State Immunity and the Enforcement of Investor-State Arbitral Awards

Andrea K. Bjorklund[*]

Investor-State arbitration makes it possible for investors to bring claims against foreign governments that play host to investments; it does not necessarily make it easy for them to claim the fruits of any of their successful arbitral endeavours. Study of investment awards tends to end with the publication of any award; the difficult of enforcing the ensuing award receives less attention. For example, Christoph Schreuer's magisterial treatise on the ICSID Convention runs some 1290 pages, yet the provisions relating to the enforcement of awards occupy only 104 of them.[1] While the assumption may be that those awards get paid, such is not always the case. A lingering issue, in ICSID arbitration, as well as in any arbitration against a State, is the problem of State immunity[3] and the obstacle it poses to the enforcement[4] of arbitration awards rendered against sovereign States.

It has long been accepted that a waiver of State immunity from the jurisdiction of an international tribunal does not encompass any automatic waiver of immunity from the execution of a resulting award.[5] This distinction between waivers of immunity with respect to litigation or arbitration and waivers of immunity with respect to execution means that victorious investors may have difficulty collecting the monies owed them from States that do not wish to pay voluntarily.[6]

The rationale for maintaining immunity from execution is that certain State assets, such as central bank reserves and military and diplomatic property, are integral to the business of government and should not be subject to seizure.[7] Yet in concession contracts and in investment treaties States have acquiesced in the creation of

---

[*] Professor of Law, University of California, Davis, School of Law. I am grateful for the comments and helpful suggestions I received from Seán Duggan, Timothy Nelson, August Reinisch, and Gabriella Venturini. Any errors are, of course, my own. I also thank Anna Beier-Pedrazzi and Diana Meekay for superb research assistance. Deans Johnson and Amar provided generous research support, and Erin Murphy in the UC Davis Law Library was as usual of great help in locating sources.

[1] C. Schreuer, *The ICSID Convention* (2001).

[3] C. Schreuer, *State Immunity: Some Recent Developments* (1988).

[4] A semantic note is in order here. The words recognition, enforcement, and execution are often used imprecisely. Recognition involves the process often called *exequatur*: confirmation by a municipal court that the award is authentic and thus has legal consequences, such as *res judicata* status. Execution usually refers to the mechanics of attaching assets to satisfy an award. 'Enforcement' is sometimes coupled with recognition, is sometimes coupled with execution, and is sometimes used as an umbrella phrase to encompass both recognition and execution. This essay will follow the lead of Professor Schreuer in using enforcement as synonymous with execution, unless otherwise specified. Schreuer, above n. 1, 1124. In the United States there is strictly no such thing as execution of an award. A claimant moves to have an award confirmed under the ICSID, New York, or Panama Conventions. 22 U.S.C. section 1650a; 9 U.S.C. section 201 et seq.; 9 U.S.C. section 301 et seq. The confirming court enters a judgment on the award, and that court judgment can then be executed against the assets of the defendant.

[5] H. Fox, *The Law of State Immunity* (2d ed. 2008) 599, 601-604; Schreuer, above n. 3, 126.

[6] See, eg, G.R. Delaume, 'ICSID Arbitration and the Courts', 77 *American Journal of International Law* (1983) 784.

[7] H. Fox, 'State Immunity and the New York Convention', in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008) 829, 858.

international arbitral tribunals before which foreign investors can seek relief. Decoupling the waiver of immunity from jurisdiction from a waiver of immunity from execution seems inconsistent with the purpose of making a forum available to the foreign investor. As Professor Schreuer noted in his 1988 study of State immunity, long before the recent surge in the number of investors resorting to investor-State arbitration,

> The assumption of jurisdiction by domestic courts over foreign States without any prospect of having the resulting decisions made effective would not only be rather half-hearted but would also largely nullify the progress made in the protection of the private claimant.[8]

Immunity from execution means that respondents who lose investor-State cases still retain the ability not to pay awards rendered against them, although by doing so they are in violation of their international obligations. Professor Sompong Sucharitkul, the Special Rapporteur for the International Law Commission's project on the codification of the law of State immunity, has described State immunity from execution as 'the last fortress, the last bastion of State immunity.'[9] Successful investors in investor-State arbitrations are increasingly finding themselves loosing arrows at that fortress. This impediment to an investor's recovery of assets is becoming more evident as recalcitrant States refuse to pay the awards rendered against them. Recent examples of those States include Russia and Argentina, though there have been other isolated instances over the years.

The more than 2,500 bilateral investment treaties now extant are not identical.[10] Many permit investors to choose either to submit a dispute to ICSID under the auspices of the ICSID Convention or to convene proceedings under other arbitral rules. Under the former election, enforcement of the award is governed by the ICSID Convention; under the latter, no matter which rules govern the arbitration, those non-ICSID awards will nearly always be subject to enforcement under the New York Convention on the Recognition and Enforcement of Arbitral Awards.[11]

The enforcement provisions in both of these Conventions are usually heralded as a powerful tool in the hands of investors, who, if they win, will have in hand arbitral awards readily recognized around the world. The ICSID Convention requires that State parties to the Convention recognize and enforce ICSID awards as if they were final awards of their own courts.[12] Yet it also makes clear that waivers of immunity from jurisdiction do not encompass waivers of immunity from execution; actual execution of awards is subject to the laws, including those on State immunity, of the State in which execution is sought.[13] New York Convention awards are enforceable in 142 countries and are often more readily enforceable than municipal court judgments

---

[8] Schreuer, above n. 3, 125.

[9] S. Sucharitkul, *Commentary to ILC Draft Articles*, Article 18, para 1, C/AN.4/L/452/Add 3.

[10] UNCTAD, *Investment Promotion Provisions in International Investment Agreements*, UNCTAD/ITE/IIT/2007/7 (7 February 2008) 3 (putting number of BITs at 2,573 as of the end of 2006).

[11] Convention on the Recognition and Enforcement of Arbitral Awards (1958), 21 *UST* 2517; 330 *UNTS* 3 [hereinafter New York Convention]. The Inter-American Convention on International Commercial Arbitration (the Panama Convention) is an OAS Convention with 17 State parties. 14 I.L.M. 336 (1975); http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp. In the United States it takes precedence over the New York Convention, when it is applicable, unless the parties agree otherwise. 9 U.S.C. section 305 (2008). Its provisions, however, largely mirror those of the New York Convention, and I will not address it separately here

[12] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, (1966), 575 *UNTS* 159, Article 54 [hereinafter ICSID Convention].

