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**ENFORCING ARBITRAL AWARDS
AGAINST SOVEREIGN STATES**

**THE VALIDITY OF SOVEREIGN IMMUNITY DEFENCE
IN INVESTOR-STATE ARBITRATION**

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Thesis submitted for the degree of PhD in Law

2015

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Thesis Abstract

This thesis concerns the inter-relationship between international investment law and the law of sovereign immunity focusing on the enforcement of arbitral awards against sovereign states. The core hypothesis is that investor-state arbitration is severely hampered in its role of providing a remedy to foreign investors for losses to their investments caused by the breaches of International Investment Agreements by host states. In particular, there exists the risk that an arbitral award against the respondent state can be undermined by the respondent state's use of the sovereign immunity doctrine against execution as a defence against the payment of compensation.

Accordingly, this leads to the main research question: Whether the defence of sovereign immunity doctrine should be fully available to a state in order to refuse the enforcement of arbitral awards, or should it be subject to limitations specified in the municipal sovereign immunity law of the country, in which the enforcement is sought? The major problem of investor-state arbitration is the extent to which the consent of a state to waive its immunity from enforcement and execution in both arbitration clauses and municipal sovereign immunity laws actually exists in any given case.

The thesis argues that international investment law is a hybrid law displaying both private and public law characteristics. This can influence the development of rules concerning immunity from execution. Accordingly, the balancing of state obligations and investor rights under a proportionality analysis could be considered as an effective tool to promote the investment and to protect the interests for both investors and host countries towards a fair and impartial forum, where such immunity is in issue. Lastly, this attempt could not be effective without the development of international conventions and municipal laws on sovereign immunity in parallel to secure the execution of arbitral awards before a municipal court as well as to support the applicability of international conventions. Thus, this would limit the excessive or unjustified claims of sovereign immunity as a defense against the enforcement of arbitral awards in which state responsibility could not be avoided for a breach of investment treaty obligations towards private investors.

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Khanapoj Joemrith
London, United Kingdom
April 2015

Table of Contents

Abstract	3
Acknowledgements	4
Table of Cases	9
Table of Legislations and other Materials	17
PART I INTRODUCTION	
Chapter 1 : Introduction	
1. Brief synopsis	20
2. Structure	28
3. Methodological Framework	29
(a) Doctrinal Issues	30
(b) Legislative Practice	31
(c) Judicial Decisions and Arbitral Awards	35
4. Concluding Remarks	39
PART II THEORETICAL FRAMEWORK	
Chapter 2 : International Investment Law as a Regime of Public International Law and its related Doctrines	
1. Introduction	42
2. International Investment Law as a Regime of Public International Law	43
3. The Fragmentation or Defragmentation of International Law	53
4. Doctrines relating to Investor-State Dispute Settlement	57
(a) The Doctrine of Treaty Interpretation	57
(b) The Doctrine of State Responsibility	64
5. Concluding Remarks	72

Chapter 3 : The Progressive Restriction of Sovereign Immunity Law and its Relevance to Investment Treaty Arbitration

1. Introduction	74
2. The Evolution of Restrictive Sovereign Immunity	79
(a) Foundations of Modern Sovereign Immunity Doctrine	79
(b) The Effect of State Trading	82
(c) The Shift to Restrictive Immunity	86
3. The Commercial Activity Exception and its Relevance to Investment Treaty Arbitration	91
(a) Immunity from jurisdiction	93
(b) Immunity from enforcement and execution	99
4. Concluding Remarks	111

PART III THE ENFORCEMENT AND EXECUTION OF ARBITRAL AWARDS

Chapter 4 : International Conventions on the Enforcement and Execution of Arbitral Awards in Municipal Courts Jurisdictions

1. Introduction	114
2. The ICSID Convention	117
(a) Background	117
(b) The Enforcement of ICSID Arbitral Awards	119
3. The New York Convention	126
(a) Background	126
(b) The Enforcement of the New York Convention Awards	127
4. The Main Distinction between the ICSID and New York Convention on the Enforcement of Arbitral Awards	129
(a) The Applicable Law Governing the Enforcement of Arbitral Awards	132
(b) The Finality and the Review of Arbitral Awards in Domestic Courts	139
(c) The Claim of “Public Policy”	148
(d) Conclusion: A Value of Arbitral Awards and its Alternative to Enforcement	151

5. Concluding Remarks	154
Chapter 5 : The Impact of International Arbitration Conventions on an Agreement to Arbitrate before Municipal Courts	
1. Introduction	156
2. Immunity from Jurisdiction	158
3. Immunity from Enforcement and Execution	170
4. The Impact of International Arbitration Conventions	179
(a) The ICSID Convention	180
(b) The New York Convention	185
(c) Institutional Arbitration Rules	192
5. Concluding Remarks	203
PART IV CHALLENGES AND LIMITATIONS	
Chapter 6 : Challenges and Limitations to Enforcing Arbitral Awards Against Foreign States	
1. Introduction	206
2. Execution against Mixed Purposes and Specially Protect Foreign State Properties	209
(a) Bank Accounts Held by Diplomatic Missions in The Executing Country	209
(b) Central Bank Funds	227
(c) Specially Protected Property	233
(d) Concluding Remarks	235
3. The Nexus Requirement	236
4. Concluding Remarks	244
PART V CONCLUSIONS	
Chapter 7 : Practical Considerations and A Way Forward	
1. Introduction	247
2. Practical Considerations	251

(a) Amendment to International Conventions and Investment Treaties to include an Express Waiver of Sovereign Immunity from Execution	253
(b) Development in the Interpretation of Municipal Law on Sovereign Immunity	262
3. A Way Forward : Reform and the use of Proportionality?	265
4. Concluding Remarks	281
Chapter 8 : Concluding Remarks	283
Bibliography	292

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PART I
INTRODUCTION

Chapter 1

Introduction

1. Brief synopsis

With over 3,200 Bilateral Investment Treaties (BITs) and additional international investment agreements negotiated at the end of 2014¹, both developed and developing countries have been increasingly involved in commercial transactions with private parties. This brings the total amount of identified investor-state treaty based dispute settlement ('ISDS') cases, brought by international investment agreements ('IIAs'), to 608.² Therefore, international investment arbitration has become a vital mechanism for settling investor-state disputes, through arbitral institutions such as the International Center for the Settlement of Investment Disputes ('ICSID'), the International Chamber of Commerce Court of Arbitration ('ICC'), the London Court of International Arbitration ('LCIA') and the Stockholm Chamber of Commerce ('SCC'), as well as ad hoc tribunals such as the United Nations Commission on International Trade Law ('UNCITRAL'). Among these institutions, the majority of cases have been brought under the ICSID Convention and ICSID Additional Facility Rules, amounting to 497 cases (33 of the 42 new disputes in 2014 were filed before the ICSID, 6 disputes under the Arbitration Rules of UNCITRAL, 2 disputes under the SCC and 1 dispute under the ICC Arbitration Rules).³

The establishment of the ICSID, in turn, allows investors to claim against the state without exhausting local remedies plus directly seeking enforcement of arbitral awards

¹ UNCTAD, *IIA Issues Note* (2015), No.1 February 2015, pp.1, , <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> ; See also UNCTAD Investment Policy Hub, it shows a number of Bilateral Investment Treaties in total of 2927, which is in force only 2280, while a number other international investment agreements in total of 349, which is in force only 278, <<http://investmentpolicyhub.unctad.org/IIA> > accessed June 9, 2015.

² UNCTAD, *IIA Issues Note* (2015), No.2 May 2015, pp.1, <http://investmentpolicyhub.unctad.org/Upload/Documents/UNCTAD_WEB_DIAE_PCB_2015_%202%20IIA%20ISSUES%20NOTES%2013MAY%20.pdf>.

³ *ibid* 4; See also The ICSID Caseload – Statistic (Issue 2015-1), <[https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20\(English\)%20\(2\)_Redacted.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-1%20(English)%20(2)_Redacted.pdf)>

before the domestic court, so as to resolve the problem of an unfair dispute settlement.⁴ The drafters of the ICSID Convention intended to offer a forum of international adjudication on a footing of equality in order to protect the risk inherent in diplomatic protection, which is granted by a powerful state to one of its nationals.⁵

Therefore, the ICSID Convention aims to depoliticize the settlement of investment disputes.⁶ Besides, it further attempts to build a reliable international arbitration mechanism, which is able to promote the economic development and balance the interests between the developing and developed countries.⁷ Therefore, the nature of investment arbitration rests on the borderline amid international and domestic law.⁸ Accordingly, the ICSID mechanism has replaced a national court's dispute settlement process with a private model of adjudication in matters of public law at an international level.⁹ Gus Van Harten and M. Loughlin have discussed this phenomenon suggesting that "the regime of investment arbitration should be recognised as constituting an exceptionally important and powerful manifestation of global administrative law."¹⁰

In general, the subject-matter of an investment arbitration is a regulatory dispute arising with a host state, acting in its capacity as a public authority, for example, expropriation either direct or indirect and nationalisation of foreign property, to impose a public policy or legislation, and foreign investor, which is connected to the application of that public

⁴ Gus Van Harten & Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' 17 EUR. J. INT'L L. 121 (2006), pp.128. (Investment treaty Arbitration as a Species of Global Administrative Law)

⁵ I. Seidl-Hohenveldern 'Proportionality in and Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States' in I. Seidl-Hohenveldern, *Collected Essays on International Investments and International Organizations* (Kluwer Law, The Netherlands 1998), pp 375.

⁶ Article 10 of The report of the World bank executive directors on ICSID Convention.

⁷ J. Paulsson, 'Third World participation in international investment arbitration' 2 ICSID Rev. 19 (1987); A. Broches, 'Awards Rendered pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' 2 ICSID Rev. 287 (1987).

⁸ C. Schreuer, 'The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes' < http://www.univie.ac.at/intlaw/wordpress/pdf/81_csunpublpaper_1.pdf >, pp.1

⁹ Gus Van Harten, 'The Public-Private Distinction in the International Arbitration of Individual Claims against the State' 56 ICLQ. 371 (2007), pp. 372. (The Public-Private Distinction)

¹⁰ Investment treaty Arbitration as a Species of Global Administrative Law (n 4), pp. 148; See also R. Dolzer, 'The Impact of international investment treaties on domestic administrative law', 37 Int'l & pol. 37 (2006).

authority by a host state.¹¹ A host state has the right to control its property and economic resources within its own territory, without compensation under the legitimate exercise of the so-called “*police power*”.¹² However, a host state has also been obliged under the treaty obligations to protect foreign investment and foreign investors.¹³ The rights and obligations of a state have been reflected in the provisions of IIAs between states.

The IIAs provisions have required a host state to provide and guarantee an appropriate legal, administrative and regulatory framework, that will shield foreign investment with special international law rights and remedies,¹⁴ including national treatment, most-favoured nation treatment, fair and equitable treatment, the prohibition against expropriation without compensation, stabilisation clause and other general clauses.¹⁵ However, it could be seen from the recent IIAs that the protection of foreign investors’ rights and interest has not been given much attention in these provisions, while they significantly preserve the rights for the host states in controlling the activities of the investors.¹⁶ Therefore, there has been an attempt to balance the rights and obligations of both parties in modern international investment agreements (IIAs).¹⁷

In the enforcement of arbitral awards, a state’s treaty obligations may be used as leverage by an investor to claim against a host state, who wishes to frustrate or refuse an arbitral

¹¹ See Investment treaty Arbitration as a Species of Global Administrative Law (n 4).

¹² R. Higgins, *The taking of property by the State* (1982) 167 Recueil des Cours 267.; See also M. Sornarajah, *The International Law on Foreign Investment* (CUP, UK 2010), pp. 363.; Rudolf Dolzer, *Indirect expropriation: New development*, NYU, 11 Environmental Law journal 64, pp.67

¹³ W. M. Reisman and R. D. Sloane, ‘Indirect Expropriation and its valuation in the BIT Generation’ 75 Brit. Y.B.I.L. 115 (2004), pp. 117.

¹⁴ *ibid.*; Howard Mann, *International Investment Agreements, Business and Human Rights : Key issues and opportunities*, (International institute for sustainable development, 2008)
http://www.iisd.org/pdf/2008/iiia_business_human_rights.pdf., pp. 3

¹⁵ R. Dolzer, ‘Indirect Expropriation: New Development’, 11 N.Y.U. Environmental Law Journal 64 (2002-2003), pp.67.

¹⁶ I. Seidl-Hohenveldern ‘Proportionality in and Under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States’ in I. Seidl-Hohenveldern, *Collected Essays on International Investments and on International Organizations* (Kluwer Law, The Netherlands 1998), pp. 375.

¹⁷ See L. Zarsky (eds), *Balancing Rights and Rewards: International Investment for Sustainable Development* (Nautilus Institute for Security and Sustainability, UK 2005).

award under “*sovereign immunity*”¹⁸ doctrine. Therefore, a state as a party to the International Conventions on recognition and enforcement of arbitral awards, either the New York Convention or ICSID Convention, is under an obligation to enforce arbitral awards rendered elsewhere. In a case of non-compliance by a party, it would be breach of treaty obligation and lead to legal, political and economic consequences in the international business community.¹⁹

In international law, two doctrines are involved in proceedings for the enforcement of arbitral awards, namely, treaty obligations under international investment law (*pacta sunt servanda*)²⁰ and the doctrine of sovereign immunity (*par in parem non habet jurisdictionem*).²¹ Whilst the former principle forms the basis for Article 26 of the Vienna Convention on the Law of Treaties (VCLT), which states “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.²² The latter principle forms the basis of the doctrine of absolute immunity, which holds that “one sovereign state is not subject to the jurisdiction of another state”. Therefore, there is a conflict of law when a domestic court applies and interprets these two principles simultaneously. As principles come from different areas of international law it must be ascertained which doctrine takes precedence or how they will interface together. Consequently, the rules of *lex specialis* and *jus cogens* are necessary to deal with the matter of conflict of laws.²³

By a states’ entry into BITs, it is obliged to settle the investor-state dispute, by arbitral tribunals and is additionally deemed to waive its immunity from jurisdiction of the

¹⁸ 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) pp.13.

¹⁹ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp. 1107-1108.

²⁰ It is a Latin word, meaning that “agreements must be kept”; See also W. Park and A. Yanos, ‘Treaty Obligations and National Law: Emerging Conflicts in International Arbitration’ 58 *Hastings Law.Rev.* 251 (2006); J. Yackee, ‘PACTA SUNT SERVANDA and state promises to foreign investors before bilateral investment treaties: Myth and reality’ 32 *Fordham Int’l L. J.* 1550 (2009).

²¹ See H. Lauterpacht, ‘The problem of jurisdictional immunities of foreign states’ 28 *Brit.Y.B. Int’l L.* 220 (1951); J. Crawford, ‘International law and foreign sovereigns: Distinguishing immune transactions’ 54 *Brit.Y.B. Int’l L.* 75. (1983).

²² Art. 26 of VCLT, May 23, 1969, 1155 U.N.T.S. 331.

²³ See L. Coolins, *Dicey, Morris and Collins on the Conflict of laws* (Sweet & Maxwell, London 2006) pp. 778-785.

national court in favour of arbitration proceedings.²⁴ However, a significant problem of the enforcement of arbitral awards is the express permission of a state to waive its immunity from enforcement and execution in arbitration clauses and municipal sovereign immunity law. Whilst the doctrine of sovereign immunity has been shifted from an absolute to a restrictive immunity approach in the late 1970s, the defence of sovereign immunity is still available for host states before a national court to refuse arbitral awards enforcement and execution.²⁵ Therefore, although the arbitral awards could be recognised and enforced before a national court, it does not mean that the victorious investor will successfully attach the assets of a state when such assets are categorized as sovereign assets or specially protected assets in the execution stage.²⁶

In the light of the above, the core hypothesis of this thesis is that investor-state arbitration, under the global regime of international investment agreements ('IIAs'), is severely hampered in its role of providing a remedy to foreign investors for losses to their investments, caused by the breaches of IIAs by host states. In particular, there exists the risk that an arbitral award against the respondent state can be undermined, by the respondent state's use of the sovereign immunity doctrine against execution, as a defence against the payment of compensation. Accordingly, this leads to the main research question being: whether the defence of the sovereign immunity doctrine should be fully available to a state, in order to refuse the enforcement of arbitral awards, or should it be subject to limitations specified in the municipal sovereign immunity law of the country, in which the enforcement is sought?

This thesis argues that international investment law is a hybrid law displaying both private and public law characteristics in which it creates the relationship between a state and private parties. This relationship is not equal but hierarchical, because a state, unlike

²⁴ A. Blane, 'Sovereign immunity as a bar to the execution of international arbitral awards', 41 JILP 453 (2009)

²⁵ *ibid* 455; 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. 260-261.

²⁶ A. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes', 21 Am.Rev.Int'l. Arb. 211 (2010) pp. 211-213.

private parties under reciprocal legal relationship, possesses a different set of powers and obligations in law²⁷ in which a state can unilaterally exercise those powers and obligations to bind foreign investor by administrative order or legislation.²⁸ The public-private characteristics rest on the concept of state sovereignty, which uses to determine the function and nature of state activities.²⁹ Accordingly, the balancing of state obligations and investor rights under a proportionality analysis could be considered as an effective tool to promote the investment and to protect the interests for both investors and host countries towards a fair and impartial forum, where such immunity is in issue.

Given that a pure economic approach of investment treaty arbitration system has failed to balance the rights under investment protection of foreign investors with rights to regulate of a host state as well as it is perceived as a threat to the effectiveness of other legal regimes, particularly non-investment matters, such as, human rights and sovereign immunity law. In this regard, investment treaty arbitration does not adequately provide an engagement with other areas of international law and public concerns. This thesis, therefore, contends that investment treaty arbitration should be considered as a form of a global administrative law in order to interpret those public-private rights. However, this thesis does not literally adopt a global administrative law approach in interpreting the relationship between international investment law and sovereign immunity law.

Rather, it particularly focuses on the application of public law principle of proportionality to deal with a conflict between investor's rights and public concerns in investment treaty arbitration. Accordingly, the thesis is trying to balance a state control in investment arbitration with a foreign investor protection. A proportionality analysis is deemed to be methodologically workable as a means to compare and balance the interests by a court or tribunal. Moreover, it could also be an effective tool to deal with the theoretical tension between conflicting legal concepts. In pursuing this approach, an investment treaty

²⁷ Van Harten, *A Case for an International Investment Court*, SIEL Working paper no.22/08, (2008), pp. 4

²⁸ S. Schill, *Enhancing International Investment Law's legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 Virginia J. Int'l L. 57, pp.77

²⁹ See L.J. Bouchez, *The nature and scope of state immunity from jurisdiction and execution* (1979) Netherlands Y.B.I.L. 1.

tribunal and municipal court would be able to weight a regulatory measure or sovereign immunity defense raised by state against the economic damage done to a private investor by that regulatory measure or defense.³⁰

However, this attempt could not be effective without the development of international conventions and municipal laws on sovereign immunity in parallel to secure the execution of arbitral awards before a municipal court as well as to support the applicability of international conventions. Combining these two fundamental sets of frameworks, this cross-fertilisation would provide some potential practical considerations as well as to unite the two areas of international law or so-called ‘defragmentation’ of international law towards a harmonised development.³¹ Thus, this would limit the excessive or unjustified claims of sovereign immunity as a defense against the enforcement of arbitral awards in which state responsibility could not be avoided for a breach of investment treaty obligations towards private investors.

To support this presumption, it is believed that the capacity of arbitral awards varies between different jurisdictions, depending on the performance and interpretation of municipal sovereign immunity law as well as the arbitration clauses of a national court. As yet, despite the fact that the role of domestic courts in interpreting and enforcing arbitral awards is a vital, and the final stage of investor-state dispute settlement, the issue of sovereign immunity from execution, defensively raised by a host state, rarely receives much attention from scholars. The majority of literature in this field has limited its research, concentrating on the finding of jurisdiction over dispute settlement in a domestic court. The relevant literature does not delve into other jurisdictional aspects or examines the limitations and challenges of the enforcement of arbitral awards.

³⁰ B. Kingsbury and S. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest- The Concept of Proportionality’ in S. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, New York 2010), pp. 77

³¹ C. Schreuer, *The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes*, Available at < www.univie.ac.at/intlaw/wordpress/pdf/81_csunpublpaper_1.pdf >, pp. 9; Anne Van Aaken, *Fragmentation of International law : The case of International investment protection*, (University of St. Gallen Law School, Law and Economics Research Papers Series, Working Paper No. 2008-1, 2008), pp. 2.

In addition, the issue of measures of execution would be significant and problematic when a host state itself or a third state is a losing party; because there is no guarantee for an investor to effectively obtain its awards. Without this guarantee, the investor-state arbitration mechanism might be just an illusion and its arbitral award worth nothing more than a promissory piece of paper. Therefore, this thesis will need to fill the gap in the existing literature in order to develop the understanding in this field and to provide an effective solution for an investor.

A key purpose of this thesis is to discuss the theoretical underpinnings of the concept of sovereign immunity, particularly immunity from enforcement and execution, and analyse the arguments for and against its use by a state as a defence against the enforcement of arbitral awards. The discussion must take into account both state practice and doctrine. Accordingly, this thesis aims to answer and examine the following questions:

- Whether the development of international investment law and its related doctrine regarding the enforcement of arbitral awards are considered as a fragmentation or harmonisation of international law
- Do the New York Convention and ICSID Convention alter and/or supersede the domestic rules of immunity from execution or other challenges applicable in contracting states?
- What are the criteria to distinguish immunity from jurisdiction and immunity from enforcement and execution? (Separate immunity principle) and under this circumstance to what extent can the state's undertaking to arbitrate (a treaty obligation) be considered as an implied waiver from execution?
- In a process of execution, whether the exceptions provided in certain codifications have provided sufficient grounds in order to allow for an execution against foreign property with a mixed purpose or of specially protected property as well as further challenges and additional requirements specified in some codifications.
- Whether a proportionality analysis could be used as an effective tool to

balance state obligations and investor rights under a hybrid regime of investor-state dispute settlement.

2. Structure

In order to answer and examine the questions mentioned above, this thesis is split into four parts, as follows:

Part I introduces the background of the thesis and methodology used to analyse the problem, which based on both doctrinal and comparative legal research.

Part II considers the basis of the relationship between international investment law and its related doctrines. Chapter 2 analyses the development of international investment law towards a regime of public international law. This will lead to a problem of defragmentation of international law when dealing with a different area of international law. Moreover, it will provide a background of the doctrines, which relate to investor-state dispute settlement, plus whether they are treaty interpretation and state responsibility. Chapter 3 is dedicated to the evolution of the doctrine of sovereign immunity from the absolute to restrictive approach in different jurisdictions, as well considering the commercial activity exception and its relevance to investment treaty arbitration.

Part III examines the enforcement and execution of arbitral awards, which is the main objective of this thesis. Chapter 4 analyses international conventions, which provide a ground for the enforcement and execution of arbitral awards in a municipal court. This, particularly, focuses on the New York and the ICSID Convention. Also, a comparison of enforcement and execution, between these conventions, is provided to recognise the problems and conditions in enforcing arbitral awards. Chapter 5 shows the impact of international arbitration conventions on an agreement to arbitrate before municipal courts, which reflects the state practices on the enforcement and execution of arbitral award in municipal courts. This will analyse the relationship between international conventions and municipal laws on sovereign immunity in the stage of enforcement and execution of

an arbitral award, on the basis of a waiver of sovereign immunity. The chapter will demonstrate that the enforcement of arbitral awards by a municipal court could cause diverse circumstances owing to the combination of different arbitral procedures of international conventions and different law on sovereign immunity in a forum state.

Part IV clarifies the challenges and limitations in enforcing arbitral awards against foreign states. It shows that certain types of property are protected from execution in any situation, even when a foreign state has waived its sovereign immunity from execution. Moreover, some codifications add a further requirement of jurisdictional nexus in order to execute against a commercial property of foreign state. Therefore, these difficulties have caused some potential challenges and limitations when enforcing arbitral awards against foreign states' property both for a municipal court and investor.

Part V deals with the conclusion of the thesis. Chapter 7 provides some practical considerations to overcoming the difficulties in enforcement and execution of arbitral awards against the sovereign state, offering certain solutions, at both a domestic and an international level. More importantly, it will discuss a way forward for the investor-state arbitration, in a theoretical framework. Chapter 8 concludes on some of the significant ideas and propositions developed in this thesis, making suggestions for further research.

3. Methodological Framework

The legal framework of this thesis is principally concerned with the inter-relationship between international investment law and doctrine of sovereign immunity. It will examine and critically analyse the enforcement of arbitral awards against sovereign states by a comparison of several jurisdictions where such issues have arisen under a public law approach. The methodological framework will be focused on both doctrinal and comparative legal research. This thesis will first consider the “*black-letter-law*”³² approach, in order to clarify the relevant laws to understand socio-political and economic context of each jurisdiction, and then it will extend to the comparison of legal materials,

³² See M. McConville and W.H. Chui, *Research Methods for Law*, (Edinburgh University Press, Edinburgh 2010) pp.4

from a variety of jurisdictions, in which the main research problem has arisen in order to understand the “*legal transplants*”³³ on the topic where the principles and practices of one legal system influence to another system. The predominant source, of this thesis, is concentrated on the treaties, legislations and judicial decisions at both international and domestic levels. The thesis will be developed in three main stages as follows;

(a) Doctrinal issues

This first stage aims to provide an overview and the background of the investor-state arbitration mechanism, particularly under ICSID, which has replaced a national court’s dispute settlement process with a private model of adjudication in matters of public law at an international level.³⁴ In international law, two doctrines are involved in the process of the enforcement of arbitral awards, namely, treaty obligations under the international investment law (*pacta sunt servanda*) and the doctrine of sovereign immunity (*par in parem non habet jurisdictionem*). However, it is not clear how the development of these two doctrines might be affected by each other or which doctrine might take precedence.

To tackle this problem, the first part will conceptualise the basic terms and the usages relevant to this thesis, based on doctrinal research. It is important to have a clear understanding of the basic terms by distinguishing the claims of a sovereign act (*acta jure imperii*) and a commercial act (*acta jure gestionis*) under a restrictive immunity approach. By adopting this approach, a foreign state cannot raise the defence of immunity from jurisdiction with respect to the claim involving a commercial act of state. However, there is no clear definition of those terms and certain activities or assets could be categorised as mixed activities or assets. Moreover, certain assets are not clearly designated or used for sovereign acts. Therefore, this thesis will need to examine the basis of restrictive immunity to clarify what is meant by a commercial act or asset. Specifically, the framework of this analysis will not only cover the state’s assets, but also

³³ See P.Legrand, ‘The Impossibility of Legal Transplants’, 4 Maastricht Journal of European and Comparative Law 111 (1997); N. Foster, ‘The Journal of Comparative Law: A New Scholarly Resource’, 1 Journal of Comparative Law 1 (2006).

³⁴ The Public-Private Distinction (n 9), pp. 372

extend to a state entity or its instrumentality's asset, which has a separate legal entity. The thesis will look at this problem by referring to a recent trend of capital-exporting countries investing in capital-import countries (North-South), since the growing of BITs period in 1970s, which raises difficulties when determining a commercial act.

The doctrine of treaty obligations also requires consideration. This will necessitate a review of the Vienna Convention on the Law of Treaties, particularly Article 31-33, which sets out the rules of treaty interpretation.³⁵ Whilst this rule is applicable in the interpretation of all treaties, constituting a customary international law, whether a state involved is a party to the Vienna Convention or not, it is doubtful when it comes to the interpretation of a treaty in a domestic level and whether a treaty, which is governed by international law, is excluded from Vienna rules within a national legal system.³⁶ Additionally, as Article 31(3)(c) clarifies that “any relevant rules of international law applicable in the relations between the parties”, the doctrine of sovereign immunity, a well-recognised doctrine in international law, has come into play together with the treaty provisions in the process of interpretation.³⁷ Thus, this thesis will need to look at the development of international law as a legal system, whether it is by way of harmonisation or fragmentation, in order to understand the relationship of those two areas of international law, namely, international investment law and sovereign immunity doctrine. Accordingly, the rules of *lex specialis* and *jus cogens* are needed to deal with the matter of conflict of laws.

(b) Legislative practice

The enforceability of international arbitral awards in a national court is based on two international conventions; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the Washington or ICSID Convention). The adoption of these conventions ensures the

³⁵ Vienna Convention on the Law of Treaties, signed at Vienna, 23 May 1969: UN DocA/Conf39/28

³⁶ See R. Gardner, *Treaty Interpretation* (OUP New York 2008).

³⁷ C. McLachlan, ‘The principle of systemic integration and article 31(3)(c) of the Vienna Convention’, 54 ICLQ 279 (2005).

enforceability of arbitral awards before a national court of signatory states and precludes the challenge of a national court on several grounds. However, both Conventions leave some uncertain issues needed to be analysed.

For the purpose of this study, the research is focused on the applicability of these two Conventions, being the ICSID Convention based on a treaty obligation and the New York Convention based on a contractual obligation, in order to enforce arbitral awards in a domestic court. Whilst the judgment or arbitral award of the ICSID is revered as the final judgment of the domestic court, the judgment or award under the New York Convention is seen as a foreign judgment, subject to the review of the national court. Thus, this thesis will investigate the role of the domestic court in limiting or refusing the enforcement of an arbitral. Here, the rule of treaty interpretation, as discussed in the first stage, raises its face again in the determination of the conflict of laws between treaty obligation under international law and country's public policy and legislation under domestic law.

Accordingly, it is necessary to compare the capacity between these Conventions through Articles and the effectiveness of their awards in order to understand the drafters' intention since these two Conventions come from a different history and background. On the one hand, the New York Convention is adopted by the United Nations in order to recognise and enforce arbitral awards in cross border both on commercial and investment arbitration grounds. On the other hand, the ICSID Convention is created by World Bank, which is an autonomous international organization, on the purpose of protecting the foreign investment from political risks and economic crisis. Consequently, this is to promote the foreign investment in developing countries and provide a dispute settlement mechanism, particularly focusing on investment disputes.

By comparing these Conventions, the issue of sovereign immunity is one of most controversial provisions in the ICSID Convention, since it leaves the immunity from execution to the law of a forum state, where the arbitral awards is sought, as stated in Article 54 (3) and 55. With regards to the purpose of the ICSID Convention, the inclusion

of immunity from execution runs into opposition with developing countries, which could affect the wide ratification of the Convention.³⁸ Further, it would become a tool for a court as a procedural bar to the enforcement of arbitral awards against a sovereign state. In contrary, the New York Convention makes no mention on this issue. Therefore, it is necessary to locate the reasons of the drafters, as to why they included or excluded the provision of immunity from execution between these Conventions.

At this point, the doctrine of sovereign immunity is primarily concerned in the thesis. Although sovereign immunity doctrine is part of international law, the domestic courts have developed and made an important contribution to state practice leading to the variation in both practice and interpretation of this doctrine.³⁹ Therefore, this thesis will need to look at the development of this doctrine, which has been adopted and transplanted from international law to domestic law.

The methodology of this stage will rely on a comparative law research. This method will enable me to examine the legal transplants, the harmonisation of law and the conflict of laws in detail in which the legal development and evolution from the origin to the other countries or from one jurisdiction to another jurisdiction may be observed.⁴⁰ The methodological problem raised here is the dilemma of interpretation and comparison in three relationships; between national laws in themselves, between national law and international treaties, and between treaties in themselves. The distinctions between these relationships will scrutinize the degree to which these domestic laws and international treaties have grown over time, and to what extent they have limited or assured the enforcement of arbitral awards in a domestic court.

With regards to the domestic laws, it is necessary to focus on the 1970s and 1980s, in which many common law countries, including the US, the UK, Canada and

³⁸ A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 136 *Recueil des Cours* 331, 403 (1972-II).

³⁹ C. Schreuer, *The ICSID Convention : A Commentary* (CUP, UK 2009), pp.1155.

⁴⁰ N. Foster, 'The Journal of Comparative Law: A New Scholarly Resource', 1 *Journal of Comparative Law* 1 (2006).

Australia, adopted legislation to regulate the sovereign immunity doctrine in their domestic law. The most important domestic codification and model statutes are in the United States Foreign Sovereign Immunities Act of 1976 (FSIA) and the United Kingdom State Immunity Act of 1978 (SIA), which require consideration regarding the similarities and differences because these two domestic laws and how they have been developed in parallel. Although these two domestic laws share the same ground of restrictive immunity, the interpretation of sovereign immunity by the different courts provides a dissimilar solution, in which the FSIA imposes a further restriction. On the other hand, in civil law countries, like France and Switzerland, although there is no domestic law on sovereign immunity doctrine, state practice is necessary to be considered, which reflects its transformation to a restrictive approach in a parallel with common law countries.

At an international level, there is also an adoption of the European Convention on State Immunity of 1972 as well as the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, based on International Law Commission's Draft Articles on Jurisdictional Immunity of States and Their Property of 1991. Here, it is important to observe the development of this doctrine from a regional level to an international level, in order to see the relationship between these Conventions and how the restriction, which is different in both, has been flexible from an absolute immunity to restrictive immunity over time.

Finally, the relationship between domestic laws and international treaties could be seen as an important process of the doctrine of sovereign immunity. With regards to the treaty interpretation rules, the relevant laws from an international law level could be interpreted together with the domestic law when determining the doctrine of sovereign immunity. The thesis will need to analyse how far the international treaties could be interpreted and implemented in a different domestic courts and their law. Therefore, the public international law could also affect the legal transplant of the domestic law, be it either divergent or convergent. It is important to see whether a domestic law of sovereign immunity, adopted from international treaties and somehow provides a different rule and

exception on the enforcement and execution of arbitral awards, could be recognised as a doctrine in international law. This will require an observation of state practices, which may lead to the creation of a body of customary international law.⁴¹

From the problems of interpretation and comparison in the sovereign immunity doctrine on the enforcement of arbitral awards, the uniform international instrument is still absent. Thus, it can be seen that it is insufficient to only focus on the codification of international and domestic law of sovereign immunity, as the judicial law making is additionally an important process used to develop the doctrine of sovereign immunity and the enforcement of arbitral awards, illustrating either possible solutions or strict limitations.

(c) Judicial decisions and arbitral awards

Since a multilateral instrument on the doctrine of sovereign immunity does not yet exist, many jurisdictions, including both common and civil law jurisdictions, have adopted a restrictive immunity doctrine in their municipal law. Although these countries have developed their municipal law in the same direction, the law of sovereign immunity, which has been adopted, are not always consistent between countries. This is because the system of operative rules is different; common law jurisdictions, such as the US and UK, have adopted specific instruments to clarify a considerable detail of sovereign immunity doctrine while civil law jurisdictions, such as France and Germany, have directly applied the principles of public international law and relied on the case laws and judicial law making, which are developed by their national courts.⁴² Therefore, it is so restricted and difficult to interpret the state practice in many countries. Furthermore, it is well known that the doctrine of sovereign immunity in socialist countries, for instance, China, remains an absolute one. Accordingly, the divergence of state practices could be seen in their judicial decisions and arbitral awards, which raises concern as to enforcement because of sovereign immunity. These important cases and arbitral awards in the 1990s

⁴¹ C. Schreuer, *The ICSID Convention : A Commentary* (CUP, UK 2009) pp.1155.

⁴² Karl M. Meessen, 'State immunity in the arbitral process' in Norbert Horn (eds) *Arbitrating foreign investment disputes* (Kluwer law international 2004), pp. 388.

include *LETCO v Liberia*,⁴³ *Sedelmayer v Russian Federation*,⁴⁴ *Benvenuti & Bonfant v Congo*⁴⁵ and *SOABI v Senegal*.⁴⁶

The thesis will analyse, by jurisdictional case comparison, the development of the sovereign immunity doctrine, which has been transplanted from its origin in the common law countries to the civil law countries and finally to socialist countries. The problem here is how to compare these cases, which involve different legal systems and cultures, and to what extent could it be possible that a case from one jurisdiction is considered as a precedent in another. Therefore, the thesis will need to collect domestic cases relevant to the sovereign immunity issues raised in the enforcement of arbitral awards before a domestic court, which are broadly categorised into four grounds: the link between the property to be executed and the claim, the implied waiver of sovereign immunity from execution in arbitral agreement, the difficulties in distinguishing commercial from sovereign property, plus as mixed-purpose property and specially protected property and the execution against its agency or instrumentality. The thesis will, thus, chiefly focus on these grounds of claims in specific jurisdictions.

In common law countries, whereas their laws are developed by the court decisions as opposed to statutes and legislations adopted through a legislative process in civil law countries, they, by some means, have adopted a municipal law on sovereign immunity. It is necessary to look at the cases and statutes in the US and UK jurisdictions. This is because these two jurisdictions are regarded as traditional municipal law on sovereign immunity law in respect with the restrictive approach, which has been developed in parallel. More importantly, most arbitral awards have been rendered in these jurisdictions and have become a framework and precedents to other countries. Therefore, these two jurisdictions must be compared, as they offer a different test and exception, when enforcing and executing arbitral awards, especially the nexus requirement. The cases

⁴³ *LETCO v Liberia*, ICSID case no. ARB/83/2, Award, March 31, 1986.

⁴⁴ *Sedelmayer v Russian Federation*, Stockholm Chamber of Commerce, Decision on Jurisdiction and Final Award, July 7, 1998.

⁴⁵ *Benvenuti & Bonfant v Congo*, ICSID case no. ARB/77/2, Award, August 8, 1980.

⁴⁶ *SOABI v Senegal*, ICSID case no. ARB/82/1, Award, February 25, 1988.

include the UK case of *Alcom v The Republic of Colombia*⁴⁷ compared with *Birch Shipping Co v The United Republic of Tanzania*⁴⁸ and *LETCO v Liberia*⁴⁹ cases in the US. This is because these cases highlighted the difficulty in persuading the home courts that the property involved was intended to be used for a commercial purpose.

In civil law countries, on the other hand, they have not adopted any comparable legislation. However, they refer to international law on sovereign immunity and develop through their case laws. Most of the cases have been rendered in the French courts. The practice of the French courts is in line with the common law jurisdictions, which allow the enforcement and execution for the property in use for commercial activities. However, in the case of *Creighton v. Qatar*,⁵⁰ the decision of the Cassation court, it was held that the hierarchy and authority to set a French jurisprudence, seems to be out of line from the general practice in regards to the implied waiver from execution when a state is undertaking to arbitrate, following the US position which allows the waiver of immunity from execution to be given either explicitly or implicitly (set forth in the FSIA and interpreted by the US court).

In this context, the *Creighton* decision set a new precedent in defining what constitutes a waiver of immunity from execution. As a matter of fact this case has been rendered in the US courts as well. Accordingly, it may demonstrate the perception and interpretation between these two jurisdictions on the sovereign immunity doctrine and how the US law has had an effect on the French court's decision. In this research, it is necessary to analyse the cross-influence of decisions, especially the new precedent, not only between the US and French Court but also between other jurisdictions, in order to see how domestic courts will adopt and develop court decisions from other jurisdictions, which potentially could lead to the harmonisation of the doctrine.

⁴⁷ *Alcom Ltd. v The Republic of Colombia*, House of Lords (Court of Appeal) AC 580 (1984).

⁴⁸ *Birch Shipping Co v Embassy of The United Republic of Tanzania*, D.C.C., 18 November 1980, 63 ILR 524 (1982).

⁴⁹ *LETCO v Liberia*, United States District Court, the District of Columbia, Judgment, 16 April 1987, 2 ICSID Reports 390.

⁵⁰ *Creighton Limited v Government of the State of Qatar*, The French Cour de Cassation, (6 July 2000), reported in XXV Yearbook of Commercial Arbitration 458 (2000).

Another civil law country, which needs to be considered is Argentina, which adopted its own statute on the restrictive immunity doctrine. Recently, there have been many arbitral awards claimed against Argentina due to its financial crisis. These cases will significantly demonstrate the political and economical considerations, which have been raised in the proceedings, in order to avoid the enforcement of arbitral awards. As in the case of *NML Capital Limited v Republic of Argentina* (NML),⁵¹ before the French Supreme Court, regarding a waiver of sovereign immunity from enforcement and execution, the French Supreme Court required an express and specific waiver of sovereign immunity to public assets or category of public assets over which the waiver was granted. This jurisprudence could be seen as a strict approach applied to a waiver of sovereign immunity from execution and seems to be a more state friendly approach.

In socialist countries, including China, the possible transformation on its shift of position may well be considered by those countries, as they have already signed a 2004 UN Convention. In the recent case between *FG Hemisphere Associates LLC v Democratic Republic of the Congo*,⁵² before the High Court of the Hong Kong SAR, the court has needed to consider whether a common law of Hong Kong, a special administrative of China, continues to recognise the doctrine of restrictive immunity post 1997. After the Court of Appeal came to the conclusion that the doctrine of absolute immunity applied in Mainland China and could not supersede the common law jurisdictions' practice of restrictive immunity in Hong Kong, the Court of Final Appeal proceeded to reversed the Court of Appeal's decision, ruling that Hong Kong could not adhere to a doctrine of sovereign immunity, which is different from that adopted by Mainland China in accordance with the Basic law. This extreme jurisprudence of Hong Kong Court could be seen as a case study for foreign investors, who wish to invest in a centre of international commerce, such as Hong Kong, causing them hardship when enforcing an arbitral award against state assets. Moreover, this is not reconciled with the

⁵¹ *NML Capital Limited v Republic of Argentina*, Cass civ 1, March 28 2013, No. 11-10-450.

