Langford et a., 'The ethics and empirics of double hatting' (2017), 6(7) ESIL Reflection.

[990] See Article 37 (1) and Rule 1(1) of ICSID Arbitration Rules, see also Article 10 of the Additional Facility Arbitration Rules, and also see Article 8 of UNCITRAL Arbitration Rules.

[991] Article 10(1) of the UNCITRAL Rules also permits a challenge of arbitrators' appointments… 'if circumstances exist that give rise to justify able doubts as to the arbitrator's impartiality or independence' (Emphasis added)

[992] Article 14(1) of the ICSID Convention states:

lack of [the] quality' listed under Article 14(1) to be successful.[993] The tribunal sitting on the Decision on the Proposal for the Disqualification of a Member of a Tribunal (the 'Suez challenge') emphasised the high threshold established by the rule:

> the language of Article 57 places a heavy burden of proof on the Respondent to establish facts that make it obvious and highly probable, not just possible, that […] such a person who may not be relied upon to exercise independent and impartial judgement.[994]

Other arbitral institutional rules maintain a less stringent requirement for the purpose.[995] For example, the UNCITRAL Rule of 2013 requires that "an arbitrator may be challenged if circumstances exist that give rise to the justifiable doubts as to his impartiality or independence."[996] The high threshold of the ICSID Rule makes it almost impossible to challenge successfully a perceived lack of independence or impartiality on the part of an arbitrator. Indeed, many challenges have failed in their attempts.[997] Moreover, like other cited anomalies, the backlash against the regime has been severe, including

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(1) "Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."

[993] Article 57 and 14(1), ICSID Convention.

[994] See the 'First Suez challenge' (dated 22 October 2007) and the 'Second Suez challenge' (dated 12 May 2008). [Both cases are in reference to appointment challenges brought against Professor Kaufmann-Kohler as an arbitrator in three arbitrations that had been consolidated. See generally: *Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic*, ICSID Case No. ARB/03/17; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic*, ICSID Case No. ARB/03/19; and *AWG Group v The Argentine Republic (UNCITRAL).*

[995] See Article 15 of the Stockholm Chamber of Commerce Arbitration Rules, 2010 http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf. Accessed 23/06/20. See also, General Standard 2(a) and (c) of the International Bar Association (IBA) Guidelines on Conflict of Interest in International Arbitration, at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#conflictsofinterest. Accessed 23/06/20. See general various rule of independence and impartiality and neutrality of arbitrator:https://www.quadrantchambers.com/images/uploads/documents/Luke_Parsons_QC-_IPBA_paper.pdf. Accessed 23/06/20.

[996] See Article 11 and 12 of the UNCITRAL Arbitration Rules 2010 available at https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/06-54671_Ebook.pdf. Accessed 23/06/20.

[997] *Urbaser SA v Argentine Republic* (ICSID Case No. ARB/07/27) (Decision on Claimant's Proposal to Disqualify).

reluctance to comply voluntarily with arbitral awards without contestation. In short, the value needs improvement in the ISA context. Guaranteeing tenure, providing fixed remunerations for adjudicators, and providing a system of accountability such as instituting a higher supervision (appellate) body and engaging in increased transparency can improve the current status quo. Some of the reform proposals under consideration in the UNCITRAL area are moving in the right direction and if adopted could help enhance greater transparency under the regime.[998]

5.4.3.3 Consistency/Coherence

Consistency and coherency in the application and interpretation of rules is another vital value for creating legitimacy in the adjudicatory system. Consistency requires that in identical or similar circumstances, rules must be applied and, as much as possible, arrive at a similar conclusion.[999] Consistency stimulates an adjudicative system's predictability, thereby contributing to enhancing its trustworthiness and legitimacy. It legitimates a rule or system by linking the respective rule and its

[998] Proposal like introducing an appeal process or multilateral investment court (MIC). There is an on-going effort by ICSID alongside UNCITRAL to draft a generally applicable code of conduct for ISDS arbitrators which responds to conflicts of interest, double hatting, and multiple appointment. ICSID/UNCITRAL, Draft Code of Conduct for Adjudicators in International Investment Disputes (September 2021), at https://icsid.worldbank.org/sites/default/files/documents/Code_of_Conduct_V3.pdf. Accessed 09/01/22. However, current draft does not totally prohibit multiple arbitrator appointments. Article 4 of the current Draft Code contains three options for consideration. Option 1 "Full prohibition" applies by default, "unless the disputing parties agree otherwise." Option 2 "Modified prohibition" provides that without party consent, an adjudicator is not permitted to take on multiple roles in proceedings in exhaustive list of actions, i.e., (a) the same measures; (b) [substantially] the same legal issues; (c) one of the same disputing parties or its subsidiary, affiliate, parent entity, State agency, or State-owned enterprise; or [and] (d) [the same treaty]. Option 3 "Full disclosure" (with option to challenge) is the most lenient of all. It just requires an adjudicator to disclose whether she/he is taking on multiple roles in cases involving the same or related parties, the same measures, the same legal issues (or, alternatively, "substantially" the same legal issues). In terms of analysis, while full prohibition may serve to provide greater check against double-hatting, it may impact the diversity of the pool of arbitrators further deepening the legitimacy crisis. It submitted that Option 3 is unlikely to address issues of arbitrators' impartiality and independence and regime's wider legitimacy concerns. The Option 2 is flexible and appear viable however, effectiveness will depend on the definition of the four set of exhaustive criteria. It is in hope that the drafters will provides clarification. Article 11 contains enforcement of the Draft Code, which primarily relies on voluntary compliance and, if that fails, on the disqualification and removal procedures in the applicable rules or treaties. Thus, the success of enforcement of Article 4 relies on the success of the cardinal rules and treaties. This could lead to diverging interpretations and deepen the regime's legitimacy concerns. For generally view see Giorgetti and Abdel Wahab, (n 948) and D Boon and A, 'Kalisz Regulating Double-Hatting in Investment-Treaty Arbitration: Latest ICSID-UNCITRAL Proposals' London VYAP and Jus Mundi version, posted on Jan 18, 2022 at https://blog.jusmundi.com/regulating-double-hatting-in-investment-treaty-arbitration-latest-icsid-uncitral-proposals/. Accessed 19/07/22.

[999] See GV Harten *Investment Treaty*, (n 901), at 164; see also I Laird and R Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005), J. App. Prac. & Process 7, at 285.

intended purpose. By implication, if an adjudicative system fails to apply the same rules consistently across the same or similar situations, that adjudicative system will be deemed unpredictable.[1000] Predictability is significant to the rule of law as it is inherently linked to key related concepts such as justice, fairness, accountability, and correct use of procedure. In the absence of these fundamental concepts, the subjects of an adjudicative system (States and investors alike, in the context of this work), as Franck notes, "cannot anticipate how to comply with the law and plan their conduct accordingly."[1001] In essence, this could lead to difficulties in securing voluntary compliance with rules and outcomes thereof.

Consistency can be enhanced in several ways. These include consolidation of cases, interpretive guidance by a permanent body, instituting an appellate structure, and the use and adoption of the doctrine of precedent.[1002] Consolidation of cases demands the amalgamation of two or more related claims into one claim presided over by a special tribunal upon the affirmative consent of disputants.[1003] Consolidating claims that have a common question of law or fact arising from the same event or situation serves to eliminate parallel proceedings, which often leads to conflicting decisions.

In respect of an appellate mechanism, this could create coherence and harmonise rules otherwise reached inconsistently; it will not only reduce the number of adjudicators engaged in dispute settlement proceedings but also pronounce the true statement of the law and, where possible, correct errors to aid in the effective delivery of justice. As Tams rightly states, "the more generous the scope for challenging decisions by appeal or review, the greater the chance of eliminating error."[1004] Thus, it will engender

[1000] Ibid.

[1001] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L. Rev., at 1584.

[1002] Ibid.

[1003] C Schreuer, 'Multiple Proceedings' in A Gattini et al., (eds), *General Principles of Law and International Investment Arbitration* (Brill Nijhoff, 2018), at 152-167; LB De Chazournes, 'Parallel and Overlapping Proceedings in International Economic Law: Towards an Ordered Co-existence' In *International Law and Litigation* (NV mbH & Co. KG, 2019), at 331-362.

[1004] C Tams 'An Appealing option: The Debate about an ICSID Appellate Structure' (2006), *Essays on Transnational Eco. Law* 1, at 26

effective errors management to promote justice and fairness, thereby aiding voluntary compliance with outcomes as well as curbing attacks on awards at a later stage. Instituting a higher body such as an appellate body can also aid the production of precedent to guide future cases.[1005]

Engaging in a 'reference procedure' provides an affirmative statement of the law and thus harnesses benefits similar to those of an appellate structure. The European Union uses this tool, and the high level of uniformity it achieves may be attributed to it.[1006] Lastly, regarding achieving consistency in the system, the use of precedent has been deemed the most effective for the purpose.[1007] Used by most common law jurisdictions, it requires cases with similar facts to follow decisions of earlier cases. Predictability and reliability are fostered and nurtured,[1008] thereby facilitating the perception of legitimacy for compliance pull. An appellate body could therefore aid in the creation of precedent for the purpose.

a. Inconsistency under the Current ISA System

Franck identifies three instances in which inconsistency can be said to arise or apply:

> First, different tribunals can come to different conclusions about the same standard in the same treaty. […] Second, different tribunals organized under different treaties can come to different conclusions about disputes involving the same facts, related parties, and similar investment rights. […] Finally, different tribunals organized under different investment treaties will consider disputes involving a similar commercial situation and similar investment rights, but will come to opposite conclusions.[1009]

[1005] LT Wells, 'Backlash to Arbitration: Three Causes' in Waibel M et al., (eds) *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law Int'l., 2010).

[1006] Ibid, at 41.

[1007] A Reinisch 'The Future of Investment Arbitration' in Christina Binder et al., (eds.) in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (2009), at 915.

[1008] RC Chen, 'Precedent and Dialogue in Investment Treaty Arbitration' (2019), 47 Harv. Int'l LJ, at 60; S Borzu, et al., 'International Investment Law and Arbitration: History, Modern Practice, and Future Prospects' (2018), Brill Research Perspectives in International Investment Law and Arbitration 1, at 1-64.

[1009] SD Franck, (n 49), at 1545.

The first instance of consistency in outcome under ISA is highlighted by the NAFTA cases of *Pope and Talbot v Canada*,[1010] *Metalclad v Mexico*,[1011] and *S.D. Mayer v Canada*,[1012] where three arbitral tribunals came to different conclusions about the meaning and interpretation of the same FET provision under the NAFTA framework.[1013] The *Lauder*[1014] claims are the most famous examples, falling within the second category. Two different tribunals, one in London and one in Stockholm, with virtually the same facts before them arrived at two inconsistent outcomes.[1015] Mr Lauder, a US investor, brought a claim against the Czech Republic for violating a range of obligations under the US-Czech BITs and the Netherlands-Czech BIT, respectively. The claim under the former BIT provision was before a London tribunal, while that of the latter BIT provision was before a tribunal in Stockholm. While both BITs presented the prospect of consolidating the two proceedings, the parties never agreed to the same tribunal hearing both disputes.[1016]

Both Tribunals arrived at the same conclusion on the issues in the claims, considering whether Lauder was a target of discrimination. However, separate from this issue, there was hardly any consensus between them.[1017] The Stockholm tribunal observed that the Czech Republic's actions (reversing the prior agreements) amounted to unlawful expropriation, as proscribed under Article 5 of the Netherlands-Czech

[1010] *Pope and Talbot Inc. v Government of Canada* (2002) ILR 293.

[1011] *Metalclad Corporation v United Mexican States* (2000), ICSID Case No ARB(AF)/97/1.

[1012] *S.D. Myers v Government of Canada* (2000) ILM 1408 (NAFTA Arbitration).

[1013] North American Free Trade Agreement (NAFTA) signed by the USA, Canada and Mexico, entered into forced 1 January 1994, at https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between. Accessed 12/08/2019.

[1014] *Lauder v The Czech Republic* (Final Award, 3 September 2001).

[1015] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev. 1521, at 1559 -1562.

[1016] Ibid.

[1017] Ibid.

BIT,[1018] and therefore ordered a sum of $355 million USD in compensation to the Lauder.[1019] The London tribunal, somewhat intriguingly, observed that the State's actions did not amount to unlawful expropriation, as proscribed under Article 3 of the US-Czech BIT,[1020] having concluded that there was no direct interruption by State's agencies, and Lauder's property rights had been completely preserved. Additionally, the tribunal thought it important that the actions did not benefit the State. Consequently, Lauder was not granted any compensation. To determine which of the two tribunals' reasoning is valid or accurate will be beyond the scope of this current work. However, what is evident and broadly acknowledged by experts is the impact of these inconsistent awards in undermining the ISA system. Rushton, one of the broadly cited experts, rightly declares that the inconsistent outcomes in the Lauder case "brings the law into disrepute, it brings arbitration into disrepute - the whole thing is highly regrettable."[1021]

Other noted cases of inconsistency include the *SGS* arbitrations[1022] and the infamous Argentine arbitration sagas involving *CMS*, *LG&E*, *Enron*, and *Sempra*.[1023] In the latter cases, some of which have

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[1018] Article 5 of the Netherlands-Czech BIT:

> "neither country shall take any measures depriving, directly or indirectly, investors of their investments unless the following conditions are complied with: (a) the measures are taken in the public interest and under due process of law; (b) the measures are not discriminatory; (c) the measures are accompanied by just compensation."

Entered into force on 01/10/1992 (now terminated on 10/12/2021), Full provision available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1212/czech-republic---netherlands-bit-1991. Accessed 13/02/22.

[1019] *Lauder* (n 982).

[1020] Article 3 US-Czech Republic BIT, entered into force 19/12/1992. Full provision available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/1244/czech-republic---united-states-of-america-bit-1991-. Accessed 13/02/22.

[1021] M Rushton, 'Clifford Chance Entangled in Bitter Lauder Arbitrations' (2001) Legal Bus. at 108, cited in Tams, 'An appealing option? (n 972), and SD Franck (n 49), at 1559.

[1022] *Cf. SGS Société Générale de Surveillance SA v Pakistan* (Decision on Jurisdiction, 6 August 2003), [2003] 18 ICSID Rev-FILJ 307 at https://www.iisd.org/itn/2018/10/18/sgs-v-pakistan/. Accessed 23/06/20; *SGS Société Générale de Surveillance S.A. v Republic of the Philippines* (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) ICSID Case No. ARB/02/6; A Bjorklund, 'The Continuing Appeal of Annulment: Lessons from Amco Asia and CME' in Todd Weiler (ed), International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law (Cameron May 2005) 486.

[1023] WW Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 AJWH 199, at 209.

been highlighted in Chapter 2, the defence of necessity advanced by Argentina was accorded different interpretations by four different arbitral tribunals. While the arbitral tribunals in *CMS*, *Enron*, and *Sempra* found that Argentina could not rely on the defence despite the extreme financial predicament it faced, the tribunal in the *LG&E* accepted Argentina's necessity plea and therefore spared the State from paying compensation.[1024]

While these examples are among few existing cases of inconsistency under ISA system, there is predictable potential for inconsistent outcomes to increase in future because there are certain features of the investment system that act as catalysts or make it "perceived as being more prone to inconsistent decisions than other areas of law."[1025] In particular, the system's decentralised nature and lack of binding of precedence may foster inconsistent outcomes.[1026] It is usually recognised that the issue of inconsistent outcomes is inherently linked with the lack of binding precedent. ISA lacks a vertical hierarchical body whose decisions could serve as a basis for a *de facto* vertical precedence: tribunals are to consider earlier cases to be persuasive.[1027] The persuasive nature of earlier cases has been highlighted by several investment tribunals, including the tribunal in *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*:

[1024] Ibid, at 216; K Chubb, 'The "State of Necessity" Defense: A Burden, Not A Blessing to the International Investment Arbitration System' (2013), 14 Cardozo J. Conflict Resol. at 531; *cf. CMS Gas Transmission Co. v Argentine Republic* (Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 Sept. 2007) ICSID Case No. ARB/01/8; *CMS Gas Transmission Company v Argentine Republic* (Award, 12 May 2005) ICSID Case No. ARB/01/8, [2005] 44 Int'l Legal Mat 1205; *LG&E Energy Corp. v Argentine Republic* (Decision on Liability, 3 Oct. 2006) ICSID Case No. ARB/02/1, [2006] 21 ICSID FILJ, at 203; *Enron Corp. Ponderosa Asset, L.P. v Argentine Republic* (Award, 22 May 2007) ICSID Case No. ARB/01/3; *Sempra Energy International v Argentine Republic* (Award, 28 Sept. 2007) ICSID Case No. ARB/02/16.

[1025] See 'Consistency, Efficiency and Transparency in investor state arbitration' (2018), IBA Arbitration Subcommittee on Investment Treaty Arbitration Report, 5, at Vncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf. Accessed 20/04/20.

[1026] Ibid, "The decentralised nature of dispute resolution under investment treaties contributes to its inconsistency: treaties provide for arbitration in the context of different arbitral institutions, each with its own set of differing rules; in addition, the mere nature of arbitration, where parties have a determining influence over the composition of the tribunal, allows for inconsistent results. Each dispute is decided by tribunals consisting of different arbitrators chosen by the parties, sometimes with opposing views on the relevant matters."

[1027] IA Laird and R Askew, 'Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System' (2005), 7 J App Prac & Process 285, at 299; C Schreuer and M Weiniger, 'Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?' (2008), 5(3) Trans. Dis. Mgt., at 16.

> It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the present BIT in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.[1028]

This approach could obligate a tribunal to give due consideration to prior decisions and, where possible, give reasoning behind following or departing from the relevant prior decision, thereby leading to consistent outcomes.[1029] But this does not make it self-evident that a doctrine of precedent exists in the system. Currently, no formal applicable control mechanisms exist to ensure consistency in arbitral decisions. Neither ICSID nor UNICTRAL has rules directing the use of precedent under their proceedings and, at present, there are also no coherent rules on the consolidation of claims under ISA. Following the 2014 UNICITRAL Rule Amendments, however, third party participation has been allowed to be a part of proceedings as a measure to prevent parallel proceedings which are directly linked to inconsistencies in some arbitral decisions. ICSID has also put forward proposals for amendments to increase consistency through the consolidation of claims.[1030] Some FTAs such as NAFTA[1031] and CETA[1032] have included

[1028] *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* (Award, 2 October 2006) ICSID Case No. ARB/03/16, 50 et seq para. 293.

[1029] K Grant, 'The ICSID Under Siege: UNASUR and the Rise of a Hybrid Regime for International Investment Arbitration' (2015) 52(3) Osgoode Hall L. J., 1.; CN Brower et al., 'The Saga of CMS: *Res Judicata*, Precedent, and the Legitimacy of ICSID Arbitration' in C Binder et al., (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Scheuer* (OUP, 2009), at 851.

[1030] See IA Reporter, 'ICSID Identifies Sixteen Topics that Have Emerged from Rules Amendment Consultation, and Turns to Study and Drafting', IA *Rep* (Santa Monica, 8 May 2017) www.iareporter.com/articles/icsid-identifies-sixteen-topics-that-have-emerged-from-rules-amendmentconsultation-and-turns-to-study-and-drafting. Accessed 27/06/19. The proposal is supposed to be voted on by 2020.

[1031] North American Free Trade Agreement (signed on 17 December 1992, entered into force on 1 January 1994) https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American- Free-Trade-Agreement. Accessed 27/06/19. NAFTA, chapter 11 section B, art. 1126(2). The NAFTA consolidation regime appears to be modelled after the Draft MAI consolidation procedure.

[1032] Trans-Pacific Partnership Agreement (signed on 4 February 2016) <http://www.tpp.mfat.govt.nz/text> accessed 7 December 2017, TPP, chapter 9 section B, art. 9.28; 2016 CETA, chapter 8 section F, art. 8.43;

some consolidation measures, though these instruments are limited in scope as there are only a few contracting parties to them. Beyond the measures highlighted, inconsistency in arbitral decisions stands without further solutions.

With no system of appeal or effective review of awards in cases of inconsistent decisions, such outcomes, which exist in parallel, are all regarded as valid and binding upon the parties to comply. Instituting a higher review body, i.e. an appellate body under the ISA framework, remains a good option for promoting consistency and coherency; it will not only aid in the creation of precedent to guard future cases but also correct legal and factual errors in outcomes and allow the outcome to be reviewed by an impartial and neutral body. The OECD lends support to this, having identified benefits of an appeal mechanism in ISA to include greater consistency and coherency and correction of legal and factual errors.[1033] Scholars have identified that an appellate structure could resolve many of the problems faced under the ISA. Accordingly, "an appellate body can reduce the risk of inconsistent decisions [. . .][and] help legitimize and institutionalize the process of investor state dispute settlement and aid in making the

Dominican Republic-Central America Free Trade Agreement (signed 5 August 2004, in force) <https://ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf> accessed 23 June 2019, CAFTA-DR, chapter 10 section B, art. 10.25; United States-Singapore Free Trade Agreement (signed on 6 May 2003, entered into force on 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/singapore-fta/final-text> accessed 23 June 2019, chapter 15 section B, art. 15.24; United States-Morocco Free Trade Agreement (signed on 15 June 2004, entered into force on 1 January 2006) <https://ustr.gov/trade-agreements/free-trade-agreements/morocco-fta/final-text> accessed 23 June 2019, chapter 10 section B, art. 10.24; United States-Chile Free Trade Agreement (signed on 6 June 2003, entered into force on 1 January 2004) <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text> 23 June 2019, CLFTA, chapter 10 section B, art. 10.24.

[1033] Yannaca-Small K, 'Improving the System of Investor-State Dispute Settlement: An Overview' (2006) http://www.oecd.org/china/36052284.pdf. [highlighting OECD working Paper of 2006].

system more sustainable."[1034] It could furthermore serve as a remedial mechanism[1035] and can enhance objectivity.[1036]

5.4.3.4 Efficiency and Related Consideration

Aside from the presence of legitimising values, another vital value for the legitimacy and compliance relationship is efficiency. Efficiency considerations are of enormous importance to adjudication. Having timely legal redress or equitable relief creates confidence in an adjudicative process and thus boosts subjects' perception of legitimacy in that a remedy is not only available but effective. After all, as the saying, justice delayed is justice denied.

In arbitration, efficiency is often assimilated with cost and time efficiency, which often aims to protect finality. Achieving finality is one of the fundamental motivations parties in commercial engagements have for choosing arbitration to resolve their disputes. The flexibility in arbitration can be juxtaposed with the increasingly prescriptive approach embraced in civil proceedings. Of course, rules for expedient and cost-effective outcomes aimed at securing finality are important, as stakeholders will hardly perceive as positive an adjudicative process that lacks a reasonable timeframe or takes a more extended period to bring a dispute to an end.[1037] However, an equally important feature is to gain efficient proceedings without risking either the due process or the correctness of the outcome.[1038] In other words,

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[1034] D Bishop, 'The case for an appellate panel and its scope for review' in F Ortino et al (eds), *Investment Treaty Law: Current Issues* Vol. 1., cited in A Qureshi, 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008), at 1157. See also M Dimsey, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven Int'l Publ., 2008), at 35-36 and see also Yannaca-Small (n 1033), at 193.

[1035] Yannaca-Small, ibid at 193.

[1036] A Qureshi, 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008), at 1157.

[1037] SD Franck 'Rationalising Costs in Investment Treaty Arbitration' (2011), Wash. Univ. L. Rev. 769; LA Markert, 'Improving Efficiency in Investment Arbitration' (2011) 4 Contemp. Asia AJ 215, at 217, [noting that "Lack of efficiency does not merely pose a theoretical problem. The legitimacy of the arbitral system is called into question if the length of proceedings and the associated prohibitive costs impair legal certainty and render adequate legal remedies unavailable."] at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966467> Accessed 23/06/19.

[1038] C Newmark, 'Controlling Time and Costs in Arbitration' in C Newmark (edn), *Leading Arbitrators Guide* (Juris Publis. NY, 2006), at 81; J Risse, 'Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings' (2013), 23(3) Arb. Int'l. 5: where Risse considers the quality as an alternative to saving time and costs.

stakeholders will hardly perceive as positive and legitimate an adjudicative process that sacrifices correctness and due process for an expedient and cost-effective process. As Fortese and Lotta put it,

> Parties to arbitration are obviously not after a cheap dispute resolution process at the expense of a well-founded outcome. At its best, an efficient arbitration process can be equivalent to good case management and thereby result in a correct outcome. It does not have to be an 'either … or' scenario.[1039]

Expedient, cost-effective processes and ensuring a well-founded, correct outcome are two sides of the same coin. Therefore, both values must be balanced. Rules of procedures such as equal representation, impartiality, independence, fair hearing, and most importantly rights to appeal or effective review of a given arbitral outcome are essential to ensuring the correctness (fairness) of an adjudicative process and outcome. Ultimately, this could aid finality. Indeed, the presence of a well-founded outcome (both substantively and procedurally), or an effective process to seek redress in the event of doubt, can help parties to develop perceptions of fairness and legitimacy of the process, thereby motivating them toward timely voluntary compliance and shortening delays that comes with non-compliance and coercive enforcement actions thereof. Subjects' perception of legitimacy will be stronger when they can predict or know beforehand the period it will take to conclude a claim fully.[1040]

In sum, ensuring correctness requires some degree of time efficiency "since justice too long delayed becomes justice denied. Equally, without fairness [correctness] an arbitral proceeding could hardly be considered an efficient mechanism of dispute resolution."[1041] Therefore, both factors must be adequately managed to engage effectively with efficiency as one cannot stand without the other. Among other instruments, instituting an effective review or appellate mechanism may promote equality between the two.

[1039] F Fortese and H Lotta, 'Procedural Fairness and Efficiency in International Arbitration' (2015), 3(1) Groningen J Int'l Law, at 116.

[1040] A Sinclair, et al., 'ICSID arbitration: how long does it take' (2009), 4(5) Global Arb. Rev., at 1-5; See also, Markert, (n 1011), at 217.

[1041] Fortese and Lotta, (n 1039).

a. Efficiency and Related Consideration under the current ISA System

Currently, efficiency issues are one of the main weaknesses ISA faces. The public interest elements associated with ISA processes, and the fact that awards can run into tens, hundreds, thousands, billions and even billions of US dollars, make the issue of efficiency even more pronounced. Indeed, not only is an expediate process economical, but the correctness too. Unfortunately, given that the ISA is modelled after private commercial arbitration, time and cost-efficiency is prioritised over the correctness of outcomes.[1042] Currently, procedures to effect correctness in arbitral outcomes (for example, annulment procedure under ISCID) are limited in scope as they aim to promote and protect finality at the expense of correctness. Review of arbitral outcomes on merit is not permissible.[1043] A recent study shows that States with adverse ICSID awards against them sought an annulment in 83 per cent of them, for predictive reasons including "an earnest conviction that the award is incorrect or unjust."[1044] However, a full remedy in erroneous outcomes is unlikely under the current limited review procedure. For the disgruntled and vanquished, the main arsenal with which to challenge the adverse erroneous award is to refuse voluntary compliance, forcing the award into domestic courts, where State immunity and related unconventional tactical defences become deployed, even if to cause substantial delay to the process.[1045] Ultimately, in respect of time and cost efficiency, and thus finality, become hampered, because these measures can accumulate into extra time and cost to the proceedings.

While instituting an appellate mechanism would serve as a way forward, stakeholder reactions to it are mixed. For instance, ICSID prioritises finality and works towards maintaining the current state of affair. Yet the ICSID and the entire ISA system currently have no strict timeframe under which disputes must be resolved, and time and cost are noted to have increased. Data available from study published in

[1042] Newmark, (n 1006), at 81.

[1043] Article 52 of the ICSID Convention.

[1044] Gaillard and Penusliski (n 19).

[1045] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L. Rev.

2017 shows that ICSID and UNCITRAL proceedings last an average of 3.6[1046] and 3.9 years,[1047] respectively. ICSID arbitration takes four to six months on average to constitute an arbitration tribunal.[1048] Of the disputes arbitrated or published under ICSID and UNCITRAL between June 2017 and May 2021, the average time to resolve these disputes was 4.8 years and 4.2 years, respectively[1049] - thus, recent proceedings have last one year, and six months longer than arbitral decisions published before 2017.[1050] Annulment proceedings under ICSID are another time-insensitive process. While ICSID's most recent Background Paper on Annulment has reported that the average duration between 2010 to 2016 was approximately 22 months from the date of its registration,[1051] annulment proceedings can take up to six years.[1052] Besides, more time may be required for executing the award if voluntary compliance fails. One must launch a worldwide hunt to locate assets of the recalcitrant State and defeat municipal law on immunity and related defences in order to recoup remedy - these accumulate to further delays. Using Argentina's case discussed earlier, although settlement agreement came through, causing further delays, it took the State between 5 – 13 years of wilful non-compliance and fruitless coercive enforcement actions.[1053] The *Sedelmayer* saga is a typical example of this mishap; it has been 20 years since the award

[1046] A Sinclair, et al., 'ICSID arbitration: how long does it take' (2009), 4(5) Global Arb. Rev., 5.at 20. https://globalarbitrationreview.com/article/1028686/icsid-arbitration-how-long-does-it-take> Accessed 23/06/19. Also confirming nearly, the same figure, see Jeffrey Commission, 'The duration costs of ICSID and UNCITRAL investment treaty arbitrations', Vannin Capital Funding in Focus (July 2016) 9 https://vannin.com/downloads/funding-in-focus-three.pdf> Accessed 23/06/19.

[1047] Ibid.

[1048] Markert, (n 1011), at 224.

[1049] Y Hodgson et al., 'Empirical Study: Costs, Damages and Duration in Investor State Arbitration; British Institute of International and Comparative Law & Allen and Overy: London, UK, 2021; at 33 – 34. https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf. Accessed 23/2022.

[1050] Ibid.

[1051] Updated Background Paper on Annulment the Administrative Council of ICSID, May 2016, at https://icsid.worldbank.org/resources/publications/background-papers-annulment>. Accessed 1603/22.

[1052] Markert (n 1011).

[1053] Ibid, at 13 -14, 49. [the five ICSID awards were issued between 2000 and 2008 and settlement arrangement came after October 2013; it took the State between 5 – 13 years approximately to settle. Subsequent awards in BG Group, El Paso, Total and Suez rendered in 2007, 2011, 2013 and 2015 respectively, settlement agreements were reached between 2016 and 2019" thus, approximately, between 2 – 12 years.

was issued and yet full payment is yet to be realised.[1054] Regarding cost, instituting ICSID arbitration requires a $25,000 USD filing fee and expenses relating to arbitrators and tribunals average USD1 million, while the counsels for disputing parties, including expert costs, ranges between $5–6 million USD.[1055]

Of late, ICSID and other institutions have begun to propose a change to address this efficiency concern. ICSID, in terms of time and cost efficiency, have introduced "an option to 'opt in' to an expedited arbitration process at any time by mutual agreement. The change which is contained in proposed rules 75–86, accordingly "would reduce the length of proceedings by half" and reduce fees, increasing thus the efficiency of the proceedings. The change is intended to come into effect on July 1, 2022.[1056] As far as correctness is concerned, since weighing correctness implicates other legitimacy concerns such as inconsistency and coherency, it is safe to say that the proposals underway to institute an appellate mechanism, among other ideas, are a step towards ensuring the correctness of arbitral outcomes. However, as will be discussed later, an appellate mechanism must come with conditions that can induce compliance and, ultimately, enforcement of awards, as well as guard against abuse.

In conclusion, as constructivist epistemology provides, the perception of the legitimacy of an adjudicative system impacts subjects' compliance behaviour. Accordingly, legitimacy is fostered by the presence of certain fundamental values of adjudication such as transparency, consistency, independence, impartiality, and efficiency. As the section has shown, the current ISA system insufficiently

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[1054] D Charlotin, 'Looking back: German investor, Franz Sedelmayer, was early-adopter of investment treaty arbitration, but had to engage in decade-long assets hunt against Russia' (IA Reporter, 29 August 2017) www.iareporter.com/articles/looking-back-german-investor-franz-sedelmayer-was-early-adopter-of-investment-treaty-arbitration-but-had-to-engage-in-decade-long-assets-hunt/. Accessed 23/09/2019. [The Sedelmayer enforcement proceedings started after the 1998 award under the SCC arbitration was rendered against Russia. The award debtor as at 20/04/22, 20 years on, yet to recoup full remedy.]

[1055] Y Hodgson et al., 'Empirical Study: Costs, Damages and Duration in Investor State Arbitration; British Institute of International and Comparative Law & Allen and Overy: London, UK, 2021; at 33 – 34. https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf. Accessed 23/2022

[1056] See https://icsid.worldbank.org/resources/rules-amendments. Accessed 03/05/22. For related proposals or amendments under other arbitral institutional rules, see generally, "Consistency, efficiency and transparency in investment treaty arbitration" (November 2018), A report by the IBA Arbitration Subcommittee on the topic, at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=a8d68c6c-120b-4a6a-afd0-4397bc22b569 https://icsid.worldbank.org/en/Documents/resources/ICSID_AR15_ENG_CRA-highres.pdf. Accessed 03/09/21.

accommodates these fundamental values. The deficits have resulted in many reactions from stakeholders implying that the system indeed suffers from a legitimacy crisis and therefore requires re-evaluation. The next section delves into the backlash and reactions from the regime's stakeholders to shed more light on the impact of the crisis, particularly how it impacts States' compliance behaviour toward arbitral awards.

5.4.4 Reactions to Lack or Insufficiency of the Legitimacy Values and Concluding Remarks

As a consequence of the insufficiency of the fundamental values of legitimacy under the current investment protection system, some stakeholders have started avoiding the system.[1057] For example, Bolivia,[1058] Ecuador,[1059] and Venezuela[1060] have denounced membership of the core investment arbitral institution of ICSID. Some States have cancelled existing and/or redrafted new IIAs with no or limited access to ISA mechanisms (Ecuador, Bolivia, India, Indonesia, and South Africa, for example).[1061] Also, some have banned arbitration in cases concerning the State (or State entities or specific sectors) and the launch of inter-State arbitration in an attempt to annul a jurisdictional award in favour of the investor.[1062]

[1057] M Langford et al., 'Backlash and State Strategies in International Investment Law' in T Gammeltoft-Hansen and T Aalberts (eds), *The International Investment Regime: The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (CUP, 2018), at 341; M Waibel, 'The Backlash Against Investment Arbitration: Perceptions and Reality' in M Waibel et al., (eds), *The Backlash Against Investment Arbitration* (London: Kluwer Law Int'l, 2010), at 1 - 9.