[13] ICSID Convention, above n. 12, Articles 54(3), 55.

from other States. Yet they, too, are subject to the immunity laws of the place of enforcement. Because those immunity laws vary greatly, enforceability is much less certain than might be inferred from a cursory review of the enforcement provisions.
The insertion of municipal law into the execution process inevitably introduces a note of unpredictability, though it would be going too far to say there is no prospect of a decision resulting from an investment arbitration award being executable in local courts. State practice over the last several decades has shifted perceptibly, though not uniformly, towards a restrictive theory of immunity with respect to assets subject to execution, a reflection of the inroads made by the restrictive theory of immunity in the jurisdictional context.[14] Thus, a successful investor can very likely execute his arbitral award against commercial assets of a State, assuming he is able to locate those assets and surmount any immunity defence raised by the State that the assets are properly classified as used for government rather than for commercial purposes. This half-a-loaf approach, however, is unlikely to satisfy many foreign investors, and they may hesitate to bring claims if recovery should prove to be too difficult. As Professor Schreuer has noted:

> [A]llowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution may put them into the doubly frustrating position of having been lured into expensive and seemingly successful lawsuits only to be left with an unenforceable judgment plus legal costs.[15]

In the first two sections below I describe the regimes set forth for the enforcement of awards under the ICSID Convention and under the New York Convention. Though the routes each prescribes are different, each refers the prevailing party in a dispute to the municipal legal system(s) of State parties to the treaties in the event of a losing party's recalcitrance to pay an award. Successful investors in investment arbitrations governed by either regime can thus run into difficulties in attempts to recover assets that are protected by municipal laws on sovereign immunity with respect to execution. Section three below illustrates the pitfalls investors can face both because of the protections States enjoy due to State immunity and the complexity of the interaction between the New York Convention and municipal State immunity laws. It serves to demonstrate Professor Schreuer's prescience with respect to the perennially intractable nature of State immunity with respect to enforcement.

Execution of Awards Under the ICSID Convention

Article 53 of the ICSID Convention provides that awards have binding force as between the parties, and that parties to a dispute '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.'[16] The obligation to comply with awards extends to both States and foreign investors. Foreign investors are more

---

[14] Fox, above n. 5, 604-609; see also Delaume, above n. 6, 797 (noting new trend (as of 1983) in France towards permitting execution against commercial property provided claimants could meet the burden of proof to show that the property was indeed commercial) and 800 (noting general trend towards restrictive doctrine of immunity in the enforcement context in countries home to the world's leading financial centers); A.F.M. Maniruzzaman, 'State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends', 60(3) *Dispute Resolution Journal* (August-October 1985) 1, 4; J. Crawford, 'Execution of Judgments and Foreign Sovereign Immunity', 75 *American Journal of International Law* (1981) 820, 854-855.
[15] Schreuer, above n. 3, 125.
[16] Article 53(1) ICSID Convention.

likely to face this obligation in awards issued under a concession contract which selects ICSID Convention arbitration to govern any dispute. Most investment treaties permit claims to be brought by foreign investors against host States, but do not expressly permit reciprocal claims by the State against a foreign investor on the basis of applicable treaty provisions; it is possible that closely linked counterclaims may nonetheless go forward and lead to recovery against investors.[17]

The ICSID Convention provides for a compliance mechanism in Article 54. 'Each contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.'[18] ICSID Convention arbitral awards are thus independent of any treaties or domestic laws applicable to the enforcement of foreign judgments or awards. This was a deliberate decision by the Convention's drafters to remove any impediment to enforcement of the awards such as would have been available were awards enforceable under the New York Convention, which had been the initial proposal.[19] Theoretically, then, ICSID Convention Awards are more readily enforceable than awards under the New York Convention. The New York Convention would still be applicable, however, when enforcement is sought in non-ICSID Convention States, or when awards are rendered under the ICSID Additional Facility.

Article 54(1) refers to the recognition of awards and enforcement of any pecuniary obligations contained therein. Recognition is often a step preliminary to the enforcement of an award (*exequatur*); it also confirms the award as *res judicata*.[20] Article 54(2) governs the formal procedures that a State must establish, and that a party must follow, to achieve recognition or enforcement in the State's courts. Finally, Article 54(3) provides that execution of the award is governed 'by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.'[21]

Articles 54(1) & 54(2) both refer to 'enforcement', whereas Article 54(3) refers to 'execution', in the English version of the text. The equally authentic French and Spanish texts do not, however, change the terms of reference between sections of Article 54. Professor Schreuer suggests that the appropriate way to reconcile these differences under Article 33(4) of the Vienna Convention on the Law of Treaties is to conclude that the terms 'execution' and 'enforcement' are identical in meaning.[22] The obligation to recognize extends to all awards, whether they order restitution or other remedies, whereas the obligation to enforce extends only to pecuniary obligations. Furthermore, the obligation to recognize is subject to no qualifications, while the Convention makes clear that a State need not create new procedural mechanisms to enforce awards. This distinction will usually not matter, given that existing mechanisms will usually be adequate to enforce pecuniary obligations.[23]

---

[17] See, eg, J. Crawford, 'Treaty and Contract in Investment Arbitration', 24 *Arbitration International* (2008) 351, concluding that contractual claims and counterclaims may be brought under appropriately worded BITs; A.K. Hoffmann, 'Counterclaims by the respondent state in investment arbitrations – The decision on jurisdiction over Respondent's counterclaim in Saluka Investments B.V. v. Czech Republic', *SchiedsVZ*, No. 6 (2006) 317; A.K. Bjorklund, 'Mandatory Rules of Law in Investment Arbitration', 18 *American Review of International Arbitration* (2007) 175, 195, 199.

[18] Article 54(1) ICSID Convention.

[19] Schreuer, above n. 1, 1100-1101.

[20] Ibid., 1114-1115.

[21] Article 54(3) ICSID Convention.

[22] Schreuer, above n. 1, 1121-1124.

[23] Ibid., 1140.

Article 55 is the last of the trio of provisions pertaining to the enforcement of ICSID awards. A companion to Article 54, it provides that 'Nothing in Article 54 shall be construed as derogating from the law in force in any contracting State relating to immunity of that State or of any foreign State from execution.'[24] The ICSID Convention is thus explicit about State parties *not* having waived sovereign immunity with respect to the execution of awards; there is no room to argue that the waiver of immunity with respect to jurisdiction should be read to imply a waiver of immunity with respect to enforcement. The drafters were concerned that waiving immunity from execution would have 'run into the determined opposition of developing countries and would have jeopardized the wide ratification of the Convention.'[25]

The State immunity referred to in Article 55 is not static; it leaves room for the law of immunity from execution to change over time. Moreover, the availability of an immunity claim to resist enforcement of the award as against particular assets has no bearing on the award's status; States have a compliance obligation under Article 53 regardless of an investor's ability to enforce that obligation as against any particular assets.[26]

The original motivation for providing an explicit mechanism for the enforcement of awards was to ensure that States would be able to recover against investors who might be loath to pay awards rendered against them. No one expected States to fail to abide by their obligations.[27] If they do, however, the Convention provides two avenues of recourse for investors. The first avenue is for an investor to launch enforcement proceedings under Article 54. The second possibility is for an investor's home State to espouse the investor's claim. Article 27 permits an investor's home State to exert diplomatic protection on her behalf before the International Court of Justice should a State fail to pay an award.[28] Article 27 thus explicitly lifts the bar to espousal that remains in force during the investor's pursuit of her ICSID Convention arbitration. A third source of pressure on a State to pay an award might be found in ICSID's connection to the World Bank. Although not a strategy under the control of the investor, the Secretary General of ICSID (who until late 2008 was also General Counsel of the Bank itself) can communicate officially with non-paying parties to remind them of 'their international obligation to respect the result of a process to which they have given their consent.'[29]

Individual States may also attempt to influence a foreign government's actions. For example, in the United States, the 1961 Foreign Aid Act, with the Helms Amendment of 1994, limits foreign aid to any country that has 'nationalized or expropriated the property of any United States person' and has not 'provided adequate and effective compensation […], as required by international law.'[30] The suspension of aid will not

---

[24] Article 55 ICSID Convention.

