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Is Sovereign Immunity the Achilles Heel in enforcement of investment treaty awards against states?

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Benard Ogutu,
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TABLE OF ABBREVIATIONS

BIT- Bilateral Investment Treaty

ICSID- The International Centre for Settlement of Investment Disputes'

LCIA- London Court of International Arbitration

UNCITRAL- United Nations Commission on International Trade Law

UK SIA- United Kingdom State Immunity Act

US FSIA- United States Foreign Sovereign Immunities Act

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The Parlement Belge (1880) 5 P.D. 197, at p. 214

Duff Development Co. Ltd. v Government of Kelantan [1924] AC 797; 2 ILR 140

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'LETCO' v. The Government of Liberia (Dec. 12, 1986), 2 ICSID REP. 383-89 (1994)

Decision of the United States District Court. Southern District of New York. in the matter of the Application of Liberian Eastern Timber Corporation [hereinafter, 'LETCO'] v. The Government of Liberia (Dec. 12, 1986), 2 ICSID REP. 383-89 (1994).

Embassy of the Russian Federation et.al v Compagnie NOGA d'importation et d'exportation (NOGA), Paris Court of Appeal (1st Ch. A), Case no. 2000/14157

Weston Compagnie de Finance et d'Investissement, S.A. v La Republica del Ecuador, 823 F. Supp 1106 (SDNY 1993)

Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980)

Flatow v Alavi Foundation, 225 F 3d 653 (4th Cir 2000)

“Allowing 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.” – Professor Christopher Schreuer

1. INTRODUCTION

One of the main expectations of parties involved in any dispute resolution mechanism is not just to have the dispute resolved conclusively and efficiently, but also to ensure that the outcome of the dispute resolution process is adhered to by all the parties involved; thus making the recognition and enforcement stage a critical part of the entire process. In the context of investment treaty arbitration, the disputing parties' major concerns likewise include whether an award can be effectively enforced without any impediments by the opposing party or otherwise, and that the recognition and enforcement of such an award is done without any challenges. On the face of it, it appears that enforcement of arbitral awards is not as controversial as compared to the enforcement in other forms of dispute resolution such as court litigation. But is this really the case? One of the challenges witnessed in recent times as regards the recognition and enforcement of awards is the tendency by losing states to plead sovereign immunity in a bid to frustrate the successful enforcement of awards against them.

The mechanism for enforcement provided under the ICSID Convention, for instance, does not adequately address this aspect, leaving unclear how aggrieved investors could respond to such attempts by the respondent states. The Convention only goes to the extent of providing that member states should enforce ICSID awards directly as though the awards were made by national courts. This gives the liberty to municipal courts to intervene at the enforcement stage which may lead to the application of municipal laws and interpretation of the doctrine of sovereign immunity in the given cases. This, in essence, takes away the enforcement from the confines of investment treaty arbitration dispute settlement mechanisms and raises the possibility for states to frustrate enforcement using municipal laws that regard their sovereignty and the application of the same to their assets and properties which are mostly the subject of enforcement attempts by successful investors. One of the key concerns is the additional costs and time implications that the investor will have to incur outside the

realm of the formal arbitration procedure once the process is concluded and an award rendered in their favor and they have to go an extra mile to have the actual enforcement done.

The other element linked to this is the challenge regarding massive awards and attempts by investors to seize multiple assets to the tune of the award once the states fail to comply. There is also the aspect of how municipal courts have recently handled the question of either restrictive or absolute immunity, or the extent to which they should be applied whenever these challenges arise as regards sovereign immunity.

On the backdrop of the fact that arbitration is likely to remain the most preferred avenue for dispute resolution between states and investors, this thesis aims to examine how the defence of sovereign immunity is used to challenge the enforcement of arbitral awards before domestic courts. It intends to suggest possible recommendations to stakeholders in investment treaty arbitration, including but not limited to, the parties, tribunals and national policy makers; with an aim to strike a balance between the protection of the sanctity of sovereign immunity of a state and its responsibility towards investors with whom they enter into commercial dealings with.

Moreover, the proposed recommendations will also ensure that states respect all obligations that arise out of such commitments recognized under international law while at the same time ensuring that arbitration remains attractive to both investors and states as an avenue for efficient dispute resolution based on the all-round package in efficiency that it contends to offer right from the notice for arbitration until the enforcement stage.

1.1.PROBLEM QUESTION

How has the defence of sovereign immunity before domestic courts affected the enforcement of investment treaty arbitration awards?

1.2.DISPOSITION

This thesis focuses on how sovereign immunity is used as a defence before domestic courts to resist enforcement. It looks at the nexus concerning the assets in question and the tough burden it poses on investors with the financial and time considerations in mind, the jurisdictional rules in certain municipal laws as well as recent developments and cases on this area then make recommendations on how to best remedy the situation outlined in the problem description. One of my key concerns would be to come up with suitable and favorable manners of protecting the interests for investors in order to enable the enforcement of arbitral awards, without contravening the sovereignty of state in so as to safeguard its sovereign property and public interest and thus, ensure that investment treaty arbitration remains the most favorable avenue assuring the recognition and enforcement of arbitral awards to all parties involved.

1.3.RESEARCH OBJECTIVES

The objective of this research is to analyze how sovereign immunity had been used before national courts in a bid by states to resist the enforcement of arbitral awards issued against them. This will be broken down as follows:

- I. To examine the existing regimes on enforcement of ICSID and non-ICSID awards.
- II. To examine the defence of sovereign immunity in ICSID and non-ICSID awards.
- III. To come up with possible remedies to tackle the use of sovereign immunity by states to resist enforcement of awards.

1.4.THEORITICAL FRAMEWORK AND RESEARCH METHODOLOGY

This thesis adopts the doctrinal legal research approach. The methodology involves the examination of existing regulations concerning the enforcement stage of the investment treaty arbitration regimes and how the same has been used in national cases in enforcement proceedings, with specific focus on the defence of sovereign immunity. Chapter two analyses the existing enforcement mechanisms by looking

through their background and recent developments and case law. An analysis of the provisions regarding the enforcement of ICSID and non-ICSID awards is also from the perspective of challenges brought up in domestic courts in the bid by states to refuse enforcement of awards against them. The thesis limits itself to The United States and The United Kingdom as the two major national jurisdictions to achieve this comparison. This choice is motivated by the popularity and development of international trade in these two jurisdictions as well as preferred venues for enforcement for investors based on the number of investments held by other states in their territories. The cases selected in this comparative analysis are both ICSID and non-ICSID cases in these jurisdiction where the circumstances of enforcement or the assets sought for enforcement are similar. Special attention is also given to the domestic regime on enforcement of awards as well as sovereign immunity in these jurisdictions, and how national courts applied the law in the cases.

The research has been conducted by way of library research, both online and offline, and has involved finding information on the research problem from books, law reports, current academic debates, reported and unreported awards, cases volumes, journals, opinion by practitioners and scholars, newspapers and periodicals amongst other resources. General internet search has also been employed to find out additional information on the research topic, comparative studies in various jurisdictions and any other information relevant to this research. This information has guided the direction of the research in answering the problem question. The conclusion and recommendations of the research has been arrived at by analyzing the findings of the research's substantive analysis and the various perspectives established about the research problem.