[1058] S Manciaux, 'Bolivia's withdrawal from ICSID' (2007), 4(5) Transnat'l.Disp. Mgt; R Lazo, 'Is There a Life in Latin America After ICSID Denunciation?' (2014), 11(1) Transnat'l.Disp. Mgt,.

[1059] ICSID News Release, 9 July 2009, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20. Accessed 12/09/20.

[1060] ICSID News Release, 26 July 2010, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement100. Accessed 12/09/20.

[1061] R Lazo, 'Is There a Life in Latin America After ICSID Denunciation?' (2014), 11(1) Transnat'l.Disp. Mgt,.; K Gomez, 'Latin America and ICSID: David versus Goliath' (2011), 17(2) Law and Bus., Rev. of the Americas, 195; PC Mavroidis et al., 'Preventing a Backlash against Investment Arbitration: Could the WTO Be the Solution' (2011), 12(3) J. World Invest. And Trade, 425-446.

[1062] *Republic of Ecuador v United States of America*, PCA, Award, 29 September 2012. See Article 24(3) of the 2015 Brazil Model BITS, excluding certain sectors or issues from being subject to arbitration:

> The following may not be subject to arbitration: Article 13 - Corporate Social Responsibility; Paragraph 1 of Article 14 – Investment Measures and Combating

Meanwhile, others have modified their investment regime, including initiating templates for future IIAs.[1063] The United States, for example, includes elaborate wording of IIAs aimed at constraining arbitrators from an expansive interpretation beyond the scope. It also provides for (subject to parties' affirmative consent) the right to use appellate mechanisms in the future.[1064] At the regional level, the EU has developed a new investor-state dispute settlement (ISDS) model that seeks to replace the current investment arbitration with a system of multilateral investment courts.[1065] Remarkably in 2012, United Nations Conference on Trade and Development (UNCTAD) also suggested "limiting resort to ISDS and increasing the role of domestic judicial systems […] or even refraining from offering ISDS".[1066] This is not to mention the numerous reform proposals put forth by States and other stakeholders under consideration by the UNCITRAL Working Group III, which include consideration for the possible introduction of the appellate or investment court system to handle investor-state dispute settlement (ISDS) under the regime.[1067]

Corruption and Illegality; and paragraph 2 of Article 15 - Provisions on Investment and Environment, Labor Affairs and Health.

Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download. Accessed 09/06/21.

[1063] Mavroidis et al, (n 1061).

[1064] See for example, Annex 10-H The United States-Chile Free Trade Agreement (FTA) entered into force on January 1, 2004, available at https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text. For similar provision with other States see, The Office of the US Trade representative, Free Trade Agreements at https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta. Accessed 23/08/21.

[1065] Mavroidis et al, (n 1061); See also, NJ Calamita, 'The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime' (2017), 18(4) The J. World Invest. and Trade, at 585-627; N Butler and S Subedi, 'The Future of International Investment Regulation: Towards a World Investment Organisation?' (2017) 64 Neth Int'l Law Rev., 43.

[1066] UNCTAD (2012c) Investment Policy Framework for Sustainable Development. http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf. Accessed 23/07/19, at 43–44.

[1067] UNCTAD 51st Session 2018, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, 2017, Part I, at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/83/PDF/V1802983.pdf?OpenElement. Accessed 24/03/20. The lastest development is "Consolidated draft provision on appellate mechanism and enforcementdraft", available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues.docx. Accessed 12/09/21.

More adversely, some States have reacted by enacting domestic legislation to impede awards' coercive enforcement against States and/or declined to implement awards.[1068] Some come as multijurisdictional challenges against the awards by the award debtors themselves, either directly or indirectly. Some States with awards against them have reacted directly by attacking the awards through annulment and related proceedings while refusing or delaying voluntary compliance, or have simply blatantly declared non-compliance with the award and future awards.[1069] A recent survey of State compliance with ICSID awards shows that States attacked awards rendered against them in 83 per cent of the cases through annulment proceedings.[1070] While some complied with their award after the utility of the annulment proceedings, in others, non-compliance has persisted to the present,[1071] forcing the award creditors to initiate coercive enforcement actions to recoup the awards. In this regard, States have indirectly attacked the awards by tactically blocking or attempting to block coercive enforcement actions in domestic courts through State immunity and related national defences.[1072] The Federal Republic of Nigeria, in a recent arbitration claim,[1073] is one example of this. After blatantly declaring non-compliance in an arbitral outcome it deemed unfair and unjust, the State threatened to block enforcement actions instituted in domestic courts against its assets through immunity defences, having been recorded saying that the "government would strongly avail itself of all defences customarily afforded to sovereign states under the United Kingdom Sovereign Immunity Act at any such enforcement actions."[1074] Subsequent

[1068] France Sapin No. II Law; Russia new enforcement legislation.

[1069] For example, Argentina, see news carried out by CNN (Jan. 9, 2012) 'Chavez Says He Won't Respect World Bank Panel's Decision' at http://edition.cnn.com/2012/01/09/business/venezuela-exxon/index.html. Accessed 03/07/19. Recently, the Russia Federation in Yukos awards.

[1070] Gaillard and Penusliski (n 19).

[1071] Ibid.

[1072] Ibid; J Calvert, 'Constructing investor rights? Why some states (fail to) terminate bilateral investment treaties' (2018), 25(1) Rev. Int'l Pol. Eco.: 75-97, highlighting Argentina approach in subjecting awards to domestic review; J Hepburn, 'Domestic Investment Statutes in International Law' (2018) 112(4) AJIL, 658-706.

[1073] *Process and Industrial Dev. Ltd. v The Ministry of Petroleum Resources of the Federal Republic of Nigeria*, Final Award, (Jan. 31, 2017) ¶ 2.

[1074] Available at https://punchng.com/fg-to-stop-uk-courts-9bn-award-against-nigeria/

enforcement actions against the State in the United Kingdom and the United States courts met immunity and related defences.[1075] Another example of a State attacking awards (refusing voluntary compliance and using alternative means to block an award's coercive enforcement) for perceived illegitimacy lies in Argentina's compliance behaviour, as indicated above. Cavert writes the following about Argentina's case:

> It was assumed when ICSID was established that states would voluntarily comply with rulings as the costs of non-compliance, in terms of the state's international reputation and the threat of economic sanctions, were considered enough to invent good behaviour. However, Argentina government officials were deeply sceptical of ICSID and believed the institution to be biased towards corporate interests. Officials criticized the lack of transparency […]. Paying ICSID awards was perceived to validate unfair rulings. Argentina withheld payment on five awards after investors refused to submit them to Argentine courts for review.[1076]

Indeed, not only was the State sceptical about the system, citing apparent deficits such as lack of transparency, impartiality, consistency, and an appeal mechanism, but honouring the five awards was perceived by the State as validating an unfair outcome, hence validating illegitimate jurisprudence.[1077] Another commentator explains:

> the hostile approach undertaken by the government of Argentina vis-á-vis ICSID was prominently influenced by the 'legitimacy deficit' of ICSID tribunals in Argentina. The government of Argentina […] raised

[1075] B Pazanowski, 'Immunity Issue Hinders $9 Billion Arbitral Award Against Nigeria' (June 19, 2020), at https://news.bloomberglaw.com/us-law-week/immunity-issue-hinders-9-billion-arbitral-award-against-nigeria>. Accessed 12/09/21. For details of ruling on immunity as raised by the State in US courts see, *Process and Industrial Developments Limited v Federal Republic of Nigeria, Court of Appeals*, Dist. of Columbia Circuit 2020; *Process and Indus. Dev., Ltd. v. Fed. Republic of Nigeria*, 506 F.Supp.3d 1, 6–11 (D.D.C. 2020). The objection to enforcement raised in UK relates to public policy consideration; *Process and Industrial Developments Limited v Federal Republic of Nigeria* [2019] EWHC 2241 (Comm); *Federal Republic of Nigeria v Process & Industrial Developments Limited* [2020] EWHC 2379 (Comm), para 226.

[1076] Calvert (n 1032); see also Goodman, (n 129), at 479.

[1077] Calvert, ibid.

> significant doubts regarding the legitimacy of ICSID tribunals, particularly pertaining to their independence and impartial attitude.[1078]

Although in 2013 Argentina declared it would honour the five outstanding awards, the settlement came with a 25 per cent discount, and further default is likely given the State's mistrust of the ISA system.[1079] Venezuela holds the same sentiments toward the investment regime; scepticism toward the investment regime. After unsuccessful attempts to annul awards and declaring that it "will not recognize any ICSID decisions"[1080], the State strategically blocked possible enforcement efforts by moving its gold reserves, valued at $9 billion USD, from foreign banks to the home bank.[1081] Apart from Venezuela, Argentina, and Nigeria, notable examples of States showing dissatisfaction with the ISA system in general and refusing to honour arbitral obligations include Zimbabwe,[1082] Liberia,[1083] Russia,[1084] Thailand,[1085]

[1078] See Hirsch (n 46).

[1079] See Argentina's Delay in Paying the Suez ICSID, Barker McKanzie Publication of February 26, 2019 at https://www.bakermckenzie.com/en/insight/publications/2019/02/argetinas-delay-in-paying#:~:text=Under%20his%20administration%2C%20Argentina%20settled,million%20with%20other%20bond%20holders.> Accessed 23/09/21.

[1080] K Vyas, "Venezuela's Chávez: Won't Accept Rulings by ICSID Court", 8 January 2012, at http://online.wsj.com/article/BT-CO-20120108-703460.html.

[1081] Central Bank of Venezuela, "BCV completó histórica repatriación del oro monetario de la República", 30 January 2012, at http://www.bcv.org.ve/c4/notasprensa.asp?Codigo=9662&Operacion=2&Sec=False. The State was reported to have planned to transfer $6 billion USD in cash reserves held in European and US banks to Russian, Chinese and Brazilian banks where freezing order were presumably unattainable. Accessed on 22/10/21. See J. De Córdoba, "Chávez Takes Steps to Exit Global Forum", 13 September 2011, at http://online.wsj.com/article/SB10001424053111903285704576560760106674594.html.

[1082] *Funnekotter v Republic of Zimbabwe* ICSID Case No ARB/05/6, Award (2009) *http://italaw.com/documents/ZimbabweAward.pdf*> Accessed 23/09/21.

[1083] *Liberian Eastern Timber Corp v Republic of Liberia* ICSID Case No ARB/83/2, Award 2 ICSID Rep. 346 (1994).

[1084] *Sedelmayer v Russian Federation,* Arbitration Award (*ad hoc* arbitration under the Stockholm Chamber of Commerce arbitration rules July 7, 1998), *http://italaw.com/documents/investment_sedelmayer_v_ru.pdf*. accessed on 21 August 2019; see also *Hulley Enterprises Limited (Cyprus) v The Russian Federation* (PCA Case No. AA 226); *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No. AA 227); *Veteran Petroleum Limited (Cyprus) v The Russian Federation* (PCA Case No. AA 228), 'The Yukos Awards.'

[1085] *Walter Bau AG (in liquidation) v Kingdom of Thailand,* Award (UNCITRAL Arbitration July 1, 2009), http://italaw.com/sites/default/files/case-documents/ita0067.pdf> Accessed 23/09/21.

Senegal,[1086] Kyrgyzstan,[1087] and Venezuela.[1088] In the specific case of Russia in the *Yukos* awards,[1089] the refusal to comply voluntarily with the awards and blocking every enforcement action by the investors stems from the State's scepticism about the regime's fairness, particularly during the Yukos arbitral proceedings. The then Finance Ministry cited "biased investigations and use of evidence, inadmissible reviews of Russia's court judgments"[1090] and many other irregularities, thus pointing to the system's legitimacy deficits as identified above. Other stakeholders like academics have acted in response to the system's shortcomings, having criticized awards or issued collective statements condemning the current ISA system.[1091]

The numerous reactions from stakeholders, including the unfortunate attacks on arbitral awards, evidence the presence of a legitimacy crisis. They also show how States are increasingly working to protect their interests through backdoor channels. These reactions alone, particularly those relating to compliance resistance may provide other States with the motivation for non-compliance and, as the arbitral caseload surges, instances of non-compliance will also rise as a tactical means of self-preservation.

Does this mean the regime is a failure? Absolutely not. As the late arbitration giant Johnny Veeder observed, it took years of inter-State engagements for the United Kingdom investor to get payment in

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[1086] *Socie´te´ Ouest Africaine des Be´tons Industriels v Senegal,* ICSID Case No ARB/82/1, Award, 2 ICSID Rep 190 (1994).

[1087] *Petrobart Ltd. v Kyrgyz Republic,* Arbitration No 126/2003, Award II (Arbitration Institute of the Stockholm Chamber of Commerce Mar. 29, 2005), 13 ICSID Rep. 387 (2008).

[1088] *Mobil Corp. v Bolivarian Republic of Venezuela,* ICSID Case No ARB/07/27, Decision on Jurisdiction (June 10, 2010), *https://icsid.worldbank.org* accessed on 20/10/2013; See also CNN (Jan. 9, 2012) *Chavez Says He Won't Respect World Bank Panel's Decision*, at http://edition.cnn.com/2012/01/09/business/venezuela-exxon/index.html> Accessed 23/09/21.

[1089] The Yukos Awards.

[1090] ITAR-TASS (2014, July 28), *Russia to appeal ruling of The Hague Arbitration Court – Finance Ministry* – available at http://en.itar-tass.com/economy/742610, accessed 21 August 2019; ITAR-TASS. (2014, Aug. 12), *Russia might appeal Hague's arbitration court resolution on Yukos* available at http://en.itar-tass.com/russia/744558> Accessed 23/09/21. For case full details, see MD Brauch, 'Yukos v Russia: Issues and legal reasoning behind $50 billion USD awards' *Investment Treaty News* (2014) https://www.iisd.org/itn/wp-content/uploads/2014/09/iisd_itn_yukos_sept_2014_1.pdf> Accessed 23/09/21.

[1091] See GV Harten et al., 'Public Statement on the International Investment Regime' Aug. 31, 2010 available at https://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/. Accessed 2/08/20.

respect of award in the infamous *Lena Goldfields* arbitration against the Soviet Union for four successive breaches: "without compensation (1918), repudiation of the concession (1929), failure to honour the arbitration award (1930) and repudiation of settlement agreement (1940)."[1092] That dispute occurred within the traditional framework for resolving investment disputes, the effectiveness of which rested exclusively on the State's willingness to espouse its citizens' claims. Compared with the pre-ICSID era, it could be concluded without doubt that the current ISA system, despite its shortcomings, continues to be revolutionary in safeguarding rule-based transnational investment protection and adjudication. But as Franck notes,

> [the] investment arbitration [system] is still in its infancy but in the middle of its first "growing pains," it is appropriate to help the jurisprudence develop, acknowledge the difficulties in the current framework, and find ways to minimize the looming legitimacy crisis. In this manner, investment arbitration will not be thrown out with the proverbial bathwater and international arbitration will be firmly on track to promote international justice.[1093]

Indeed, what we are noticing are normal growing pains for a relatively new area of law. Improvement is essential to enhance effectiveness in all aspects of the system, including the aspects dealing with awards' implementation, on which this work focuses.

5.5 Conclusion

Voluntary compliance with and coercive enforcement of arbitral awards are fundamental elements that determine the effectiveness of an arbitration system. Although States have mostly comply with their arbitral obligations, recent developments suggest that compliance is becoming a problem under the ISA regime. Understanding what motivates States to refuse or comply with their international obligations could provide insight into how to improve compliance with and enforcement of arbitral awards.

[1092] VV Veeder, 'The Lena Goldfields Arbitration: The Historical Roots of Three Ideas' (1998) 47 ICLQ, at 747. See also in Gaillard and Penusliski (n 19), at 54.

[1093] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L. Rev., at 1523.

Examination of various perspectives to compliance under IR theories identified that negative and positive consequences of (non)compliance could impact State compliance behaviour. For example, coercive sanctions like removing economic benefits and/or an isolation from the international community and loss of reputation, hence the quest to protect (or restore) a trustworthy reputation in the eyes of relevant stakeholders have proven effective, at least in compelling and motivating compliance through settlement agreements. The Argentina case demonstrates that this usually occurs after an initial long period of subsistent lack of voluntary compliance and unsuccessful awards' coercive enforcement actions in domestic courts.

Normative perspective to compliance which implicates subjects' perception of legitimacy, has been shown to impact States' compliance behaviour at an initial stage. Thus, as a proactive measure to secure the desired outcome, where the perception of legitimacy is fostered, subjects voluntarily comply outcomes even with outcomes adverse to their interests and *vice-versa*. The presence of values such as consistency, independence, impartiality, transparency, and efficiency provide an adjudicative system with the necessary perception of legitimacy in its shareholders' eyes, thereby motivating them to accept and comply with rules and outcomes. Conversely, the absence or insufficient consideration of these values, which is the case under the current ISA regime the chapter identified, will lead to numerous stakeholders' reactions, including attacks on the outcomes. Lack of voluntary compliance and subsequent use of annulment procedures, sometimes resisting coercive execution through the utility of States immunity, are typical instances of States trying to salvage the crisis. Therefore, to effectively address the difficulties in implementing arbitral awards for the benefit of the investors, attention must be devoted to improving factors that impact States' compliance behaviour.

The next chapter is devoted to exploring and proffering solutions that can improve compliance with, and enforcement of arbitral awards under the regime. The proposal for the introduction of an appellate mechanism into the current ISA system is of cardinal importance and will be explored together with other

solutions that target both compliance with and coercive enforcement of awards, the latter of which is often hindered by the application of the doctrine State immunity.

Chapter 6: Practical Considerations for Improving ISA Awards' Implementation

6.1 Introduction

The current investor-state arbitration system (ISA) is revolutionary in providing and safeguarding rule-based transnational investment protection and adjudication between host States and foreign investors. However, as the preceding chapters have identified, significant challenges and limitations still exist, particularly in the context of implementing arbitral awards. Improvement is necessary. This chapter aims to proffer workable solutions to how the current system might be improved upon in the context of implementing arbitral awards. It will address itself to alternative solutions aimed at facilitating effective compliance and coercive enforcement of arbitral awards.

First, this chapter will examine a pragmatic solution to address the legal challenges relating to State immunity from measures of constraint and execution, including viability of implementing an express waiver of immunity from such measures. As coercive enforcement and associated challenges only arise after voluntary compliance fails, alternative solutions that look to secure or improve voluntary compliance with awards will follow. Here, increased transparency and the establishment of an appeal mechanism are discussed as a way forward to secure and encourage voluntary compliance. The latter proposal draws from the argument that sometimes non-compliance and subsequent attacks on arbitral awards (through immunity and related defences) are tactics deployed by the debtor State to address some perceived inaccuracies in the arbitral outcomes. Although these solutions have the potential to facilitate voluntary compliance and ultimately coercive enforcement of awards under the regime, they have not been considered in this manner and in such depth as engaged by the thesis. Therefore, this serves as a valuable original contribution to furthering knowledge in the field. Also, it is hoped that the proposed solutions will inform and influence policy decisions as the regime's stakeholders converged under the auspices of the UNCITRAL Working Group III and related institutional frameworks to consider measures to enhance and sustain the regime.

6.2 Addressing Immunity from Measures of Constraint and Execution challenges

Ultimately, the enforceability of arbitral awards is the crux of the international investment arbitral jurisprudence. As Mistelis states, "it is the enforceability and indeed the enforcement of the award that gives credence to the entire arbitration process and justifies the cost and time that the parties to a dispute have invested in the resolution process."[1094] This last link cannot be the weakest as it stands to undermine the regime's effectiveness and legitimacy entirely. Therefore, any obstacle in this regard should be addressed with intensity. Undeniably, international and domestic rules regarding arbitration and State immunity have all developed to the point where foreign investors engaged in commercial activity with States are guaranteed enforceability of arbitral awards.[1095] Nevertheless, these rules of engagement fail to clearly specify the States' obligations and investors' rights when the latter fails to comply voluntarily with arbitral awards rendered against them.

A shift from an absolute immunity doctrine to a more curtailed approach, the restrictive immunity doctrine, purportedly balances the parties' rights for effective adjudication. A distinction drawn between acts of a sovereign nature (*actus jure imperii*) and of a commercial nature (*actus jure gestionis*), with immunity from suit (jurisdictional immunity) being removed from *actus jure gestionis*, highlights the feat. Essentially, a State waives its jurisdictional immunity when it engages in commercial activity and agrees to arbitrate resulting disputes. For determining the commerciality of the relevant act, the rules of engagement predominantly look to the *nature of the activity* (nature test) and not the *purpose of the activity* (purpose test).[1096] As the German Constitutional Court in the *Empire of Iran* held,

> The distinction between sovereign and non-sovereign State activities cannot be drawn according to the purpose of the State transaction and whether it stands in a recognisable relation to the sovereign duties of the state. […] As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one

[1094] Mistelis, *Award as an Investment*, (n 16) at 3.

[1095] L Reed and L Martinez, 'Treaty Obligations to Honour Arbitral Awards and Diplomatic Protection' in D Bishop (eds), *Enforcement of Arbitral Awards Against Sovereigns*, (Juris Publis., Inc., 2009), at 13.

[1096] *Rafidain v Consarc*, Belgium, (1993) 106 ILR 274, 277. See Chapter 3 for more.

> should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity.[1097]

By engaging the nature test, suits can proceed against States when they enter (or breach) commerce, trade and investment contracts for avowedly political or sovereign purposes. Indeed, this is usually not problematic given that a State in ISA proceedings would have already consented to such proceedings, therefore immunity from jurisdiction is waived and is unavailable to plead. However, the State can continue to claim immunity in actual coercive enforcement actions, as the criteria determining the commerciality of the relevant act turn different. As Yang rightly puts it,

> Without exception current State practice grants immunity to foreign State property that is used for sovereign or governmental purposes and allows enforcement and execution only in respect of property used for commercial purposes. Thus the 'purpose' test, much discredited at the [jurisdictional] stage, now becomes the decisive criterion for the enforcement of the […] judgments.[1098]

The purpose test makes actual attachment only permissible against foreign States' assets 'in use [or destined to be used] for' commercial non-governmental purposes, even if the relevant asset is by its very nature commercial (e.g. a bank account held in a commercial bank).[1099] Such an approach directly leads to the classification problem: how does one determine the use or destined use of a relevant State asset? For example, what would be the use of a bank account kept in a commercial bank if not for commercially related engagements? What is a non-governmental/commercial purpose? Indeed, as noted in the preceding chapter, in practice the 'in use for commercial purposes' restraint underlying immunity from measures of

[1097] *Empire of Iran Case*, Germany, (1963) 45 ILR 57, 80; see also for examples Article 2 of the UNCSI; Section 1603(d) of the US FSIA; Section 3 of the UK SIA (particularly Lord Denning MR in *Trendtex v The Central Bank of Nigeria* [1977] Q.B. 529 [1977] 2 WLR 356, 558.

[1098] Yang, (n 25) at 362; *Philippine Embassy Bank Account Case*, Judgment of Dec. 13, 1977, Constitutional Court, 65 I.L.R. 146, 155 *Socie´te´ Sonatrach*, (French).

[1099] See among others, Article 19 of the UNSCI and Article 26 of the ESCI; Section 1610(A) US FSIA; section 13(4) of the UK SIA.

constraint and execution has been problematic.[1100] In many jurisdictions, interpreters, legislators and drafters have sought to add specificity, thereby creating enormous difficulties for both courts and awards creditors at the coercive enforcement stage. Domestic courts confronted with the difficulty turn to be deferential primarily to foreign States interest due to reciprocity considerations,[1101] if not somewhat confused at times. Exacerbating the already chaotic status quo is the fact that there is some category of States' assets that are designated for 'public use' against which execution measures are prohibited, except under some additional requirements. These assets include embassy assets, cultural and heritage assets and assets of the central bank.[1102] Some of these assets, namely, the central bank and embassy mission bank accounts, implicate the problem of mixed accounts, which remain uncertain since the basis on which domestic courts turn to grant immunity from their execution is unclear. Further, the problem of executing against the assets of States' entities remains given their complex heterogenous nature.

In short, the restrictive immunity doctrine is a quasi-misnomer as immunity in respect of measures of constraint and execution is literally intact and can successfully aid a recalcitrant State in blocking awards' coercive implementation. With the rising phenomenon of non-compliance with arbitral awards by States, coercive enforcement actions take on relevance as alternative means of effective remedy. Without it, award creditors will be left with a pyrrhic victory and, ultimately, the potential to undermine the utility of the ISA. The thesis recommends amending State immunity rules to include an express waiver of immunity from measures of constraint and execution, particularly under both ICSID and New York Conventions, or engaging in such a waiver through bilateral means to circumnavigate the landscape governing immunity. This chapter details these recommendations, including considerations about their viability for the purpose. It must be noted that this section and its recommendations aim primarily to

[1100] See chapter 3 and 4 for more on this.

[1101] H Fox, *'The Restrictive Rule of State Immunity The 1970s'* (n 26), at 36.

[1102] See Article 21 of the UNSCI.

address coercive enforcement actions and the challenges posed by the doctrine of State immunity, rather than to address voluntary compliance.

6.2.1 Amending Rules to include an Explicit Waiver of Immunity from Measures of Constraint and Execution

It is recommended to engage an explicit/express waiver of immunity from constraint and execution measures that correspond to immunity from jurisdiction and are thus more reflective of the restrictive immunity approach. This is foremost, the most suitable solution to immunity problems, as it will provide the necessary *consent* to taking measures of constraint and execution against States' assets which would otherwise amount to unlawful taking under international law. Such amendment is necessary under the governing frameworks like the New York Convention and the ICSID Convention. Such a treaty amendment will place immunity from execution in the same position as immunity from jurisdiction, waived and unavailable to plead in ISA proceedings, thereby providing a robust system for implementing arbitral awards when voluntary compliance fails.

The inclusion of an express waiver of immunity from measures of constraint and execution was discussed at length during the ICSID Convention's drafting. As Schreuer explained, the fear that this would "run into the determined opposition of developing countries and would have jeopardised the wide ratification of the Convention" ultimately resulted in its exclusion.[1103] The timing was inappropriate for such a radical step given the considerable frictions between developed and developing nations that had ensued following Hull and Calvo and related doctrines.[1104] Of course, the later doctrines did not gain traction or achieve their principal aim to subject foreign investor-state engagements to the host State's law and judicial system, and to limit harsh diplomatic interventions usually espoused by powerful developed

[1103] Schreuer *A commentary*, (n 42), at 1154, citing A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, (1972), 136 Recueil des Cours., 331, at 403.

[1104] See Chapter 3 for more.

States against weaker developing States.[1105] ICSID was established, offering a better framework for the purpose, i.e. to depoliticise such engagements by creating a neutral forum for all the parties to engage, devoid of States' involvement and associated weaknesses.

In this sense, the ICSID framework "offer[s] a neutral dispute resolution forum both to investors that are (rightly or wrongly) wary of nationalistic decisions by local courts and to host States that are (rightly or wrongly) wary of self- interested actions by foreign investors."[1106] Indeed, once consent is obtained, the exclusive jurisdiction of the framework becomes fully activated, thereby removing from the ambit of the relevant dispute settlement any State involvement. This includes diplomatic protection espoused by investors' home State and recourse to host States' law and judicial system when dispute precipitating from investment engagement arises.[1107] Nevertheless, Article 55 (relating to immunity) was reserved in much the same way as Article 27 of the Convention, which entertains diplomatic interventions by the investors' home States.[1108] As long as ICSID still retains these articles implicating sovereign involvements, achieving a *depoliticised* system of adjudication appears elusive.

However, it could be argued that the drafters never intended to limit actual coercive confiscation of recalcitrant assets through State immunity bars, save for encouraging the Convention's wider ratification for the ultimate good of investors. As Gaillard and Penusliski noted,

> When the ICSID system was being set up, the matter of compliance with investment awards rendered against States was considered 'academic'. ICSID's

[1105] PR de Almeida, 'Sovereignty and regional integration in Latin America: a political conundrum?' (2013) 35(2) *Contexto internacional* 471-495, at https://www.scielo.br/scielo.php?pid=S0102-85292013000200006&script=sci_arttext. Accessed 12/11/19.

[1106] L Reed et al, 'Recognition, Enforcement and Execution of ICSID Awards' in *Guide to ICSID Arbitration*, (Kluwer Law Int'l, 2004), at 2 - 5.

[1107] Article 25 and 27 of the ICSID Convention.

[1108] P Martins, 'The Limits of Depoliticization in Contemporary Investor-State Arbitration' (2010), Select Proceedings of the European Society of Int'l Law, Vol. 3, at https://ssrn.com/abstract=1716833. Accessed 12/11/19.

> architects believed that as long as States would remain under an international obligation to comply with awards they would generally do so.[1109]

Indeed, non-compliance was never envisaged given the importance States place on the doctrine of *pacta sun servanda.* If the Convention's drafting commentary is to be given any credence, it was believed that host States, rather than investors, required protection against potential non-compliance.[1110] The drafters' belief in absolute compliance on the part of States proved to be naïve or myopic. The surge in non-compliance with awards by States, coupled with the fact that Article 55 poses a significant hindrance to coercive enforcement when voluntary fails and the surge in home State intervention (and inevitably the *re-politicisation*) in the investment disputes, perhaps underscores that the time is ripe to re-evaluate critically and re-introduce into the ICSID framework an *express* waiver of immunity from measures of constraint and execution. Other enforcement governing frameworks are not exempted. In this context, feasibility becomes essential. So, how feasible is an amendment to include an express waiver of immunity from measures of constraint and execution in the ICSID and related Conventions?

Like all international treaties, an amendment will require all contracting parties' consent. Indeed, under Article 66 of the ICSID Convention, any anticipated amendment to the Convention will become effective only when "all Contracting States have ratified, accepted or approved the amendment."[1111] The ICSID Convention currently has 155 contracting States members as of June 2022. Achieving or gathering such unanimity and consensus with these number of members will be cumbersome, expensive and time-consuming. Besides, as Bjorklund rightly emphasised, such an amendment will require a great degree of political will and momentum, which is currently lacking in the international community,[1112] perhaps due

[1109] Gaillard and Penusliski (n 19), at 1; See also, AS Alexandrov, 'Enforcement of ICSID Awards: Article 53 and 54 of the ICSID Convention' in C Binder et al., (eds) *International Investment Law for the 21st Century, Essays in Honour of C Schreuer* (OUP, 2009), at 326-27.

[1110] ICSID, Documents Concerning the Origin and The Formulation of the Convention Vol. II, At 304 (1968) [Hereafter, The ICSID, Documents Vol. II]; Alexandrov, ibid.

[1111] Schreuer, *A Commentary* (n 42) at 1265.

[1112] See Bjorklund, *Re-Politicization of Investment Disputes* (n 13), at 240.

to States' tendencies towards protectionism and sovereignty considerations. The regime's ongoing legitimacy crisis exacerbates the situation.[1113] It is submitted that any amendment to the general rules of engagement, including State immunity and awards' enforcement, will be incremental towards strengthening States' interests instead of curtailment in favour of investors. The current calls for a systemic overhaul of the ISA system and the numerous steps to recapture the 'taken' rights of the sovereigns,[1114] not to mention the interpretative approach adopted by the CJEU in the *Achmea* judgement,[1115] reinforced this statement. Furthermore, opportunities have been presented to effect changes to the rules on immunity from execution as they currently apply, at least to clarify or incorporate some modern practices which are beginning to emerge under some arbitral rules.[1116] In all these, either the old rules are reiterated (Fox noting the UNSCI specifically[1117]) and/or States' protection has arguably become more robust. This is illustrated by the CETA[1118] and some recent *lex specialis* regimes of immunity

[1113] See Chapter 5.4. for a more detailed discussion of this.

[1114] Ibid, see specifically, Section 5.4.4.

[1115] See Chapter 2.4.1.

[1116] For example, The UNSCI. [Fox, critiques that the Convention reiterates the old rule instead of clarifying the existing uncertainties. She also notes that "Part IV [of the UNSCI] is out of line with the many sophisticated forms employed in commercial dealings of garnishee, sequestration, freezing and other measures to secure a creditor's interest in the preservation of assets short off direct transfer of ownership.", noting that "such procedures do exist in practice", to support this she notes the US Supreme Court ruling in *Argentine Republic v NML Capital Ltd*. that " [n]o provisions in the FSIA immunises a foreign-sovereign judgement debtor from post judgement discovery of information concerning its extraterritorial assets and has upheld the lower court's order for the disclosure of assets held by Argentina outside the United States."], Fox, *The Restrictive Rule 1970s Enactment* (n 26), at 32, 36 -37.

[1117] Ibid.

[1118] Articles 8.28(9)(d) and 8.41(4) of the CETA follows after the ICSID Convention enforcement provisions by holding that ''[e]ach Party shall recognize an award rendered pursuant to this Agreement as binding and enforce the pecuniary obligation within its territory as if it were a final judgement of a court in that Party''; ''[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force where such execution is sought.'' See respectively Canada–EU Comprehensive Economic and Trade Agreement (Hereafter, CETA) revised 29 February 2016 <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf> Accessed 21/10/20.

regarding certain States' assets,[1119] as well as recently enacted primary domestic immunity legislation.[1120] It is instructive to highlight that the ongoing reform of the ISDS by the UNCITRAL Working Group III maintained the current status quo on the questions of immunity from execution, instead of effecting changes to aid execution. In fact, the draft provision - para. 61, part 3 of the proposed article - follows after the conventional route of leaving immunity from execution to be governed by the national law.[1121] Therefore, although ideal, an amendment on the treaty level is unrealistic and doubtful. But, of course, discussions that go beyond ICSID and related arbitral mechanisms as it presently stands are legitimate.

6.2.2 An Explicit Waiver through Bilateral or Contractual Arrangements

Comparatively, a more viable option would be to negotiate an express waiver of immunity from measures of constraint and execution on a contractual basis (specifically between a host State and foreign investor) or through Bilateral Investment Treaties (BITs) (between States, bilaterally, for the investors'

[1119] The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016 https://www.congress.gov/bill/114th-congress/house-bill/6477; See also, The Council of European Declaration on Jurisdiction Immunities of State-Owned Cultural Property https://www.coe.int/en/web/cahdi/news-cahdi/-/asset_publisher/FL6bNvghtkKV/content/declaration-on-jurisdictional-immunities-of-state-owned-cultural-property?_101_INSTANCE_FL6bNvghtkKV_viewMode=view/>. Accessed 14/09/20.