[25] Schreuer, above n. 1, 1145, citing Aron Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 136 *Recueil des Cours* (1972) 331, 403; Delaume, above n. 6, 800, noting that the solution 'is to be regretted' but was unavoidable due to the 'lack of consensus on the meaning and scope of immunity from execution.'

[26] S. Alexandrov, 'Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention', *Transnational Dispute Management* (Provisional Issue, September 2008); Schreuer, above n. 1, 1087.

[27] Schreuer, above n. 1, 1087-1088, 1142; Alexandrov, above n. 26, 8-9.

[28] Article 27 ICSID Convention.

[29] J. Paulsson, 'ICSID's Achievements and Prospects', 6 *ICSID Review – Foreign Investment Law Journal* (1991) 380, 386; Schreuer, above n. 1, 1088.

[30] US Foreign Aid Act of 1961, 22 USC section 2370a(a)(1)(A), (a()2)(B). The law as initially passed was known as the 'First Hickenlooper Amendment' after the Senator who was its primary author. Senator Hickenlooper is perhaps better known for the 'Second Hickenlooper Amendment', which provides that the Act of State doctrine will not prevent a court in the United States from entertaining a

occur so long as the expropriating country has either compensated the US investor or has agreed to submit the dispute to arbitration under the ICSID Convention or other comparable agreement.[31] If, however, the claims have not been settled within three years of the date on which the claim was filed (or other dates depending on the circumstances), the prohibition on funding would resume.[32] In addition, the Act provides that the President 'shall instruct the United States Executive Directors of each multilateral development bank and international financial institution to vote against any loan or other utilization of the funds of such bank or institution for the benefit of any country' that is subject to the suspension of US foreign aid under the section's provisions.[33]

Enforcement of Awards Under the New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one of the most successful international treaties; indeed, it has been described as the most successful.[34] With 142 State parties,[35] it establishes a uniform regime for the enforcement of arbitral awards, as well as the enforcement of agreements to arbitrate. A court may refuse enforcement only on those grounds enumerated in Article V of the Convention.[36]

---

claim of expropriation under international law against a foreign State unless the President determines that a court's hearing the case would be detrimental to the foreign policy interests of the United States. 22 U.S.C. section 2370(e)(2) (2008).

[31] 22 USC section 2370a(a)(2). A United States person is 'any United States citizen or corporation, partnership, or association at least 50 percent beneficially owned by United States Citizens.' Ibid., (h).

[32] 22 USC section 2370a(c). Although the law does not expressly say that if the claims are not settled after three years funding under the Foreign Assistance Act would be prohibited, that is the implication of the provision.

[33] 22 USC. section 2370a(b). The United States appoints by right one of the Executive Directors on the board of the World Bank by virtue of its number of shares in the institution. That same director also serves on the board of the International Finance Corporation. There are 24 Executive Directors in total, 19 of whom are elected. The elected Directors are ordinarily elected to ensure balanced and widespread geographic representation. http://tinyurl.com/r5bgu. Thus, the ability of the United States Director to influence the outcome of a funding decision simply by voting against it is limited.

[34] See, eg, J. Neuhaus, 'Current Issues in the Enforcement of International Arbitration Awards', 36 *University of Miami Inter-American Law Review* (2004) 23, 24; W.W. Park and A.A. Yanos, 'Treaty Obligations and National Law: Emerging Conflicts in International Arbitration, 58 *Hastings Law Journal* (2006) 251, 257.

[35] This number is accurate as of 11 October 2008. The parties are listed at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[36] Article V provides in section 1 that recognition and enforcement of the award may be refused only if the party challenging the awards offers proof that:

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

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

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration […]; or

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

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

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

State immunity is not one of the explicit grounds on which a court can rest a decision to refuse to enforce an arbitral award under the New York Convention. There are, however, several avenues through which immunity might arise. State jurisdictional immunity could arise in defences based on lack of capacity, arbitrability of the award, or the tribunal's treatment of matters beyond the scope of submission to arbitration.

State immunity from execution proper would likely arise in two ways. The first avenue is via the public policy exception in Article V(2)(b).[38] The argument in favour of extending the exception to encompass immunity is that the basic justifications for recognizing State immunity are effectively public policy concerns: 'Either for reasons of international comity or of internal constitutional structure, it is believed that the courts should not complicate potentially sensitive foreign policy issues by "interfering" to order execution against property vested in a foreign State.'[39] The second avenue is via Article III of the New York Convention, which provides that contracting parties 'shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied on. [...].' Accordingly, municipal immunity laws have been treated as preliminary matters of procedure which claimants seeking to execute awards must overcome.[40]

Claimants have argued, with a mixed degree of success, that the agreement of a State to arbitrate encompasses an implied waiver of a claim of immunity from the enforcement of any resulting award if that award is governed by the New York Convention.[41] Certainly there is no explicit reservation of waiver with respect to execution, such as exists in the ICSID Convention, which leaves open the possibility of an implied waiver argument in an enforcement action in municipal court. Again, though, the success of that argument depends on municipal State immunity law. Moreover, varied responses are possible. One possibility is that a respondent State's agreement to arbitrate in a State that is party to the New York Convention, such that any award is governed by the Convention, is an implied waiver of immunity in any subsequent enforcement action, regardless whether the respondent State is itself a party to the Convention. A second variation is that only if the respondent State itself is a party to the Convention would such a waiver be implied, regardless whether the award itself was rendered in a New York Convention State and was thus subject to enforcement under the Convention. Some States accept the implied waiver argument, but require that the subject matter of the dispute be tied to assets a successful claimant

---

Section 2 provides that recognition and enforcement may be refused if 'The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

The recognition or enforcement of the award would be contrary to the public policy of that country.'

[37] A. Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) 277-282;

[38] S.J. Toope, *Mixed International Arbitration* (1990) 140-141; Fox, above n. 7, 837.

[39] Toope, above n. 38, 141.

[40] Fox, above n. 7, 836-837.

[41] Toope, above n. 38, 146-148; A. Jan van den Berg, 'Some Recent Problems in the Practice of Enforcement Under the New York and ICSID Conventions', 2 *ICSID Review – Foreign Investment Law Journal* (1987) 439, 450; V.O. Orlu Nmehielle, 'Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)', 7 *Annual Survey of International & Comparative Law* (2001) 21, 35.

is seeking to attach.[42] Finally, even if a State's court will assert jurisdiction over the respondent State in the enforcement proceeding, most municipal immunity laws require an examination of the status of the property sought to be attached. If it is not commercial property, an explicit waiver of immunity with respect to that property will be required before attachment is permitted.