2.0 ANALYSIS OF EXISTING ENFORCEMENT MECHANISMS

2.1 ENFORCEMENT UNDER THE ICSID CONVENTION

The International Centre for Settlement of Investment Disputes' (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States directly regulates the enforcement of awards issued under it. It provides for the enforcement of awards in all contracting states in the same manner as judgments or decisions issued by their own national courts¹. This provision is uniform and excludes any possible exceptions provided under non-ICSID arbitration particularly in the New York Convention². When a state fails to honor an arbitral award issued against it, the party to whom the award issued in favor of may pursue the enforcement of the award in the national courts in one or more jurisdictions, and this is subject to the prevailing national laws in those jurisdictions and the legal framework on enforcement of awards. The enforcement against states is, in most cases, rendered more difficult based on the fact that assets owned by states are usually protected by laws of sovereign immunity. When these challenges arise, additional implications such as additional time and costs on the part of the party seeking enforcement are also bound to happen.³

¹ Article 54 ICSID Convention: "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. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state".

² Article 5 of the New York Convention provides for various exceptions to the rule of recognition and enforcement of awards such as if it contravenes public policy or disputes not capable or solving by arbitration; See also Christoph H Schreuer et al, *The ICSID Convention: A Commentary*, 2ndedn (Cambridge: Cambridge University Press, 2009) p 1111.

³ Sylvia Tonova and Baiju Vasani, *Enforcement Of Investment Treaty Awards Against Assets Of States, State Entities And State-Owned Companies*, In *Enforcement Of Investment Treaty Arbitration Awards: A Global Guide* (Global Law and Business 2015). P. 83

As opposed to the New York Convention the ICSID Convention presents a strict obligation on state parties to recognize and enforce awards with no foreseeable grounds for departure. In essence, faults of procedural nature relating to an award which may warrant refusal of recognition and enforcement under Article V(1) of the New York Convention cannot be pleaded before domestic courts.⁴ On the other hand, the procedure for annulment under of the ICSID Convention's Article 52 provides a purposeful equivalent to the New York Convention's provisions aimed at correcting any substantial and procedural errors in the ICSID arbitration proceedings.⁵ The ICSID Convention's exclusive nature in its control mechanisms was affirmed by the ad hoc Committee's decision in the **MINE v Guinea** case, which held that:

*“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’. 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.**”⁶*

The strict nature of obligation imposed on state parties to recognize and enforce ICSID arbitral awards was also inferred by the French Cour de Cassation in their decision in the **SOABI v. Senegal** case, in which they held that: *‘the Washington Convention of 18 March 1965 has instituted in its Articles 53 and 54 an autonomous and simplified regime for recognition and enforcement which excludes that provided*

⁴Ibid at Article 5 (1): “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

⁵S.A. Alexandrov, Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, in *International Investment Law of the 21st Century: Essays in Honour of Christoph Schreuer* 322

⁶*MINE v. Guinea*, Decision on Annulment (Dec. 22, 1989), 4 ICSID Rep. 79, 84

for in [national law]'.⁷ This decision overturned an earlier French Court of Appeal judgment which had ruled in favor of denial of recognition of an ICSID award on the basis that it was contrary to French public policy.

2.1.1 LIMITATION OF SOVEREIGN IMMUNITY UNDER ARTICLE 55 OF THE ICSID CONVENTION

The initial challenge that confronts the progressive nature of the enforcement regime under ICSID is presented by Article 55 which exempts the rules of state immunity regarding execution from the autonomous nature of enforcement envisioned by the convention. Article 55 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.*” This is the basis for most challenges to enforcement that states keen on refusing enforcement seek to rely on. It has been the major limitation on attempts to execute ICSID awards in practice on the basis of each contracting state’s application of the various doctrines of sovereign immunity.

The subjection of execution of ICSID awards to the limitation posed by rules of sovereign immunity was first exemplified by the ***Benvenuti & Bonfant v. People’s Republic of Congo case***⁸, which was one of the earliest ICSID decisions to be brought before domestic courts. This case was first decided by a French First Instance Court in 1980 and later revised by a French Court of Appeal in 1981. The Court of Appeal held that the national court’s recognition of the ICSID award was only subject to determination of awards’ authenticity. As far as deciding whether or not to recognize the award was concerned, the domestic court could not address itself to the issue of sovereign immunity. On the other hand, the execution of the ICSID award against specific assets owned by the state was a distinct subject to be dealt with in separate proceedings, and subject to the French national law regulating how and when

⁷SOABI v. Senegal, France, Cour de Cassation (June 11, 1991), 2 ICSID Rep. 341. This case reversed the decision in the earlier case of. SOABI v. Senegal, Courd’appel, Paris (Dec. 5, 1989), 2 ICSID Rep. 338.

⁸S.A.R.L. Benvenuti&Bonfant v. People’s Republic of the Congo, ICSID Case No. ARB/77/2

foreign States had waived sovereign immunity with regards to specific assets.⁹In the subsequent proceedings, the claimants in the case were not permitted to execute against the specific assets they had identified, even though the respondent reportedly ended up paying the amount of the award voluntarily.¹⁰

Subsequent to the decision in the *Benvenuti case*, sovereign immunity from execution against specific assets owned by states has remained the main frontline upon which the enforcement of ICSID awards issued against states has been battled. Lopez et al., assert that the domestic courts faced with this subject have applied different standards, each treating the question of sovereign immunity of assets according to their own national laws.¹¹

2.1.2. ICSID ADDITIONAL FACILITY RULES

The ICSID Additional Facility arbitration and the enforcement mechanisms therein, are not regulated by the aforementioned enforcement regulations of the ICSID Convention. Awards under the Additional Facility Avenue are enforced in accordance with the national laws applicable in the given circumstances in accordance with the provisions of the New York Convention.¹² This is one of the reasons why the ICSID

⁹Edward Baldwin, Mark Kantor and Michael Nolan, ‘Limits to Enforcement of ICSID Awards’ 16, 3–5.

¹⁰Christoph Schreuer et al., *The ICSID Convention: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* 938 (2d ed., Cambridge University Press 2009):

¹¹Alejandro López Ortiz, Patricia Ugalde-Revilla and Christopher Chinn, ‘Chapter 12: The Role of National Courts in ICSID Arbitration’ ,12, in Crina Baltag ,*ICSID Convention after 50Years: Unsettled Issues*,(© Kluwer Law International;Kluwer Law International2016) pp. 329 - 362.

¹²See Article 20 of ICSID Additional Facility Rules provides: ‘Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards’.

Additional Facility Arbitration Rules provide that proceedings shall be held in states that are parties to the New York Convention.¹³

2.2 ENFORCEMENT UNDER NON-ICSID ARBITRATION

2.2.1 ENFORCEMENT UNDER THE NEW YORK CONVENTION

Parties seeking recognition and enforcement of non-ICSID awards such as those rendered under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules or ICSID's Additional Facility Rules, usually rely on The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as applied by national courts of its party states. The New York Convention also covers enforcement of ICSID awards in a country that is a party to the New York Convention but not a party to the ICSID Convention; and the enforcement of non-monetary obligations, which are not possible under the framework of Article 54 of the ICSID Convention.¹⁴ As a major recognition and enforcement regime in international arbitration, The New York Convention imposes an obligation on all member states to recognize awards as though they are made within their territories.