[1120] Japan – Acts on Civil Jurisdiction over Foreign States (JACJFS) 2010, 53 JYBIL, 830. Sweden recent enacted immunity laws which mirror UNCSI - France also in Sapin No. II Law of 2016 at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000029593949/2014-10-15. Accessed 12/02/20. See also Russia, Federation Federal Law No. 397-FZ (2015).

[1121] UNCTAD 51st Session 2018, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session, 2017, Part I, at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V18/029/83/PDF/V1802983.pdf?OpenElement. Accessed 24/03/20. The lastest lastest development of the Working Group reform agenda hammers on award enforcement issues, nonetheless, there appear no ulternace to immunity issues, see Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues: Note by the Secretariat, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues.docx. Accessed 12/09/21. This concern has also been highlighted by Chernykh and Usynin in their recent notes to the UNCITRAL Secretariat: Y Chernykh and M Usynin, 'Comments to the UNCITRAL Secretariat's Note 'Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues'' https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/inland_norway_university_of_applied_sciences_comments_uncitral_wp_appeal_and_enforcement.pdf. Accessed 18/05/22.

benefit).[1122] Regarding the former, new model BITs are at present being signed among States[1123] amid concerns that the old models have principally benefitted multinational corporations or lawyers at States' expense, so efforts towards protecting and strengthening States' interests become the overarching motivation. Against this, the use of investment arbitration becomes highly contentious as some new BITs have proceeded to exclude or limit the use of ISA by way of such protection.[1124] Indeed, as the OECD notes in the recent Annual Conference on Investment Treaties, "a number of efforts to include investment protection with ISDS in treaties between large advanced economies, at times advocated as necessary to convince other governments of its merits, have faced serious obstacles or have been suspended, postponed or abandoned."[1125] As noted in Chapter 5, the response to the regime's legitimacy crisis has resulted in the creation and circulation of new BITs and related investment agreements, some of which contain significantly reduced or no access to ISA.[1126] While support for investment arbitration in new BITs may be losing favour in States' eyes, one must also highlight that engaging a waiver in new BITs will depend on the relative economic strength of the two States.[1127] Last, as Choi and Blane have each emphasised, due to reciprocity predispositions and the sensitivity of executing against sovereign assets, engaging a

[1122] I Uchkunova and O Temnikov, 'Enforcement of Awards under the ICSID Convention What Solutions to the Problem of State Immunity?' (2014), 29(1) ICSID Rev.- FILJ, 187 at 201 – 202.

[1123] See Investment Policy Hub 'Most Recent IIAs at https://investmentpolicy.unctad.org/international-investment-agreements. (Between 2010 and 2021 about 500 new IIAs have been signed among States with the majority being BITs).

[1124] See for example, Brazil and Canada Model BITs which exclude ISA entirely]; South African entertains similar rule. The New Indian Model BITs scaled back on the scope investment protection, while subjecting investor-state disputes to domestic court first for resolution. The European Union Member States have agreed to terminate all their intra-EU BITs following the CJEU judgment in the Achmea case.

[1125] 6th Annual Conference on Investment Treaties The Future of Investment Treaties (March 29, 2021) at https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf accessed on 02/10/2021.

[1126] See Chapter 5.4.4.

[1127] See S Choi, 'Judicial Enforcement of Arbitral Award under the ICSID and New York Convention' (1995), 28 N.Y.U. J. Int'l L. & Pol. 175, at 214.

waiver of immunity from measures of constraint and execution in BITs provisions is uncommon among States.[1128]

Perhaps, then, a waiver on a contractual basis stands to be more effective than the treaty-based one if the potential investor has significantly more bargaining power. In fact, such a waiver could be considered the "only one hope."[1129] To this end, Delaume[1130] and Dopagne[1131] have both stressed the importance of effective drafting. Such a provision must accordingly be written explicitly and broadly to cover the relevant assets, where possible, including those under the specially protected category. A model clause by the ICSID is formulated as follows:

> The [name of contracting state] hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.[1132]

According to Delaume, securing the above provision will compel the respondent States to seek an amicable settlement (for example, voluntary compliance) rather than pushing the award into the coercive enforcement stage.[1133] The possibility of this provision effectively to waive immunity in favour of execution is doubtful given its narrowness and the difficulties surrounding 'the sovereign and non-

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[1128] Ibid. See also Blane, (n 18), at 498; G Cane, 'The Enforcement of ICSID Awards: Revolutionary or Ineffective?' (2004) 15 Am. Rev. Int'l Arb. 439, 458, at 457.

[1129] FS Barbosa, 'The Enforcement of International Investment Arbitral Awards: is There a Better Way?' (2009) 6.21 Revista Brasileira de Arbitragem at https://www.transnational-dispute-management.com/article.asp?key=1488. Accessed 16/09/21.

[1130] GR Delaume, 'Contractual Waivers of Sovereign Immunity: Some Practical Considerations', 5(2) ICSID Review-FILJ 232 (1990), at 233.

[1131] F Dopagne, 'Waivers of Immunity from Execution' in T Ruys et al., (eds.), *Cambridge Handbook of Immunities and International Law* (CUP, 2020), 389 - 418.

[1132] ICISD Model Clauses, Doc. ICSID 5/Rev. 1, at d. XIX, reprinted in Pieter Sanders (ed) Yearbook Commercial Arbitration (Volume 9, 1984).

[1133] GR Delaume, 'Contractual Waivers of Sovereign Immunity: Some Practical Considerations' (1990), 5(2) ICSID Review-FILJ 232.

sovereign' divides that prelude foreign States' assets. Equally doubtful is its potential to waive immunity from measures of constraint and execution in respect of foreign States' assets in the specially protected category, of which *lex specialis* regimes provide much stronger protection against their execution.[1134] The following consolidated version, put forward by Schreuer, is worth consideration:

> The Host State hereby irrevocably waives any rights of sovereign immunity as to it and any of its property, regardless of the commercial or non-commercial nature of this property, in respect of the enforcement and execution of an award rendered by an Arbitral Tribunal constituted pursuant to this agreement. Such property includes any bank account belonging to the Host State whether held in the name of a diplomatic mission or otherwise. This waiver extends to property, including bank accounts belonging to the Host State's central bank or other monetary authority.[1135]

Indeed, the more comprehensive yet concise scope of the above provision may be explicitly fit for the purpose *if* it can be contractually secured. However, by virtue of the application of Article 55 of the ICSID Convention, some national immunity rules of engagement may still apply to vitiate the waiver in enforcement actions. For example, while such a waiver provision under the UK SIA may suffice for execution against both sovereign and non-sovereign assets of States without additional requirements,[1136] such a blanket waiver may not suffice to lift immunity from execution against States' assets under US FSIA. Indeed, the commercial activity/purpose requirements under section 1610 of the US FSIA, plus any additional statutory exceptions, must be satisfied before such a waiver provision can suffice for execution.[1137] The same conclusion can be made of the execution in Switzerland, given the State's

[1134] See chapter 4 Sec. 2 for more on this. A 'special explicit waiver' is the requirement; the *NOGA I, ARA LYbertad, NML* case. See, rules of engagement in respect of these assets in chapter 6. See also Dopagne (n 674).

[1135] Schreuer, *A Convention*, (n 42), at 1181.

[1136] UKSIA, Sections 13, 14 and 15.

[1137] The requirement under section 1610 (a)(2) of the US FSIA, makes award execution against State assets in the US possible only when there a exist a jurisdictional link between the assets serving commercial and the act upon which the claim is based (i.e., subject-matter under the claim). This will not apply in cases of execution against the States' entities and appendages.

deference to there being a sufficient nexus between the claim and territory (*Binnenbeziehung)* in order to allow execution measures.[1138] The question of waiver of immunity in the context of the *Binnenbeziehung* rule was noted in *Noga*, where a waiver contained in a settlement agreement was considered valid to allow execution measures mainly because there was a sufficient nexus, i.e. the settlement agreement (waiver) was concluded in Switzerland.[1139] Indeed, as Schreuer notes, "a State can renounce [waive] its right […]. But the reference of Article 55 to the law of the respective country means that any limitation in that law to the validity of a waiver would have to be respected", and "it is doubtful whether a waiver that goes beyond that provision would be effective".[1140] In this regard, close consideration must be given to the conditions contained in relevant domestic laws, mainly in light of the changing legislative landscape governing immunity from measures of constraint and execution.

In sum, a well-drafted contractual waiver stands a chance to lift immunity from measures of constraint and execution during coercive enforcement when voluntary compliance fails. Securing an express *waiver* on a treaty basis will be a difficult, if not an impossible, quest to engage, either bilaterally or collectively, like under the ICSID Convention, which is also the case under the New York Convention. Although the Convention does not expressly refer to State immunity, the public policy exception under Article V(2)(b) of the Convention, which Bjorklund argues implicates State immunity considerations,[1141] would inevitably apply to produce a similar outcome to the ICSID jurisprudence. However, unlike the strict application accorded to Article 55 of the ICSID Convention, under the New York Convention, a foreign investor could argue for the existence of an *implicit waiver* of immunity from measures of constraint and execution on the basis of an 'agreement to arbitrate' provision between the parties.

Is Implied Waiver Contestation Feasible, at al?

[1138] Yang (n 25), at 399 – 401.

[1139] *NOGA v Office des Poursuites de Geneve*, BGE 134 III 122 para.5.3, cited in M Arroyo, *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law Int'l. BV, 2018), paras. 144 – 154.

[1140] C Schreuer, *A Convention*, (n 42) at 1166, 1179.

[1141] Bjorklund, *Re-Politicization of Investment Disputes* (n 13).

There is an argument weighing in for the existence of an *implicit waiver* of immunity from measures of constraint and execution on the basis of an 'agreement to arbitrate' provision between the parties. This will appear to imply that a State's waiver of immunity from jurisdiction should automatically extend to waive its immunity from execution. There are various possible ways to engage this formulation, depending on the relevant States' membership status to the Convention and national laws in engagement. Bjorklund elucidates:

> One possibility is that a respondent State's agreement to arbitrate in a State that is party to the New York Convention, such that any award is governed by the Convention, is an implied waiver of immunity in any subsequent enforcement action, regardless of whether the respondent State is itself a party to the Convention. A second variation is that only if the respondent State itself is a party to the Convention would such a waiver be implied, regardless of whether the award itself was rendered in a New York Convention State and was thus subject to enforcement under the Convention.[1142]

Some jurisprudence is noted for entertaining an implied waiver of immunity from measures of constraint and execution based on 'an agreement to arbitration' provision.[1143] The infamous 2000 decision rendered by the Cour de cassation in *Creighton v Qatar*[1144] makes France a notable example. In this case, a State of Qatar's commitment in an arbitration clause "to carry out the resulting award without delay", in

[1142] Bjorklund, *State Immunity* (n 30), at 309.

[1143] See Sections, 1610(a)(1) and 1610(b)(1) of the US FSIA. See also section 12(5) of the Canada SIA of 1982; Article 17(1) of the Ley Oreganica 16/2015 de 27 de Octubre, sobre Privilegios e Inmunidades de los Estados Extranjeros, las Organizacions Internacionales con sede u Oficina en Espana y las Conferencias y Reuniones Internacionales Celebradas en Espana (2015); See *Central Bank of Nigeria, Landgericht Frankfurt*, 2 December 1975, 65 ILR 131 (1984), at 135; B Juratowitch, 'Waiver of State Immunity and Enforcement of Arbitral Awards' (2016), 6(2) AJIL, at 220-230; *Werner Schneider v Kingdom of Thailand [R Kläger, 'Werner Schneider (liquidator of Walter Bau AG) v Kingdom of Thailand*: Sovereign Immunity in Recognition and Enforcement Proceedings under German Law' (2014) 29 (1) ICSID Review 142-148]; F Dopagne, (n 674), at 389.

[1144] *Creighton Limited v Government of the State of Qatar* the French Cour de Cassation, (6 July 2000), reported in XXV Yearbook of Commercial Arbitration 458 (2000) cf *Creighton Ltd. v Government of the State of Qatar*, 181 F.3d 118, 127 (D.C. Cir. 1999) [noting by conclusion that a state's agreement to arbitrate in a jurisdiction other than the US did not constitute a waiver of personal jurisdiction in the United States.] See generally SI Strong, 'Enforcement of Arbitral Awards against Foreign States or State Agencies' (2006), 26 NW J. Int'l L. & Bus., at 335.

accordance with the terms of Article 24 of the International Chambers of Commerce (ICC) arbitration rules,[1145] was held to constitute a waiver of immunity in respect of execution on an implied waiver basis. In arriving at this conclusion, the *Cour de* cassation implied a waiver of the State's immunity from execution measures on the basis of the ICC arbitration rules, thereby holding that immunity from jurisdiction and immunity from execution were interconnected and that a waiver of one removes the right to invoke the other.[1146]

The French approach has since metamorphosised. Indeed, in a month following the ruling in *Creighton*, the French *Cour de* cassation of Paris scaled the scope of that decision in the case of *Russian Embassy v Noga* stating that an express waiver instead of an implied waiver, is the requirement.[1147] Later decisions of the jurisdiction have reiterated the express waiver connotation wherein some decisions have gone further to add an additional layer in respect of execution against a specific category of States' assets (discussed below). Indeed, in *Société NML Capital v République Argentine* for instance, the Cour de Cassation stated that the waiver of immunity from execution measures not only had to be *express*, but also needed to be *special*, i.e. express and asset-specific in order to execute against States' assets in the special category of protection.[1148] It is instructive to note that the Court made this ruling despite there being an arbitration agreement which contained what appears to be a waiver between the parties. In a more recent case of *Commissions Import Export SA (Commisimpex) v Republic of Congo* (with similar facts to *Creighton)*, the Court took an unequivocally different approach where an express waiver, instead of an implied waiver, of immunity from measures of constraint and execution was required in order to execute

[1145] ICC Rules in a version in force at then.

[1146] A month following the ruling the French Court of Appeal of Paris in the case of *Russian Embassy v Noga* scaled the scope of the *Creighton* decision in what stated to be the requirement of an express waiver instead of an implead waiver. The latter ruling has been confirm in the following cases: *Société NML Capital v République Argentine*.

[1147] *Companie Noga D'Importation et D'Exportation S.A. v The Russian Federation*, 361 F.3d 676, 685 (2d Cir. 2004).

[1148] *Société NML Capital Ltd v République argentine et Société Total Austral* Société/*NML Capital Ltd v République Argentine et Société Air France*, Cass. 1re civ. 28 mars 2013.

against States' assets in the regular category.[1149] Indeed, the Court supports its ruling by noting that "customary international law does not require a waiver of the execution immunity to be anything else than express".[1150] Thus, the presence of a contractual document with a clause and a letter of undertaking by the Republic of Congo not to "invoke, in the context of the settlement of a dispute related to the undertakings, any immunity from jurisdiction as well as any immunity from execution" was held to be too general to allow execution against assets belonging to Republic of Congo and/or its emanations.[1151]

The above developments outlaw the *Creighton* approach and sever its likelihood of becoming a persuasive precedent to other courts, thereby contributing to custom formation.[1152] The development also supports the entrenched and dominant position that a waiver of jurisdictional immunity by virtue of commerciality and consent to arbitrate does not automatically waive immunity from measures of constraint and execution. The *Creighton* approach has been intensively criticised. Gaillard criticised the judgement by suggesting that the French were taking a "very far-reaching step" in developing the law.[1153] While entertaining the *Creighton* approach would have provided a better means to execute against sovereign assets without any additional condition, such an approach, accordingly, will likely lead to the derogation of sovereigns' power in securing rights under their sovereign assets. This perhaps explains why the approach is uncommon in state practice. To this end, it can be concluded that even among other States with implicit waiver connotations textually formulated in their relevant laws, an express waiver of immunity from measures of constraint and execution will still be required to execute against foreign States' assets.[1154]

[1149] *Commisimpex v Republic of Congo*, Case No. 13-17751, May 13, 2015, Bullentine 2015 I No.107, J. du Droit In'l 141; See also the ruling in *Societe NML Capital v Argentine Republic*, Case No. 11-10.450, March 28, 2013, 2013 Bulletin I No. 63

[1150] F Dopagne, (n 674), at 392 – 397.

[1151] *Commisimpex*.

[1152] See Article 38(1)(b) Statute of the International Court of Justice (annexed to the Charter of the United Nations), 26 June 1945, UNCIO 15, 355.

[1153] E Gaillard, Commentary (2002) 18(3), Arb. Int'l 247, at 250. https://doi.org/10.1023/A:1020750832394.

[1154] See Chapter 4.3.2.

The preference for an express waiver becomes even more pronounced in execution measures against States' assets protected under the *lex specilis* regimes, namely central banks and embassy, military, cultural and heritage assets. As discussed in Chapter 4, an 'express and special' waiver of immunity from execution is required in order to execute against embassy and central bank accounts and military and cultural assets.[1155] The *Commisimpex, NOGA* and *NML Capital* cases above highlight this limitation as the three cases implicates the named States' assets. For example, in the *NOGA* case, although the French Court identified that the "Russian Federation had explicitly waived any rights of immunity" in favour of attachment against its assets, it added that "such a general waiver of sovereign immunity from measures of constraint and execution did not explicitly express the State's intention to waive its diplomatic immunity guaranteed by the Vienna Convention and customary international law."[1156] In *Commisimpex,* the presence of a contractual document with a clause, and a letter of undertaking by the Republic of Congo not to "invoke, in the context of the settlement of a dispute related to the undertakings, any immunity from jurisdiction as well as any immunity from execution", was held to be too general to allow execution against numerous accounts held in the name of the Congo's diplomatic mission.[1157] Although the court posited that CIL law requires an express waiver in order to execute against States' assets, it concluded that an express and specific waiver is required against States assets in the special category of protection.[1158] The *Commisimpex* position is contained in France's new Sapin No. II Law.[1159]

A similar approach can be seen in *Af-Cap, Inc v Chevron Overseas (Congo) Ltd*. An express waiver of immunity provided in respect of "all assets of the relevant States" was held invalid to allow execution

[1155] Ibid.

[1156] *Embassy of the Russian Federation et.al v Compagnie NOGA d'importation et d'exportation* (NOGA), Paris Court of Appeal (10 August 2000), reported in (2001) XXVI Yearbook of Commercial Arbitration 273, at 275.

[1157] Cour d'appel de Versailles, 15 November 2012, 11-09.073; see also Franc-Menget L and Archer P, 'French Supreme Court decision in Commisimpex dispute heralds significant change in approach to sovereign immunity' on Herbert Smith Freehills Public International Law Notes (4 June 2015).

[1158] Cour de cassation, 1ère chambre civile, 10 January 2018, 16-22.494.

[1159] Article L. 111-1-2(1) of the Code, Sapin No. II Law, at https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000029593949/2014-10-15.

against States' assets under the US FSIA.[1160] A similar line of thought could be inferred from the UNCLOS Tribunal's decision in the *ARA Liberdad* case regarding execution measures instituted against Argentina's war ship.[1161] By implication, being armed with a 'valid' express waiver of immunity from measures of constraint and execution does not guarantee execution against all States' assets. For assets under the *lex specialis* category, the waiver must be explicitly and specifically worded to the assets to suffice for execution measures. This relates to execution measures under all enforcement Conventions, including the ICSID and New York Conventions.

In this context, the argument in support of an implied waiver of immunity from measures of constraint and execution based on an 'agreement to arbitrate' provision becomes far less favourable, if not entirely displaced.

Other Potential Immunity-specific Solutions

Another way to circumvent the current state of immunity from execution is by adopting a new uniform regime outside the general adoption of the restrictive immunity approach and its weaknesses, as found under the current rules of engagement. This would undoubtedly provide clarity and predictability, hence providing foreign investors with the necessary protection in executing their awards. A single uniform regime will be applied instead of recourse to the numerous primary domestic immunity rules and diverse interpretations that follow their application. The ILC's UNSCI becomes purposeful in this context. As Fox emphasised, however, the UNSCI restates the old rules; there are still gaps and uncertainties owing to the generality of its wordings, particularly regarding Part IV of the Convention which covers immunity from measures of constraint and execution.[1162] Further, the rules have predominant deference to greater

[1160] *Af-Cap, Inc v Chevron Overseas (Congo) Ltd*, 475 F3d 1080, 1087 (9th circuit 2007), 1093 -1095.

[1161] *ARA Liberdad (Argentine Republic v Ghana),* ITLOF, Case No. 20 Order for prescription of provisional measures, (Dec.15). See Chapter 5 Section 5.2.2. [In short, a waiver from execution measures which Argentina argued to lacked specificity to the war ship and hence invalid to vitiate its immunity was thought to have persuaded the UNCLOS Tribunal to order the release of the warship. The ship was previously seized on the basis of the waiver as provided by the State.]

[1162] Fox, *The Restrictive Rule 1970s Enactment* (n 26), at 32.

States' interests.[1163] Therefore, the Convention's usefulness for the purpose is in question. Besides, assuming the UNSCI was formulated to resolve the identified limitations relating to immunity from measures of constraint and execution, it is highly improbable that a State party to both ICSID and New York Conventions would adopt the UNSCI as a uniform regime given the favoured position States enjoy under the current Conventions.

Perhaps creating *lex specialis* soft law will be more realistic. Fox argues that such an instrument could set a minimum standard by which immunity requirements relating to the execution of awards are engaged.[1164] This approach carries the advantage of "separat[ing] the much less controversial topic of enforcement of arbitral awards to which a state is a party from the general question of proceedings in national courts concerning state activities."[1165] Such instruments can be established through the UNCITRAL Model Law and adopted by States to supplement their primary domestic immunity rules and the UNSCI. Notwithstanding, it is necessary to highlight that (like the aforementioned solutions) reciprocity and related dispositions underlying State immunity considerations could render the adoption or use of such instruments ineffective. The regime's ongoing legitimacy backlash and States' responses to it could also threaten this seemingly viable solution to curb immunity from measures of constraint and execution challenges.

In conclusion, it is submitted that except where one acquires an express waiver of immunity on a contractual basis, there is little prospect of circumventing challenges posed by immunity from execution during the awards' coercive implementation stage. To this end, a more modest alternative would be to limit situations in which immunity could be invoked in the first place. It is axiomatic that immunity-related challenges only come to play when voluntary compliance with an award fails, and the award

[1163] Ibid, at 30 - 38 [The Part IV of the UNCSI for example, is out of line with many supplicated forms of measures employed in commercial dealings of garnishee, sequestration, freezing and other measures to secure creditors' interest in the preservation of assets short of transfer even where some state practice appears to show changes.]

[1164] H Fox, 'State immunity and enforcement of arbitral awards: Do we need an UNCITAL model law mark II for execution against state property?' (1996), 12 Arb. Int'l at 89.

[1165] Ibid, at 93.

creditor subsequently seeks remedy through national courts. So, solutions facilitating voluntary compliance with awards from the outset provide a robust alternative. This is not a solution to the legal challenges posed by immunity from execution per se, but instead a method of improving effectiveness in implementing awards under the ISA system. It is also a call to encourage unequivocally features that can potentially strengthen the regime's effectiveness and remaining legitimacy so that, as the "regime matures and external forces shape its contours, the baby is not thrown out with the proverbial bathwater."[1166] The following section of the thesis looks at these solutions.

6.3 Encouraging Voluntary Compliance with Awards.

Numerous variables impact subjects' willingness to comply voluntarily with the rules and judgements of an adjudicative system. Relating specifically to the ISA system, the lack of voluntary compliance could be caused by a perceived lack of legitimacy in the adjudicative outcome or institutional processes.[1167] Reputational cost and coercive sanctions, factors tallied to measures such as withdrawal of economic and other related benefits and potential loss of investment flow, could also dictate States' compliance behaviour either before or after the obligation to comply arises. Whatever reason(s) one considers to guide this behaviour, anecdotal and empirical evidence suggests that compliance with arbitral awards is becoming challenged.[1168] There is an increasingly hostile and defiant attitude towards the ISA regime, which implicates *inter alia* a lack of voluntary compliance and subsequent use of tactical defences to attack arbitral awards.[1169] With an exponential increase in arbitral caseload, non-compliance is projected to increase and, as highlighted by Gaillard and Penusliski, as "States watchfully observe each

[1166] M Devaney, *The Remedies Stage of the Investment Treaty Arbitration Process: A Public Interest Perspective* (QMU, 2015), at 207.

[1167] See Chapter 5; See also M Hirsch, (n 46); CM Ryan, 'Discerning the Compliance Calculus: Why States Comply with International Investment Law' (2009) 38 Ga J Intl & Comp L 63.

[1168] Gaillard and Penusliski (n 19); CN Brower et al., 'The Coming Crisis in the Global Adjudication System' (2003), 19(4) Arb. Int'l, at 418.

[1169] See generally KF Gomez, 'Latin America and ICSID: David Versus Goliath?' (2011), 17 Law & Bus. Rev. Am., at 195; See also M Waibel, 'The Backlash Against Investment Arbitration: Perceptions and Reality' in M Waibel et al., (Kluwer Law Int'l, 2010), at 4.

other's conduct, non-compliance may breed further non-compliance."[1170] While improvements are both feasible and crucial to salvage this, "the ongoing discussion about the future of [the regime] has hardly focused on compliance, enforcement and, more generally, effectiveness."[1171]

As previously discussed, increased hostility and deviancy towards an adjudication system signals the presence of a crisis.[1172] As Sornarajah rightly affirms, the ISA system is suffering from a "crisis of legitimacy."[1173] There are several causes of this. Sornarajah points to increased arbitral case law and a trend towards the creative interpretation by tribunals of some key BIT provisions beyond the parties' contemplation. This is disturbing not only because cases are often settled by tribunals on *ad hoc* bases but because they also lack an available mechanism to control the interpretative discretion exercised by the tribunals.[1174] Critics have underscored other shortcomings (which often overlap), including the lack of coherence/consistency in arbitral judgements (and lack of effective mechanisms to address this) and the lack of impartiality and confidentiality.

Dimsey cited the principle of *confidentiality* as the main root of the regime's crisis, noting the worsening impact on the regime's other shortcomings.[1175] Accordingly, while confidentiality is hailed as the hallmark of international arbitration, the principle has led to an adjudicative process that may be

[1170] Gaillard and Penusliski (n 19).

[1171] Ibid.

[1172] See Chapter 5.

[1173] M Sornarajah, 'A coming crisis: expansionary trends in investment treaty arbitration' in K Sauvant (eds), *Appeals Mechanism in International Investment Disputes*, (OUP, 2008), and F Ortino et al., (eds) Investment Treaty Law: Current Issues (2006), 1 British Inst. of Int'l and Comp. Leg. Stud., at 73; See also D Behn, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art' (2015), 46(2) Geo. J Int'l Law, at 363; D Behn, 'Performance of Investment Treaty Arbitration' in T Squatrito et al., (eds), *The Performance of International Courts and Tribunals* (CUP, 2018), at 77.

[1174] Ibid, at 41.

[1175] M Dimsey, (n 1034*)* at 36.

criticised for its lack of transparency.[1176] Lack of transparency undermines legal certainty, which often leads to inconsistency and, overall, decreases confidence in the adjudicative process.[1177]

Inherently linked to confidentiality issues in ISA is the absence of binding precedent. Currently, there is no 'overarching' body[1178] with the sole responsibility of adjudicating all investment disputes between host States and investors, aside from a myriad of dispute resolution options with innumerable individual tribunals overseeing such matters. Consequent to this current state of chaos, ISA is plagued by inconsistent decisions and general incoherency.[1179] Although the lack of binding precedent is traditionally justified in arbitration given that it purposes which is "to fulfil the desire of two parties to have their dispute resolved privately through alternative means," with each case handled in isolation and with no intention of considering precedent and *stare decisis*[1180] the contours of ISA have dramatically changed over the years. The increasing arbitral caseload and public interest considerations underlying such adjudication have increased the negative impact of the lack of precedent under the system. Against this, the traditional inclination toward upholding 'no binding effect of past cases on subsequent cases' necessitates a re-evaluation.

Issues such as increased treaty, forum and nationality shopping also serve to intensify the crisis. Investors are engaged in cherry-picking legal rules, tribunals and nationalities which favour their cause. In forum shopping, investors are known to engage *ad hoc* tribunals to gain control over the proceedings, usually selecting their preferred arbitrators. These are not necessarily improper, given the commercial arbitration model on which the ISA was built. Moreover, as Reinisch notes, the proliferation of ISA "bears

[1176] Ibid.

[1177] Ibid.

[1178] Ibid, at 40

[1179] Infra, (footnote 80 – 81).

[1180] Ibid, at 41 - 62.

its own risks" such as multiple proceedings, including relitigating settled claims and forum shopping.[1181] However, these shortcomings, Reinisch states, can "contribute to the fragmentation of international law and weaken both [. . .] [its] coherence and credibility"[1182], thus also compromising its legitimacy, ultimately. Moreover, these threats may have already emerged; the *SGS*,[1183] *Lauder*[1184] and Argentina awards[1185] climax inconsistent outcomes,[1186] and epitomize the existence of a legitimacy crisis under the regime.

Franck discusses the inconsistency in arbitral outcomes, noting how the lack of effective control mechanisms (for example, a permanent appellate body overseeing arbitral engagements and remedying erroneous outcomes) exacerbate the crisis, including lending attack on awards after they are rendered:[1187]

> the most utilised option in investment arbitration […] to remedy inconsistent decisions is to *attack the award after it is made*. Specifically, parties that have received inconsistent arbitral awards have options to either: (1) annul the award

[1181] A Reinisch, 'The proliferation of international dispute settlement mechanisms: the threat of fragmentation vs. the promise of a more effective system? Some reflections from the perspective of investment arbitration' in J Crawford et al., (eds), International Law Between Universalism and Fragmentation (Brill Publ, 2008), at 114.

[1182] Ibid.

[1183] *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (2003) 42 ILM 1290; *SGS Société Générale de Surveillance S.A. v Republic of the Philippines,* ICSID Case No. ARB/02/6 (2004) [Different ICSID proceedings being initiated against Pakistan and the Philippines. The two tribunals came to different decisions on the crucial meaning of umbrella clauses]

[1184] *CME Czech Republic B.V. v Czech Republic*, Ad hoc – UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003; L*auder v Czech Republic*, Final Award, 3 September 2001 (Ad hoc- UNCITRAL Arbitration Rules).

[1185] Considered whether the Economic crisis faced by Argentina in the 2000 constituted a state of necessity, pursuant Article 25 of the ILC Articles on State Responsibility. Opposing conclusions were drawn creating inconsistency in respect of the matter. See *CMS Gas Transmission Co. v The Argentine Republic*, ICSID Case No. ARB/01/08 (2003); *CMS Gas Transmission Co. v The Argentine Republic* (note 68) cf. *LG&E v The Argentine Republic*, ICSID Case No. ARB/02/01 (2007) 16 ILM 36. See C McLachlan, Investment Treaties and General International Law, 57 INT'L & COMP. L.Q. 361, 385 (2008) (discussing series of ICSID cases involving Argentina, including CMS, and comparing legal analyses of tribunals).

[1186] See Chapter 5.4.3.

[1187] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Rev., at 1521.

> or (2) try to vacate an award at the seat of the arbitration and/or contest enforcement at the place where enforcement is sought.[1188]

Unfortunately, the above options are not limited only to inconsistent arbitral outcomes but all other cases of actual or perceived erroneous outcomes in the system, a common outcry or reaction of the ISA users. A survey completed in 2004 discovered that over a third of ICSID users are disgruntled with the quality of ICSID's arbitral awards.[1189] In a recent survey, earnest convictions that a rendered award is incorrect or unjust were among the predictive reasons for non-compliance and subsequent use of review (annulment) procedure in 83 per cent of the awards rendered against States.[1190] Of course, these awards implicate public interests and can run into tens, hundreds, thousands, millions and billions of US dollars in payable remedies sourced from taxpayers.[1191] Nevertheless, there is no single body available to resolve serious errors in arbitral outcomes effectively. The current review procedures (for example, annulment pursuant to Article 52 of the ICSID Convention which is of particular note in the current crisis of confidence with the system) are very limited in scope. Unlike a full fresh review procedure, i.e. an appeal procedure which covers both the legitimacy of the arbitral process, and with the substantive accuracy of the arbitral outcome, the current review procedures allow challenges only in the case of the former.[1192] Challenging an erroneous outcome on legal merit/correctness is unavailable, so the possibility of *not* getting justice after the utility of the procedures is a constant reality.[1193]

[1188] Ibid.

[1189] 'ICSID Stakeholder Survey' (2004) <http://icsid.worldbank.org/ICSID/ICSID/ViewNewsReleases.jsp> Accessed 09/02/2019, cited in I Penusliski, 'A dispute systems design diagnosis of ICSID' in M Waibel et al (eds), The Backlash Against Investment Arbitration: perceptions and Reality (Kluwer 2010), at 507.

[1190] Gaillard and Penusliski, (n 19).

[1191] For example, the Yukos award was $50 USD, and CMS award was $133.2 million USD.

[1192] ICSID Convention, Article 52(1): (i) the tribunal was improperly constituted, (ii) the tribunal manifestly exceeded given powers, (iii) a tribunal member was corrupt, (iv) serious departure from a fundamental rule of procedure, or (v) the award failed to state the reasons upon which it was based.

[1193] Similar effect can ensue non-ICSID awards, arguably. Rules under the New York Convention/UNCITRAL Rules or modified domestic arbitral laws, on one spectrum permits the awards to be reviewed on issues of law, in other spectrum, challenge is only permitted on ''specific, narrow grounds designed to promote the procedural integrity of the arbitration process'' Franck, (n 49), at 1551.

Amid this state of affairs, however, further complication follows the utility of the current review procedures. While annulment committees have consistently affirmed their limit to reviewing procedural irregularities, some have exceeded their limit to engage in an extensive appellate-like review, thereby directly and indirectly annulling awards that should otherwise be retained.[1194] The *Klöckner v Cameroon,*[1195] *Amco Asia v Indonesia* (Amco I),[1196] *Sempra Energy International Argentina,*[1197] *Enron Argentine Republic* [1198] and *CMS v Argentine Republic* [1199] ICSID awards are telling examples in which committees engaged de facto appeal in the guise of annulment. This outcome raised some concerns in the arbitral community as to the finality and legitimacy of ICSID awards. Interestingly, unlike the other awards, the *CMS* award was not annulled, but the effect mirrors annulment. In arriving at the decision to retain the award, the committee engaged in arguably prohibited merit-based review of the tribunal's award, describing it as a product of a "cryptically and defectively" applied rule.[1200] This conclusion considerably undermined the legitimacy of the tribunal's decision in the eyes of Argentina and other stakeholders. Unsurprisingly, as Baetens and Schneider rightly assert, the committee's criticisms of the

[1194] Ibid. See also Chapter 2.