⁵² *FG Hemisphere Associates LLC v Democratic Republic of the Congo*, FACV 5-7/2010 (Court of Final Appeal).

position of China in signing of the UN Convention, which shifts to a restrictive approach of sovereign immunity.

Considering a comparative analysis, the background of each jurisdiction also necessitates investigation in a political and economic context, in order to determine the doctrinal research problems, and see what is the reasons or factors behind these problems, plus understand what makes one or another means more or less effective in particular contexts that have created an effect on the development and/or adoption of the doctrine.⁵³ Looking at the way of differences and similarities of context in each jurisdiction are well explainable in court reasoning and interpreting the doctrine in each case. Consequently, these judicial decisions coming from principal cases, pursuant to the domestic and international law enactments of sovereign immunity, could be used to construct the improvements to the sovereign immunity doctrine, with regards to the enforcement and execution of arbitral awards.

4. Concluding remarks

The interpretation of the doctrines and concepts in each jurisdiction is different with regards to the waiver of immunity from execution. As yet, the three stages in enforcing arbitral awards, being jurisdiction, recognition or enforcement and the execution stage, are still unclear and needed to be closely re-examined. More importantly, there are a limited number of cases. Until now, only few ICSID cases have involved the defence of sovereign immunity, when enforcing arbitral awards, as well as these few cases are not open to public. Moreover, most of the cases are before other arbitral tribunals. Therefore, it is necessary to use the cases from those tribunals to support and analyse the comparison with the ICSID cases. Lastly, the relevant literatures are mainly focused on the immunity from jurisdiction, without mention to the immunity from execution. Apart from the limitation of literatures, there is also a methodological problem in dealing with the conflict of laws between international law and domestic law when interpreting the doctrine and state practice. Therefore, it depends on the domestic court to interpret and

⁵³ G. Wilson, 'Comparative Legal Scholarship' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, Edinburgh 2010) .

enforce arbitral awards, in which it is inconsistent, and varies between different jurisdictions. Consequently, the lack of data in this field either from the cases or literatures is a main concern in the research of this thesis in which it limits the ability of the thesis's writer to analyse on a variety and adequate data. On this account, this is a main challenge for future researchers in this field to overcome this problem.

PART II
THEORETICAL FRAMEWORK

Chapter 2

International Investment Law as a Regime of Public International Law and its related Doctrines

1. Introduction

In the recent past international investment law has been recognised as the fastest evolving area of international law, however, it has been seen as controversial, with increasing debates and challenges from scholars and practitioners, relating to its interpretation and implementation of Investor-State Dispute Settlement (ISDS).¹ With regards to the phenomenal proliferation of international investment agreements (IIAs) and growing number of treaty-based cases in arbitral tribunals, one of the main concerns focuses on the relationship between international investment law and international law. Yet, notwithstanding the growth of the development of international investment law and the literature in this field, the theoretical framework is incomplete and insufficient to tackle the debates and challenges. The core question in this context is whether the development of international investment law and related doctrines regarding the enforcement of arbitral awards are considered as a fragmentation or harmonisation of international law.

Generally, investor-state dispute settlement, in particular investment treaty arbitration, is not based on a form of reciprocal dispute settlement between an investor and a state.² Instead, it should be analysed as a structure of “*global governance*”, being a mechanism of an adjudicative evaluation in public law.³ As the nature of investment treaty arbitration is frequently implicated in the scope of a regulatory dispute, it is not only required to distinguish between the public (sovereign) and private (commercial) nature of disputes

¹ B. Kingsbury and S. Schill, ‘Investor-state arbitration as governance: Fair and equitable treatment, proportionality and the emerging global administrative law’, New York University Public law and legal theory working papers (2009)

http://lsr.nellco.org/cgi/viewcontent.cgi?article=1146&context=nyu_plltwp&sei-redir=1#search=%22Investor-state+arbitration+as+governance:+Fair+and+equitable+treatment,+proportionality+and+the+emerging+global+administrative+law%22 , pp.1. (Investor-State Arbitration as Governance)

² Gus Van Harten, *Investment treaty Arbitration and Public Law* (OUP, New York 2007), pp. 45

³ *ibid*

but also to reach a balance between investor protection and state regulatory power.⁴ From this perspective, this issue becomes a matter of public-private distinction, with many doctrines in public international law coming into play in tandem with international investment law in order to understand and classify this distinction.

In dealing with the public-private characteristic, this thesis adopts a global administrative law approach. It is necessary to have recourse to a structure of global governance to strike a fair balance between international investment law and sovereign immunity law, as well as between foreign investor protection and the sovereignty of the state. Therefore, it is the aim of this chapter to provide a general background to the doctrine of treaty interpretation and state responsibility, considering their interactions and influences when assessing the relevance of different bodies of international law in investment treaty arbitration, characterised by a regime of global administrative law.

2. International Investment Law as a Regime of Public International Law

Despite the reality that international investment law has received much attention from scholars and practitioners, especially with growing numbers of states entering into many bilateral investment treaties (BITs) and numerous significant regional treaties, its theoretical and conceptual framework remains insufficiently studied in both procedural and substantive aspects, including the interpretation of provisions in BITs to the enforcement of arbitral awards in the final stage.⁵ More importantly, the growth of investment treaty arbitration has made the underlying issues at stake in disputes more diversified and complicated, especially when it concerns the relationship of obligations of a host state under international investment law and other areas of international law.⁶ This consequently leads to the unpredictability and inconsistency of decisions and arbitral

⁴ Investor-State Arbitration as Governance (n 1), pp.1.

⁵ See Andrea K. Bjorklund, 'State immunity and the enforcement of investor-state arbitral awards' in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the 21st century: Essays in honour of Christopher Schreuer* (OUP, New York 2009).

⁶ W. Burke-White and A. von Staden, 'Private litigation in a public law sphere: The standard of review in Investor-state arbitrations', University of Pennsylvania Law school (2009) <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1291&context=upenn_wps&sei-redir=1#search=%22Private+litigation+in+a+publiv+law+sphere:+The+standard+of+review+in+Investor-state+arbitrations%22> , pp 284. (Private Litigation in a Public Law Sphere)

awards in arbitral tribunals.⁷ In order to tackle such uncertainties, a purely doctrinal analysis would be inevitably limited. In addition, the current perspective in this field still overlooks one vital fact, being the need for a comprehensive framework to analyse and understand international investment law as a whole mechanism as well as its role in the relationship and development with other areas of international law as a dynamic process.⁸

Among scholars, there has been a substantial amount of criticism regarding the significant ‘asymmetry’ of the investment protection regime.⁹ Although it is an identified provision of investment treaties that they create obligations for host states, but not for foreign investors, it is also recognised that the treaties create rights for foreign investors but not for host states.¹⁰ Therefore, there has been an attempt to balance the rights and obligations of both parties in modern international investment agreements (IIAs). This attempt is reflected in recent UNCTAD’s World Investment Reports ranging from 2012 to 2014, by the enhancement of the sustainable development dimension of international investment policies.¹¹ However, it has been seen, from the provisions contained in some agreements, that it focuses too much on expanding the rights of investors with the responsibility of host states to protect them, but gives too little effort to preserve the

⁷ J. Behring, T.R. Braun, R.A. Lorz, C. Tams, S. Schill, and C. Tietje, ‘General Public International Law and International Investment Law: A Research Sketch on Selected Issues’ *Beiträge zum Transnationalen Wirtschaftsrecht. International Law Association German Branch – Sub-Committee on Investment Law*, Halle (2009) pp. 5; See M. Sornarajah, ‘A Coming Crisis: Expansion Trends in Investment Treaty Arbitration in K. P. Sauvant, *Appeals Mechanism in International Investment Disputes*, (OUP, New York 2008); S.D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’, 73 *Fordham Law Review* 1522 (2005).

⁸ See S. Schill, ‘International Investment Law, the Law of State Immunity, and Human Rights: A Case Study in Cross-Regime Analysis as an Instrument of Defragmentation’, http://works.bepress.com/stephan_schill/1, pp1 (International Investment Law, the Law of State Immunity, and Human Rights); See also Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 *Br. Y.B. Int’l L.* 151 (2003) (The Hybrid Foundations of Investment Treaty Arbitration)

⁹ Tra T. Pham, ‘International investment treaties and arbitration as imbalanced instruments : a re-visit’ 13(3) *Int. A.L.R.* (2010), pp 81.

¹⁰ *ibid.*

¹¹ UNCTAD, *World Investment Report 2012 : Towards a New Generation of Investment Policies* (UN, Switzerland 2012) pp. 84; UNCTAD, *World Investment Report 2013 : Global Value Chains: Investment and Trade for Development* (UN, Switzerland 2013), pp. 101; UNCTAD, *World Investment Report 2014 : Investing in the SDGs: An Action Plan* (UN, Switzerland 2014) pp. 114.

rights for host states.¹² Therefore, there must be a potential conflict of interest between the protection of foreign investor in IIAs and the protection of state regulatory powers and control or so-called “police power”, in the domestic legislation of the host states with regards, in particular, to environment, national security and human rights policies.¹³

Traditionally, foreign nationals needed to rely on the exercise of diplomatic protection, by their home states, in order to protect their rights and property in the host state, either by bring a case before the International Court of Justice (‘ICJ’) or under the host state’s court and domestic law.¹⁴ By exercising a diplomatic protection, a state national relies on to its home state to exercise its rights on the basis of interstate claim, in which such a right to bring a claim is not legally transferable to the national investor, even if the home state successful pursues the claim.¹⁵ As Douglas points out that;

“In the context of diplomatic protection, the state of the injured national has full discretion as to whether to take up the claim on behalf of its injured national at all. It may waive, compromise, or discontinue the presentation of the claim irrespective of the wishes of the injured national. In exercising this discretion, the state often gives paramount consideration to the wider ramifications of the espousal of a diplomatic protection claim so fat as it concerns the conduct of its foreign policy vis-à-vis the host state.”¹⁶

Therefore, the state has full ownership and control over the claim by whatever means or extent. This is demonstrated in the case of *Barcelona Traction*.¹⁷ Given these difficulties

¹² L. Zarsky (ed.), *Balancing Rights and Rewards: International Investment for Sustainable Development* (Nautilus Institute for Security and Sustainability, UK 2005), pp. 6; See also Konrad von Moltke, ‘A model international investment agreement for the promotion of sustainable development’, (International institute for sustainable development and the Swiss agency for development and cooperation, 2004) http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf.

¹³ M. Sornarajah, *The International Law on Foreign Investment* (CUP, UK 2010), pp. 224-225; See Omar E. Garcia-Bolivar, ‘Sovereignty v. Investment Protection : Back to Calvo?’, http://works.bepress.com/omar_garcia_bolivar/12/.

¹⁴ L. Reed and L. Martinez, ‘Treaty Obligations to Honor Arbitral Awards and Diplomatic Protection’ in D. Bishop (ed), *Enforcement of Arbitral Awards against Sovereigns*, (Jurisnet, New York 2009).

¹⁵ A. Boralessa, ‘Enforcement in the United States and United Kingdom of ICSID awards against the Republic of Argentina: Obstacles that Transnational Corporations may Face’, 17 N.Y. Int’l L. Rev 53 (2004) pp. 111.

¹⁶ The Hybrid Foundations of Investment Treaty Arbitration (n 8), pp. 169.

¹⁷ *Barcelona Traction, Light and Power Co. Case* (Belgium v. Spain) [1970] ICJ Rep.3, para 78-79, reads:

and uncertainties, an investor is often willing to decline a recourse to diplomatic protection but rather intends to satisfy its arbitral award more directly by means of investor-state arbitration dispute settlement provided under investment treaty basis where, in the word of Douglas:

“the investor is under no obligation to inform its national state of the existence of proceedings against the host state, nor to consult with the state on the substantive and procedural issues that arise in the proceedings. The investor is guided in the prosecution of its claim solely by the dictates of self-interest without necessary regard for any consequences to the diplomatic relationship between its national state and the host state.”¹⁸

By pursuing a diplomatic protection in solving a dispute, in the context of investor-state arbitration in the interstate level, such action is, by some means, heavily influenced by political considerations. Undoubtedly, it relies on the basic notion of amicable international relations between home and host state, which is outside the control of the national investor.¹⁹

In breaking with a traditional means of dispute settlement under customary international law, investment treaty arbitration, in turn, empowers foreign investors to directly claim against a host state without exhausting local remedies, plus directly seeking enforcement of arbitral awards before the domestic courts of a host state in order to solve the problem of unfair dispute settlement.²⁰ In principle, investment treaty arbitration obliges state parties to submit its jurisdiction over a dispute in an arbitral tribunal involving a unilateral ‘public offer’ or ‘general consent’ of arbitration by a host state provided for in

“...within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting...”

The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it granted, and when it will cease. It retains in this respect a discretionary power to exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case.”

¹⁸ The Hybrid Foundations of Investment Treaty Arbitration (n 8), pp. 169.

¹⁹ E Baldwin M Kantor and M Nolan, ‘Limit to Enforcement of ICSID awards’ 23 J Intl Arb 1 (2006), 7-8; I. Shihata, ‘Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA’, 1 ICSID Review 1 (1986), pp.9.

²⁰ Gus Van Harten & Martin Loughlin, ‘Investment treaty Arbitration as a Species of Global Administrative Law’ (2006) 17 EUR. J. INT’L L. 121, 128. (Investment treaty Arbitration as a Species of Global Administrative Law)

BITs or IIAs in a prospective and generalised form²¹ so as to establish a classical ‘agreement to arbitrate’ with a foreign investor. As such, Paulsson has termed this unique form of investment treaty arbitration as “*arbitration without privity*”²², which makes its mechanism fundamentally different from other forms of dispute settlement. In this context, a state under ‘general consent’ has much less control over the dispute than the traditional means of diplomatic protection. Therefore, it could be said that, instead of being reminiscent of “*gunboat diplomacy*”²³, a treaty-based system of dispute settlement would be a superior alternative for investor protection, rather than reliance on an uncertain political-based system of diplomatic protection.²⁴

As demonstrated above, contemporary investment treaty arbitration goes beyond the traditional concerns, with a simple expropriation and nationalisation disputes arising between a host state and a foreign investor.²⁵ The subject matter frequently covers a broader range of the regulatory powers, either by the legitimate or invalid exercise of power by a host state, ranging from the provisions of basic public service to the maintenance of public orders.²⁶ In dealing with these complicated matters, the investment treaty arbitration mechanism has become a significant method in relocating an adjudication power from a state to a multinational enterprise (MNE) or a foreign investor and from a domestic court to a private arbitration body.²⁷

²¹ S. Schill, ‘Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach’, 52 *Virginia J. Int’l L.* 57, pp.77 (2011) (Enhancing International Investment Law’s Legitimacy); S. Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’, 23 *Leiden J. Int’l L.* 401 (2010) pp. 411 (Crafting the International Economic Order)

²² J. Paulsson, ‘Arbitration Without Privity’, 10 *ICSID Review Foreign Investment Law Journal* 232 (1995); J. Paulsson, ‘Arbitration Unbound: Award detached From the Law of Its Country of Origin’, 30 *Int’l L and Com. L. Q.* 358 (1981).

²³ See O.M. Johnson Jr. and J. Gimbleet, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’ in K.P. Sauvant (eds), *Yearbook on International Investment Law & Policy 2010-2011* (OUP, New York 2012) pp. 649-692.

²⁴ P. Muchlinski, ‘The Diplomatic Protection of Foreign Investors: A Tale of Judicial Caution’ in C. Binder, U. Kriebaum, A. Reinisch, and S. Wittich (eds) *International Investment Law for the 21st Century Essays in Honour of Christoph Schreuer.* (OUP, Oxford 2009) pp.362.

²⁵ Private Litigation in a Public Law Sphere (n 6), pp. 284.

²⁶ *ibid*, pp 289.

²⁷ Van Harten, ‘Five Justifications for Investment Treaties: A Critical Discussion’, 2(1) *Trade L. & Dev.* 1 (2010) pp. 2.

In addition, although the characteristic of public and private of international law is considered as a distinct discipline, the lines blur when it is regarded in relation to investment treaty arbitration. Consequently, contemporary investment treaty arbitration is not only recognised as another form of private law in commercial arbitration, in which one party of the dispute is a state, but also constitutes another form of dispute settlement, involving a public law context at both domestic and international level.²⁸ Van Harten has pointed out that:

“States have in fact taken this additional step by establishing an international adjudication system, based on investment treaties that give to arbitrators a comprehensive jurisdiction over what are essentially regulatory disputes... Arbitrations conducted pursuant to investment treaties are distinct from international commercial arbitration- where the latter engages disputes between the state and a private individual- because states are assumed in the commercial context to be acting in a private capacity... Investment treaty arbitration is a much clearer instance of the state’s retreat from adjudication because it replaces courts with a private model of adjudication in matters of public law”²⁹

Given the public-private characteristic of investment treaty arbitration, it displays a system of hybridisation³⁰, where either public international law or private transnational dispute resolution cannot adequately rationalise its mechanism. In other words, the system of investment treaty arbitration combines the applicable law of public international law with the procedural law of private arbitration rules, used for resolving disputes between private parties in commercial arbitration.³¹ Not surprisingly, this hybrid model of investment treaty arbitration nowadays is a unique form of public law adjudication in which its mechanism has been understood by many scholars as public regulatory or administrative law. Van Harten and Loughlin have described this phenomenon, stating that “the regime of investment arbitration should be recognised as constituting an exceptionally important and powerful manifestation of global

²⁸ Private Litigation in a Public Law Sphere (n 6), pp. 285.

²⁹ Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims Against the State’, 56 ICLQ 371 (2007) pp. 372. (The Public-Private Distinction)

³⁰ See The Hybrid Foundations of Investment Treaty Arbitration (n 8)

³¹ Crafting the International Economic Order (n 21), pp.402

administrative law.”³² Similarly, Choudhury has contended that “the breadth of the regulatory powers of arbitrators in their review of national state decisions, regulations, and legislation has even caused some scholars to characterise investment arbitration as part of the evolving concept of global administrative law.”³³ Therefore, the conception of global administrative law can be summarised as:

“...comprising the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they met adequate standards of transparency, participation, reasoned decision, and legality and by providing effective review of the rules and decisions they make. Global administrative bodies include formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international governmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance.”³⁴

With regards to global administrative law, the institutional architecture of investment treaty arbitration has highlighted a commonality of judicial review in domestic administrative law, which has been replicated to a greater degree by an intergovernmental regime or so called ‘global administrative space’.³⁵ Therefore, it supports the underlying assumptions that investment treaty arbitration, unlike international commercial arbitration, is a form of public law adjudication, which is particularly utilised in order to resolve regulatory disputes reaching beyond a state and its domestic law.³⁶ Accordingly,

³² Investment treaty Arbitration as a Species of Global Administrative Law (n 20), pp. 148; B. Kingsbury, N. Krisch and R. Stewart, *The Emergence of global administrative law* 68 *Law & Contemporary Problems* 15 (2005); K. Ladeur, ‘The Emergence of Global Administrative Law and Transitional Regulation’, IILJ Working paper 2011/1.

³³ B. Choudhury, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’, 41 *VAND. J. TRANSNAT’L L.* 775, 778 (2008).

³⁴ See B. Kingsbury, N. Krisch and R. Stewart, ‘The Emergence of Global Administrative Law’ 68 *Law & Contemporary Problems* 15 (2005).

³⁵ N. Krisch and B. Kingsbury has provided a definition of ‘Global Administrative Space’ in N. Krisch and B. Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order* 17 *EJIL* 1 (2006) that “a space in which the strict dichotomy between domestic and international has largely broken down, in which administrative functions are performed in often complex interplays between officials and institutions on different levels, and in which regulation may be highly effective despite its predominantly non-binding forms”.

³⁶ See also Van Harten, ‘A Case for an International Investment Court’, *SIEL Working paper no.22/08*, (2008).

this form of public law adjudication is reflected by the ability of international tribunals, particularly the ICSID, to override domestic law with public international law, obliged by a state under Bilateral Investment Treaties ('BITs') and other forms of International Investment Agreements ('IIAs').³⁷ This is contrary to an international commercial arbitration in the way that it is a reciprocal consensual adjudication based on a negotiated contract.³⁸

In particular, an international commercial arbitration deals with a dispute between private parties, including a dispute between a private party and a state party, who assumed to be acting in a private capacity.³⁹ Alternatively, investment treaty arbitration is used to resolve a dispute between a private party, particularly foreign investor, and a state acting in a sovereign power. Thus, the relationship between the parties is not equal but a hierarchical structure. The state, unlike private parties under a reciprocal legal relationship, possesses a different set of powers and obligations in law⁴⁰ as well as it may unilaterally exercise to bind foreign investor by administrative order or legislation.⁴¹ This public conduct of the state, affecting a foreign investor under investment treaty arbitration, is more aligned to the domestic constitutional and administrative law than the function of the state under international commercial arbitration based on a commercial contract in private law.⁴²

In both contexts, it is clear that the public-private distinction between those two international adjudication mechanisms rests on the concept of state sovereignty, which is used to determine the function and nature of state activities.⁴³ As mentioned earlier, states are now increasingly losing their control over regulatory disputes and appearing to

³⁷ V. Greiman, 'The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships', 32 Whittier L. Rev. 395, 404 (2010-2011). See also Investment treaty Arbitration as a Species of Global Administrative Law (n 20), pp123.

³⁸ See The Public-Private Distinction (n 29).

³⁹ *ibid* 372.

⁴⁰ Van Harten, 'A Case for an International Investment Court', SIEL Working paper no.22/08, (2008) pp. 4.

⁴¹ Enhancing International Investment Law's Legitimacy (n 21), pp.77.

⁴² *ibid* 59.

⁴³ See L.J. Bouchez, 'The nature and scope of state immunity from jurisdiction and execution' (1979) Netherlands Y.B.I.L. 1.

transfer their sovereign power to private adjudication in matters of public law.⁴⁴ For this reason, a challenge has been posed to a legal conception of state sovereignty as the public-private characteristic of investment treaty arbitration may result in ‘the retreat of the state’.⁴⁵

Meanwhile, this new sense of uncertainty of state sovereignty raises the criticism that the structure of international investment law and investment treaty arbitration has established an asymmetric legal regime, in favour of the private interests of foreign investors over the public interests of the host states.⁴⁶ Still, it is important for the host states, especially the developing host states, to be aware of the equivocal impact on the definition and interpretation of the discretion by sovereign states being challenged by foreign investors.⁴⁷ Indeed, existing IIA models remain focused on the interests of investors and pay less attention to public interests in a host states’ policy space.⁴⁸ Therefore, it seems that many investor-state cases and their regime do not intend to strike an appropriate balance between these public and private interests but instead tend to increase the conflict between public and private international law.⁴⁹

A considerable amount of literature intimates and casts a “*legitimacy crisis*”⁵⁰ in relation to the entire system of international investment law and investment treaty arbitration,

⁴⁴ The Public-Private Distinction (n 29), pp. 372; See also Van Harten, ‘Private Authority and Transnational Governance: The Contours of the International System of Investment Protection’, 12 Rev. Intl. Pol. Eco. 600 (2005).

⁴⁵ See S. Strange, *The Retreat of the State* (CUP, Cambridge, 1996).

⁴⁶ C.N. Brower and S. Chill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law’, 9 Chi. J. Int’l L. 471, 474 (2008-2009).

⁴⁷ UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (UN, Switzerland 2012) pp. 84.

⁴⁸ See Vicente Yu and Fiona Marshal, ‘Investor’s obligations and host state policy space’, 2nd Annual forum of developing country investment negotiators (2008)

http://www.iisd.org/pdf/2008/dci_inv_obligations.pdf accessed 25 July 2010.

⁴⁹ See Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, New York 2007) pp.152-184. See also, Gus van Garten, ‘A Case for An International Investment Court’, Society of International Economic Law Inaugural Conference Working Paper No.22/08, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424.

⁵⁰ M. Sornarajah, ‘A Coming Crisis: Expansion Trends in Investment Treaty Arbitration in K. P. Sauvant, *Appeals Mechanism in International Investment Disputes*, (OUP, New York 3008); M. Sornarajah, *Power and Justice in Foreign Investment Arbitration*, 14 Journal of International Arbitration 103-140 (1997). S.D. Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law

which is based on a pro-investor bias and is detrimental to a state sovereignty.⁵¹ With those aspects of international investment law and investment treaty arbitration, it is purported that the hybridisation of investment treaty arbitration is firmly situated within the matrix of public international law.⁵² To strike a distinction within the conceptual framework between a public and private law perspective, Van Harten contends that “even though the system relies on the model of international commercial arbitration and expands private authority as a method of governance, the system exists within the realm of public international law- not international commerce- and it remains tied to the authority of states.”⁵³

In conclusion, it is submitted that international investment law is considered as a part of public international law because investment treaty arbitration is a form of public law adjudication, in which one party of a dispute is a state and is utilised to resolve regulatory disputes. Accordingly, the thesis will adopt this approach to analyse and examine each research question throughout the thesis since it serves as an effective tool to balance the interests between a state and private party. In other words, a global administrative law approach under a public law aspect has brought a public dimension into a private sphere of international investment law, which mainly concerns the interest of a private party. It is the main purpose of this thesis to balance the defense of sovereign immunity doctrine under public international law and investment protections under international investment law by the application of proportionality analysis, which is provided under a public law concept. Thus, this would limit the excessive or unjustified claims of sovereign immunity as a defense against the enforcement of arbitral awards as well as allow a state to defend a public interest in response to an unreasonable claim for a protection of private interests.

through Inconsistent Decisions’, 73 *Fordham Law Review* 1522 (2005); M. Sornarajah, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’, 73 *Fordham Law Review* 1521,1523 (2005)

⁵¹ N. Brower and S. Chill, ‘Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law’, 9 *Chi. J. Int’l L.* 471, 474 (2008-2009).

⁵² J. Behring, T.R. Braun, R.A. Lorz, C. Tams, S. Schill, and C. Tietje, ‘General Public International Law and International Investment Law: A Research Sketch on Selected Issues’. *Beiträge zum Transnationalen Wirtschaftsrecht. International Law Association German Branch – Sub-Committee on Investment Law*, Halle (2009) pp. 5.

⁵³ Van Harten, ‘Private Authority and Transnational Governance: The Contours of the International System of Investment Protection’, 12 *Rev. Intl. Pol. Eco.* 600 (2005), pp. 604.

3. The Fragmentation or Defragmentation of International Law

It is unsurprising that international investment law is embedded in the discipline of public international law. It is concerned with the restriction of the state authority to regulate foreign investors within the scope of public interests obliged by legislative, administrative and judicial conducts.⁵⁴ In addition, modern BITs have adopted the traditional investment protection provisions found under classical public international law, whether as local remedies rule, police power, the taking of foreign property, diplomatic protection and the treatment of aliens.⁵⁵ Significantly, a public international law is not only applicable in international investment law, investment treaty arbitration; the customary international law concerning the rules of treaty interpretation under the Vienna Convention on the Law of Treaties,⁵⁶ and the rules of state responsibility under ILC's Articles on state responsibility⁵⁷ are also central to international investment law and investment treaty arbitration.⁵⁸

Faced with this particular interaction of legal concepts, there is a close relationship and mutual influence between these two areas of international law; the analysis of international investment law in certain specific issues, referring to the doctrines of public international law, and public international law affected by the development of international investment law. This highlights the cross-fertilisation and integration of international investment law with other areas of international law in relation to the

⁵⁴ See C. Schreuer, 'The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes', www.univie.ac.at/intlaw/wordpress/pdf/81_csunpublpaper_1.pdf. (The Relevance of Public International Law) ; See also S. Montt, *State Liability in Investment Treaty Arbitration Global Constitutional and Administrative Law in the BIT Generation* (Hart, Oxford and Portland 2009).

⁵⁵ See generally C.F. Amerasinghe, *Local Remedies in International Law* (2nd ed.), (CUP, UK 2004).; J. Paulsson, *Denial of Justice in International Law*, (CUP, UK 2010), pp.100-130.

⁵⁶ Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969)

⁵⁷ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1

⁵⁸ J. Behring, T.R. Braun, R.A. Lorz, C. Tams, S. Schill, and C. Tietje, 'General Public International Law and International Investment Law: A Research Sketch on Selected Issues'. *Beiträge zum Transnationalen Wirtschaftsrecht. International Law Association German Branch – Sub-Committee on Investment Law*, Halle (2009), pp. 7

interpretation and application of legal concepts by an arbitral tribunal, pertinently covering the concept of state responsibility and treaty interpretation.⁵⁹

However, the interpretation and application of legal concepts by arbitral tribunals are insufficient to fulfil the gap between international investment law and public international law. In addition, as it is commonly known that there is no doctrine of precedent (*stare decisis*) in investment treaty arbitration⁶⁰, the system is inevitably faced with the unpredictability and inconsistency regarding decisions and arbitral awards in arbitral tribunals, which could lead to the threat of fragmentation of international law.⁶¹ Following the International Law Commission's ('ILC') Reports on the 'Fragmentation of International Law', due to the increasing emergence of new and special type of laws, self-contained regimes and limited treaty system, a problem of coherence is created in international law where:

“What once appeared to be governed by “general international law” has become the field of operation for such specialist systems as “trade law”, “human rights law”, “environment law”, “law of the sea”, “European law” and even such highly specialized forms of knowledge as “investment law” or “international refugee law”, etc.- each possessing their own principles and institutions.”⁶²

⁵⁹ See P. Sands, 'Custom, Treaty, Cross-Fertilisation of International Law', Yale Hum.Rts.Dev.L.J. 3 (1998).

⁶⁰ See G. Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?', 23(3) Arbitration International 357 (2007); J. Commission, 'Precedent in Investment Treaty Arbitration A Citation Analysis of a Developing Jurisprudence', 24(2) J. Int'l. Arb. 129-158 (2007).

⁶¹ See M. Koskeniemi and P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 Leiden Journal of International Law 553 (2002); Anne van Aaken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal', 16 Indiana Journal of Global Legal Studies 483 (2009); M. Craven, 'Unity, Diversity and Fragmentation of International Law', 14 The Finnish Yearbook of International Law 3 (2003); A. Fischer-Lescana and G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 Michigan Journal of International Law 999 (2004); A Reich, 'Bilateralism versus Multilateralism in International Economic Law', 60 U Toronto LJ 263 (2010); S. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law', 22(3) EJIL 875 (2011).

⁶² Study Group of the International Law Commission, *Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* – Finalized by Martti Koskeniemi (A/CN.4/L.682), 13 April 2006, para 8.

Accordingly, scholars of international law have been mostly concerned with the conflict of different areas in international law.⁶³ Koskenniemi has summarised in the ILC report that “conflict exists if it is possible for a party to two treaties to comply with one rule only by thereby failing to comply with another rule.”⁶⁴ As Schill has maintained in relation to the multilateral system of BITs that “the existing investment treaties, whether bilateral, regional or sectoral, can be understood as part of a treaty-overarching legal framework⁶⁵ that backs up an international investment space that is part of the developing global market economy.”⁶⁶ However, he contends that the proliferation of dispute settlement would cause a large degree of fragmentation of international investment law, resulting from the multiplicity of sources and proceedings and the inconsistent interpretations.⁶⁷

This is one of the main concerns with regards to the relationship of international investment law and other areas of international law when arbitral tribunals need to determine the law governing the merits of the dispute. While some treaties may agree the governing law of the dispute between the host state and foreign investor, certain treaties contain a clause allowing a choice of law, in case there is no such concord between the parties.⁶⁸ The ICSID tribunal refers to the law of the host state and the international law in the absence of such an agreement, which is stipulated in Article 42(1). This rule could also be found in Article 1131 of NAFTA⁶⁹ and Article 26(6) of the Energy Charter

⁶³ See L. Collins, *Dicey, Morris and Collins on the Conflict of laws* (Sweet & Maxwell, London 2006), pp. 778-785.

⁶⁴ Study Group of the International Law Commission, *Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* – Finalized by Martti Koskenniemi (A/CN.4/L.682), 13 April 2006, para 24.

⁶⁵ S. Schill, ‘Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System?’, Paper for the 4th Global Administrative law Seminar (2008).

⁶⁶ *ibid* 2.

⁶⁷ *ibid* 5; See also S. Schill, *The Multilateralization of International Investment Law*, (CUP, UK 2009); P. Muchlinski, ‘Corporations and the Uses of Law: International Investment Arbitration as a “Multilateral Legal Order”’, 1 Onati Socio-Legal Series (2011), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832562> .

⁶⁸ *The Relevance of Public International Law* (n 54), pp. 9.

⁶⁹ Article 1131 of NAFTA, reads “A Tribunal established under this Section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law.”

Treaty.⁷⁰ In addition, the foreign investor is also subject to a domestic court and the law of a host state in relation to the enforcement of arbitral awards under the ICSID Convention, which is the main concern of this thesis.

Since conflicts of law may arise between an obligation of a state towards a foreign investor during proceedings concerning the enforcement of arbitral awards, a state being a party to the International Conventions on the recognition and enforcement of arbitral awards either the New York Convention or ICSID Convention, is under a treaty obligation to enforce arbitral awards rendered elsewhere before its jurisdiction. Non-compliance by a party would be a breach of the treaty obligations and lead to legal, political and economic consequences.⁷¹

With this respect, although the governing law of the dispute is far from uniform,⁷² it is submitted that international investment law has to be interpreted and be applicable in consistency and compatibility with other areas of international law. This needs to be both in investment and non-investment obligations, such as, WTO law, human rights law, diplomatic law and state immunity law, as well as domestic law of the host state, particularly domestic law of state immunity.⁷³ Anne van Aaken has contended that “a good faith interpretation of substantive provisions of investment law may lead to a reading and application of investment law more consistent with other special areas of international law.”⁷⁴ Therefore, international investment arbitration, in contrast, gives even more leeway to the parties and arbitrators by having a broader wording in the procedural as well as in the substantive law.⁷⁵

⁷⁰ Article 26(6) of the Energy Charter Treaty, reads “A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”

⁷¹ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp. 1077.

⁷² *The Relevance of Public International Law* (n 54), pp. 9.

⁷³ See Moshe Hirsch, ‘Interactions between investment and non-investment obligations in international investment law’, (The Hebrew University of Jerusalem, 2006)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947430.

⁷⁴ Anne Van Aaken, ‘Fragmentation of International law : The case of International investment protection’, (University of St. Gallen Law School, Law and Economics Research Papers Series, Working Paper No. 2008-1, 2008) pp. 2. (Fragmentation of International Law)

⁷⁵ *ibid.*

4. Doctrines relating to Investor-State Dispute Settlement

(a) The doctrine of treaty interpretation

As mentioned earlier, international investment law must be interpreted consistently with other areas of international law. Nonetheless, a conflict of norms may arise, on both procedural and substantive grounds, between a state and an investor in relation to the obligations each party has. With regards to the enforcement of arbitral awards, the conflict of laws between two doctrines is involved; namely, treaty obligations under international investment law (*pacta sunt servanda*)⁷⁶ and the doctrine of sovereign immunity (*par in parem non habet jurisdictionem*).⁷⁷ While the former principle forms the basis for Article 26 of the Vienna Convention on the Law of Treaties (VCLT), which states “every treaty in force is binding upon the parties to it and must be performed by them in good faith”⁷⁸, the latter principle forms the basis of the doctrine of absolute immunity, being that “one sovereign state is not subject to the jurisdiction of another state”. This creates a grey area concerning the exchanges between investment and non-investment obligations within international investment law. Therefore, there is a conflict of norms when a domestic court applies and interprets these two principles simultaneously as they originate from different areas of international law. This leads to the question regarding which doctrine might take precedence over the other and/or how they interface with each other.

In order to solve the ensuing legal issues, a tribunal will mainly refer to Article 31 and 32⁷⁹ of the Vienna Convention on the Law of Treaties (VCLT) when it is required to

⁷⁶ In Latin for “agreements must be kept”; See also W. Park and A. Yanos, ‘Treaty Obligations and National Law: Emerging Conflicts in International Arbitration’, 58 *Hastings Law.Rev.* 251 (2006); J. Yackee, ‘PACTA SUNT SERVANDA and state promises to foreign investors before bilateral investment treaties: Myth and reality’, 32 *Fordham Int’l L. J.* 1550 (2009).

⁷⁷ See H. Lauterpacht, ‘The problem of jurisdictional immunities of foreign states’, 28 *Brit.Y.B. Int’l L.* 220 (1951); J. Crawford, ‘International law and foreign sovereigns: Distinguishing immune transactions’ 54 *Brit.Y.B. Int’l L.* 75 (1983).

⁷⁸ Art. 26 of VCLT, May 23, 1969, 1155 U.N.T.S. 331.

⁷⁹ Art.32 of VCLT, reads:

“Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

interpret the treaties. Therefore, the treaty interpretation under the VCLT is considered as a main tool in interpreting the treaties and other principles. Article 31(3) (c) of VCLT sets out a general rule of interpretation to “any relevant rules of international law applicable in the relations between the parties”⁸⁰

Considering the interpretation of the international investment law and other areas of international law, the *travaux preparatoires* of Article 31(3) (c) say that it codifies a principle of systematic integration⁸¹ in that all sources of international law, including treaties, are to be included. Therefore, this provision should be taken into account in the context of interpreting treaty obligations⁸² where other human rights or environmental law have acquired a customary international law status.⁸³ Accordingly, this could include other non-investment obligations as a relevant legal obligation underlying an investment disputes. However, Anne van Aaken has highlighted that “a distinction has to be drawn conceptually between the application of other (general or special) norms of international law in investment disputes directly on the one hand and the interpretation of investment

(b) leads to a result which is manifestly absurd or unreasonable.”

⁸⁰ Art. 31 of VCLT, reads:

- “1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes;
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context;
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.”

⁸¹ C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, 54(2) ICLQ 279 (2005).

⁸² Fragmentation on International Law (n 75), pp. 11-12.

⁸³ Anne van Aaken, ‘Defragmentation of Public International Law Through Interpretation: A Methodological Proposal’, 16 Indiana Journal of Global Legal Studies 483 (2009), pp. 497-498; See also R. Gardner, *Treaty Interpretation* (OUP New York 2008); C. Schreuer, ‘Diversity and harmonization of Treaty Interpretation in Investment Arbitration’ in M. Fitzmaurice, O. Elias and P. Merkouris (eds.) *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Brill, The Netherlands 2010)

norms by considering non-investment law, indirectly, mainly through Art. 31(3) (c) of the Vienna Convention on the Law of Treaties (VCLT) on the other hand.”⁸⁴

The application of non-investment law in investment dispute has been clarified in the Article 42 (1) of ICSID Convention, which reads that “the Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law may be applicable.”⁸⁵ Article 42 provides a mechanism for the tribunal to select the most appropriate substantive law applicable to the merits of the disputes.⁸⁶ In investment disputes rendered before the ICSID, the applicable law will normally be the host state’s law and international law. This may result in a conflict between the obligation of a host state towards a foreign investor (under the IIAs) and its obligations in domestic laws or international laws in the area of environment, national security and human rights, considered as a *jus cogens* norm. In this regard, although sovereign immunity law is considered as a procedural bar in enforcing arbitral awards, which is not determined here and treated differently, it is necessary to see how the tribunal deals with other non-investment laws by referencing to Article 42 of the ICSID Convention. This practice of the tribunal could influence other tribunals or courts to consider and interpret the investment law and non-investment law in a procedural level when enforcing arbitral awards together with the application of principal of proportionality, which will be discussed later.

The application of non-investment law before the tribunal can be observed in the case of *Piero Foresti v. Republic of South Africa*.⁸⁷ In this case, an Italian mining company challenged the South African’s Mineral and Petroleum Resources Development Act (‘MPRDA’), which was backed by the Black Economic Empowerment (‘BEE’)

⁸⁴ Fragmentation on International Law (n 74), pp. 9.

⁸⁵ Art. 42(1) of ICSID Convention.

⁸⁶ C. Schreuer, *The ICSID Convention : A commentary*, (CUP, UK 2009) pp. 550.

⁸⁷ *Piero Foresti, Laura De Carli and others v. Republic of South Africa* (International Center for Settlement of Investment Disputes, Case No. ARB (AF)/07/1).

policies, in an effort to improve and protect the participation of the historically disadvantaged South Africans (HDSA) within the mining sector.⁸⁸ The investors claimed before the ICSID Additional Facility that this policy was in breach of the provisions of the Italy-Republic of South Africa ('RSA') BIT and the Benelux⁸⁹-Republic of South Africa BIT non-discrimination provisions.⁹⁰ The tribunal did not provide a decision on the merits of the case, as the case had been dropped at the request of the claimant who sought to discontinue the proceeding. In this context, although the tribunal did not give the decision, it could be seen that it had to take Article 54 of the ICSID Additional facility rules when applying the rules of law nominated by the parties as appropriate to the elements of the dispute, including international law, as a method of interpretation. This rule of interpretation is similarly provided in Article 42(1) of the ICSID and Article 31 (3) (c) of the VCLT. Therefore, international human rights law could be considered as having legal relevance applicable to the dispute.