Municipal State Immunity Laws & Recalcitrant Respondents

State immunity is something of a hybrid of customary international law, municipal law, and to a very limited extent treaty law.[43] The trend towards the codification of State immunity started with the US Foreign Sovereign Immunities Act of 1976.[44] The United Kingdom[45] and Australia[46] and others followed, leaving the unusual situation of many common law countries working with codifications of State immunity law, whereas civil law countries have developed the law on a case-by-case basis.[47] In addition, there are two international conventions on immunity, only one of which is in force. The European Convention on State Immunity has been adopted by 8 countries.[48] The UN Convention on Jurisdictional Immunities of States and Their Property was adopted by the General Assembly on 2 December 2004,[49] but has not yet entered into force. Both Conventions follow the custom of distinguishing between immunity from jurisdiction and immunity from execution.[50] The UN Convention would permit execution against property used for 'government non-commercial purposes' provided that the property 'has a connection with the entity against which the proceeding was directed.'[51]
Although they are informed by customary international law on State immunity, immunity practices vary. Even countries with broadly similar approaches to State immunity, such as Australia and the United Kingdom, nonetheless differ in detail.[52] While most States follow the restrictive theory of immunity, some have taken different paths. Italy, for example, used to require authorization from the executive branch of government to authorize enforcement.[53] In 1992, the Italian Constitutional

[42] For a recent canvassing of these varied positions by an English commercial court, see Orascom Telecom Holding SZE v. Republic of Chad, [2008] EWHC 1841 (Comm).
[43] Schreuer, above n. 3, 4.
[44] Foreign Sovereign Immunities Act of 1976, Pub L. 94-583, codified at 28 USC Section 1602 *et seq.*
[45] State Immunity Act 1978, 17 *ILM* (1978) 1123.
[46] Foreign State Immunities Act 1985, 8 *Australian Yearbook of International Law* (1983) 71.
[47] Schreuer, above n. 3, 4. See also J. Crawford, 'Australian Legislation on Foreign State Immunity', in id., *International Law As An Open System* (2002) 453, listing other states with state immunity codifications, including South Africa, Canada, and Singapore.
[48] European Convention on State Immunity (1972), ETS No. 74.
[49] United Nations Convention on Jurisdictional Immunities of States and Their Property, General Assembly Resolution 59/38 (2 December 2004). See generally D.P. Stewart, 'The UN Convention on Jurisdictional Immunities of States and Their Property', 99 *American Journal of International Law* (2005) 194, 206-207.
[50] Article 23 European Convention, above n. 48; Article 19 UN Convention, above n. 49.
[51] Article 19(c); Article 21 (describing categories of property that will never be subject to attachment) UN Convention, above n. 49. Under codifications and common law the United Nations and other international organizations enjoy absolute immunity from suit and execution.
[52] Crawford, above n. 47, 458, 460, 462.
[53] A. Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', 17 *European Journal of International Law* (2006) 803, 813-817; Andrea Atteritano, Immunità dalle misure esecutive e cautelari, in N. Ronzitti and G. Venturini (eds), *Le Immunità Giurisdizionali Degli Stati e Degli Altri Enti Internazionali* (2008).

Court declared that 1926 law unconstitutional.[54] Thus, Italy now follows generally the restrictive theory of immunity as developed by its courts, though Italy has yet to face any ICSID enforcement cases raising State immunity issues. This short essay is not the place to undertake a detailed examination of the various State immunity practices.[55] Rather, it seeks to illustrate through recent examples the obstacles posed by immunity to claimants in investment cases brought under ICSID and the New York Convention.

Argentina's Response to ICSID Claims Arising from the Financial Crisis

Claimants who seek redress under Article 54 of the ICSID Convention do so subject to municipal law on State immunity. Though most respondents have indeed paid the awards rendered against them, States have not inevitably done so: Liberia, Senegal, Congo, and Kazakhstan have each failed to pay awards, and their successful invocations of sovereign immunity defences illustrate the difficulties that even victorious investors face vis-à-vis recalcitrant States.[56] The latest challenge to the enforceability of ICSID awards is likely to come from Argentina.

Argentina faces over 30 ICSID Convention cases filed under various bilateral investment treaties to challenge actions it took during the Argentina financial crisis; others have been filed under other arbitral rules.[57] Decisions have been rendered against Argentina in several of those cases. Most of the ICSID cases are in annulment proceedings, and Argentina has sought to have enforcement of the awards stayed pending the outcome of the annulment proceedings.[58] While the ad hoc committees hearing the annulment proceedings have discretion to grant such a stay, they are not required to do so.[59] In most instances, however, they have granted Argentina's request.

The annulment proceedings in one of the cases, *CMS Gas Transmission Company v The Argentine Republic*, ended in September 2007.[60] The *ad hoc* committee had stayed enforcement of the award without requiring a bank guarantee, 'despite reports in the Argentine press that, in the event of a negative annulment decision, the constitutionality of ICSID awards would be examined before the Argentine Supreme Court, or that Argentina would bring a case before the International Court of Justice under the Argentina-US BIT.'[61] Argentina's attorney general had given an

---

[54] Atteritano, above n. 53, 235 – 247.

[55] For an excellent overview of recent state immunity practice in Europe, see Reinisch, above n. 53. For a general survey of immunity practices, see D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (2007).

[56] *Benvenuti & Bonfanti S.A.R.L. v Congo*, Tribunal de grande instance de Paris, 13 January 1981, 108 *Journal du Droit International* (1981) 365; *LETCO v Liberia*, 650 F. Supp. 73 (SDNY 1986); *SOABI v Senegal*, Cour d'appel Paris, 5 December 1989, 117 *Journal du Droit International* (1990) 141; *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company (U.S.) v Republic of Kazakhstan*, [2005] EWHC 2239 (Comm.).

[57] In addition, other governmental measures not prompted by the financial crisis have also formed the basis for claims against Argentina

[58] *CMS Gas Transmission Company (US) v The Argentine Republic*, ICSID Case No. ARB/01/08, Decision on Argentine's Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006; *Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Request for continued Stay of Enforcement, 7 October 2008.

[59] Article 52(5) ICSID Convention.

[60] *CMS Gas Transmission Company (US) v The Argentine Republic*, ICSID Case No. ARB/01/08, Annulment Decision, 25 September 2007.

[61] M. Friedman, I. Laird, E.J. Mathieu, St. Michaels, K. O'Gorman, D.W. Prager, A. Sabater and B.H. Sheppard Jr, 'International Arbitration', 41 *International Lawyer* (2007) 251, 275-276; *CMS Gas*

undertaking to the CMS Gas Transmission Company that 'in accordance with its obligations under the ICSID Convention, it would recognize the award rendered by the Arbitral Tribunal in this proceedings as binding and would enforce the pecuniary obligations imposed by that award within its territories.'[62] Based on that undertaking, which the CMS Tribunal found to be a binding commitment, the *ad hoc* Committee maintained the stay without requiring a bank guarantee.[63] The *ad hoc* Committee declined to annul the award, but Argentina has not yet paid it.

Indeed, Argentina has been forthright about its intention to fight against paying the awards rendered against it using all weapons it can find. In a remarkably public debate between two treaty parties, Argentina and the United States have taken opposing views about the mechanism created by ICSID for the enforcement of ICSID Convention awards. The debate has arisen in *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, a dispute brought by Siemens pursuant to the bilateral investment treaty between German and the Argentine Republic.

Argentina's initial arguments were made in a document that has not been made public, but in which Argentina evidently discussed its interpretation of Articles 53 and 54 of the ICSID Convention and suggested that '[t]he United States Government has not objected to that interpretation of the ICSID Convention.'[64] The United States wrote to correct any misapprehension created by the Government of Argentina. The United States made it clear that it disagreed with Argentina's position.[65] A subsequent communication from Argentina in response to the US letter described Argentina's position.