[1195] ICSID Case No. ARB/81/2, Decision on annulment (3 May 1985), 2 ICSID Rep 95 (1994).

[1196] ICSID Case No. ARB/81/1 Decision on annulment (16 May 1986), 1 ICSID Rep 509 (1993). In "Amco I, the *ad hoc* Committee went beyond a prima facie examination and undertook a fairly extensive substantive analysis. This analysis led to the result that the Tribunal had not just erred in applying Indonesian law but had, in fact, failed to apply it. This, in turn, constituted a manifest excess of powers." Cited in Schreuer, *A Commentary*, (n 42), at 153.

[1197] *Sempra Energy International v Argentine Republic,* ICSID Case No. ARB/02/16, Award, ¶ 378 (Sept. 28, 2007).

[1198] *Enron v Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Annulment, ¶ 219 (July 30, 2010). See also, *Mitchell v Democratic Republic of the Congo* ICSID Case No. ARB/99/7, Decision on annulment (1 November 2006); *MHS v Malaysia ICSID* Case No. ARB/05/10, Decision on annulment (16 April 2009).

[1199] *CMS Gas Transmission Co. v Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Annulment, 25 Sep. 2007.

[1200] Ibid, at 136 ["notwithstanding the identified errors and lacunas in the Award, it is the case in the end that the Tribunal applied Article XI of the Treaty. Although applying it cryptically and defectively, it applied it."].

award provided the State with moral justifications to refuse paying the $133.2 million USD award rendered in favour of the investor.[1201]

After refusing voluntary compliance, the State went further by attacking the 'erroneous' award at the coercive enforcement stage by deploying unconventional defence strategies like requesting a domestic review and using state immunity defence to obstruct the process.[1202] The lengths to which a dissatisfied State will go in attacking an apparent or perceived error in arbitral outcomes in the absence of an effective review mechanism are highlighted in Nigeria in *PI&A* and in Russia in *Yukos* - Both States, while highlighting errors in the respective awards, did not only blatantly refuse voluntary compliance and sought to a set-aside but have also attacked the awards at the coercive enforcement stage through other defence strategies like deploying state immunity and related measures to obstruct the process.[1203] In fact, the then Attorney General of Nigeria was recorded as boldly stating that Nigeria "intends to strongly avail itself of all defences customarily afforded to sovereign states under the United Kingdom Sovereign Immunity Act at any […] enforcement actions."[1204] Indeed, the State stayed true to the promise as subsequent attempts at enforcement in some jurisdictions have been met with immunity and related defences.[1205] To this end, aside from the scepticisms toward the regime in general, it can be argued that the recent waves

[1201] F Baetens, 'Enforcement of Arbitral Awards: 'To ICSID or Not to ICSID' is Not the Question' (2011) Investment Treaty Arb. and Int'l Law, Juris Arb. Series 5, at 211-228; AK Schneider, 'Error Correction and Dispute System Design in Investor-State Arbitration' (2013), 5 Y.B. Arb. & Mediation 194.

[1202] Tonova and Vasani, (n 179), at 83.

[1203] See Chapter 5 section 5 for details.

[1204] FG to stop UK court's $9bn award against Nigeria, New article published August 17, 2019 available at https://punchng.com/fg-to-stop-uk-courts-9bn-award-against-nigeria/amp/?_twitter_impression=true. Accessed 28/08/20. See also Attorney General of Nigeria Abubakar Malami stating in categorical terms that "We will pursue all available legal avenues in our fight to secure justice for the people of Nigeria." See Financial Time ''The $6bn judgment pitting Nigeria against a London court'' on July 12, 2020, at https://www.ft.com/content/91ddbd53-a754-4190-944e-d472921bb81e. Accessed on 02/11/20.

[1205] *Process and Industrial Developments Limited v Federal Republic of Nigeria and Ministry of Petroleum Resources of The Federal Republic of Nigeria*, Appellants. No. 18-7154.US Court of Appeals, District of Columbia Circuit. Argued October 4, 2019. Decided June 19, 2020; Financial Times 'Nigeria granted stay of execution in $9.6bn court battle' published on Sept. 26, 2019, available at https://www.ft.com/content/f6704600-e077-11e9-9743-db5a370481bc Accessed at 28/10/20.

of annulment/vacatur and coercive enforcement challenges are just strategies to exhaust the full range of mechanisms available to challenge awards in the absence of an effective review mechanism.[1206]

The discussion offers a brief insight into the regime's legitimacy shortcomings, forming the basis for proposals to be discuss below. Although the crisis' existence goes without contestation, the ISA jurisprudence speaks for itself as there is evidence of inconsistency and related shortcomings. Most importantly, these shortcomings have also involved non-compliance and the coercive enforcement challenges, which this thesis centres on. In this context, one must consider what could be done to improve voluntary compliance with and, ultimately, the coercive enforcement of arbitral awards by States. Increased transparency in the arbitral processes is one way, and instituting an appellate mechanism is another. The discussion now turns to these solutions.

6.3.1 Increased Transparency

As mentioned above, the principle of confidentiality is at the root of the regime's crisis. One must not overlook the principle's exacerbated effect on other shortcomings such as inconsistency and the inherent links to potential attacks on arbitral awards. As noted in the Chpater 5, there is virtue in increased transparency to guide against these shortcomings and also encourage features that potentially strengthen the regime's remaining legitimacy, thus creating or re-establishing confidence towards greater effectiveness for all stakeholders.[1207] Unless justice will be jeopardised, making publicly available certain information (such as the existence of or allegations of wrongdoing, who the adjudicating arbitrators are, what legal issues are at stake, what legal arguments and factual assertions are put forth, what procedural or interim orders are issued and, most importantly, the final award, thus compliance or enforcement status)[1208] is essential for adjudications with public law elements like the ISA for a number of reasons.

[1206] A Joubin-Bret, 'Is There a Need for Sanctions in International Investment Arbitration' (2012), 106 Am. Soc'y Int'l L. Proc. 130 -131.

[1207] See Chapter 5.4.2, subsection on Transparency.

[1208] DB Magraw and NM Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2008) 15 ILSA J. Int'l & Comp. L. 337, 342 -343.

Increased transparency can improve the quality of decision-making.[1209] Obtaining accurate and defensible outcomes is particularly important for the regime. This is not least because effective mechanisms to correct erroneous outcomes are currently missing, which has been argued earlier, could impact users' sense of justice and hence their compliance behaviour. But inconsistency in arbitral outcomes, one of the core contributors to backlash against the regime, could be guarded against. Transparency of the legal process and of the outcome conveys greater consistency. Increased transparency (publication) of decisions and arbitral awards is a prerequisite for the development of a consistent case-law which generates legal certainty by guaranteeing that all cases are handled equally. It thus guarantees predictability for users.[1210] This will in turn increase users' confidence in the dispute settlement process, which is required in order to encourage positive compliance behaviour.

Further, increased transparency is exceptionally important in guaranteeing systemic improvements in the areas of law that are covered in ISA proceedings. It allows stakeholders including governments, States, individuals and institutions to examine the wider implications of the existing laws in actual practice and to recognise what works and what does not. This can lead to the formation of improved laws and institutions and also enhances the credibility of ISA as a valuable forum for all interested parties.[1211] To this end, users' confidence could be boosted toward enhancing positive compliance behaviours with the laws and the outcomes.

Additionally, increased transparency can encourage public participation in arbitral processes toward greater legitimacy and effectiveness.[1212] Whether by direct amicus curiae participation or indirect participation such as observing, the public (stakeholders) can spur good governance and accountability of all participants. The public can in essence serve as watchdogs against tribunal arbitrators' misconduct

[1209] Ibid., at 345.

[1210] A Reinisch and C Knahr, 'Transparency versus confidentiality in international investment arbitration–the Biwater Gauff compromise' (2007), 6(1) The Law & Practice of Int'l Courts and Trib. 97, at 110.

[1211] DB Magraw and NM Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' (2008) 15 ILSA J. Int'l & Comp. L. 337, at 352.

[1212] Ibid, at 345.

during and after arbitral proceedings. Certainly, arbitrators would be motivated to carry out the arbitral proceedings immaculately out of absolute self-interest knowing that the proceedings or vital aspects of it such as the final decision are public and subject to scrutiny by the wider shareholders.[1213] More importantly, stakeholder participation can encourage proper behaviour among the disputants (both States and investors) because the public can hold them accountable for their decisions and actions, including actions taken leading up to the dispute and those taken after the arbitral resolution. This is particularly helpful in encouraging proper behaviour among State parties during the implementation of the final arbitral outcomes.[1214] Magraw and Amerasinghe explain:

> The public are less likely to disapprove of a decision or process in which they participated or even had a right to participate. As such, public participation may lead to more effective implementation because public acceptance of outcomes of a process they participated in is more likely. On a more practical level, public participation would benefit implementation because members of the public are more likely to become involved in implementation if they participated in the decision-making process.[1215]

Of course, public participation can also produce the contrary effect. In other words, implementing final arbitral outcomes by States can be difficult or obstructed if the public after having been exposed to adjudicative process, are opposed to the outcome or they are uncooperative.[1216] With increased transparency, it is noted that "governments [with] cooperative members of the public tend to implement decisions, […] with greater effect than governments that do not."[1217] In this respect, unwilling States or States with uncooperative public members can be spurred towards better compliance behaviour through other measures that are also fostered by transparency – documentation of non-compliant States. In this

[1213] J Ribeiro and M Douglas, 'Transparency in Investor-State Arbitration: the way forward' (2015) Asian Int'l Arb. J. 11, 49.

[1214] Ibid.

[1215] Ibid, at 352.

[1216] See Chapter 5.3.1.

[1217] Magraw and Amerasinghe (n 1208), at 351 -352.

regard, the approach adopted by the G-20 member States to publicly 'name and shame' non-complying behaviours may be considered. As Joubin-Bret posits,

> the best way to ensure that States will abide by adverse arbitral awards […] is to encourage and strengthen transparency about the outcomes of these cases, and the subsequent enforcement of arbitral awards. The approach taken by the G-20 to 'name and shame' those states that take protectionist measures is a good way to encourage a certain type of behaviour. This is […] a valuable diplomatic tool.[1218]

Current arbitral frameworks can foster the use of this tool by making more information available about the statuses of final arbitral outcomes, including compliance with and enforcement of awards. This is a double-edged sword as it could encourage compliance with State parties while also raising awareness of their recalcitrancy, thereby aiding foreign investors in locating their investment, reinvesting or keeping their investment in (or away from) a particular State. Indeed, public announcement of non-compliance in all cases and with promptness could have a damaging reputational impact on the non-complying party, particularly in respect of the State party, who aims to portray good public image to attract foreign investments. In the event of a strained reputation, the named States might be pressured to correct the damage caused by non-compliance by complying voluntarily with existing or future awards.[1219] Most importantly, foreign investors can also capitalise on the State's strained reputation to muscle more substantial bargaining power and negotiate to include a clear express and specific waiver of immunity from execution in their early arbitration agreements, thus circumventing coercive enforcement challenges when voluntary fails.

As noted in Chapter 5, many arbitral institutions, including the ICSID, have responded to the public call for increased transparency by implementing specific measures to effect greater transparency. More

[1218] A Joubin-Bret, 'Is There a Need for Sanctions in International Investment Arbitration' (2012), 106 Am. Soc'y Int'l L. Proc. 130.

[1219] It works like sanctions and reputational considerations and has its own limitations. If States are generally unhappy about the system, it will be unsettled for peers to call out a peer for non-compliance. There are times the incentive to not comply becomes stronger, and in this sense, reputational damage may be less effective to motivate compliance.

information regarding arbitral proceedings is now publicly available, including outcomes of annulment/vacatur proceedings, and public participation in arbitral proceedings has also been encouraged.[1220] The ICSID system, for instance, now maintains public registers of dispute settlement proceedings and regularly circulates awards with parties' consent. However, more can be achieved in this regard because the vital and specific contents of a significant number of final arbitral outcomes, including compliance and enforcement statuses of given outcomes, remain unknown. Indeed, as Gaillard and Penusliski write in their recent study on State compliance behaviour,

> out of 170 cases that States lost, [. . .] [t]here is no public information about compliance with 51 or 30.5 per cent of these cases. [. . .] Public information on compliance is also lacking in relation to an important number of awards against the Russian Federation, Kazakhstan, Kyrgyzstan, Libya and Ukraine. Conversely, the most widely publicised enforcement efforts are associated with some of these jurisdictions.[1221]

Generally, the public only get to know about State recalcitrancy during and after coercive enforcement proceedings. Institutional statistics incorporating detailed specifics of compliance information should be available, such as the time frame of compliance or pre-award or post-award settlements with/out the need for enforcement applications. To thesis author's knowledge, no such work exists currently except the few tabulations by individual researchers like Gaillard and Penusliski. Such information might well be helpful in improving compliance in practice and aiding the effective enforcement of awards, amidst the other benefits that transparency provides.

6.3.2 Instituting an Appellate Mechanism

Hostile and defiant stakeholder reactions, such as States' attacks on arbitral outcomes implicating non-compliance and coercive enforcement challenges, can be ameliorated by instituting an appellate mechanism in addition to the solutions offered thus far. A call for an appellate mechanism under the

[1220] See specifically, subsection 3.4.3; 'Transparency'.

[1221] Gaillard and Penusliski (n 19), at 47-48.

system has been made. In fact, many observers believe that an appellate mechanism would be a pleasant addition to the ISA system, and that it could cure several of the problems it has presently. Bishop highlights that the call for appellate mechanism under the system "should not be viewed as a reaction to cure the current system [because it is unbroken], but as a new phase in the evolution towards a more sophisticated system.[1222] Taking cognisance of how important the component of arbitration is to the international justice system, Lauterpacht says, "We should contemplate the possibility that its value may be enhanced if it is linked to a system of appeal."[1223] Indeed, the benefit of an appellate mechanism to the current system of foreign investment protection has been highlighted by many commentators.

Yananka-Small argues that a significant advantage of instituting the appellate system is the creation of "*consistency* and coherence of jurisprudence" which "create predictability and enhance the legitimacy of the system of investment arbitration."[1224] Other scholars have also highlighted this and related advantages of engaging an appellate mechanism under the regime. Subedi notes that an appeal mechanism could assist in harmonising interpretations of BITs and related IIAs, therefore minimising the scope of potential inconsistent decisions. Subedi adds that the mechanism will also help "bring about more cohesion and more legal certainty to this body of law" and hence the enhancement of the system's legitimacy.[1225] Franck highlights that an appellate body would aim to "provide a public forum for the review of public disputes and create a determinate and coherent jurisprudence."[1226] Bishop also asserts that "an appellate body can reduce the risk of inconsistent decisions [. . .] [and] help legitimize and institutionalize the process of investor-state dispute settlement and aid in making the system more

[1222] D Bishop, 'The case for an appellate panel and its scope of review' (2005), 2 Transnat'l. Disp. Mgt., BIICL.ORG.

[1223] E Lauterpacht, *Aspects of the Administration of International Justice*, (CUP, 1991) Vol. 9 at 111, in Bishop, ibid.

[1224] K Yannaca-Small, (n 1033), at para 38.

[1225] S Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publis., 2008) at 207.

[1226] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through inconsistent Decisions' (2005) 73 Fordham L Rev. 1521.

sustainable."[1227] Furthermore, it could serve as a remedial mechanism for correcting legal and factual errors[1228] and enhancing objectivity.[1229] Bjorklund asserts that the mechanism could enhance the reputation of ISA by improving the integrity of the process, encouraging better-reasoned decisions in the first instance and encouraging correctness of decisions.[1230] In short, an appellate mechanism could promote greater consistency and coherence, correct errors, harmonise interpretation of rules and divergent opinions of tribunals, enhance greater sensitivity and objectivity of the system and create a more predictable and sustainable system for all stakeholders.

Other scholars, including Yananka-Small, have also emphasised that creating an appeal mechanism could contribute to more effective implementation of arbitral awards.[1231] Zamir and Segal have also reinforced this statement, holding that an appeal mechanism could enhance coercive enforcement and execution of awards.[1232] As argued above, sometimes non-compliance and subsequent attacks on arbitral awards at the post-award enforcement stage, through immunity and related defences, are tactics deployed to address perceived errors in arbitral outcomes. In other words, the absence of an effective review mechanism under the ISA system to handle actual or perceived erroneous outcomes makes its awards susceptible to post-award challenges. The appeal process is an important element of justice. The presence of an appeal mechanism in an adjudicate system like ISA can promote justice, lead to satisfaction with

[1227] D Bishop, 'The Case for an Appellate Panel and Its Scope for Review' in F Ortino et al (eds), *Investment Treaty Law: Current Issues* Vol. 1., cited in A Qureshi, 'An Appellate System in International Investment Arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008), at 1157. See also M Dimsey, (n 1034), at 36 and see also Yannaca-Small, (n 1033), at 193.

[1228] Ibid. See also Yannaca-Small, ibid.

[1229] A Qureshi, 'An appellate system in international investment arbitration?' in P Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP 2008), at 1157.

[1230] A Bjorklund, 'The Continuing Appeal of Annulment: Lessons from Amco Asia and CME' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005), 471-521.

[1231] K Yannaca-Small, (n 1033), at para 38.

[1232] N Zamir and P Segal, 'Appeal in International Arbitration: An Efficient and Affordable Arbitral Appeal Mechanism' (2019), 35(1) Arb. Int'l 79, at 85.

the adjudicative outcome and hence contribute to finality.[1233] Indeed, in social science parlance, an effective error correction mechanism has been identified as promoting subjects' perception of fairness and legitimacy, which in turn encourages voluntary compliance even in outcomes adverse to the party's interests.[1234]

Therefore, to the extent that an appellate mechanism could enable the rectification of legal errors and severe factual errors, subjects' sense of fairness and legitimacy could be enhanced towards effective voluntary compliance with the final awards. Once voluntary compliance occurs, there is no need to resort to coercive enforcement and the immunity and related defences within this context. To this end, it can be argued that, indirectly, an appellate mechanism could promote coercive enforcement of awards. Zamir and Segal explain this:

> a dissatisfied party who had received an opportunity to appeal and lost the appeal, would probably be less inclined to spend additional sums on trying to resist enforcement […] [of the award in] domestic courts, as it will presumably rely on the fact that its arguments were examined by appeal arbitrators.[1235]

Even so, based on a projection that non-compliance will occur after the opportunity to seek redress, an appellate mechanism (depending on how it is drafted and especially if is reinforced with certain conditions, which will be discussed later) could lead directly to effective coercive enforcement of awards. In other words, a well-drafted appellate mechanism could close the implementation gap between compliance and coercive enforcement measures, thereby directly enhancing the latter's success.

[1233] N Gal-Or 'The Concept of Appeal in International Dispute Settlement' (2008), 19(1) EJIL, at https://ssrn.com/abstract=2238795. Accessed 12/06/21.

[1234] TR Tyler, 'Procedural Justice, Legitimacy, and the Effective Rule of Law' (2003) Crime and Justice, vol. 30, 2003, at 283–357, at www.jstor.org/stable/1147701. Accessed 10 April 2020; TR Tyler, 'Social Justice: Outcome and Procedure' (2000), 35 Int'l J. Psychol. 117, 119; EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (Springer Science & Business Media, 1988).

[1235] N Zamir and P Segal, 'Appeal in International Arbitration: An Efficient and Affordable Arbitral Appeal Mechanism' (2019), 35(1) Arb. Int'l 79, at 85.

Therefore, an appellate mechanism could effectively aid spontaneous compliance and foster effective coercive enforcement of the awards under the regime.

a. Argument Against Instituting an Appellate Mechanism

Arguments made in opposition to the development of an appellate mechanism within the ISA regime have normally been based on the policy considerations of efficiency and finality.[1236] Finality relates to the principle of *res judicata*, which "covers all the various possible binding effects of a judgment on subsequent litigation."[1237] *Res judicata* has two aspects, the first of which is the identity of the claim which operates as direct estoppel preventing a party from re-litigating the same claim against the same respondent.[1238] The second aspect bars re-litigation by the same parties where the new claims are different from those previously judged but the issue in question is the same and has been determined by the court.[1239] *Res judicata* counters the risk of indeterminacy arising from multiple proceedings. The doctrine finds justifications under two diverging yet sometimes contradictory views: private interest and public good.

The former (private interest) ensures that "the private interest [is] not […]vexed by more than one litigation on the same matter", its purpose being "to promote stability and assure the litigant that he may rely on it knowing that his rights and duties have been *finally* determined by a competent tribunal".[1240] The second justification, which takes a public good perspective, holds that for the general public good it is required that litigation comes to an "end so as to ensure effective and economic work of the courts."[1241] What the second therefore takes issue with is the unprecedented multitude of proceedings likely to arise

[1236] M Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32(3) ICSID Rev.- FILJ 528, at 529 and reference therein.

[1237] E Harnon, 'Res Judicata and Identity of Actions. Law and Rationale', 1 Israel L Rev (1966) 539, in Gal-Or (n 1233), at 49.

[1238] Ibid, at 540.

[1239] Ibid.

[1240] Harnon, in Gal-Or (n 1233), at 49.

[1241] Ibid.

in different for a, which come with significant 'financial and time sacrifices' yet fail to fulfil the desired outcome, hence hindering certainty.

Despite the apparent difficulty in separating the two grounds of justification, one must not lose sight of the fact that "even to the extent it is important, *finality* is not guaranteed by the absence of meaningful appeal."[1242] Indeed, if the history of ISA jurisprudence demonstrates anything, it is that when negotiated solutions end, or are brought to an end, others simply spring up in their place, lasting many years and even decades. The various annulment and prolonged and sometimes multiple review court proceedings, including the frustrating journey toward the coercive enforcement of awards when voluntary compliance fails, are all telling examples, contradicting the very arguments upholding finality over the appeal under the regime. As Knull and Rubins provide,

> the absence of a meaningful appeal process does little to guarantee that an arbitrator's award will mean the end of a dispute. Because arbitral awards require the confirmation of a national court at the place of enforcement in order to attach assets [of the recalcitrant] party, and […] [enforcement] treaties provide legitimate bases upon which awards can be challenged, the rendering of an arbitral award may be only the first step in a chain of litigation […]. In fact, where the only form of recourse against arbitral awards is in national courts, the appeal process may entail more than one phase of case presentation, as the losing party attempts to force its real grievances into the recognized grounds for vacatur and pursues its contentions up the ladder of courts in the judicial system.[1243]

Parties can also challenge awards indirectly through other litigation defences. Argentina's quest for a comprehensive judicial review of awards under its local law, and its tactical adoption of conventional defences like state immunity and limitation periods in enforcing States are telling examples.[1244] This is

[1242] WH Knull and ND Rubins, 'Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?' (2000), 11 Am. Rev. Int'l Arb. 531, at 8.

[1243] Ibid, at 17.

[1244] [Perhaps, the State noted that absent an effective appellate mechanism, ICSID was ill-equipped to handle the disputes effectively, hence the need to take action to secure balance of interest]. See CE Alfaro, 'ICSID Arbitration and Bits Challenged by the Argentine Government and its Supreme Court' (2004), 2(4) OGE Law J.,43.

particularly the case when the stakes are significantly high, as is the case of investment arbitration. Indeed, parties will highly choose features that promote correctness and over finality.[1245] As Knull and Rubins note, finality is an advantage if the tribunal does not make mistakes, which is unlikely with all adjudicators, including distinguished judges in the traditional court systems,[1246] hence the necessity of there being effective review mechanisms available. Therefore, it is submitted that the absence of an effective appeal mechanism creates an atmosphere that nurtures prolonged litigation after awards are issued.

Arguments relating to speed and cost-saving is further displaced as the current framework does not provide a speedy or efficient course of action. It is noted that "savings in procedural costs mean little when measured against potentially significant error in a high stakes dispute."[1247] Additionally, "the complexity and volume of evidence that frequently characterizes international disputes have narrowed the gap considerably in the time and money spent to pursue judicial and arbitral recourse."[1248] Consequently, investment arbitrations have taken more and more time and resources to resolve, thereby making many view arbitration as a more costly alternative to litigation.[1249] On an average, four to six months are required just to constitute an arbitration tribunal. As noted in Chapter 5, between June 2017 and May 2021, it took an average of 4.8 years and 4.2 years to resolved disputes under ICSID and UNCITRAL system,

[1245] Knull and Rubins, (n 1242), at 16.

[1246] Ibid, at 3, 15.

[1247] Ibid, at 14.

[1248] Ibid.

[1249] Ibid. See also, WK Slate, 'Cost and Time Effectiveness of Arbitration' (2010), 3(2) Contemp. Asia Arb. J. 185, at 186. As noted in Chapter 5.4.3.4, ICSID has introduced a mechanism, aimed to serve time of proceedings by half, which come into effect July 1, 2022. Since it comes in opt-in basis, only utility will expose the effectiveness for the purpose. see generally, "Consistency, efficiency and transparency in investment treaty arbitration" (November 2018), A report by the IBA Arbitration Subcommittee on the topic, at: https://www.ibanet.org/Document/Default.aspx?DocumentUid=a8d68c6c-120b-4a6a-afd0-4397bc22b569 https://icsid.worldbank.org/en/Documents/resources/ICSID_AR15_ENG_CRA-highres.pdf. Accessed 03/09/21.

respectively.[1250] Compared with data published before 2017,[1251] the ISA proceedings have lasted 1.6 years longer. Increased time technically means increased cost. The average period for annulling an ICSID award is approximately 2.11 years accordingly to dated collected between January 2015 and June 2017.[1252] Some cases have taken six years to conclude from the date they were initially registered.[1253] Also, disputing parties are not limited to one annulment request. This means they can raise multiple requests, hampering the same award and thereby increasing the time and costs taken to resolve the dispute,[1254] this is not to mention the separate time and cost coercive enforcement actions could add to the proceedings when voluntary compliance fails.[1255]

Compared with instituting an appellate mechanism that some advocates argued should be fashioned after the WTO Appellate jurisprudence,[1256] whose proceedings take only three months to engage, the argument upholding speed and efficiency is further displaced.[1257] It is submitted that time and cost can be significantly reduced if the appellate mechanism is well constituted, for example by making it the only available mechanism, excluding other review mechanisms like those currently in existence under the

[1250] Y Hodgson et al., 'Empirical Study: Costs, Damages and Duration in Investor State Arbitration; British Institute of International and Comparative Law & Allen and Overy: London, UK, 2021; at 33 – 34. https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf. Accessed 23/2022.

[1251] Average time previously was 3.6 and 3.9 years, for UNSCI and UNCITRAL arbitration, respectively, See A Sinclair, et al., 'ICSID arbitration: how long does it take' (2009), 4(5) Global Arb. Rev., 5.; Jeffrey Commission, 'The duration costs of ICSID and UNCITRAL investment treaty arbitrations', Vannin Capital Funding in Focus (July 2016) 9 https://vannin.com/downloads/funding-in-focus-three.pdf> Accessed 23/06/19.

[1252] M Langford et al., 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' (2019) *ISDS Academic Forum Working Group 7 Paper*. Vol, at https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf Accessed at 06/03/20

[1253] See specifically *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1 *Klöckner* and *Wena* cases. Markert, (n 1011).

[1254] The Amco award annulment proceedings lasted nearly a decade, after the second annulment award was issued. See *Amco Asia Corp.v. Indonesia*, ICSID (W. Bank) ARB/81/1(1990). The Klöckner award was not concluded until a third tribunal decided a second annulment application seven years after the original proceeding was registered with ICSID. Klöckner Industrie-Anlagen GmbH v Cameroon, ICSID (W. Bank) ARB/81/2 (1985).

[1255] Sedelmeyer, Argentina awards, Yukos awards and other numerous awards, are telling.

[1256] Dimsey, (n 1034), at 178-180.

[1257] WTO, Appellate Body Annual Report (2005), at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p4_e.htm. Accessed 02/11/20.

system.[1258] Also by utilising the current procedural irregularity mandates with a few "well-defined errors of law and, possibly of fact (within a narrow definition, arguably)."[1259] Further, "time could also be saved if the appellate body is entrusted with the power to render a new arbitral award where it admits the appeal in part or in full."[1260] In this sense, finality and the related values of cost and time efficiency could be well balanced against other equally important values like correctness and enforceability, which a well-conditioned appellate mechanism is well suited to promote.

Other concerns have included increased caseload and unwarranted appeals (abuse of use). The UNICTRAL Working Group Three WGIII has looked into this concern, having made a distinction between "conditions and filters provided within the appellate mechanism itself and provisions outside of the appellate mechanism which may have an indirect effect on the caseload."[1261] Procedures in the edifice of the appeal mechanism may certainly be beneficial in managing caseload and unwarranted appeals. It is instructive to note that the standards of review in the context of international bodies are usually very high. For instance, to utilise of the Appeal Chamber of the International Criminal Tribunal for the former

[1258] HP Hestermeyer and A De Luca, 'Duration of ISDS Proceedings' (2019) https://www.ejiltalk.org/duration-of-isds-proceedings/. Accessed 13/03/20. Note that the UNICTRAL Working Group III (WGIII) is currently working toward reforming ISDS, and the agenda involve instituting an appellate mechanism. An important question from the standpoint "of procedural efficiency is whether existing annulment or setting aside procedures should continue to exist alongside an appellate mechanism and, if so, how to ensure that they would not overlap" - (A/CN.9/1004/Add.1, para. 30). The WGIII note that, "as the grounds for appeal normally encompass the narrower grounds for annulment and setting aside, the existence of an appeal could be seen as making any further review, including annulment or setting aside, redundant. Keeping the annulment or set-aside remedies might *de facto* create a three-tier dispute settlement system, which might run contrary to the objectives of finality and efficiency (including the time and cost-efficiency)." It adds that if the existing "grounds for annulment and setting aside under the ICSID Convention [Article 52] and the Model Law [Article 34] are made grounds for appeal, it would be necessary to ensure that disputing parties would not be able to commence annulment or setting aside procedures and that States would be required to waive the right of review of decisions made by the appellate mechanism." Engaging this approach will serve to ensure procedural efficiency. See https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues.docx. Accessed 12/02/22.

[1259] Ibid. For instance, toward the procedural efficiency and also enhancing correctness of arbitral decisions and other advantages, the "draft provision provides, for the consideration of the Working Group, that decisions on both merits and procedural matters are subject to appeal", […]while certain other decisions are excluded from the scope of appeal (even if any of the grounds for appeal is met) [A/CN.9/1004/Add.1, para. 55], so as to ensure both the right to appeal and the efficiency and manageability of an appellate mechanism [A/CN.9/1004/Add.1, para. 31]."

[1260] Ibid.

[1261] Ibid.

Yugoslavia (ICTY), the appellants ought to "submit the arguments for appeal, clear references to the records, the legal and the factual foundation for the appeal. The appellants have not only to show that the Trial Chamber made an error, but it must be proven that this error caused a miscarriage of justice, which implies a rather higher threshold than simply a reassessment of the evidence."[1262] Concerning conditions "outside of the appellate mechanism, security for costs, cost allocation and early dismissal constitute possible means to indirectly ensure that the caseload of a system of appeal would remain manageable."[1263]

Upholding finality over other essential elements of effective adjudication does not serve the regime's greater good. There must be a balance, particularly between finality and correctness, which an appellate mechanism could calibrate toward enhancing awards' implementation under the regime. An appellate mechanism to secure voluntary compliance and ultimately, coercive enforcement of awards will now be examined.

b. The Effective Appellate Mechanism for the Purpose

As mentioned earlier, calls to institute an appellate mechanism under the current ISA system have been ongoing. As Qureshi and Khan observed, "there is evidence of a growing consensus amongst investment practitioners and academics that there is a need for an appellate system in the investment sphere."[1264] Divergent views, however, ensue as to the form it should take. Some suggest creating a separate and independent appellate system like an international investment court (MIC); others that it be fashioned after the Appellate Body of the WTO or incorporated into the existing ISDS framework by

[1262] See the Kunarac Case (Prosecutor v Kunarac [Judgment] ICTY-96-23&23/1 [12 June 2002]; Fair Trial, Right to, International Protection), cited in, Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues: Note by the Secretariat, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/appellate_mechanism_and_enforcement_issues.docx. Accessed 12/09/21. [Noting that "[f]rom the earliest days of appellate review of decisions to the present, criminal appellate courts have provided a limited interpretation of the grounds of review and of the extent to which they can or should legitimately "interfere" with the original sentence."]

[1263] Ibid.

[1264] A Qureshi and S Khan, 'Implications of an appellate body for investment disputes from a developing country point of view' in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP, 2008), at 269.

adding a layer of arbitration onto each of the already-existing arbitral frameworks.[1265] ICSID has in the past contemplated implementing an appellate facility within its framework.[1266] Although it has since abandoned the plan, stating that it "would be premature to attempt to establish such an ICSID mechanism at this stage"[1267], as criticisms around the traditional ISDS continue to emerge and gain notoriety, the need for amendments is no longer premature and so the door is open for a second attempt at reform.[1268] The UNCITRAL Working Group III is currently discussing the possibility of including the mechanism as part

[1265] See, AJV Berg, 'Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions' (2019), 34:1 ICSID Rev.- FILJ, at 156–189 <https://doi.org/10.1093/icsidreview/siz016>. Accessed 21/02/20; A Qureshi, 'An Appellate System in International Investment Arbitration?' in P Muchlinski et al., (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008), 1157.

[1266] For example, C Tams, 'An appealing option? The debate about an ICSID appellate structure?' (2004) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1341268> Accessed 21/11/20; IM Penusliski, 'A dispute system design diagnosis of ICSID' in M Waibel et al., (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer 2010) 530; Y Ngangjoh-Hodu and CC Ajibo, 'ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration' (2015) 6(2) J. Int'l Disp. Settl., at 308–331, <https://doi.org/10.1093/jnlids/idv010> Accessed 21/10/20.

[1267] International Centre for Settlement of Investment Disputes. *Suggested Changes to The ICSID Rules and Regulations*. ICSID Secretariat, 2005, para. 4.