In dealing with the conflicts of peremptory norms and other general international laws, Article 53 of VCLT goes further in clarifying that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general law”⁹¹ and could lead to Article 64 that “if a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”⁹² This application of the *jus cogens* rule is also illustrated in Article 103 of the UN Charter.⁹³ Therefore, the superior normative status of *jus cogens* rules undoubtedly protects certain fundamental human rights obligations, including the prohibition against racial discrimination. For a purpose of this thesis, it, however, raises a question of whether the

⁸⁸ M. Jacob, ‘International Investment Agreements and Human Rights’, (INEF Research paper series of human rights, corporate responsibility and sustainable development, 2010) http://www.humanrights-business.org/files/international_investment_agreements_and_human_rights.pdf, pp14. (International Investment Agreements and Human Rights)

⁸⁹ The Benelux is an economic union in Western Europe that comprises three neighboring countries, Belgium, the Netherlands, and Luxembourg.

⁹⁰ International Investment Agreements and Human Rights (n 87), pp 14-15.

⁹¹ Art. 53 of VCLT.

⁹² Art. 64 of VCLT.

⁹³ Art. 103 of UN Charter, it reads “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

fundamental human right obligations or other peremptory norms would, in any case, take precedence over the doctrine of sovereign immunity, which is not considered a *jus cogens* norm.

In this context, the jurisprudence of courts and tribunals has considered Article 53 of the VCLT together with Article 31(3) (c) of the VCLT when interpreting the conflict of laws. In the ICJ case of *Arrest Warrant*,⁹⁴ a separate joint opinion of Judges Higgins, Kooijmans and Buergenthal considered a relationship between immunity of high state officials and peremptory *jus cogens* norms of international criminal law as follows:

“These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.”

In this respect, although international criminal law is considered as a “peremptory *jus cogens* norm”, it has to be harmonised with other areas of international law in order to balance the interests of both private and public. Therefore, it is apparent that a reference to Article 31 (3)(c) of the VCLT could not only apply to human rights obligations, but is also extendable to the law of sovereign immunity, where the court or tribunal adopts a

⁹⁴ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, 14 February 2002, Joint Separate opinion of Judges Higgins, Kooijmans and Buergenthal, ICJ Report 2002, 63, para 75.

proportionality analysis to harmonise a conflict of norms between special and general international law through interpretation.⁹⁵ In addition to the ICJ case law, the ECtHR jurisprudence applies a similar nature of reasoning when dealing with human rights and sovereign immunity law. As in *Al-Adsani*,⁹⁶ *Forgarty*⁹⁷ and *McElhinney*,⁹⁸ the ECtHR has adopted the rule of treaty interpretation in order to determine whether the rule of state immunity, under domestic law, is a proportionate or legitimate measure to prevail over the right to access of justice in Article 6 of ECHR. The court confirmed the treaty interpretation to Article 31(3) (c) of VCLT, in which the law of state immunity is considered a relevant rule of international law and must be interpreted, as with other rules of international law, with consistency.⁹⁹ The issue of proportionality analysis, raised in these human rights cases, and its significance in relation to the issue of sovereign immunity in the enforcement of arbitral awards, will be more fully discussed later in the thesis.

With regards to the interpretation of international investment law, by considering non-investment law, while most IIAs are silent on the subject of non-investment law, the tribunals have at times referred to non-investment law, such as human rights obligations, when interpreting investment law so as to defend the treatment provided to foreign

⁹⁵ Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 *Indiana Journal of Global Legal Studies* 483 (2009) pp. 493-502.

⁹⁶ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001.

⁹⁷ *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001.

⁹⁸ *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001.

⁹⁹ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 55-56

“...the Convention has to be interpreted in the light of the rules set out in the Vienna Convention... and... Article 31(3)(c)... indicates that account is to be taken of ‘any relevant rules of international law applicable in the relations between the parties’. The Convention, including Article 6, cannot be interpreted in vacuum. The Court must be mindful of the Convention’s special character as human rights treaty, and it must also take the relevant rules of international law into account...The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including to those relating to the grant of State immunity.

It follows that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to court as embodied in Article 6(1).”

investors.¹⁰⁰ Moreover, in *Maffezini*, the tribunal accepted the protection of environmental rights of the citizen,¹⁰¹ as did the tribunals in *SD Myers*¹⁰² and *Santa Elena*¹⁰³ in relation to international environmental law. Moreover, the issue of cultural rights was considered in both *Parkerings*¹⁰⁴ and *SPP*.¹⁰⁵ Therefore, in this regard, it could be possibly said that most recent tribunals do not hesitate to face the inconsistency between investment and non-investment obligations.¹⁰⁶

Although they have not reached a *jus cogens* norm ranking, there are other rules which can regulate the determination of other international law rules, such as those existing in human rights treaties. The *lex specialis* rule might be applied in other non-investment obligations in international law.¹⁰⁷ This is where the legal relevance of non-investment obligations might be usually stopped due to the fact that IIAs are considered as a specific law that prevails over other general laws in investor-state disputes. At this point, an interpretation by reference to Article 31(3) (c) is more effective than other techniques, because “the application of a technique of interpretation that permits reference to other rules of international law offers the enticing prospect of averting conflicts of norms by enabling the harmonisation of rules rather than the application of one norm to the exclusion of another.”¹⁰⁸ As a result, this approach could solve the conflicts between different areas of international law as well as balance the relation between public and private interests.

¹⁰⁰ Jasper Krommendijk and John Morijn, ‘Proportional by what measure (s)? Balancing Investor interests and human rights by way of applying the proportionality principle in investor-state arbitration’ in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human rights in international investment law* (Oxford University Press, Oxford 2009) 426.

¹⁰¹ *Emilio Agustin Maffezini v. Kingdom of Spain*, ICDIS No. Apr/97/7, Decision on Jurisdiction, 25 January 2000; Award of the Tribunal of 13 November 2000, at 67.

¹⁰² *SD Myers Inc. v Government of Canada*, UNCITRAL Arbitration, Partial award (Nov. 13, 2000).

¹⁰³ *Santa Elena v Costa Rica*, ICSID case No. ARB/96/1, Award on Merits, 17 February 2000.

¹⁰⁴ *Parkerings v. Lithuania*, ICSID case no. ARB/05/8, Award, September 11, 2007, section 8.3.1.

¹⁰⁵ *SPP v Egypt*, 19 Yearbook Commercial Arbitration 51 (1994).

¹⁰⁶ Moshe Hirsch, *Interactions between investment and non-investment obligations in international investment law*, (The Hebrew University of Jerusalem, 2006)

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947430>, at 25.

¹⁰⁷ *ibid* at 8.

¹⁰⁸ C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, ICLQ 54 (2005), 286.

(b) The doctrine of state responsibility

In investment treaty arbitration, the doctrine of state responsibility is no less important than the doctrine of treaty interpretation of obligations international investment law (*pacta sunt servanda*)¹⁰⁹ and the principle of sovereign immunity (*par in parem non habet jurisdictionem*).¹¹⁰ Historically, the doctrine of state responsibility has been developed due to the traditional concern for the diplomatic protection of nationals and injuries to aliens. Therefore, this doctrine reflected the traditional legal systems between states as a sovereign state, where states are accountable under international obligations and diplomatic status.¹¹¹

With regard to a diplomatic protection, although the modern dispute settlement of investor-state arbitration has been established to replace diplomatic protection, a state can rely on some forms of diplomatic protection when there is non-compliance of a state; provided for under the ILC's 2006 Draft Articles on Diplomatic Protection.¹¹² Therefore, a diplomatic protection doctrine has long been established for the protection of foreign investment in the form of state responsibility, particularly regarding assets of an alien. Sornarajah explains concerning this doctrine that:

“Historically, this area of the law has been built up as a part of the area of the diplomatic protection of citizens aboard and of state responsibility for injuries to aliens. Since the function of diplomatic missions was the protection of nationals living in the states to which the missions were assigned, the protection of the property of these nationals also became a concern of such missions. The right of diplomatic missions to intercede on behalf of the property rights of their nationals came to be asserted in the diplomatic

¹⁰⁹ W. Park and A. Yanos, ‘Treaty Obligations and National Law: Emerging Conflicts in International Arbitration’ 58 *Hastings Law.Rev.* 251 (2006).

¹¹⁰ See H. Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ 28 *Brit.Y.B. Int’l L.* 220 (1951); J. Crawford, ‘International law and foreign sovereigns: Distinguishing immune transactions’ 54 *Brit.Y.B. Int’l L.* 75 (1983).

¹¹¹ E.B. Weiss, ‘Invoking State Responsibility in the Twenty-First Century’, 96 *AJIL* 798 (2002) pp. 798.

¹¹² Art. 1 of the International Law Commission, Draft Articles on Diplomatic Protection, 2006, UN Doc. A/CN.4/L.684, it reads:

“For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.”

practice of the capital-exporting states. Since this right of protection of the alien can be extended to the protection of foreign investment, it was a logical step to argue that this right could be utilized to protect the investments made by aliens. The roots of the international law on foreign investment lie in the effort to extend the right were contested from the time it was attempted on the ground that it leads to unwarranted interference in the domestic affairs of the host state.”¹¹³

Moreover, although the New York Convention requires that any contracting state, under state’s obligations, must recognise and enforce arbitral award rendered elsewhere, it does not expressly mention a state’s responsibility for a breach of this obligation. This is contrary to the ICSID Convention in which Article 27(1) of the ICSID Convention, which provides that:

“(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”

Therefore, once a state has refused to honour an ICSID award, an investor can seek diplomatic protection pursuant to Article 27 plus request the investor’s home state (state of nationality of a natural person) to initiate a claim to the International Court of Justice (‘ICJ’) to review the dispute between the Contracting Parties concerning the interpretation and application of the ICSID Convention pursuant to Article 64. This reads:

“Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.”

In this context, foreign nationals have to rely on their home states to exercise of diplomatic protection in order to protect their rights and property in the host state, either by bringing a case before the International Court of Justice (‘ICJ’) or under the host state

¹¹³ M. Sornarajah, *The International Law on Foreign Investment* (3rd ed.), (CUP, UK 2010) pp.18.

court and domestic law.¹¹⁴ In practice, an attempt to rely on a diplomatic protection and ICJ involvement remains a rare case as most states are inclined to voluntarily comply with an arbitral award rendered against them, even if it may face some difficulties at an execution stage. This could be supported by an empirical survey conducted in 2008 by School of International Arbitration, Queen Mary University demonstrates that nearly 90% of the awards are voluntarily complied by the respondents.¹¹⁵ Although a home state of an investor allows an exercise of a diplomatic protection, it may choose not to do so due to political concerns. This is because the reinstatement of a home state involvement constitutes a re-politicisation in which it is likely that a more powerful state could get involved or apply pressure in a dispute settlement against a less powerful host state. If that is the case, a state responsibility, to a certain extent, could be seen as a last resort in enforcing an arbitral award under treaty obligations in the context of investor-state arbitration.

Apart from international conventions dealing with a state responsibility by recourse to a diplomatic protection in an episode of non-compliance, the concept of state responsibility is demonstrated in the 2001 International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (the 2001 ILC's Articles),¹¹⁶ in order to preserve an amicable international relations between states. This concept is not only considered part of public international law but is also accepted as forming part of customary international law.¹¹⁷ The main concern of this doctrine is whether a state and its sub-organ can be held responsible for violation of investment treaty obligations and other international law obligations by a foreign investor.¹¹⁸ Article 1 and 2 of the 2001 ILC's Articles provide a general principle that:

¹¹⁴ 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).

¹¹⁵ L. Mistelis & C. Baltag, 'Recognition and Enforcement of Arbitral Awards and Settlement and International Arbitration: Corporate Attitudes and Practices, 19 Am. Rev. Int'l Arb. 319 (2008), pp.324.

¹¹⁶ See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, (CUP, UK 2005).

¹¹⁷ K. Hober, 'State Responsibility and Investment Arbitration', 25(5) J. of Int'l Arb. 545 (2008).

¹¹⁸ See C.F. Amerasinghe, *State Responsibility for injuries to aliens* (OUP, UK 1967); K. Hober, 'State Responsibility and Attribution' in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP, UK 2008); E. Gaillard and Younan (eds.), *State Entities in International Arbitration*, (Juris Publishing, New York 2008).

“Every internationally wrongful act of a state entails the international responsibility of the state.”

“There is an internationally wrongful act of a state when conduct consisting of an action or omission:

- (a) Is attributable to the State under international law; and
- (b) Constitutes a breach of international obligation of that State.”¹¹⁹

Thus, both provisions provide a key concept of this doctrine in which the conduct or omission must be the internationally wrongful act, which is attributable to the state under international law, constituting a breach of international obligation by the state. However, since a state is an abstract legal person, it must be represented by its organ or entities, which are assumed to act in the conduct of the state. Such conduct can be considered as being ‘the attribution of conduct to state’.¹²⁰ Moreover, due to the proliferation of investment treaty arbitration and economic liberalisation, the state is not the only main concern of the doctrine of state responsibility; it also creates a new dimension of the doctrine by including state organs or entities, person and groups acting on behalf of a state, which are attributed to a state conduct and give rise to state responsibility under international law.¹²¹

Article 4¹²² of the 2001 ILC’s Articles provides the rule of attribution concerning the wrongful act of a state organs or entities acting on the behalf of the state in which a state is entirely responsible for the act of it organ, entity and person acting in the conduct of a state, regardless of the function or character of that conduct. In contrast, Article 5¹²³

¹¹⁹ Art. 1-2 of ILC’s Articles.

¹²⁰ G.I. Malumfashi, ‘State Responsibility in Investment Arbitration: to What Extent is the State Responsible for Contracts Concluded by State Enterprises and Sub-National Authorities?’, 2(1) TDM (2005).

¹²¹ K. Hober, ‘State Responsibility and Investment Arbitration’, 25(5) J. of Int’l Arb. 545 (2008), pp. 347.

¹²² Article 4 of ILC’s Articles, reads:

“1. The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercise legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the state, and whatever its character as an organ of the central government or of a territorial unit of the state.

2. An organ includes any person or entity which has that status in accordance with the internal law of the state.”

¹²³ Article 5 of ILC’s Articles, reads:

of the 2001 ILC's Articles deals with the conduct of a person or entity, which is not considered a state organ pursuant to Article 4. However, the conduct of a state enterprise must be an exercise of state authority. This characteristic of conduct under Article 5 is very close to the term of non-state entity or state enterprise in which the 2001 ILC's Articles does not clearly define the position of state commercial entity and its act.¹²⁴

This new phenomenon of state responsibility has put the effectiveness and adequacy of the doctrine into question. Professor Crawford has responded to this concern stating that “to what extent the conduct of state enterprises is attributable to the state under general international law of state responsibility is far from clear.”¹²⁵ Therefore, the rule of attribution of conduct to a state has become increasingly important in determining the nature and function of a state. In this respect, this rule has to examine the conduct of state enterprise, whether it is acting on the basis of sovereign acts (*acta jure imperii*) or commercial acts (*acta jure gestionis*). Accordingly, when state enterprise acting in a sovereign conduct breaches an international obligation, state will be held responsible for the purpose of attribution.

This could be found in Articles 4-11 of the 2001 ILC's Articles. However, the principles of attribution to a state of the conduct of its entities, under the rules of state responsibility, should be distinguished from the possibility of state entities becoming a party to proceedings.¹²⁶ Article 25 of the ICSID Convention sets out the possibility of state entities becoming a party to proceedings, which would include “any constituent subdivision or agency of a Contracting State designated to the Centre by that State.”¹²⁷ However, the issue of attribution of state entities' acts and the jurisdiction of that state

“The conduct of a person or entity which is not an organ of the state under Article 4 but which is empowered by the law of that state to exercise elements of the government authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance.”

¹²⁴ G.I. Malumfashi, 'State Responsibility in Investment Arbitration: to What Extent is the State Responsible for Contracts Concluded by State Enterprises and Sub-National Authorities?', 2(1) TDM (2005) pp. 20; Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp. 97.

¹²⁵ J. Crawford, *International Law Commission, First Report on State Responsibility*, UN.Doc. A/CN.4/490/Add.5, 21.

¹²⁶ C. Schreuer, *The ICSID Convention : A commentary*, (CUP, UK 2009) pp. 150.

¹²⁷ See Art. 25 of the ICSID Convention.

entity has been addressed in several cases.¹²⁸ In the case of the ICSID arbitration, the ICSID jurisdiction extends only to a violation of BIT and breach of contract that binds a state directly, this does not include a breach of contract by state entities unless that breach also amounted to a violation of the BIT as explained in *Salini v Morocco*¹²⁹ and *Vivendi v Argentina*.¹³⁰

Moreover, the 2001 ILC's Articles provides countermeasures in Article 49-54 for an injured state against a recalcitrant state in the event of non-compliance with arbitral awards as a breach of investment treaty obligations. Therefore, an injured state could take a countermeasure against a state, which is responsible for an internationally wrongful act but it has to comply with the requirements specified in the 2001 ILC's Articles.¹³¹ These requirements include a proportionality of countermeasures¹³², a respect to the inviolability of diplomatic or consular agents, premises, archives and documents¹³³ as well as the fulfilment of its obligations under any dispute settlement procedure applicable between it and the responsible state.¹³⁴ On this account, it seems that a state under its obligation under the ICSID Convention should first enforce an arbitral awards under the ICSID Convention before taking any countermeasures in which their actions of countermeasure for a purpose of execution cannot affect any immunity of diplomatic

¹²⁸ *Maffezini v Spain*, Decision of Jurisdiction, 22 April 2005, paras 71-89; *Wena Hotels v. Egypt*, Award, 8 December 2000, paras 65-69, 82, 84.; *Salini v. Morocco*, Decision on Jurisdiction, 23 July 2001, paras 28-35; *Saipem v. Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras 146-149.

¹²⁹ *Salini v. Morocco*, Decision on Jurisdiction, 23 July 2001, paras 60-62.

¹³⁰ *Vivendi v Argentina*, Award, 21 November 2000, paras 50-51.

¹³¹ Art. 50 of the ILC's Articles, it reads;

“1. Countermeasures shall not affect:

- (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) obligations for the protection of fundamental human rights;
- (c) obligations of a humanitarian character prohibiting reprisals;
- (d) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

- (a) under any dispute settlement procedure applicable between it and the responsible State;
- (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.”

¹³² Art. 51 of the ILC's Articles, it reads;

“Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”

¹³³ Art. 50(2)(b) of the ILC's Articles, it reads;

¹³⁴ Art. 50(2)(a) of the ILC's Articles

property under diplomatic law.

Apart from the consideration of state responsibility under the 2001 ILC's Articles., the doctrine of state responsibility has long been recognised as a customary international law utilised to fulfil the gap of international investment law. One of the most controversial aspects of state responsibility, with regards to international investment law, is the question of expropriation of foreign investment and its standard of compensation.¹³⁵ It is a well-recognised rule in international law that the taking of foreign investments or the so-called "aliens property" whether they are "direct" or "indirect" expropriation cannot be completed without adequate governmental compensation.¹³⁶ Therefore, a state is obliged by an international minimum measure in relation to the treatment of foreign property under customary international law. Presently, although most modern BITs require the payment of the full market value as compensation, there is no clear rule, which sets a standard for a case of regulatory expropriation.¹³⁷

Conventionally, the Hull formula of "*prompt, adequate and effective*" has been recognised as a clear standard for compensation and adopted in many BITs. The *Chorzow Factory case* decision adopted the Hull formula to pay compensation for expropriation. The court stated:

"The essential principle contained in the actual notion of an illegal act- a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals- is that reparation must, as far as possible, wipe out all the consequences of an illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it- such are the principles which should serve to determine the amount of compensation due to an act contrary to international law."¹³⁸

¹³⁵ See A. Newcombe, 'The Boundaries of Regulatory Expropriation in International Law', 20(1) ICSID Review-FILJ (2005).

¹³⁶ R. Higgins, 'The Taking of Property by the State' (1982) 167 Recueil des Cours 267.

¹³⁷ M. Sornorajah, *The international law on foreign investment* (CUP, UK 2010) pp. 412

¹³⁸ *Chorzow case (Germany v Poland)*, 1928 PCIJ Rep Series A No. 13, at 47 (Sep., 13).

However, there are a number of questions and debates where it deals with the compensation for a public purpose. In *Sporrong and Lonroth v. Sweden*, the court considered “whether a fair balance which needed to be struck between the general interest of the community and the protection of the individual’s fundamental’s rights.”¹³⁹ The court in *James* followed this theory, holding that:

“Article 1 [of protocol 1 of ECHR] does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of public interest, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of full market value. Furthermore, the Court’s power of review is limited to ascertaining whether the choice of compensation terms falls outside the state’s wide margin of appreciation in this domain.”¹⁴⁰

Therefore, the payment of less than the full market value is justifiable when there is a case of legitimate public interest. *Banco National* concluded regarding the standard of compensation that “it may well be the consensus of nations that full compensation need not be paid in all circumstances,... and that requiring an expropriating state to pay appropriate compensation- even considering the lack of precise definition of that term, - would come closest to reflecting what international law requires.”¹⁴¹

Consequently, the state has a responsibility for a regulatory expropriation, obliged by clauses in BITs as well as the standard of compensation. As Newcombe contended: “the role of international expropriation law is to provide a minimum standard of protection to foreign investors against expropriatory measure.”¹⁴² Although there is still controversy relating to the standard of compensation due to on a case-by-case basis, both parties should be set a clear standard of compensation through BITs by either the approach of Hull Formula, appropriate compensation or just compensation in the case of

¹³⁹ *Sporrong & Lonroth v. Sweden*, ECtHR Application no. 7151/75; 7152/75, Judgment, 23 September 1982, para 69.

¹⁴⁰ *James and others v the United Kingdom*, ECtHR Application no. 8793/79, Judgment, 21 February 1986, para 147.

¹⁴¹ *Banco National de Cuba v Chase Manhattan Bank*, 658 F.2d at 892 (2d Cir. 1981) paras 14-15.

¹⁴² A. Newcombe, ‘The Boundaries of Regulatory Expropriation in International Law’, 20(1) ICSID Review-FILJ (1005) pp. 5.

regulatory expropriation.

Significantly, certain tribunals adopted a form of ‘proportionality’ rule from the ECtHR jurisprudence in order to strike a fair balance between investor rights and sovereign state regulatory power when attempting to shield the interests of both parties.¹⁴³ Sornarajah argued that “the divergence of standards and principles stated in the treaties are such that they cannot be regarded as supporting any definite proposition relating to the murky area of state responsibility for foreign investment”.¹⁴⁴ In this regard, although the provisions of BITs are not being increasingly developed into a truly multilateral system as the claim of Schill,¹⁴⁵ this jurisprudence will substantially set a threshold of proportionality, depending on the customary international law.¹⁴⁶ Accordingly, this proportionality analysis will be used as a tool to limit the impact of investment treaty obligations and sovereign immunity laws upon the enforcement of arbitral awards under investor-state arbitration. At the same time, this would aid the development of sovereign immunity law and international investment law towards a defragmentation of international law. In consequence, the investor-state arbitration would become a friendly mechanism for foreign investors in terms of reliability and effectiveness regarding the enforcement of arbitral awards against sovereign states.

5. Concluding remarks

Although the interactions of different areas of international law has led to numerous criticisms by scholars, it should be considered as a normal process of legal development.

¹⁴³ August Reinisch, ‘Expropriation’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds.), *The Oxford Handbook of International Investment Law (Oxford Handbooks in Law)* (OUP, UK 2008) pp 456.

¹⁴⁴ M. Sornarajah, ‘State Responsibilities and Bilateral Investment Treaties’, 20 J. WORLD TRADE L. 79 (1986) pp. 80.

¹⁴⁵ P. Muchlinski, ‘Corporations and the Uses of Law: International Investment Arbitration as a “Multilateral Legal Order”’, 1 Onati Socio-Legal Series (2011), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832562> pp. 6-9; See also S. W. Schill, *The Multilateralization of International Investment Law* (CUP, UK 2009); S. Schill, ‘Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System?’, Paper for the 4th Global Administrative Law Seminar (2008).

¹⁴⁶ A. Lowenfeld, ‘Investment Agreements and International Law’, 42 Colum. J. Transnat’l L. 123, (2003-2004).

In conclusion, this chapter submits that the interconnections between international investment law and other areas of international law will develop on the basis of harmonisation or defragmentation rather than fragmentation through treaty interpretation methods as clarified in the VCLT's systematic integration principle. In addition, this is coupled with the application of a global administrative law approach in international investment law in order to deal with public-private law contexts of investment treaty arbitration.

Furthermore, the tribunals in recent arbitrations have resorted to the jurisprudences of European Court of Human Rights (ECtHR)¹⁴⁷ as well as adopting its 'margin of appreciation' and 'proportionality approach' to balance investor and host state interests when interpreting the expropriation and fair and equitable treatment provisions of the investment treaty.¹⁴⁸ Still, an investment treaty tribunal could additionally recourse to this approach when dealing with the tension between investment treaty obligations and sovereign immunity aspects. Taken together, this illustrates and introduces a cross-fertilisation of international investment law and public international law under the hybridisation of investment treaty arbitration, providing and developing an integrated legal framework that serves the interests of both a state and foreign investor. This thesis will adopt this approach in its analysis of the legal norms and cases at hand, which will be discussed in Part V of this thesis.

¹⁴⁷ See *James and others v the United Kingdom*, ECtHR Application no. 8793/79, Judgment, 21 February 1986; *Lithgow and Others v. United Kingdom*, ECtHR Application no.9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment, 8 July 1986

¹⁴⁸ UNCTAD, *Selected recent development in IIA Arbitration and Human Rights*, UNCTAD/WEB/DIAE/IA/2009/7, 5.

Chapter 3

The Progressive Restriction of Sovereign Immunity Law and its Relevance to Investment Treaty Arbitration

1. Introduction

When determining the relationship between international investment law and the doctrine of sovereign immunity, it should be noted that the element of sovereign immunity from jurisdiction plays no role in investment treaty arbitration; however, sovereign immunity from enforcement is available for a state to invoke against the enforcement of arbitral awards.¹ The doctrine of sovereign immunity has been highlighted in copious scholarly works and in the case law of numerous jurisdictions.² Generally, it is a principle of international law, which requires application in accordance with municipal law in a national court. As Fox summarises:

“The law of state immunity relates to the grant in conformity with international law of immunities to states to enable them to carry out their public functions effectively and to the representatives of states to secure the orderly conduct of international relations...When disputes arise a state or a state agency may prevent their adjudication in another state’s court by pleading state immunity.”³

At this point, the doctrine of sovereign immunity is generally considered to be a procedural bar in the domestic courts. Hess points out that “it is the special feature of

¹ S. Schill, ‘International Investment Law, the Law of State Immunity, and Human Rights: A Case Study in Cross-Regime Analysis as an Instrument of Defragmentation’, http://works.bepress.com/stephan_schill/, pp.3 (International Investment Law, the Law of State Immunity, and Human Rights)

² See H. Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’, 28 BYIL 220 (1951); P. Trooboff, ‘Foreign state immunity: Emerging consensus on principles’, 200 Recueil Des Cours V 235 (1986) pp. 235; L.J. Bouchez, ‘The nature and scope of state immunity from jurisdiction and execution’ Netherlands Y.B.I.L. 1 (1979).; R. Higgins, ‘Certain unresolved Aspects of the Law of State Immunity’, 29 NILR 265 (1982); S. Sucharitkul, ‘Developments and Prospects of the Doctrine of State Immunity, Some Aspects of Codification and Progressive Development’ 29 NILR 252 (1982); I. Sinclair, ‘The Law of sovereign immunity: recent developments’, 167 Recueil Des Cours 113 (1980) pp. 113; N.C.H. Dunbar, ‘Controversial aspects of sovereign immunity in the case law of some states’ 132 Recueil Des Cours I 197 (1987) pp. 197; Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008); A. Dickinson, R. Lindsay and J. Loonam, *State Immunity: Selected Materials and Commentary* (OUP, New York 2004).

³ H. Fox, *The Law of State Immunity* (OUP, New York 2008), pp. 1

state immunity that it is at the point of intersection of international law and national procedural law.”⁴

The law of sovereign immunity has been the subject of several governmental and non-governmental projects for codification.⁵ The international community has made an effort to codify a multilateral convention or treaty on sovereign immunity for several years.⁶ A multilateral convention relating to sovereign immunity includes the Brussels Convention relating to the Immunity of State Owned Vessels of 1926 (‘The Brussels Convention’), the European Convention on State Immunity of 1972 (‘The European Convention’)⁷ and most recently the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 (‘The UN Convention’),⁸ which is based on International Law Commission’s Draft Articles on Jurisdictional Immunity of States and Their Property of 1991. In addition, the attempt to codify a law on sovereign immunity is to be found in many non-governmental drafts, including the Harvard Research Project, which published the Draft Convention III in 1932⁹, the Institut de Droit International in 1954¹⁰, the American Law Institute’s Restatement of Foreign Relations Law in 1965¹¹ and the Draft Montreal Convention of the International Law Association in 1982.¹²

Building on the aforementioned Conventions and drafts, the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 appears to be the most influential, and also the first attempt to codify a universal convention for a substantial

⁴ B. Hess, ‘The International Law Commission’s Draft Convention on the Jurisdictional Immunities of States and their Property’, 4 EJIL 269 (1993), pp. 271.

⁵ J. Crawford, ‘Execution of Judgments and Foreign Sovereign Immunity’, 75 AJIL 820 (1981), pp. 831.

⁶ D. Gaukrodger, ‘Foreign State Immunity and Foreign Government Controlled Investors’, OECD Working papers on international investment, 2010/2, OECD Publishing (2010), pp. 10 (Foreign State Immunity and Foreign Government Controlled Investors).

⁷ At present, only 8 states are the party to the Convention, at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=8&DF=&CL=ENG> (Accessed on December 1st, 2014).

⁸ 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.

⁹ Harvard Research’s Draft on the Competence of Courts in regard to Foreign States of 1932

¹⁰ Institut de Droit International’s Resolution of 1954.

¹¹ American Law Institute’s Restatement of Foreign Relations Law of 1965

¹² Draft Montreal Convention of the International Law Association of 1982

harmonisation of state practices containing the general rules on sovereign immunity at an international level.¹³ However, currently, the Convention has not come into force as it first requires the ratification of thirty states (their acceptance, approval or accession) with the Secretary-General of the United Nations.¹⁴ As of May 2015, eighteen states, being: Austria; Czech Republic; Finland; France; Iran; Italy; Japan; Kazakhstan; Latvia; Lebanon; Liechtenstein; Norway; Portugal; Romania; Saudi Arabia; Spain; Sweden, and Switzerland have ratified or acceded to the Convention.¹⁵

From these few numbers of adoption and ratification, the UN Convention might not achieve the status of customary international law where most states follow the same rule in their patterns of practice on sovereign immunity. Therefore, the UN Convention could not represent as a custom of state practice to bind on non-parties to the treaty.¹⁶ This is due to the fact that although the UN Convention adopts a restrictive approach of sovereign immunity, the degree to which a restrictive approach recognised by each state remains open to debate and shows a considerable divergence. This can be concluded that a restrictive approach is widely though not universally recognised in which such state practices are very difficult to interpret.¹⁷ More importantly, some provisions in the UN Convention are not congruent with the existing sovereign immunity laws and state practices, which might provide more favours to states. Accordingly, the attempts for an international convention on sovereign immunity could not be successful, which leaves the usefulness of the UN Convention open to doubt.

As the legal implementation of international conventions is the best source of international law for the principles and rules of sovereign immunity, according to Article

¹³ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008), pp. 175.

¹⁴ Art. 30 of the UN Convention.

¹⁵ See The status of the UN Convention at

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-13&chapter=3&lang=en

¹⁶ L. F. Damrosch, 'Changing the International Law of Sovereign Immunity Through National Decisions', 44 *Vanderbilt Journal of Transnational Law* 1185 (2011), pp. 1189-1191.

¹⁷ D. Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working papers on international investment, 2010/2, OECD Publishing (2010) pp. 11.

38(1) of the Statute of the International Court of Justice,¹⁸ it would be imprudent to rely solely upon those Conventions as a primary source. This is because the plea of sovereign immunity is normally considered and raised by a state before a municipal court under municipal law to frustrate the whole arbitral process.¹⁹ Therefore, apart from the treaty obligations by way of international conventions by states, the enforcement of arbitral awards can be effective with the supportive role of a municipal court and a municipal legal system. The doctrine of sovereign immunity was not simply codified by a law making process of international conventions, but was gradually developed over a sustained period by municipal courts, by way of state practice.²⁰ For this reason, national legislations and national court decisions may also be recognised as additional significant sources of international law on sovereign immunity, referred to in the subparagraph of Article 38(1).²¹ Sucharitkul has provided a forceful argument that:

“The doctrine of state immunity, as far as can be ascertained, was sufficiently well established in the practice of states to justify its claim to become a principle of international law in the nineteenth century. The original version, as stated by Chief Justice Marshall in *The Schooner Exchange v. M’Faddon* in 1812, is generally considered to be representative of absolute immunity.”²²

This can be summarised in Higgins’ words that: “But by far the greatest source material

¹⁸ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp. 174.

¹⁹ 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. 246.

²⁰ E.K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer, Germany 2005), pp. 13; S. Sucharitkul, *State Immunities and Trading Activities in International Law* (Stevens & Sons Limited, London 1959) pp. 3

²¹ Art. 38(1) of the ICJ Statute, says:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

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

See also P. Trooboff, ‘Foreign state immunity: Emerging Consensus on Principles’, 200 *Recueil Des Cours V* 235 (1986) pp. 253.

²² S. Sucharitkul, *State Immunities and Trading Activities in International Law* (Stevens & Sons Limited, London 1959) pp. 355.

is to be found in the case law of States and in their domestic enactments. The evidences of international law to be gleaned from domestic legislation may be categorized... as State practices, or as general principles of law.”²³ As the doctrine of sovereign immunity was developed by way of state practice, many states have codified the law on sovereign immunity in order to accommodate the needs of their society. Interestingly, the intellectual framework of legal system in each country does not restrict an approach of law development in this area. The common law countries, on the one hand, such as, the United States and the United Kingdom, have decided to codify specific statutory instruments to shape their law in a considerable detail, whilst the civil law countries, such as, France and Germany, adhere to the principle of precedent, *stare decisis*, relying on a case by case approach.²⁴ The most important domestic codifications and the model statutes are the United States Foreign Sovereign Immunities Act of 1976 (US FSIA)²⁵ and the United Kingdom State Immunity Act of 1978 (UK SIA).²⁶

Due to the increasing participation of states participating in commercial transactions with private entities, these international conventions and municipal laws on sovereign immunity have tended to veer towards restrictive immunity, limiting sovereign immunity to cases of sovereign, as opposed to commercial transactions.²⁷ Nonetheless, the interpretation of sovereign immunity by a municipal court provides a different detailed solution. As will be submitted in this chapter, the sources of sovereign immunity law are fragmented and diverse owing to state practices arising from customary international law, treaty and municipal law. This situation could thus result in a number of problems, including a conflict of laws and an uncertainty of decision-making. Therefore, it is the purpose of this chapter to examine and compare state practice on sovereign immunity in

²³ R. Higgins, *Certain unresolved Aspects of the Law of State Immunity*, 29 NILR 265 (1982) pp. 265.

²⁴ K.M. Meessen, ‘State Immunity in the Arbitral Process’ in N. Horn (eds) *Arbitrating Foreign Investment Disputes- Procedural and Substantive Legal Aspects* (Aspen Publishing Inc., USA 2004) pp.388; A. Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The repoliticization of International Investment Disputes’, 21 *Am.Rev.Int’l. Arb.* 211 (2010) pp. 220 (Sovereign Immunity as a Barrier).

²⁵ United States Foreign Sovereign Immunities Act of 1976, reprinted in 15 ILM 1388 (1976).

²⁶ United Kingdom State Immunity Act 1978, c. 33 (UK), reprinted in 17 ILM 1123 (1978).

²⁷ K. H. Bockstiegel, ‘States in the International Arbitral Process’, in J.D. Lew, *Contemporary Problems in International Arbitration*, (Queen Mary College, UK 1996) pp. 47.

both common and civil law countries in relation to the restrictive approach. This chapter will detail the history of the sovereign immunity and how it has historically shifted from absolute to restrictive immunity, which is formative of a proportionality analysis, in order to differentiate sovereign function from private or commercial function of the state. Accordingly, it will illustrate the commercial exception, being the major characteristic of the restrictive sovereign immunity doctrine and its relevance to investment treaty arbitration, as well as its implementation into municipal law on sovereign immunity.

2. The Evolution of Restrictive Sovereign Immunity

(a) Foundations of modern sovereign immunity doctrine

Historically, the foundation of the law of sovereign immunity is derived from the notion of sovereignty, independence, equality and dignity of states in international law.²⁸ As a result, the domestic courts of one state could impermissibly be able to sue another foreign state and refuse to jurisdiction over cases against another foreign sovereign state without their consent,²⁹ under the maxim *par in parem non habet jurisdictionem*.³⁰ Under this maxim, the status of each sovereign state is equally enjoyed by all independent states in order to protect states against interference by other states in an exclusive inter-state system.³¹ Therefore, the economic activities of states under the Westphalian system departed from the political differentiation into separate sovereign entities on the basis of internal and external absolute sovereignty. This function of states in their economy, underlying in the Westphalian system, is reflected in the law of sovereign immunity.³² Prior to the 19th century, this principle formed the basis of the doctrine of absolute immunity, which was initially aimed to protect representatives of foreign states,

²⁸ See S. Sucharuitkul, *Immunities of foreign states before national authorities* 149, Recueil Des Cours 87 (1976); S. Sucharitul, *State Immunities and Trading Activities in International Law* (Stevens & Sons Limited, London 1959) pp. 13; J. Crawford, 'International Law and Foreign Sovereign: Distinguishing Immune Transactions', 54 BYIL 75 (1983), pp. 77.

²⁹ C. Miles, 'Sovereign Immunity' in D. Bishop (ed.), *Enforcement of arbitral awards against sovereigns*, (Jurisnet, New York 2009) pp 36.

³⁰ This means "submission of one state to the jurisdiction of another would be derogatory to the former's dignity and independence."; See H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 BYIL 220, 221.

³¹ I. Sinclair, 'The Law of sovereign immunity: recent developments', 167 Recueil Des Cours 113 (1980), pp. 198.

³² International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp.11.

particularly heads of state, on the basis of diplomatic immunities, including diplomatic agents and warships.³³ This absolute character extended to the state and its properties as well as to its agencies and instrumentalities regardless of the nature or purpose of activities, either sovereign acts or commercial acts.

This principle is first applied in the classic US judicial decision of *The Schooner Exchange v. McFaddon* regarding warships. In this case, a vessel owned by a US citizen, ‘McFaddon’, was seized by the French government and remodelled as a public armed ship. However, this ship entered into a US harbour due to heavy storms. McFaddon claimed that it had been forcefully seized by the French government in 1810. Chief Justice Marshall granted immunity to the French government 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.”³⁴ The Court based its decision on the reasoning that;

“One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”³⁵

The reasoning in the above case became a classic formulation of the absolute immunity doctrine in the US, UK and other common law jurisdictions, not only with regard to warships but also as a general rule of state immunity.³⁶ A similar justification and application of this doctrine is reflected in a UK judicial decision in *The Parlement Belge*,³⁷ where the court granted absolute immunity to a mail packet owned by a Belgian monarch with respect to the independence and the dignity of every other state. The court

³³ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp.201-204.

³⁴ *The Schooner Exchange v McFaddon* (1812) 11 U.S. 116, at 147.

³⁵ *The Schooner Exchange v McFaddon* (1812) 11 U.S. 116; At 135-137.

³⁶ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp. 204.

³⁷ *The Parlement Belge* (1880) 5 P.D. 197.

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, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.”³⁸

Based on this understanding of absolute immunity, the court of one sovereign state could not exercise jurisdiction over a dispute with another foreign sovereign; rather, a foreign sovereign could only be subject to its domestic court. In this context, a private trader and its interest were not considered as a ‘subject’ in international law and found no place under the Westphalian system with regard to the economic activities. Under this system together with an increasing state interference in economic activities, it could be said that the interests of foreign sovereign and foreign investors were not adequately protected in courts of a host state or a third state court, which constituted a significant obstacle in a widespread cross-border economy. In this respect, a court of a host state or a court of a third state applied many restrictions to disallow claims against foreign sovereigns arising in a dispute with foreign investors, including the sovereign immunity doctrine and the act of state doctrine.³⁹ By adhering to the absolute doctrine of sovereign immunity, it is barely possible to accommodate an efficient legal protection for a private party before courts other than a host state, which results in a significant constraint to effective dispute resolution in non-host-state courts.⁴⁰

However, the law of state immunity has evolved dramatically over the last forty years in response to state participation in commercial activities through their agencies or

³⁸ *The Parlement Belge* (1880) 5 P.D. 197, at 214-215.

³⁹ S. Schill, ‘Private Enforcement of International Investment Law: Why We Need Investor Standing in BIT Dispute Settlement’, in M. Waibel, A. Kaushal, K.L. Chung and C. Balchin (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer, The Netherlands 2010) pp. 34.