Argentina has recognized that Article 53 of the ICSID Convention 'establishes the international law obligation to comply with the award,' but has argued that Article 53 must be read in conjunction with Article 54, which it describes as the 'distinctive feature of the mechanism of recognition and enforcement of awards enshrined in the ICSID Convention.'[66] According to Argentina, Article 54 thereby privileges an ICSID Convention award over other arbitral awards, which are enforceable under the New York Convention and are thus subject to the defences that defendants are entitled to raise under it.[67] Yet Argentina has argued that Article 54 is also intended to protect the States party to the ICSID Convention: 'a further consequence of such article is that the State that is the award debtor is at least entitled to subject compliance with ICSID awards to the same or substantially the same procedures that are applicable to compliance with final judgments of local courts against the State.'[68] Finally, 'it must be stressed that Contracting States did not intend to accord creditors of ICSID awards

---

Transmission Company (US) v The Argentine Republic, ICSID Case No. ARB/01/08, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 1 September 2006; C.E. Alfaro and P. Lorenti, 'Argentina v. ICSID, Unconstitutionality of the BITS and ICSID Jurisdiction – The Potential New Government Defenses Against the Enforcement of the ICSID Arbitral Award – Issues that May Subject the Award to Revision by the Argentine Judiciary' 2:3 *Transnationl Dispute Management* (June 2005); C.E. Alfaro, 'Argentina: ICSID Arbitration and BIT Challenged by Argentine Government and its Supreme Court', 1:4 *Transnational Dispute Management* (October 2004); C.L. Goodman, 'Uncharted Waters: Financial Crisis and Enforcement of ICSID Awards in Argentina', 28 *University of Pennsylvania Journal of International Economic Law* (2007) 449, 469.

[62] *CMS* Decision on Stay of Enforcement, above n. 61, para 28.

[63] Ibid. para 50.

[64] *Siemens v Argentina*, ICSID Case No. ARB/02/8, US Department of State Letter (1 May 2008).

[65] Ibid.

[66] *Siemens v Argentina*, ICSID Case No. ARB/02/8, Argentina's Response to US Department of State Letter, 2 June 2008.

[67] Ibid.

[68] Ibid.

a better treatment than the one accorded to other private creditors of final local decisions.'[69]

The United States disputed that Article 54 conditions a claimant's rights to recover under an ICSID award in any way. Rather, the United States clarified its view that Article 54 simply addresses the obligations of all ICSID parties (not just a losing respondent State) to recognize the award in their courts in the event that the State does not pay.

Argentina made the same argument in the *Enron* case, in which it was seeking a continuation of a temporary stay of enforcement of the arbitral award rendered against it. The claimants argued that the stay should only be continued if Argentina provided financial security for the stay, and suggested that there was substantial risk that Argentina would not comply voluntarily with the award, as evidenced, *inter alia*, by Argentina's interpretation of Articles 53 and 54.[70] The *Enron ad hoc* Committee disagreed with Argentina's interpretation of Articles 53 and 54. After canvassing the relevant provisions of the ICSID Convention, the *ad hoc* Committee announced:

> The Committee further considers that it would be inconsistent with the purpose of the ICSID Convention if an award creditor had to bring proceedings pursuant to national law enforcement mechanisms established under Article 54(1) as a prerequisite for compliance with the award by the award debtor. The ICSID dispute settlement mechanism was intended to be an international method of settlement, and it would run counter to this intention for compliance with a final award to be subject, ultimately, to the provisions and mechanisms of national law. The Committee considers that it would inherently undermine confidence in the ICSID system if a State against which an award has been given could make its own compliance with the award subject to the award creditor availing itself of the mechanisms under that State's national law for enforcement of final judgments of courts.[71]

The *ad hoc* Committee concluded that Argentina's arguments suggested that in the event it was unsuccessful in its annulment application, Argentina would not comply with the award voluntarily, but would require the claimants to commence proceedings in municipal courts.[72] The *ad hoc* Committee accepted, however, that Argentina's representations about its interpretation of Articles 53 and 54 had been given in good faith. Given that, the *ad hoc* Committee decided to give Argentina 60 days (from 7 October 2008) to give a formal indication that it would comply with its obligations under Article 53 in the future. Absent such an undertaking, the *ad hoc* Committee would be inclined to consider that there would be a substantial risk of non-compliance by Argentina in the event the award was not annulled. After 60 days, it would reconsider the issue of the continuance of the stay and the matter of posting security.[73]

The *ad hoc* Committee in the long-running dispute between Vivendi and Argentina has recently issued a decision that follows the *Enron ad hoc* Committee's lead in requiring Argentina's assurance that in the event the tribunal's decision is not annulled it will pay any award within 30 days of Vivendi's formal attempt to enforce the award with the Argentine authorities as provided in Article 54(2) of the Convention.[74] If Argentina were to fail to provide such an undertaking within 30 days

---

[69] Ibid.

[70] *Enron Corporation Ponderosa Assets, LP. v The Argentine Republic*, ICSID Case No. ARB/01/3, 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), 7 October 2008, at 5-6.

[71] Ibid., 33.

[72] Ibid., 40.

[73] Ibid., 46.

[74] Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. The 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 Arbitraiton Rules), para. 46, 4 November 2008.

of receiving notification of the decision, it would have to post a bank guarantee in order to preserve the stay on enforcement.[75] The *Vivendi ad hoc* Committee also made clear its understanding that the ICSID Convention did not permit any organ of a host State to exercise any authority of the status of an ICSID Convention award.[76]

The decisions of both the *Enron* and *Vivendi ad hoc* Committees reflect the conclusion of the drafters of the ICSID Convention that to the extent possible ICSID awards should not be subject to control by national courts. If a State honours its obligations, municipal laws should not come into play at all. The fact that Argentina faces multiple awards cuts both ways. On the one hand, if Argentina continues to refuse to honour its obligations in one case, such as *CMS*, other *ad hoc* Committee faced with applications for stays of enforcement pending the outcome of annulment proceedings might be less inclined to grant them. On the other hand, the magnitude of the obligations Argentina faces in the more than 30 proceedings brought against it could cause the State to conclude that voluntary payment would be financially ruinous. And if Argentina fails to pay, claimants will be left searching ICSID Convention countries for assets that are not protected by municipal laws on State immunity. As the next case indicates, locating that property can be difficult.

The Sedelmayer Saga

A celebrated case involving a German citizen's attempt to enforce an arbitral award against Russia provides a colourful illustration of the difficulties a successful claimant may encounter when seeking to convert his award into actual monetary compensation. Franz Sedelmayer, a German citizen, moved to St. Petersburg (formerly Leningrad) in 1989 and started a company, the Sedelmayer Group of Companies, that would supply law enforcement equipment and training to the Police Department of Leningrad, Glavnoje Upravlenije Vnutrenich Del (GUVD). In 1990, Sedelmayer and GUVD agreed that he would supply police equipment, establish a training facility in St. Petersburg, and organize a private armed security agency.[77] GUVD authorized Sedelmayer to use several of its buildings for 'mutual business collaboration'.[78] He then spent more than $2 million to equip the property as a conference centre and training facility for security personnel.[79] In August 1991, Sedelmayer's company and GUVD signed an agreement establishing a joint stock company, Kammenij Ostrov Company. Later in 1991, GUVD and KOC signed an Act of Transfer, which placed ownership of the property in KOC. In 1992, a Federal Property Fund was established to hold all Russian State property, including assets that governmental agencies had contributed to the capital of joint ventures. Thus, all of GUVD's shares in KOC were transferred to the Property Fund. Soon thereafter, GUVD was ordered to transfer all of its shares to another government agency. GUVD refused, and litigation ensued. First KOC's state registration was declared null and void; next a presidential decree expropriated the property as a part of a presidential residence for Boris Yeltsin. Sedelmayer tried to fight the decree, but on 20 September 1995, the Judicial Collegium for Civil Cases ordered that the buildings be sealed.[80]

---

[75] Ibid.
[76] Ibid. para. 36.
[77] K. Hobér, 'Investment Arbitration in Eastern Europe: Recent Cases on Expropriation', 14 *American Review of International Arbitration* (2003) 377, 389.
[78] Ibid., 389.
[79] D. Crawford, 'Businessman v. Kremlin: War of Attrition', *The Wall Street Journal Online*, 6 March 2006.
[80] Hobér, above n. 77, 392.