[1268] "There are at least two ways in which appeal could be integrated into the ICSID mechanism. The first would be through an amendment of article 53; the second would be through an inter se modification of the Convention pursuant to article 41 of the Vienna Convention on the Law of Treaties ("VCLT")." Regarding the first option, Article 66 of the ICSID Convention establishes the process to amend the Convention. It requires that a member State propose an amendment, that such proposal be circulated to all members, and that the proposal be ratified, accepted or approved by all Contracting States. If successfully engaged, the amendment becomes binding on all parties to the Convenntion. Given that article 52 of the Convention prohibits appeal and other post-Award remedies "except for those provided in the ICSID Convention", it is clear that such an amendment may supplement or revise the current post-Award remedies. Alternatively, an amendment may be worded to allow individual States to elect whether to apply "appeal grounds". On the second option, i.e. an inter Se Modification in accordance with article 41 VCLT. "Inter se modification differs from amendment in that amendment changes the applicable treaty provisions for all Contracting States, whereas inter se modification changes the treaty provisions only for those endorsing the modification. Article 41 VCLT allows inter se modification where the modification is not prohibited by the treaty and does not: (i) affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole." 54. Clearly modification is permissible by the ICSID Convention: the only issue is compliance with (i) and (ii). "There is no case law on these provisions. Some scholars writing on this topic have disagreed on whether an article 41 VCLT modification under the ICSID Convention would be effective. However, a large body of scholarly comment is that such a modification would be effective. Many view this as a viable option. In the 2004 Discussion paper on Possible Improvement of the Framework for ICSID Arbitration: Possible Features of an ICSID Appeals Facility, ICSID proposed to establish an Appeals facility and cited article 41 VCLT as the basis for doing so. Again, the wording of the inter se modification is determinative. However, an inter se modification could adopt the same type of approach as noted above with respect to amendment.": https://documents-dds-ny.un.org/doc/UNDOC/LTD/V20/065/39/PDF/V2006539.pdf?OpenElement. Accessed 03/02/22.

of the ISDS reforms agenda.[1269] Options under consideration include an "ad hoc appeal mechanism, a permanent stand-alone appellate body, or an appeal mechanism as the second tier of a standing court (all these various possible options are referred to as "appellate mechanism"".[1270] Considerable considerations has also been given to the functioning of the mechanism, including the main components relating to the composition, scope (and standard of review) and issue of enforcement of decisions.[1271]

[1269] UNCITRAL Working Group III: Investor-State Dispute Settlement Reform, detailed works of the Group are available at https://uncitral.un.org/en/working_groups/3/investor-state. Accessed 12/02/22.

[1270] A/CN.9/1004/Add.1, paras. 16 and 25 of the UNICTRAL Document A/CN.9/WG.III/WP.185. For more details, see Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism: Note by the Secretariat, ["an initial draft for comments until 15 May 2022"] at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_wp_-_appeal_14_december_for_the_website.pdf. Accessed 04/05/22. The EU since publishing its 2015 Trade Commissioner Concept Paper "Investment in TTIP and beyond - the path for reform", has declared its ultimate goal to pursue the establishment of a single permanent multilateral court system to handle economic affairs between multiple agreements and trading partners globally. Also, some States have stated incorporating some form of appellate mechanism into their BITs and related IIAs. See Malmström Concept Paper: Investment in TTIP And Beyond - The Path for Reform, cit., 11. in JP Charris-Benedetti, 'The proposed Investment Court System: does it really solve the problems?' (2019), 42 Revista Derecho del Estado, at 83-115. For proposals submitted by States toward the agenda, see "A/CN.9/WG.III/WP.159/Add.1, Submission from the European Union and its Member States (Appellate body); A/CN.9/WG.III/WP.161, and A/CN.9/WG.III/WP.198, Submissions from the Government of Morocco (Prior scrutiny of the award and standing appellate mechanism); A/CN.9/WG.III/WP.163, Submission from the Governments of Chile, Israel and Japan (Treaty-specific appellate review mechanism); A/CN.9/WG.III/WP.175, Submission from the Government of Ecuador (Standing review and appellate mechanisms); A/CN.9/WG.III/WP.177, Submission from the Government of China (Stand-alone appellate mechanism); the reform option is also discussed in A/CN.9/WG.III/WP.176, Submission from the Government of South Africa and A/CN.9/WG.III/WP.180, Submission from the Government of Bahrain; A/CN.9/WG.III/WP.188, Submission from the Government of Russia; A/CN.9/WG.III/WP.195, Submission from the Government of Morocco." The WGIII has "indicated that the objectives of avoiding duplication of review proceedings and further fragmentation as well as of finding an appropriate balance between the possible benefits of an appellate mechanism and any potential costs" guide their work: (A/CN.9/1004/Add.1, para. 24).

[1271] G Kaufmann-Kohler and 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', available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cids_research_paper_mauritius.pdf. Accessed 17/09/21; D Gaukrodger *et al.*, 'The OECD Working Papers on International Investment No 2012/3, OECD Investment Division 2012, Investor-state dispute settlement: A scoping paper for the investment policy community, available at https://www.oecd.org/investment/investment-policy/WP-2012_2.pdf. Accessed 17/09/21; K Sauvant, 'The Policy Options Paper, E15 Initiative, International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum 2016, The Evolving International Investment Law and Policy Regime: Ways Forward' available at https://e15initiative.org/publications/evolving-international-investment-law-policy-regime-ways-forward/. Accessed 17/09/21; JE Kalicki and A Joubin-Bret 'Reshaping the Investor-State Dispute Settlement System, Journeys for the 21st Century', Nijhoff Int'l Inv. Law Series, Vol. 4; KP Sauvant, *Appeals Mechanisms in International Investment Disputes* (OUP, 2008); AJ van den Berg Appeal mechanism for ISDS Awards, Interaction with New York and ICSID Conventions, Conference on Mapping the Way Forward for the Reform of ISDS, available at https://www.newyorkconvention.org/publications/appeal+mechanism+for+isds. Accessed 18/09/21; M Bungenberg and A Reinisch, 'From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Options regarding the Institutionalization of Investor-State Dispute Settlement, and Standalone Appeal Mechanism: Multilateral Investment Appeals Mechanisms' European Yearbook of Int'l Eco. Law; G Kaufmann-Kohler and M Potestà, *Investor-State Dispute Settlement and National Courts. Current Framework and Reform Options* (Springer, 2020).

To draw up the above information on the topic in depth, will exceed the scope of this thesis. Of essential concern, however, to this thesis is how the mechanism can be engaged to facilitate effective compliance with and enforcement of awards, particularly for State parties. This concern has also been highlighted by Chernykh and Usynin in their recent notes to the UNCITRAL Secretariat over its recent reform agenda.[1272] The recommendation put forth by this thesis is arguably modest, that an appeal mechanism (currently in consideration) should come with a set of adequately laid out or well-defined conditions that aim to induce voluntary compliance with and aid coercive enforcement of arbitral awards.[1273] One step in the right direction would be requiring the posting of security or a performance bond by the party seeking to use the appellate mechanism, which could take the form of a bank guarantee or similar arrangement. Another condition might be requiring the State party to provide an express waiver of immunity from execution in respect of certain assets to satisfy the awards. Consequently, if the challenge to the award fails, i.e. the appeal process ends, retaining the original award, the creditor (foreign investor) will draw upon the security or attach the allocated assets in satisfaction of the award. Conversely, if the challenge is successful, i.e. the award is annulled, the security will be retained, or a waiver of immunity in respect of the allocated assets will be vitiated.

The practice of making the utility of the 'appeal' process conditional upon posting security or some other assurance is not new. Some domestic legal systems, and even some arbitral institutions including the ICSID, have engaged this condition, albeit in respect of annulment (and stay of enforcement) proceedings in the latter's case. The United States, for example, engaged such a condition in the *Loewen*

[1272] Y Chernykh and M Usynin, 'Comments to the UNCITRAL Secretariat's Note 'Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues'' https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/inland_norway_university_of_applied_sciences_comments_uncitral_wp_appeal_and_enforcement.pdf. Accessed 18/05/22.

[1273] K Yannaca-Small, (n 1033) noting particularly that ''[T]he expeditious and effective enforcement of awards [will ensue] if a respondent state that appealed were required to post a bond in the amount of the award…. and if appeal decisions were excluded from domestic court review.''

case.[1274] This case was instituted in the Mississippi State Court by Jeremiah O'Keefe (plaintiff) against the Loewen Group, Inc ('TLGI') and the Loewen Group International, Inc ('LGII') (jointly named 'Loewen') (defendant) in respect of breach of contract and Tort, among others.[1275] A judgement was entered of which the claimant, as of right, sought to execute against the defendant's assets. Several instances of judicial improprieties were cited against the trial court judgement[1276] which the defendant, as of right, sought to appeal.[1277]

However, under Mississippi Law[1278] "an appellant may stay the execution of a pecuniary judgment (which is otherwise enforceable as of right) for the pendency of the appeal by posting a supersedeas bond in the amount of 125 per cent of the judgment from which the appeal is taken."[1279] The purpose of the bond here, accordingly, "is to effect absolute security to the party affected by the appeal" so that while the appellant's right to justice is protected, the award creditor's right to remedy is not prejudiced but protected and secured.[1280] Instead of paying the bond amount to stay enforcement of the award while progressing with the appeal process, the defendant negotiated a settlement with the claimant.[1281] The condition here, the bond, encouraged spontaneous compliance with the judgment and therefore avoided the problems associated with seeking coercive enforcement in national courts.

[1274] *O'Keefe v The Loewen Group, Inc.*, 91-67-423 (Cir. Ct. Hinds Co., Miss. 1995), [This case was an investment dispute between two non-state parties.]

[1275] Ibid.

[1276] For full case brief, see MI Krauss 'NAFTA Meets the American Torts Process: O'Keefe v Loewen' (2000), 69 *Geo. Mason L. Rev.* Also, see *The Loewen Group, Inc. And Raymond L. Loewen*, The USA, ICSID Case No. ARB(AF)/98/3, at https://www.italaw.com/sites/default/files/case-documents/italaw9047_0.pdf. Accessed 19/04/20.

[1277] See Mississippi Code 1972 Ann. § 11-51-3; A18.

[1278] See Mississippi R. App. P. 8(a), at https://courts.ms.gov/research/rules/msrulesofcourt/Rules%20of%20Appellate%20Procedure%20Current.pdf. Accessed 19/04/20.

[1279] *The Loewen Group, Inc. And Raymond L. Loewen*, The USA, ICSID Case No. ARB(AF)/98/3, at 57 - 58.

[1280] Ibid.

[1281] See rules under Fed. R. Civ. P. 62(d), argued in respect of the case *Gold Reserve Inc., V Bolivarian Republic of Venezuela*, Civil Action No. 1:14-cv-02014-JEB.

At the institutional level, the ICSID Convention has granted a stay of enforcement pending annulment pursuant to Article 52(2), conditional upon posting of security or a letter of assurance to comply. While not all annulment committees have put such conditions on a stay of enforcement pending annulment, others have done so and it appears not to contravene the Convention's rules of engagement, at least as debated in the *Azurex* case.[1282] In the *CMS*,[1283] the annulment committee addressing Argentina's compliance concerns conceded that "as a general matter a respondent State should be entitled to a stay [enforcement] provided it gives reasonable assurances that the award, if not annulled, will be complied with."[1284] The committee further adds that the State must prove that it shall comply with its obligation under the Convention, and that if "there is doubt" the committee may request the provision of a bank guarantee as a condition for a stay of enforcement.[1285] Having said that, a 'commitment letter'[1286] by Argentina, declaring that in the event that annulment is refused it would "recognize the award [. . .] as binding and [. . .] enforce the pecuniary obligations imposed by that award within its territories", was held by the *CMS* committee as a reasonable assurance (condition) to stay enforcement pending challenge against the award.[1287] An enhanced condition was requested by the *Vivendi* committee:[1288]

[1282] *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (Dec. 28, 2007), at 22 -36. See generally, TY Lin, 'Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement' (2012), 5(1) Contemp. Asia Arb. J.

[1283] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/08 (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (Sept. 1, 2006), cited in Lin, ibid, at 8.

[1284] Ibid, at 38.

[1285] Ibid, at 18.

[1286] Ibid, at 47. The letter read: "in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the arbitral tribunal as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event that annulment is not granted" see Lin, (n 1232), at 8.

[1287] Ibid, at 45-50.

[1288] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* (ICSID Case No. ARB/97/3) (Annulment Proceeding). Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007 (Rule 54 of the ICSID Arbitration Rules) (Aug. 10, 2010).

> The Argentine Republic […] commits itself unconditionally to effect the full payment of its pecuniary obligation imposed by the Award - to the extent it is not annulled - within the 30 calendar days following the notification by the interested party of the enforcement request addressed to the authority designated in Article 54, paragraph 2, of the ICSID Convention.[1289]

Looking at the content of these commitment letters, this appears simply to be a restatement of the States' obligation pursuant to Article 53 of the Convention and hence inadequate to act as a guarantee. However, the *Vivendi* committee went further by placing a 30-day time limit after which "the need for a financial assurance become mandatory", i.e. a condition to posting a bank guarantee according to specific terms, should the undertaking fail to materialise.[1290] In *Sempra,* Argentina was required to provide a bond of $75 million USD as a condition to stay enforcement with 120-day time limit to hold the stay of enforcement pending challenge to the award.

Although under a limited scope of redress, i.e. annulment and on a stay of enforcement, the case examples showed instances where a condition was attached to the utility of further redress. The posting of a guarantee intends to avert the risk of non-compliance and/or non-enforcement later. The guarantee could be defined as a kind of "conditional payment in advance"[1291] in the sense that it "converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids any issue of sovereign immunity from execution, which is expressly reserved by Article 55 of the Convention".[1292]

Looking at the outcomes of the cases reviewed, however, it is submitted that stronger conditions should apply and precede the utility of an appellate mechanism, such as posting a bond or bank guarantee

[1289] Ibid, at 46 (a).

[1290] Ibid, at 46 (b).

[1291] *Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Stay of Enforcement of the Award (30 November 2004), para 31.

[1292] *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution (1 June 2005), at para 30; See also *CMS v Argentine*, ICSID Case No ARB/01/08, Award (12 May 2005), at para 39.

to the tune of the entire award price or more, as in the *Loewen* case, or requiring that the State party provide an express waiver of immunity from execution tallied to identifiable assets of similar value, serving commercial or sovereign purpose. On the subject of the express waiver, the author suggests the following comprehensive draft:

> The State hereby irrevocably waives any rights of immunity as to it and any of its assets, regardless of the sovereign or non-sovereign nature of the assets, in respect of the enforcement and execution of an arbitral award rendered by a Tribunal *and retained by appellate review by this Body* pursuant to this agreement. Such assets include [specific name] and extend to any bank account belonging to the state whether held in the name of a diplomatic mission or otherwise, and bank accounts belonging to the State's central bank or other monetary authority.[1293]

Engaging such conditions to the utility of an appellate mechanism has a dual purpose. It can facilitate or secure compliance with and ultimately coercive enforcement of the award, by serving as a conditional payment in advance. Such conditions will also prevent the appellate mechanism being used as a tactical measure to avoid, frustrate or delay compliance with and coercive enforcement of the award. One might argue that requesting such conditions to an appeal recourse might greatly negate the award-debtor's legitimate interests and right to the proceeding. On this point, however, one must also bear in mind that the award-debtor gets to have an actual erroneous decision altered or vitiated. The focus should be on this important element, the fact that justice could be served between the parties in cases of actual erroneous decisions. This will enhance the credibility and effectiveness of the regime in resolving investment disputes.

6.4 Conclusion

This chapter made suggestions to improve the general implementation of arbitral awards. Amending international conventions, particularly enforcement conventions like the ICSID, to include an express

[1293] This is a modified version of waiver put forth by Schreuer. See Schreuer, *The ICSID Convention: A Commentary* (CUP, 2009), at 1181.

waiver of immunity from measures of constraint and execution that is reminiscent of immunity from jurisdiction, reflective of the restrictive immunity approach, is ideal for curbing challenges posed by State immunity. However, as has been identified, the feasibility of successfully putting this solution into practice appears weak, if not impossible. Indeed, as Bjorklund rightly asserts, the political *will* required for this amendment on a treaty basis is currently lacking under international law.[1294] As discussed earlier, there has been ample opportunity to make changes to the law as it currently applies. However, either the old rule is reiterated, or the State's protection becomes reinforced.[1295] To this end, the law of immunity from measures of constraint and execution appears entrenched. Engaging an express waiver of immunity on a contractual basis is possible and necessary, but the success of this "only one hope"[1296] to mitigate the express application of immunity from execution will mainly depend on the bargaining strength of the private individual and the law of the enforcing state.

The chapter argues that a more modest approach would be to focus on solutions that target voluntary compliance, and which could enhance awards' coercive enforcement. Increased transparency and instituting a broader review, the appellate mechanism, under the regime could be the way forward in this regard. Transparency can enhance subjects' perception of legitimacy, thereby aiding voluntary compliance with adverse awards. It can also facilitate public participation in the dispute settlement process, which can help improve and implement outcomes more effectively. As Magraw and Amerasinghe posit, "the public is less likely to disapprove of a decision or process they participated in or even have a right to participate in."[1297] Furthermore, public knowledge of recalcitrant behaviour could incur backlash

[1294] Bjorklund, *Re-Politicization of Investment Disputes* (n 13), at 240.

[1295] See Chapter 5 Section 6.

[1295] Articles 8.28(9)(d) and 8.41(4) of the CETA follows after the ICSID Convention; See Fox, *The Restrictive Rule 1970s Enactment* (n 26), at 31 -31 [stating that UNSCI is literately reiterated the old rules]; France's Sapin No. II Law of 2016; See also Russia, Federation Federal Law No. 397-FZ (2015) and Japan – New Immunity Acts of 2010.

[1296] FS Barbosa, 'The Enforcement of International Investment Arbitral Awards: is There a Better Way?' (2009) 6.21 Revista Brasileira de Arbitragem at https://www.transnational-dispute-management.com/article.asp?key=1488. Accessed 16/09/21.

[1297] Magraw and Amerasinghe (n 1208).

and reputational damage, which a potential investor could capitalised to structure their investment engagement with States, including negotiating effectively to include an express waiver of immunity from execution in arbitration agreements.

An appellate mechanism under the regime can enhance the regime's legitimacy and effectiveness, which is currently under attack due to deficiencies in adjudicative values such as consistency, independence and impartiality. Instituting an appellate mechanism can correct severe errors in awards and promote justice, thereby improving parties' satisfaction with the arbitral outcomes toward effective compliance and/or coercive enforcement of awards. However, for it to be effective, the mechanism should come with well-defined conditions to guide against abuse. The mechanism's utility should precede the posting of security (bank guarantee) or the provision of an express waiver of immunity in respect of the asset(s) of the State. To this end, while recourse to appeal in actual erroneous awards could vitiate the obligation to honour, it could also provide award creditors with conditional payment in advance in the event the award is stayed or retained.

Chapter 7: General Conclusion

7.1 Summary of Major Findings

This thesis critically analysed the legal challenges and limitations to successful implementation of arbitral awards under the investor-state arbitration (ISA) regime, assessing root causes to offer alternative solutions. The primary focus was on the main obstacle posed by State immunity doctrine, particularly immunity from measures of constraint and execution, and its impact on the regime in the context of coercive implementation of awards. However, as a precursor to coercive implementation challenges, in conjunction with an overarching aim to identify holistic alternative solutions to award implementation challenges under the regime, the thesis also scrutinised what impacts States' willingness to not/comply with arbitral obligations in the first instance.

Until now, scholarly attention to award implementation issues have been cursory. While the doctrine of State immunity draws much scrutiny in academia, examination of its utility in resistance to ISA dispute resolution seems relatively sparse. However, as a compelling litigation tactic, the immunity claim is an invaluable tool of the State, if only to cause considerable expense to a foreign investor and provide a significant impediment to pursuing a legitimate claim. Furthermore, away from coercive enforcement challenges, voluntary compliance issues hardly attract any scholarly attention despite the latter being a precursor to the former. This lack of attention renders efforts to address these issues less effective. Most importantly, the ongoing discussions about the regime's future lack consideration of issues relating to compliance, enforcement and, more generally, their efficiency.[1298]

This thesis has filled the gap in the extant literature by engaging a comprehensive examination of both issues and identifying the root causes of the challenges while offering alternative solutions. In order to do this, the thesis considered the main question of whether the current ISA system functions adequately and effectively in facilitating successful implementation – compliance with and ultimately

[1298] Gallaid and Penusliski, (n 19).

coercive enforcement – of arbitral awards. The following are the key summary of findings and recommendations.

7.1.1 Analysing Adequacy of the Current ISA System in Facilitating Award Implementation

The discussion in the preceding chapters has shown that the current ISA regime is an adjudicative success as an overarching edifice regulating foreign investment engagements between host States and foreign investors. The reason that, throughout the history of international law, which has primarily served as the domain for inter-state affairs, foreign investors (natural or juridical) have no right to directly assert themselves except by some diplomatic interventions espoused through their respective home-State. Thus, granting foreign investors through IIAs signed among States assertible substantive rights and platforms under international law to enforce such rights against States is a triumph worthy of an accolade.

In the context of the thesis, the triumph relates to the fact that, under the IIAs, States who were previously jurisdictionally unamenable to the courts of another by reason of sovereignty, are said to have ceded part of their sovereignty by virtue of engaging in commercial activity with the foreign investor.[1299] Although state immunity regarding public acts (*acta jure imperii*) remains intact, immunity regarding private or commercial acts (*acta jure gestionis*) is waived courtesy of the theory of restrictive immunity. Indeed, as Chapters 2 and 3 identified, under the multilateral governing legal frameworks like the ICSID and New York Conventions[1300] a State's immunity before the jurisdictions of arbitral tribunals and courts is unavailable to assert whether for settling the commercial disputes or for coercive enforcement of the outcomes.[1301] This formulation balances the parties' rights ensuring that they are placed on an equal footing for an amicable and unequivocal resolution of commercially related disputes, devoid of sovereign inter-state interventions.

[1299] C Rudolph, 'Sovereignty and Territorial Borders in a Global Age' (2005), 7(1) Int'l Stud., Rev., 1–20, at http://www.jstor.org/stable/3699618. Accessed 12/02/20.

[1300] The ICSID Convention.

[1301] See Article 25 of the ICSID Convention, ibid.

Interestingly, the regime accepts that the overall integrity of the protection offered ultimately pivots on parties' ability to secure voluntary compliance and/or coercive enforcement of final arbitral outcomes.[1302] As Chapter 2 specifically clarifies in response to sub-question 1, procedural review mechanisms are placed to ensure that awards rendered are valid, having a *de jure* final and binding effect capable of facilitating voluntary compliance and coercive enforcement globally.[1303] Although limited in scope, the various review mechanisms, including annulment/vacatur under the governing frameworks of ICSID and New York/UNCITRAL and related arbitral rules, provide grounds to seek redress in erroneous outcomes toward nurturing compliance. Admittedly, access to remedy in this regard seemingly fosters the proceedings' fairness, create a sense of satisfaction and legitimacy, which are necessary elements for spurring voluntary compliance even in outcomes adverse to a party's interests. The importance of the review mechanisms is highlighted in a recent study showing that States initiated annulment proceedings in 83 per cent of ICSID awards rendered against them for predictive reasons, including earnest convictions that the outcome was incorrect or unjust.[1304]

This growing tendency to challenge awards in this respect, goes hand in hand with a tendency to resist or delay voluntary compliance after the obligation under the awards has been confirmed, following the utility of the review procedure.[1305] However, non-compliance does not vitiate awards' binding and final effect. In fact, as noted in Chapter 2, non-compliance is an outright breach of the treaty obligation, necessitating State responsibility for internationally wrongful acts[1306] and grounds for invocation of

[1302] Mistelis, *Award as an Investment*, (n 16), at 3.

[1303] See for example, Article 52, 53, and 55. Of the ICSID.

[1304] Out of total of 170 claims commends before, 31 December 2019, resulting in awards against States that Gaillard and Penusliski, in 144 of them States sought annulment. Gaillard and Penusliski, (n 19), at 47.

[1305] Article 53 of the ICSID.

[1306] J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002), 1 AJIL., 874-90. See also, Chapter 1 of the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts. See also Chapters 2 and 3 of the same Act dealing with the issues of forms of reparative and Countermeasures actions to sanction non-compliance.

diplomatic protection under Article 27 of the ICSID Convention.[1307] On the other hand, however, Articles 53 and 54 of the ICSID Convention make recouping remedy possible through coercive enforcement in municipal courts when voluntary compliance fails,[1308] thus saving diplomatic interventions as last measure of resort when award implementation, i.e. both voluntary compliance and coercive enforcement, strictly becomes unproductive.

It is instructive to highlight that, non-compliance with arbitral awards, particularly on the part of State parties to ISA proceedings, was never in the contemplation of the regime's architects. As the thesis has rightly shown and well summarised in the report of Broches, the leading architect of the ICSID system in 1968,

> since any State against which an award was granted would have undertaken in advance a solemn international obligation to comply with the award, the question of [coercive] enforcement against a State was somewhat academic.[1309]

The current surge in non-compliance and the related recalcitrancy toward ISA arbitral awards seemingly shows the regime architects' naivety. However, conventional wisdom dictates alternative arrangements to award implementation, i.e. recourse to coercive enforcement actions in municipal courts to recoup remedy, thus highlighting their ingenuity. At this point, it can also be highlighted that while coercive enforcement actions were deemed 'unlikely to arise' because non-compliance was never contemplated in the first place, the development of the rules of restrictive immunity and investment arbitration work concomitantly to ensure the balancing of the parties' conflicting interests at the coercive enforcement stage of the arbitral proceedings. To the extent that both public and private interests (the rights of States and the rights of individual) developed *pari-passu* and harmoniously, attentive to the superior common values show the

[1307] ICSID Convention. See also A Roberts, 'State-to-state investment treaty arbitration: a hybrid theory of interdependent rights and shared interpretive authority' (2014), Harv. Int'l LJ, 1.

[1308] ICSID Convention. See also Article III - V of the New York Convention.

[1309] See e.g., ICSID, 'History of the ICSID Convention: Document Concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (ICSID Publication 1968) vol., 2-1, at 304.

evolution of international law in our contemporary era. And therefore, highlights why this rule-based investment protection adjudicative system under international law is considered an adjudicative success in facilitating investor-state engagement. Nevertheless, significant limitations remain.

Instances of non-compliance by States with their arbitral obligations are significant per the recently available data and signifies the presence of cracks in this successful adjudicative system. [1310] Atypically, States do not only blatantly refuse voluntary compliance with adverse awards rendered against them.[1311] They have also turned to attack them through post-award review measures.[1312] This trend toward resistance is projected to rise exponentially: indeed, as "States watchfully observe each other's conduct, non-compliance may breed further non-compliance."[1313] To this end, coercive enforcement actions in municipal courts to recoup remedy take on greater importance. However, state immunity, which is purportedly significantly curtailed could render the actions highly unproductive, further exacerbating the issue.

While immunity of States is notably curtailed with respect to commercial acts (*acta jure gestionis*), it was noted in Chapter 3 in response to sub-question 2 that the criteria for determining immunity from jurisdiction and immunity from measures of constraints and execution turn out to differ. The advantage of the latter immunity relies principally on the purpose test, in practice, however, such a criterion represents a herculean challenge. Not least because the boundaries between State activities with a commercial purpose and State activities with a sovereign purpose are difficult to ascertain in execution actions.[1314] But resorting to the notion 'use', also represents a particular unsurmountable challenge as the claimant must prove that

[1310] Gaillard and Penusliski, (n 19), at 47.

[1311] Ibid [noting recalcitrancy of States, including Venezuela, Romania, Poland, Moldavia, Egypt, Serbia, Hungary, Italy, Nigeria, Argentina, Russia, Kyrgyzstan, Spain, Kazakhstan, Libya and Ukraine. Accordingly, these States are the only publicly known instances of failing to comply with awards. Meaning the number could be more.]

[1312] Ibid, at 46, noting specifically of ISCID awards that 83 per cent of States with adverse awards against them have sought to annul them.

[1313] Ibid, at 55.

[1314] TK Reece, 'Enforcing Against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used "Context" When Applying The "Commercial Purposes" Test' (2015), 2(1) J. of Int'l and Comp. Law, at 29.; Article 19(c) UNSCI exemplified.

the foreign State actually use, specifically use or intended specifically to use the marked asset(s) for a commercial purpose in order to debunk a presumptive sovereign use.[1315] This burden is too onerous for the claimant to discharge and arguably undesirable from a policy perspective. Proving an ordinary connection to commercial use will be insufficient,[1316] and neither will recourse to the origin of the asset(s) be accepted to overturn the asset(s) presumptive sovereign use.[1317] Besides, the claimant must satisfy that the asset(s) is used for a commercial purpose at the time of the proceedings: as the ILC says that to satisfy "an earlier time could unduly fetter States' freedom to dispose of their property."[1318]

Lastly, providing proof of a previous commercial nature of the asset(s), specifically concerning bank accounts, is inconclusive to overturn their presumptive sovereign use because "the older the use in evidence, the weaker the inference that may be drawn as to the use or intended use of the account".[1319] A State can thus lawfully obtain an asset(s), i.e. through a commercial activity or unlawfully, i.e., an edifice obtained through prohibited expropriation under international law or bought by money laundering.[1320] Nevertheless, if the asset(s) is characterised as 'used for a sovereign purpose', the foreign State is unlikely to be challenged on it.[1321] While these nuances apply to the disadvantage of the claimants, as rightly highlighted under Chapter 4, certain States' assets, including the central bank, embassy/consular missions, military, cultural and heritage assets are covered by stronger protection under general and specific immunity

[1315] Schreuer, *State Immunity: Some Recent Developments* (n 472), at 145.

[1316] *Af- Cap Inc*., (n 1118), at 1094.

[1317] *Connecticut Bank* (n 521), at 251; *SerVaas* (n 521), at para. 16.

[1318] ILC Draft Articles on Jurisdictional Immunities of States and Their Property, (2) YBILC 58 (1991), UN-Doc. A/46/10.

[1319] *AIC Ltd v Nigeria*, Case Nos. S/ 03/ 0056 and S/ 03/ 005, 13 June 2003, [2003] EWHC 1357 (QB), 129 ILR 571, at 56, cited in Thouvenin and Grandauber, (n 514), at 259.

[1320] Ibid.

[1321] Yang (n 25), at 406.

regimes.[1322] To this end, a 'special waiver' of immunity will be required to execute against them.[1323] This is notwithstanding that some additional territorial or subject matter connection requirements may apply to bar execution in some jurisdictions.[1324]

Therefore, it is concluded that the generally perceived triumph of the restrictive immunity doctrine over the absolute immunity doctrine is a quasi-misnomer because immunity from execution is virtually intact and unscathed in terms of the general development of the law. It is undeniable that immunity from execution has earned notoriety for being "the last fortress, the last bastion of state immunity"[1325] and 'the Achilles heel' of the ICSID system.[1326] Suppose the State does not willingly comply with an arbitral award rendered against it. In that case, the possibility of foreign investors recouping remedy through coercive enforcement action is slim, if not impossible, because of immunity considerations. Against this finding, it is submitted that the criteria for determining immunity from measures of constraint and execution under the restrictive immunity theory lack viability in bridging the chasms between States' right to immunity and foreign investors' ability to enforce arbitral awards when voluntary compliance fails. At this point, it is perhaps right to concur with Bjorklund that,

> The international community has created an elaborate international architecture with respect to investment protection but at the back end – the stage of actual collection – the edifice is built on shaky ground.[1327]

[1322] See for example, Article 21 of the UNSCI; Primary immunity rules of States include the USFSIA, UKSIA, and France Sapin No. II Law. Special immunity regime by treaty include, for example, embassy and consular immunity is covered by the Vienna Convention on Diplomatic Relations (VCDR), April 18, 1961, 500 U.N.T.S. 95 and Vienna Convention on Consular Relations (VCCR) 19 March 1967. Cultural and military assets are also provided by special regimes of immunity. See Chapter 4.3.

[1323] Dopagne, (n 674), at 393 -396.

[1324] Switzerland for example. See generally Chapter 4.4.

[1325] International Law Commission Commentary to Art. 18, para. 1

[1326] Schreuer *A commentary* (n 42), at 1154.

[1327] Ibid, at 229- 238; See also VO Nmehielle, 'Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes' (2011) 7 Ann. Surv. Int'l & Comp. L. 21; V Živković, 'Pursuing and Reimagining the International Rule of Law Through International Investment Law' (2019) Hague J. Rule of Law, at 1-27 [noting non-compliance impact on the overall effectiveness of the regime].

Given the nearly impossible nature of engaging coercive implementation of arbitral awards under the regime because of the challenges posed by immunity from execution, it becomes necessary to discern the question of what impacts State compliance behaviour. In response to this sub-question, Chapter 5 specifically analysed compliance motivational factors such as sanctions and reputational cost and the normative consideration of legitimacy against a seminal ISA compliance case, Argentinian compliance vis-à-vis the ICSID awards. Ultimately, as a proactive measure cognisance was taken of the critical role the perception of legitimacy plays in promoting satisfaction with the adjudicative process, including compliance with the final outcomes at the initial stage of the State compliance calculus.[1328]

Admittedly, where legitimacy is perceived, subjects' willingness to comply with rules or outcomes is enhanced even in adverse outcomes.[1329] Here, this is defined as "the basis upon which people accept or are willing to accept the legal order as they find it and [it] is premised upon the idea that law should be good for and justly serve the people."[1330] For a system to be considered legitimate, certain essential values predicative of the rule of law must be present. These have been highlighted to include but are not limited to independence and impartiality, consistency and coherency of rules and outcomes, accountability, transparency, and efficiency (fostering a healthier balance between correctness and finality).[1331] The absence of such essential values of the rule of law and of justice puts any adjudication system in a crisis of legitimacy with outcomes such as general hostility and deviance from prescribed and observable behaviours.[1332]

[1328] K Yannaca-Small, 'Improving the System of Investor-State Dispute Settlement: An Overview' (2006), para 38, at http://www.oecd.org/china/36052284.pdf. Accessed 09/10/20.

[1329] AK Schneider, 'Error Correction and Dispute System Design in Investor-State Arbitration' (2013), 5 Y.B. Arb. & Mediation 194. [The link between perception of legitimacy and compliance with a system' rules and outcomes are empirically evidenced by works in the parlance of social and psychology]: see for example, EA Lind and TR Tyler, *The Social Psychology of Procedural Justice* (Springer Sci. & Bus. Media, 1988); TR Tyler, 'Social Justice: Outcome and Procedure' (2000), 35 Int'l J. Psychol. 117.

[1330] R Hurst 'Problem of Legitimacy in the Contemporary Legal Order' (1971), 24 Okla. Law Rev., 224 at 225.

[1331] See Chapter 5.4.1 – 5.4.3.

[1332] Ibid. See also Chapter 5.4.4.

The numerous defiant attitudes by States towards awards implementation, the broader shareholder discussions and reactions, including regional, sectoral, and institutional measures to effect changes under the ISA regime, provide evidence that the regime indeed suffers from a legitimacy crisis. As Chapter 5 assessed and vehemently concluded, the regime does not inadequately engage the fundamental values necessary for effective adjudication. There is inconsistency in arbitral determinations yet a lack of mechanisms to correct such to ensure fairness and justice to the affected parties. There is a lack of independence, impartiality and transparency, among many others.