Mainly designed to facilitate the recognition and enforcement of foreign arbitral awards, the convention places an obligation on signatories to recognize arbitral awards made in other jurisdictions other than the State where recognition and enforcement of such awards are sought, subject to meeting procedural requirements no more difficult than those applicable to their own respective domestic

¹³ Arbitration Under International Investment Agreements - A Guide to the Key Issues, 2nd Edition edited by Yannaca-Small, Katia, Main Text, Part VI The Post-Award Phase, 29 Enforcement of Investment Treaty Awards

¹⁴ Billiet, J. (Johan), Maria Elenora Benini, Cari-Dee Le, Amélie Noilhac, and Cecile Oosterveen. International Investment Arbitration: A Practical Handbook. Antwerpen;Portland, Oregon;Apeldoorn;; Maklu, 2016. P. 255 -259

awards.¹⁵This places an obligation on a state not to discriminate against foreign awards.¹⁶

The main difference between the New York Convention and its enforcement under ICSID is that it permits national courts to refuse enforcement of arbitral awards on the basis of varied grounds while ICSID does not. These grounds as outlined in Article 5 of the New York Convention include: invalidity of the arbitration agreement or the parties to it; the lack of notice to a party concerning the appointment of the arbitrator or tribunal; the inclusion of matters outside the scope of arbitration into the award; improper composition of the arbitral procedure; violation of public policy of the enforcing state; non-arbitrability of the awards subject matter; and setting aside of the award. As opposed to enforcement under the ICSID convention, the implementation of the New York Convention is pegged on national legislation. The effect of this is that practically, it is dependent on both the provisions of the respective national legislations and the interpretation given by national courts in enforcement proceedings, as well as the national implementing legislation.¹⁷ These national regulations are very important in the functioning of the arbitral process and giving effect to the enforcement stage of the international arbitral processes.¹⁸

Article 7(1) of the New York Convention allows a party seeking enforcement to either premise its claim on the domestic courts' national law on the recognition and enforcement of foreign arbitral awards or on any other bilateral or multilateral treaties

¹⁵ See Article 3 of New York Convention: *“Each Contracting State shall recognize 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.”*

¹⁶ John R. Crook, Award and Discontinuance of the Proceeding, in *Litigating Investment Disputes, A Practitioner’s Guide*, 443-446 (Chiara Giorgetti, Brill Nijhoff 2014).

¹⁷ Born, Gary, *International Arbitration: Cases and Materials* (ABG Professional Information, 2016) p. 33-36

¹⁸SupraN 7 at p. 85

in force in the territory where it seeks enforcement.¹⁹ The New York Convention does not also directly address itself to the issue of sovereign immunity as opposed to the ICSID Convention in its Article 55 provisions. A broad interpretation of Article 3 of the New York Convention could be interpreted to mean that it permits national courts to apply their own domestic laws on sovereign immunity and other rules of international law. It states: *“Each Contracting State shall recognize 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.”* According to Graham et. al, The application of rules of procedure in the respective national jurisdictions should incorporate the general principles of public international law that form part of the national procedural laws such as the rules on sovereign immunity.²⁰

¹⁹ See Article 7(1) New York Convention: The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

²⁰ Graham Coop, Alvaro Nistal & Robert G. Volterra: Sovereign Immunities and Investor-State Awards: Specifications of Enforcing Awards Based on Investment Treaties, In *Enforcement Of Investment Treaty Arbitration Awards: A Global Guide* (Global Law and Business 2015). P. 67-71

3.0.SOVEREIGN IMMUNITY AT THE ENFORCEMENT AND EXECUTION STAGE

This chapter presents an analysis on the subject of resistance to enforcement based on sovereign immunity as they have arisen in different jurisdictions and highlights some cases that have been litigated over this subject. The enforcement stage is made up of three phases which are; recognition, enforcement and finally the execution of the arbitral award. The defence of sovereign immunity can be raised at any of these stages, but it has proven to be more problematic at the execution stage.²¹The first phase is the recognition phase during which the award is accepted by a national court for enforcement. The second and final phase of enforcement concerns the execution of an enforcement order against specific properties and assets. It is at this stage that issues of sovereign immunity are likely to be raised by respondent states.²²The challenge usually begins at the point where the winning investor makes an attempt to enforce the award and execute it against the losing respondent state, which may frustrate these efforts by pleading immunity from execution.²³

Efforts have been made by the international community in attempts to codify the laws on sovereign immunity for quite some time now. Some of the international conventions on sovereign immunity include: The Brussels Convention on Immunity of State Owned Vessels of 1926; The European Convention on State Immunity of 1972; and at the forefront is the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004.²⁴ The United Nations Convention on Jurisdictional Immunities of States and Their Property is the first major instrument internationally to attempt to codify the law on sovereign immunity. The convention is yet to enter into force officially, as only 28 states (Signed by 36 states: Austria, Belgium, China, Czech Republic, Denmark, Equatorial Guinea, Estonia, Finland,

²¹ibid

²² Nigel Blackaby and Martin Hunter, Redfern And Hunter On International Arbitration (Sixth Edition) (6th edn, Oxford, United Kingdom ; New York 2015). P. 587-591

²³ Ibid at p. 586

²⁴ United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, UN GAOR, 59th Session, Supp. No.22 (A/59/22), 16 Dec. 2004.

France, Iceland, India, Iran, Iraq, Italy, Japan, Kazakhstan, Latvia, Lebanon, Liechtenstein, Madagascar, Mexico, Morocco, Norway, Paraguay, Portugal, Romania, Russian Federation, Saudi Arabia, Senegal, Sierra Leone, Slovakia, Spain, Sweden, Switzerland, Timor-Leste, and United Kingdom and Northern Ireland) have ratified it²⁵, out of the requisite 30 states required for ratification. However several of its provisions have been recognized as a reflection of customary international law alongside the development in domestic case law on the law of sovereign immunity at the level of national courts.²⁶On this background, Graham et. al, assert that, “*the regime of sovereign immunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the jurisdiction where enforcement against a sovereign state where the enforcement is sought*”²⁷

3.1.A SHIFT TOWARDS RESTRICTIVE IMMUNITY

Historically, sovereign immunity prevented the application of jurisdiction against states around the world. This has however, progressively changed over time, away from absolute application of immunity, towards the direction where a more restrictive doctrine of immunity has developed. This modern approach permits national courts to exercise jurisdiction over states and also against assets owned by the states.²⁸This practice has steadily offered two major grounds that leave out the application of sovereign immunity from jurisdiction, that being, omission of commercial activity and an exclusion based concurrence to arbitrate. These exceptions are widely accepted in many jurisdictions, in both civil and common law countries, but they are still subject to municipal sovereign immunity laws as well as international conventions on enforcement and execution of arbitral awards.

²⁵Note: As at 31st May 2019: Accessed from ‘United Nations Treaty Collection’ <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&Chapter=3&lang=en> accessed 10May 2019.