⁴⁰ *ibid*; International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp.14.

instrumentalities. During this transformation period, the number of disputes arising in connection with the relationship between states or its agencies and foreign private party increased. Unfortunately, the foreign private parties were denied legal remedies in respect to the defence of sovereign immunity. Therefore, the rationale of the absolute immunity doctrine has been attacked by domestic courts in re-examining the concept of sovereign immunity in litigation against a state.⁴¹

(b) The effect of state trading

As previously discussed, modern sovereign immunity is not limited to the jurisdictional immunity of state, in which a national court is exempt from the exercise of territorial jurisdiction over a foreign state on the foundation of sovereignty of state. Rather, the doctrine of sovereign immunity also refers to a situation where a private party is prevented from impleading a foreign state in a domestic court. In this circumstance, the absolute doctrine of sovereign immunity prohibits a suit against a sovereign state by a foreign state or private party regardless of whether the acts of the sovereign state were performed in a public or private capacity.

Before the 19th century, state participation in trading was large scale phenomenon in foreign trade. However, during the 19th century, an epoch of *laissez-faire* marked a predominant ideology amongst political doctrines and social conditions, which believed that “if the self-interest of every individual was left uncontrolled by the state, it would by “natural forces” develop towards perfection and to the best public interest of the community as a whole”.⁴² Accordingly, it was a general belief that a state should not control or intervene in any commercial undertaking and international trade, leading to the presumption that a recognised function of the state did not include trade. In concert with the downfall of state trading in the 19th century, a doctrine of absolute sovereign immunity was fully developed amongst this political doctrine and social conditions, in the sense that a private party was a main player in international trade without any control and

⁴¹ D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, London 2007) pp. 69.

⁴² S. Sucharitkul, *State Immunities and Trading Activities in International Law* (Stevens & Sons Limited, London 1959) pp. 15.

participation by a sovereign state under the system of *laissez-faire*. Therefore, the issue of jurisdictional immunities was scarcely focused towards state trading. This scenario can be demonstrated in a number of creditable judicial decisions of the period, including the US and UK courts, which allowed immunity to foreign states in respect of their trading activities.⁴³ As Fensterwald pointed out that:

“The far-reaching rules of absolute sovereign immunity became crystallized at a time when international lawyers did not envisage a return to more widespread state trading.”⁴⁴

In the late 19th century to the beginning of the 20th century, a downtrend was witnessed in many states regarding the *laissez-faire* system. Such a system was weakened by the imposition of restrictions upon private foreign trade as well as the emergence of state enterprise in many industries.⁴⁵ The function of these state enterprises or state entities served a variety of purposes ranging from purely commercial ends to national development and political ends. Moreover, in developing and socialist countries, the existence of state enterprises could be regarded as being indispensable to the pursuit of their economic development policies on account of the proposed New International Economic Order (‘NIEO’).⁴⁶ Owing to spread of state trading, a great change could be identified for the factual basis of the sovereign immunity doctrine, as well as the return of state control over international trade.

In this manner, many states were engaged in trading by the beginning of the Second World War.⁴⁷ Among these countries, the Soviet Union furnished the greatest momentum in the rebirth of state trading organs, for instance, the Soviet Commissariat for Foreign Trade and Trade Delegations in various countries.⁴⁸ Since it is now evident that the trading activity of the state and its agencies is likely to increase and continue in the future, it is, thus, questionable to what extent the doctrine of sovereign immunity

⁴³ *ibid* 19.

⁴⁴ B. Fensterwald, Jr., ‘Sovereign Immunity and Soviet State Trading’, 63 *Harv. L. Rev.* 614 (1949-1950) pp. 614.

⁴⁵ *ibid*

⁴⁶ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988) pp. 92.

⁴⁷ *ibid* 17.

⁴⁸ B. Fensterwald, Jr., ‘Sovereign Immunity and Soviet State Trading’, 63 *Harv. L. Rev.* 614 (1949-1950) pp. 614.

would be affected by a significant change of state trading in commercial activities, and whether the doctrine of sovereign immunity should continue to apply in cases concerning commercial activities of foreign states.

Despite the start of decline in absolute sovereign immunity in response to the trading activities of foreign state, socialist countries, including the Soviet Union, refused to apply the restrictive theory of sovereign immunity. They instead adhered to the absolute doctrine of sovereign immunity, rooted in a particular characteristic of the socialist state.⁴⁹ As Boguslavsky explained:

“The Socialist State, as a sovereign, is vested not only with political, but also with economic power, and because of this unity of political and economic leadership the socialist state itself fulfils economic activities. It is impossible to split up the socialist state into two subjects: a sovereign power and an entity subject to private law rules. As already underlined, the state is one, but the expression of its activity are manifold.”⁵⁰

In this regard, the socialist state perceived that the political and economic activities, performed by or on behalf of the socialist states, fell within the realm of sovereign immunity in which they refused to recognise the notion that immunity should be limited to only acts of a sovereign nature (*acta jure imperii*), and did not extend to commercial acts (*acta jure gestionis*).⁵¹ This perception of socialist countries together with the scale of their state trading was seen as a threat to capitalist countries. It was perceived that socialist countries would shield the liability of a state’s trading enterprise from a contractual breach, using the barrier of state ownership, thus leading to the claim of sovereign immunity. Unlike the situation in a socialist state, the function of a capitalist state, or so-called western country, is separated between the sovereign and economic activities by the sharing of certain state’s functions or powers to private parties. This distinction of the state’s function is favourable to the adoption of restrictive immunity in

⁴⁹ C. Osakwe, ‘A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice’, 23 Va.J. Int’l L. 13 (1982-1983) pp. 18-20.

⁵⁰ M.M. Boguslavsky, ‘Foreign State Immunity: Soviet Doctrine and Practice’, 10 Neth. Y.B. Int’l L. 167 (1979) pp. 169-170.

⁵¹ B. Fensterwald, Jr., ‘Sovereign Immunity and Soviet State Trading’, 63 Harv. L. Rev. 614 (1949-1950) pp. 617.

a western country.

Accordingly, western countries attempted to overcome the expansion of NIEO in developing countries and the threat of a socialist state's trading by the adoption of restrictive immunity. However, it was not apparently evident until after the Second World War when the US and the UK, the leading capitalist states, announced a distinct policy shift to restrictive immunity, followed by an implementation of municipal law legislation relating to sovereign immunity. Therefore, it is necessary to reconsider how sovereign immunity could be entrenched in this great change and more importantly, how the contestation of sovereign immunity between the West and the East countries could be mutually developed.

Post the Second World War, the doctrine of absolute sovereign immunity doctrine widely shifted into a new restrictive immunity doctrine, distinguishing between sovereign acts and commercial acts on the basis of stability, fairness and equity in the market place.⁵² Under this doctrine, the vision of a state with dual personality was created, in which immunity was only granted to sovereign acts, albeit with a refusal of immunity in relation to their commercial acts.⁵³ Therefore, a state loses its immunity whenever it conducts a commercial activity and acts as a private entity.⁵⁴ In this respect, the sovereign immunity doctrine reflects the legal protections required by foreign investors in order to provide a fair and just dispute settlement process in a domestic court of a third state.

With the purpose to limit or refuse sovereign immunity, Lauterpacht stated that "international practice shows no frequent instances of protests against assumption of

⁵² R. Higgins, 'Certain Unresolved Aspects of the Law of State Immunity', 29 NILR 265 (1982); C. Schreuer, 'Some Recent Developments in the Law of State Immunity', 2 Comparative Law Yearbook 215 (1978) pp. 215; G.M. Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff, The Hague 1984) pp.22.

⁵³ A. van Blankenstein, 'Enforcement of an Arbitral Award against a State: with Whom are you dealing?' in S. Muller (eds), *The Flame Rekindled: New Hopes for International Arbitration* (Martinus Nijhoff, London 1993) pp. 164.

⁵⁴ M. Somarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity', 31 ICLQ 661 (1982) pp. 661.

jurisdiction, including execution, over foreign states.”⁵⁵ Crawford also supported this position and pointed out that “there is no good reason why international law could not specify the grounds for distinguishing immune from non-immune transactions, but it is significant that the distinction in each jurisdiction tends to be drawn, to some extent at least, in terms indigenous to the forum, terms that are often hardly susceptible to translations.”⁵⁶ Bearing this in mind, some national courts of leading trading states have enacted a municipal law on sovereign immunity to shape their jurisprudence and commercial activities with private parties.⁵⁷ Therefore, such state practice and codification have played key roles in developing a doctrine of restrictive immunity.⁵⁸

(c) The shift to restrictive immunity

The trend of restrictive sovereign immunity was first introduced in the Belgian courts in the middle nineteenth century,⁵⁹ when in 1879 the Court of Appeal in *The Havre*⁶⁰ case regarding the freight on Peru’s guano shipped to Ostend, Belgium. The Court assumed jurisdiction in an action based on the commercial activity of state and denied a sovereign immunity with regard to the non-public acts irrespective of the respondents’ claim that the guano was the property of Peru and acting as its agents.⁶¹ The more restrictive approach was found in the Italian court case of *Morellet c. Governo Danese*,⁶² based on the recognition of ‘the dual personality of the state’, either a public act of state as a sovereign power or a private act of state as a juristic person entering in a

⁵⁵ H. Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ 28 BYIL 220 (1951) pp.227.

⁵⁶ J. Crawford, ‘Execution of Judgments and Foreign Sovereign Immunity’ 75 AJIL 820 (1981) pp.855.

⁵⁷ 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. 247.

⁵⁸ R. Higgins, ‘Certain Unresolved Aspects of the Law of State Immunity, 29 NILR 265 (1982) pp. 265.

⁵⁹ S. Sucharitkul, ‘Immunities of Foreign States before National Authorities’, 149 Recueil Des Cours 87 (1976) pp. 132 ; H. Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp. 224.

⁶⁰ S. Sucharitkul, *State Immunities and Trading Activities in International Law* (Stevens & Sons Limited, London 1959) pp. 243 ; *Rau, Vanden Abeele et Cie c. Duruty, P.B.* 1879-II-175, 176.

⁶¹ *ibid* 243-244; S. Sucharitkul, ‘Immunities of Foreign States before National Authorities’, 149 Recueil Des Cours 87 (1976) pp. 132; G.M. Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff, The Hague 1984) pp.21-24.

⁶² Giu. It. 1883-I-125, at 130-131; S. Sucharitkul, ‘Immunities of Foreign States before National Authorities’, 149 Recueil Des Cours 87 (1976) pp. 127.

private law⁶³, which observed that:

“it being incumbent upon the State to provide for the administrations of the public body and for the material interests of the individual citizens, it must “acquire and own property, it must contract, it must use and be sued, and in a word, it must exercise civil rights in like manner as ‘un altro corpo morale o private individuo qualunque’.”⁶⁴

The Belgian and Italian cases undoubtedly influenced many countries decisions, in the late nineteenth century, in relation to the court formulation of a restrictive approach. The various courts providing limitations to the immunity, providing distinctions between state acts, commercial exploitation, implied submission and execution of judgment against foreign government.⁶⁵ The jurisprudence of the Italian-Belgium courts has been completely adopted in the Mixed Courts of Egypt. The special characteristic of the Mixed Courts of Egypt, established in 1875, was the nationality of the judges, originating from several international countries.

In this context, Badr points out that:

“the case-law of the Egyptian Mixed Courts, as they were called, reflects not only the Egyptian point of view on state immunity but the consensus of judges from a number of countries including England, the United States and France whose courts were counted at the time among the more articulate proponents of the absolute doctrine of state immunity.”⁶⁶

This adoption of restrictive immunity was also affirmed in the decision of the German Constitutional Court in the *Empire of Iran* case.⁶⁷ Apart from the early attempt of state practices from Belgium, Italy, Egypt and Germany, the attempt to distinguish was also being applied in other civil law jurisdictions, including Switzerland, Romania,

⁶³ G.M. Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Niighoff, The Hague 1984) pp.24.

⁶⁴ Giu. It. 1883-I-125, at 130-131; S. Sucharitkul, ‘Immunities of Foreign States before National Authorities’, 149 *Recueil Des Cours* 87 (1976) pp. 127.

⁶⁵ S. Sucharitkul, ‘Immunities of Foreign States before National Authorities’, 149 *Recueil Des Cours* 87 (1976) pp. 140.

⁶⁶ G.M. Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Niighoff, The Hague 1984) pp.26-27; Bankas, pp. 72.

⁶⁷ *Empire of Iran case*, German Federal Constitutional Court, 30 April 1963, UN Legal Materials, 282, 45 ILR 57.

France Austria and Greece; all who were adopting a restrictive doctrine of sovereign immunity.⁶⁸

Considering the state practices of those leading trading countries in common law jurisdictions, such as the United States and the United Kingdom, the tendency to move from the absolute immunity towards a restrictive approach was significantly evidenced after the Second World War. As mentioned previously, the US was the first country to adopt a restrictive approach; announcing in 1952 that “it would follow the restrictive theory of immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.”⁶⁹ This policy was reflected in the 1952 letter written by the Acting Legal Advisor, Jack Tate, to the Acting Attorney-General; well-known as the ‘Tate letter’.⁷⁰ In light of the development under the ‘Tate letter’, the practice of the United States regarding claims of sovereign immunity no longer adhered to the determination by the executive branch, namely, the Department of State, but to the courts.⁷¹ Accordingly, the Tate letter’s restrictive doctrine has been entrenched and confirmed by the legislative enactment of the United States Foreign Sovereign Immunities Act of 1976 (The US

⁶⁸ E.W. Allen, ‘The Position of Foreign States before National Courts: chiefly in Continental Europe, (New York, The Macmillan Company) 1933, pp. 301 cited in I. Sinclair, ‘ The Law of Sovereign Immunity Recent Developments’, pp. 134.

⁶⁹ 26 Department of State Bull. 984 (1952), cited in P. Trooboff, ‘Foreign state immunity: Emerging Consensus on Principles’, 200 Recueil Des Cours V 235 (1986) pp. 268.

⁷⁰ See the Tate Letter of May 19 1952, State Department, 26 BULL 984, it states that:

“It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy Furthermore, the granting of sovereign immunity of foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.”

⁷¹ M. Sornarajah, ‘Problems in Applying the Restrictive Theory of Sovereign Immunity’, 31 Int’l L. & Com. L. Q. 661 (1982) pp. 662; See also Congressional Committee Report on the Jurisdiction of United States Courts in Suits against Foreign States (1976) 15 I.L.M. 1398, at. 1402.

FSIA), which is considered to be the first national statute governing sovereign immunity under the restrictive approach, which was to be determined by the courts.⁷²

In this trend, other common law countries have rapidly followed the US practice in their codification efforts,⁷³ especially, the United Kingdom. While it was commonly supposed that the United Kingdom practice adhered to an absolute sovereign immunity for a sovereign state until the mid-1970's,⁷⁴ the trend and precedent of absolute immunity in *The Parlement Belge* was successfully challenged in *The Phillipine Admiral*⁷⁵ and followed in *Trendtex Trading Corporation Ltd. v The Central Bank of Nigeria*.⁷⁶ The Privy Council advised in the 1977 historic landmark case of *The Phillipine Admiral* that “although the theory of absolute immunity was applicable to an action in personam against a foreign sovereign state on a commercial contract it was inapplicable to an action in rem against a ship to which the “restrictive” theory should apply.”⁷⁷ In *Trendex*, the court held that “international law now recognised no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a government nature.”⁷⁸ This position of the UK courts has been affirmed in *I Congreso del Partido*⁷⁹ supporting the restriction of immunity in situations where the sovereign engages in commercial activities.

Therefore, the restrictive approach in the United Kingdom was affirmed by the enactment of the United Kingdom State Immunity Act of 1978 (‘UK SIA’).⁸⁰ In addition, the enactment of the UK SIA not only shifted to a restrictive approach but also paved the way for the ratification of the Brussels Convention and the European Convention on

⁷² Foreign State Immunity and Foreign Government Controlled Investors (n 6), pp. 11.

⁷³ P. Trooboff, ‘Foreign State Immunity: Emerging Consensus on Principles’, 200 Recueil Des Cours V 235 (1986) pp. 271.

⁷⁴ R. Higgins, ‘Certain Unresolved Aspects of the Law of State Immunity’, 29 NILR 265 [1982] pp. 266; See also *The Charkieh* [1973] L.R. 4 A. & E. 59; *The Parlement Belge* [1880] 5 P.D. 197; *The Christina* [1938] A.C. 485; *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan* [1975] 1 W.L.R. 1485.

⁷⁵ *The Phillipine Admiral* [1976] 2 W.L.R. 214.

⁷⁶ *Trendtex Trading Corporation Ltd. v The Central Bank of Nigeria* [1977] QB 529.

⁷⁷ *The Phillipine Admiral* [1977] A.C. 373; [1976] 1 All ER 78; 64 ILR 90.

⁷⁸ *Trendtex Trading Corporation Ltd. v The Central Bank of Nigeria* [1977] QB 529.

⁷⁹ *I Congreso del Partido* [1978] 1 All E.R. 1192; See M. Sornarajah, ‘Problems in Applying the Restrictive Theory of Sovereign Immunity’ 31 Int’l L. & Com. L. Q. 661 (1982).

⁸⁰ R. Hggins, ‘Certain Unresolved Aspects of the Law of State Immunity’, 29 NILR 265 (1982), pp. 266.

Sovereign Immunity.⁸¹ Without any doubts, the US FSIA and UK SIA have influenced and been a model statute for other common law countries promoting the codification of sovereign immunity municipal laws.⁸²

Taking the above into account, it is submitted that state practices reflected in the international conventions and municipal laws, as well as national court decisions, appear to have moved towards a doctrine of restrictive immunity. Sucharitkul states that “the doctrine of absolute immunity can no longer be said to continue to apply in the least restrictive jurisdiction.”⁸³ He also adds in his ‘Reports on Jurisdictional Immunities of States and Their Property’ that:

“the restrictive trend is also overwhelming in the opinions of contemporary writers that it is no longer possible to find any trace of an ‘absolute’ doctrine among living authorities on international law. Indeed the authors, who had earlier expressed opinions favouring an unlimited doctrine of immunity, appear to have changed their mind in the face of drastic reversals of principles in modern case-laws and in international conventions, each and every one of which seems to turn away from ‘absolutism’ towards a more realistic and relative theory of State immunity.”⁸⁴

Thus, the movement of state practices from an absolute to a restrictive sovereign immunity approach has significantly contributed, not only literally, to the development of sovereign immunity doctrine, but also to the law of international arbitration; particularly, investment treaty arbitration involving sovereign states.⁸⁵ However, it should be noted that whilst the state practices of many states have moved to a restrictive immunity, the actual application of state practice is varied and has posed difficulty to the courts when being interpreted. This has led to divergent and contrasting outcomes in cases; even when

⁸¹ E.K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer, Germany 2005), pp. 73.

⁸² For example, The Singapore State Immunity Act of 1979, The Pakistani State Immunity Ordinance of 1982, The Canada State Immunity Act of 1985, The Australia Foreign States Immunities Act of 1985, The South Africa Foreign States Immunities Act of 1987.

⁸³ S. Sucharitkul, ‘Immunities of Foreign States before National Authorities’, 149 *Recueil Des Cours* 87 (1976), pp. 126.

⁸⁴ S. Sucharitkul, *Special Rapporteur, ILC Reports on “Jurisdictional Immunities of States and Their Property”*, Report No. 4, UN doc. A/CN.4/357 (31 March 1982), at 77, para 119.

⁸⁵ 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.

based on similar facts.⁸⁶ Clearly, the shift from absolute immunity to restrictive immunity has not entirely solved all problems in this area of law. However, a state practice shows that many states have considered a commercial activity exception to distinguish between public act of state and private act of state under a restrictive approach in which it only grants immunity to only public act of state. This is in order to uphold the balance of interests between a state and a private party. Therefore, this state practice will eventually have a significant impact in investment treaty arbitration when a state entity engages in commercial activities.

3. The Commercial Activity Exception and its Relevance to Investment Treaty Arbitration

Due to the increasing participation of states and their entities engaging in commercial activities, investment treaty arbitration has become a significant method for the resolution of investment disputes between a state and a private party. In respect of the special characteristics relating to public-private disputes, many issues of sovereign immunity doctrine have arisen when a state is a party to arbitration.⁸⁷ Accordingly, the relevance of sovereign immunity and investment treaty arbitration become more apparent. The claim of sovereign immunity can be raised by a state in many stages of an arbitration process, either procedurally or substantially, resulting in the disruption of the entire process of arbitration.⁸⁸ If the claim of sovereign immunity is to be allowed during arbitration proceedings a private party would be left without any remedy or compensation.⁸⁹ As Fox summarises, “whereas a court proceeding leading to judgment may be conducted in the absence of the foreign state and produces no immediate hindrance to that State’s conduct of its affairs, execution of the judgment involves, in the last resort, the use of force

⁸⁶ S. Sucharitkul, *Special Rapporteur, ILC Reports on “Jurisdictional Immunities of States and Their Property”*, Report No. 4, UN doc. A/CN.4/357 (31 March 1982), at 37, para 51.

⁸⁷ K. H. Bockstiegel, ‘States in the International Arbitral Process’, in J.D. Lew, *Contemporary Problems in International Arbitration*, (Queen Mary College, UK 1996) pp. 47.

⁸⁸ G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, pp. 404.

⁸⁹ D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, London 2007), pp. 79

against the foreign State by the seizure of assets.”⁹⁰ Yet, such situations might be less problematic, since state practices in many jurisdictions appear to have moved towards a restrictive immunity.

Traditionally, many states have widely accepted the restrictive jurisdictional immunity concept, which means that a domestic court only exercises jurisdiction over cases relating to the commercial activity of a state. With regards to the investor-state dispute settlement, many states have also adopted a restrictive immunity doctrine to distinguish between sovereign activity and commercial activity, as well as the separation between property used for public purposes and property used for commercial purposes, in order to determine jurisdiction and enforcement powers. In this respect, the separate regime of immunity from enforcement and execution from immunity from jurisdiction is considered by most states and reflected in the New York Convention and the ICSID Convention.⁹¹ It is submitted that once a state is a party to the Conventions and consents to submit the dispute to a tribunal, which is so called “an agreement to arbitrate”, it is deemed to have waived its immunity from jurisdiction raised, during the recognition and enforcement procedures before the tribunals and courts.⁹²

This position was also adopted in the US FSIA, the UK SIA and the UN Convention, but with considerable variations.⁹³ In these circumstances, it appears that immunity from execution is considered to be unclear and absolute, which is difficult to change or develop. Sucharitkul describes this characterization as “*the last bastion of sovereign*

⁹⁰ H. Fox, ‘Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity’ 34(1) ICLQ 115 (1985) pp. 123.

⁹¹ Art. III of the New York Convention and Art. 54 of the ICSID Convention; *Second report on Jurisdictional Immunities of States and Their Property*, by Mr. M. Ogiso, *Special Rapporteur*, [1989] 2 Y.B. Int’l Law Comm’n 72, UN Doc. A/CN.4/SER.A/1989/Add.1.; See also H. Fox, ‘Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity’ 34(1) ICLQ 115 (1985) pp. 123.

⁹² Bernini and Van Den Berg, ‘The Enforcement of Arbitral Awards against a State: the Problem of Immunity from Execution’ in J DM Lew, *Contemporary Problems in International Arbitration* (Queen Mary College, UK 1996) pp. 359.

⁹³ C. Schreuer, *State immunity : Some recent developments* (Grotius Publication, Great Britain 1988) pp. 63.

immunity”,⁹⁴ since actual measures of enforcement are considered to more drastically affect and directly interfere with a state’s sovereignty than the mere assumption of adjudicatory jurisdiction.⁹⁵

Despite this uncertainty, a number of domestic courts and their municipal sovereign immunity laws have clearly expressed the opinion/position that immunity from enforcement and execution is no longer absolute. Although these judgments and codifications have listed a condition or exception in the denial of immunity from execution, they are still controversial and scholarly conceptualisations concerning the possibilities and grounds to grant or deny immunity from execution frequently encounter difficulties.⁹⁶ This proposition will be discussed further in the next chapter. Since both types of sovereign immunity are subject to a commercial exception, this section now turns to the relevance of the commercial exception to the separation regime of sovereign immunity. It is the aim of this section to provide an explanation of the relevance of sovereign immunity and investment treaty arbitration. Thus, the main question is to what extent a commercial activity exception, under a restrictive approach, applies to the immunity from jurisdiction and immunity from enforcement and execution, for the purposes of enforcement of an arbitral award.

(a) Immunity from jurisdiction

The separation regime of sovereign immunity has made a distinction between the plea of adjudication or jurisdiction immunity and enforcement immunity. The plea of jurisdictional immunity has been seen from the first stage of the arbitration process to the final stage in order to refuse the exercise of jurisdiction of a forum court state or arbitral

⁹⁴ ILC Report on Jurisdictional Immunities of States and their Property 1991 in Yearbook Int’l Commission (YBILC), ii, Part Two, 1, at 56.

⁹⁵ C. Schreuer, *State immunity: Some recent developments* (Grotius Publication, Great Britain 1988) pp. 126.

⁹⁶ A. Reinisch, ‘European court practice concerning state immunity from enforcement measures’, 17 EJIL 803, 804 (2006).

tribunal.⁹⁷ However, the exercise of jurisdictional immunity is commonly referred to territorial jurisdiction. This principle could be found in the *Schooner Exchange v. McFaddon*; where the court clarified 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 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.”⁹⁸

In this context, the notion of territorial jurisdiction limits the role of a municipal court, in a forum state, exercising jurisdiction over a foreign state, grounded in the principle of the independence, equality and the dignity of states under the maxim *par in parem non habet jurisdictionem*.⁹⁹ Therefore, a sovereign immunity defence may be raised by a foreign state before a municipal court, since it enjoys immunity from jurisdiction. In addition, the jurisdictional immunity extends equally to its agencies and representatives acting in the function of the state to pursue missions based on the principle of extraterritorial. The jurisdictional immunity, consequently, is not limited to the territory of the forum state, but extends to a person or an act of nationality outside the territory of the forum state.¹⁰⁰ In applying the extraterritorial jurisdiction, the state might need a territorial connection or territorial link to identify the relationship between a person or act and the forum state. This requirement of a territorial link has been reflected in the codification of certain sovereign immunity laws, such as, the UN Convention and the US FSIA, in order to initially establish a jurisdiction over private persons or assets of a foreign state relating to the subject-matter in dispute.

⁹⁷ D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, London 2007) pp. 79; See also AJ van den Berg, ‘The New York Arbitration Convention and State Immunity’ in KH Bockstiegel (eds) *Acts of State and Arbitration* (C. Heymanns, Koln 1997) pp. 49.

⁹⁸ *The Schooner Exchange v. McFaddon* (1812) 11 U.S. 116; At 135-137.

⁹⁹ H. Lauterpacht, ‘The problem of jurisdictional immunities of foreign states’ (1951) 28 BYIL 220, 221.

¹⁰⁰ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp.70-74.

The exercise of sovereign power, regarding the territorial jurisdiction, applies only to the relationship between the court of a forum state and a foreign state party or its asset.¹⁰¹ In respect to the arbitral tribunal, Fox asserts that “the plea of sovereign immunity in the sense of a procedural bar to jurisdiction based on the personal capacity of the litigant, has little immediate relevance in arbitration proceedings.”¹⁰² This is due to the fact that arbitration proceedings are based on the consent of both parties in the form of an arbitration agreement. When a state is entering into an arbitration agreement with a private party, it is widely accepted that the state consents to the jurisdiction of the arbitral tribunal and is deemed to waive its immunity from jurisdiction. Therefore, as Crawford states, “subject to the doctrine of non-justiciability, no fundamental principle prohibits the exercise of jurisdiction, and immunity may be waived by the state concerned either expressly or by conduct.”¹⁰³

It can be said that a state cannot plead the doctrine of sovereign immunity doctrine, not only because of the restrictive sovereign immunity limiting the immunity only to the sovereign activities, but also because of good faith regarding its treaty obligation, *pacta sunt servanda*, under the agreement to arbitrate between the parties. As will be seen in the next chapter, international conventions on the recognition and enforcement of arbitral awards have provided a manner of dealing with the issue of immunity from jurisdiction and enforcement in their provisions.

For the purpose of this section, it is necessary to identify the preferred criteria used to distinguish a sovereign activity and a commercial activity in order to plead jurisdictional immunity. It is submitted that the nature of the activity is more decisive than the purpose of the activity in determining whether sovereign immunity should be

¹⁰¹ D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, London 2007) pp. 81.

¹⁰² H. Fox, ‘Sovereign Immunity and Arbitration’ in J.D. Lew (ed), *Contemporary Problems in International Arbitration* (Centre of Commercial Studies, Queen Mary College, London 1986) pp. 323.

¹⁰³ J. Crawford, *Brownlie’s Principles of Public International Law*, (8th ed.) (OUP, New York 2012) pp.501.

allowed regarding the activity in question for a jurisdictional purpose.¹⁰⁴ Many decisions of the municipal courts and the codifications of states regarding sovereign immunity have supported this position,¹⁰⁵ as mentioned earlier in the *Empire of Iran* case.¹⁰⁶ However, although some municipal courts also refer to the purpose or the contextual test in distinguishing a sovereign and commercial act, as in the case of *I Congreso del Partido*, the most possible and practical approach now appears to refer to the nature test, which is adopted in the US FSIA, the UK SIA and the UN Convention.¹⁰⁷

All codifications regarding sovereign immunity refer to a commercial activity exception, albeit with considerable variations. Under the US FSIA, the most significant provision, embodying the core concept of restrictive immunity is the commercial exception provision. Section 1605(a) (2) deals with a general exception to jurisdictional immunity of a foreign state, providing that:

“(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.”¹⁰⁸

This commercial activity exception under this section has three requirements: action based upon a commercial activity, an act performed in connection with commercial activity and there being a sufficient nexus to the United States. In addition, Section 3(1) (a) of the UK SIA also provides that “a state is not immune with respect to proceedings relating to a commercial transaction entered into by the State”. Apart from the municipal law on sovereign immunity, an international convention also provides a

¹⁰⁴ L. J. Bouchez, ‘The Nature and Scope of State Immunity from Jurisdiction and Execution’, 10 Netherlands Y.B.I.L. 1 (1979) pp. 14.

¹⁰⁵ Foreign State Immunity and Foreign Government Controlled Investors (n 6), pp. 19; See the US FSIA, section 1603 (d).

¹⁰⁶ *Empire of Iran*, German Constitutional Court, 45 ILR 57 (1963).

¹⁰⁷ 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. 254-255.

¹⁰⁸ Section 9(1) of the UK SIA.

commercial activity exception stipulated in Article 10 of the UN Convention.¹⁰⁹

As mentioned earlier, the main difficulty of a restrictive sovereign immunity doctrine is how to define a commercial activity exception.¹¹⁰ The US FSIA provides a meaning for “commercial activity” under Section 1603 (d) and (e), it provides:

“(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.”¹¹¹

This meaning of “*commercial transaction*” leaves much to be debated since it does not clearly define this term in a straightforward manner.¹¹² On the other hand, the UK SIA provides a very broad definition of this term under Section 3(3), it includes:

“(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.”¹¹³

This broad definition of “commercial transaction” has been similarly adopted in

¹⁰⁹ Art. 10 of the UN Convention, it reads;

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

¹¹⁰ 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.

¹¹¹ Section 1603 (d) and (e) of the US FSIA.

¹¹² 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.

¹¹³ Section 3(3) of the UK SIA.

the UN Convention.¹¹⁴ From the above provisions, it can be said that those instruments providing a broad definition of “*commercial activity*” leaves the task to a municipal court to provide a final pronouncement on the issue.¹¹⁵ Accordingly, although the nature and purpose test is widely adopted in municipal courts as a technique to distinguish between a government act, which is immune from jurisdiction, and a commercial act, which is not immune, it is widely accepted that, in order to distinguish between a government act and a commercial act for a jurisdictional immunity purpose, the nature test is preferable. This can be seen in many codifications¹¹⁶ and court decisions.¹¹⁷

Furthermore, a commercial exception has been combined with an agreement to arbitrate provision in some codifications by specifically referring only to arbitration on a commercial matter.¹¹⁸ This limitation is not included under the UK SIA and the US FSIA.¹¹⁹ Ideally, such a limitation should not be added to an arbitration agreement clause. As Schreuer contends “the rationale for denying immunity in cases involving agreements to arbitrate is consent and this should not be combined with other exceptions to immunity. Such a combination would tend to dilute or even defeat the effects of the

¹¹⁴ See Art. 2(1)(c) of the UN Convention, reads:

“A “*commercial transaction*” means: (i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.”

¹¹⁵ 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.

¹¹⁶ See Art. 2(2) of the UN Convention; Sec. 1603(d) of the US FSIA.

¹¹⁷ *Empire of Iran case*, German Federal Constitutional Court, 30 April 1963, UN Legal Materials, 282, 45 ILR 57; *Republic of Argentina v. Weltover*, 504 US 607 [1992], at 614 the court states:

“...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 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.”;

See also *Saudi Arabia v Nelson*, 507 US 349 [1993], at 359.

¹¹⁸ See Art. 12(1) of the European Convention; Art. 17 of the UN Convention.

¹¹⁹ C. Schreuer, *State immunity : Some recent developments* (Grotius Publication, Great Britain 1988) pp. 68-69.

arbitration exception by adding further requirements.”¹²⁰ Last but by no means least, the differences in the commercial activity exception between the US FSIA and the UK SIA should not be overlooked. While Section 1603(e) and 1605 of the US FSIA apply only to a commercial activity taking place or having a jurisdictional link in the United States, Section 3 of the UK SIA contains no such limitation.¹²¹ In this context, a jurisdictional nexus reveals a significant effect in US jurisdiction, which raises a number of jurisdictional problems in the enforcement of an arbitral award, particularly in the context of non-ICSID arbitration. Thus, it is necessary to analyse in more detail the issue of jurisdictional link in the next chapter.

From the above situations, under restrictive immunity, although all recent codifications and court decisions among major jurisdictions generally agree that a state is not immune from the jurisdiction of a forum state when a state engages in a commercial activity, the definition of commercial activity is still uncertain and not uniform in practice. Nevertheless, the implication of the commercial activity exception is still used as criteria for the determination of the nature of a transaction or property of a state at every stage in arbitration proceedings. However, owing to this uncertainty it should not be considered that the test is unworkable.¹²² A possible solution to this issue could be found by relying on judicial interpretations, in order to find a common international standard. Currently, a nature test is well recommended, which is already adopted in the US FSIA, the UK SIA and the UN Convention.¹²³

(b) Immunity from enforcement and execution

Regarding the separate regime of immunity, it is generally agreed that the issue of immunity from execution is distinct from immunity from jurisdiction. Whilst jurisdictional immunity relates to adjudication by means of a judgment and declaration of

¹²⁰ Ibid.

¹²¹ G.R. Delaume, ‘The State Immunity Act of the United Kingdom’, 73(2) AJIL 185 (1979) pp.190-191.

¹²² C. Schreuer, *State immunity : Some recent developments* (Grotius Publication, Great Britain 1988) pp. 41.

¹²³ 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. 254-255.

rights and obligations on the territorial basis, enforcement immunity relates to the measure of constraint against the property of foreign state, either for the purpose of enforcing post-award execution or pre-award attachment (provisional measures) resulting from the exercise of jurisdiction.¹²⁴ In this context, the enforcement immunity stage is comprised of three different steps: recognition, enforcement and execution. The problems relating to a sovereign immunity defence could arise at any enforcement step; however, a private party is likely to face a problem at the execution step when it comes to executing an arbitral award against sovereign assets.¹²⁵

The separate regime of sovereign immunity has been welcomed by courts in many jurisdictions in order to distinguish between immunity from jurisdiction and immunity from execution. This position was found in a leading case of *Duff Development Co. Ltd. v Government of Kelantan*, in the House of Lords, where the court affirmed the plea of sovereign immunity to a foreign state in respect to proceedings to enforce an arbitral award. The reasoning of the House of Lords was as follows:

“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.”¹²⁶

Similarly, this state practice can also be seen in *Yugoslavia v SEEE*,¹²⁷ which was before the French and Dutch court. Nevertheless, the precedent towards a separate regime of sovereign immunity might be challengeable after the French Cour de Cassation decision in *Creighton v Qatar*,¹²⁸ wherein the court adhered to a single regime of sovereign immunity. Breaking new ground, the *Creighton v Qatar* decision has made a remarkable impact to a long established precedent in many jurisdictions. This will need to

¹²⁴ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp. 35; See also I. Brownlie, *Principles of Public International Law*, (7th ed.) (OUP, New York 2008) pp. 342.

¹²⁵ 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. 260.

¹²⁶ *Duff Development Co. Ltd. v Government of Kelantan* [1924] AC 797; 2 ILR 140.

¹²⁷ Paris Tribunal de Grande Instance, 65 ILR 46 (6 July 1970) 49; Paris Court of Appeal (29 January 1975)(21 April 1982); Netherlands Supreme Court, 65 ILR 356 (26 October 1973).

¹²⁸ *Creighton Limited v. Government of the State of Qatar*, The French Cour de Cassation, (6 July 2000), reported in XXV Yearbook of Commercial Arbitration 458 (2000).

be discussed in more detail in the following chapter with regard to a waiver of sovereign immunity by an agreement to arbitrate. A leading scholar in this subject, Professor Christopher Schreuer, has made thorough argument stating that by:

“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.”¹²⁹

In addition, although this jurisprudence is not widely welcomed among major jurisdictions, it cannot be implied that there is no previous state practice in denying the distinction between the two immunities. Additionally, the courts in certain jurisdictions depart from a separate regime to the single regime of sovereign immunity, in which immunity from jurisdiction and immunity from enforcement and execution could be regarded as a single immunity.¹³⁰ For instance, the Swiss courts have explicitly denied the separate regime of immunity in which the court treats immunity from jurisdiction and immunity from execution on a similar footing.¹³¹ In this context, the proposition is that the court asserts ‘the overall unity of substantive law’ for the enforceability of a judgment and the execution of property, which is not in public use and has a connection with the Swiss forum.¹³² It could be said that the Swiss court, by requiring a jurisdictional nexus, aims to balance the wide power of the Swiss court under the single regime of sovereign immunity, with the sufficient connection between the claim and the Swiss territory

¹²⁹ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988) pp. 125.

¹³⁰ I. Sinclair, *The Law of sovereign immunity: recent developments*, 167 *Recueil Des Cours* 113 (1980) pp. 220.

¹³¹ *Kingdom of Greece v Julius Bar and Co.*, Swiss Federal Tribunal, 6 June 1956; 23 *ILR* 195, the court declared that:

“As soon as admits that in certain cases a foreign State may be a party before Swiss courts to an action designed to determine the rights and obligations under a legal relationship in which it had become concerned, one must admit also that a foreign State may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. If that were not so, the judgment would lack its most essential attribute, namely that it will be executed even against the will of the party against which it is rendered... there is thus no reason to modify the case-law of the Federal Tribunal insofar as it treats immunity from jurisdiction and immunity from execution on a similar footing.”

¹³² Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp. 603.

(*Binnenbeziehung*).¹³³ As a result, the Swiss practice appears to be towards the less restrictive approach to the sovereign immunity doctrine.

Although it has long been recognised that immunity from execution is no longer absolute, the restrictive doctrine has less effect on the immunity from enforcement and execution on state property than immunity from jurisdiction.¹³⁴ This is due to the fact that the issue of immunity from execution against state property has more difficulties than immunity from jurisdiction. A main obstacle to immunity from execution is the political sensitivity between a forum state and other states affected by this execution, either being a home state of a foreign investor or a host state or a respondent state, in implementing a measure of forcible execution against the assets of losing party. As a result, this may discourage a forum state to enforce an arbitral award since it would affect the friendly relationship between states with good diplomatic relations.¹³⁵

With regard to the possibilities and grounds in denying immunity from execution, the most important trend is waiver of immunity from execution, regarding certain types of state property, which are not serving a sovereign purpose. This position was adopted in *The Empire of Iran*¹³⁶ and *Philippine Embassy*¹³⁷ cases by the German Constitutional Court. This approach of the court decisions, in allowing immunity from execution for property used for a sovereign purpose but not property used for a commercial purpose has also been found in subsequent cases in the Spanish¹³⁸ and Italian Constitutional Courts,¹³⁹ as well as in the codifications on sovereign immunity in the US FSIA¹⁴⁰, the UK SIA¹⁴¹,

¹³³ D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, London 2007) pp. 213.

¹³⁴ *ibid* 92.

¹³⁵ Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp. 601.

¹³⁶ *Empire of Iran case*, German Federal Constitutional Court, 30 April 1963, UN Legal Materials, 282, 45 ILR 57

¹³⁷ *The Philippine Embassy case*, 46 BverfGE, 342; 65 ILR 140; UN Legal Materials 297 13 December 1977, at 395.

¹³⁸ *Abbott v Republic of South Africa*, the Spain Constitutional Court (2nd Chamber), 1 July 1992; 113 ILR 413.

¹³⁹ *Condor and Filvem v. National Shipping Company of Nigeria*, 2-15 July 1992, 33 ILM 393.

¹⁴⁰ Section 1610(a) of the US FSIA.