It is submitted that enhancing legitimacy could facilitate better compliance behaviour and thus ultimately contribute towards effective enforcement of awards. Because at times the problem encountered at the implementation stage - non-compliance and subsequent attacks on awards through numerous annulment and vacatur proceedings – and most importantly, the utility of immunity and related defences are thus, an expression of frustration against the regime's shortcomings.

This conclusion does not renege on the thesis' considerations that the regime is an adjudicative success in submission to the main question relating to its adequacy and effectiveness for award implementation. The findings show that, at least from the viewpoint of ensuring enhanced effectiveness at the implementation stage, improvement is necessary so that as this young powerful and successful international investment protection regime grows into maturity and external forces continue to shape its contours, the baby will not be thrown away with the proverbial bathwater. Below are some recommendations for improvement for policy consideration.

7.1.2 Recommendations for Facilitating Award Implementation

a. Immunity-specific recommendation

The ruling in the *Commisimpex* case and ILC commentary on an implied waiver formulation to name but a few, show that state practice requires an express waiver of immunity from execution in order

to successfully execute against States' assets.[1333] The demand for an express waiver is further bolstered regarding executing against States' assets in the special category given the more robust protection general and specific immunity regimes provide them. Engaging an express waiver of immunity from execution will provide consent to taking measures of constraint and execution against States' assets, which would otherwise amount to unlawful taking under international law. Ideally, as Chapter 6 specifically notes, amending the governing frameworks of the ICSID Convention and the New York Convention to include an express waiver of immunity from execution is the best option to circumvent the immunity bars. Such treaty amendment will place immunity from execution in the same position as immunity from jurisdiction, i.e. waived and unavailable to plead in ISA proceedings. However, it is an unlikely goal to achieve (at least for the time being) because the political *will* to carry on this amendment is simply lacking.[1334]

The most viable alternative will be for the potential claimant to secure this waiver of immunity from execution from the State on a contractual basis personally. Against this, success will all depend on the claimant's bargaining strength and, most importantly, securing an adequately drafted waiver: the following draft is suggested:

> The Host State hereby irrevocably waives any rights of sovereign immunity as to it and any of its property, regardless of the commercial or non-commercial nature of this property, in respect of the enforcement and execution of an award rendered by an Arbitral Tribunal constituted pursuant to this agreement. Such property includes any bank account belonging to the Host State whether held in the name of a diplomatic mission or otherwise. This waiver extends to property, including bank accounts belonging to the Host State's central bank or other monetary authority.[1335]

This waiver provision is broad and will cover all States' assets, including those within the special category of protection during execution measures when voluntary compliance fails.

[1333] *Commisimpex v Republic of Congo*, Case No. 13-17751, May 13, 2015, Bullentine 2015 I No.107, J. du Droit Int'l 141; Draft Articles on Jurisdictional Immunities, at 52.

[1334] Bjorklund (n 13), at 240.

[1335] C Schreuer, *The ICSID Convention: A Commentary*, (CUP UK, 2009), at 1181.

b. Encouraging and Enhancing Voluntary Compliance with Awards

The thesis recognises that achieving voluntary compliance from the onset is vital and recommends increasing transparency and implementing an appellate mechanism under the regime for the purpose. This could also aid facilitate the coercive enforcement of awards, often hindered by immunity bars.

Increased Transparency

Admittedly, the regime has swiftly responded to the public call for increased transparency by making publicly accessible certain information and data, allowing *amicus curia* participation and publication of some aspects of arbitral proceedings. In the context of awards implementation, however, more is required. More information regarding the status of non/compliance and coercive enforcement actions in domestic courts should be made available to the public. Public knowledge of States' behaviour toward treaty obligations in this way, can spur them toward positive compliance behaviour. As Magraw and Amerasinghe expressed, transparency aids governments to implement treaty obligations with better effectiveness as fear of backlash from the public for non-compliance provides an incentive for them to act otherwise.[1336]

Of course, the contrary can happen. For example, as identified in Chapter 5, the public can pressure governments toward non-compliance with obligations. In such instances, the approach by the G20 member States to publicly 'name and shame' non-complying behaviours can be adopted by arbitral institutions. This diplomatic tool may cause reputational damage and consequently push the recalcitrant State toward compliance. Most importantly, it could help potential claimants to structure their investment with the recalcitrant States, including muscling stronger bargaining to negotiate for the inclusion of an express waiver of immunity from execution in arbitration agreements.

An Appellate Mechanism

In recommending instituting an appellate mechanism under the regime, the thesis noted the narrow scope of the existing review mechanisms and the impact these have on awards implementation under the

[1336] Magraw and Amerasinghe, (n 1208), at 351 -352.

regime. Under the current ISA framework correctness is sacrificed for finality as arbitral awards are not subject to review on substance or merit.[1337] For instance, under ICSID an allegation of error of fact or law is not grounds for annulment. So, while State parties frequently use annulment in the majority of adverse awards against them, like all parties, the possibility of not getting justice (corrected outcomes) after the utility of the procedure is a constant reality. A balance between finality and correctness is essential, and an appellate mechanism is a good suit to calibrate this.

An effective error correction feeds into subjects' sense of justice and fairness and thus enhances their perception of the legitimacy of the adjudicative process toward compliance pull, even in adverse outcomes. [1338] In the end, this safeguards finality. Meanwhile, the absence of such a mechanism nurtures an atmosphere of prolonged litigation after awards' issuance, rendering awards more susceptible to post-award attacks. As Knull and Rubin rightly pointed out, the lack of an effective appellate mechanism forces non-victorious litigants to accede their grievances to national courts to try to situate their grievances tactically into some grounds for vacatur.[1339] In other words, the lack of an effective review mechanism to address actual or perceived erroneous outcomes, causes voluntary compliance to fail and forces the losing party into constructing new and creative defence strategies to try to defeat award implementation.[1340] As the thesis has submitted, sometimes blatant refusal to comply with arbitral awards and the utility of various defences like State immunity are tactical devices to shed off unfavourable awards perceived to have been erroneously made.

In this context, taking cognisance of the current debates and proposals surrounding introducing an appellate mechanism into the current regime, the thesis recommends for policy consideration an introduction of an appellate mechanism that encompasses well-defined conditions aimed at inducing

[1337] See Articles 50 - 52 of the ICSID Convention. For instance, an allegation of error of fact or law is not grounds for annulment.

[1338] See (n 1328) and Chapter 5 for more.

[1339] Knull and Rubins (n 1242), at 542.

[1340] See CE Alfaro, 'ICSID Arbitration and Bits Challenged by the Argentine Government and its Supreme Court' (2004), 2(4) Oil, Gas & Energy Law Journal (OGEL), at 212.

compliance and securing effective enforcement of awards. Requiring the posting of a security or performance bond by the party seeking to use the appellate mechanism will be a step in the right direction. This can take the form of a bank guarantee and similar arrangements. Another condition supposed is that the party seeking the appeal process provides an express waiver of immunity regarding its assets. Consequently, if the challenge to the award failed, i.e. the appeal process ends, retaining the original award, the creditor will draw upon the security or attach the waived assets in satisfaction of the award. Conversely, if the challenge is successful, e.g. the award gets vacated, the security will be retained, or a waiver vitiated in respect of the allocated assets. The utility of the appellate mechanism based on these proposed conditions will secure compliance and coercive enforcement as well as safeguard against the process being abused or used as a tactical tool to avoid or delay implementation.

7.2 General limitations of the Research and Scope for Future Research

Due to time constraints, some important topics or approaches relevant to the study of award implementation could not be considered. Although this research has relied significantly on both theoretical and empirical data sourced from existing literature to investigate award implementation challenges and make relevant recommendations for improvement, there was significantly limited data, especially empirical data to enable the assessment of the full extent of State compliance with ISA awards and the effectiveness of coercive enforcement of the same, when voluntary compliance fails. This is a limitation that must be captured going forward in all considerations of award implementation issues.

Further, considerations of State compliance with IIAs under this research were limited to consideration of non/compliance with investment protection obligations enshrined in treaties (not investment contracts) and post-arbitration only, i.e. after the issuance of an award following successful ISA proceedings. No consideration was given to compliance with investment protection obligations in treaties prior to the initiation of ISA proceedings. In this light, the author also believes that consideration of post-award compliance-related issues should encompass analyses of what impact voluntary compliance at the regime level as well as what legal obstacles are encountered by States domestically in mobilising

funds to pay creditors in adverse outcomes, in the case of States determined to comply with their IIAs obligation.

Indeed, while the recent trend towards 'resistance' to ISA awards necessitates scholarly scrutiny into (non)compliance at the regime level, it is equally important also to investigate what States encounter domestically in implementing awards rendered against them, including specific budgetary mechanisms put forth for the diligent payment of such awards.[1341] Given constraints relating to time, this thesis has only considered the former, leaving the latter issue for future consideration.

In enhancing award implementation through the measures recommended, in particular regarding the appellate mechanism, future research must have more consideration of whether an appellate mechanism with the proposed conditions can be effectively adopted. This is because while it is noted that the current ICSID framework has entertained such kind of conditions for stay of enforcement pending annulment proceedings pursuant to Article 52 of the ICSID Convention, the practice is uncommon under the regime as a whole. In fact, some annulment committees of the ICSID jurisprudence have fought against such an approach highlighting its potential impact on the delivery of justice.[1342] Therefore, it must be thoroughly analysed whether the ISA framework can effectively adopt such conditions; this is most important given that the reform efforts are predominantly geared toward engaging a proper balance for the State's greater interests. However, with literature providing in-depth support of the benefits an appellate mechanism with such conditions could have in securing a balance between the parties' interests, especially of States interests compared to the current state of the affair, it could be argued that such an approach can be adopted. Therefore, it is essential to look at this concern in order to provide a more thorough analysis.

[1341] Such engagement could help understand State compliance behaviour in terms of wilful blatant non-compliance (for example, because of perception of illegitimacy (and injustice) of the legal processes and the outcomes thereof) and willingness to comply but delayed compliance occasioned by onerous domestic payment procedures. See AB Mansour, 'Domestic Procedures for the Payment of Damages by States in Investment Arbitration' https://www.iisd.org/itn/en/2020/06/20/domestic-procedures-for-the-payment-of-damages-by-states-in-investment-arbitration-affef-ben-mansour/ Accessed 17/12/2021.

[1342] *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (Dec. 28, 2007).

In conclusion, the research has investigated award implementation under the international investment law and investor-state arbitration (ISA) regime. It assessed whether the current ISA regime functions adequately and effectively in facilitating the successful implementation of awards. While it appraised the regime as an adjudicative success, significant limitations and challenges were noted as impacting voluntary compliance and coercive enforcement of awards. The commercial activity exception – the main exception that marks the restrictive immunity approach, thus distinguishing it from the absolute immunity approach – is difficult to ascertain given the various theoretical contextualisation and variations in state practice. In practice, the exception is unworkable and often, the application turns to favour States' interests. Facilitating effective coercive enforcement of awards goes beyond advocating for changes to the current seemingly entrenched, theoretical and practically unworkable rule of State immunity. Indeed, to facilitate coercive enforcement of awards is to enhance compliance with awards voluntarily. Arguably, lack of voluntary compliance and resort to immunity and related defence during coercive enforcement actions, are an expression of States' dissatisfaction and lack of confidence in the regime's process. Thus, it is recommended to increase transparency and introduce an appellate mechanism into the regime's process. Both measures, as argued, could enhance the perception of legitimacy, and create a sense of confidence and justice toward facilitating voluntary compliance and ultimately, coercive enforcement of awards.

Cases

National Cases

Australia

Spain v Infrastructure Services Luxembourg S.A.R.L. [2021] FCAFC 3.

Austria

Diag Human v Czech Republic, Case No. 72 E 1855/11 z-20, 21 June 2011.

Dralle v the Republic of Czechoslovakia (1950), Intl L Rep 155, 10th May 1950.

Belgium

Irak v SA Dumez, Tribunal civil, Brussels, 27 Feb. 1995 [1995] JT 565; 106 ILR 284.

M v The Democratic Republic of Congo, Fortis Bank SA, The State of Belgium and the French Community, Appeal Judgment, 2008/AR/2441.

Mabibi-Ma-Kibebi v The Democratic Republic of Congo, Fortis Bank S.A., The State of Belgium and the French Community, Appeal judgment, Case No. 2008/AR/2441, ILDC 1623 (BE 2010), 26 April 2010.

Rafidain Bank and Iraqi Ministry for Industry v Consarc Corporation Belgium, Cour d'Appel, Brussels (Eighth Chamber), 10 March 1993, ILR, vol. 106 (1997).

Re´ publique du Zaıre v d'Hoop et crts, Cour d'appel, Brussels, 8 October 1996, JT (1997) 100.

Societe pour la Fabrication de Cartouches c. Col M. Ministre de la Guerre de Bulgarie Jud 1889, Col 383; PB 1889-111-62.

Société Anonyme "Dhellemes et Masurel" v. Banque Centrale de la République de Turquie , 4 December 1963, 45 ILR 85.

Canada

USA v The PSA of Canada, the AG of Canada, and the Canada Labour Relations Board (Re Canada Labour Code), Case No. 21641, 21 May 1992, 86 ILR 626.

France

Benvenuti & Bonfant v Banque Commerciale Congolaise, Judgment of July 26, 1987, Cour d'Appel de Paris, 108 Journal Du Droit Int' 843 (1981).

Benvenuti & Bonfant v Banque Commerciale Congolaise, Judgment of July 26, 1987, Cour d'Appel de Paris, 108 Journal Du Droit International 843 (1981).

Braspetro Oil Services Company (Brasoil) v The Management and Implementation Authority of the Great Man-Made River Project, Paris Court of Appeal (France), 1 July 1999, XXIV Yearbook Com. Arb. 296 (1999).

Commisimpex v Republic of Congo, Case No. 13-17751, May 13, 2015, Bullentine 2015 I No.107, J. du Droit In'l 141.

Condor and Filvem v National Shipping Company of Nigeria, 2-15 July 1992, 33 ILM 393.
Creighton Limited v Government of the State of Qatar, The French Cour de Cassation, (6 July 2000).

Embassy of the Russian Federation et.al v Compagnie NOGA d'importation et d'exportation (NOGA), Paris Court of Appeal (10 August 2000).

Laforest v Office Commercial de l'Ambassade d'Espagne, June 5th, 1959, (1960) 87 Journal du Droit Int'l, 467.

NML Capital v Argentine Republic et al., Decision of Mar. 28, 2014, Cass civ 1re (Fr.).

Procureur de la République v SA Ipitrade International, Tribunal de grande instance, Paris, 12 Sept. 1978, [1979] Clunet 857; 65 ILR 75.

Société Eurodif v République islamique d'Iran, Cour de cassation (1st Civil Chamber), 14 Mar. 1984 [1984] Revue critique de droit international privé 644, 77 ILR 513.

Societe NML Capital v Argentine Republic, Cour de. Cassation, France, No 10–25.938, Cass civ 1 (Mar. 28, 2013).

Société Sonatrach v Migeon, Decision of Oct. 1, 1985, Cass civ 1re, 77 I.L.R. 525.

Germany

Central Bank of Nigeria, Landgericht Frankfurt, 2 December 1975, 65 ILR 131 (1984).

Empire of Iran case, German Federal Constitutional Court (30 April 1963), 45 ILR 57.

NIOC Revenues Case, Germany, (1983) 65 ILR 215, 219, Ground A.I. ILR 144.

Philippine Embassy Bank Account Case, Judgment of Dec. 13, 1977, Constitutional Court, 65 I.L.R. 146, 155.

Ghana

NML Capital Limited v Argentine Republic, Accra High Court Comm. Div., October 11, 2012, suit No RPC/343/12.

Italy

Borri v Argentine Republic, Case no. 11225, 27 May 2005 88 Rivista di Dirito Internationale 856.

Guttieres v Elmilik, Italy, Giurisprudenza Italiana, 1886-I-1-486, 487.

Morellet c. Governo Danese Giu. It. 1883-I-125, 1886.

The Netherlands

Condor and Filvem v National Shipping Company of Nigeria, 2-15 July 1992, 33 ILM 393.

Etat d'Irak v Vinci Constructions Grands Projets SA de droit franc¸ais, Cour d'appel, Brussels, 4 October 2002, JT (2003) 318.

Re´ publique du Zaı¨ re vd'Hoop et crts, Cour d'appel, Brussels, 8 October 1996, JT (1997) 100.

M v The Democratic Republic of Congo, Fortis Bank SA, The State of Belgium and the French Community, Appeal Judgment, 2008/AR/2441.

Supreme site Services GmbH and Other v Supreme HQs Allied Powers Europe (SHAPE), Case No. 200.217.388/01, June 27th, 2017.

Span

Abbott v Republic of South Africa, Spain Constitutional Court (2nd Chamber), 1 July 1992; 113 ILR 413.

Switzerland

CME v Czech Republic, Case No T8735-01, Svea Court of Appeal Decision (15 May 2003).

Liamco v Libya, Arbitral Award, 12 April 1977, 20 ILM (1981) 1.

Libya v LIAMCO, Switzerland, (1980) BGE 106 IA 142, 148, Ground 3b; 62 ILR 228, 234.

Lybian Arab Socialist People' Jamahiriya v Actimon SA Judgement of April 24, 1985, Federal Tribunal, 82 I.L.R. 30. 31.

Moscow Centre for Automated Traffic Control v Geneva Supervisory Commission of the Debt Office, Judgement of August 15, 2007.

Swiss Federal Tribunal, BGE 116, II, 634 (11 November 1990).

United Kingdom

AIG Capital Partners Inc and Another v Republic of Kazakhstan [2005] EWHC 2239 (Comm).

Alcom Ltd v Republic of Colombia [1984] AC 580.

Alcom Ltd v Republic of Colombia: HL 1984, 2 Lloyds Rep 24, [1984] 2 All ER 6.

Compagnie Europeene De Cereales S.A. v Tradax Export S.A. [1986] 2 Lloyd's Rep. 301.

Dimes v Proprietors of Grand Junction Canal (1852) 3 H.L. Cas. 759.

Federal Republic of Nigeria v Process & Industrial Developments Limited [2020] EWHC 2379 (Comm).
I Congreso del Partido CA ([1978] QB 500).

Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) & Others [2006] UKHL 26.

Kuwait Airways Corp v Iraqi Airways Co [1995] 1 WLR 1147, 1158E-1160F.

Micula and others v Romania [2020] UKSC 5.

Process And Industrial Developments Limited v Federal Republic of Nigeria [2019] EWHC 2241 (Comm).

Process and Industrial Dev. Ltd. v The Ministry of Petroleum Resources of the Federal Republic of Nigeria, Final Award, (Jan. 31, 2017).

R v Sussex Justices, Ex parte McCarthy [1924] EWHC 1 KB 256.

SerVass Incorporated v Rafidian Bank & Others, [2012] UKSC 40.

Taurus Petroleum Limited v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq [2017] UKSC 64.

The Charkieh, 4 High Court of Admiralty & Ecc. 59, 59 (1873).

The Parlement Belge, (1880) LR 5 PD 197.

Trandex Tradding Corp. v Central Bank of Nigeria, Jan.13, 1977, [1977] QB 529.
Veteran Petroleum Limited v The Russian Federation [2021] EWHC 894.

Viorel Micula and others v Romania and European Commission (Intervener) [2017] EWHC 31 (Comm), Bus LR 1147.

Yukos Universal Limited v The Russian Federation [2021] EWHC 894.

Yukos Capiral Sarl v OJSC Oil Co Rosneft [2014] EWHC 2188 (Comm).

United States of America

Af-Cap Inc. v Chevron Overseas (Congo) Ltd., 475 F.3d. 1080 (9th Cir. 2007) 1087.

Aurelius Capital Partners, LP v Argentine Republic, 584 F.3d 120, 130 (2d Cir. 2009), cert. denied, 130 S. Ct. 1691 (2010).

Aurelius Capital Partners, LP v Argentine Republic, 584 F.3d 120, 130 (2d Cir. 2009), cert. denied, 130 S. Ct. 1691 (2010).

Aurelius Capital Partners, LP v Argentine Republic, 584 F.3d 120, 130 (2d Cir. 2009).

Blue Ridge Investments LLC v Argentine Republic, Memorandum of Opinion & Order, 10 Civ 153 (SDNY September 30, 2012).

Certain Underwriters at Lloyd's, London v. Argonaut Inc. Co., 264 F.Supp.2d 926 (N.D. Cal. 2003).

Colella v Argentine Republic, May 29th, 2007, 2007 WL., US District Court for the Northern District of Col.).

Connecticut Bank of Commerce v Republic of Congo, 309 F.3d 240 (2002).

Creighton Ltd v Government of the State of Qatar, 181 F 2d 118, 125-6 (DC Cir 1999).

Crystallex Int'l Corp. v Bolivarian Republic of Venezuela, No. 17-mc-151-LPS, 2018 WL 3812153 (D. Del. Aug. 10, 2018).

Ct. Bank of Commerce v. Republic of Congo, 309 F.3d 240 (5th Cir. 2002).

EM Ltd. v Argentine Republic 695 F.3d 201 (2d Cir. 2012).

Empire of Iran, German Federal Constitutional Court, 45 ILR 57 (1963).

Etat d'Irak v Vinci Constructions Grands Projets SA de droit franc¸ais, Cour d'appel, Brussels, 4 October 2002, JT (2003).

Export-Import Bank of the Republic of China v Grenada, F 3d WL 4773451 C.A.2 (2014).

Federal Court of Germany, Decision of 4 July 2013 (Bundesgerichtshof Beschluss vom 4. Juli 2013), VII ZB 63/12.

FG Hemisphere Assocs., LLC v République du Congo, 455 F.3d 575, (5th Cir. 2006).

Firebird Global Master Fund II Ltd v Republic of Nauru [2014] NSWCA 360.

First National City Bank v Banco Para El Comercio Exterior de Cuba 462 U.S. 611 (1983).

FleetBoston Financial Corporation v Alt, 638 F.3d 70, 79 (1st Circuit Court 2011).

GIE La Reunion Aerienne v Libyan Arab Jamahiriya, September 19th, 2012, 898 F.Supp.2d 301 (D. Mass. 2012)

Global Master Fund II Ltd v Republic of Nauru [2014] NSWCA 360.

Loewen Group Inc. v USA (2003) 42 ILM 811.

Gold Reserve Inc., v Bolivarian Republic of Venezuela, No. 1:14-2014-JEB. US District Court of Columbia.

Hercaire v Argentine Republic, US, 821 F.2d 559, 565 (11th Cir. 1987); 98 ILR 48.

Hercaire Intern., Inc. v. Argentina, U.S.D.Ct, S.D. Florida, Miami Div., May 7, 1986 642 F. Supp., 126.

Kuwait Airways Corp v Iraqi Airways Co [1995] 1 WLR 1147, 1158E-1160F.

Letelier v Chile, US, 748 F.2d 790, 794–795 (2nd Cir. 1984).

Liberia Eastern Timber Corporation v Liberia, The District Court for the Southern District of New York, 650 F. Supp. 73 (1986).

Liberian E. Timber Corp. v Government of the Republic of Liberia, 659 F. Supp. 606, 610 (D.D.C. 1987).

Libyan American Oil Company (LIAMCO) v Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980).

Malewicz v City of Amsterdam, 362 F. Supp. 2d 298 (D.D.C. 2005).

Maritime International Nominees Establishment (MINE) v Republic of Guinea, 505 F.Supp. 141 (D.D.C. 1981).

NML Capital, Ltd. v. Banco Central de la República Argentina, US Court of Appeals for the Second Circuit 652 F.3d 172, 193-94, 5 July 2011.

O'Keefe v The Loewen Group, Inc., 91-67-423 (Cir. Ct. Hinds Co., Miss. 1995).

Peterson v Islamic Republic of Iran, 627 F.3d 1117, 1125 (9th Cir. 2010).

Process and Indus. Dev., Ltd. v. Fed. Republic of Nigeria, 506 F.Supp.3d 1, 6–11 (D.D.C. 2020).

Process And Industrial Developments Limited v Federal Republic of Nigeria, Court of Appeals, Dist. of Columbia Circuit 2020.

Process and Industrial Developments Limited v Federal Republic of Nigeria and Ministry of Petroleum Resources of The Federal Republic of Nigeria, Appellants. No. 18-7154.US Court of Appeals, (D.C. Cir. October 4, 2019).

Re Rivera Torres, 432 F.3d 20, 23–24 (1st Cir.2005).

Argentine Republic v Weltover, 504 U.S. 607, 614 (1992).

Rubin v Islamic Republic of Iran,637 F.3d 783 (7th Cir. 2011).

The schooner Exchange v McFadden, 24 Feb. 1812, 11 US 116 (1812).

United Arab Republic v Mrs X, Judgment of Feb. 10, 1960, Federal Tribunal, 65 ILR 385.

United Mexican States v Metalclad, Reasons for Judgment (2 May 2001) (2001) BCSC 664.

Universal Trading and Investment Co v Bureau for Representing Ukrainian Interest in International and Foreign Courts US, September 19th, 2012, 898 F.Supp.2d 301 (D. Mass. 2012).

Universal Trading and Investment Co v Bureau for Representing Ukrainian Interest in International and Foreign Courts, August 12th, 2013, 727 F.3d 10 (1st Cir. 2013).

Verlinden B.V. v Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980).

Victory Transport Inc. v Comisaria General de Abastacimientos y Transportes, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965).

Walker Int'l Holdings Ltd. v Republic of Congo, 395 F.3d 229, 233–34 (5th Cir. 2004).

Weston Compagnie de Finance et d'Investissement, S.A. v La Republica del Ecuador, 823 F. Supp 1106 (SDNY 1993).

Worldwide Minerals, Ltd. v Republic of Kazakhstan, 296 F.3d 1154 (D.C.Cir.2002).

International Cases

ECHRs/CJEU

Achmea BV v Slovak Republic (Achmea). CJEU Case No. C-284/16, ECLI:EU:C:2018:158.

Al-Adsani v United Kingdom, ECtHR Application No. 35763/97, Judgment, 21 November 2001 General Court of European Union.

Ioan Micula and others v European Commission, Cases T-624/15, T-694/15 and T-704/15, Judgment of the General Court (18 June 2019).

ICJ

Barcelona Traction, Light and Power Co. Case (Belgium v. Spain) [1970] ICJ Rep.3

Certain Norwegian Loans, (France v Norway) Judgment, 1957 ICJ 9 (July 6).

Jurisdictional Immunities of the State, (Germany v Italy), ICJ Reports (2012) 99.

ICSID

ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary (Award, 2 October 2006) ICSID Case No. ARB/03/16.

Amco Asia Corp. v Indonesia, ICSID (W Bank) ARB/81/1(1990).

Amco Asia Corporation and others v Republic of Indonesia, ICSID Case No ARB/81/1, Decision on Annulment (16 May 1986).

Azurix Corp. v The Argentine Republic, ICSID Case No. ARB/01/12, (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (Dec. 28, 2007).

Azurix Corp. v The Argentine Republic, ICSID Case No. ARB/01/12, (Annulment Proceeding).

Bayview Irrigation District and Others v United Mexican States, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007.

Bear Creek Mining Corporation v Republic of Peru, Procedural Order No 1, para 21.6 (ICSID Case No ARB/14/21).

Biwater Gauff (Tanzania) Ltd v Tanzania, ICSID Case No. ARB/05/22 - Procedural Order No 3 of 29 September 2006.

BSG Resources Limited v Republic of Guinea [ICSID Case No. ARB/14/22]

Cable Television of Nevis, Ltd. and Cable Television of Nevis Holdings, Ltd. v Federation of St. Kitts and Nevis, ICSID Case No. ARB/95/2, Award, 13 January 1997.

CDC Group plc v Republic of Seychelles, ICSID Case No ARB/02/14, Decision on Annulment (29 June 2005).

CMS Gas Transmission Co. v Argentine Republic (Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 Sept. 2007) ICSID Case No. ARB/01/8.

CMS Gas Transmission Co. v The Argentine Republic (note 68) cf. LG&E v The Argentine Republic, ICSID Case No. ARB/02/01 (2007) 16 ILM 36.

CMS Gas Transmission Co. v The Argentine Republic, ICSID Case No. ARB/01/08 (2003), and Decision on annulment (25 September 2007).

CMS Gas Transmission Co. v The Argentine Republic, ICSID Case No. ARB/01/08 (2003).

CMS Gas Transmission Co. v The Argentine Republic, ICSID Case No. ARB/01/08 (2003).

CMS Gas Transmission Company v Argentine Republic (ICSID Case No. ARB/01/8) Annulment Decision, 25 September 2007.

CMS Gas Transmission Company v Argentine Republic ICSID Case No ARB/01/8, Decision on Annulment (25 September 2007).

CMS Gas Transmission Company v Argentine Republic, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules) (Sept. 1, 2006).

CMS Gas Transmission Company v Argentine Republic (Award, 12 May 2005) ICSID Case No. ARB/01/8, [2005].

Compan˜ı´a de Aguas del Aconquija and Vivendi Universal v. Argentine Republic, ICSID Case No ARB/97/3, Decision on Annulment (10 August 2010).

Companıa de Aguas del Aconquija and Vivendi Universal v Argentine Republic, ICSID Case No ARB/97/3, Decision on Annulment (10 August 2010).

Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 35 (Nov.4 2008).

Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentina, ICSID Case No. ARB/97/3, Respondent's Letter Regarding Stay of Enforcement (Nov. 28, 2008).

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic (ICSID Case No. ARB/97/3) (Annulment Proceeding).

Corp. Ponderosa Asset, L.P. v Argentine Republic (Award, 22 May 2007) ICSID Case No. ARB/01/3.

Crystallex International Corporation v. the Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2.

Decision on the Application for Annulment (23 December 2010).

Eiser Infrastructure Ltd v Spain [2020] FCA 157.

Engra, ICSID Case No. ARB/81/2, Decision on Annulment (3 May 1985).

Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic, ICSID Case No. ARB/01/3 (October 7, 2008).

Enron Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No. ARB/01/3, Decision Stay of Enforcement of the Award (October 7, 2008).

Enron Corporation and Ponderosa Assets, LP v Argentine Republic, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (October 7, 2008).

Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines, ICSID Case No ARB/03/25.

Funnekotter v Republic of Zimbabwe ICSID Case No ARB/05/6, Award (2009).

Infrastructure Services v Spain, ICSID Case No. ARB/13/31.

Ioan Micula and others v Romania, ICSID Case No ARB/05/20, Decision on Annulment (26 February 2016).

Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Award, 11 December 2013.

Klöckner Industrie-Analagen v Republic of Cameroon (Klöckner I) ICSID Case No. ARB/81/2, Decision on annulment (3 May 1985), 2 ICSID Rep 95 (1994).

Klöckner Industrie-Anlagen GmbH v Cameroon, ICSID (W Bank) ARB/81/2 (1985).

LG&E Energy Corp. v Argentine Republic (Decision on Liability, 3 Oct. 2006) ICSID Case No. ARB/02/1, [2006]

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Jurisdiction on 30 April 2004.

LG&E v The Argentine Republic, ICSID Case No. ARB/02/01 (2007) 16 ILM 36.

Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia, ICSID Case No. ARB/83/2, Award, 31 March 1986, (1994) 2 ICSID Rep 346.

Maritime International Nominees Establishment v Republic of Guinea ICSID Case No ARB/84/4, Decision on Annulment (22 December 1989).

Mobil Corp. v Bolivarian Republic of Venezuela, ICSID Case No ARB/07/27, Decision on Jurisdiction (June 10, 2010).

MTD Equity Sdn Bhd. & MTD Chile SA v The Republic of Chile, ICSID Case No ARB/01/7, Decision on Annulment (21 March 2007).

S.A.R.L. Benvenuti & Bonfant v People's Republic of the Congo, ICSID Case No. ARB/77/2 Award, 15 August 1980.

Sempra Energy International v Argentine Republic (Award, 28 Sept. 2007) ICSID Case No. ARB/02/16.

Sempra Energy International v Argentine Republic ICSID Case No. ARB02/16, Decision on annulment (29 June 2010).

SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan ICSID Case No. ARB/01/13 (2003) 42 ILM 1290.

SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan, ICSID Case No. ARB/01/13 (2003) 42 ILM 1290.

SGS Société Générale de Surveillance S.A. v Republic of the Philippines (Decision on Objections to Jurisdiction, 29 January 2004) ICSID Case No. ARB/02/6.

SGS Société Générale de Surveillance S.A. v Republic of the Philippines ICSID Case No. ARB/02/6 (2004).

SGS Société Générale de Surveillance S.A. v Republic of the Philippines, ICSID Case No. ARB/02/6 (2004).

Siemans v The Argentine Republic ICSID Case No. ARB/02/8 (2007).

Siemens A.G. v Argentine Republic, ICSID Case No. ARB/02/8 (June 2, 2008).

Siemens AG v Argentine Republic, ICSID Case No. ARB/02/8, Annulment Decision (June 2, 2008).

Siemens AG v Argentine Republic, ICSID Case No. ARB/02/8, Argentina's Response to the Submission by the United States of America to the ad hoc Annulment Committee (June 2, 2008).

SOABI v Senegal, Cour de cassation, Judgment, 11 June 1991, 2 ICSID Reports.

Socie´te´ Ouest Africaine des Be´tons Industriels v Senegal, ICSID Case No ARB/82/1, Award, 2 ICSID Rep 190 (1994).

Suez, Sociedad General de Aguas de Barcelona SA and InterAguas Servicios Integrales del Agua SA v The Argentine Republic, ICSID Case No. ARB/03/17.

Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v The Argentine Republic, ICSID Case No. ARB/03/19.

The Renco Group Inc v Republic of Peru, Procedural Order, ICSID Case No UNCT/13/1.

Tidewater Investment SRL and Tidewater Caribe, CA v Bovarian Republic of Venezuela, ICSID Case No. ICSID Case No. ARB/10/5.

Tidewater Investment SRL and Tidewater Caribe, CA v Bovarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment (27 December 2015).

UP (formerly Le Cheque Dejeuner) and CD Holding Internationale v Hungary, ICSID Case No. ARB/13/35 [Up v Hungary].

Urbaser SA v Argentine Republic (ICSID Case No. ARB/07/27) (Decision on Proposal to Disqualify).

Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1.

Victor PeyCasado v Chile, ICSID Case No ARB/98/2, Decision on Application for Annulment (18 December 2012).