²⁶ J Crawford, Bownlie’s Principles of Public International Law (Oxford University Press, 8thEdn, 2012) p. 487-498

²⁷SupraN 23 at p. 74

²⁸ Nicholas Brown and James D.A. Lewis, ‘Game of Thrones: A Narrowing Immunity?’ ,Journal of International Arbitration, (© Kluwer Law International; Kluwer Law International 2013, Volume 30 Issue 6) pp. 689 - 69

Article 19 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property postulates that any post-judgment actions amounting to constraint such as arrest, execution against property of a state or attachment may be taken in relation with proceedings before a court of another state only if:

- The former state has expressly consented, by international agreement or an arbitration agreement or in a written contract to the taking of such actions; or
- It has been established that the property in question is specifically in use or intended for use by that state for other than government non-commercial purposes.

As far as the latter case is concerned, the property in question must be in the territory of the state of the proceedings and the actions must be taken against property with a link to the entity against which the proceedings are directed. This is one of the major obstacles that might be faced by successful investor claimants out for enforcement of an award in their favor, as states' assets located abroad maybe, in some cases legally owned by separate corporate entities of the states.²⁹Article 20³⁰ of The 2004 UN Convention stipulates that in cases where consent to the measures of constraint is required under 19, outlined above, consent to the jurisdiction under Article 7³¹ shall not imply consent to the taking of measures amounting to constraint. The import of this provision is that even in cases where a state consents to jurisdiction of a tribunal or court; it does not imply an express waiver of immunity from execution.

²⁹Kuipers, J. A. (2016). TOO BIG TO NAIL: HOW INVESTOR-STATE ARBITRATION LACKS AN APPROPRIATE EXECUTION MECHANISM FOR THE LARGEST AWARDS. *Boston College International and Comparative Law Review*, 39(2), 417-451. Retrieved from <http://ezproxy.its.uu.se/login?url=https://search-proquest-com.ezproxy.its.uu.se/docview/1823083376?accountid=14715>

³⁰ Article 20 of 2004 UN Convention: “ Effect of consent to jurisdiction to measures of constraint: Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.”

³¹ Article 7 of 2004 UN Convention: Express consent to exercise of jurisdiction 1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding. 2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

The definition and scope of the commercial activity exception has been one of the major challenges in delimiting the doctrine of restrictive sovereign immunity.³² Despite some of the major national codifications on sovereign immunity such as The United States Foreign Sovereign Immunities Act (FSIA) of 1976 and United Kingdom's State Immunity Act (SIA) 1978, having provisions regarding the commercial exception principle;³³ they do not do so in a straightforward and clear manner. The United States FSIA defines the scope of commercial activity under Section 1603 (d) and (e), as:

“(d) 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.

(e) A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.”³⁴

The UK State Immunity Act on the other hand, also presents a broad definition over the scope of commercial activity as,

³² R. Brazil-David, 'International Commercial Arbitration Involving a State Party and the Defense of State Immunity', 22 Am. Rev. Int'l Arb. 241 (2011), pp. 250.

³³ Section 1605(a) (2) of US FSIA outlines the general exception as: “(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case- (2) in which in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” SEE also Section 9(1) of the UK State Immunity Act: (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration. (2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

³⁴ Section 1603 (d) and (e) of The United States FSIA

“(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.”³⁵

As seen in these two examples above relating to the national codification of the laws on sovereign immunity, the huge task of this delimitation is therefore left with national courts in their judgments to decide with finality on the extent of this exception. According to Delaume³⁶, despite the fact that the purpose and nature test is majorly used by municipal courts as a method to differentiate between an action of the state, which is immune from jurisdiction and a commercial act, which is not immune; it is widely accepted, across several jurisdictions, that, to be able to tell apart between a government action and a commercial act regarding jurisdictional immunity purpose, the nature test is preferable option as is evidenced by several decisions in national courts and domestic codifications of the law on sovereign immunity.³⁷ For instance, in 1963 The *Empire of Iran*³⁸ case, the German Federal Constitutional Court applied a more restrictive approach after a thoroughly reviewing state practice and international law and held that,

“...when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are “commercial” within the meaning of the FSIA. Moreover, because the Act provides that the commercial character of an act is to be determined by reference to its “nature” rather than its “purpose,” 28 U. S. C. § 1603(d), the question is not whether the foreign government is acting with a profit motive

³⁵ Section 3(3) of the UK SIA.

³⁶ G.R. Delaume, ‘Three Perspectives on Sovereign Immunity Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976’, 71(3) AJIL 399 (1977) pp. 404.

³⁷ *ibid*

³⁸ *Empire of Iran*, German Federal Constitutional Court, 45 ILR 57 (1963)

*or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in “trade and traffic or commerce”*³⁹

The United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 remains the major international convention exemplifying the progressive shift away from absolute immunity in international law restricting execution against a foreign state’s property. The development of the restrictive immunity doctrine has, however, not been universally applicable so far as a 2011 judgment⁴⁰ by Court of Appeal in Hong Kong ruled that the principle of absolute state immunity was still applicable in the Special Administrative Region of Hong Kong. The dispute in *Democratic Republic of the Congo and Ors v FG Hemisphere Associates LLC* arose from an agreement in the 1980s concerning energy infrastructure construction in the Democratic Republic of the Congo by Energoinvest DD, a Yugoslavian corporation. The project was funded by way of credit that Energoinvest DD advanced to the Democratic Republic of the Congo and Nationale d’ Electricité, an electricity company owned by the state – both of which ended up defaulting on repayments. Based on the parties’ agreements the matter was referred to arbitrations, which the Democratic Republic of the Congo did not attend, and awards were made against both respondents, Democratic Republic of the Congo and Société Nationale d’ Electricité. Subsequently, Energoinvest DD assigned this award debt to FG Hemisphere Associates LLC. FG Hemisphere then attempted to enforce part of the pending awards from a US\$221 million payment to the respondents arising out of a joint venture agreement between The Democratic Republic of Congo and a consortium of Chinese companies.⁴¹ FG Hemisphere’s attempt to enforce the outstanding arbitral award was unsuccessful at the Hong Court High Court and they

³⁹ Ibid at 614

⁴⁰ FG HEMISPHERE ASSOCIATES v. DEMOCRATIC REPUBLIC OF THE CONGO. [2011] 14 H.K.C.F.A.R.395. Court of Final Appeal of the Hong Kong Special Administrative Region, June 8, 2011. available at <http://legalref.judiciary.gov.hk>.

⁴¹ ibid

then appealed this decision in the Court of Appeal successfully, during which the Congolese government unsuccessfully asserted state immunity from the proceedings. This decision was later overturned in Democratic Republic of the Congo's appeal to the Hong Kong Court of Final Appeal where the majority decision was that The Hong Kong Special Administrative Area could not adhere to a doctrine of state immunity concept that was inconsistent with the one of the People's Republic of China, therefore compelling the application of doctrine of absolute state immunity and thereby quashing the earlier decision.