¹⁴¹ Section 13(4) of the UK SIA.

the Australia FSIA¹⁴², the Canada SIA¹⁴³ and the UN Convention.¹⁴⁴

Considering the criteria used to determine a commercial exception, it is, however, contrary to the requirements of immunity from jurisdiction; which considers the nature of activities instead of the purpose of activities. Accordingly, this could imply that the limitations on the immunity from execution are somehow less intrusive than in the field of immunity from jurisdiction.¹⁴⁵ Therefore, a more cautious view is reflected in the codification of the law of sovereign immunity in both domestic and international levels as well as in court decisions, in order to protect state property from execution (as mentioned above). Thus, a majority of state practices for immunity from execution appear to be adopting the restrictive approach, by using the criteria of a purpose to distinguish between sovereign property and commercial property, which reflects in a court practice and domestic statute of the US, UK Canada and Australia.¹⁴⁶

However, although most municipal laws on sovereign immunity follow the same approach of restrictive sovereign immunity from execution, each municipal law on sovereign immunity might vary in degree regarding the conditions and definition of commercial activity when allowing execution against a foreign state's commercial property.¹⁴⁷ Therefore, it is the purpose of this section to determine the distinction between the types of property that are subject to execution and those that are not. In other words, the distinction is usually made between a foreign state property used for commercial activity (under the US FSIA) or being in use or intended for use for commercial purposes (under the UK SIA) and a foreign state property used for sovereign activity.

¹⁴² Section 32(1) of the Australia FSIA.

¹⁴³ Section 11 of the Canada SIA.

¹⁴⁴ Article 19(C) of the UN Convention.

¹⁴⁵ A. Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', 17 EJIL 803, 804 (2006).

¹⁴⁶ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1155-1158; I. Brownlie, *Principles of Public International Law*, (7th ed.) (OUP, New York 2008) pp. 343.

¹⁴⁷ P. Trooboff, *Foreign state immunity: Emerging consensus on principles*, 200 Recueil Des Cours V 235 (1986) pp. 364.

In this context, the availability of commercial properties for execution seems requires an investor to locate a state owned property in order to levy an execution.¹⁴⁸ However, it is not always easy to levy against all commercial properties of a foreign state since some municipal laws also add a jurisdictional nexus requirement between the property subjected to an execution and the underlying claim with a commercial activity exception. The combination of a commercial activity exception and a jurisdiction nexus requirement limits the availability of commercial properties for execution leading to more difficulties for the investors to locate a specified property and to satisfy execution. Schreuer argues that “it is unlikely that a host state will keep commercial assets in another country that can be said to have a direct connection to an investment in its territory.”¹⁴⁹

Such a requirement between the property subjected to an execution and the underlying claim is a main characteristic of the US FSIA. Under the US FSIA, a foreign state property is immune from an execution under Section 1609,¹⁵⁰ unless it falls under the exceptions provided in Section 1610 and 1611. The US FSIA has a two-tiered requirement, which must be met in order to enable execution of an arbitral award.¹⁵¹ However, those exceptions are limited to only a foreign state’s property used for a commercial activity in the United States, which is considered a first threshold requirement. Once this first requirement has been established, a second tier threshold must be satisfied, as provided in Section 1610 (a)¹⁵² in which the most referred exception

¹⁴⁸ Sovereign Immunity as a Barrier (n 21), pp. 225.

¹⁴⁹ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1160.

¹⁵⁰ Section 1609 of the US FSIA, reads:

“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.”

¹⁵¹ A. Boralessa, ‘Enforcement in the United States and United Kingdom of ICSID awards against the republic of Argentina: Obstacles that transnational corporations may face’, 17 N.Y. Int’l L. Rev 53 (2004) pp. 63.

¹⁵² Section 1610 (a) of the US FSIA, reads:

“(a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or

is that the property is or was used for the commercial activity upon which the claim is based.¹⁵³ In this respect, it clearly appears that the possibility of the availability of foreign state's property depends on a foreign state's property used for a commercial activity together with a jurisdictional nexus requirement. Another interesting exception, which has been added in the 1988 amendment of the US FSIA, to a sovereign immunity from execution is Section 1610 (a) (6). Under this Section, it is provided that:

“(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or”

The 1988 amendment of the US FSIA in Section 1610 (a)(6) allows execution against all foreign state property used for a commercial activity in the United States, but it no longer requires any jurisdictional nexus between the underlying claim and the property sought to execute.¹⁵⁴ Accordingly, this provision places cases involving arbitral awards on a better footing, by the creation of a special rule to facilitate the execution of

from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605 (a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.”

¹⁵³ Section 1610 (a)(2) of the US FSIA.

¹⁵⁴ M.B. Feldman, ‘Foreign Sovereign Immunity in the United States Courts 1976-1986’, 19 Van. J. Transnat’l L. 19 (1986) pp. 44-46.

arbitral awards.¹⁵⁵ In this regard, the amendment of the US FSIA has provided a more possible ground or exception, making it easier for an investor to locate a foreign state's property in the United States. In effect, it should be noted that it is more generous to the arbitral awards based on an arbitration agreement than to the decisions of the United States courts.¹⁵⁶

Nevertheless, the amendment to this provision might contradict with Article 54 of the ICSID Convention, since it treats an arbitral award as a final judgment of a court in a forum state. In fact, the draftsmen of the ICSID Convention intended to place the ICSID award in the highest position without any court intervention or review in a court of a forum state. Therefore, the amendment of the US FSIA does not restrict the degree of effectiveness towards the enforcement and execution of arbitral awards¹⁵⁷ but it, rather, supports the ICSID Convention by filling the gap of execution stage under Article 55, which is subject to a municipal law of sovereign immunity. In this respect, the interaction between an international convention and a municipal law can be referred to as two sets of relationships in parallel. On the one hand, it could refer to the principle of good faith and binding force of the treaty (*pacta sunt servanda*)¹⁵⁸ and provision of effectiveness to the arbitration agreement (*favor contractus*),¹⁵⁹ which could be found in the US FSIA provisions on immunity from execution in Section 1610 and 1611, which are subject to

¹⁵⁵ G. Kahale, 'New Legislation on the United States Facilities Enforcement of Arbitral Agreements and Awards Against Foreign States', 6(2) J. Int. Arb. 57 (1989) pp. 63.

¹⁵⁶ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1161.

¹⁵⁷ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1161.

¹⁵⁸ See Art.26 of the VCLT, which reads:

“Article 26: Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

¹⁵⁹ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009), pp.1161.; See Art. 46 of the VCLT; which reads:

“Article 46: Provisions of internal law regarding competence to conclude treaties

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.”

international conventions to which the US is a party.¹⁶⁰ On the other hand, it could refer to the principle of a treatment of more specialized rule (*lex specialis*) over a generalized one (*lex generalis*). Therefore, these two relationships do not always result in opposite results. However, the amendment of the US FSIA and the ICSID Convention could be jointly implemented in order to retain the effectiveness of ICSID award.

Although the fact that most states have generally accepted either the nature or purpose test, the difficulty in determining whether a specified property is the commercial property of foreign state, especially if such property is not clearly designated, came to light in the case of *LETCO v Liberia*.¹⁶¹ In this case, *LETCO* sought to execute an ICSID award against registration fees and other taxes in the United States from ship owners flying the Liberia flag. The court recognised and enforced an arbitral award plus further considered whether the property in question was used for a commercial activity in the United States. Liberia, inevitably, claimed a sovereign immunity from execution provided for under the US FSIA, in which those fees were used for a sovereign purpose, whilst *LETCO* argued that the fees could not be immune from execution under the US FSIA. Following the reasoning in *MINE v. Guinea* case, if a state has consented to ICSID arbitration, it has waived sovereign immunity from jurisdiction and enforcement. However, the arbitral award could not be executed against those fees due to the fact that such registration fees and other fees were revenues to support and maintain the government functions. Therefore, Liberia's motion to vacate the execution upon such funds was granted on the ground that those fees were sovereign rather than commercial and thus were immune from execution under the US FSIA.¹⁶² In this respect, it could be summarised that although the effectiveness of ICSID arbitration assures the recognition and enforcement of arbitral award, it provides no guarantee when it comes to the issue of

¹⁶⁰ See Section 1609 of the US FSIA; D. Chamlongradsr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 222.

¹⁶¹ *Liberia Eastern Timber Corporation v. Liberia*, The District Court for the Southern District of New York, 650 F. Supp. 73 [1986].

¹⁶² *LETCO v Liberia*, United States District Court, Southern District of New York, Judgment, 12 December 1986, 2 ICSID Reports 367/8. December 1986, 2 ICSID Reports 387/8; See also C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1133, 1161.

sovereign immunity from execution.¹⁶³

Apart from the complicated provisions under the US FSIA, the UK SIA provides a simpler commercial activity exception for a sovereign immunity from execution. Under Section 13(4) of the UK SIA, it is provided that:

“Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if—

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.”

In order to execute an arbitral award against a foreign state’s property, it must show that a foreign state’s property is for the time being in use or intended to be used for a commercial purpose. In contrast with the US FSIA, the UK SIA does not require any jurisdictional nexus between the commercial property and the underlying claim. Therefore, it is easier for an investor to satisfy the claim by allowing execution of all property used for commercial purpose in the United Kingdom.¹⁶⁴ As mentioned earlier, in the event that the specified property is not clearly designated for either a sovereign or commercial purpose, the Act, unlike the US FSIA, provides a clearer solution by allowing the head of the diplomatic mission to issue a certificate to clarify the use of such property.¹⁶⁵

Furthermore, the UN Convention also deals with a commercial activity exception for a post-judgment measure of constraint in Article 19 (c), which reads:

“No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another

¹⁶³ A. Alexandroff and I. Laird, ‘Compliance and Enforcement’ in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (2008) (OUP, UK 2008) pp. 1180.

¹⁶⁴ G.R. Delaume, ‘The State Immunity Act of the United Kingdom’, 73(2) AJIL 185 (1979) pp.195.

¹⁶⁵ See Section 13(5) of the UK SIA.

State unless and except to the extent that:

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.”

This provision allows attachment and execution against a foreign state’s property in use or intended to be used for a non-governmental purpose, but with a nexus requirement between a commercial property of foreign state and an entity of a foreign state, which the proceedings relate to. In other words, it is possible to execute against a commercial property of a foreign state if it is directed against property owned by the same states.¹⁶⁶ Unlike in the US FSIA,¹⁶⁷ it should be noted that the UN Convention does not combine a waiver of sovereign immunity exception to a commercial activity exception, plus an express waiver does not only cover a commercial property.¹⁶⁸ In this context, a commercial activity exception is independent from the consent of a foreign state.

Whilst the commercial activity exception permits execution only against a property in use or intended to be used for a commercial purpose, Article 21¹⁶⁹ is

¹⁶⁶ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1166.

¹⁶⁷ The US FSIA allows execution regarding the commercial property of a foreign state, even in the case of an express waiver under Section 1610.

¹⁶⁸ See Art. 19 of the UN Convention.

¹⁶⁹ Art. 21 of the UN Convention, reads:

“1. The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c):

(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use in the performance of military functions;

(c) property of the central bank or other monetary authority of the State;

(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).”

expressly limited to certain types of property, including bank accounts of a diplomatic mission, military property, central bank property, cultural heritage property and exhibition of objects of science, cultural or historical interest. These could not be regarded as a commercial property under Article 19 (c) but are classified as specifically in use or intended for use by the state for a sovereign purpose. Since an express waiver by a state is not limited to execution against only commercial property, an execution against either a sovereign property or specific categories of property might be possible under the UN Convention. As Schreuer stated “a waiver of immunity from execution for non-commercial property would appear particularly important. Since most statutes provide for non-immunity of commercial property anyway, provisions on waiver of immunity from execution make sense only if they extend to non-commercial property.”¹⁷⁰

As mentioned earlier, a commercial activity exception has been combined with a waiver of sovereign immunity exception, in which these two exceptions seem to be the most common approaches to defeat a sovereign immunity defence. However, although a test used to distinguish a commercial activity exception is far from uniform, depending on municipal court’s interpretation, a waiver of sovereign immunity exception appears to be more problematic, since it is very difficult to determine whether consent to a waiver of immunity from jurisdiction could constitute an implicit waiver of immunity from enforcement and execution. To put it another way, the question is whether a ‘state undertaking to arbitrate’ or ‘agreement to arbitrate’ can amount to a waiver of immunity from jurisdiction or whether it extends equally to a waiver of immunity from execution on a basis of an implied waiver. Although most investment treaties and international conventions do not contain a waiver of immunity from execution in their provisions, a successful claimant must rely on the claim of an implied waiver from a ‘state undertaking to arbitrate’ obligation under investment treaties or international conventions.¹⁷¹ Therefore, a waiver of sovereign immunity exception significantly depends on the provisions and obligations under investment treaties or international conventions. The

¹⁷⁰ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1177.

¹⁷¹ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988) pp. 75; Sovereign Immunity as a Barrier (n 21), pp. 223.

next chapter will discuss this issue in more detail.

4. Concluding remarks

From the increased participation of states in commercial activities in the twentieth century, the development of the sovereign immunity doctrine has shifted from the practice of absolute immunity to a restrictive immunity before a municipal court in order to uphold the balance of interests between a state and a private party.¹⁷² Under a restrictive doctrine, a commercial exception to immunity is considered the hallmark of a restrictive approach,¹⁷³ in which it only grants immunity to public acts of states (*acta jure imperii*) whilst denying immunity to their private acts (*acta jure gestionis*). Hence, it is not reasonable for a state to plead a sovereign immunity before a municipal court when a state engages in commercial activities and acts as a private entity.¹⁷⁴ With regards to the criteria used to distinguish the commercial activity of state, Schreuer provides a thorough summary that “for purposes of immunity of foreign states from jurisdiction the overwhelming authority points towards a test that looks at the nature of the activity and not its purpose. But the test for immunity from execution is usually the purpose of the property that is to be seized although the origin of the property is also sometimes taken into account.”¹⁷⁵ This could be seen as an initial step to balance the public and private interest on account of the proportionality analysis; used as a tool to increase the balance court decision-making.

However, if the plea of sovereign immunity is denied before a municipal court for a commercial activity, the enforcement of arbitral awards is very difficult to execute when it involves a state asset or governmental policy matters. Sornarajah asserted that “difficult problems would arise only in situations where a transaction which has commercial characteristics is nevertheless one that is undertaken in pursuance of a governmental

¹⁷² C. Schreuer, ‘Some Recent Developments in the Law of State Immunity’, 2 *Comparative Law Yearbook* 215 (1978) pp. 215; G.M. Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff, The Hague 1984) pp.22.

¹⁷³ Foreign State Immunity and Foreign Government Controlled Investors (n 6), pp. 18.

¹⁷⁴ M. Sornarajah, ‘Problems in Applying the Restrictive Theory of Sovereign Immunity’, 31 *ICLQ* 661 (1982) pp. 661.

¹⁷⁵ C. Schreuer, *The ICSID Convention : A Commentary*, (CUP UK 2009) pp. 1160.

policy or where a breach of contract or a tort is brought about by changes in policy made by state.”¹⁷⁶ Such difficulties in determining those regulatory acts, which are conducted for a sovereign purpose and affect foreign investors, will be left to a municipal court to determine. By any means, the sovereign immunity doctrine will continue to benefit a state when it is claimed in third state courts, which tend to refrain from reviewing sovereign acts or regulatory acts of foreign states.

Without doubt, a municipal court of third states could use this lacuna of municipal law on sovereign immunity to avoid exercising jurisdiction over an investor of a foreign state. Therefore, the municipal court and municipal law on sovereign immunity itself does not provide a sufficient legal protection for foreign investors against sovereign acts or the regulatory acts of host states. As will be seen in the next chapter, the establishment of international investment agreements and investor-state arbitration can be seen as a reaction to insufficient legal protection from municipal courts of a third state or a home state in order to ensure the enforceability of arbitral awards.

¹⁷⁶ M. Sornarajah, ‘Problems in Applying the Restrictive Theory of Sovereign Immunity’, 31 ICLQ 661 (1982) pp. 665.

PART III
THE ENFORCEMENT AND EXECUTION
OF ARBITRAL AWARDS

Chapter 4

International Conventions on the Enforcement and Execution of Arbitral Awards in Municipal Courts Jurisdictions

1. Introduction

Undoubtedly, the effectiveness of investment treaty arbitration depends on the question of whether arbitration awards can be voluntarily enforceable against losing parties in municipal courts.¹ Nonetheless, it is not always the case that the winning party is successful in enforcing an arbitral award against a losing party when the losing party, mostly a state, refuses to pay or the municipal court could not execute the assets in the country where the arbitral award is rendered by claiming the “sovereign immunity” doctrine. Accordingly, an investor is inevitably left with the hurdle of a sovereign immunity defence, claimed by a state, when locating any available assets in an enforcement stage. In an attempt to remove this barrier, the international community has attempted to create comprehensive international mechanisms and vehicles in respect to investment protection.²

Methods used to provide such protection for an investor are reflected in a variety of formulations and provisions in order to internationalise the agreement between a state and an investor, particularly in the context of Bilateral Investment Treaties (BITs).³ More importantly, the most frequent vehicles used for determining and providing enforcement of arbitral awards against the state are the Convention on the Recognition and

¹ A. Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes’, 21 *Am.Rev.Int’l. Arb.* 211 (2010). (Sovereign Immunity as a Barrier)

² *ibid* pp.212.

³ H. Booyesen, ‘The Municipal Enforcement of Arbitral Awards against States in Terms of Arbitration Conventions, with special reference to the New York Convention- Does International Law Provide for a Municipal Law Concept of an Arbitrable Act of State?’, 12 *South African Yearbook of International Law* 73 (1986/87) pp. 74 (The Municipal Enforcement of Arbitral Awards).

Enforcement of Foreign Arbitral Awards of 1958 ('the New York Convention')⁴ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 ('the Washington' or 'ICSID Convention').⁵ Therefore, a state, which is a party to both Conventions, is under a treaty obligation (*pacta sunt servanda*) to enforce arbitral awards rendered elsewhere in any contracting states of the Conventions before its jurisdiction.⁶ A non-compliance by a party would be a breach of treaty obligations and lead to legal, political and economic consequences.⁷

It may be believed that the current mechanism of investment treaty arbitration and the network of multilateral treaties and conventions ensure the enforceability of international arbitral awards in multiple jurisdictions by limiting the challenges and standardizing the treatment of arbitral awards.⁸ Although such mechanisms and conventions have technically been recognised as “depoliticization” and “delocalisation”,⁹ international investment arbitration, however, cannot be completely separated from the municipal courts and laws. As a matter of fact the New York Convention fails to limit the role of the municipal court to determine and interpret the merit of the award by providing grounds to deny the enforcement of arbitral awards. Whilst the ICSID Convention requires the municipal court to treat and enforce its awards as a final judgment in that state; it leaves the execution stage to be determined by the municipal court and its law. By all means, the enforcement and execution of arbitral awards under either Convention will inevitably take place and be open to challenge in a municipal court and under municipal law.

The enforcement of arbitral awards before municipal courts can be divided into two stages. In the first stage, an arbitral award must be recognised and enforced as a legally binding decision and confirmed, or the so-called *exequatur*, to the parties under the law

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, 10 Jun. 1958.

⁵ Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, Mar. 18, 1965, 17 U.S.T. 1270. 575 U.N.T.S. 159.

⁶ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1124.

⁷ *ibid* 1077.

⁸ Alexis Blane, 'Sovereign immunity as a Bar to the execution of international arbitral awards', 41 JILP, 453 (2009) pp. 454. (Sovereign immunity as a Bar)

⁹ See J. Paulsson, 'Delocalization of International Commercial Arbitration', 32 Int'l & Comp. L.Q. 53 (1983).

of the forum state. At this stage, a defendant state could raise a plea of immunity from jurisdiction so as to prevent the recognition of an award. The following stage or the final stage of enforcement of arbitral awards consists of the measures of execution against the property of a defendant state. At this stage a state could claim immunity from execution to refuse the enforcement of arbitral awards.

However, it is clear that the capacity of the municipal court to enforce and execute an arbitral award is not only subject to simply international conventions but also to the sovereign immunity doctrine, which is varied under the differing municipal law systems.¹⁰ This is because it contains a different set of limitations and conditions both at the stage of enforcement and of execution.¹¹ Theoretically, a municipal law of sovereign immunity should be applicable along with the law governing enforcement in the process of enforcement and execution.¹² Nevertheless, in the event of non-compliance the sovereign immunity doctrine, in municipal law, is usually raised by a state as a procedural bar to international conventions in order to avoid satisfying an arbitral award.¹³ In this regard, the application of sovereign immunity defense at any stages of an enforcement of arbitral awards, therefore, could nullify the most attractiveness of investor-state arbitration system as the most impartial method of dispute settlement from the investors' perspective in which it is dependent from a municipal law and municipal court intervention.

Therefore, it is the aim of this chapter to examine whether the ICSID Convention and the New York Convention, which assure the enforceability of arbitral awards before a municipal court of signatory states, can override the defence of sovereign immunity and other challenges in the municipal courts. For this purpose, it is necessary to provide an overview and an outline of the structure of the ICSID Convention and the New York Convention. In particular, this chapter will examine and compare how the municipal court determines the substantive provisions regarding the enforcement of an arbitral

¹⁰ G. Delaume, 'Sovereign immunity and transnational arbitration', 3(1) *Arb. J.* (1987) 28, 29-30.

¹¹ *Sovereign Immunity as a Barrier* (n 1), pp.212.

¹² Section 1609 of US FSIA.

¹³ *Sovereign immunity as a Bar* (n 8), pp. 466.

award, illustrating the enforceability and limitation between these two Conventions. The comparison, *tertium comparationis*, between the ICSID Convention and the New York Convention is established through a core function and provisions of these Conventions, which affect the nature and effectiveness of an arbitral award. Although these two Conventions have shared the same purpose in ensuring the enforcement of arbitral awards, the outcome of an enforcement of arbitral awards through each convention does not necessarily to be the same in which this chapter will illustrate this presumption.

2. The ICSID Convention

(a) Background

The ICSID Convention was formulated by the International Bank for Reconstruction and Development ('the World Bank') and is administered by the International Center for Settlement of Investment Disputes ('ICSID').¹⁴ It entered into force on 14 October 1966 and currently has 159 signatory states.¹⁵ The main purpose of the ICSID Convention, as stated in the Preamble, is to "promote private foreign investment by improving the investment climate for investors and host states alike."¹⁶ The mechanism of the ICSID is the expectation that it should assure the protection of investors under international law from unilateral action from host states. Walde has also contended that "investment arbitration is one of the most powerful instruments available to foreign investors to counteract political risk at least to the extent such risk is within the control of the host state."¹⁷ Thus, it aims to maintain an equitable balance between the interests of investors and host states.¹⁸

¹⁴ J. K. Ryans JR. and J. C. Baker, 'The International Center for Settlement of Investment Disputes (ICSID)', 10 J. of World Trade Law 65 (1976).

¹⁵ ICSID, List of contracting states and other signatories of the Convention (as of April 11th, 2014), ICSID Doc. ICSID/3.

¹⁶ A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 136 Recueil des Cours 331, 348 (1972-II).

¹⁷ T. Walde, 'Investment Arbitration under the Energy Charter Treaty- From Dispute settlement to Treaty Interpretation' 12 Arb. Intl'l 429 (1996), 432.

¹⁸ 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States', 18 March 1965, in ICSID, *ICSID Convention, Regulations and Rules* (2006) 35, 40.

Another distinctive feature of ICSID is the establishment of the investors' capacity to bring a claim directly against states without reliance on the investors' home states. This recognition of an individual as a subject of international law is initiated by the cornerstone of the ICSID jurisdiction, which lies in the 'consent of the parties'¹⁹ and the two criteria set out in the ICSID Convention: jurisdiction *ratione personae* and jurisdiction *ratione materiae*. Once consent to jurisdiction has been met, it takes away the investor's right to call upon 'diplomatic protection'.²⁰ At the same time, consent to jurisdiction under an ICSID arbitration also excludes other remedies, including the requirement of exhaustion of local remedies. The exclusivity of ICSID proceedings is a result of the delocalised character of ICSID arbitration.²¹ This represents a significant development in international law and state practice with regards to the dispute settlement between foreign investors and host states. Sir Elihu Lauterpacht pointed out that:

“For the first time a system was instituted under which non-state entities- corporations or individuals- could sue states directly; in which state immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host state; in which the operation of the local remedies rule was excluded; and in which the tribunal's award would be directly enforceable within the territories of the state parties.”²²

Apart from this limited interference of a home state, a host state and its municipal court are also prevented from reviewing an arbitral award, which is considered a final judgment and enjoys automatic enforcement.²³ In this respect, the ICSID Convention provides a comprehensive, self-contained and independent system, insulated from the

¹⁹ Art. 26 of the ICSID Convention, it says:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

²⁰ P. Muchlinski, 'Dispute Settlement under the Washington Convention on the Settlement of Investment Disputes' in W.E. Butler (eds), *Control over Compliance with International Law* (Kluwer, the Netherlands, 1991), pp. 177.

²¹ *ibid* 174-185; M. Sornarajah, *The international law on foreign investment* (CUP, UK 2010) pp. 289.

²² E. Lauterpacht, 'Forward' to C. Schreuer in C. Schreuer, *The ICSID Convention: A Commentary* (CUP, UK 2001).

²³ C. Schreuer, 'The ICSID Convention: A Commentary' (CUP, UK 2001).

national law, enabling enforcement in the area of investment dispute,²⁴ whilst most other instruments governing arbitration do not cover an enforcement stage but leave it to be interpreted by other domestic laws or applicable treaties.²⁵ However, as will be seen, the ICSID Convention, by some means, leaves the execution of arbitral awards to be governed by the municipal court under municipal law on sovereign immunity and that role of the municipal court is of limited judicial assistance, aiming to promote and assure the effectiveness of arbitral awards.²⁶ This process inevitably requires interaction between international law and municipal law in order to execute an arbitral award, which creates the erection of ‘a mix juridical structure’.²⁷

(b) The enforcement of ICSID arbitral awards

The significant provisions dealing with the recognition, enforcement and execution of arbitral awards are Article 53-55. While Article 53 deals with the binding force of arbitral awards, Article 54 requires a domestic court to recognise and enforce an arbitral award as if it was a final judgment. These two provisions are intended to facilitate the recognition and enforcement of arbitral awards by limiting the role of a domestic court to review the merit of the case or its jurisdiction (*res judicata*).²⁸ As stated in Article 53(1):

“(1) 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.
Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

²⁴ A.J. 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 439 (1987), 441 (Some Recent Problems in the Practice of Enforcement)

²⁵ A. Broches, *Selected Essays: World Bank, ICSID, and other subjects of public and private international law*, (Martinus Nijhoff, The Netherlands 1995) pp. 433.

²⁶ G. Delaume, ‘ICSID Arbitration and the Courts’, 77 Am. J. Int’l L. 784 (1983), 785.

²⁷ A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 Recueil des Cours 331, 396 (1972-II).

²⁸ See A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ 136 (1972-II) Recueil des Cours 331, 403 G.R. Delaume, ‘Judicial decisions related to sovereign immunity and transnational arbitrations’ (1987) 2 ICSID Review-FILJ 403, 404.

- (2) For the purpose of this section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Article 50, 51 or 52.”

Article 53(1) provides that ICSID awards are final and binding on the parties to ICSID arbitration without any review from other forums outside ICSID; being one of the most important advantages of ICSID. In other words, ICSID awards are not subject to review or challenge by the municipal court of host states.²⁹ Accordingly, the losing party should comply and be bound by the award immediately. It is crucial to appreciate that the enforcement of arbitral awards under ICSID Convention is different from the enforcement of arbitral awards under the New York Convention rooted in the municipal law on arbitration.³⁰

The obligation of parties to comply with an award is originally based on the concept of *res judicata* and the maxim *pacta sunt servanda*, under customary international law. According to Bjorklund, “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.”³¹ Therefore, the legal basis of binding force is not entirely symmetrical between the parties. Considering the binding force between the parties, it is not necessary that the legal consequence of the award is limited to either a contracting state on the one hand or a foreign investor of another contracting state on the other hand.³² This could be extended to “a constituent subdivision or agency” designated to the ICSID arbitration by that State in accordance with Article 25(1),³³ in which its consent to arbitration is

²⁹ J. M. Hunter and J. G. Olmedo, ‘Enforcement/Execution of ICSID Awards against Reluctant States’, 12 J. World Investment & Trade 307 (2011), 309.

³⁰ Some Recent Problems in the Practice of Enforcement (n 24), pp.440-441.

³¹ A. K. Bjorklund, ‘State immunity and the Enforcement of Investor-State Arbitral Awards’, in in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds), *International Investment Law for the 21st century: Essays in honour of Christopher Schreuer* (OUP, New York 2009) pp. 305.

³² C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp. 1100

³³ Art. 25(1) of the ICSID Convention, it says:

“(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”

required for approval by the state. Such a designated entity has a separate *locus standi* in an ICSID proceeding.³⁴

Nevertheless, it raises the question as to whether a state is responsible for all the acts conducted by its constituent subdivisions or agencies. In respect to governmental agencies, it is not necessary that consent by a constituent subdivision or agency amounts to consent by the host state itself. Accordingly, the binding force of an award under Article 53 rendered against a constituent subdivision or agency would not be binding upon a host state, but it only obliges such entity to be a party to that proceedings.³⁵ On the other hand, a state would be responsible for such entities by the principle of attribution, under the rule of state responsibility, in certain circumstances codified in the International Law Commission's Articles on State Responsibility,³⁶ as discussed in the previous chapter. The issue of attribution has been addressed in many judicial decisions.³⁷ Broches clearly makes the point that:

“If a constituent subdivision or an agency of a contracting state meets the requirements of the Convention as regards designation and approval and has consented to submit or has submitted a dispute with a national of another contracting state to arbitration under the Convention, the former contracting state is responsible for compliance with a resulting award, whether or not the subdivision or agency is acting for or on behalf of that contracting state.”³⁸

It, therefore, follows that the violation of the ICSID Convention's *travaux preparatoires* by a state could lead to state responsibility if it meets the requirements stipulated in Article 25(1) and (3).³⁹

³⁴ This is clarified in Article 25(3), it says:

“(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.”

³⁵ C. Schreuer, ‘The ICSID Convention: A Commentary’, (CUP, UK 2001), pp. 1100

³⁶ See J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, UK 2005).

³⁷ *Salini v. Morocco*, Decision on Jurisdiction, 23 July 2001, paras. 60–62; *Vivendi v Argentina*, Award, 21 November 2000 paras. 41, 46.

³⁸ A. Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’, 2 ICSID Review 287 (1987) pp. 298.

³⁹ C. Schreuer, *The ICSID Convention: A Commentary*, (CUP, UK 2001) pp. 1100.

After the effect of binding force and finality of the awards to the parties under Article 53, the next step is to recognise, enforce and execute an arbitral award under Article 54. Article 54 provides that:

- “(1) Each Contracting state shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state.
- A contracting state with a deferral 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) A party seeking recognition or enforcement in the territories of a contracting state shall furnish to a competent court or other authority which such state shall have designated for this purpose a copy of the award certified by the Secretary-general. Each contracting state shall notify the Secretary-general of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
- (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the state in whose territories such execution is sought.”

Whilst Article 53(1) requires ‘the parties’ to an arbitration, which are the state and the investor, to abide by and comply with the arbitral award, Article 54(1) obliges all ‘contracting states’ to recognise and ensure the enforcement of arbitral awards rendered pursuant to the Convention as if the award was a final judgment of a court in that state.⁴⁰ Therefore, these two Articles are directed to different entities and impose different obligations, which should not be conflated. Accordingly, the text of the obligation to comply under Article 53 is automatic and independent, which is not conditional upon the enforcement mechanisms under Article 54.⁴¹ However, Article 54 comes into play only in the event of non-compliance of the losing party under Article 53 and a refusal to pay an

⁴⁰ S. A. Alexandrov, ‘Enforcement of ICSID Awards: Article 53 and 54 of the ICSID Convention’ in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the Twenty-First Century: Essay in Honour of Christoph Schreuer* (OUP, New York 2009) pp.323.

⁴¹ A. Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’, 2 ICSID Review 287 (1987) pp 288; A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 Recueil des Cours 331, 299 (1972-II).

arbitral award. Broches asserts that “as Article 53 affirmed the absolute binding force of the award on the international law level, Article 54 affirms its external finality, i.e., vis-à-vis domestic court. The award is *res judicata* in each and every contracting state”⁴²

Before turning to analyse Article 55 of the ICSID Convention, it is essential to highlight the term ‘enforcement’ and ‘execution’ since the ICSID Convention uses both words in the same provision. This terminology has led to confusion as to whether the word ‘enforcement’ and ‘execution’ have different meanings.⁴³ Article 54(1) and Article 54(2) only refer to ‘enforcement’, whereas Article 54(3) refers to ‘execution’. The distinction between the ‘enforcement’ and ‘execution’ has raised some concerns. However, there is no clear rule whether these terms should be treated either synonymously or separately.⁴⁴

The French and Spanish texts of the Convention do not distinguish between ‘enforcement’ and ‘execution’. On this matter, Professor Schreuer has suggested that the appropriate way to interpret and reconcile Article 54 is by resorting to the 1969 Vienna Convention on the Law of Treaties. It, therefore, could be said that the words ‘enforcement’ and ‘execution’ are essentially identical in meaning⁴⁵. Most courts and authors support this trend by using the term ‘enforcement’ as a broad concept to embrace all steps, which are ‘recognition’, ‘enforcement’ and ‘execution’ covered by Article 54.

Last but not least, Article 54(3) deals with the execution of arbitral awards. This provision provides contracting states with the possibility for review of arbitral awards at the execution stage using their municipal law concerning execution in which such a review under the ICSID Convention only allows on the procedural grounds, for instance, a sovereign immunity defence, not on the merits of the award. Accordingly, the

⁴² A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 *Recueil des Cours* 331, 400 (1972-II).

⁴³ See N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration*, (OUP, New York 2005) pp. 627.

⁴⁴ J. M. Hunter and J. G. Olmedo, ‘Enforcement/Execution of ICSID Awards against Reluctant States’, 12 *J. World Investment & Trade* 307 (2011) 311.

⁴⁵ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp. 1135.

contracting states have the total discretion to determine whether arbitral awards could be executed against particular assets under their municipal laws.⁴⁶ The reasoning behind this provision has been explained in The Report of the Executive Directors to the ICSID Convention:

“...Because of the different legal techniques followed in common law and civil law jurisdictions and the different judicial systems found in unitary and federal or other non-unitary states, Article 54 does not prescribe any particular method to be followed in its domestic implementation, but requires each contracting state to meet the requirements of the Article in accordance with its own legal system.”⁴⁷

This explanation confirms the determination of the law, of enforcing states, that governs the execution arbitral awards in a municipal court, which is different in each country. However, Article 54(3) does not allow the execution law in the enforcing state to review an arbitral award, but only to serve as a procedural bar. Consequently, it does not affect the finality and enforceability of the ICSID awards without judicial interference.⁴⁸ Professor Schreuer has been clear on this point that “the impossibility to enforce an ICSID award as a consequence of the law concerning the execution of judgments in one or several states in no way affects the obligation of the party to the ICSID arbitration to abide by and comply with the award in accordance with Art.53(1).”⁴⁹ Accordingly, the failure of a state party to recognise and enforce an award would be in breach of a treaty obligation leading to a consequence of state responsibility, including diplomatic protection. This illustrates the advantages of ICSID awards over other types of arbitral awards.

The last provision of the recognition and enforcement of the award section under the ICSID Convention is Article 55, which states:

⁴⁶ J. M. Hunter and J. G. Olmedo, ‘Enforcement/Execution of ICSID Awards against Reluctant States’, 12 *J. World Investment & Trade* 307 (2011) 311.

⁴⁷ See A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 *Recueil des Cours* 331, 401 (1972-II).

⁴⁸ G. Delaume, ‘ICSID Arbitration in Practice’, 2 *International Tax & Business Law* 58, 74 (1984).

⁴⁹ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp. 1149.

“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 any foreign state from execution.”

The purpose of this provision is to emphasise and clarify Article 54, being that the execution of an arbitral award is subject to the domestic law of the enforcing state, with no exception, and that the award should be equated as a final judgment of a domestic court. The domestic law concerning execution, inevitably, includes the law on sovereign immunity. Accordingly, the effectiveness of such a measure of execution depends on the municipal law on sovereign immunity prevailing in the country where the execution is sought.⁵⁰ This is because the ICSID Convention does not alter or supersede the rules of immunity from execution applicable in contracting states under their municipal law and arbitral awards, therefore, will be treated differently amongst contracting states.⁵¹

The Report of the Executive Directors on the Convention has given the explanation on this Article that:

“The doctrine of sovereign immunity may prevent the forced execution in a state of judgments obtained against foreign states or against the state in which the execution is sought. Article 54 requires contracting states to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases in which final judgments could not be executed.”

As indicated above, it could be suggested that it may be the aim of the provision to prevent forced execution, particularly execution against the non-commercial or public assets of enforcing states⁵² and thus Article 55 does no more than acknowledge a state practice on sovereign immunity from execution.⁵³ Insofar as the sovereign immunity from execution is concerned, the meaning and the scope of sovereign immunity from

⁵⁰ V. O. Nmehielle, ‘Enforcing arbitration awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)’, 7 Annual Survey of International & Comparative Law 21, 29 (2001).

⁵¹ G. Delaume, ‘ICSID Arbitration in Practice’, 2 International Tax & Business Law 58, 74 (1984).

⁵² A. Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’, 2 ICSID Review 287 (1987) pp. 329.

⁵³ A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 Recueil des Cours 331, 404 (1972-II).

execution still lacks consensus between developing and developed states, given that the drafting stage of the Convention and the situation remains the same. The drafters of the Convention were concerned the inclusion of waiver of sovereign immunity from execution but “it would have run into the determined opposition of developing countries and would have jeopardized the wide ratification of the Convention.”⁵⁴ It is accepted that at the time of drafting it was not appropriate time for such a drastic step; thus, Article 55 leaves the law on sovereignty immunity unaffected. Even though the solution expressed in Article 55 might be regrettable, it is not avoidable.

3. The New York Convention

(a) Background

Apart from the ICSID Convention, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 also plays an important role as an effective tool in providing and determining recognition and enforcement of arbitral awards, particularly in relation to commercially related cases on a contractual basis.⁵⁵ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,⁵⁶ so called ‘the New York Convention’, was adopted by the United Nations. It entered into force on 7 June 1959 and currently has 149 contracting states.⁵⁷ The New York Convention generally aims to facilitate the recognition and enforcement of arbitral awards between private parties.⁵⁸ Even though the New York Convention does not explicitly refer to the state as a party, it covers the enforcement against sovereign states as well. However, this proposition should not be overstated since, the enforcement of

⁵⁴ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009), pp. 1154, Citing on A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours 331, 403 (1972-II).

⁵⁵ See A. Jan van den Berg, ‘The New York Convention of 1958 : An Overview; Yearbook Vol. XXVIII (2003) < http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf > ; A. Asouzu, *International Commercial Arbitration and African States : Practice, Participation, and Institutional Development* (CUP, New York 2011).

⁵⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 330 U.N.T.S. 38, 21 U.S.T. 2517.

⁵⁷ As of 2013, the contracting states are listed at: <http://www.newyorkconvention.org/contracting-states>.

⁵⁸ A. J. van den Berg, ‘The New York Arbitration Convention of 1958: Towards Uniform Judicial Interpretation’, 277-282 (1981).

arbitral awards against sovereign states might raise some problems. This is due to the fact that the New York Convention is silent on the issue of sovereign immunity.⁵⁹

Fundamentally, the New York Convention applies to foreign arbitral awards rendered in accordance with a written arbitration agreement made in a country other than an enforcing state.⁶⁰ Unlike the domestic nature of an ICSID award, the award rendered under the New York Convention is not deemed as a domestic award by the enforcing state, but rather recognised as a foreign arbitral award.⁶¹ Therefore, it is necessary to compare the differing provision of rules under these two Conventions. These rules can be seen in the applicable laws for the enforcement of arbitral awards before municipal courts in which they have an impact on the effectiveness of arbitral awards.

(b) The enforcement of New York Convention awards

Generally, the contracting states are required to recognise and enforce arbitral awards in accordance with their rules of procedure provided in Article III. This provides:

“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.”⁶²

The binding force and recognition of the New York Convention award is subject to the procedural rules in a state where the arbitral award is sought. This is contrary to the

⁵⁹ H. Fox, ‘State Immunity and the New York Convention’ in E. Gaillard and D. Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, UK 2009) pp. 829.

⁶⁰ Art. I(1) of the New York Convention. It says:

“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”

⁶¹ See A. Bucher, ‘Court Intervention in Arbitration’ in R. B. Lillich and C. N. Brower (eds.), *International Arbitration in the 21st Century: Towards “Judicialization and Uniformity”?: the Twelfth Sokol Colloquium* (Transnational Publisher, New York 1994) pp.29.

⁶² Art. III of the New York Convention.

ICSID award, which is automatically recognised in a municipal court and independent from a municipal court's review of the case at the stage of recognition and enforcement.