Vivendi Universal S.A. v Argentine Republic, ICSID Case No. ARB/97/3.

Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 Decision (Annulment Proceeding).

UNCITRAL

AWG Group Ltd. v The Argentine Republic (UNCITRAL 1978).

CME Czech Republic B.V. v Czech Republic, Ad hoc – UNCITRAL Arbitration Rules, Partial Award of 13 September 2001 and IIC 62 (2003), Final Award of 14 March 2003.

Lauder v Czech Republic, Final Award, 3 September 2001 (Ad hoc- UNCITRAL Arbitration Rules).

Walter Bau AG (in liquidation) v Kingdom of Thailand, Award (UNCITRAL Arbitration July 1, 2009).

PCA

Hulley Enterprises Limited (Cyprus) v The Russian Federation PCA Case No. AA 226, Award, 18 July 2014.

Iberdrola, S.A. and Iberdrola Energia. S.A.U. v Bolivia (PCA Case No. 2015-05).

Veteran Petroleum Ltd v Russian Federation, PCA Case No. AA 228, Award, 18 July 2014.

Yukos Universal Ltd v Russian Federation, PCA Case No. AA 227, Award, 18 July 2014.

SCC

Sedelmayer v Russian Federation, Arbitration Award (ad hoc arbitration SCC July 7, 1998).

Petrobart Ltd. v Kyrgyz Republic, Arbitration No 126/2003, Award II (Arbitration SCC Mar. 29, 2005), 13 ICSID Rep. 387 (2008).

PCIJ

Mavrommatis Palestine Concessions (Greece v UK) [1924] PCIJ Rep. Ser. A No 2, 12. (August 30).

Panevezys-Saldutiskis Railway (Est. v Lith.), 1939 PCIJ (ser. A/B) No. 76 (Feb. 28).

SCC

Mr Franz Sedelmayer v The Russian Federation Procurement Department of the President of the Russian Federation, SCC, Arbitration Award (7 July 1998).

Petrobart Limited v The Kyrgyz Republic, SCC Case No 126/2003.

ITLOS

ARA Liberdad (Argentine Republic v Ghana), ITLOF Case No. 20 Order for prescription of provisional measures, (Dec. 15).

Klockner v Cameroon, Decision on Annulment, 3 May 1985.

Mobil Oil v New Zealand, Findings on Liability, Interpretation and Allied Issues, 4 May 1989.

Legislations, Treaties and Related Materials

Argentina-United States: Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Washington, November 14, 1991, 31 I.L.M. 124 (1992).

Association of South-East Asian Nations Comprehensive Investment Agreement, Central American-Dominican Republic Free Trade Agreement (DR-CAFTA) 2004, 43 ILM 514 (2004).

Brazil Model BITs.

Canada Model BITs.

Canada Sovereign Immunity Act of 1982, R.S.C., 1985, c. S-18.

Canada–EU Comprehensive Economic and Trade Agreement (CETA) revised 29 February 2016.

Central American-Dominican Republic Free Trade Agreement (DR-CAFTA) 2004, 43 ILM 514 (2004).

Declaration on Permanent Sovereignty Over Natural Resources (1962) UN General Assembly Resolution 1803, 14 December 1962 UN Doc. A/5217.

UN General Assembly, 3201 (S-VI). Declaration on the Establishment of a New International Economic Order, 1 May 1994, A/RES/3201(S-VI).

Draft Articles on Responsibility of States for Internationally Wrongful Acts November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

Energy Charter Treaty (ETC) 1994, 2080 UNTS 95.

ICSID, Documents Concerning the Origin and The Formulation of the Convention Vol. II, At 304 (1968).

International Centre for Settlement of Investment Disputes. *Possible Improvements of the Framework for ICSID Arbitration*. ICSID Secretariat, 2004 ICSID Secretariat Discussion Paper (October 22, 2004).

Japan – Acts on Civil Jurisdiction over Foreign States (JACJFS) 2010, 53 JYBI.

Ley Oreganica 16/2015 de 27 de Octubre, sobre Privilegios e Inmunidades de los Estados Extranjeros, las Organizacions Internacionales con sede u Oficina en Espana y las Conferencias y Reuniones Internacionales Celebradas en Espana (2015).

New Indian Model BITs.

North American Free Trade Agreement (NAFTA) 1992, 32 ILM 289, 605 (1993).

Russia Federation Federal Law No. 397-FZ (2015).

Sixth Annual Conference on Investment Treaties The Future of Investment Treaties (March 29, 2021) at https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf.

The Council of European Declaration on Jurisdiction Immunities of State-Owned Cultural Property https://www.coe.int/en/web/cahdi/news-cahdi/-/asset_publisher/FL6bNvghtkKV/content/declaration-on-jurisdictional-immunities-of-state-owned-cultural-property?_101_INSTANCE_FL6bNvghtkKV_viewMode=view/>.

The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act of 2016 https://www.congress.gov/bill/114th-congress/house-bill/6477.

Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.- Arg., Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1993).

UN General Assembly Resolution 3201, 1 May 1974 UN Doc. A/RES/S-6/3201 Draft Articles on Diplomatic Protection (2006).

Books and Books Chapters

Aalberts T and Gammeltoft-Hansen T (eds) *The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (CUP, 2017).

Alexandrov AS & Laird IA, 'Compliance and Enforcement' in Muchlinski P et al., (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008).

Alexandrov AS, 'Enforcement of ICSID Awards: Article 53 and 54 of the ICSID Convention' in C Binder et al., eds., *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, 2009).

Amerasinghe CF, *Local Remedies in International Law* (2nd Edn. CUP, 2004).

Amirfar C, 'Waivers of Jurisidctional Immunity' in T Ruy et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP, 2019).

Arroyo M, *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law Int'l. BV, 2018).

Badr GM, *State immunity: An Analytical and Prognostic View* (Vol. 5. Martinus Nijhoff Publ., 1984).

Balthasar S, *International Commercial Arbitration: International Conventions, Country Reports and Comparative Analysis* (Bloomsbury Publis., 2016).

Banifatemi Y, 'Defending Investment Treaty Awards: Is There an ICSID Advantage?' in AJV den Berg (ed), *50 Years of The New York Convention, ICCA Congress Series No 14* (Kluwer, 2009).

Banifatemi Y, 'Jurisdictional Immunity: Commercial Activity Transaction' in T Ruy et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP, 2019).

Bankas EK, *The State Immunity Controversy: Private Suits against Sovereign States in Domestic Courts* (Heidelberg: Springer, 2010).

Behn D, 'Performance of Investment Treaty Arbitration' in Squatrito T et al., (eds), *The Performance of International Courts and Tribunals* (CUP, 2018).

Berger A, 'Investment Rules in Chinese PTIAs–A Partial "NAFTA-ization,"' in Hofmann R et al., (eds) *The Rise of Preferential Trade and Investment Agreements: Bridging the Gap?* (NV mbH & Co. KG, 2013).

Bernini G and Berg AJV, 'The Enforcement of Arbitral Awards against a State: The Problem of Immunity from Execution' in JDM Lew (eds), *Contemporary Problems in International Arbitration* (Queen Mary College, UK 1996).

Bishop, DR, *Enforcement of Arbitral Awards against Sovereigns* (Juris Publishing, Inc., 2009).

Bjorklund AK, 'The Continuing Appeal of Annulment: Lessons from AMCO Asia and CME' in T Weiler (ed), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005).

Bjorklund AK and Vanhonnaeker L, 'Stays of Enforcement Pending Annulment and Set-Aside Proceedings in Investment Arbitration' in J Fouret (ed) *Enforcement of Investment Treaty Arbitration Awards* (Globe Bus. Publ., 2015).

Bjorklund AK, 'State Immunity and the Enforcement of Investor-State Arbitral Awards' in C Binder et al., (eds) *International Investment Law for the 21st Centur: Essays in Honour of Christopher Schreuer* (OUP, 2009).

Blackaby N et al., Redfern and Hunter on International Arbitration (6th edn., OUP, 2009).

Bodansky D et al., 'Legitimacy in international law and international relations' in *Interdisciplinary perspectives on international law and international relations: The state of the art* (2013).

Borchard E, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publ. Co., 1915).

Born GB, *International Arbitration: Cases and Materials* (Kluwer Law Int'l., 2011).

Born GB, *International Commercial Arbitration* (2nd Edn. Kluwer Law Int'l BV, 2014).

Born GB, *International Commercial Arbitration: Commentary and Materials* (2nd Edn. Transnat'l Publ., 2001).

Bradley CA, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford Handbooks, 2019).

Brower CN et al., 'The Saga of CMS: Res Judicata, Precedent, and the Legitimacy of ICSID Arbitration' in C Binder et al., (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Scheuer* (OUP, 2009).

Brownlie I, *Principles of Public International Law* (8th Edn. OUP, 2012).

Brownlie I, *Principles of Public International Law* (7th Edn. OUP, New York 2008).

Bull H, *The Anarchical Society: A Study of Order in World Politics* (NY: Col. Univ. Press, 1977).

Bull H, *The Anarchical Society: A Study of Order in World Politics* (Macmillan Int'l, 2012).

Bungenberg M and Reinisch A, 'Recognition and Enforcement of Decisions' in *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (Springer Cham., 2018).

Caron D and Shirlow E, 'Dissecting Backlash: The Unarticulated Causes of Backlash and Its Unintended Consequences' in A Follesdal and G Ulfstein (eds), The Judicialization of International Law: AMixed Blessing? (OUP, 2018).

Carver JP, 'The Strengths and Weaknesses of International Arbitration involving a State as a Party: Practical Implications' in *Contemporary Problems in International Arbitration* (Springer, Dordrecht 1987).

Chamlongrasdr D, *Foreign State Immunity and Arbitration* (Cameron May, London 2007).

Chayes A and Chayes AH, *The New Sovereignty Compliance with International Regulatory Agreements* (HUP, 1998).

Chayes A et al., 'Managing Compliance: A Comparative Perspective', in EB Weiss et al., (eds), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 1998).

Chazournes De LB, 'Parallel and Overlapping Proceedings in International Economic Law: Towards an Ordered Co-existence' in *International Law and Litigation* (NV mbH & Co. KG, 2019).

Chernykh Y, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' in SW Schill et al., (eds) *International Investment Law and History* (Edward Elgar Publ., 2018).

Coop G et al, 'Sovereign Immunities and Investor-State Awards: Specificities of Enforcing Awards based on Investment Treaties' in J Fouret, (ed) *Enforcement of Investment Treaty Arbitration Awards* (London: Globe Bus. Publ., 2015).

Crawford CJ, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2005).

Cymrot MA, 'Enforcing Sovereign Arbitral Awards - Sate Defence and Creditors Strategies in an Imperfect World' in, T Ruys, et al (eds), *The Cambridge Handbook of Immunities and International Law* (CUP, 2019).

Damrsoch LF, 'The Sources of Law of State Immunity' in T Ruys, et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP, 2019).

De Palma 'NAFTA Powerful Little Secrets: Obscure Tribunal Settle Dispute but Go Too Far Critics Say', in AD Mestral (ed), *Second Thoughts: Investor State Arbitration Between Developed Democracies* (MQUP, 2017).

Denza E, *Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations* (3rd Edn OUP, UK 2007).

Derains Y and Schwamz E, *A Guide to The New ICC Rules of Arbitration* (Kluwer Law Int'l, 2005).

Devaney M, The Remedies Stage of the Investment Treaty Arbitration Process: A Public Interest Perspective (QMU, 2015).

Dugan CF, *Investor–State Arbitration* (OUP, 2008).

Freyer DF, 'Attachment of Debts Owed to Sovereigns' in Bishop DR (eds), *Enforcement of Arbitral Awards Against Sovereigns* (Jurisnet, New York, 2009).

Dimsey M, *The Resolution of International Investment Disputes: International Commerce and Arbitration* (Eleven Int'l Publ., 2008).

Dolzer R and Schreuer C, *Principles of International Investment Law* (OUP, 2008).

Dolzer R and Schreuer C, *Principles of International Investment Law* (2nd edn, OUP, 2012).

Dolzer R and Stevens M, *Bilateral Investment Treaties* (Martinus Nijhoff Publ., 1995).

Dopagne F, 'Waivers of Immunity from Execution' in T Ruys et al (eds), *The Cambridge Handbook of Immunities and International Law* (CUP 2019).

Finnemore M, 'Constructing Norms of Humanitarian Intervention' in Peter J Katzenstein (eds), *The Culture of National Security: Norms and Identity in World Politics* (NY: Col. Univ. Press, 1996).

Finnemore M, *The Purpose of Intervention: Changing Beliefs about the Use of Force* (Corn. Uni. Press, 2004).

Fisher R, *Improving Compliance with International Law* (Charlottesville: Univ. Virg. Press, 1981).

Fox H, 'Sovereign Immunity and Arbitration' in JDM Lew (eds), *Contemporary Problems in International Arbitration* (Queen Mary College, London 1996).

Fox H, 'The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status' in T Ruys et al., (eds), *The Cambridge Handbook of Immunities and International Law* (CUP, 2019).

Fox H, QC and Webb P, *The Law of State Immunity* (OUP, 2013).

Franck TM, *Fairness in International Law and Institution* (Oxford: Clarendon Press, 1995).

Franck TM, *The Power of Legitimacy Among Nations* (OUP, 1990).

Gaillard E and Banifatemi Y (eds), *IAI Series on Int'l Arbitration No. 1, Annulment of ICSID Awards* (Juris Publis. 2004).

Gaillard E and Fouchard SJ, *Goldman on International Commercial Arbitration* (Kluwer Law, 2001).

Gallard E and Bermann GA, *Guide on Convention on The Recognition and Enforcement of Foreign Arbitral Awards New York* (Brill Nijhoff, 2017).

Garrett G and Weingast BR, 'Ideas, interests, and institutions: constructing the EC's internal Market' in J Goldstein and RO Keohane (eds) *Ideas and Foreign Policy* (Cornell Univ. Press, 1997).

Gattini A, 'The International Customary Law Nature of Immunity from Measures of Constraint for State Cultural Property on Loan' in Buffard I et al., (eds) *International Law between Universalism and Fragmentation Festschrift in Honour of Gerhard Hafner* (Brill Nijhoff, 2008).

Grotius H, 'De Jure Belli ac Pacis Tres (1625), [English translation: 'On the Law of War and Peace'] reprinted (Kessinger Publ. 2010).

Guido ST, 'Binding Force and Enforcement of ICSID Awards: Untying Articles 53 and 54 of the ICSID Convention in AJV den Berg (ed), *50 Years of The New York Convention, ICCA Congress Series* No 14 (Kluwer, 2009).

Hanotiau B and Caprasse O, 'The Review of Arbitral Awards by Domestic Courts: Introductory Report' in Emmanuel Gaillard (ed), *The Review of International Arbitral Awards* (Juris Publ., 2010).

Happold M, 'Immunity from Execution of Military and Cultural Property' in T Ruys et al., (eds), *Cambridge Handbook of Immunities and International Law* (CUP, 2019).

Harten GV, 'Investment Treaty Arbitration, Procedural Fairness and the Rule of Law' in Stephan Schill (eds) *International Investment Law and Comparative Public Law* (OUP, 2010).

Heller H, *Sovereignty: A Contribution to the Theory of Public and International Law* (OUP, 2019).

Henkin L, *How Nations Behave* (Col. Univ. Press, 1979).

Hindelang S and Krajewski M, *The Shifting Paradigms in International Investment Law, A More Balanced, Less Isolated, Increasingly Diversified* (OUP, 2016).

Hirsch M, *Invitation to The Sociology of International Law* (OUP, 2015).

Ho J, *State Responsibility for Breaches of Investment Contracts* (CUP, 2018).

Hunter R, *The Law of Arbitration in Scotland* (2nd edn. Butterworths, 2002).

Jeswald WS, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP, 2013).

John TS, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (OUP, 2018).

Joubin-Bret A, 'The Effectiveness of the ICSID mechanism regarding the enforcement of arbitral awards' in J Fouret (eds), *Enforcement of Investment Treaty Arbitration Awards* (Globe Law and Bus., 2015).

Kaufmann-Kohler G, 'Is Consistency a Myth?' in E Gaillard and Y Banifatemi (eds), *Precedent in International Arbitration* (Juris Publish., 2008).

Kaufmann-Kohler G and Potestà M, *Investor-State Dispute Settlement and National Courts. Current Framework and Reform Options* (Springer, 2020).

KH Bockstiegel, 'States in the International Arbitral Process', in JDM Lew (eds), *Contemporary Problems in International Arbitration* (Queen Mary College, UK 1996).

Kalicki JE and Joubin-Bret A (eds) *Reshaping the Investor-State Dispute Settlement System* (Brill Leiden, 2015

Koppell JGS, World Rule: *Accountability, Legitimacy, and the Design of Global Governance* (UCP, 2010).

Lalive P, 'Enforcing Awards', in Sixty Years of ICC Arbitration (ICC Publ., 1984).

Landes DS, *The Wealth and Poverty of Nations* (Hachette UK, 2015).

Langford M et al., 'Backlash and State Strategies in International Investment Law' in T Gammeltoft-Hansen and T Aalberts (eds), *The International Investment Regime: The Changing Practices of International Law: Sovereignty, Law and Politics in a Globalising World* (CUP, 2018).

Lew JDM et al., (eds) *Comparative International Commercial Arbitration* (Kluwer Law Int'l BV 2003).

Lind EA and Tyler TR, *The Social Psychology of Procedural Justice* (Springer Science & Business. Mediation, 1988).

McConville S and Chui WH, *Research Methods for Law*, (EUP, Edinburgh, 2010).

McDougal MS, 'Foreign Sovereign Immunities Act of 1976: Some Suggested Amendments' in ML Landwehr (eds), *Private Investors Abroad - Problems and Solutions in International Business* (NY, Bender, 1981).

Merrills J, *International Dispute Settlement* (5th Edn., CUP, 2011).

Mistelis LA, *Concise International Arbitration* (2nd Edn. Wolters Kluwer, 2010).

Morgenthau HJ et al., *Politics Among Nations: The Struggle for Power and Peace* (New York, Knopf, 6th edn. 1985).

Moses ML, *The Principles and Practice of International Commercial Arbitration* (CUP, 2017).

Musa RB and Polasek M, 'The Origins and Specificities of the ICSID Enforcement Mechanism, Enforcement of Investment Treaty Arbitration Awards: A Global Guide' (2015) in J Fouret (ed) *Enforcement of Investment Treaty Arbitration Awards* (Globe Bus. Publ., 2015).

Musa RBH and Polasek M, 'The Origins and Specificities of the ICSID Enforcement Mechanism' in J Fouret (ed) *Enforcement of Investment Treaty Arbitration Awards* (Globe Bus. Publ., 2015).

Newcombe AP, and Paradell L, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law Int'l BV, 2009).

Newmark C, 'Controlling Time and Costs in Arbitration' in C Newmark (eds), *Leading Arbitrators Guide* (Juris Publis. NY, 2006).

Nollkaemper A, Reinisch A, Janik R, Simlinger F, (edn) *International Law in Domestic Courts: A Casebook* (OUP, 2019).

O'Connell ME, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (OUP, 2008).

Oeter S, 'The Law of Immunities as a Focal Point of the Evolution of International Law' in A Peters et al., (eds) Immunities in The Age of Global Constitutionalism, (Martinus Nijhoff Publishers, 2015).

O'Keefe et al., *The United Nations Convention on Jurisdictional Immunities of States and their Property: A Commentary* (OUP, 2013).

Okeke EC, *Jurisdictional Immunities of States and International Organizations* (OUP, 2018).

Oppenheimer JA, *Rational Choice Theory, The Sage Encyclopaedia of Political Theory* (London Sage Publications, 2008).

Orakhelashvili A, 'Explaining the Gestionis v Jus Imperii' in T Ruy et al (eds), The Cambridge Handbook of Immunities and International Law (CUP, 2019).

Ortino F et al., (eds), *Investment Treaty Law: Current Issues* (British Inst. Int'l and Comp. Legal Stud., 2006).

Ortino F et al., (eds.) *Investment Treaty Law: Current Issues Volume II: Nationality and Investment Treaty Claims, Fair and Equitable Treatment in Investment Treaty Law*. (Vol. 2. BIICL, 2007).

Park WW, 'Arbitrator Integrity' in M Waibel et al., (eds) *The Backlash against Investment Arbitration: Perception and Reality* (London: Kluwer Law Int'l, 2010).

Paulsson J (ed) *International Handbook on Commercial Arbitration* (Kluwer Law, 2004).

Penusliski IM, 'A dispute system design diagnosis of ICSID' in M Waibel et al., (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010).

Peters A, 'Immune against Constitutionalisation? in A Peters et al., (eds) *Immunities in The Age of Global Constitutionalism*, (Martinus Nijhoff Publ., 2015).

Qureshi A and Khan S, 'Implications of an appellate body for investment disputes from a developing country point of view' in K Sauvant (ed), *Appeals Mechanism in International Investment Disputes* (OUP, 2008).

Qureshi A, 'An appellate system in international investment arbitration?' in P Muchlinski et al., (eds), *The Oxford Handbook of International Investment Law* (OUP, 2008).

Raustiala K and Slaughter A-M, 'International Law, International Relations and Compliance' in W Carlsnaes et al., (eds) *Handbook of International Relations* (London; Thousand Oaks, 2002).

Reed L and Martinez L, 'Treaty Obligations to Honour Arbitral Awards and Diplomatic Protection' in Bishop D (eds), *Enforcement of Arbitral Awards Enforcement of Arbitral Awards Against Sovereigns* (Jurisnet: New York, 2009).

Reed L et al., 'Recognition, Enforcement and Execution of ICSID Awards' in *Guide to ICSID arbitration* (Kluwer Law Int'l BV, 2011).

Reinisch A and Malintoppi L, 'Methods of Dispute Resolution' in Muchlinksi P et al., (eds) *The Oxford Handbook of International Investment Law* (OUP, 2008).

Reinisch A, 'Enforcement of Investment Awards' in Yannaca-Small K (ed) *Arbitration Under International Investment Agreements: A Guide to The Key Issues* (OUP, 2010).

Reinisch A, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. The Promise of a More Effective System? Some Reflections from The Perspective of Investment Arbitration' in J Crawford et al., (eds), *International Law Between Universalism and Fragmentation* (Brill Publ., 2008).

Rown C, ‘Procedure on Investment Treaty Arbitration and the Relevance of Comparative Public Law’ in S Schill (ed) *International Investment Law and Comparative Public Law* (OUP, 2010).

Rubins ND, ‘Judicial Review of Investment Arbitration Awards’ in T Weiler (edn) *NAFTA Investment Law & Arbitration: Past Issues, Current Practice, Future Prospects* (Transnat’l Publ., 2004).

Salacuse JW, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (OUP, 2013).

Sauvant KP and Sachs LE, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, And Investment* (3rd Edn. OUP, 2009).

Schaefer RT, *Sociology Matters* (5th Edn., McGraw Hill, 2012).

Schill SW, ‘Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement’, in M Waibel et al., (eds) *The Backlash against Investment Arbitration* (Wolters Kluwer 2010).

Scherer M, ‘Article III: Formal Requirements for Recognition and Enforcement of Arbitral Awards’ in R Worlff (edn.) *New York Convention: Article-by-Article Commentary* (2012).

Schmitthoff CM, ‘Finality of Arbitral Awards and Judicial Review’, in JDM Lew (Edn) *Contemporary Problems in International Arbitration* (Queen Mary College, London 1986).

Schreuer CH, ‘Multiple Proceedings’ in A Gattini et al., (eds) *General Principles of Law and International Investment Arbitration* (Brill Nijhoff, 2018).

Schreuer CH et al., *The ICSID Convention; A Commentary on the Convention on the Settlement of Investment Dispute between States and Nationals of Other States* (2nd Edn. OUP, 2009).

Schreuer CH, *State Immunity: Some Recent Developments*, (Cambridge: Grotius Publ. Ltd., 1988).

Sheppard A, ‘Arbitrator independence in ICSID arbitration’ in *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, 2009).

Sneider M and Knoll J, ‘Enforcement of Foreign Arbitral Award Against Sovereigns -Switzerland’ in R D Bishop (eds), *Enforcement Arbitral Awards Against Sovereigns*, (Juris Pub., 2009).

Sommerer T and Agné H, *Consequences of Legitimacy in Global Governance: Sources, Processes, and Consequences* (J Tallberg et al., (trs), OUP, 2018).

Sornarajah M, ‘A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration’ in K Sauvant (ed) *Appeals Mechanism in International Investment Disputes* (OUP, 2008).

Sornarajah M, *International Law on Foreign Investment* (CUP, 1994).

Sornarajah M, *The International Law on Foreign Investment*. (3rd Edn. CUP, 2010).

Sornarajah M, *The International Law on Foreign Investment*. (4th Edn. CUP, 2021).

Sornarajah M, *The Settlement of Foreign Investment Disputes* (Kluwer Law Int’l, 2000).

Sornarajah M, *Toward Normlessness: The Ravage and Retreat of Neo-Liberaism in International Investment Law* (Y.B. Int'l Investment L. & Pol'y, 2010).

Stein JV, 'The Engines of Compliance' in JL Dunoff et al., (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP, 2013).

Stewart DP, *The Foreign Sovereign Immunities Act, A Guide for Judges* (2nd Edn. Federal Judicial Centre, 2018).

Subedi SP, *International Investment Law Reconciling Policy and Practice* (3rd edn, Hart Publ., 2016).

Subedi SP, *International Investment Law: Reconciling Policy and Principle* (Bloomsbury Publ., 2008).

Tallberg J et al., *Legitimacy in Global Governance: Sources, Processes, and Consequences*, (OUP, 2018).

Thouvenin JM and Grandaubert V, 'The material Scope of State Immunity from Execution' in T Ruys et al., (eds) *The Cambridge Handbook of Immunities and International Law* (CUP, 2019).

Tonova ST, 'Compliance and Enforcement of Awards: Is there a Practical Difference between ICSID and Non-ICSID Awards' in IA Laird and TJ Weiler (eds), *Investment Treaty Arbitration and International Law*, vol. 5 (Juris Publ., 2012).

Tonova ST and Vasani BS, 'Enforcement of Investment Treaty Awards Against Assets of States, State Entities and State-Owned Companies' in J Fouret (ed) *Enforcement of Investment Treaty Arbitration Awards* (Globe Bus. Publ., 2015).

Tyler TR, *Why People Obey the Law* (Princeton Univ. Press, 2006 (originally printed in 1990).

Van Aaken A, 'Blurring boundaries between sovereign acts and commercial activities: A functional view on regulatory immunity and immunity from execution' in PetersA et al., (eds) *Immunities in the Age of Global Constitutionalism* (Leiden: Brill, 2015).

Waibel M et al., (ed), *The Backlash against Investment Arbitration* (Wolters Kluwer, 2010).

Waibel M, 'The Backlash Against Investment Arbitration: Perceptions and Reality' in M Waibel et al., (eds), *The Backlash Against Investment Arbitration* (London: Kluwer Law Int'l, 2010).

Wälde T, '"Equality of Arms" in Investment Arbitration: Procedural Challenges' in Yannaca-Small K (ed) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP, 2010).

Waltz KN, *Theory of international politics*, (Waveland Press, 2010).

Wells LT, 'Backlash to Arbitration: Three Causes' in Michael Waibel et al., *The Backlash Against Investment Arbitration: Perceptions and Reality* (Alphen: Kluwer Law Int'l, 2010).

Yang X, *State Immunity in International Law* (CUP, 2012).

Journal Articles

Alfaro CE, 'ICSID Arbitration and Bits Challenged by the Argentine Government and its Supreme Court' (2004), Oil, Gas & Energy Law Journal 1:2(4).

Almeida de PR, 'Sovereignty and regional integration in Latin America: a political conundrum?' (2013): 35.2 *Contexto internacional* 471-495, at https://www.scielo.br/scielo.php?pid=S0102-85292013000200006&script=sci_arttext.

Antonietti A, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules (2006) 21 (2) ICSID Rev.- FILJ, 427–448.

Aust A, 'Pacta Sunt Servanda ''Max Planck Encyclopedia of Public International Law' (2007) www.mpepil.com.

Baetens F, 'Enforcement of Arbitral Awards: 'To ICSID or Not to ICSID' is Not the Question' (2011), Investment Treaty Arb. and Int'l Law, Juris Arbi. Series 5: 211-228.

Baldwin E et al., 'Limits to Enforcement of ICSID Awards' (2006) 23(1), J Int'l Arb..

Baltag C, 'Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards Against States' (2004) 19 Am. Rev. Int'l Arb. 391.

Barrera EB, 'Property Rights as Human Rights in International Investment Arbitration: A Critical Approach,' (2018) 59 B.C.L. Rev. 263.

Battisson A and Mills T, 'Enforcement and Recovery: Theory' (2022) Norton Rose Fulbright, GAR.

Behn D, 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art' (2015) 46 (2) Geo. J. Int'l Law 363.

Berg den AJV (ed) 'Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention' ICCA Cong. Ser., Vol. 9 (Springer,1999).

Berg den AJV, 'Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions, ICSID Review' (2019) 34(1) ICSID Rev.-FILJ at https://doi.org/10.1093/icsidreview/siz016.

Berger KP, 'The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective' (1989) 12 Fordham Int'l Law J. 605.

Bishop WW, 'New United States Policy Limiting Sovereign Immunity' (1953), 93 American Journal of International Law 47.

Bjorklund AK et al., 'State Immunity as a Defense to Resist the Enforcement of ICSID Awards' (2020), 35(3) ICSID Rev.- FILJ, 506-522.

Bjorklund AK, 'Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims' (2005) 45 Va. J. Int'l L. 809.

Bjorklund AK, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes' (2010) 21 AM. Rev. Int'l Arb. 211.

Blair W, 'The Legal Status of Central Bank Investments under English law' (1998) 57 Camb. L. J. 374.

Blandford AC, 'Reputational Costs Beyond Treaty Exclusion: International Law Violations as Security Threat Focal Points' (2011), 10 Washington Univ. Global Studies Law Review 669.

Blane A, ‘Sovereign Immunity as a Bar to the Execution of International Arbitral Awards’ (2008) 41(2) N.Y.U. J. Int’l L. & Pol. 453.

Blumrosen A, and Malet-Deraedt F, ‘NML Capital Ltd. v. Republic of Argentina’ (2013) 107(3) Am. J. Int’l L. 638.

Bodansky D, ‘The Legitimacy of International Governance: A coming Challenge for International Environmental Law’ (1999), AJIL 592.

Bogdandy von A, ‘Globalization and Europe: How to Square Democracy, Globalization and International Law’ (2004) 15 EJIL 885.

Boguslavsky MM, ‘Foreign State Immunity: Soviet Doctrine and Practice’ (1979), 10 Neth. Y.B. Int’l L. 167.

Borchard EM, ‘The Minimum International Standard in the Protection of Aliens’ (1939) 33 Am. S’ty of Int’l Law Proc. 143.

Börzel T et al., ‘Obstinate and Inefficient: Why Member States Do Not Comply with European Law’ (2010), 43(11) Comp. Pol. Stud.

Brazil-David R, ‘International Commercial Arbitration Involving a State Party and the Defence of State Immunity’ (2011) 22 Am. Rev. Int'l Arb. 241.

Brekoulakis S, *International Arbitration: Basic Principles and Characteristics*, QFINANCE 1, 2 (2011). http://www.qfinance.com/contentFiles/QF02/g1xtn5q6/12/2/international-arbitration-basic-principles-and-characteristics.pdf.

Broches A, ‘Awards rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Recognition’ (1987), 2(2) ICSID Rev.-FILJ, 287.

Broches A, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, (1972) 136 Recueil des Cours 331.

Brower CN and Schill S W, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9(2) Chic. J. Int’l Law 5.

Brower CN and Tepe Jr. J B, ‘The Charter of Economic Rights and Duties of States: A Reflection or a Rejection of International Law?’ (1975) 9 Int'l Law 295.

Brower CN and Schill SW, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?’ (2009) 9(2) Chic. J. Int’l Law 5 at http://chicagounbound.uchicago.edu/cjil/vol9/iss2/5.

Brower CN et al., ‘The Coming Crisis in the Global Adjudication System’ (2003) 19(4) Arb. Int’l 415.

Brubaker JR, ‘The Judge Who Knew Too Much: Issue Conflicts in International Adjudication’ (2008), 26 Berk. J. Int'l L. 111.

Bubb RJ and Rose-Ackerman S, ‘BITs and Bargains: Strategic Aspects of Bilateral and Multilateral Regulation of Foreign Investment’ (2007) 27 Int'l Rev. L. & Econ. 291.

Buchanan A and Keohane RO, ‘The Legitimacy of Global Governance Institutions’ (2003), 20(4) Ethics & Int’l Affairs, 405.

Bungenberg M and Reinisch A, ‘Recognition and Enforcement of Decisions’ In From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court’ (2018) Springer, Cham,.

Burke-White W and Staden von A, ‘Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations’ (2010) 35 Yale J. Int’l L. 283.

Burke-White WW, ‘The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System’ (2008), 3 Asian J. WTO & Int'l Health L & Pol’y, 199.

Burns HW, ‘The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth’ (1981) 75 Am. J. Int'l L. 437.

Butler N and Subedi S, ‘The Future of International Investment Regulation: Towards a World Investment Organisation?’ (2017) 64 Neth Int’l Law Rev., 43.

Calvert J, ‘Constructing investor rights? Why some States (fail to) Terminate Bilateral Investment Treaties’ (2018) 25(1), Rev. Int’l Pol. Eco. 75.

Calamita NJ, ‘The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime’ (2017), 18(4) The J. World Invest. and Trade, at 585-627.

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

Caron DD, ‘The Legitimacy of the Collective Authority of the Security Council’ (1993), 87 AJIL 552.

Carrington PD, ‘The Function of the Civil Appeal: A Late-Century View’ (1987) 38 S.C.L. REV. 411, 428-429.

Charris-Benedetti JP, ‘The proposed Investment Court System: does it really solve the problems?’ (2019), 42 Revista Derecho del Estado. 83-115.

Choi S, ‘Judicial Enforcement of Arbitral Award under the ICSID and New York Convention’ (1995) 28 N.Y.U. J. Int'l L. & Pol. 175.

Chubb K, ‘The “State of Necessity” Defense: A Burden, Not A Blessing to the International Investment Arbitration System’ (2013), 14 Card. J. Confl. Resol. 525.

Clapham J, ‘Finality of Investor-State Arbitral Awards: Has the Tide Turned and Is There a Need for Reform?’ (2009) 26(3) J Intl Arb 437.