3.2. IMMUNITY FROM JURISDICTION

Chamlongrasdr⁴² asserts that the peculiarity in the notion of sovereign immunity makes a separation differentiating the plea of jurisdiction immunity from the enforcement immunity. According to him, the defence of jurisdictional immunity can arise from the first phases of the arbitration process to the final phase so as to resist the application of jurisdiction of an arbitral tribunal or a national court. The application of sovereign immunity concerning territorial jurisdiction only applies to the connection linking the court of a forum state and that of a foreign state party or its assets.⁴³ Jurisdictional immunity in this context relates to territorial jurisdiction, and this was exemplified in *Schooner Exchange v. McFaddon*⁴⁴ case where the court held that,

“This full and absolute territorial jurisdiction, being alike the attribute of every sovereign and being incapable of conferring extraterritorial power, 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

⁴² D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, London 2007) p. 79-82

⁴³ *Ibid* p. 81

⁴⁴ *The Schooner Exchange v. McFaddon* (1812) 11 U.S. 116.

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.”⁴⁵

In this case, a McFaddon owned vessel from the US, was apprehended by authorities from the French government and modified to a public armed ship. Later on this ship docked into a United States harbor as a result of heavy storms and McFaddon tried to reclaim it maintaining that it had been forcefully detained by the French government in 1810. The court granted immunity to the government of France and held that “France, the purported sovereign owner of the vessel, was protected by an implied grant of immunity from the jurisdiction of US courts.”⁴⁶

The reasoning in *The Schooner Exchange v. McFaddon* played a guiding role in the formulation and development of the doctrine of absolute immunity from jurisdiction in The United States, The United Kingdom and several other common law jurisdictions, not just with regard to commercial ships and warships, but also as a general rule relating to state immunity.⁴⁷ Elsewhere in The United Kingdom, a similar line of reasoning and application of the doctrine of absolute immunity from jurisdiction was applied in *The Parlement Belge* case where the court decision granted absolute immunity to a Belgian monarch’s mail packet while giving reliance to the respect of the dignity and independence of every other state. It thus held that:

“The principle to be deduced from the cases is that, 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,

⁴⁵ Ibid At 135-137.

⁴⁶ *The Schooner Exchange v McFaddon* (1812) 11 U.S. 116, at 147.

⁴⁷ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) p. 204 -205

though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.”⁴⁸

The notion of territorial jurisdiction restricts the role of a national court when exercising jurisdiction over a foreign state, founded on the principle of the independence, equality and the dignity of states under the maxim *par in parem non habet jurisdictionem*, which means that equal states cannot have sovereignty over each other.⁴⁹ This principle as well covers private individuals acting as representatives functioning in state capacity and state agencies based on the principle of extraterritoriality. This requirement has been codified in the 2004 UN Convention of Sovereign Immunity that concerns investment treaty disputes between states and foreign investors. In *AIG Capital Partners v. Kazakhstan*, the court described this convention as, “*I regard the UN Convention on Jurisdictional Immunities of States and their Property, adopted by the General Assembly, as a most important guide on the state of international opinion on what is, and what is not, a legitimate restriction on the right of parties to enforce against State property generally. I accept that the Convention does not constitute a jus cogens in international law. I recognise that the Convention has not yet been adopted by any States. But its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, powerfully demonstrates international thinking on the point.*”

3.3 IMMUNITY FROM ENFORCEMENT

The distinction that exists between immunity from jurisdiction and immunity from execution is that whereas, the former concerns adjudication by means declaration of obligations and rights or a judgment regarding territorial concerns; the former relates to the actual exercise of restraint against the property of a sovereign state, either as a way of actual enforcement of post-award execution or attachment before the actual

⁴⁸ The Parlement Belge (1880) 5 P.D. 197, at p. 214

⁴⁹ H. Lauterpacht, ‘The problem of jurisdictional immunities of foreign states’ (1951) 28 BYIL 220, 221.

award, as a result of the exercise of jurisdiction.⁵⁰ This distinction has also been vividly captured in case law as the House of Lords in *Duff Development Co. Ltd. v Government of Kelantan*⁵¹ that the plea, by a state, of sovereign immunity with respect to proceedings concerning the enforcement of an arbitral award is distinct from the general plea of sovereign immunity from the jurisdiction of the domestic court of another sovereign state.⁵²

As noted earlier, of the three stages of the enforcement phase, comprising of recognition, enforcement and execution, challenges of the defence of sovereign immunity can arise at any step but is more difficult at the step of executing or attempting to execute the arbitral award against the properties owned by a sovereign state.⁵³ Professor Christopher Schreuer captures this difficulty in a rather thought-provoking argument that,

*“allowing 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.”*⁵⁴

According to Fox, despite the progressive shift towards restrictive doctrine of sovereign immunity that has been witnessed around the world over the years, the application of the restrictive approach to immunity has way lesser effect on the immunity from enforcement and execution than it has as far as immunity from jurisdiction is concerned.⁵⁵ This is for a number of reasons and key among them is the political angle and the related geopolitical elements involved either between the

⁵⁰ I. Brownlie, *Principles of Public International Law*, (7th ed.) (OUP, New York 2008) p. 342.

⁵¹ *Duff Development Co. Ltd. v Government of Kelantan* [1924] AC 797; 2 ILR 140.

⁵² *Ibid*: The court reasoned that, “The Government of Kelantan had not submitted to the jurisdiction of the Court for the purpose of the proceedings to enforce the award, either by assenting to the arbitration clause or by applying to the Court to set aside the award.”

⁵³ R. Brazil-David, ‘International Commercial Arbitration Involving a State Party and the Defense of State Immunity’, 22 *Am. Rev. Int’l Arb.* 241 (2011) p. 260-261

⁵⁴ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988) pp. 125.

⁵⁵ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) p. 601-603

host state where the enforcement is sought, the claimant investor's home state, and the state against whom the enforcement and execution is sought. This is coupled with the fact the host state where enforcement is sought will always be keen on the political and diplomatic relationship that exist between them and the state against whom the enforcement and execution against property is sought.⁵⁶

3.3.1. NON-COMMERCIAL ACTIVITY EXCEPTION

Public international law regime and the codifications of the sovereign immunity regime in different national jurisdictions have developed the non-commercial exception to sovereign immunity from execution in line with Article 19 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. This development basically limits the scope of execution to a consideration of whether the assets in question are used by the respondent state for sovereign rather commercial purposes. Among the key national codifications of this approach are The United Kingdom's SIA⁵⁷, The United States' FSIA⁵⁸ and Canada's Foreign Sovereign Immunity Act⁵⁹. According to Schreuer⁶⁰, this approach mainly concerns the adoption of the purpose criteria to distinguish whether a property is a sovereign one or a commercial one. The approach of allowing immunity for assets used for sovereign purposes and not those used for commercial purposes has also been adopted in case law in leading cases such as *Russian Federation v. Sedelmayer*⁶¹, *Philippine Embassy*⁶², and *The Empire of Iran*⁶³. In *Russian Federation v. Sedelmayer*, most recently, the Swedish Supreme Court denied the Appeal and affirmed the earlier Stockholm District Court's decision for enforcement of the award in favor of Mr. Sedelmayer. In this matter the main contention was whether a block of office

⁵⁶ Ibid

⁵⁷ Section 13(4) of The United Kingdom Sovereign Immunity Act.

⁵⁸ Section 1610(a) of The United States Foreign Sovereign Immunity Act.