Sedelmayer prevailed in a claim for expropriation under the Germany/Russia BIT. In July 1998, the Tribunal ordered the Russian Federation to pay Sedelmayer $2.35 million, including interest at 10 percent, as compensation for his investments under the treaty.[81]

Russia refused to pay the award, and Sedelmayer sought enforcement in Germany. The Kammergericht in Berlin (over Russia's objections) declared the award enforceable under the New York Convention.[82] Germany does not have a codified law on State immunity, but has adopted the restrictive principle of immunity with respect to jurisdiction and enforcement as articulated in the case law of the German Constitutional Court. Germany distinguishes, however, between enforcement of the award and its execution. A sovereign's submission to arbitration is deemed a waiver of immunity not only for the arbitration proceedings but also for any ensuing enforcement proceedings in municipal courts. That waiver, however, does not extend to execution of the award. In the *Sedelmayer* case, the Kammergericht also relied on the Article X of the Germany/Russia BIT, which states that the 'award shall be recognized and enforced in accordance with the Convention on the recognition and enforcement of Foreign Arbitral Awards of 10 June 1958.' Russia was thus deemed to have waived immunity with respect to the enforcement proceedings.[83].

Sedelmayer then started a multi-year period of attempting to locate Russian assets that could be deemed commercial and therefore unprotected by any immunity claim. According to Sedelmayer, he brought more than 20 different execution cases against Russia.[84] These, included, *inter alia*, an attempt to impound Lufthansa Airlines' payments to Russia for overflights of Russian airspace. He was initially successful with respect to this claim, but the Regional Court in Cologne ruled that the payments were to be used for sovereign purposes and were thus immune from execution.[85] After several frustrated attempts, Sedelmayer filed suit with the European Court of Human Rights against Germany for its failure effectively to enforce a remedy and discrimination.[86]

After several years, Sedelmayer finally won an interim victory when the Amtsgericht in Frankfurt am Main issued an order freezing business bank accounts of the Russian Federation held by Dresdener Bank AG, VTB Bank Deutschland AG and Deutsche Bank AG and permitting Sedelmayer to withdraw up to $300,000 each month, the estimated amount that Russia would be earning in interest on the property it seized from Sedelmayer.[87]

Complete victory only came in March 2008, when a Cologne court issued a precedent-setting ruling ordering an apartment complex that had formerly been the Soviet trade mission (and KGB compound), to be auctioned to pay off the Russian

---

[81] *Franz Sedelmayer v. The Russian Federation (UNCITRAL)*, 2 *Stockholm International Arbitration Review* (2005) 38, 56-57, 63-73.

[82] S. Kröll and J. Griebel, 'To Pierce or not to Pierce the Veil', 2 *Stockholm International Arbitration Review* (2005) 37, 95.

[83] Ibid., 96.

[84] F.J. Sedelmayer, 'Sedelmayer v. Germany, European Court of Human Rights', 2 *Transnational Dispute Management* (2005) 30, 30.

[85] Kröll and Griebel, above n. 82, 96.

[86] *Sedelmayer v. Germany, European Court of Human Rights*, Application, 25 October 2005.

[87] M. Kirby, 'German Court Freezes Russian Government Account in Asset Claim', *World Markets Research Centre*, 13 October 2006; F.J. Sedelmayer, 'Franz J. Sedelmayer v. The Russian Federation: The Tribulations of an Arbitral Award Winning Party', 3 *Transnational Dispute Management* (2006) 39; S. Shuster, 'German Court Rules Against the Kremlin', *The Moscow Times*, 12 October 2006.

Federation's by-then €4.9 million debt to Sedelmayer.[88] Sedelmayer had initially won control over the $40 million property in 2006. He apparently learned of the existence of the property from Russian spy friends, and then discovered in Cologne ownership lists that the (now) apartment complex was indeed the property of the Russian State.[89] Though the Russian government opposed his seizure of the property on grounds of sovereign immunity, the Cologne court ruled that the former Soviet trade mission was not in fact immune from execution because it was used for commercial purposes rather than for State affairs.[90] An auction on the property is scheduled to take place in December 2008.[91] Russia could prevent the auction if it paid its debt to Sedelmayer.[92]
Sedelmayer's case illustrates the hurdles a claimant faces when it must attempt to locate assets that are not protected by State immunity laws. It has taken Sedelmayer more than 10 years to collect his award.

The Foreign Sovereign Immunities Act, the New York Convention, and the US Constitution

The final case study illustrating difficulties faced by investors seeking enforcement of their awards is the increasingly complex situation in US courts' approach to the New York Convention. Enforcing arbitral awards against States in US courts requires navigating around the shoals of US constitutional law as well as one complex statute, the Foreign Sovereign Immunities Act, and the New York Convention, as interpreted by US courts. Recent decisions by US courts on the interaction between the New York Convention and US constitutional law have generated uncertainty about the efficacy of the New York Convention in enforcement proceedings involving private parties in US courts. That uncertainty might or might not extend to awards against foreign States; the extent to which uncertainty is layered on uncertainty is governed by the Foreign Sovereign Immunities Act and judicial determinations of the interplay between it and the US constitutional requirement of due process. Moreover, because the United States is divided into 12 judicial circuits, none of which is bound to follow the decisions of the other circuits, the potential for divergent outcomes is great.
In order to hear a case, a court in the united States must have both subject-matter and personal jurisdiction. It must be authorized to hear the type of claim presented (subject matter jurisdiction), and be authorized to exert authority over the defendants in the case (personal jurisdiction).
As far as subject matter jurisdiction is concerned, state courts are usually courts of general jurisdiction, meaning they can hear any kind of case; federal courts are courts of limited jurisdiction, meaning they hear only cases that raise a federal question or that arise in diversity.[93] While cases that raise federal questions can be brought in state

---

[88] 'Kremlin Says Ruling on Soviet Trade Mission in Cologne Illegal', *Ria Novosti*, 21 March 2008, LEXIS 7023955.
[89] 'Russia Loses Compensation Case', *The Moscow Times*, 7 March 2006.
[90] 'Kremlin says ruling on Soviet trade mission in Cologne illegal', *RIA Novosti*, 21 March 2008.
[91] 'Gebäude von Russlands Handelsvertretung in Köln wird versteigert', *RIA Novosti*, 30 September 2008. Russia tried and failed to forestall the auction. See eg German Supreme Court IX ZR 64/08 (Bundesgerichtshof); City Court Cologne 093 K 029/06 (Amtsgericht Köln).
[92] Ibid.
[93] D. Brian King and A.J. Benjamin, 'Enforcing Foreign Arbitral Awards Under the New York Convention: Jurisdiction Over Party or Its Property as a Prerequisite in the United States', 18(4) *Mealey's International Arbitration Report* (2003) 39.