The most distinctive characteristic of the New York Convention is to provide the list of grounds on which the recognition and enforcement may be refused.⁶³ These grounds for refusal can be divided into two functions: the refusal proven by the respondent and the refusal raised by the court on a public policy concern.⁶⁴

The first main feature of grounds for refusal is mentioned in Article V(1) to be proven by the party against the award. These grounds are listed in short:

- Lack of a valid arbitration agreement (Article V(1)(a))
- Violation of due process (Article V(1)(b))
- Excess of the arbitral tribunal's authority (Article V(1)(c))
- Irregularity in the composition of the arbitral tribunal or arbitral

⁶³ Grounds for refusing enforcement under Article V:

“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:

(a) 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

(b) 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

(c) 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced; or

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

(e) 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.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

⁶⁴ A. Van Den Berg, *The New York Convention of 1958: An Overview* pp. 13.

procedure (Article V(1)(d))

- The award has not yet become binding, set aside or suspended (Article V(1)(e)).

In addition, the second feature of the grounds could be raised by a court to refuse enforcement for reasons of public policy as provided for in Article V(2). This public policy exception has been considered as a ‘safety valve’ of the New York Convention, due to the varied interpretation in each contracting state’s legislation or judicial process.⁶⁵ Consequently, these procedural and substantive grounds for refusal inevitably restrict the enforceability of arbitral awards in a municipal court, which will be analysed in the next section.

4. The Main Distinctions between the ICSID and New York Convention on the Enforcement of Arbitral Awards

The previous section has provided a background of the ICSID Convention and the New York Convention, it demonstrates that the applicable laws relating to the enforcement of arbitral awards in both procedural and substantive law are significantly different between these two International Conventions. In other words, each mechanism provides a different route to the enforcing arbitral awards. Accordingly, the distinction of applicable laws might result in a different outcome and effectiveness of the enforcement of arbitral awards through international conventions before a municipal court. This has raised many obstacles and limitations during the process, which will be predominately dealt with in this section.

Insofar as the enforcement of arbitral awards is mainly concerned, it is necessary to examine the theoretical aspect of the relationship between the ICSID and New York Convention. On the one hand, the New York Convention is subject to the reciprocity reservation, in that it only enforces ‘foreign arbitral awards’ made in the territory of a

⁶⁵ S. Choi, ‘Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions’, 28 *International Law and Politics* 175 (1995-1996) pp. 197. (Judicial Enforcement of Arbitration Awards)

Contracting state, with a necessity that the award originates from a commercial dispute between private parties.⁶⁶ The ICSID Convention, on the other hand, governs arbitral awards rendered in proceedings originating from investment disputes, between a national of one Contracting state and another; the award being enforceable within any territory of all state parties.⁶⁷

In consideration of the nature of the parties to the dispute, although the New York Convention does not explicitly refer to a state as a party to a dispute, it undoubtedly permits the enforcement of a foreign arbitral award against sovereign states.⁶⁸ It might be thus viewed that the New York Convention provides the widest scope of application compared with the ICSID Convention, which is limited between a ‘foreign national’ and a ‘state’. Furthermore, most arbitral awards, conducted under the ad hoc arbitrations by arbitration rules: ICC Rules, LCIA Rules, UNCITRAL Rules, or ICSID Additional Facility Rules, will be mostly subject to the enforcement pursuant to the New York Convention.⁶⁹ However, only arbitral awards in the specific field of investment, conducted under the auspice of ICSID, will be subject to the enforcement under the ICSID Convention.⁷⁰ Accordingly, it is not surprising that there are a scant number of cases or court decisions under the ICSID Convention.⁷¹

From this aspect, it is likely that there are no conflicts as to the applicability between the ICSID and the New York Convention, since a successful claimant will be able to enforce an arbitral award in a ‘multiple jurisdiction’ or even a ‘multiple proceeding’ before a

⁶⁶ Art. I (3) of the New York Convention; N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* (OUP, New York 2005) pp. 634.

⁶⁷ Art. 52 of the ICSID Convention; See C. F. Dugan, D. Wallace, Jr., N. D. Rubins and B. Sabahi, *Investor-State Arbitration* (OUP, New York 2008).

⁶⁸ Sovereign Immunity as a Barrier (n 1), pp. 218; Some Recent Problems in the Practice of Enforcement (n 24), pp. 441.

⁶⁹ A. K. Bjorklund, ‘State immunity and the Enforcement of Investor-State Arbitral Awards’, in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds), *International Investment Law for the 21st century: Essays in honour of Christopher Schreuer* (OUP, New York 2009), pp. 303

⁷⁰ See M. Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, The Netherlands 2000).

⁷¹ E. Kehoe and P. Maslo, ‘Trends in International Investment Agreements 2009/2010: Recent Steps in the Evolution of Bilateral Investment Treaties and the UNCITRAL Arbitration Rules in K. Sauvant, *Yearbook on International Investment Law & Policy 2010-2011* (OUP, New York 2012) pp. 37.

municipal court of their Contracting states.⁷² However, this special characteristic of the enforcement of arbitral awards under international conventions could lead to abuse by investors initiating proceedings in a number of forums, to ensure that their rights will be all protected.⁷³ In practice, the process of recognition and enforcement of arbitral awards by means of international conventions is not independent from municipal law and the municipal court system,⁷⁴ which operates under specific procedural and substantive rules. Therefore, although the international conventions are aimed to secure effectiveness and uniformity in the enforcement of arbitral awards in most trading countries throughout the world, the process of enforcement adopted in each municipal court will vary from country to country.

Additionally, the mechanism of enforcement between the ICSID and New York Convention is quite different due to its provisions adopted in domestic courts, which will result in a different outcome of arbitral awards. Therefore, this raises the question as to whether the application of the ICSID and New York Convention guarantees the effectiveness of enforcement and provide a uniform standard in limiting a court's discretion to refuse an arbitral award.⁷⁵ Before answering this question, it is important to emphasise the distinction between compliance with international conventions under the principle of *pacta sunt servanda* and the procedural issues of the enforcement of arbitral awards. This is due to the fact that the problem of enforcement is a separate issue from a non-compliance with a treaty obligation. Alexandroff and Laird have clarified this distinction in that “while compliance is an international treaty concept concerning the good faith performance of treaty obligations, the question of enforcement of arbitral awards has largely involved the challenge by state respondents to adverse investment awards in domestic courts.”⁷⁶

⁷² Some Recent Problems in the Practice of Enforcement (n 24), pp. 441.

⁷³ H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration* (OUP, UK 2013) pp.1-2.

⁷⁴ N. Blackaby, C. Partasides, A. Redfern and M. hunter, *Redfern and hunter on International Arbitration*, (OUP, New York 2005) pp. 632.

Judicial Enforcement of Arbitration Awards (n 65), pp. 176.

⁷⁶ A. Alexandroff and I. Laird, ‘Compliance and Enforcement’ in P. Muchlinski et al (eds) *The Oxford Handbook of International Investment Law* (2008). (OUP, UK 2008) pp. 1172-1173.

As far as the procedural and substantive challenges by a domestic court are concerned, the three problems discussed hereafter are chosen as they raise a particular practical relevance under both Conventions. Firstly, there is the question of the applicable law, which governs the enforcement of arbitral awards. This raises the dilemma between denationalised arbitration of the New York Convention and delocalised arbitration of the ICSID Convention. This unique arbitration mechanism of each convention leads to the second problem, which is the finality and the review of arbitral awards in domestic courts. Domestic courts in host states have different conditions when interpreting and enforcing an arbitral award, depending on the provisions stipulated in each convention. Lastly, the claim of public policy may be considered a safety valve for a municipal court in order to refuse the enforcement of an arbitral award. However, the New York Convention and the ICSID Convention provide a different set of rules in dealing with these claims, which results in a varying effectiveness in enforcing an arbitral award at a final stage.

(a) The applicable law governing the enforcement of arbitral awards

The applicable law governing the enforcement of arbitral awards can be categorised in two ways: procedural law and substantive law. Generally speaking, most investment treaties or commercial contracts entered into between two parties contain an express choice of law, specifically an ‘arbitration clause’, for the resolution of the disputes.⁷⁷ This is based on the assumption that the parties have an autonomy to choose the law as well as the courts or tribunals, other than the municipal laws and courts of the host state *lex fori*, which is applicable to investment treaties or contracts.⁷⁸ Due to the fact that an investment dispute involves a sovereign act of state as the subject matter, the applicable law governing the dispute is necessarily a ‘hybrid mechanism’ or ‘mixed character’ between international and municipal law. This is because the nature of the

⁷⁷ Z. Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’, 74 Br. Y.B. Int'l L. 151 (2003) pp.194.

⁷⁸ M. Sornarajah, *The international law on foreign investment* (CUP, UK 2010) pp. 284-305.

dispute is based on public-private interest factors.⁷⁹

In addition, this grey area of public-private interest in an international arbitration is a matter of an individual claiming against a state in a regulatory dispute. Therefore, whilst a private or commercial interest is at the heart of the jurisdiction governed by a municipal commercial law in a host state, a public interest is also considered in order to protect a state interest governed by an international treaty or international law. In this regard, the applicable law governing this investment dispute could not only be rooted in a contractual basis, but may also refer to a public law and international law basis. In order to serve and protect the interest of both a state and a private party, the ICSID and the New York Convention provide a different route to apply for the applicable law in both procedural and substantive rules. As will be seen later, the ICSID and the New York Convention serve different purposes in international arbitration. The ICSID Convention is chiefly used in order to resolve a dispute between a private party, particularly a foreign investor, and a state acting in a sovereign power in a so-called ‘investment treaty arbitration.’ However, the New York Convention particularly engages in a dispute between private parties, including a dispute between a private party and a state party assumed to be acting in a private capacity in a so-called ‘international commercial arbitration’.⁸⁰

As briefly mentioned earlier, the ICSID Convention and ICSID awards are independent from municipal law and outside of the jurisdiction of a municipal court for the enforcement of an arbitral award.⁸¹ In the context of the New York Convention, most

⁷⁹ Z. Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’, 74 Br. Y.B. Int’l L. 151 (2003) pp. 195; J. Lew, ‘Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards’ (New York: Oceana Publication, 1978) at p.21; See also S. J. Toope, *Mixed International Arbitration Studies in Arbitration between States and Private Persons* (Grotius Publication Limited, London 1990).

⁸⁰ Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims Against the State’, 56 ICLQ 371 (2007), pp.372.

⁸¹ See Art.44 of the ICSID Convention; Y. Banifatemi, ‘The Law Applicable in Investment Treaty Arbitration’, in Katia Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, (OUP, New York 2010), pp. 191.; C. Brown, ‘Procedure on Investment Treaty Arbitration and the Relevance of Comparative Public Law’, in S. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, UK 2010), pp. 659.

arbitral awards are governed by the arbitration law where an arbitration is taking place; the *lex loci arbitri*.⁸² This distinctive nature of the ICSID arbitration provides autonomous procedural rules, regardless of the applicable law in a host state. These procedural rules are pursuant to the ICSID Convention and preventively bind the municipal courts of a Contracting state from exercising jurisdiction on a matter of the interpretation of the arbitration agreement, the arbitration procedure and especially the challenge to enforcement of arbitral awards.⁸³ Hence, it could be said that the removal of a foreign investment dispute from the sphere of a host state law and court applied by ICSID tribunal is ‘internationalised’ in the sense that international law is the *lex fori* under the principle of *pacta sunt servanda*.⁸⁴ This is stipulated in Article 42 (1) that:

“(1) The Tribunal shall decide in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting state party to the dispute (including its rules on conflict of laws) and such rules of international law as may be applicable”⁸⁵

In a matter of conflict of laws, the relevance to the international law of the ICSID Convention could be explained by referring to Article 25 and Article 44, which provide the fundamental condition, being the giving of consent by a state to the jurisdiction of the tribunal and providing its own procedural proceedings pursuant to ICSID Arbitration

⁸² Some Recent Problems in the Practice of Enforcement (n 24), pp. 442; Art. III of the New York Convention; See W. Park, ‘The Lex Loci Arbitri and International Commercial Arbitration’, 32 ICLQ 21 (1983); W. Park and J. Paulsson, ‘The Binding Force of International Arbitral Awards’, 23 Virginia Journal of International Law 253 (1983); R. Goode, ‘The Role of the Lex Loci Arbitri in International Commercial Arbitration’, 17(1) Arbitration International 19 (2001).

⁸³ Z. Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’, 74 Br. Y.B. Int'l L. 151 (2003) pp. 219; G. Petrochilos, *Procedural Law in International Arbitration* (OUP, New York 2004) pp. 252; Art.54 of the ICSID Convention.; See also L. Mistelis, ‘Delocalization and Its Relevance in Post-award Review’, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 144/2013; A. Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’, 2 ICSID Review 287 (1987); I. Shihata and A. Parra, ‘Applicable substantive law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention’ 9 ICSID Rev.—FILJ 183 (1994); A.R. Parra, ‘Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, 12 ICSID Review-FILJ 287, 332 (1997).

⁸⁴ O. Spiermann, ‘Applicable Law’ in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (2008) (OUP, UK 2008) pp. 93; M. Sornarajah, *The international law on foreign investment* (CUP, UK 2010) pp. 289; See J. Cherian, ‘Investment Contracts and Arbitration: The World Bank Convention on the Settlement of Investment Disputes’ (Leyden, A.W. Sijthoff 1975) pp. 89.

⁸⁵ Art. 42(1) of the ICSID Convention.

Rules, respectively.⁸⁶ Therefore, the procedural rules for the ICSID awards are entirely insulated from a municipal law system. The municipal court of contracting states is under an obligation to refrain from exercising a jurisdiction over a dispute and award.⁸⁷ This jurisprudence could be found in the cases of *Amco v. Indonesia*⁸⁸ and *Klockner v. Cameroon*,⁸⁹ where the tribunals applied rules of international law in lieu of any domestic law provisions that would be inconsistent with the requirements of international law.⁹⁰ As stated by Hirsch, “the arbitral awards of the Centre and the works of prominent scholars have determined that when there is a contradiction between the municipal law of the host state and international law, the latter prevails.”⁹¹

⁸⁶ A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 *Recueil des Cours* 331, 348 (1972-II), pp. 352.; O. Spiermann, ‘Applicable Law’ in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (2008) (OUP, UK 2008) pp. 115; See also *CMS Gas Transmission v. Argentina*, Decision on Jurisdiction, 17 July 2003, 7 ICSID Reports 494, at para 88, *Azurix Corp v. Argentina*, Decision on Jurisdiction, 8 December 2003, at para 48-50, *Wena v Egypt*, Award, 17 February 2000, 5 ICSID Reports 157, at para 104.

⁸⁷ Z. Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’, 74 *Br. Y.B. Int'l L.* 151 (2003) pp. 219.

⁸⁸ *Amco v. Indonesia*, Case no. ARB/81/1, Ad hoc Committee Decision on the Application on Annulment, 16 May 1986, 1 ICSID Reports 569, at 580. It states

“Article 42(1) refers to the application of host-state law and international law. If there are no relevant host-state laws on a particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must be checked against international laws, which will prevail in case of conflict. Thus international law is fully applicable and to classify its role as ‘only’ supplemental and corrective’ seems a distinction without a difference.”

⁸⁹ *Klockner v Cameroon*, Case no. ARB/81/2, Ad hoc Committee Decision on Annulment, 3 May 1985, 2 ICSID Reports 95, 122-5, 156 and 159; This jurisprudence could be also found in non-ICSID arbitrations: *Saudi Arabia v Arabian American Oil Co. (ARAMCO)* [1958] 27 ILR 117, *Sapphire International Petroleum v National Iranian Oil Co.* [1963] 35 ILR 136; *British Petroleum Exploration Co. v Libyan Arab Republic* (1973) 53 ILR 297; *Texaco Overseas Petroleum & California Asiatic Oil Co. v. Libya (TOPCO)* (1978) 17 ILM 1; and *Libyan American Oil Co. v Libyan Arab Republic (LIAMCO)* (1978) 20 ILM 1, where the tribunals held that “international law governed the arbitration between a private party and a sovereign state rather than a municipal law at the seat of arbitration as the *lex loci arbitri*.”

⁹⁰ See E. Gaillard and Y. Banifatemi, ‘The Meaning of “and” in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process.’, 18 ICSID Review 375 (2003); I. Shihata and A. Parra, ‘Applicable substantive law in Disputes between States and Private Foreign Parties: The Case of Arbitration under the ICSID Convention’ 9 ICSID Rev.—FILJ 183 (1994).

⁹¹ M. Hirsch, *The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes* (Nijhoff, The Netherlands 1993) pp. 140; This proposition is also supported by C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp. 612; A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 *Recueil des Cours* 331, 348 (1972-II) pp. 392; G. Delaume, ‘State Contracts and Transnational Arbitration’, 75 *AJIL* 784 (1981) pp.786.

Nevertheless, although the ICSID arbitration is substantially delocalised from municipal court intervention, due to its nature of a treaty-based and state-involved dispute system, it does not mean that international law is entirely regulating the conduct of the ICSID tribunal.⁹² Rather, the ICSID arbitration makes reference to the applicable municipal law arising only in the context of execution, in which the process of a tribunal might be attacked under the municipal law and municipal court, where the process of execution takes place.⁹³ Hence, Chukwumerjie summarizes that:

“While the former [applicable procedural law] governs the procedure for the conduct of the arbitration proceedings and the challenge and annulment of any ensuing award, the latter [applicable substantive law] provides the rules for the resolution of the substantive disputes between the disputes. The delocalization of procedural law does not mean that international law should prevail in cases of conflicts with the otherwise applicable municipal law.”⁹⁴

In view of the nature of ICSID arbitration, it is valid to categorise the ICSID arbitration and ICSID arbitration award as ‘international’. Luzzatto explains this position that:

“...arbitration under the same is international in character in that it is organized and regulated only by international rules of the convention, to the exclusion of any reference to any municipal law (and to international law) except those specifically contained in the text of the convention. Arbitration under those rules rests entirely on the international treaty. It is therefore independent from any reference to other laws and may be qualified as international...”⁹⁵

Against this background, the issue of delocalized arbitration and the so called ‘anational’ award, which is detached from a national arbitration law, are much more problematic when it comes to enforcement under the New York Convention. As it has

⁹² O. Chukwumerjie, ‘International Law and Article 42 of the ICSID Convention’, 14 ICSID Rev.-FIJL 79 (1997) pp. 82.

⁹³ G. Petrochilos, *Procedural Law in International Arbitration* (OUP, New York 2004) pp. 253; C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp. 674.

⁹⁴ O. Chukwumerjie, ‘International Law and Article 42 of the ICSID Convention’, 14 ICSID Rev.-FIJL 79 (1997) pp. 82.

⁹⁵ R. Luzzatto, ‘International Commercial Arbitration and the Municipal Law of States’, 157 Recueil Des Cours 13, (1977) pp. 98.

been discussed in the question whether the New York Convention award applies to the term of ‘anational’ or ‘denationalised’ award,⁹⁶ the *SEEE v Yugoslavia*⁹⁷ case illustrates a difficulty to enforce an arbitral award in both Dutch and French court proceedings⁹⁸ since it depends on the national arbitration law. In this case, the award made in the Canton of Vaud in Switzerland was given back on the declaration that it was not an arbitral award within a meaning specified by the Vaud arbitration law. Following the Vaud Court decision, the Dutch Supreme Court and the French Court of Appeal of Rouen accepted the theory that the New York Convention applies to an ‘anational’ award, however, coming to a different decision in enforcing the same award. It is interesting to highlight that the Dutch Supreme Court in its second decision in 1975 considered the award as not being ‘anational’ award and thereafter refused the enforcement of arbitral award,⁹⁹ whereas the French Court of Appeal of Rouen accepted the ‘anational’ nature of an arbitral award and ruled that the decision was binding on the parties in pursuant to the New York Convention.¹⁰⁰

Choi has argued that “the New York Convention has failed to limit the role of the courts in uniformly determining which arbitral awards are “not domestic” and thus encompassed by the Convention.”¹⁰¹ This provides a municipal court with far reaching interpretative powers in order to determine what arbitral awards can be enforced through the New York Convention. Under this circumstance it is significant where the location seat of the arbitration is, and thus where an arbitral award is rendered. This may lead to forum shopping for countries with the most inclusive view of the scope of the New York Convention in which a municipal court has a supervisory control to both an arbitration

⁹⁶ Some Recent Problems in the Practice of Enforcement (n 24), pp. 442.

⁹⁷ *SEEE v. Yugoslavia*, Judgment of 13 November 1984, Cour d’appel de Rouen, 112 Journal Du Droit International 473 (1985); *SEEE v Yugoslavia*, Judgment of Dutch Supreme Court on October 26, 1973.

⁹⁸ Some Recent Problems in the Practice of Enforcement (n 24).

⁹⁹ Judgment of October November 7, 1975, Hoge Raad, Nederlandse Jurisprudentie, No. 174 (1976), reported in 1 Y.B. Com. Arb. 198 (1976).

¹⁰⁰ *SEEE v. Banaue Mondiale, Repinlique de Yougoslavie, Etat Francais*, Judgment of November 13, 1984, Cour d’appel, Rouen, 1985 Revue de l’Arbitrage 115, reported in 11 Y.B. Com. Arb. 491 (1986).

¹⁰¹ Judicial Enforcement of Arbitration Awards (n 65), pp. 190.

process and an enforcement of arbitral awards.¹⁰² Accordingly, it is difficult in pursuing a denationalised or delocalised arbitration due to the fact that “national courts are always asked for support or to intervene... This is why arbitration cannot be fully delocalized from the national law”¹⁰³ as in the word of Professor Loukas Mistelis.

Hence, it could be summarized that ‘denationalized’ arbitration and an ‘anational’ award governed under international law cannot be made under the New York Convention, since the procedural and substantive law falls within the regime of the municipal law in a municipal court. Though the differences and limitations between these two conventions do exist, with regards to the applicable law on the enforcement of arbitral awards, both international conventions are designed and aimed to settle disputes and enforce arbitral awards on the international plane with less interference by a state and municipal court and on the pro-enforcement bias.¹⁰⁴

In respect of such an attempt by the drafters, it is a valid assertion that ICSID, appears to be the nearest arbitration mechanism that operates closely to the ‘internationalization’ or ‘delocalization’ theory; even it applies a municipal law only in the irregularities of the execution process. Consequently, it is best categorised as a ‘mixed character’ or ‘hybridization’ of arbitration in the way that Lew correctly summarized: “ICSID arbitration is not a pure international arbitration; rather it falls somewhere between public and private international arbitration. It has for this reason been variously described as quasi-international or semi-international arbitration.”¹⁰⁵

¹⁰² *ibid.*197; G. Delaume, ‘Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies’, 8 ICSID Review-FILJ 29. 48 (1993); Z. Douglas, ‘The Hybrid Foundations of Investment Treaty Arbitration’, 74 Br. Y.B. Int’l L. 151 (2003) pp. 219.

¹⁰³ L. Mistelis, ‘Delocalization and Its Relevance in Post-award Review’, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 144/2014, pp.172

¹⁰⁴ N. Blackaby, C. Partasides, A. Redfern and M. Hunter, *Redfern and Hunter on International Arbitration* (OUP, New York 2005) pp.634; G. Petrochilos, *Procedural Law in International Arbitration* (OUP, New York 2004) pp. 257.

¹⁰⁵ J. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications, New York 1978) at pp. 21.

(b) The finality and the review of arbitral awards in domestic courts

Without any doubt, the effectiveness of investor-state arbitration is illustrated by the enforceability of arbitral awards. One of the main problems in international arbitration is the difficulty of ensuring the finality of arbitral awards.¹⁰⁶ This is because of the recent trend that a municipal court of a host state or an ad hoc committee continues to review the merit of the awards or to refuse the enforcement on several grounds.¹⁰⁷ With an increasing number of cases emphasizing the review of arbitral awards, it has been debated whether there is a difference in interpretation and applicability regarding the finality of arbitral awards between international conventions on the enforcement of arbitral awards. That is to say, it is necessary to examine whether or not the review process between a municipal court, pursuant to the New York Convention, and an ad hoc committee, pursuant to the ICSID Convention, will be conducted by the same procedural and substantive rules and thereafter reach the same outcome.

Article 53 of the ICSID Convention has affirmed the self-contained and exhaustive nature of review of the ICSID Convention, which is independent from a national court's procedure when reviewing of arbitral awards. The review procedure under the ICSID Convention particularly restricts the review of post-award procedures provided only in this Convention: interpretation, revision and annulment.¹⁰⁸ The independent nature of the ICSID provisions puts the ICSID awards on the same grounding as any domestic judgment, creating the obligation to recognise the award as a

¹⁰⁶ M.B. Feldman, 'The Annulment Proceedings and the Finality of ICSID Awards', 2 ICSID Review-FILJ 85 (1987).

¹⁰⁷ C. Schreuer, 'From ICSID Annulment to Appeal Half Way Down to Slippery Slope', 10 International Courts and Tribunals 211 (2011); E Baldwin M Kantor and M Nolan, 'Limit to enforcement of ICSID awards', 23 J Intl Arb 1 (2006) pp. 3-5; See some well known cases on this issue; *Benvenuti & Bonfant v Congo*, ICSID case no. ARB/77/2, Award, August 8, 1980; *LETCO v Liberia*, ICSID case no. ARB/83/2, Award, March 31, 1986; *SOABI v Senegal*, ICSID case no. ARB/82/1, Award, February 25, 1988.; *AIG Capital Partners v Kazakhstan* [2005] EWHC Comm. 2239, October 20, 2005.; *Sedelmayer v Russian Federation*, Stockholm Chamber of Commerce, Decision on Jurisdiction and Final Award, July 7, 1998.

¹⁰⁸ *MINE v Guinea*, Decision on Annulment, 22 December 1989, para 4.02, it states "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"; See Art. 50-52 of the ICSID Convention.; A. Giardina, 'ICSID: A Self-contained, non-National Review System' in R. B. Lillich and C. N. Brower (eds), *International Arbitration in the 21st Century: Towards "Judicialization and Uniformity"?: the Twelfth Sokol Colloquium* (Transnational Publisher, New York 1994) pp. 199.; C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp. 1102-1103.

final judgment and not subject to review.¹⁰⁹ However, the review of arbitral awards under the ICSID Convention is possibly conducted only under its own internal appeal procedure, not through a municipal court at the seat of the arbitration.¹¹⁰ Article 52(1) lists the grounds of annulment to be determined by the ad hoc committee.¹¹¹ In the light of the self-contained regime for a limited review under Article 53, it is submitted that the arbitral awards under the ICSID Convention are prohibited from appeal to a municipal court under municipal law.¹¹² This means that the place of arbitration in ICSID proceeding is not relevant for the enforcement of an award and its validity, since it is final and delocalised from judicial control in municipal court.¹¹³ The autonomous review of the ICSID arbitration is substantially different from an arbitral award enforced in accordance with the New York Convention where it opens to be reviewed by a municipal court at the place of arbitration and a municipal court can set aside an arbitral award to be enforced. Therefore, a supervisory role of municipal courts in the enforcement of arbitral awards under the New York Convention has been eradicated in the ICSID Convention to prevent a municipal court intervention.

In contrast with the arbitral awards under the New York Convention, an arbitral award is subject to a municipal court review on a wide range of grounds.¹¹⁴ As mentioned above, Article V of the New York Convention authorizes a party to contest and a municipal court to review an arbitral award on both legitimacy of process and substantive

¹⁰⁹ A. Boralessa, 'Enforcement in the United States and United Kingdom of ICSID awards against the republic of Argentina: Obstacles that transnational corporations may face', 17 N.Y. Int'l L. Rev 53 (2004) pp. 57 (Enforcement in the United States and United Kingdom); Sovereign immunity as a bar (n 8), pp. 458.

¹¹⁰ M.B. Feldman, 'The Annulment Proceedings and the Finality of ICSID Awards', 2 ICSID Review-FILJ 85 (1987) pp.90.

¹¹¹ Article 52(1) of the ICSID Convention provides five specific grounds for the annulment:

- “(a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.”

¹¹² A. Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution', 2 ICSID Review 287 (1987) pp. 290.

¹¹³ C. Schreuer, 'The ICSID Convention: A Commentary' (CUP, UK 2001) pp. 1103.

¹¹⁴ E Baldwin M Kantor and M Nolan, 'Limit to enforcement of ICSID awards', 23 J Intl Arb 1 (2006), pp. 4.

accuracy of an arbitral award. Therefore, these procedural and substantive challenges set forth in the New York Convention may be brought into a municipal court under a forum state's arbitration law at the place of an arbitration or jurisdiction where the arbitral award is to be enforced.¹¹⁵ On this account, non-ICSID awards are not generally required to be treated as a final judgment of a domestic court of a host state; therefore, it could be subject to a review and challenge to an arbitral awards by a municipal court.

In the light of these two international conventions, the distinctive feature of the ICSID Convention offers more procedural advantage over the New York Convention and other instruments governing the recognition and enforcement of arbitral award. This is because they do not cover the enforcement stage in any provisions but leave it to the consideration of municipal courts, pursuant to municipal laws or applicable treaties.¹¹⁶ Therefore, the recognition of non-ICSID awards may be subject to certain conditions or review depending on the law of the country where the recognition is sought. Consequently, this would lead to the conclusion that the ICSID awards have a higher degree of finality than the New York Convention awards due to the fact that the Convention eliminates the review procedure in a municipal court by equating the ICSID awards to a final domestic judgment, opposed to foreign award under the New York Convention.¹¹⁷

The effectiveness of the ICSID procedure has been acknowledged by a municipal court in many countries. In *Bevenuti & Bonfant v. Congo*, the *Tribunal de Grande instance* of Paris granted the recognition of award confirmation *exequatur* to an investor,

¹¹⁵ Sovereign immunity as a bar (n 8), pp. 458; See N. Rubins, 'Judicial Review of Investment Arbitration Awards' in T. Weiler (eds), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Transnational Publisher, USA 2004) pp.359.

¹¹⁶ See A.R. Parra, 'Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, 12 ICSID Review-FILJ 287, 332 (1997).

¹¹⁷ G. R. Delaume, 'Decision: Decisions of Regional and Foreign Courts: France-Recognition of ICSID Awards-Sovereignty', 86 AM.J.INT'L. 138 (1992) pp. 139; G.R. Delaume, 'Recognition and Enforcement of State Contracts Awards in the United States: A Restatement, 91 AM.J.INT'L. 476 (1997) pp. 484; C. F. Dugan, D. Wallace, Jr., N. D. Rubins and B. Sabahi, *Investor-State Arbitration* (OUP, New York 2008) pp. 699; A. Broches, 'Observations on the Finality of ICSID Awards', 6 ICSID Review-FIJL 321 (1991) pp. 322; See also W. M. Reisman, 'The Breakdown of the Control Mechanism in ICSID Arbitration', 1989 Duke Law Journal 739 (1989).

but stipulated a limiting condition by requiring the award creditor first to seek the court's authorisation if they wished to seek a measure of execution on any Congolese assets located in France.¹¹⁸

On appeal, the Cour d'appel of Paris referred to Article 54 of the ICSID Convention and reversed the lower court's decision that the provision of Article 54 offers a straightforward procedure for a recognition and enforcement of the order of *exequatur* and the function of a municipal court of each contracting states is limited to only confirm the authenticity of an arbitral award verified by the ICSID Secretary-General.¹¹⁹ Further, the court also referred to Article 55 of the Convention regarding sovereign immunity from execution, holding that:

“The judge at first instance, acting on a request pursuant to Article 54 of the Convention of Washington, could not therefore, without exceeding his competence, become involved in the second stage, that of execution, to which the question of the immunity from execution of foreign state relates.

Consequently, that part of the order of 23 December 1980 of the President of Tribunal de Grande instance of Paris which is the object of this appeal must be deleted.”¹²⁰

According to the Cour d'appel of Paris, the order of *exequatur* by the lower court does not constitute a measure of execution. Rather, it is only a mere preliminary step to an execution and therefore the limiting condition was deleted.

Another similar case in the French courts' is *SOABI v Senegal*. The lower court in this case granted the recognition of an award. Senegal appealed this order and the Cour d'appel of Paris vacated the order of *exequatur*.¹²¹ The court relied on French domestic law and held that the execution of an arbitral award in France would be contrary to the international public policy with regards to the principle of immunity. The *exequatur*,

¹¹⁸ *Bevenuti & Bonfant v. Congo*, Judgment of December 23, 1980, Tribunal de Grande Instance de Paris; See also 108 Journal Du Droit International 843 (1981).

¹¹⁹ *Bevenuti & Bonfant v Congo*, Judgment of June 26, 1981, Cour d'Appel de Paris, 108 Journal Du Droit International 843 (1981).

¹²⁰ *ibid.*

¹²¹ *SOABI v. Senegal*, Cour d'Appel de Paris, 5 December 1989, 2 ICSID Reports 337; 117 Journal Du Droit International 141 (1990).

therefore, had to be vacated in accordance with the applicable provisions of the Code of Civil Procedure. The Cour de Cassation, however, annulled the Cour d'appel of Paris's decision and held that the principle of immunity from execution should not be considered during the recognition stage since Article 53 and Article 54 of the ICSID Convention created an autonomous regime for a recognition and execution, which excludes other applicable provisions of the Code of Civil Procedure in a place where an arbitral award is sought.¹²²

Meanwhile, the U.S. case of *LETCO v Liberia*, which dealt with the recognition and enforcement of an ICSID arbitral award also illustrates a problem of automatic recognition of arbitral award in a national court. In *LETCO*, although a United States District Court issued an *ex parte* order to recognise and execute an arbitral award, Liberia moved to vacate the *ex parte* order under the same court. The court referred to the obligation under Article 54 and held that:

“The fact that LETCO is a French entity and Liberia a foreign sovereign does not deprive the district court of subject matter jurisdiction. Thus, this court had jurisdiction to direct the entry of judgment against Liberia to enforce the pecuniary obligations of the arbitration award in favor of LETCO. The motion to vacate the judgment is denied.”¹²³

Therefore, the U.S. court denied the motion to vacate the award due to the fact that when Liberia entered into a concession contract with LETCO and consented to ICSID arbitration, it had waived its sovereign immunity from jurisdiction in the U.S. under the US FSIA.¹²⁴ Nevertheless, although the U.S. court recognised, in a way, the ICSID arbitral award, the reasoning of the court was in conflict with the automatic recognition of arbitral award under Article 54, since it first determined the sovereign immunity from jurisdiction in which the parties to the ICSID arbitration have waived by consenting to the ICSID arbitration. Furthermore, Article 55 of the ICSID Convention allows a municipal court to determine a municipal law on sovereign immunity in the

¹²² *SOABI v. Senegal*, Cour de Cassation, 11 June 1991, 2 ICSID Reports 341; 118 Journal Du Droit International 1005 (1990).

¹²³ *LETCO v Liberia*, United States District Court, Southern District of New York, Judgment, 12 December 1986, 2 ICSID Reports 367/8.

¹²⁴ *LETCO v Liberia*, 650 F. Supp, at 76.

execution stage only, not the recognition stage. By relying on this decision, it could set a fallacious precedent in the U.S. courts dealing with the recognition of the ICSID arbitral awards.¹²⁵

In accordance with the ICSID Convention, both the decisions in the French and U.S. courts distinguished between the recognition of awards and the execution of awards. Schreuer has commented on this point that “in most cases recognition will be seen as a first step towards enforcement or execution. As a consequence of recognition, the award becomes a valid title, which can form the basis of execution. Recognition is subject only to the requirements of the Convention and may not be refused for reasons of domestic law. By contrast, Art. 54(3) subjects execution to the modalities of the local law of the country where execution is sought.”¹²⁶ Although Article 55 provides an opportunity for a state to insert sovereign immunity as a procedural bar to thwart the enforcement and execution of arbitral awards against particular assets, a state would violate its compliance obligation under Article 53(1) of the ICSID Convention regardless of an ability of an investor to enforce such arbitral award against particular assets.¹²⁷ Therefore, the issue of sovereign immunity will only arise when the actual measure of execution is taken under Article 55 to enforce the award’s pecuniary obligations.¹²⁸

Meanwhile, a further concern in this area is the review of awards, which might threaten the finality of an arbitral awards.¹²⁹ In ICSID practice, the risk of undermining the finality of arbitral awards is illustrated by ad hoc committee decisions in many well-known cases: *Klockner v Cameroon*¹³⁰, *Amco v Indonesia*¹³¹, *MINE v Guinea*¹³², *Vivendi*

¹²⁵ Judicial Enforcement of Arbitration Awards (n 65), pp. 185-186.

¹²⁶ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp. 1129; See also G. Delaume, ‘ICSID Arbitration in Practice’, 2 *International Tax and Business Law* 58, 74 (1984).

¹²⁷ S. A. Alexandrov, ‘Enforcement of ICSID Awards: Article 53 and 54 of the ICSID Convention’ in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the Twenty-First Century: Essay in Honour of Christoph Schreuer*, (OUP, New York 2009), pp.322.

¹²⁸ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1153.

¹²⁹ T.W. Walsh, ‘Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?’ 24 *Berkeley Journal of International Law* 444 (2012) pp. 452.

¹³⁰ *Klockner v. Cameroon*, Case no. ARB/81/2, Ad hoc Committee Decision on Annulment, 3 May 1985, 2 *ICSID Reports* 95. (1994).

*v Argentina*¹³³ and *Wena Hotels v Egypt*.¹³⁴ These cases were annulled when reviewed on their merits.¹³⁵ However, Article 52 provides the grounds on the review of arbitral awards to be annulled by allowing the ad hoc committee to make determinations on jurisdictional grounds and due process only, thus excluding jurisdiction to make a review of the merits.¹³⁶ Illustratively, most international commercial arbitration instruments allow a court authority to decline the enforcement of a final award, not only on the same grounds similar to Article 52(1), but also for a lack of arbitrability on the subject-matter of the dispute and inconsistency with the public policy concerns.¹³⁷ Therefore, the annulment procedure under Article 52 (1) of the ICSID Convention prevents the lack of arbitrability and public policy defences.

In this respect, the ad hoc committee should be more careful to assure the finality of arbitral awards and to distinguish more carefully between annulment proceedings and an appeal. Otherwise, this would lead to a similar way as in the New York Convention appeal mechanism, which would eventually undermine the exceptionality of the ICSID annulment procedure.¹³⁸ By adhering with the main objective of review procedure under the ICSID Convention, it is possible to provide a uniform procedure and consistent decisions, which could ensure the finality of arbitral awards as well as securing the

¹³¹ *Amco v Indonesia*, Case no. ARB/81/1, Ad hoc Committee Decision on the Application on Annulment, 16 May 1986, 1 ICSID Reports 569 (1993).

¹³² *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, Decision on partially annulling the award, 22 December 1989, 4 ICSID Reports 79 (1997).

¹³³ *Compania de Aguas del Aconquija S.A. and Vivendi Universal v Argentine Republic*, Decision on application for annulment, 3 July 2002, 41 I.L.M. 1135 (2002)

¹³⁴ *Wena Hotels Limited v. Arab Republic of Egypt*, Decision on application for annulment, 3 February 2002, 41 I.L.M. 933 (2002).

¹³⁵ I. Kalniva and D. Di Pietro, 'The Scope of ICSID Review: Remarks on Selected Problematic Issues of ICSID Decision' in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds.), *International Investment Law for the Twenty-First Century: Essay in Honour of Christoph Schreuer*, (OUP, New York 2009) pp. 221; C. Schreuer, 'Three Generations of ICSID Annulment Proceedings' in E. Gaillard and Y. Banifatemi (eds), *Annulment of ICSID Awards: A new Investment Protection Regimes on Treaty Arbitration* (Juris Pub., New York 2004) pp. 17.

¹³⁶ A.K. Bjorklund, 'The Continuing Appeal of Annulment: Lessons from Amco Asia and CME' in T. Weiler (ed.) *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London 2005) pp. 471; J. Paulsson, 'Achievements and Prospects, 6 ICSID Review-FIJL 380 (1991) pp. 391.

¹³⁷ E Baldwin M Kantor and M Nolan, 'Limit to enforcement of ICSID awards', 23 J Intl Arb 1 (2006), pp. 4.

¹³⁸ I. Laid and R. Askew, 'Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?' 7 J. APP. PRAC. & PROCESS 285 (2005) at. 286.

enforcement of an arbitral award, without a review from a municipal court at the final stage.

Apart from the review of arbitral awards, it is necessary to further consider whether the ICSID tribunal is restricted to grant a relief only to a pecuniary obligation as stipulated in Article 54 of the Convention or is it also allowed to grant non-pecuniary remedies such as an order of specific performance or an injunction. If the answer for the first question is negative, then is it possible to enforce non-pecuniary remedies in the ICSID awards under the New York Convention. In considering types of remedies, different legal systems and tribunals offers various types of remedies for a reward of compensation. However, it could be categorised into two main types of remedies.¹³⁹ The first type refers to pecuniary remedies, which is considered as secondary remedies and to be a dominant in investment arbitration, including monetary compensation, interest and costs, while the second type refers to non-pecuniary remedies, which is considered as primary or judicial review remedies, including injunctions and orders of specific performance whether they are an annulling of government measure or decision and a declaration of the rights and obligations of the parties.¹⁴⁰

Due to the fact that investment tribunals have almost always granted a relief in a form of pecuniary damages since their claims are generally connected to an investment in which a monetary value is in question. Moreover, a pecuniary remedy is more practical and effective as it does not require any defendant state to act pursuant to the award.¹⁴¹ This could be specifically seen in Article 54 of the ICSID Convention, which only covers pecuniary obligations. However, it would be wrong to restrictively interpret this provision that the ICSID Convention restricts investors to only pecuniary remedies, not to non-

¹³⁹ A. van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in S. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, New York 2010), pp. 721.