⁵⁹ Section 11 of Canada Sovereign Immunity Act

⁶⁰ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1155-1158

⁶¹ Decision of The Swedish Supreme Court in *The Russian Federation v. Franz. J. Sedelmayer*, 1 July 2011

⁶² *The Philippine Embassy case*, 46 BverfGE, 342; 65 ILR 140; UN Legal Materials 297 13 December 1977, at 395.

⁶³ *Empire of Iran case*, German Federal Constitutional Court, 30 April 1963, UN Legal Materials, 282, 45 ILR 57

apartments owned by The Russian Federation in Stockholm and rental income collected from them, was barred from execution based on sovereign immunity of a foreign state's property. The Swedish Supreme Court used the "purpose" and nature approach and quashed the appeal holding that,

*"...State immunity is deemed as an inherent consequence of the principle that states are sovereign and mutually equal, and consequently do not have jurisdiction over each other. In general, it can be said that the principle of state immunity has evolved from a previous right of states to claim absolute immunity to a current more restrictive practice...In light of the above, it is clear that the property Lidingö Kostern 5 was not to a substantial part used for the official purposes of The Russian Federation. The nature of the use has not otherwise been of such specific nature as to grant the property immunity from enforcement in the present enforcement matter...A claim for rent is an asset that has arisen through an act that is of a private nature, and typically it is an asset that is of commercial nature.. ."*⁶⁴

From the foregoing it is still not assured for winning claimant investors to fully bank on the non-commercial activity and agreement to arbitrate exceptions when seeking to execute awards against assets owned by foreign states due to the complex intricacies that exist. One of the difficulties is the determination of whether a property of a state is of commercial nature especially when it is not clearly designated as such. This came out in *LETSCO v Liberia*⁶⁵, where it was held that registration fees and other taxes in the US from ship owners bearing the Liberian flag, could not be attached in execution as the said proceeds were solely aimed at supporting government functions and as such an award could not be executed against them under the non-commercial exception requirement

⁶⁴SupraN 64 at paras 7, 23 and 24.

⁶⁵ *Liberia Eastern Timber Corporation v. Liberia*, The District Court for the Southern District of New York, 650 F. Supp. 73 [1986].

4.0 FINDINGS, RECOMMENDATIONS AND WAY FORWARD

4.1 LIMITATIONS TO ENFORCEMENT AND EXECUTION OF ARBITRAL AWARDS AGAINST STATES.

As discussed in the preceding chapter, despite there being an established practice arising out of case law, international public law instruments and codification of national laws regarding sovereign immunity; there have been challenges during the enforcement of arbitral awards particularly with regard to the two exceptions postulated under the progressive doctrine of restrictive sovereign immunity. One of the major challenges has been to do with determining exactly whether the assets that are targeted for execution meet the scope of either sovereign-purpose protected assets or assets used for commercial purposes. Of key concern is the fact that, as much as most national sovereign immunity regimes recognize either express or implied immunity from execution of properties meant for sovereign purposes; a difficulty is still evident on how to categorize certain types of properties so as to be able to effectively decide on claims for enforcement that come up before national courts. This section addresses these categories of assets and other challenges that may pose difficulty towards the efforts of successful claimants to seek enforcement and execution of arbitral awards against respondent states.

4.1.1. BANK ACCOUNTS OPERATED BY DIPLOMATIC MISSIONS

Bank accounts operated by diplomatic missions of the creditor-respondent states in the states where execution is sought are normally one of the assets targeted for execution of arbitral awards yet they present a challenge as far as their purpose and use is concerned. It is normally difficult and uncertain to draw the line between the use of funds held in such accounts for sovereign purposes or government non-commercial purposes.⁶⁶ Chamlongrasdr is of the view that in cases where such accounts are not used for the exclusive purposes related to sovereignty, they cannot be exempted from the rules and measures taken as part of execution.⁶⁷ Crawford, on

⁶⁶ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) p. 260

⁶⁷ *Ibid*

the other hand argues that such funds can only be attached in instances where they are earmarked for purposes of meeting such obligations by the foreign state; yet this scenario is very unlikely that a state would take this measure as a way of meeting obligations of this nature in foreign states.⁶⁸In *LECTO v Liberia*⁶⁹, for instance, the court based its reasoning on the diplomatic protection envisioned by The US FSIA and The Vienna Convention⁷⁰ and denied enforcement against bank accounts held by the Liberian Embassy by holding that the waiver of immunity on grounds of signing The ICSID Convention was not sufficient; and that the attachment of the bank accounts in execution would have seriously impaired the performance of the diplomatic functions of the Embassy of Liberia in the US, whether or not the accounts were solely used for sovereign purposes or not.

A similar hurdle was witnessed in *Noga v Russian Federation*⁷¹where The French Court of Appeal adopted a narrow interpretation and ruled that even though The Russian Federation had expressly waived diplomatic immunity under the arbitration agreement, such a waiver could not be extended to funds held in bank accounts operated by the Russian Embassy as this fell under the ambit of The Vienna Convention of 1961 and international customary law on sovereign immunity in diplomatic relations.⁷² It is interesting to note that even though funds held in these bank accounts have been held to be immune from attachment and execution based on the provisions of The 1961 Vienna Convention on Diplomatic Relations, the convention, at Article 22, does not expressly mention them but only lists “the mission, their furnishings and other property thereon and the means of transport of the mission” as being immune from attachment and execution in a foreign state.⁷³ These case studies clearly demonstrate that the balance of power suddenly shifts in

⁶⁸J. Crawford, ‘Decisions of British Courts During 1984 Involving Questions of Public of Private International law’ 55 British Yearbook of International Law 330 (1984) pp. 342.

⁶⁹ Decision of the United States District Court. Southern District of New York. in the matter of the Application of Liberian Eastern Timber Corporation [hereinafter, '**LET**CO'] v. The Government of Liberia (Dec. 12, **1986**), 2 **ICSID** REP. **383-89** (1994).

⁷⁰ Article 25 of Vienna Convention on Diplomatic Protection.

⁷¹ Embassy of the Russian Federation et.al v Compagnie NOGA d’importation et d’exportation (NOGA), Paris Court of Appeal (1st Ch. A), Case no. 2000/14157

⁷²ibid

⁷³ Article 22: Vienna Convention on Diplomatic Relations, 1961

favor of the respondent states whenever issues of demarcating the categorization of assets such as fund in bank accounts arise and the burden of proof remains with the aggrieved investor seeking enforcement, to prove that the identified accounts meet the criteria of non-immune property.⁷⁴The absence of uniformity in practice and codification also leaves national courts handling this subject, with a wide discretion as far as the interpretation of statutory and regulatory provisions is concerned.