courts, foreign government defendants have the right to 'remove' cases against them to federal courts, and in practice they usually exercise that right.[94]
Subject-matter jurisdiction is not at issue with respect to cases brought to enforce foreign arbitral awards against States under the New York Convention. The Foreign Sovereign Immunities Act is the exclusive basis for achieving jurisdiction over foreign States in the courts of the United States, whether those be federal or state courts.[95] It was first passed in 1976 in order to regularize US practice with respect to sovereign immunity by removing from the Executive Branch of government the authority to make determinations related to immunity and conforming US practice with international practice regarding sovereign immunity.[96] It provides that a court in the United States has subject matter jurisdiction to hear cases against foreign sovereigns if any one of the exceptions to immunity enumerated in provisions are present. Amendments to the Foreign Sovereign Immunities Act in 1988 removed any doubt that federal courts had subject-matter jurisdiction to hear claims against foreign sovereigns based on the enforcement of an arbitral award. The arbitration exception applies only when the arbitration agreement involves a 'private party.'[97] If the investor is itself sovereign-owned, it might not be able to overcome the defence that the arbitration exception does not apply, though it could still fall back on the 'waiver' exception.
The issue of personal jurisdiction is more complex for our purposes. As a general matter, all US courts – both state and federal – can only exercise jurisdiction over defendants in a manner consistent with US constitutional standards of due process. In the case of a non-resident defendant, the defendant must have 'minimum contacts' with the forum such that the exercise of jurisdiction is 'consistent with standards of fair play and substantial justice.'[98] Personal jurisdiction must also be consistent with the statutory grants of jurisdiction provided in state 'long-arm' statutes – those statutes that govern the exercise of jurisdiction over non-resident defendants. Thus, for example, a California state court must have jurisdiction under California's state long-arm statute as well as under the Constitution. California, like many states, has effectively merged those inquiries; the state long-arm statute permits the exercise of jurisdiction to the same extent permitted by the Constitution.[99] Federal courts usually 'borrow' the long-arm statute of the state in which they sit. In certain instances, however, federal statutes will themselves identify the contours of the personal jurisdiction conferred on federal courts. In those instances, the state long-arm statutes do not apply to limit federal courts' exercise of jurisdiction. It is also possible for the court to consider a defendant's contacts with the United States as a whole, rather than only with the state in which jurisdiction is sought, in a case involving a federal cause

---

[94] 28 USC 1441(d).
[95] *Argentine Republic v. Amareda Hess Shipping*, 488 US (1989) 428, 434. See also 28 USC Section 1602 ('Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.'); Section 1604 ('a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.').
[96] For an interesting description of a recent Supreme Court case regarding the breadth of the FSIA and its relationship with international law, see A.K.A. Greenawalt, 'Foreign Sovereign Immunities Act: Supreme Court Upholds New York City Action for Tax Liens against UN Missions', 11(22) *ASIL Insight*, 28 August 2007.
[97] 28 U.S.C. section 1605(a)(6).
[98] *International Shoe Co. v Washington*, 326 US (1945) 310, 316.
[99] Cal. Code Civ. Pro. section 410.10 (2008).

of action.[100] It is probable that nationwide contacts could come into play in a New York Convention case.[101]

A significant distinction between subject-matter jurisdiction and personal jurisdiction is that objections to personal jurisdiction are waivable. If a defendant fails to object to the court's assertion of power over her in her first defensive pleading, she is deemed to have waived any right to object.[102] The same is not true for subject-matter jurisdiction, which may be raised at any time throughout the proceeding.[103]

The FSIA provides that a court may exercise personal jurisdiction over a foreign sovereign if one of the exceptions to immunity is present and the foreign sovereign has been served with process as provided in the statute.[104] In that respect it fuses the subject-matter jurisdiction and personal jurisdiction inquiries. Most of the exceptions to immunity require that there be a jurisdictional nexus between the property at issue or the conduct surrounding the claim and the United States; the legislative history to the FSIA suggests that these requirements were designed to ensure that the exercise of jurisdiction comported with the due process requirements of the US Constitution.[105] In 1988 the FSIA was amended to include an explicit exception to immunity for cases brought either to enforce an agreement to arbitrate, or to

> confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, [or] (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards […].[106]

This provision was quite clearly meant to permit enforcement of awards under the New York Convention and the Inter-American Convention on International Commercial Arbitration 'by clarifying that a foreign state's agreement to submit a dispute to international commercial arbitration amounts to a waiver of sovereign immunity in any suit to enforce arbitral awards relating to such agreements.'[107] Prior to 1988, courts had differed over whether States that had agreed to arbitration had concomitantly waived immunity for proceedings related to the enforcement of any award rendered by the arbitral tribunal.[108] The 1988 amendment put to rest that controversy, but raised others.

Nothing in the arbitral amendment requires a nexus between foreign government activity and the United States, even though that is where enforcement or recognition is

---

[100] Federal Rule Civil Procedure 4(k)(2) (permitting a court to exercise jurisdiction if the defendant has 'minimum contacts' with the United States as a whole).

[101] *Glencore Grain Rotterdam B.V. v Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1126-27 (9th Cir. 2002); *Base Metal Trading Ltd. v OJSC 'Novokuznetsky Aluminum Factory'*, 283 F.3d 208, 215-16 (4th Cir. 2002).

[102] Federal Rule of Civil Procedure, 12(g); 12(h)(1) foreign respondent recently attempted to challenge the adequacy of the service of process under the Foreign Sovereign Immunities Act approximately one year after the case had commenced and during which the country had actively litigated the case. The Court concluded that the respondent had waived its right to object. *Democratic Republic of Congo v F.G. Hemisphere Associates*, 508 F.3d 1062, 1064-65 (DC Cir. 2007).

[103] Federal Rule of Civil Procedure, 12(h)(3).

[104] 28 USC Section 1608.

[105] Flowers, 'Jurisdiction of United States Courts Against Foreign States', HR No. 94-1487 (1976) at 13.

[106] 28 USC Section 1605(a)(6).

[107] K. Halverson, 'Is a Foreign State a "Person"? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act', 34 *N.Y.U. Journal of International Law & Policy* (2001) 115, 123.

[108] M.B. Feldman, 'Waiver of Foreign Sovereign Immunity by Agreement to Arbitrate: Legislation Proposed by the American Bar Association', 40(1) *The Arbitration Journal* (1985) 24.

sought. Usually a claimant seeking recognition and enforcement of an arbitral award will do so in a jurisdiction in which the defending party has assets available for attachment. She might also seek recognition of the award, even if no assets are available to be enforced, because of the *res judicata* effects that would flow from such recognition. It is thus an open question whether a court's exercise of jurisdiction under the FSIA arbitration award provision comports with the constitutional requirements of due process because the foreign sovereign, aside from the possible presence of assets in the jurisdiction, might not otherwise have minimum contacts sufficient to support jurisdiction under the due process clause.