Cosmos J, ‘Legitimacy Crisis in Investor – State International Arbitration System: A Critique on the Suggested Solutions & the Proposal on the Way Forward’ (2017) http://www.ijsrp.org/research-paper-1114/ijsrp-p3550.pdf.

Craig WL, ‘International Ambition and National Restraint in ICC Arbitration’ (1985) No. 1 Arb. Int'l 49.

Crawford J, ‘Execution of Judgments and Foreign Sovereign Immunity’ (1981), 75 AJIL 820.

Delaume GR, ‘Contractual Waivers of Sovereign Immunity: Some Practical Considerations’ (1990) 5(2) ICSID Review-FILJ 232.

Delaume GR, ‘Reflections on the Effectiveness of International Arbitral Awards’ (1995), 12 J. Int’l Arb. 5.

Delaume GR, ‘Recent French Cases on Sovereign Immunity and Economic Development Activities’ (1987), 2(1) ICSID Rev.-FILJ, 152.

Delaume GR, ‘Sovereign Immunity and Transnational Arbitration, International Arbitration’ (1987), 3(1) Arb.Int’l, https://doi.org/10.1093/arbitration/3.1.28.

Delaume GR, ‘State Contracts and Transnational Arbitration’ (1981), 75.4 AJIL https://doi.org/10.2307/2201354.

Delaume, GR, ‘Reflections on the Effectiveness of International Arbitral Awards’ (1995) 12 J. Int’l Arb. 5.

Desierto DA, ‘ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model During Financial Crises’ (2012) 44 Geo. Wash. Int’l L. Rev. 473.

Diel-Gligor K, ‘Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration’ (2018), EJIL 1447.

Dixon WJ, ‘Democracy and the management of international conflict’ (1993), 37(1) J Confl. Resol., 42-68.

Dodge WS, ‘Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement’ (2006) 39 Vand. J. Transnat’l L. 323.

Doyle MW, ‘Liberalism and World Politics’ (1986), 80 Amer. Pol. Sci. Rev., 1151.

Elkins Z et al., ‘Competing for the Capital: The Diffusion of Bilateral Investment Treaties’ (2006) 60 Int’l Organisation.

Finke J, ‘Sovereign Immunity: Rule, Comity or Something Else?’ (2010), *EJIL* 21.4, 872-878.

Finnemore M, ‘The Purpose of Intervention: Changing Beliefs About the Use of Force’ (2003) JSTOR, www.jstor.org/stable/10.7591/j.ctt24hg32.

Fortese F and Lotta H, ‘Procedural Fairness and Efficiency in International Arbitration’ (2015), 3(1) Groningen J Int’l L. 112.

Foster GK, ‘Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgements Against States and their Instrumentalities, and Some Proposals for its Reform’ (2008), 25 Ariz. J. Int'l & Comp. L. 665.

Fox H, ‘State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITAL Model Law Mark II for Execution against State Property?’ (1996) 12 Arb. Int’l 89.

Fox P and Rosenberg CB, ‘The Hidden Tool in a Foreign Investor's Toolbox: The Trade Preference Program as a “Carrot and Stick” to Secure Compliance with International Law Obligations’ (2013), 34 NW J. Int’l Law & Bus., 53.

Franck SD, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 Fordham Law Rev. 1521.

Franck SD, ‘Rationalising Costs in Investment Treaty Arbitration’ (2011) Wash. Univ. L. Rev. 769.

Franck SD, ‘The Liability of International Arbitrators: A Comparative Analysis & Proposal for Qualified Immunity’ (2000), 1 NYL Sch. J. Int'l & Comp. L., 20.

Franck TM, ‘Fairness in the International Legal and Institutional System’ (1993), 240 Hague Acad. Int’l L. 9.

Franck TM, ‘Legitimacy in the International System’ (1988), 82 AJIL, 705.

Freyer D and Gharavi HG, ‘Finality and Enforceability of Foreign Arbitral Awards: From “Double Exequatur” to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity’ (1998) 13 ICSID Review – FILJ 101.

Friedland P and Brumpton P, ‘Rabid Redux: The Second Wave of Abusive ICSID Annulments’ (2011), Am. U. Int'l L. Rev. 27.

Fry JD and Odysseas GR, ‘Towards a New World for Investor-State Arbitration Through Transparency’ (2015) 48 NY J Int'l L & Pol., 782.

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

Gaillard E and Penusliski IM, ‘State Compliance with Investment Awards’ (2021), 25 ICSID Rev.-FILJ

Gaillard E and Savage J, ‘Fouchard Gaillard Goldman on International Commercial Arbitration’ (2001) Kluwer Law 8.

Gaillard E, ‘Enforcement of Foreign Arbitral Awards in the Country of Origin’ (1999), 14 ICSID - FILJ, 17.

Gal-Or N, ‘The Concept of Appeal in International Dispute Settlement’ (2008) 1 EJIL 19.

Gantz DA, ‘An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges’ (2009) 39 Vand. J Transnat’l L .39.

Gantz DA, ‘The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement’ (2004) 19 Am. U. Int'l L. Rev. 679.

Gerlich O, ‘State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?’ (2015) Am. Rev. Int’l Arb. 26.

Gibson T and AC Gregory, ‘The Legitimacy of Transnational Institutions: Compliance, Support and the European Court of Justice’ (1995), 39(2) Am. J. Pol. Sci., 459.

Giroud S and Leroux N, ‘Switzerland ratifies the United Nations Convention on Jurisdictional Immunities of States and Their Property’ (2010) IBA Int’l Lit. News 39.

Giuttari TR, 'The American Law of Sovereign Immunity: An Analysis of Legal Interpretation' (1970), Praeger, 26–102.

Gleason E, 'International Arbitral Appeals: What Are We So Afraid Of?' (1987) 7 Pepp. Disp. Resol. L.J. 269.

Glucksmann E, '*Commisimpex v. Republic of Congo'* (2017), 111 AJIL 453- 465.

Goh N, 'Court-Ordered Interim Relief Against States in Aid of Arbitration: Sovereign Immunity, Waiver and Comity' (2017) 34(4) J. Int'l Arb. 679.

Gomez KF, 'Latin America and ICSID: David Versus Goliath?' (2011), 17 Law & Bus. Rev. Am. 195.

Goodman CL, 'Uncharted waters: Financial crisis and enforcement of ICSID awards in Argentina' (2007) 28 U. Pa. J. Int'l Econ. L., 449.

Grosse R, 'Location Choice of Foreign Banks in the United States' (1994), 46(5) J. Econ. & Bus. 367.

Grossman N, 'Legitimacy and International Adjudicative Bodies' (2009), 41 Geo. Wash. Int'l Law Rev. 107.

Guzman AT, 'A Compliance-Based Theory of International Law' (2002), 90 California Law Review, 1823.

Guzman AT, 'The Design of International Agreements' (2005), 16 EJIL 579.

Guzman AT, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 V. J. Int'l L. 639.

Hanotiau B, 'The Res Judicata Effect of Arbitral Awards' (2003), The Int'l Courts of Arb., Bullentin: Complex Arbitrations Special Supplement.

Harnon D, 'Res Judicata and Identity of Actions. Law and Rationale' (1966) 1 Israel L Rev. 539.

Hathaway O, 'Do Human Rights Treaties Make a Difference? (2002) Yale Law School Legal Scholarship Repository, Vol. 111(1), at 1935-1981.

Hathaway O and Shapiro S, 'Outcasting: Enforcement in Domestic and International Law' (2011), 121 Yale Law Journal, 252.

Hefter LR and Slaughter A 'Towards a Theory of Effective Supranational Adjudication' (1997) Yale LJ., 273.

Hepburn J, 'Domestic Investment Statutes in International Law' (2018) 112(4) AJIL, 658.

Higgins R, 'Certain unresolved Aspects of the Law of State Immunity' (1982), 29 NILR 265.

Hirsch M, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' (2016) 19(3) J. Int'l Eco. L. 681.

Hober K, 'State Responsibility and Investment Arbitration' (2008) 25(5) J. Int'l Arb. 545.

Horvath GJ, 'The Duty of the Tribunal to Render an Enforceable Award' (2001) 18(2) J Int'l Arb. 135.

Howard DM, ‘Creating consistency through a world investment court’ (2017), 41(1) Fordham Int'l L J.

Hurst JW, ‘Problem of Legitimacy in the contemporary legal order’ (1971), 24 Okla. L Rev. 224.

Huseynli K, ‘Enforcement of Investment Arbitration Awards: Problems and Solutions’ (2017) Baku St. UL Rev. 3.

Hyland R, ‘Pacta Sunt Servanda*:* A Meditation’ (1993) 34 VA J Intl L 405.

Ivanovich LI, ‘The Principle Pacta Sunt Servanda and the Nature of Obligation under International Law’ (1989) 83 AJIL 513.

Joubin-Bret A, ‘Is There a Need for Sanctions in International Investment Arbitration’ (2012) 106 Am. Soc'y Int'l L. Proc. 130.

Jung Won J, ‘The Integrity of Finality of International Arbitral Awards: International Commercial and ICSID Arbitration Awards’ (2018) J. Arb. Stud. 28.

Juratowitch B, ‘Waiver of State Immunity and Enforcement of Arbitral Awards’ (2016) 6(2) Asian J Int’l Law 220-230.

Kahale G, ‘New Legislation on the United States Facilities Enforcement of Arbitral Agreements and Awards Against Foreign States’ (1989), 6(2) J. Int. Arb. 57.

Kaye LM, ‘Art Loans and Immunity from Seizure in the United States and the United Kingdom’ (2010) 17 Int’l J. Cult’l P’ty 335.

Kelsen H, ‘The Principle of Sovereign Equality of States as a Basis for International Organization’ (1944), 53 Yale L. J., 207.

Keohane RO Jr., International Institutions: Two Approaches in Keohane, International Institutions and State Power (2008) 17-37, 159.

Knahr C, ‘Transparency, third party participation and access to documents in international investment arbitration’ (2007), 23(2) Arb. Int’l, 327.

Knull III WH and Rubins ND, ‘Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?’ (2000) 11 Am. Rev. Int'l Arb. 531, 531.

Koh HH, ‘Why Do Nations Obey International Law?’ (1997) 106(8) Yale L. J. 2599.

Kohn A, ‘Why incentive plans cannot work’ (1993) 17(5) Harvard Bus. Rev. 54-60.

Kratochwil FV and Ruggie JG, ‘International Organization: A State of the Art on an Art of the State’ (1986), 40(4) Int’l Org.

Krauss MI, ‘NAFTA Meets the American Torts Process: *O'Keefe v. Loewen*’ (2000) 9 Geo. Mas. L. Rev.69.

Kuipers JA, ‘Too Big to Nail: Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards’ (2016) 39(2) Boston Coll Int’l and Comp L Rev 417.

Kumm M, ‘The Legitimacy of International Law: A Constitutionalist Framework of Analysis’ (2004) 15 EJIL 917.

Laborías AR, ‘Immunity of Foreign Central Banks: A Comparison Between the Legislations in Argentina and China’ (2016) Âmbito Jurídico http://ambitouridico.com.br/site/?n_link=revista_artigos_leitura&artigo_id=17050).

Laird I and Askew R, ‘Finality Versus Consistency: Does Investor-State Arbitration Need an Appellate System’ (2005), J. App. Prac. & Proc., 7.

Lauterpacht H, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 Brit. Y.B. Int’l L. 220.

Lazo R, ‘Is There a Life in Latin America After ICSID Denunciation?’ (2014), 11(1) Transnat’l.Disp. Mgt,.

Lew JDM, ‘Achieving the dream: autonomous arbitration’ (2006), 22(2) Arb. Int’l, 179.

Lew JDM, ‘The Law Applicable to the Form and Substance of the Arbitration Clause’ (2015) 9 ICCA CONG.

Lin TY, ‘Systemic Reflections on Argentina's Non-Compliance with ICSID Arbitral Awards: A New Role of the Annulment Committee at Enforcement’ (2012) 1 Cont. Asia Arb. J. 5.

LM Kaye, ‘Art Loans and Immunity from Seizure in the United States and the United Kingdom’ (2010), 17 Int’l J. Cultural Property 335.

Lopina DA, ‘The International Centre for the Settlement of Investment Disputes: Investment Arbitration for the 1990s’ (1988) 4 Ohio ST. J. on Disp. Resol. 107.

Magraw DB and Amerasinghe NM, ‘Transparency and public participation in investor-state arbitration’ (2008) 15 ILSA J. Int'l & Comp. L. 337.

Manciaux S, ‘Bolivia’s withdrawal from ICSID’ (2007), 4(5) Transnat’l.Disp. Mgt; R Lazo, ‘Is There a Life in Latin America After ICSID Denunciation?’ (2014), 11(1) Transnat’l.Disp. Mgt,.

Mansbach RW et al., ‘The Web of World Politics, Non-State Actors and The Transformation of International Relations’ (1976), Englewood Cliffs, NJ.

Markert LA, ‘Improving Efficiency in Investment Arbitration’ (2011) 4 Contemp. Asia A. J 215.

Martins P, ‘The Limits of Depoliticization in Contemporary Investor-State Arbitration’ (2010), Select Proceedings of the European Society of International Law, Vol. 3, https://ssrn.com/abstract=1716833.

Mathieson AR and Gross SR, ‘Review for Error’ (2003) 2 Law Probability & Risk 259.

Mavroidis PC et al., ‘Preventing a Backlash against Investment Arbitration: Could the WTO Be the Solution’ (2011), 12(3) J. World Invest. And Trade, 425-446.

Mearsheimer JJ, ‘The False Promise of International Institutions’ (1994) 19(3) Int’l Sect’y, 5-49.

Meron T, ‘Judicial Independence and Impartiality in International Criminal Tribunals’ (2005), AJIL 359.

Mistelis LA, ‘Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement’, (2013) 28(1) ICSID Rev.- FILJ 64.

Morrow JD, ‘When do states follow the laws of war?’ (2007), 101(3) Am. Pol. Sci. Rev. 559.

Murphy K, ‘Regulating more Effectively: The Relationship between Procedural Justice, Legitimacy, and Tax Non-compliance’ (2005), 32(4) J Law and Soct’y 562.

Nagan WP and Root JL, ‘The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the U.N. Charter, and the Application of Modern Communications Theory’ (2013), 38 N.C. J. Int'l L. & Com. Reg. 375.

Nalmark RW and Keer SE, ‘International Private Commercial Arbitration-Expectations and Perceptions of Attorneys and Businesspeople-A Forced-Rank Analysis’ (2002), 30 Int'l Bus. Law. 203.

Narver CL, ‘Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status’ (2001) 19 B.U. Int'l L. J. 163.

Nelson L, ‘International Joint Ventures’ (1990), 2 Int’l Leg. Persp. 75.

Neumayer E, ‘Distance, Power and Ideology: Diplomatic Representation in a World of Nation-States’ (2008) 40(2) Area 228 at https://rgs-ibg.onlinelibrary.wiley.com/doi/10.1111/j.1475-4762.2008.00804.x.

Ngangjoh-Hodu Y and Ajibo CC, ‘ICSID Annulment Procedure and the WTO Appellate System: The Case for an Appellate System for Investment Arbitration’ (2015) 6(2) J. Int’l Disp. Settl., 308.

Nilsson A and Englesson O, ‘Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?’ (2013), 30 J Intl. Arb., 561.

Nmehielle VO, ‘Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes’ (2011) 7 Ann. Surv. Int'l & Comp. L. 21.

Okafor OC, ‘The Global Process of Legitimation and the Legitimacy of Global Governance’ (1997), 14 Ariz. J. Int'l & Comp. L., 117.

Oldfather CM, ‘Error Correction’ (2010) 85 Ind. L.J. 49.

Olson C, ‘Enforcement of International Investment Arbitration Against the Russian Federation’ (2014) 22 Am. Rev. Int’l Arb. 711.

Osakwe C, ‘A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice’ (1983), 23 Va. J. Int’l L.,13.

Oxman B, ‘The Regime of Warship under the United Nations Convention on the Law of the Seas’ (1984) 24 VA JIL 342.

Paparinskis M, ‘The Limits of Depoliticization in Contemporary Investor-State Arbitration’ (2010) 3 Select Proceedings of the Eur.Soc’ty Int’l L. at SSRN: https://ssrn.com/abstract=1716833.

Pape RA, ‘Why economic sanctions do not work’ (1997), 22(1) Int’l Security 90-136.

Park W and Yanos A, ‘Treaty Obligations and National Law: Emerging Conflicts in International Arbitration’ (2006), 58 Hastings Law. Rev. 251.

Peterson LE & Hepburn J, ‘Payment Round-up: New Reporting on ICSID Award Debts of Kazakhstan, Kyrgyzstan and Bangladesh’ *(*2011) *Inv. Arb. Reporter*, http://www.iareporter.com/articles/201112317.

Pickering H, ‘Why Do States Mostly Obey International Law’ (2016) E-International Relations. Recuperado Abril 15.

Platte M, ‘An Arbitrator's Duty to Render Enforceable Awards’ (2003) 20 J. Int'l Arb. 307.

Puig S and Shaffer G, ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’ *(2018)* 112 AJIL.

Pulkowski D, ‘Testing Compliance Theories: Towards US Obedience of International Law in the Avena Case’ (2006), 19 Leiden J. Int’l Law, 511.

Raymond GA, ‘Democracies, Disputes, and Third-party Intermediaries’ (1994), 38(1) J. Confl. Resol., 24-42.

Reece TK, ‘Enforcing Against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used "Context" When Applying The "Commercial Purposes" Test’ (2015), 2(1) J. of Int’l and Comp. L.

Reinisch A and Knahr C, ‘Transparency versus confidentiality in international investment arbitration–the Biwater Gauff compromise’ (2007), 6(1) The Law & Practice of Int’l Courts and Trib.

Reinisch A, ‘European Court Practice Concerning State Immunity from Enforcement Measures’ (2006) 17 EJIL 803.

Reisenfeld KB and Robbins JM, ‘Finality under the Washington and New York Conventions: Another Swing of the Pendulum?’ (2017), 32 (2) ICSID Review-FILJ, 371.

Reus-Smit C, ‘Politics and international legal obligation’ (2003), 9(40) EJIL, 591.

Ribeiro J and Douglas M, ‘Transparency in Investor-State Arbitration: the way forward’ (2015) Asian Int'l Arb. J. 11 97.

Rice B, ‘States Behaving Badly: Sovereign Veil Piercing in the Yukos Affair’ (2015), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673335.

Risse J, ‘Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings’ (2013), 23(3) Arb. Int’l., 5.

Roberts A, ‘Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration’ (2018) 112 AJIL at https://ssrn.com/abstract=3189984.

Roberts A, ‘The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds’ (2017) EJIL: TALK! at https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalistsreformists- revolutionaries-and-undecideds.

Roebuck D, ‘Sources for the History of Arbitration’ (1998), 3 Arb. Int’l., 231.

Rosenberg CB, ‘The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards (2013) 44 Geo. J. Int'l L. 503.

Rudolph C, ‘Sovereignty and Territorial Borders in a Global Age’ (2005), 7(1) Int’l Stud. Rev., 1-20.

Ruscalla G, ‘Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?’ (2015) 3(1) Groningen J. Int’l L. 34.

Ryan CM, ‘Discerning the Compliance Calculus: Why States Comply with International Investment Law’ (2009) 38 Ga J Intl & Comp L 63.

Ryngaert C, ‘Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors’ (2013) 26(1) Leiden J. Int’l L .73.

Salacuse JW and Sullivan N, ‘Do BITs really work? An evaluation of bilateral investment treaties and their grand bargain’ (2005) 46 Harv. J. Int’l L. 67.

Salacuse JW, ‘The Emerging Global Regime for Investment,’ (2010) 51 Harv. J. Int’l L.

Scharpf FW, ‘Games Real Actors Play: Actor-Centered Institutionalism in Policy Research’ (2018), Routledge.

Schill SW, ‘Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’ (2011) 52 Va. J. p. 66. Int’l L. 57.

Schneider AK, ‘Error Correction and Dispute System Design in Investor-State Arbitration’ (2013) 5 Y.B. Arb. & Med. 194.

Schneiderman D, ‘Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes’ (2010), 30 Nw. J. Int’l L. & Bus. 383.

Schreuer C and Weiniger M, ‘Conversations Across Cases - Is There a Doctrine of Precedent in Investment Arbitration?’ (2008), 5(3) Trans. Dis. Mgt., 16.

Schreuer C, ‘From ICSID Annulment to Appeal Halfway Down to Slippery Slope’ (2011), 10 Int’l Courts and Tribunals, 211.

Schreuer CH, ‘From ICSID Annulment to Appeal Halfway Down the Slippery Slope’ (2011) 10(2) *The Law & Practice of International Courts and Tribunals* 211.

Seidman GI, ‘The Origins of Accountability: Everything I Know About the Sovereigns Immunity, I Learned from King Henry’ (2005) 111 (49) ST. Louis U. L.J. 393.

Simmons BA ‘Compliance with International Agreements’ (1998), Ann. Rev. of Pol. Sci. 75.

Sinclair A and Stranger-Jones D, ‘Execution of Judgments or Awards Against the Assets of State Entities (2010), 4:1 Disp Resol Int’l 95.

Sinclair A et al., ‘ICSID arbitration: how long does it take’ (2009), 4(5) Global Arb. Rev., 5.

Sinclair IM, ‘The Law of Sovereign Immunity, Recent Development’ (1080), 167 Hague Recueil 113.

Singla T, ‘Achmea: The Fate and Future of Intra-EU Investment Treaty Awards under the New York Convention’ (1028) EJIL, at www.ejiltalk.org/achmea-the-fate-and-future-of-intra-eu-investment-treaty-awards-under-the-new-york-convention.

Slate WK, ‘Cost and Time Effectiveness of Arbitration’ (2010), 3(2) Contemp. Asia Arb. J. 185.

Slaughter A-M, ‘International law in a World of Liberal States’ (1995), 6 EJIL 503.

Sornarajah M, ‘Toward Normlessness: The Ravage and Retreat of Neo-Liberaism in International Investment Law’ (2010), Y.B. Int'l Investment L. & Pol'y 595.

Sternlight JR, ‘Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts’ (1998), 91 U. Pa. L. Rev. 147.

Stone SA, ‘Investor-State Arbitration: Proportionality’s New Frontier’ (2010) 4 Law & Ethics Hum. RTS. 47.

Strong SI, ‘Contractual Waivers of Investment Arbitration: Waive of the Future?’ 29 ICSID Rev.- FILJ.

Strong SI, ‘Enforcement of Arbitral Awards against Foreign States or State Agencies’ (2006), 26 Nw. J. Int'l L. & Bus. 335.

Sucharitkul S ‘Jurisdictional immunities in contemporary international law from Asian perspectives’ 4(1) (2005) Chin. J. Int’l L.1.

Suchman MC, ‘Managing legitimacy: Strategic and institutional approaches’ (1995), 20(3) Am Rev., 574.

Sutton J, ‘Emilio Augustin Maffezini v Kingdom of Spain and the ICSID Secretary General’s Screening Power’ (2005) 21 Arb. Int’l 119.

Tallberg J, ‘Paths to Compliance: Enforcement, Management, and the European Union’ (2002), 56(3) Int’l Org.

Tams C, ‘An appealing option? The debate about an ICSID appellate structure?’ (2004) http://papers.ssrn.com/sol3/papers.cfm?_id=1341268.

Tannock Q ‘Judging the Effectiveness of Arbitration through the Assessment of Compliance with and Enforcement of International Arbitration Awards’ (2005), 21(1) Arb. Int’l, 71-90.

Thomas CA, ‘The Concept of Legitimacy and International Law’ (2013), LSE Law Soct’y and Eco. Working Papers.

Thomas JC and Dhillon HK, ‘The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards’ (2017) 32(3) ICSID Rev. FILJ.

Titi C, ‘Investment Arbitration in Latin America: The Uncertain Veracity of Preconceived Ideas’ (2014) 30 Arb. Int’l 357.

Tomuschat C, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’ (1999) Recueil des Cours 281: 9–438.

Trevino C et al., ‘Award Compliance: Updates on Two Awards against Democratic Republic of Congo, and a Third against Turkmenistan’ (2015), 8(2) Investment Arbitration Reporter 24.

Trooboff PD, ‘Foreign State Immunity: Emerging Consensus on Principles’ (1986), 200 Recueil des Cours: Collected Courses of the Hague Academy of Int’l Law, 235.

Tyler TR, ‘Procedural Justice, Legitimacy, and the Effective Rule of Law’ (2003) Crime and Justice, Vol. 30, at www.jstor.org/stable/1147701. Accessed 10 April 2020.

Tyler TR, ‘Psychological Perspectives on Legitimacy and Legitimation’ (2006), 57 Ann Rev Psych., 375.

Tyler TR, ‘Social Justice: Outcome and Procedure’ (2000), 35 Int’l J. Psychol. 117.

Uchkunova I and Temnikov O, Enforcement of Awards under the ICSID Convention What Solutions to the Problem of State Immunity? (2014), 29(1) ICSID Rev - FILJ 187.

Van den Berg AJ, ‘Appeal Mechanism for ISDS Awards: Interaction with the New York and ICSID Conventions’ (2019), 34(1), ICSID Rev. – FILJ.

Van Harten G et al., ‘Public Statement on the International Investment Regime’ (2007) at http://tinyurl.com/3qhnjwr.

Vandevelde KJ, ‘A Brief History of International Investment Agreements’, (2005) 12 U. C. Dav. J. Int'l L. & Pol’y 157.

Vandevelde KJ, ‘The Bilateral Investment Treaty Program of the United States’ (1988), *21* Corn. Int'l L.J. 201.

Vandevelde KJ, ‘U. S. Bilateral Investment Treaties: The Second Wave’, (2010) 14 Mich. J. Int'l L.

Vandevelde KJ, ‘United States Investment Treaties: Policy and Practice’ (1992). 7 Kluwer L. and Tax. 22.

Vattel E de, ‘Les Droits des Gens [English Translation: The Law of Nations]’ (1758) reprinted by Natural Law and Enlightenment Classics 2008).

Veeder VV, ‘The Lena Goldfields Arbitration: The Historical Roots of Three Ideas’ (1998) 47 ICLQ 747.

Vinuales JE and Bentolila D, ‘The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States’ in LB Chazournes et al. (eds), *Diplomatic and Judicial Means of Dispute Settlement* (Brill Nijhoff, 2012).

Voon T, et al., ‘Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights’ (2014) 29 ICSID Rev.-FILJ 451.

Wai KWL, ‘Exercise of Residual Discretion under Article V of the New York Convention by Enforcement Court When Award Is Alive, Dead, and Undead in Seat’ (2019) 7 China Leg. Sci. 123.

Walde T, ‘Investment Arbitration under the Energy Charter Treaty- From Dispute settlement to Treaty Interpretation’ (1996) 12 Arb. Intl’l 429.

Walsh TW, ‘Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality’ (2006), 24 Berk. J. Int’l L. 444.

Weiler JHH, ‘The Geology of International Law: Governance, Democracy and Legitimacy’ (2004) 64 Zao RV. 547.

Wendt A, ‘Anarchy is what States Make of it: The Social Construction of Power Politics’ (1992), 46 Int’l Org.

Whitaker B 'Compliance Among Weak States: Africa and The Counter-Terrorism Regime' (2010) 36 Rev. Int'l Stud., at www.internationalarbitrationlaw.com/arbitration-courts/icsid.

Whitaker B, 'Compliance Among Weak States: Africa and the counter-terrorism regime' (2010), 36 Review of International Studies.

Yackee J, 'PACTA SUNT SERVANDA and state promises to foreign investors before Bilateral Investment Treaties: Myth and Reality' (2009), 32 Fordham Int'l L. J. 1550.

Yackee WJ, 'Are BITs Such a Bright Idea? Exploring the Ideational Basis of Investment Treaty Enthusiasm' (2005), 12 U.C. Davis J. Int'l L. & Pol'y 195.

Yackee WJ, 'Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality' (2008) Fordh. Int'l L. J. 1559 at http://ir.lawnet.fordham.edu/ilj.

Yackee WJ, Do BITs Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment (October 2007), Univ. of Wisconsin Leg. Std. Research Paper 1054.

Yannaca-Small K, 'Improving the System of Investor-State Settlement: An Overview' 21 (2006) <http://www.oecd.org/china/36052284.pdf.

Young CS, 'Enforcement of Investor-State Arbitral Awards against the Assets of State-Owned Enterprises' 29 (2019), J. Arb. Stud.

Young OR, 'The Politics of International Regime Formation: Managing Natural Resources and the Environment' (1989), 43 International Organization 349.

Zhu L, 'State Immunity from Measures of Constraints for the Property of Foreign Central Banks: The Chinese Perspective' (2007) 6(1) Chin. J. Int'l L. 67.

PhD Thesis

Al-Adba NM, 'The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance the Investment Relationship' (PhD diss., The University of Manchester 2014).

Butler N, 'The State of International Investment Arbitration: The Possibility of Establishing An Appeal Mechanism' PhD Diss., The University of Leeds 2012).

Cantelmo T, 'Enforcement of Arbitral Awards in ICSID Arbitration' ''PhD diss., Universita' Degli Studi Di Napoli Federico II.

Cosmos J, 'A Critical Assessment of The Legitimacy of The International Investment Arbitration System: A Call for Reform' (PhD diss., University of the Western Cape 2015).

Khanapoj J, 'Enforcing Arbitral Awards Against Sovereign States: The Validity of Sovereign Immunity Defence in Investor-State Arbitration' (PhD diss., SOAS University of London 2015).

Websites and Other Materials

Hanessian G et al, 'Argentina's Delay in Paying the Suez ICSID' Barker McKanzie Publication of February 26, 2019 at <https://www.bakermckenzie.com/en/insight/publications/2019/02/argetinas-delay-

inaying#:~:text=Under%20his%20administration%2C%20Argentina%20settled,million%20with%20other%20bond%20holders.>.

Pazanowski B, 'Immunity Issue Hinders $9 Billion Arbitral Award Against Nigeria' (June 19, 2020), at <https://news.bloomberglaw.com/us-law-week/immunity-issue-hinders-9-billion-arbitral-award-against-nigeria>.

Battisson A and T Mills, 'Enforcement and Recovery: Theory Norton Rose Fulbright' (2022) at https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/enforcement-and-recovery-theory#footnote-077-backlink.

Boog C et al., 'The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award,' Kluwer Arbitration Blog (2013) < http://kluwerarbitrationblog.com/2013/01/28/the-lazy-myth-of-the-arbitral-tribunals-duty-to-render-an-enforceable-award/>.

Boog C et al., 'The Lazy Myth of the Arbitral Tribunal's Duty to Render an Enforceable Award' (2013) Kluwer Arbitration Blog (January 28,2013).

Chernykh Y and Usynin M, 'Comments to the UNCITRAL Secretariat's Note 'Possible reform of investor-State dispute settlement (ISDS) Appellate mechanism and enforcement issues'' https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/inland_norway_university_of_applied_sciences_comments_uncitral_wp_appeal_and_enforcement.pdf.

Central Bank of Venezuela, "BCV completó histórica repatriación del oro monetario de la República", 30 January 2012, at http://www.bcv.org.ve/c4/notasprensa.asp?Codigo=9662&Operacion=2&Sec=False.

CNN (Jan. 9, 2012) *Chavez Says He Won't Respect World Bank Panel's Decision*, at http://edition.cnn.com/2012/01/09/business/venezuela-exxon/index.html>

D Charlotin, 'Looking back: German investor, Franz Sedelmayer, was early-adopter of investment treaty arbitration, but had to engage in decade-long assets hunt against Russia' (IA Reporter, 29 August 2017) at www.iareporter.com/articles/looking-back-german-investor-franz-sedelmayer-was-early-adopter-of-investment-treaty-arbitration-but-had-to-engage-in-decade-long-assets-hunt/.

De Córdoba, "Chávez Takes Steps to Exit Global Forum", 13 September 2011, at http://online.wsj.com/article/SB10001424053111903285704576560760106674594.html.

Di Pietro D, 'Arbitral Awards under the New York Convention: What Are and What May Be' (2011) NYU Law Blog.

Federal Reserve Bank of New York, 'International Services, Seminars and Training', <ttps://www.newyorkfed.org/banking/international.html.>

FG to stop UK court's $9bn award against Nigeria, New article published August 17, 2019 available at https://punchng.com/fg-to-stop-uk-courts-9bn-award-against-nigeria/amp/? twitter_impression=true

Financial Time ''The $6bn judgment pitting Nigeria against a London court'' on July 12, 2020, at https://www.ft.com/content/91ddbd53-a754-4190-944e-d472921bb81e.

Financial Times 'Nigeria granted stay of execution in $9.6bn court battle' published on Sept. 26, 2019, at https://www.ft.com/content/f6704600-e077-11e9-9743-db5a370481bc.

Giorgetti C and Wahab AM, 'A Code of Conduct for Arbitrators and Judges' (14 October 2019) Academic Forum on ISDS Concept Paper, 2019/8.

Giorgetti C, 'Independence and Impartiality of Arbitrators in Investor-State Arbitration: Perceived Problems and Possible Solutions' (2019) at https://www.ejiltalk.org/independence-and-impartiality-of-arbitrators-in-investor-state-arbitration-perceived-problems-and-possible-solutions/>

Investment Policy Hub 'Most Recent IIAs at https://investmentpolicy.unctad.org/international-investment-agreements.

ITAR-TASS (2014, July 28), *Russia to appeal ruling of The Hague Arbitration Court – Finance Ministry* – available at http://en.itar-tass.com/economy/742610.

ITAR-TASS. (2014, Aug. 12), *Russia might appeal Hague's arbitration court resolution on Yukos* available at http://en.itar-tass.com/russia/744558>.

Mansour AB, 'Domestic Procedures for the Payment of Damages by States in Investment Arbitration' https://www.iisd.org/itn/en/2020/06/20/domestic-procedures-for-the-payment-of-damages-by-states-in-investment-arbitration-affef-ben-mansour/>.

Spicer J, 'Special Report: How the Federal Reserve serves U.S. foreign intelligence,' Reuters, 26 June 2017, <https://www.reuters.com/article/us-fed-accounts-intelligence-specialrepo/special-report-how-the federal-reserve-serves-u-s-foreign-intelligence-dUSKBN19H19>.

Vyas K, "Venezuela's Chávez: Won't Accept Rulings by ICSID Court", 8 January 2012, <http://online.wsj.com/article/BT-CO-20120108-703460.html>.

Y Hodgson et al., 'Empirical Study: Costs, Damages and Duration in Investor State Arbitration; British Institute of International and Comparative Law & Allen and Overy: London, UK, 2021, <https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf.>