4.1.2. CENTRAL BANK FUNDS

The challenge with central banks funds normally arise when the winning investors attempt to have the award execute against central bank funds owned by the respondent award-debtor states, in other countries for a number of reasons such as foreign federal reserves in banks in the state where enforcement is sought. Chamlongrasdr⁷⁵ asserts that central bank funds held in a bank in another state are generally immune from execution as far as the funds held are meant to be used for the sovereign state's function and meet its obligations. This immunity also extends to such funds used for commercial purposes. A look at the national sovereign immunity codifications as far as central bank funds are concerned paints a picture of different approaches and criteria for each jurisdiction. In The United States, FSIA grants immunity to central banks funds held in a bank in another state, unless that state has expressly waived immunity for those funds (where the execution is sought), by dint of Section 1611 (b) (1) which provides that,

“(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if— 1) 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; or”

Dickinson et.al., are of the view that a major challenge in this provision is that some funds held in foreign banks have still been used for certain aspects of commercial

⁷⁴ Alexis Blane, Sovereign Immunity as a Bar to the Execution of International Arbitral Awards, 41 N.Y.U. J. Int'l L. & Pol. 453. P. 473

⁷⁵supraN 69 at p. 307

activities other than the official central bank fund functions which poses the question of the legitimacy of the FSIA provisions on the immunity of funds held in these accounts.⁷⁶ On the backdrop of this, the court in *Weston Compagnie de Finance et d'Investissement, S.A. v La Republica del Ecuador*⁷⁷ took the view that in instances where central bank funds held in a foreign bank are used for mixed commercial and sovereign purposes, then entire account is not to be treated as not immune to enforcement. This provision can be abused by states evading execution against them by combining funds in central bank accounts in the country where execution is sought and using part of them for commercial purposes without fear of losing them to attachment in execution of the arbitral award held by an investor.

In the United Kingdom, the 1978 Sovereign Immunity Act offers a broader extent of protection for central bank funds held by foreign states in banks in the United Kingdom. Section 14(4) provides that central bank funds of another state held in banks in the United Kingdom shall not be regarded as held for commercial purposes and shall be protected as immune from execution and attachment. The full protection of these funds means that they can only be exempted from immunity in cases where a state expressly waives its immunity, whether those funds are used for a commercial purpose or not.⁷⁸ The court in *AIG Capital Partners v Kazakhstan* applied this wider scope of interpretation and held, pursuant to UK'S SIA, that Kazakhstan central bank funds held by third parties in The United Kingdom were immune from execution notwithstanding whether they were held for a commercial purpose or not. Fox concludes that the UK and US experiences, in addition to the application of Article 21 of The UN Convention, show that in as far as central bank funds are concerned, absolute immunity is still applied to them when attempts to execute arise, irrespective of the commercial activities they may engage in.⁷⁹

⁷⁶ A. Dickinson et.al. (eds), *State Immunity: Selected Materials and Commentary* (OUP, New York 2004) p. 325-326

⁷⁷ *Weston Compagnie de Finance et d'Investissement, S.A. v La Republica del Ecuador*, 823 F. Supp 1106 (SDNY 1993) at 1114.

⁷⁸ C. Schreuer, *The ICSID Convention: A commentary* (CUP UK 2009) pp.1174

⁷⁹ H. Fox, *The Law of State Immunity* (OUP, New York 2008) pp. 646.

4.1.3. CHALLENGES RELATED TO THE NEXUS REQUIREMENT AND STATE ASSETS

Despite the fact that a clear line is drawn in instance where national laws and international regimes on sovereign immunity point out on the types of assets that are protected from execution; there still exists one more challenge related to the requirement for a link or nexus between the property that is targeted for execution and the subject matter of the dispute as well as the state against which the execution is sought. This poses further difficulty to investors attempting to have the awards enforced in their favor. Chamlongrasdr notes that the national courts are also given the burden of ascertaining properties which meet these requirements and thus able to be attached for execution for non-immunity.⁸⁰

Section 1610(a)(2) of the United States FSIA places the jurisdictional nexus requirement between the forum court and the subject-matter of the transaction; in addition to meeting the commercial exception rule, thus making it more strenuous for investors seeking enforcement to prove both elements. This double-tier approach also requires the investor to not only show that the commercial asset is used for a commercial purposes in addition to proving that it is used for non-sovereign purpose. These provisions serve to further protect a respondent state's property which may be target of execution in foreign countries. The US court in *Verlinden B.V. v Central Bank of Nigeria* adopted this strict approach and denied enforcement on the basis that the mere agreement to arbitrate on the part of NIGERIA could not be the only basis for its jurisdiction as a result of waiver of immunity.⁸¹

This approach is backed by the provisions of ICSID arbitration regarding sovereign immunity in so far as Article 55 still gives national courts the leeway to interpret sovereign immunity on enforcement and execution matters irrespective of the fact that ratification of the convention is an implied agreement to waive immunity. The challenge posed by this nexus requirement is quite ironical given that national and

⁸⁰SupraN 69 at p 317

⁸¹*Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980)

public international law on sovereign immunity has gradually moved from absolute immunity to a restrictive approach which was discussed earlier in this thesis. This challenge may also arise where the assets in question is owned by a state entity and the investor has the difficulty of finding out whether the state entity operates as a total separate body or if it has direct links in an agency relationship or otherwise with the respondent state. In light of this, the court in *Flatow v Alavi Foundation* rejected enforcement attempts against Alavi, an Iranian foundation on the basis that it was a separate legal entity registered in The United States as a foundation and could not be recognized as a state organ of The Republic of Iran.⁸²

4.2. RECOMMENDATIONS AND WAY FORWARD

As has been elaborated in the preceding chapters, most of the challenges faced by investors seeking to enforce awards against states, are at a disadvantaged position as compared to these states whom the national and international regime on sovereign immunity seem to protect more. This is in sharp contrast with the aim and purpose of investment treaty arbitration which is viewed as an impartial avenue where all parties can come to on an equal footing and expect equal treatment right from the commencement of the arbitration proceeding, all the way to the enforcement, irrespective of the outcome of the process. This research therefore suggests a number of possible ways to address the identified challenges and problems evident as regards to sovereign immunity defence during the execution and enforcement stage of investment treaty arbitration.

4.2.1 PROPOSED AMMENDMENTS TO BILATERAL INVESTMENT TREATIES AND INTERNATIONAL CONVENTIONS TO STRENGTHEN WAIVER FROM IMMUNITY.

The first proposal that this research suggests is the amendment of international conventions governing the investment arbitration regimes by strengthening the enforcement mechanisms to as to ensure that investment treaty arbitration remains not just attractive to the states involved, but also to investors to have an increased faith

⁸²Flatow v Alavi Foundation, 225 F 3d 653 (4th Cir 2000)

that whenever disputes arise, they can be sure to have them amicably resolved to conclusion and award measures taken in totality. Nmehielle argues that such amendments will also improve the flow of foreign investments into host states; as investors will be motivated by the improved confidence of the protection of their investors as well as both parties' improved confidence in the outcome of dispute resolution that may arise.⁸³ As far as the ICSID convention is concerned, this proposal targets Article 55 which could be amended to waive sovereign immunity from execution by having an exception of waiver being possible as a result of an agreement to arbitrate clauses, even if the national legal regime in the host states provide otherwise. This then leaves it to both parties to negotiate and have this clause included in their BIT arbitration agreements as the ICSID convention will then automatically apply and give force to this recommendation.