¹⁴⁰ D. Gaukrodger and K. Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', OECD Working Papers on International Investment, 2012/03, OECD Publishing (2012), available at <<http://dx.doi.org/10.1787/5k46b1r85j6f-en>>, pp. 98

¹⁴¹ A. van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View' in S. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, New York 2010), pp. 734

pecuniary remedies. Rather, the ICSID Convention only states that an award shall deal with every question submitted to the tribunal.¹⁴² Therefore, the ICSID tribunal could be able to grant primary remedies. To support this practice, the tribunal is bound by Article 53 of the ICSID Convention as well as *travaux preparatoires* to comply with awards applied to all remedies in the award, which is not affected by a restriction of the award enforceability specified in Article 54(1) to only pecuniary obligations.¹⁴³ Accordingly, a non-compliance with a primary remedy would result in a breach of treaty obligations leading to a subsequent proceeding.

From the above situation, it could summarise that the ICSID Convention is not restricted a tribunal to grant a relief to only pecuniary obligations but also non-pecuniary obligations. In considering the New York Convention, it is possible to enforce a non-pecuniary award under the New York Convention because it does not limit the enforceability of award showing in a number of commercial arbitration cases that most of municipal courts have granted both pecuniary and non-pecuniary remedies.¹⁴⁴ As the New York Convention offers more grounds for an enforcement of arbitral awards, non-pecuniary remedies in the ICSID awards may be enforced under the New York Convention but it might be subject to a municipal law and court in the place of enforcement. After all, it should bear in mind that there would be the impossibility of enforcing such non-pecuniary obligations; therefore, it would be better off for a tribunal to include a pecuniary obligation in the same award as an alternative to a case of non-performance.¹⁴⁵

¹⁴² Art. 48(3) of the ICSID Convention.

¹⁴³ D. Gaukrodger and K. Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', OECD Working Papers on International Investment, 2012/03, OECD Publishing (2012), available at <<http://dx.doi.org/10.1787/5k46b1r85j6f-en>>, pp. 98; See also, C. Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration', 20(4) *Arbitration International* 325 (2004), pp. 326; E Baldwin M Kantor and M Nolan, 'Limit to enforcement of ICSID awards', 23 *J Intl Arb* 1 (2006)

¹⁴⁴ G. Born, *International Commercial Arbitration* (2nd Ed.), (Kluwer Law International, The Netherland 2009), pp. 2481.

¹⁴⁵ C. Schreuer, 'Non-Pecuniary Remedies in ICSID Arbitration', 20(4) *Arbitration International* 325 (2004), pp. 332.

(c) The Claim of “Public Policy”

As stated earlier, one of the main advantages sought by parties in international arbitration is an ability to select the forum that provides most suitable procedural and substantive laws to govern their dispute. Although both the ICSID Convention and New York Convention are established to assure the enforceability of arbitral awards, it also establishes a different ground in which a municipal court may refuse to enforce an arbitral awards. One of the most controversial grounds is a claim of public policy. As a matter of fact that the defense of public policy is always used as a ‘safety valve’ or ‘escape clause’ for a municipal court to refuse an arbitral award since the definition of ‘public policy’ is uncertain and unpredictable¹⁴⁶, it is necessary to examine the scope of the ‘public policy’ and how the international conventions define and apply this term in the process of enforcement of arbitral awards.

In general, the issue of public policy is predominately seen in the enforcement of arbitral awards under the New York Convention, as it is widely accepted that the recognition and enforcement of arbitral awards may be refused by a municipal court when that recognition and enforcement of arbitral awards would be opposed to the public policy of that country.¹⁴⁷ On the contrary, the ICSID Convention offers no grounds related to a public policy defence on which a municipal court may refuse such recognition and enforcement.¹⁴⁸ It is submitted that “ICSID Convention awards thus avoid any impediments to enforcement found in treaties or domestic laws applicable to the enforcement of foreign judgments or awards.”¹⁴⁹ Therefore, Schreuer has summarized that “since enforcement under the ICSID Convention is easier to obtain than under the New York Convention, the question of the applicability of the New York Convention to ICSID awards is not likely to arise. But this issue may become relevant in exceptional circumstances like the enforcement of an ICSID award in a state that is a party to the

¹⁴⁶ R. A. Cole, ‘The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards’, 1 *Ohio State Journal on Dispute Resolution* (1985) pp. 374.

¹⁴⁷ *The Municipal Enforcement of Arbitral Awards* (n 3), pp. 656.

¹⁴⁸ *Enforcement in the United States and United Kingdom* (n 107), pp. 57.

¹⁴⁹ *Sovereign Immunity as a Barrier* (n 1), pp. 216; C. Schreuer, *The ICSID Convention : A commentary* (CUP, UK 2009) pp. 1106-1107.

New York Convention but not to the ICSID Convention.”¹⁵⁰ Accordingly, the main discussion in this section will focus on arbitral awards rendered pursuant to the New York Convention.

Since the scope of the public policy is varied due to its interpretation by a municipal court from country to country, based on the values and standards accepted by that country, it is difficult to define a uniform standard of the public policy, which reflects the fundamental economic, legal, political, moral, religious and social standards, which change over time.¹⁵¹ This raises the question as to what grounds a public policy could be used as a bar to refuse recognition and enforcement of arbitral awards. It should be noted that the concept of public policy exceptions is divided into two major levels: domestic public policy and international public policy. While the former refers to the laws and standards that regulate domestic matters, for instance, immorality, unconscionability, economic policy, unprofessional conduct and other diverse criteria, the latter is an extension of a domestic public policy that will also be applied by that state in an international context.¹⁵² In this regard, the concept of international public policy is not necessarily the same with the domestic public policy.¹⁵³

As the New York Convention governs the enforcement of foreign arbitral awards in a municipal court, it should be legitimate to apply international public policy when refusing recognition and enforcement of foreign arbitral awards.¹⁵⁴ The Final Report on

¹⁵⁰ C. Schreuer, *The ICSID Convention : A commentary* (CUP, UK 2009) pp. 1118.

¹⁵¹ A. J. Van Den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law, Deventer 1981), pp. 360; J. D. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publication, New York 1978) pp.532.

¹⁵² M. Buchanan, ‘Public Policy and International Commercial Arbitration, 26 American Business Law Journal 511 (1988) pp. 514; P. Lalive, ‘Transnational or (truly International) Public Policy and International Arbitration’ in P. Sanders (eds), *Comparative Arbitration Practice and Public Policy in Arbitration (International Council for Commercial Arbitration Congress series no. 3)* (Kluwer, New York 1986) pp. 257.

¹⁵³ M. Buchanan, ‘Public Policy and International Commercial Arbitration, 26 American Business Law Journal 511 (1988) pp. 514; Judicial Enforcement of Arbitration Awards (n 65), pp. 198.

¹⁵⁴ *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, International Law Association New Delhi Conference (2002) Committee on International Commercial Arbitration, pp. 5, it recommends that:

public policy as a bar to enforcement of international arbitral awards by International Law Association presented in 2002, reflects an attempt to provide a narrower scope of public policy exception. According to the report, it is generally accepted that enforcement should be refused only in exceptional circumstances.¹⁵⁵ This reason reflects the trend of pro-enforcement bias of the New York Convention.

As far as the ICSID Convention does not expressly refer to the public policy exception, Article 52 provides some grounds for an annulment, which might fall within the scope of international public policy: corruption on the part of a member of the tribunal and serious departure from a fundamental rule of procedure.¹⁵⁶ However, since the independent nature of the ICSID awards is considered as a final judgment and not subject to review, those grounds cannot be challenged in a municipal court in order to refuse enforcement of arbitral awards. Kalnina and Di Pietro explain this point:

“One of the reasons for this absence is the fact that commercial arbitration awards are virtually always rendered between private parties and are aimed at enforcing private contracts which might or might not be compatible with the public policy of the country where enforcement of the award might be sought. In the case of ICSID arbitration, on the other hand, the dispute arises either out of a contract containing an ICSID arbitration clause entered into by a ‘host state’ and a foreign investor or out of an alleged breach of a bilateral investment treaty (BIT) signed by the host state. It is therefore at least arguable that ICSID arbitration deals with disputes arising out of subject matters that have already been subject to a certain degree of scrutiny as to their compatibility with public policy.”¹⁵⁷

“the expression “international public policy” is used in these Recommendations to designate the body of principles and rules recognised by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either the procedure pursuant to which it was rendered (procedural international public policy) or of its contents (substantive international public policy).”

¹⁵⁵ *ibid* 2; The narrower of public policy decision of the court could be found in *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papeer (RAKTA)*, 508 F. 2d 969 (2nd Cir. 1974), in which the court held that “the enforcement of an international award may be denied on public policy grounds only if enforcement would violate the forum’s state most basic nations of morality and justice.”

¹⁵⁶ See Art. 52 of the ICSID Convention; *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, Committee on International Commercial Arbitration, International Law Association, London Conference (2000) pp.9.

¹⁵⁷ I. Kalniva and. D. Di Pietro, ‘The Scope of ICSID Review: Remarks on Selected Problematic Issues of ICSID Decision’ in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds), *International Investment*

Therefore, in conclusion, whereas the New York Convention allows a municipal court to raise a defence of international public policy exception in order to refuse a recognition and enforcement of foreign arbitral awards in both procedural and substantive grounds, the ICSID leaves no place for a public policy defence to restrain the enforcement of arbitral awards, either at a domestic or international level. Thus, the public policy exception is considered as potentially a main bar to the enforcement of arbitral awards. Consequently, a municipal court should apply a narrower scope of public policy; otherwise it would ultimately undermine the finality of arbitral awards and the pro-enforcement bias of the New York Convention.¹⁵⁸

(d) Conclusion: A Value of Arbitral Awards and its Alternative to Enforcement

From the main distinctions between the ICSID and the New York Convention, although both conventions aim at ensuring the enforcement of arbitral awards in pursuant to the pro-enforcement bias, in the event of non-voluntary compliance of a respondent state with arbitral awards, investors are likely to be left without any effective remedies to execute an arbitral awards due to the application of sovereign immunity from execution. This is because both conventions are silent on post-award settlement or remedies, which directly address the problem of sovereign immunity from execution in the enforcement of arbitral awards apart from the a resort to a diplomatic protection and claiming before the ICJ by an investor's home state provided in the ICSID Convention. This could imply that a non-compliance of an arbitral award would likely lead to a state responsibility. In fact, the actual legal nature and value of arbitral awards should not be undermined by the absent of post-award remedies in the Convention.

As mention earlier, an arbitral award either commercial or investment awards is acknowledged as an outcome or decision made by an arbitration tribunal in an arbitration

Law for the Twenty-First Century: Essay in Honour of Christoph Schreuer (OUP, New York 2009) pp. 226.

¹⁵⁸ See F. Junita, 'Public Policy Exception in International Commercial Arbitration- Promoting Uniform Model Norms', 5(1) *Contemp. Asia Arb. J.* 45 (2012).

proceedings in a form of non-monetary nature and payment of a sum of money.¹⁵⁹ Therefore, this essential characteristic of arbitral awards could create, *de facto* and *de jure*, a value and its international currency provided by the international conventions in which it provides a wider scope of enforceability than a court judgment of a state.¹⁶⁰ Accordingly, an arbitral award should not be governed by the law of the place where it was made, but it should have a transnational effect. This legal nature of arbitral award is supported by the French Supreme Court decision in *Putrabali* that;

“an international award, which is not connected to any legal system, is an international judicial decision, whose legality is examined with regards to the applicable laws in the country where its recognition and enforcement are sought.”¹⁶¹

Therefore, the transnational dynamic of arbitral awards will have an impact in its value when enforcing an arbitral award, particularly in the event of non-compliance, in which the value of an arbitral award might be negotiated. According to the survey conducted by the School of International Arbitration in 2008, 44% of the participating corporations had received a full value and 84% of the participating corporations had received more than 75% of the full value of the award from enforcement and execution.¹⁶² In order to protect the highest value of arbitral award, the survey shows that some of the corporations had negotiated a post-arbitral award settlement with the opposing party after the arbitral award had been delivered.¹⁶³ Such a post-award settlement can be used as an alternative to a voluntary compliance or enforcement with an arbitral award through the actions of municipal courts.

¹⁵⁹ See A full definition of arbitral award defined in US Legal Dictionary, quoted in L. Mistelis, ‘Award as an Investment The Value of an Arbitral Award or the Cost of Non-Enforcement’, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 129/2013, pp. 4

¹⁶⁰ L. Mistelis, ‘Award as an Investment The Value of an Arbitral Award or the Cost of Non-Enforcement’, Queen Mary University of London, School of Law, Legal Studies Research Paper No. 129/2013, pp.8-9; See also W. Laurence Craig, ‘Some Trends and Developments in the Laws and Practice of International Commercial Arbitration’, 30 Texas International Law Journal 1 (1995); E. Gaillard, ‘Representation of International Arbitration’, 1(2) Journal of International Dispute Settlement 271 (2010);

¹⁶¹ *Societe PT Putrabali Adyamulia v. Ste Rena Holding*, French Cour de Cassation, 29 June 2007.

¹⁶² L. Mistelis & C. Baltag, ‘Recognition and Enforcement of Arbitral Awards and Settlement and International Arbitration: Corporate Attitudes and Practices, 19 Am. Rev. Int’L Arb. 319 (2008), pp.324-325.

¹⁶³ *Ibid* 339.

This post-arbitral award settlement refers to an agreement reached by the parties after the original award has been rendered by the arbitral tribunal so that it could modify the rights and obligations of the original arbitral awards by changing the terms of its performance.¹⁶⁴ Under this circumstance, an investor may refrain from their original rights and obligations so as to allow a recalcitrant state to reduce a payment of arbitral award, to pay an arbitral award in instalments and to change a different time frame in exchange for a guarantee of prompt payment.¹⁶⁵ The negotiation of post-award settlement would benefit both parties to the arbitration, especially for an investor to avoid potential costs and endless time in a process of enforcement of arbitral awards. Recently, it has been reported that Argentina had agreed to negotiate a post-award settlement with the award creditors relating to five investment treaty arbitration awards made between 2005-2008 (*CMS Gas Transmission Company, Azurix Corp, Vivendi Universal SA, Continental Casualty Company and National Grid plc*).¹⁶⁶ This post-award settlement brings an end to a long running dispute by transferring of previously issued Argentinean sovereign bonds with a lower amount of compensation.

After all, since the post-award settlement has put an investor in a less advantageous position than the original arbitral award has provided. Therefore, this method might be not widely welcomed in some countries in which they may wish to proceed with the enforcement of original arbitral awards. In pursuing this, a non-compliance with an enforcement of arbitral awards would amount to a breach of investment treaty obligations, which inevitably lead to a state responsibility. Such a presumption of state responsibility for a breach of investment treaty obligations will be fully discussed in chapter 7.

¹⁶⁴ Ibid

¹⁶⁵ Ibid

¹⁶⁶ Allen & Overy Publications, 'Argentina Settles Five Investment Treaty Awards, 7 November 2013, Available at <<http://www.allenoverly.com/publications/en-gb/Pages/Argentina-settles-five-investment-treaty-awards.aspx>>

5. Concluding Remarks

As the main distinctions between the ICSID and New York Convention have been already discussed above, the fundamental difference underlying these two conventions is the public-private model of the arbitration mechanism. This leads to a different route when dealing with enforcing and executing arbitral awards in relation to a sovereign immunity doctrine. In contrast, under a contractual basis of international commercial arbitration, investment treaty arbitration in the context of BIT, constitutes another form of dispute settlement, which involves a public law context at both domestic and international level,¹⁶⁷ where a state might subject the entirety of its public law regulatory powers to adjudication by a private law arbitration tribunal.¹⁶⁸

In order to protect a state sovereignty under the ICSID arbitration, a sovereign immunity doctrine is expressly included to ensure that there will be a procedural means available to a state to protect its interests against enforcement of an arbitral award. However, the New York Convention makes no mention about the sovereign immunity doctrine in any of its provisions. In this respect, the ICSID arbitration goes a step further by introducing a state and state sovereignty into a public dimension through a private law model of the arbitration mechanism in order to answer a public law question.¹⁶⁹ This is in contrast to the New York Convention, which significantly leaves the public law question within a private law model to deal with a state party without any adjustment.

Therefore, such an attempt to create a ‘denationalized’ arbitration and the ‘anational’ award governed under international law towards a ‘internationalization’ and

J. D. Lew, L.A. Mistelis and S. M. Kroll (eds.), *Comparative International Commercial Arbitration* (Kluwer law international, The Hague/London/New York 2003), pp. 24

¹⁶⁷ W. Burke-White and A. von Staden, ‘Private litigation in a public law sphere: The standard of review in Investor-state arbitrations’, University of Pennsylvania Law school (2009) http://lsr.nellco.org/cgi/viewcontent.cgi?article=1291&context=upenn_wps&sei-redir=1#search=%22Private+litigation+in+a+publiv+law+sphere:+The+standard+of+review+in+Investor-state+arbitrations%22 , pp. 285;

¹⁶⁸ Sovereign immunity as a bar (n 8).

¹⁶⁹ See S. Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’, 23 *Leiden J. Int’l L.* 401 (2010); J. Lew, *Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards* (Oceana Publications, New York 1978).

‘delocalization’ theory is more possible with the ICSID Convention, since its public-private model of arbitration mechanism supports the most fundamental aspects of investment treaty arbitration. It balances the bargaining power of parties by avoiding a state having more influence over the municipal court in rendering a judgment outside an argument, which has been presented.¹⁷⁰

This form of public law adjudication is reflected in the ability of the international tribunals, particularly the ICSID, to override domestic law with public international law, obliged by a state under Bilateral Investment Treaties (BITs) and other forms of International Investment Agreements (IIAs).¹⁷¹ In this aspect, the limitations of impact of investment treaty arbitration might be subject to the application of sovereign immunity doctrine at the domestic level before a municipal court.¹⁷²

However, it could be seen that the New York Convention might find it difficult to adopt a public law concern, owing to its private law model. Therefore, it could be summarised that the distinctive feature of the ICSID Convention offers a more procedural advantage over the New York Convention and other instruments governing the recognition and enforcement of arbitral award. Thus leading to a conclusion that the ICSID awards have a higher degree of effectiveness than New York Convention awards, due to the fact that the ICSID was specifically created to deal with the matter of public law in a private law model.¹⁷³ For this reason, investment treaty arbitration should be, more appropriately, described as a public-private law model utilised to best resolve a dispute between state and private investor.

¹⁷⁰ Sovereign immunity as a bar (n 8).

¹⁷¹ V. Greiman, ‘The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships’, 32 Whittier L. Rev. 395, 404 (2010-2011). See also G. Van Harten and M. Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, 17 Eur. J. Intl. L. 121, 123 (2006).

¹⁷² S. Schill, ‘International Investment Law, the Law of State Immunity, and Human Rights: A Case Study in Cross-Regime Analysis as an Instrument of Defragmentation’, http://works.bepress.com/stephan_schill/1, pp20.

¹⁷³ G. R. Delaume, ‘Decision: Decisions of Regional and Foreign Courts: France-Recognition of ICSID Awards-Sovereignty’, 86 AM.J.INT’L. 138 (1992) pp. 139.

Chapter 5

The Impact of International Arbitration Conventions on an Agreement to Arbitrate before Municipal Courts

1. Introduction

The issue of sovereign immunity raised during the process of enforcing arbitral awards is a significant problem before municipal courts. Both the New York and the ICSID Conventions leave the enforcement and execution of arbitral awards to the municipal court to determine and interpret in accordance with the applicable municipal law of sovereign immunity, mentioned in chapter 4. Thus, it is strongly considered that apart from the treaty obligations in the international conventions, the enforcement of arbitral awards cannot be effective without the supportive role of the municipal courts and legal system.¹ With regards to the law of sovereign immunity, it has been the subject of a number of government and non-government projects for codification.²

Apart from the commercial activity exception, mentioned earlier in chapter 3, most of the recent international codifications on sovereign immunity contain a provision concerning the ‘agreement to arbitrate’ as an exception to the waiver of immunity, as well as a measure to combine these two exceptions. Therefore, a fundamental proposition made in this thesis is that an agreement to arbitrate by parties not only constitutes a waiver of immunity from jurisdiction but also extends to constitute an implied waiver of immunity from execution. This chapter seeks to illustrate how far an agreement to arbitrate exception and its combination to a commercial activity exception could possibly override the defence of sovereign immunity from jurisdiction and execution in a municipal court brought under the ICSID and New York Conventions. This is considered as a cross-fertilization of international investment law and public international law on sovereign immunity.

¹ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988) pp.67.

² J. Crawford, ‘Execution of Judgments and Foreign Sovereign Immunity’, 75(4) AJIL 820 (1981) pp. 831.

However, it is very difficult to identify how such a state undertaking to arbitrate could constitute an implied waiver of immunity from execution. Although there is a general accord in municipal laws on sovereign immunity that a foreign state can consent or waive its sovereign immunity from jurisdiction by submitting a dispute to arbitration,³ it is still unclear whether such consent or waiver could also constitute an implied waiver in respect to the immunity from enforcement and execution.

Undoubtedly, it becomes appealing to examine whether, in the absence of an express waiver of sovereign immunity, consent to arbitration by a state, under an agreement to arbitrate provision, could be considered as an implied waiver of immunity from jurisdiction and execution before a municipal court in a forum state. It is widely accepted that an agreement to arbitrate by a state constitutes an implicit waiver of immunity from jurisdiction in a municipal court.⁴ Thus, a state cannot plead sovereign immunity as a bar in order to establish a jurisdiction over a dispute when it enters into an arbitration agreement. This is found in many recent codifications, arbitral tribunals and court decisions.⁵ However, this position is questionable when it comes to the immunity from execution, since there is no clear provision that views an agreement to arbitrate as a waiver for immunity from execution in any recent codifications.

A further question is whether such an implied waiver of immunity from jurisdiction could be legitimately extended to immunity from enforcement and execution of a resultant award. It is noteworthy that this problem becomes more significant against the backdrop of a separate regime of immunity, which distinguishes between a waiver of immunity from jurisdiction and a waiver of immunity from execution.⁶ In this context, a waiver

³ Section 9(1) of the UK SIA; Section 1605(a) of the US FSIA; Section 17(1) of the Australian FSIA; Article 12 of the European Convention; Article 17 of the UN Convention.

⁴ A. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes', 21 *Am.Rev.Int'l. Arb.* 211 (2010) pp. 221 (Sovereign Immunity as a Barrier); G.R. Delaume, 'Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration', 2(2) *ICSID Review* 403 (1987) pp. 403.

⁵ See J.G. Wetter, 'Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals', 2 *J. Int. Arb.* 7 (1985).

⁶ K.I. Vibhute, 'Waiver of State Immunity by an Agreement by Arbitrate and International Commercial Arbitration', *J. Bus. L.* 550 (November 1998) pp. 559.

from immunity from jurisdiction cannot constitute a waiver of immunity from enforcement and execution; therefore, a separate waiver of immunity from execution is necessarily required.⁷

This state practice could be seen in the provision of many codifications, for instance, the UN Convention, the European Convention, the US FSIA and the UK SIA.⁸ Nevertheless, there is a trend towards a single immunity regime in which an implied waiver of immunity from jurisdiction by an agreement to arbitrate extends to immunity from execution in certain municipal courts, for instance, the Swiss Court and the French Court.⁹ As will be discussed later in this chapter, this trend might be more practical and effective in keeping with the parties' intentions entering into arbitration proceedings. Without doubt, the conflict of these two approaches, as to the interpretation of an agreement to arbitrate, would have an adverse effect on the enforcement of an arbitral award.

2. Immunity from Jurisdiction

The first opportunity during arbitration proceedings when a state could plead a sovereign immunity defence is at the stage when a municipal court, in the forum state, exercises its jurisdiction in order to recognise and confirm an arbitral award. Bernini and Van den Berg clarify this point, stating that “the state will more frequently rely on a plea of immunity from jurisdiction when recognition and enforcement of the award is sought, rather than wait until actual measures of execution are requested and raise the exception

⁷ The Second report on jurisdictional immunities of States and their property by Mr. Sompong Sucharitkul, Special Rapporteur, A/CN.4/331 and Add.1, Vol II (1) (1980) pp. 206;

D. Chamlongrasdr, *Foreign State Immunity and Arbitration* (Cameron May, London 2007) pp. 219.

⁸ See also Art. 17 of the UN Convention; Section 1610(a)(1) and (b)(1); Section 13(3); Art. 23 of the European Convention.

⁹ K.I. Vibhute, ‘Waiver of State Immunity by an Agreement by Arbitrate and International Commercial Arbitration’, J. Bus. L. 550 (November 1998) pp. 560.; See *Creighton Limited v. Government of the State of Qatar*, The French Cour de Cassation, (6 July 2000), reported in XXV Yearbook of Commercial Arbitration 458 (2000); *Kingdom of Greece v Julius Bar and Co.*, Swiss Federal Tribunal, 6 June 1956; 23 ILR 195.

of immunity from execution.”¹⁰ As previously mentioned, a state might possibly claim sovereign immunity from jurisdiction, before a municipal court of a forum state, on the basis of a territorial jurisdiction doctrine. This plea of sovereign immunity at the first step of enforcement of an arbitral award could hamper the smooth conduct of arbitration proceedings and undermine the effectiveness of the whole arbitration process; leading to unsatisfactory outcomes. In asserting the sovereign immunity defence, the degree of application by a municipal court may depend on the international conventions that a state is a party to, as well as its municipal law or state practice on sovereign immunity in a forum state.

A trend towards a restrictive sovereign immunity has brought about two fundamental grounds for the exclusion of sovereign immunity from jurisdiction: commercial activity exception and agreement to arbitrate exception. Such 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.¹¹ The commercial activity exception has been discussed earlier; therefore, the main purpose of this section will be to focus on an agreement to arbitrate exception employed to defeat a sovereign immunity defence. In this respect, although the issue of sovereign immunity from jurisdiction is less problematic than immunity from enforcement and execution, the degree of its success is varied and unpredictable owing to the lack of uniformity in the rules and regulations amongst different jurisdictions.¹²

In arbitration proceedings, the restrictive immunity approach has offered significant progress to the enforcement of arbitral awards. As far as a sovereign immunity from

¹⁰ G. Bernini and A. J. Van den Berg, ‘The Enforcement of Arbitral Awards against a State: The Problem of Immunity from Execution’ in Lew (eds), *Contemporary problems in international arbitration* (Queens Mary college 1986) pp. 359. (The Enforcement of Arbitral Awards against a State)

¹¹ Sovereign Immunity as a Barrier (n 4), pp. 220; See also A. K. Bjorklund, ‘State immunity and the Enforcement of Investor-State Arbitral Awards’, in C. Binder, U. Kriebaum, A. Reinisch and S. Wittich (eds), *International Investment Law for the 21st century: Essays in honour of Christopher Schreuer* (OUP, New York 2009).

¹² See G.R. Delaume, ‘ICSID Arbitration and the Courts’, 77 *Am. J. Int’l L.* 784 (1983).

jurisdiction is concerned, the question arises as to whether an agreement to arbitrate, by a submission to arbitration, is considered an implicit waiver of immunity from jurisdiction in the absence of an express waiver. However, the position of a waiver of sovereign immunity from jurisdiction is quite clear and less problematic than the immunity from execution. The general rule of thumb in this context is that an agreement to arbitrate should be regarded as an implicit waiver of sovereign immunity from jurisdiction of a municipal court, thus compelling arbitration proceedings.¹³ As Delaume put it:

“Decisions of international and domestic tribunal, treaty and statutory provisions found in the European Convention and modern Western statutes, all concur that a State party to an arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of the agreement.”¹⁴

For this reason, a state cannot plead a sovereign immunity defence in order to frustrate the jurisdiction of a municipal court. This proposition is now well-accepted in many jurisdictions, both common and civil,¹⁵ provided either directly or by implication in the European Convention,¹⁶ the US FSIA,¹⁷ the UK FSIA,¹⁸ the Australian FSIA¹⁹ and the UN Convention.²⁰ In addition, the same theory that an agreement to arbitrate provides an implied waiver of sovereign immunity from jurisdiction has been eloquently pursued in the New York Convention and the ICSID Convention. It could be correctly stated that both conventions provide, in effect, a similar provision on this matter, in pursuance of treaty obligations by states; *pacta sunt servanda*.²¹ In accordance with the New York Convention, Article II (1) provides that:

¹³ G.R. Delaume, ‘Sovereign Immunity and Transnational Arbitration’, 3(1) Arb. J. 28 (1987), pp. 30; See also G.R. Delaume, *Transnational Contract: Applicable Law and Settlement of Dispute*, Chapter XI, April 1990, pp. 67

¹⁴ G.R. Delaume, ‘Sovereign Immunity and Transnational Arbitration’, 3(1) Arb. J. 28 (1987), pp. 30.

¹⁵ G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987) pp. 405.

¹⁶ The European Convention on State Immunity, May 16, 1972, at Art. 12.

¹⁷ The United Kingdom Sovereign Immunity of 1978, 17 ILM 1123 (1978), at Sec. 9.

¹⁸ The United States Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Sec. 1330, Sec. 1605(a)(1).

¹⁹ The Australia Foreign States Immunities Act, No. 196 (Austl. 1985), 25 ILM 715 (1986), at Sec. 17.

²⁰ The United Nations Convention on Jurisdictional Immunities of States and their Property of 2004, at Art. 17.

²¹ J.G. Wetter, ‘Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals’, 2 J. Int. Arb. 7 (1985) pp. 14-15.

“Each Contracting States shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.”²²

It can be assumed from this provision that although there is explicit provision for a waiver of sovereign immunity from jurisdiction, the issue of sovereign immunity from jurisdiction has been settled in many jurisdictions, such as Netherlands,²³ the United States²⁴ and France.²⁵ The trend amongst those jurisdictions is that “when a State has waived its immunity by submitting to arbitration, the scope of the waiver extends to proceedings for confirmation or recognition of the resulting award.”²⁶ Thus, a plea of sovereign immunity, regarding immunity from jurisdiction, has been unsuccessfully when claiming under the New York Convention. However, this position might not be easily solved when it concerns sovereign immunity from enforcement and execution, which is more complicated.²⁷

Such uncertainty, with regards to the provision of a waiver of sovereign immunity from jurisdiction, is totally eliminated from the outset under the ICSID Convention. Under the ICSID Convention, the consenting to ICSID arbitration constitutes an irrevocable waiver of immunity from jurisdiction, either at the stage of institution of the arbitration proceedings or at the time of recognition of ICSID award, where such consent could not be unilaterally revoked once it is given to the ICSID arbitration.²⁸ In addition, a municipal court is not allowed to judicially interfere in the decision on the merits of the case because of the binding character of ICSID award and arbitration agreement.²⁹ This

²² Article II (1) of the New York Convention.

²³ *N.V. Cabolent v National Iranian Oil Co.*, Hague Court of Appeal 28 November 1968, 9 ILM 152 (1970).

²⁴ *Ipitrade International S.A. v Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978), 17 ILM 1395 (1978).

²⁵ *Societe Europeenne d’Etudes et d’Entreprises v Republique Federale de Yougoslavie et al.*, *Revue de l’Arbitrage* 1975, 328, *Journal de Droit International* 1971, 131.

²⁶ G.R. Delaume, ‘Sovereign Immunity and Transnational Arbitration’, 3(1) *Arb. J.* 28 (1987), pp. 33.

²⁷ S. Toope, *Mixed International Arbitration Studies in Arbitration between States and Private Persons* (Cambridge, Grotius 1990) pp. 140.

²⁸ G.R. Delaume, ‘Foreign Sovereign Immunity: Impact on Arbitration’, 38(2) *Arb. J.* 34 (1983), pp. 36.

²⁹ See Article 54(1) of the ICSID Convention.

unique feature of the ICSID arbitration could sufficiently shield a foreign investor by preventing any state party raising a plea of sovereign immunity from jurisdiction; this potentially being far more effective than any other mechanism. These propositions are well stipulated in Article 53, Article 54(1) and Article 54(2) of the ICSID Convention, as already clarified in chapter 4. In the words of Delaume:

“In the system of the Convention, the Contracting State party to the dispute is deemed to have waived any defence, including immunity from suit, which would interfere with the ICSID machinery and would be inconsistent with the consent given by that State to ICSID arbitration.”³⁰

Apart from international conventions, an agreement to arbitrate provision has been similarly set out at a regional level; being the European Convention on State Immunity of 1972. It provides that:

“Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:

- (a) the validity or interpretation of the arbitration agreement,
 - (b) the arbitration procedure,
 - (c) the setting aside of the award,
- unless the arbitration agreement otherwise provides.”³¹

It could be said that the European Convention explicitly denies sovereign immunity from jurisdiction when there has been a consent to arbitration under an arbitration agreement in a commercial activity.³² A more recent codification, which is almost identical to the European Convention, is the UN Convention. Although it is not yet into force, the provision concerning an agreement to arbitrate is considered an excellent model for the codification and revision in this area.³³

³⁰ G.R. Delaume, ‘Sovereign Immunity and Transnational Arbitration’, 3(1) *Arb. J.* 28 (1987), pp. 34.

³¹ Art. 12(1) of the European Convention.

³² See A. Reinisch, ‘European Court Practice concerning state immunity from enforcement measures’, 17 *EJIL* 803, 836 (2006).

³³ Art. 17 of the UN Convention, it reads:

From the above situation, a state, as a party to international convention or regional convention, is obliged under international convention treaty obligations to recognise and enforce an arbitral award, which a private party seeks to enforce in any states contracted to such conventions. However, it must be noted that this only applies if a forum state and a recalcitrant state are parties to the international convention in question.³⁴ In this context, pursuing enforcement of an arbitral award under a different international convention might require different conditions to establish a jurisdiction in a forum state, such as a jurisdictional nexus. However, it is still subject to the law governing the dispute, which might possess additional restrictions in relation to the enforcement of arbitral awards. Thus, it could be summarised that an international convention is, inevitably, considered the first hurdle in enforcement of an arbitral award, followed by the law governing the dispute, thereafter followed by either international law or the municipal law in a forum state. Accordingly, an implied waiver might differ in various states owing to the diverse degrees of interpretation in the particular municipal courts.

In connection, the first codification for a municipal law on sovereign immunity is the US FSIA, which concerns an implicit waiver of sovereign immunity from jurisdiction by submission an agreement to arbitrate.³⁵ Without doubt, a foreign state in the United States courts is not immune from a sovereign immunity defence relating to jurisdictional immunity.³⁶ The issue of waiver of sovereign immunity from jurisdiction is initially clarified in Section 1605(a) (1), it provides:

“If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

- (a) the validity, interpretation or application of the arbitration agreement;
- (b) the arbitration procedure; or
- (c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.”

³⁴ X. Yang, *State Immunity in International Law* (CUP, UK 2012) pp.325.

³⁵ M. Feldman, ‘Waiver of Foreign Sovereign Immunity by Agreement to Arbitrate: Legislation Proposed by the American Bar Association’, 40(1) *Arb. J.* 24 (March 1985), pp. 26.

³⁶ K.I. Vibhute, ‘Waiver of State Immunity by an Agreement by Arbitrate and International Commercial Arbitration’, *J. Bus. L.* 550 (November 1998), pp. 554.

“(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.”³⁷

Before the amendment of the US FSIA in 1988, it contained no explicit provision relating to the status of an arbitration agreement clause as a waiver of sovereign immunity from jurisdiction. Additionally, it did not specify any jurisdictional nexus between the underlying claim and the United States for a waiver exception, unlike other immunity exceptions, which led to a judicial controversy.³⁸ In this respect, the legislative history of the FSIA in the House Report indicates that “the court have found such waivers in cases where a foreign state has agreed to arbitration in another country or where the foreign state has agreed that the law of a particular country should govern a contract.”³⁹ While this proposition might suggest a solution to the difficulty of waiver of sovereign immunity from jurisdiction it still left a further issue unresolved. A divergence of opinions amongst the court decisions has been highlighted relating to whether by referring “to arbitration in another country” underlying an intention of Section 1605(a)(1), whether the US FSIA requires a jurisdictional territorial link between the arbitration and the United States in order to constitute an implicit waiver of immunity.⁴⁰

One of the leading cases regarding this issue in the 1978 is *Ipirtrade International, S.A. v Federal Republic of Nigeria*, which is considered to be the first decision dealing with the arbitration clause as an implied waiver of sovereign immunity from jurisdiction under section 1605(a)(1) of the US FSIA. The court concluded that “[Nigeria’s] agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by

³⁷ Section 1605(a)(1) of the US FSIA.

³⁸ A Working Group of the International Litigation Committee of the Section of International Law and Practice of the American Bar Association, *Report on the U.S. Foreign Sovereign Immunities Act*, April 2001, pp. 66-71.

³⁹ H.R. Rep. No.1487, 94th Cong., 2d Sess. 18 (1976), reprinted in 1976 *U.S. Code Congressional & Administrative News* 6604, at 6617.

⁴⁰ See *Victory Transport Inc. v Comisaria General de Abastacimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965), where the court accepted an implied waiver of immunity by an agreement to arbitrate in New York to establish jurisdiction in the US.

arbitration under International Chamber of Commerce Rules constitutes a waiver of sovereign immunity under the [Foreign Sovereign Immunities] Act. This waiver cannot be revoked by a unilateral withdrawal.”⁴¹

Accordingly, although the parties to the dispute agreed to submit a contractual dispute to ICC arbitration in Switzerland, it was possible to enforce such an arbitral award before a United States court due to the fact that all the relevant parties in the disputes, the United States, France, Switzerland and Nigeria, were signatories to the New York Convention. Therefore, they were obliged under the treaty commitment to give effect to the arbitration agreement and the resulting award.⁴²

Furthermore, a similar reasoning was considered in the cases of *Libyan American Oil Co. v Socialist People’s Libyan Arab Jamahriya* (LIAMCO)⁴³ in 1980 and *Verlinden B.V. v Central Bank of Nigeria*⁴⁴ in 1980. Ironically, whereas the court in the United States accepted an implicit waiver from jurisdiction under the New York Convention, the same award was declined in the Swiss court on the ground of the nexus requirement between the underlying transaction and Switzerland.⁴⁵ Accordingly, those cases have raised a controversial issue on a jurisdictional territorial connection. As Delaume points out, “the controversial question can, therefore, be limited to situations in which the seat of arbitration is neither in the United States nor in a country linked to the United States by a multilateral or a bilateral treaty.”⁴⁶ In addition, the effect of a territorial connection requirement for an implied waiver was also echoed in *Ohntrup v Firearms Center Inc.*⁴⁷ and *Zernicek v Petroleos Mexicanos*⁴⁸, where the courts held that “most courts have refused to find an implicit waiver of immunity to sue in American courts from a contract

⁴¹ *Ipitrade International, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) at 826.

⁴² G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987) pp. 410.

⁴³ *Libyan American Oil Co. v. Socialist People’s Libyan Arab Jamahriya* (LIAMCO), 482 F. Supp. 1175 (D.D.C. 1980).

⁴⁴ *Verlinden B.V. v Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980).

⁴⁵ G.R. Delaume, ‘Foreign Sovereign Immunity: Impact on Arbitration’, 38(2) Arb. J. 34 (1983), pp. 37.

⁴⁶ G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987) pp. 410.

⁴⁷ *Ohntrup v Firearms Center Inc.*, 516 F. Supp. 1281 (E.D. Pa. 1981).

⁴⁸ *Zernicek v Petroleos Mexicanos*, 614 F. Supp. 407 (S.D. Tex. 1985).

clause providing for arbitration in a country other than the United States.”⁴⁹ In this respect, although an arbitration clause could effectively be considered an implicit waiver, it should be borne in mind that:

“It may well not be an effective waiver for purposes of subject matter and in personam competence when suit is brought on the award in a place other than that of the arbitration. After all a person who agrees to an arbitration clause does not contemplate proceedings in a place other than that in which the arbitration is to take place and perhaps the place in which he resides. Construing a waiver of immunity clause as waiving objection to suit in a place with which the defendant has no reasonable connection would appear not only unfair but may also be unconstitutional.”⁵⁰

By reference to the above-mentioned cases, it appears that the use of an arbitration agreement would give rise to a waiver of sovereign immunity. However there must be some form of territorial connection.⁵¹ Although the amendment made to the US FSIA would not solve this particular problem, it provides a clearer proposition as to an agreement to arbitrate clause.⁵² The US FSIA amendment in 1988 provide an additional exception to sovereign immunity from jurisdiction with respect to an arbitration agreement; where there is a jurisdictional territorial connection or minimum contacts with the United States in order to constitute a basis for a personal jurisdiction in the United

⁴⁹ *ibid* at 411.