This issue should not even arise in an enforcement action brought under the New York Convention. The reason it appears at all is because several US appellate courts have in the last 8 years mistakenly engaged in a personal jurisdiction query in New York Convention cases as if they involved litigation on the merits, rather than the enforcement of an award.[109] In a similarly misguided decision, the Second Circuit dismissed a case seeking enforcement of a New York Convention award on the grounds of *forum non conveniens*.[110] These cases arguably place the United States in violation of its international obligations.[111] They misapprehend the requirements imposed by the U.S. Constitution and fail to understand properly the enforcement mechanism created by the New York Convention. Specifically, they fail to take into account arguments that by assenting to an arbitration in which the award would be governed by the New York Convention parties to an arbitration, including States, can be deemed to have waived any objections to personal jurisdiction with respect to recognition and enforcement of the award.[112]

The waiver question continues to bedevil courts. In one case involving Qatar (which is not party to the New York Convention) the D.C. Circuit held that Qatar's agreement to arbitrate in France, which meant that the resulting award would be a New York Convention award (because France is a party to the Convention), did not constitute waiver of its ability to object to the personal jurisdiction of US courts., although it did suffice to confer on them subject-matter jurisdiction under the FSIA arbitration provision.[113] The *Creighton v. Qatar* case left open the question whether Qatar's argument would have succeeded had Qatar itself been a party to the New York Convention.

The celebrated case of *Shaffer v Heitner* held that it was inconsistent with due process for a court to exercise jurisdiction over a person for any matter whatsoever based solely on the presence of property belonging to that person,[114] thereby doing away with the much-maligned *quasi-in-rem* basis for jurisdiction.[115] But the *Shaffer* court explicitly confirmed that 'while property of a defendant that is unrelated to the dispute

---

[109] *Base Metal Trading, Ltd. v OJSC 'Novokuznetsky Aluminum Factory'*, 283 F.3d 208 (4th Cir. 2002); *Glencore Grain Rotterdam v Shivnath Rai Harnarain Co*., 284 F.3d 1114 (9th Cir. 2002); *Base Metal Trading Ltd. v OJC 'Novokuznetsky Aluminum Factory'*, 47 Fed. Appx. 73 (3d Cir. 2002); cf. *Dardana Ltd. v A.O. Yuganskneftegaz*, 317 F.3d 202 (2d Cir. 2003).

[110] *Monegasque de Reassurances S.A.M. v NAK Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002)

[111] Park and Yanos, above n. 34, 296-297.

[112] Ibid., 286-87. Professor Park and Mr Yanos also suggest other legal theories under which the New York Convention provisions could be made enforceable, such as estoppel.

[113] *Creighton Ltd. v Government of the State of Qatar*, 181 F.3d 118, 125-26 (DC Cir. 1999). *Creighton* was decided before the DC Circuit concluded that foreign sovereigns were not persons for purposes of the exercise of personal jurisdiction under the due process clause. See below n. 119.

[114] *Shaffer v Heitner*, 433 US 186 (1977).

[115] See generally L. Silberman, '*Shaffer v. Heitner*: The End of an Era', 53 *New York University Law Review* (1978) 33.

cannot be a basis for jurisdiction over an initial claim, the presence of such property can be used as the basis for enforcement of a judgment.'[116] Thus, the courts in *Base Metal Trading* and *Glencore Grain* erred in determining that they must have personal jurisdiction over the defendant based on minimum contacts.

Those cases involved private parties. With respect to cases in which foreign sovereigns are the respondents, the same criticisms would apply. But claimants seeking to enforce awards against foreign sovereigns might be able to escape the question of whether the exercise of personal jurisdiction meets the standards of due process on another ground.

It might be that the exercise of jurisdiction over a foreign State need not comport with due process at all because recently courts have questioned whether foreign sovereigns are 'persons' for the purposes of the Due Process clause of the Constitution. Justice Scalia, in *Republic of Argentina v Weltover*, suggested in *obiter dicta* that they might not be entitled to those protections.[118] The US circuit courts are divided on the issue. The District of Columbia Circuit, for example, has followed the suggestion of the Supreme Court in *Weltover*.[119] The Second Circuit, while questioning its precedent in light of *Weltover* and *Price*, has not overruled its conclusion that foreign sovereigns are indeed entitled to the protections of the due process clause.[120] Similar uncertainty exists whether State agencies and instrumentalities can invoke due process protections, even if States themselves cannot.[121]

The struggle over a US court's exercise of personal jurisdiction is but the first step a foreign claimant faces. The execution of awards must conform to the requirements of the FSIA. By its terms, the FSIA permits execution only against property that is used for a commercial activity.[122] Thus, a claimant seeking to attach property must find some that is used for a commercial activity. While claimants have exercised a certain degree of ingenuity in locating such property, it nonetheless remains difficult.[123] Certain types of property can never be commercial; property held by a foreign central bank or monetary authority held for its own account (absent explicit waiver) or property that is intended to be used in connection with a military activity.[124]

---

[116] L. Silberman, 'International Arbitration: Comments from a Critic', 13 *American Review of International Arbitration* (2002) 9, citing *Shaffer v Heitner*, 433 US 186, at 210-211 n. 36).

[118] *Republic of Argentina v Weltover*, Inc., 504 US 607, 619-20 (1992); cf. *Texas Trading & Milling Corp v Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981), finding that a foreign State is 'person' for purposes of the due process clause.

[119] *Price v Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-99 (DC Cir. 2002).

[120] *Frontera Resources Azerbaijan Corporation v State Oil Company of the Azerbaijan Republic*, 479 F. Supp. 2d 376 (SDNY 2007), citing *Texas Trading & Milling Corp. v Federal Republic of Nigeria*, 647 F.2d 300, 308 (2d Cir. 1981); *Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala and Uzinexportimport*, 989 F.2d 572 (2d Cir. 1993). The Eleventh Circuit, in enforcing an award against the Republic of Yemen did not have to decide whether foreign states could invoke due process protections as minimum contacts were met in that case. *S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292 (11th Cir. 2000).

[121] Compare *TMR Energy Ltd v. State Property Fund of Ukraine*, 411 F.3d 296, 302-02 (D.C. Cir. 2005), in which the court held that if the Ukrainian agency were a separate juridical entity it would have been entitled to due process protection, with *Cruz v. United States*, 387 F. Supp. 2d 1057, 1067 (N.D. Cal. 2005), in which the court held that agencies and instrumentalities were not entitled to such protections.

[122] 28 USC Section 1610(a).

[123] See, eg, T.G. Nelson and J. Bédard, 'The President's Plane is Missing', *International Financial Law Review* (August 2008).

[124] 28 USC Section 1611(b).

Conclusion

The ICSID Convention and the New York Convention establish comprehensive and valuable mechanisms for the enforcement of arbitral awards against foreign States. Notwithstanding the strong pro-enforcement trend of each Convention, however, neither addresses in full that 'last bastion' of sovereignty – State immunity from execution of assets. Even though in many States the restrictive theory of immunity – that it applies only to States in their capacity as sovereigns, and not to States acting in a commercial capacity – has been extended to the execution of awards, a successful claimant must still locate commercial assets and defeat any arguments about their status that a State may raise.

Given the persistence of State immunity, it might well be the Achilles heel in the body of investor-State dispute settlement. It is understandable that States wish to preserve certain assets that go to the core of State immunity from execution. Yet a non-cooperative State has the potential to stymie a claimant's attempt to make his arbitral award good. While commentators like Lady Fox have suggested that there be a model law on the execution of awards,[125] such a goal seems out of reach given the current global climate of hostility to multilateral conventions on matters involving trade and investment. Further development of State immunity law in a manner that is consistent with one of the goals underlying arbitral proceedings – that winning an award means collecting any monetary recompense due in addition to achieving a victory as to principle - will likely come only in incremental and discrete steps as municipal courts grapple with increased numbers of enforcement measures sought against increased numbers of recalcitrant states.

[125] H. Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property', 12(1) *Arbitration International* (1996) 89, 93.