This proposal is a delicate one which will highly be pegged on the member states considerations for improving the effectiveness of investment treaty arbitration and the need to simply comply with the outcome of arbitral proceedings in good faith arising out of their own agreement to submit the arising disputes to arbitration.⁸⁴ It will also improve the ICSID arbitration regime by improving the concept of proportionality to the extent that, as Nmehielle argues, if a state or an investor agrees to submit to arbitration, then it can only be implied that they also agree to fully adhere to and comply with the outcome of the arbitration.⁸⁵ A classical illustration of this proposed approach is illustrated by the arbitration rules of The London Court of International Arbitration (LCIA) which waives any possibility to resort to sovereign immunity to frustrate enforcement, thus:

“All awards shall be final and binding on the parties. By agreeing to arbitration under these Rules, the parties undertake to carry out any award immediately and without any delay (subject only to Article 27); and the

⁸³ V. O. Nmehielle, 'Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)', 7 Ann. Surv. Int'l & Comp. L. 21 (2001).

⁸⁴ E. Gaillard, 'Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities Three Incompatible Principles' in E. Gaillard and J. Younan (eds.), *States Entities in International Arbitration* (JurisPublihing, Paris 2008).

⁸⁵supraN 86 at p.35-36

*parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made.*⁸⁶

4.2.2. PROPOSED AMMENDMENTS TO NATIONAL LAWS TO IMPROVE ENFORCEMENT REGIME.

The second proposal aims to harmonize the national legal regimes on enforcement of awards with the proposal outlined above so that the domestic laws reflect the proposed progressive changes. This will ensure that both parties in the arbitration who may seek enforcement are saved from the trouble of having to separately shop for a favorable enforcement forum state in addition to making efforts to find assets and properties that they can target to attach in enforcement of arbitral awards. Fox suggests that in addition to this approach, domestic laws should also be amended to the effect of making the commercial exception rule more practicable to investors as they may have a very hard time in proving the nature and use of certain properties such as central bank funds and bank accounts held by diplomatic missions.⁸⁷

It is therefore suggested that the national laws should be amended to shift the burden of proof from the party seeking enforcement to the respondent state to prove that a given property fits within the realm of the non-commercial exception rule. To illustrate this challenge, Section 13(5) of the UK SIA, authorizes the head of a diplomatic mission of the state concerned to simply produce a certificate to the effect that a given asset targeted by an aggrieved investor is not used for commercial purpose or intended to be used as such and puts the burden of proof to the investor to prove otherwise and this definitely presents challenges to such investors, who have no information on the activities of the diplomatic mission.⁸⁸ It is also recommended

⁸⁶ LCIA Arbitration Rules at Art. 26(9)

⁸⁷ H. Fox, 'State immunity and enforcement of arbitral awards: Do we need an UNCITRAL model law mark II for execution against state property?', 12 Arb. Int'l 89 (1996) pp. 93.

⁸⁸ Section 13 (5), UK SIA: The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by

that national laws to narrow down and clearly specify which properties fit within the non-commercial activity exception so as to avoid the risk of side interpretation that is currently presented in some categories of assets such as bank accounts that are used by diplomatic missions for both sovereign and commercial purposes.

4.2.3 ADOPTION OF THE PROPORTIONALITY PRINCIPLE

This thesis proposes that national courts faced with the task to decide on enforcement matters do adopt the proportionality approach in deciding these disputes. This recommendation is pegged on the basis that all arbitral award enforcement disputes arise at the tail end of the arbitration dispute resolution mechanism. It thus goes without a say that both parties take part or otherwise in the proceedings up until challenges of enforcement arise. The foundation of this lies in the arbitration agreement.

On this background both parties consent to the arbitration proceedings through a BIT or an agreement and the requirement to comply with the arbitral award is at the core of it and should therefore not be negated by the enforcement measures. As such the resistance at enforcement stage can only be treated as a bar of procedural nature which should not affect the binding nature of the agreement to arbitrate and comply with the outcome in any way.⁸⁹ The two should be squarely proportionate. Schreuer observes that, “...*the obligation to comply exists also where a State party finds that it can rely on State immunity in accordance with Art. 55. State immunity may be used to thwart enforcement against certain types of property of the award debtor. But it does not affect the obligation to comply with the award.*”⁹⁰ Proportionality should also be applied by national courts to help in striking a balance between public international law dealing with sovereign immunity and international investment law, which guides

or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

⁸⁹ L. Reed and L. Martinez, ‘Treaty Obligations to Honor Arbitral Awards and Diplomatic Protection’ in D. Bishop (eds), *Enforcement of Arbitral Awards Against Sovereigns*, (Jurisnet, New York 2009).

⁹⁰SupraN 63 at p. 1107

the relationship between states and private entities; so that the former does not affect the ability of states to honor obligations that they enter into with private entities.

5.0 CONCLUSION

Historically the success rate of compliance with ICSID and non-ICSID awards has been fairly high as a considerable number of states have voluntarily complied and made payments thus avoiding the route for seeking enforcement through national courts.⁹¹ Some states have, however, shown persistent trend for resistance and non-compliance with awards issued against them and particularly raised the defence of sovereign immunity. Argentina has been a notable example of countries with a high tendency to resist ICSID awards and for a long time actually refused to voluntarily pay even a single non-ICSID or ICSID award issued against its favor.⁹² This thesis concludes that the enforcement and execution of arbitral awards issued in favor of investors against sovereign states is generally a complex affair with various dynamics and calls for a deep inquiry, by investors, of the legal regimes on execution of arbitral awards in the possible jurisdictions where they might be forced to enforce the arbitral awards issued in their favor.

Secondly, a keenly selection of the choice of assets to target in execution in cases where respondent states fail to voluntarily comply with the awards is also called for as an additional way of addressing the challenges described in chapter three. This arises out of one of the major impediment that investors face in identifying assets and being able to show that they meet the threshold of non-immunity and therefore attachable in execution of arbitral awards. This is two-fold as they must first spend resources to find out where such targeted assets are located and secondly establish whether they are protected under the laws on sovereign immunity. This problem is further compounded as the size of awards issued increase making it even more demanding to enforce.⁹³ Both ICSID and non-ICSID awards face similar hurdles at the final stage of enforcing and execution arbitral awards as none of the prevailing

⁹¹SupraN 7 at p. 83

⁹²LE Peterson, "How Many States are not Paying Awards Under Investment Treaties?" www.iareporter.com

⁹³ Richard W. Naimark & Stephanie E. Keer, Post-Award Experience in International Commercial Arbitration, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 269, 270

national and international regimes of enforcement provide an elaborate assurance for enforcement when states fail to voluntarily comply; and this leaves doctrine of state immunity an enormous impediment in the enforcement of arbitral awards.⁹⁴ As has been demonstrated by case law such as *Sedelmayer v. The Russian Federation* execution of arbitral awards by investors against uncooperative sovereign states can be a daunting task to the extent of discouraging potential investors. As such, the thesis has recommended a number of possible solutions to address this problem and in turn to ensure that investment treaty arbitration remains as the most favorable avenue for resolution of investment disputes and in turn spur the increased investments around the world and trade relations between states and foreign investors.

⁹⁴Vasily Shubin, *The Enforcement of ICSID Arbitral Awards, Practice and Problems*, 11 *Kor. U. L. Rev.* 11 (2012) p. 32

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