⁵⁰ H. Smit, N. M. Galston, S. L. Levitsky (eds), *International Contracts*, Parker School of Foreign and Comparative Law, Columbia University (M. Binder, New York 1981) pp 259.

⁵¹ R. J. Oparil, ‘Waiver of Sovereign Immunity in the United States and Great Britain by an Arbitration Agreement’, 4 *J. Int’l Arb.* 61 (1986) pp. 76.

⁵² Section 1605(a)(6); it reads:

“(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

...(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, 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,
- (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,
- (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.:

States.⁵³ As a result, this provision provides evidence 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”⁵⁴ wherein it would consequently permit enforcement of an arbitral award claimed under the New York Convention.⁵⁵

Furthermore, apart from the treaty commitment under the New York Convention, the issue of waiver of sovereign immunity by an agreement to arbitrate, pursuant to the US FSIA, was also raised in the context of the ICSID Convention. As mentioned earlier, the ICSID arbitration has the exclusive character of precluding any other remedy under Article 26 of the ICSID Convention. Therefore, a municipal court in a forum state is barred from considering the matter; instead it has to decline a jurisdiction on the rule of abstention.⁵⁶ This situation was illustrated in *Maritime International Nominees Establishment (MINE) v Republic of Guinea*⁵⁷ in which both parties had agreed to submit to the ICSID arbitration. Interestingly, *MINE* submitted a matter to the American Arbitration Association (AAA) instead of the ICSID arbitration as previously agreed. Whereas the district court confirmed an arbitral award and found an implied waiver on the ground of the nexus requirement arising out of the arbitration agreement under the ICSID Convention with the United States⁵⁸, the court of appeal reversed the decision on the ground that it ignored the exclusive character of the ICSID arbitration, which has precedence over the US FSIA.⁵⁹ Consequently, by consenting to the ICSID arbitration, immunity from jurisdiction is eradicated at the outset without any jurisdictional connection under either the US FSIA or the New York Convention.

⁵³ G. Kahale, ‘New Legislation on the United States Facilities Enforcement of Arbitral Agreements and Awards Against Foreign States’, 6(2) J. Int. Arb. 57 (1989), pp. 61-62; H. Fox, *The Law of State Immunity* (OUP, New York 2008) pp. 339.

⁵⁴ 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. J. of INT’L L. & POL’Y 115 (2001) pp. 123.

⁵⁵ Sovereign Immunity as a Barrier (n 4), pp. 222.

⁵⁶ G.R. Delaume, ‘Foreign Sovereign Immunity: Impact on Arbitration’, 38(2) Arb. J. 34 (1983) pp. 38.

⁵⁷ *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, 505 F.Supp. 141 (D.D.C. 1981).

⁵⁸ *ibid* 143

⁵⁹ G.R. Delaume, ‘Foreign Sovereign Immunity: Impact on Arbitration’, 38(2) Arb. J. 34 (1983) pp. 39.; G. Sullivan, ‘Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits’, 18 Texas International Law Journal 329 (1983) pp. 332.

Against this background, with the requirement of a jurisdictional nexus in the United States, the UK SIA does not require any territorial connection.⁶⁰ In the words of Fox, “unlike the ECSI or the US FSIA, the English Act does not impose, for all the enacted exceptions which it introduces in order to give effect to the restrictive doctrine of immunity, additional jurisdictional links; it stipulates such a requirement for some exceptions but most importantly omits it with regard to the general exception for commercial transaction.”⁶¹ By excluding a jurisdictional link, Section 9(1) of the UK SIA provides that:

“9(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.”⁶²

This section may be faced with a degree of ambiguity relating to the interpretation on whether an agreement to arbitrate anywhere worldwide will be construed widely as consenting to UK court jurisdiction or it should be interpreted narrowly to restrict only the consent to arbitration in United Kingdom in order to remove immunity from proceedings in the UK courts.⁶³ The situation of jurisdictional connection has been raised with regards to Section 9 in *Svenska v Lithuania* case.⁶⁴ After reviewing Parliamentary proceedings, the Lord Chancellor stated that:

“Clause 9 of the Bill provides that where a State has agreed in writing to submit a dispute to arbitration in, or according to, the law of the United Kingdom, the State is not immune as respects proceedings which relate to the arbitration. The Amendment removes the links with the United Kingdom, and by deleting the reference to the United Kingdom or its law,

⁶⁰ The Enforcement of Arbitral Awards against a State (n 10), pp. 368; G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987) pp. 410.

⁶¹ H. Fox, *The Law of State Immunity* (OUP, New York 2008) pp. 268.

⁶² Section 9(1) of the UK SIA.

⁶³ H. Fox, ‘States and the Undertaking to Arbitrate’, 37 Int’l. & Comp. L.Q. 14 (1988) pp. 11-14.

⁶⁴ *Svenska Petroleum Exploration AB v Lithuania and Another* [2006] EWCA Civ 1529; [2007] WLR 876; H. Seriki and M. Beeley, ‘State Immunity and Arbitration: Svenska Petroleum Exploration AB v Government of the Republic of Lithuania and AB Geonafta’, 9(2) Int. A.L.R. 37 (2006); See also X. Yang, *State Immunity in International Law* (CUP, UK 2012) pp.337-338.

it will ensure that a State has no immunity in respect of enforcement proceedings for any foreign arbitral award.”⁶⁵

Owing to this, the position in the United Kingdom is quite clear, being that the UK courts will not require a jurisdictional connection between an arbitration agreement and the United Kingdom itself, unlike the specific requirement contained in the US FSIA.⁶⁶ However, Fox is in favour of the narrow construction of implied waiver of sovereign immunity from jurisdiction and argues that “whilst it is probably correct, that an arbitration which produces a legally unenforceable award is probably not an arbitration agreement according to English law it may be going too far to construe consent to arbitration as producing consent to enforcement elsewhere.”⁶⁷ Accordingly, it should be noted that an implied consent under section 9(1) of the UK SIA applies only to the jurisdictional proceedings, and is not extended to the enforcement stage, expressly provided for under Section 13, and is subject to a different exception.⁶⁸ Thus, the adjudication stage is completely separate from the enforcement stage under the UK SIA.

Considering the above situations, all recent codifications on sovereign immunity contain provisions relating to an agreement to arbitrate as an implied waiver of exception to immunity from jurisdiction.⁶⁹ However, its scope could be subject to considerable variations from one state to another.⁷⁰ Although it can be assumed that an agreement to arbitrate might be sufficient to constitute an implicit waiver of immunity from jurisdiction, the problem could arise in the event that the arbitration proceedings do not have a jurisdictional territorial connection or minimum contact with the forum state.

⁶⁵ The Parliament proceedings reported in Hansard on 28 June 1978, Col. 316, quoted in H. Fox, *The Law of State Immunity* (OUP, New York 2008) pp. 287.

⁶⁶ H. Fox, ‘States and the Undertaking to Arbitrate’, 37 Int’l. & Comp. L.Q. 14 (1988) pp. 14; See also four cases in a US court concerning the jurisdictional connection, *Verlinden B.V. v Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980); *Ipirtrade International, S.A. v Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978); *Libyan American Oil Co. v Socialist People’s Libyan Arab Jamahriya* (LIAMCO), 482 F. Supp. 1175 (D.D.C. 1980).

⁶⁷ H. Fox, ‘Sovereign Immunity and Arbitration’ in J DM Lew, *Contemporary problems in international arbitration* (Queen Mary College, UK 1996) pp. 326.

⁶⁸ H. Fox, ‘States and the Undertaking to Arbitrate’, 37 Int’l. & Comp. L.Q. 14 (1988) pp. 15.

⁶⁹ T.A. O’Brien, ‘The validity of the foreign sovereign immunity defense in suits under the Convention on the Recognition and Enforcement of Foreign Arbitral awards’, 7 Fordham Int’l L.J. 321 (1983-1984) 1, 344.

⁷⁰ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988), pp.64

However, this circumstance could only be seen in the context of non-ICSID arbitration, where a domestic court is allowed to intervene and consider the matter of the dispute. This is in contrast with the ICSID arbitration where the exclusive character of the ICSID machinery excludes all the judicial intervention by a municipal court at all stages of the proceedings,⁷¹ plus as a municipal court is obliged by the ICSID Convention to remove all jurisdictional considerations from the process of recognition of an arbitral award.⁷² On this basis, the problem of jurisdictional immunity is eliminated in the context of the ICSID Convention. By comparing the effectiveness of the ICISD arbitration and the New York Convention, it is significantly demonstrated that the ICSID arbitration is by far more effective than the non-ICSID arbitration when enforcing an arbitral award.

3. Immunity from Enforcement and Execution

As discussed in the previous section, it is now well recognised amongst major jurisdictions that a plea of sovereign immunity from jurisdiction is no longer available in the arbitration proceedings. This is because a consent under an agreement to arbitrate exception and a commercial activity exception are considered a waiver of sovereign immunity from jurisdiction in a forum state. The situation is not always that straightforward for immunity from enforcement and execution. As Delaume points out, “the rules regarding sovereign immunity from execution are in even greater disarray than those concerning immunity from suit. Certain legal systems continue to deny execution against the property of foreign states even after rendition of a judgment or award against the state involved. Other systems subject execution to prior approval by the executive branch of government”⁷³ Without doubt, sovereign immunity issues play an even more important role as a bar to enforcement and execution proceedings

As the New York Convention and the ICSID Convention leaves the issue of immunity

⁷¹ G.R. Delaume, ‘ICSID Arbitration and the Courts’, 77 Am. J. Int’l L. 784 (1983) pp. 791; See Art. 53 of the ICSID Convention.

⁷² G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987) pp. 411.; See Art. 54 of the ICSID Convention.

⁷³ G.R. Delaume, ‘Foreign Sovereign Immunity: Impact on Arbitration’, 38(2) Arb. J. 34 (1983) pp. 45.

from execution to municipal laws or applicable treaties,⁷⁴ such municipal laws and applicable treaties on sovereign immunity provide different routes and conditions in relation to the enforcement and execution of arbitral awards; resulting in different degrees of effectiveness. In the event of a non-express waiver of sovereign immunity from enforcement and execution, enforcement and execution of arbitral awards is commonly possible under two exceptions: an implied waiver of sovereign immunity exception by an agreement to arbitrate and a commercial activity exception. Therefore, it is necessary to discuss the extent of impact that a sovereign immunity defence could have on the New York Convention and the ICSID Convention for the enforcement and execution of arbitral awards.

Once an arbitral award has been recognised under the jurisdiction of a forum state, a further significant question as to whether the implied waiver of immunity from jurisdiction by an agreement to arbitrate can be legitimately and automatically extended to the enforcement and execution of the resultant award.⁷⁵ This question becomes more significant against the backdrop of the effectiveness of arbitration proceedings as most municipal courts will consider immunity from jurisdiction and immunity from enforcement and execution as separate immunities.⁷⁶ In this context, it is suggested that a waiver of sovereign immunity is not usually interpreted as extending to immunity from enforcement and execution.⁷⁷ Thus, although a state consents to the jurisdiction of a municipal court in a forum state by an agreement to arbitrate, it does not imply that a municipal court could interpret such consent to jurisdiction as an implied waiver of immunity from enforcement and execution.

On the other hand, courts and municipal laws on sovereign immunity in some jurisdictions, equally treat the immunity from jurisdiction and immunity from

⁷⁴ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1117-1118.

⁷⁵ K.I. Vibhute, 'Waiver of State Immunity by an Agreement by Arbitrate and International Commercial Arbitration', *J. Bus. L.* 550 (November 1998) pp. 559.

⁷⁶ *Second report on Jurisdictional Immunities of States and Their Property*, by Mr.M.Ogiso, *Special Rapporteur*, [1989] 2 Y.B. Int'l Law Comm'n 72, UN Doc. A/CN.4/SER.A/1989/Add.1.

⁷⁷ A. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes', 21 *Am.Rev.Int'l. Arb.* 211 (2010) pp. 222.

enforcement and execution on the same ground of restrictive approach of sovereign immunity.⁷⁸ Crawford concludes this proposition that “there are reasonably good grounds for treating a rule of restrictive immunity from execution as, in principle at least, entailed by restrictive immunity from jurisdiction.”⁷⁹ Therefore, it does not make any sense if a state engaging in arbitration proceedings and consenting to the jurisdiction, by an agreement to arbitrate, does not abide by the resultant award.⁸⁰ In this context, it could be said that the position of sovereign immunity from enforcement and execution is not yet settled. Given the present state of law, an issue of sovereign immunity remains illusory, even after a municipal court assumes jurisdiction to enforce the award.⁸¹

It is currently generally accepted that immunity from enforcement and execution measures may be waived by a state. This is clearly stated in Article 18 and 19 the UN Convention and Article 23 of the European Convention. Apart from those international codifications, Section 1610(a) (1) of US FSIA⁸² and Section 13(3) of UK SIA⁸³ allow for the possibility to waive immunity from execution in a level of municipal laws. Most municipal laws on sovereign immunity agree on the general rule that this requires a separate waiver of sovereign immunity from jurisdiction and a waiver of sovereign immunity from enforcement and execution.⁸⁴ Under the US FSIA, there is express reference to two distinct immunities: immunity from jurisdiction and immunity from attachment and execution, together with two distinct waivers of these immunities.⁸⁵ Interestingly, the two distinct immunities are both “subject to existing agreements to which the United States is a party at the time of enactment of this Act.”⁸⁶ By the effect of these sections, although section 1609 and 1610 match the rules set forth in section 1604

⁷⁸ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 212.

⁷⁹ J. Crawford, ‘Execution of Judgments and Foreign Sovereign Immunity’, 75(4) AJIL 820 (1981) pp. 854.

⁸⁰ K.I. Vibhute, ‘Waiver of State Immunity by an Agreement by Arbitrate and International Commercial Arbitration’, J. Bus. L. 550 (November 1998) pp. 560.

⁸¹ M. Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, The Hague, London, Boston 2000) pp. 302-303.

⁸² Section 1610 (a)(1) of US FSIA.

⁸³ Section (13)(3) of UK SIA.

⁸⁴ See Section 1604 and 1609 of the US FSIA and Section 2 -11 and Section 13-14 of the UK SIA where it separates immunity from jurisdiction and immunity from enforcement; See also G.R. Delaume, ‘The State Immunity Act of the United Kingdom’, 73(2) AJIL 185 (1979).

⁸⁵ X. Yang, *State Immunity in International Law* (CUP, UK 2012) pp.354.

⁸⁶ See Section 1604 and 1609 of the US FSIA.

and 1605 in regard to immunity from jurisdiction, the US FSIA requires a separate waiver in respect of the jurisdiction and the execution process.⁸⁷ Therefore, a waiver of sovereign immunity from jurisdiction does not affect sovereign immunity from execution.⁸⁸ Section 1610 (a)(1) provides an exception paralleling the exceptions in section 1605 (a) regarding sovereign immunity from jurisdiction that:

“(a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or”⁸⁹

Under this provision, a party seeking to execute an arbitral award against a foreign state’s property must proceed against only a property used as a commercial property in the United States and then must satisfy an additional exception provided in subsection (a)(1) regarding a waiver of sovereign immunity either explicitly or by implication. However, this exception applies only to a foreign state entity, irrespective of an agency or instrumentality of a foreign state, which has a different exception pursuant to Section 1610 (b).⁹⁰ In this respect, only property of the foreign state or one of its political subdivisions, used for a commercial activity in the United States upon which the claim is based, is subject to execution, whereas the execution could be made against all property in the United States of an agency or instrumentality of a foreign state, regardless of the nexus connection and the use of the property.

As Section 1610(a) combines a waiver of sovereign immunity and commercial activity as an exception for the execution, it provides a narrower restriction than a sovereign

⁸⁷ 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. 410.

⁸⁸ *ibid* 416.

⁸⁹ Section 1610 (a)(1) of the US FSIA.

⁹⁰ Section 1610 (b) of the US FSIA.

immunity from jurisdiction under Section 1605, which only requires either a waiver or a commercial activity. In other words, a foreign state enjoys a broader immunity or more protection in respect of execution.⁹¹ This can be referenced to the House of Representative Report, in which the drafters of the FSIA only partially lifted a sovereign immunity from execution; it explains that:

“The FSIA would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. [The FSIA] seeks to restrict this broad immunity from execution... by partially lowering the barrier of immunity from execution”⁹²

Consequently, even though the separation of sovereign immunity is not expressly stated in the US FSIA, it could possibly be assumed from the US state practice that a waiver of sovereign immunity from jurisdiction cannot be implicitly extended to a waiver of sovereign immunity from execution; since the two immunities are separate and distinct.⁹³ The US court reaffirmed this position of the US practice in *FG Hemisphere*; the court expressed its view that:

“Although jurisdiction over the parties does not change after the action commences or after the party submits to the court’s jurisdiction, immunity from execution is nevertheless narrower than jurisdictional immunity... We reject [the plaintiff’s] argument because it conflates the considerations and effects attendant to commencement and/or notice of a suit seeking to execute upon the foreign sovereign’s property with those attendant to deciding whether to authorize execution upon that property.”⁹⁴

In relation to the US Court’s reaffirmation of the distinction between the two immunities it should be highlighted that US state practice under the US FSIA, regarding a sovereign immunity of execution under sections 1610 and 1611, is subject to any international

⁹¹ X. Yang, *State Immunity in International Law* (CUP, UK 2012) pp.355.

⁹² The US House of Representative Reports, Report No. 94-1487, 1976, pp.8 and 27.

⁹³ 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. 416.

⁹⁴ *FG Hemisphere v. Congo*, US. 455 F.3d 575, at 589 (5th Cir. 2006), quoting *Connecticut v Congo*, US. 309 F.3d 240, at 252 (5th Cir. 2002).

agreements to which the US is a party. According to the Legislative History in the House of Representatives Report:

“Explicit and implied waivers [are] governed by the same principles that apply to waiver immunity from jurisdiction under section 1605(a) (1) of the bill. A foreign state may waive its immunity from execution, inter alia, by the provisions of a treaty, a contract, an official statement, or certain steps taken by the foreign state in the proceedings leading to judgment or to execution.”⁹⁵

In this context, the US courts have found an implicit waiver of sovereign immunity from execution in an arbitration agreement made by a foreign state in another country.⁹⁶ Accordingly, the consideration of an agreement to arbitrate in pursuant to international convention provisions, should be in line with the municipal laws on sovereign immunity.⁹⁷ To support this position, some scholars have contended that a state undertaking to arbitrate could be considered as an implied waiver of immunity from execution.⁹⁸ They believe that if a state consents to arbitration, it must be considered to accept all the consequences, including complying with an unfavourable award. Bernini and Jan Van Den Berg pointed out this position, stating that:

“By agreeing to arbitration, a state must be deemed to have waived immunity. For the same reason, we deem it inappropriate to distinguish between immunity from jurisdiction and immunity from execution in relation to arbitration. It is in our opinion, illogical that having agreed to arbitration a state would have waived its right to invoke immunity from jurisdiction but not its right to immunity from execution.”⁹⁹

Therefore, it should be admitted that the distinction between immunity from jurisdiction

⁹⁵ The US House of Representative Reports, Report No. 1487, 94th Cong., 2d Sess. 1 (1976), pp. 18; reprinted in 1976 U.S. Code Cong. & Ad. News 6604.

⁹⁶ P.M. McGowan, ‘Arbitration Clauses as Waivers of Immunity from Jurisdiction and Execution under the Foreign Sovereign Immunities Act of 1976’, 5 N.Y.L. Sch. J. Int’l & Comp. L. 410 (1983-1984) pp. 428.

⁹⁷ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 222.

⁹⁸ See Delaume, ‘Judicial decisions related to sovereign immunity and transnational arbitration’ 2 ICSID Review 403 (1987); Albert Ban Den Berg, ‘Some recent problems in the practice of enforcement under the New York and ICSID Convention’ 2 ICSID Review 439 (1987), 449.

⁹⁹ The Enforcement of Arbitral Awards against a State (n 10), pp. 359; See also A. van Blankenstein, ‘Enforcement of an arbitral award against a state: with whom are you dealing?’ in S. Muller (eds), *The Flame Rekindled: New hopes for international arbitration* (Martinus Nijhoff, London 1993), pp. 164 (Enforcement of an arbitral award against a state: with whom are you dealing?); C. Schreuer, *State immunity: Some recent developments* (1988), at 125; L.J. Bouchez, ‘The nature and scope of state immunity from jurisdiction and execution’, Netherlands Y.B.I.L. 1 (1979), at 19.

and immunity from enforcement is not relevant if a foreign state acts as a private person in commercial activities. However, it should be pointed out that since most arbitration proceedings are considered as an equivalent basis of non-immunity of commercial activity under the US FSIA, it is doubtful whether an explicit waiver could add anything for the purpose of the enforcement of an arbitral award and extend to non-commercial property.¹⁰⁰ Thus, it is worthwhile mentioning Schreuer's comment wherein he contends that "the rationale for denying immunity in case involving agreement to arbitrate is consent and this should not be combined with other exceptions to immunity. Such a combination would tend to dilute or even defeat the effects of the arbitration exception by adding further requirements."¹⁰¹

Before going further, it is necessary to highlight other municipal laws concerning waiver of sovereign immunity from execution in order to compare state practices in this area. Similarly, although the UK SIA allows a foreign state a general immunity concerning the prohibition of foreign state property being subject to the enforcement of a judgment or arbitration award under section 13(2),¹⁰² it also provides an exception under section 13(3) to such immunity, being that:

“(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.”¹⁰³

By this provision, it could be said that only written consent under subsection (3) is

¹⁰⁰ A. Boralessa, 'Enforcement in the United States and United Kingdom of ICSID awards against the republic of Argentina: Obstacles that transnational corporations may face', 17 N.Y. Int'l L. Rev 53 (2004) pp. 66.

¹⁰¹ C. Schreuer, *State immunity : Some recent developments* (Grotius Publication, Great Britain 1988) pp. 69.

¹⁰² Section 13(2) of the UK SIA, it reads:

“(2) Subject to subsections (3) and (4) below—

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.”

¹⁰³ Section 13 (3) of the UK SIA.

sufficient to waive immunity from execution. This is in contrast with the US FSIA, which allows for a waiver of immunity from execution either by express statement or by implication.¹⁰⁴ This aspect raises the question as to whether an implied consent under section 9, regarding an agreement to arbitrate, is limited in its effect to matters arising before or during arbitration proceedings but also to the recognition and enforcement of arbitral awards.¹⁰⁵ However, the UK SIA, unlike the US FSIA, makes it clear that a waiver of sovereign immunity from jurisdiction, by submitting to the jurisdiction of the courts, is not necessarily regarded as a waiver of sovereign immunity from execution.¹⁰⁶ Lord Diplock has clarified this distinction between the two immunities in *Alcom v. Republic of Colombia*, stating that:

“The State Immunity Act 1978... draws a clear distinction between the adjudicative jurisdiction and the enforcement jurisdiction of courts of law in the United Kingdom. Sections 2 to 11 deal with adjudicative jurisdiction. Sections 12 to 14 deal with procedure and of these, sections 13(2) to (6) and 14(3) and (4) deal in particular with enforcement jurisdiction. Section 13(3)... makes it clear that such submission does not of itself imply any submission to the enforcement jurisdiction of the courts. Separate consent to that is needed.”¹⁰⁷

Once again, the UK state practice on sovereign immunity from execution follows the US state practice by treating the execution stage as a distinct feature of immunity requiring a separate consent. However, the UK SIA and the Australian FSIA do not follow the US practice in containing a specific provision limiting execution to only property that ‘is or was used for commercial activity’ in a forum state. Rather, the UK SIA allows for a waiver of immunity from execution against a non-commercial property of foreign state under section 13(4) by an expressed waiver of immunity from execution under section 13 (3). Moreover, the UK SIA authorises the head of the state’s diplomatic mission to waive

¹⁰⁴ J. Ostrander, ‘The last bastion of sovereign immunity: A Comparative look at immunity from execution of judgments’, 22 Berkeley J. Int’l L. 451 (2004) pp. 549-550.

¹⁰⁵ H. Fox, ‘States and the Undertaking to Arbitrate’, 37 Int’l. & Comp. L.Q. 14 (1988) pp. 15.

¹⁰⁶ G.R. Delaume, ‘The State Immunity Act of the United Kingdom’, 73(2) AJIL 185 (1979) pp.190-197.

¹⁰⁷ *Alcom v Republic of Colombia*, England [1984], 1 AC 580 at 600; 74 ILR 170, at 183; See also *Al-Adsani v Kuwait*, England [1996] 107 ILR 536, at 542, 548; *AIC v. Nigeria*, England [2003] 129 ILR 571, at 575-576, paras. 16-17; *AIG v Kazakhstan*, England, [2005], [2006] 1 WLR 1420, at 1434, para 29(3); 1438, para 42; 1439, paras 47-48; 1440, para 54; 129 ILR 589, at 606, 610, 611-612, 613; *Svenska v Lithuania (No.2)*, England, [2006], [2007] QB 886, at 930, para 135.

a sovereign immunity from execution, which is provided for under section 13(5).¹⁰⁸

At this point, it should be highlighted that whilst the US FSIA provides an easier route to waive a sovereign immunity from execution, either expressly or by implication, it should not be overstated as that a waiver, either express or by implication, under the US FSIA is restricted to only commercial assets. The US FSIA additionally requires a nexus connection to exist between the property subject to execution and the commercial activity underlying the claim.¹⁰⁹ Such a requirement under the US FSIA will make it more difficult to execute against a foreign state's property, which will be discussed in chapter 6.

In addition to these municipal laws on sovereign immunity, specific provisions of express consent can be found, almost identically, in treaty commitments of a forum state,¹¹⁰ for instance, the European Convention¹¹¹ and the UN Convention.¹¹² Following this trend, it can be, so far, said that a separate and express consent is necessary for a waiver of sovereign immunity from execution among major jurisdictions. In particular, Article 20 of the UN Convention lays down a clear-cut provision in Article 20. It says:

¹⁰⁸ Section 13 (5) of the UK SIA, it reads:

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

¹⁰⁹ G.R. Delaume, ‘The State Immunity Act of the United Kingdom’, 73(2) AJIL 185 (1979) pp. 195.

¹¹⁰ G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987) pp. 414.

¹¹¹ Art. 23 of the European Convention, it reads:

“No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in a particular case.”

¹¹² Art. 19 (a) of the UN Convention, it reads:

“No post-judgment measures of constraint, such as attachment, arrest or execution, against the property of State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

- (a) the State has expressly consented to the taking of such measures as indicated:
 - (i) by international agreement;
 - (ii) by an arbitration agreement or in a written contract; or
 - (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or ”

“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.”¹¹³

By the effect of this provision, it can be concluded that the UN Convention follows exactly the same format under the municipal laws on sovereign immunity. It does this by distinguishing the immunity from jurisdiction and the immunity from execution entitled to a foreign state before a municipal court of a forum state. This, accordingly, results in the current state practice where a separate waiver must be provided in relation to these two immunities; wherein a waiver of sovereign immunity from jurisdiction does not mean a waiver of sovereign immunity from execution.¹¹⁴

This situation is in accordance with the concern emphasised by Delaume, as mentioned earlier, in which the rules concerning sovereign immunity from execution are more confused and unsettled than those concerning sovereign immunity from jurisdiction and may be subject to a prior approval by the executive branch of government.¹¹⁵ In this respect, it cannot be said that a state’s obligation under municipal law and international conventions regarding a sovereign immunity from execution is irrelevant. Rather, such state obligations play an important role in the execution of arbitral awards against foreign state property. This, in turn, leads to forum shopping, in order to locate the most favorable forum.¹¹⁶ A waiver of sovereign immunity from execution, thus, can also be construed from provisions in international conventions.

4. The Impact of International Arbitration Conventions

The issue of sovereign immunity from execution cannot be settled when it comes to the conflict of laws between international conventions and municipal laws on sovereign immunity. This raises concern as to whether international conventions can overrule a

¹¹³ Art.20 of the UN Convention.

¹¹⁴ *Seventh report on Jurisdictional Immunities of States and Their Property*, by Mr. Sompong Sucharitkul, *Special Rapporteur*, 2 Y.B. Int’l Law Comm’n 21 (1985), UN Doc. A/CN.4/388 and Corr. 1., pp. 35.

¹¹⁵ G.R. Delaume, ‘Foreign Sovereign Immunity: Impact on Arbitration’, 38(2) *Arb. J.* 34 (1983) pp. 45.

¹¹⁶ S. Toope, *Mixed International Arbitration Studies in Arbitration between States and Private Persons* (Cambridge, Grotius 1990) pp. 145.

defence of sovereign immunity from execution provided under a municipal law. Chamlongrasdr has pointed out this concern, stating that “international conventions can be said to have a prevailing effect over the forum State’s laws when they appear to be in conflict.”¹¹⁷ Therefore, it is appealing to consider the relationship between international conventions and municipal law in order to uncover a waiver of sovereign immunity from execution. As far as international conventions are usually concerned, neither the New York Convention nor the ICSID convention provide any provisions for the purpose of waiver of sovereign immunity from execution. It is, consequently, a matter of interpretation by a municipal court to consider the combination of provisions under both international conventions and municipal laws, which the state is obliged to follow.

(a) The ICSID Convention

By leaving sovereign immunity from execution untouched and subject to a municipal law of sovereign immunity, where the arbitral award is sought,¹¹⁸ it is clear that the ICSID Convention does not intend to prevent the invocation of a sovereign immunity defence in the process of execution. The answer to the problem of sovereign immunity from execution thus cannot be found in the ICSID Convention.¹¹⁹ As in the Report of the Convention, it is explained that “the doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought.”¹²⁰ Therefore, whilst a sovereign immunity defence cannot be raised to attack the recognition and enforcement of arbitral awards at the outset of an ICSID arbitration, such a defence is available to attack the execution of arbitral awards in a forum state, provided in Article 55 of the ICSID Convention. Schreuer concludes that “state immunity only comes into play when concrete measures of execution are taken to enforce the award’s pecuniary obligations,

¹¹⁷ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 222.

¹¹⁸ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1129.

¹¹⁹ S. Toope, *Mixed International Arbitration Studies in Arbitration between States and Private Persons* (Cambridge, Grotius 1990) pp. 145.

¹²⁰ International Bank for Reconstruction and Development, ‘Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States’ (18 March 1965), reprinted in 4 ILM 524 (1965) pp. 530.

typically after recognition has been granted.”¹²¹ In this respect, it is worth pointing out that the defence of sovereign immunity from execution is the only ground permitted under the ICSID Convention for non-enforcement of arbitral awards.¹²² However, the intention of the drafter of the ICSID Convention is to limit the role of municipal court and state intervention by only placing a sovereign immunity from execution in the execution stage. Therefore, an intervention by a municipal court in a host state would undermine the main objective of the Convention as well as the will of state parties, which would make an award simply “a piece of paper deprived from any legal value and dependent on the will of state organs.”¹²³

In this circumstance, it requires emphasis that the ICSID Convention has made a clear distinction between two aspects: immunity from jurisdiction and immunity from execution, as well as immunity from enforcement and immunity from execution, as mentioned in chapter 4 in the leading cases of *Benvenuti & Bonfant v Congo*,¹²⁴ *SOABI v Senegal*¹²⁵ and *LETSCO v Liberia*.¹²⁶ It can be summarised from these cases that some major jurisdictions draw a clear distinction between the recognition of an arbitral award and their actual execution. Following this distinction, although an agreement to arbitrate may be seen as a waiver of sovereign immunity from jurisdiction and enforcement to have an arbitral award recognised and enforced under the ICSID Convention, such a waiver could not be, *per se*, automatically extended to immunity from execution against a foreign state’s property in which a separate waiver is required. In other words, a waiver of sovereign immunity from execution can only be found in a case where there is an unambiguous affirmation of an express waiver of immunity from execution.¹²⁷ Therefore,

¹²¹ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1153.

¹²² D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 223.

¹²³ *Vivendi Universal SA v. Argentina*, ICSID Case no. ARB/97/3, Decisio on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 4 Nov. 2008, para 36.

¹²⁴ *Benvenuti & Bonfant v Congo*, Judgment of June 26, 1981, Cour d’Appel de Paris, 108 Journal Du Droit International 843 (1981).

¹²⁵ *SOABI v Senegal*, Cour de Cassation, 11 June 1991, 2 ICSID Reports 341; 118 Journal Du Droit International 1005 (1990).

¹²⁶ *LETSCO v Liberia*, United States District Court, Southern District of New York, Judgment, 12 December 1986, 2 ICSID Reports 367/8 and 2 ICSID Reports 387/8.

¹²⁷ 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. 267.

it can be said that although the sovereign immunity doctrine has shifted to a restricted approach, in which a waiver of sovereign immunity from jurisdiction is widely accepted in a large number of countries, a sovereign immunity from execution remains absolute.¹²⁸

As mentioned earlier, Van den Berg, has opposed the above presumption by supporting a single immunity rule.¹²⁹ In this respect, a waiver of sovereign immunity from execution could be implied from a waiver of sovereign immunity from jurisdiction in accordance with the application of *pacta sunt servanda* principle,¹³⁰ where a state must comply with an arbitration awards, if it has consented to arbitration under the treaty obligations.¹³¹ However, this principle might have a greater effect under other international arbitration rules and institutions. Fox has argued that “agreement to rules such as those of the ICC by a state party, or commitment by a contracting state to the New York Convention, or adoption of the UNCITRAL Model law by a state, all of which instruments impose obligations on the party to honour any arbitral awards rendered, argues for an even stronger case of implied waiver of immunity from execution of the award.”¹³² Although this approach might be applied in some jurisdictions, where they allow a restrictive immunity to execution, such as Switzerland¹³³ and Germany,¹³⁴ there is only limited evidence that this approach is applied, since this could interfere with the rights of a state in relation to its political and economic considerations.¹³⁵

The inclusion of a waiver of sovereign immunity from execution has been raised in the process of drafting the Convention. However, this appeared to have far-reaching

¹²⁸ A.J. 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 439 (1987) 449.

¹²⁹ *ibid*

¹³⁰ *ibid* 450.

¹³¹ O. Chukwumerije, ‘ICSID arbitration and sovereign immunity’ 19 *Anglo-Am L. Rev.* 167 (1990); See E Silva-Romero, ‘ICC Arbitration and state contract’ 13(1) *ICC Intl Court Arb Bull* 34 (2002); G.Delaume, ‘Consent to ICSID Arbitration’ in JJ Norton, M Andenas and M Footer (eds) *The changing world of international law in the twenty-first century* (Kluwer Law International, The Hague 1998).

¹³² Fox CMG QC, *The Law of State Immunity* (OUP, New York 2008) pp.266-267.

¹³³ See *Arab Republic of Egypt v CINETEL*, Federal Tribunal, 20 July 1979, 65 *ILR* 425 (1984), at 430.

¹³⁴ See *Central Bank of Nigeria*, Landgericht Frankfurt, 2 December 1975, 65 *ILR* 131 (1984), at 135.

¹³⁵ K.H. Bockstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice* (Kluwer law, Boston 1984) pp.50; See also C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1157.

implications during the drafting process due to the fact that “an attempt to include such a waiver would have run into the determined opposition of developing countries and would have jeopardized the wide ratification of the Convention.”¹³⁶ As a matter of fact, although the ICSID Convention does not provide any waiver for immunity, it cannot be said that it freezes the law on state immunity, but makes reference to a municipal law on sovereign immunity from execution as it evolves over time.¹³⁷

As the ICSID Convention refers to a municipal law on sovereign immunity regarding an execution against a foreign state’s property, it could be seen that a waiver of sovereign immunity from execution is possible, in principle, under a municipal law on sovereign immunity, as illustrated earlier. In practice, it may be subject to some specific conditions under a municipal law regarding a waiver of sovereign immunity from execution. One possible solution in locating a waiver of sovereign immunity from execution is to treat consent to the ICSID arbitration as an implied waiver of sovereign immunity from execution.¹³⁸ The possibility of locating such an implied waiver is limited and subject to certain conditions under a municipal law on sovereign immunity where the execution is sought.¹³⁹

One might assume that consenting to an ICSID arbitration could be interpreted as an implicit waiver of sovereign immunity from execution. Such a proposition is not literally applicable to ICSID arbitration because Article 55 of the ICSID Convention specifically preserves a sovereign immunity from execution to be in accordance with a

¹³⁶ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1154; See also A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 *Recueil des Cours* 331, 403 (1972-II); R. Luzzatto, ‘International Commercial Arbitration and the Municipal Law of States’, 157 *Recueil Des Cours* 13, (1977) pp. 99; A. Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’, 2 *ICSID Review* 287 (1987) pp. 333-334.

¹³⁷ C.F. Amerasinghe, ‘The International Center for Settlement of Investment Disputes and Development through the Multinational Corporation’, 9 *Vanderbilt Journal of Transnational Law* 793 (1976) pp 814.

¹³⁸ A.J. Van Den Berg, ‘Recent Enforcement Problems under the New York and ICSID Conventions’, 5 *Arbitration International* 2 (1989) pp. 13; H. Fox, ‘States and the Undertaking to Arbitrate’, 37 *Int’l. & Comp. L.Q.* 14 (1988) pp. 12; *The Enforcement of Arbitral Awards against a State* (n 10), pp. 360.

¹³⁹ C.F. Amerasinghe, ‘Submissions to the Jurisdiction of the International Centre for Settlement of Investment Disputes’, 5 *Journal of Maritime Law and Commerce* 211 (1973/74) pp. 248.

municipal law on sovereign immunity of the forum state.¹⁴⁰ In this context, whilst some municipal laws, for instance, the US FSIA, allow an explicitly or implicitly waiver of sovereign immunity, waiver of sovereign immunity from execution has to be explicit in many municipal laws, for instance, the UN Convention, the UK SIA and the European Convention. Accordingly, the validity of an implied waiver inevitably does not depend on the ICSID Convention but on the municipal law on sovereign immunity and any conventions applied by it as part of that law.¹⁴¹

Another approach in locating a waiver of sovereign immunity is to link immunity from execution to immunity from execution under a single regime of immunity.¹⁴² Under this principle, it would be permissible to refuse immunity from execution on the ground that whenever there is no immunity from jurisdiction, it should be the same with a sovereign immunity from execution.¹⁴³ As a state party, by consenting to ICSID arbitration, is prohibited from pleading its immunity at the time of recognition and enforcing arbitral award, it might be assumed that a defence of sovereign immunity from execution is also prohibited. Again, as far as Article 55 of the ICSID clearly mentions this issue, it would be, however, unwise to rely only on such linking principle.¹⁴⁴ Such a linking principle is not quite workable with the ICSID arbitration.¹⁴⁵ This linking principle, under a single regime of sovereign immunity, might be applicable and helpful in the execution of an arbitral award under other international conventions, such as, the New York Convention and the ICC arbitration.

Referring to the above, it can be summarised that a waiver of sovereign immunity from execution by an agreement to arbitrate under the ICSID Convention is hardly possible since Article 55 preserves a sovereign immunity from execution according to the

¹⁴⁰ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 223; See also C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1173.

¹⁴¹ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1173.

¹⁴² The Enforcement of Arbitral Awards against a State (n 10), pp. 364; Enforcement of an arbitral award against a state: with whom are you dealing? (n 98), pp. 159.

¹⁴³ C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1156-1157.

¹⁴⁴ *ibid* 1173.

¹⁴⁵ *ibid* 1153.

relevant municipal law on sovereign immunity where an execution is sought. However, this does not mean that a sovereign immunity from execution is an absolute bar to the enforcement of arbitral awards.¹⁴⁶ Rather, it could be possible to execute an arbitral award if the municipal law on sovereign immunity, where an execution is sought, allows for an execution to be assumed from an agreement to arbitrate.¹⁴⁷ However, such a possibility is limited to certain form of conditions such as, jurisdictional nexus, commercial activity and specially protected property. Therefore, although a waiver either expressly or implied is an exception to sovereign immunity from execution, it might be subject to or combined with other exceptions.

The combination of these exceptions is particularly found in the US FSIA, in which a waiver of sovereign immunity from execution is not independent but subject to a commercial activity exception. This situation is different under the UK SIA, the UN Convention and the European Convention, where a waiver of sovereign immunity from execution is independent from the commercial activity exception of a foreign property concerned.¹⁴⁸ As will be seen in the next section, since the municipal law on sovereign immunity in a majority of states shows that a foreign state property used for commercial activity is not immune from execution in any case, a waiver of sovereign immunity that only covers a commercial property makes little sense and has a minor effect in this regard.

(b) The New York Convention

As previously mentioned, recognition and enforcement of arbitral awards might only be refused for a number of exceptions specified in Article V of the New York Convention. With regards to the issue of sovereign immunity from execution, whilst the ICSID Convention clearly specifies a sovereign immunity from execution in Article 55. However, since the New York Convention applies with obligations to all arbitral awards rendered pursuant to a written arbitration agreement in any Contracting states other than a

¹⁴⁶ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 224.

¹⁴⁷ C. Schreuer, 'Commentary on the ICSID Convention', 14 ICSID Review 46 (1999) pp. 151.

¹⁴⁸ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1174.

state where an enforcement is sought,¹⁴⁹ it creates a jurisdictional nexus for a forum state to assume the submission to an arbitration agreement as a waiver of immunity. Professor Christopher Schreuer contends that “the combination of an agreement to arbitrate in a State Party to the [New York] Convention and of the obligations under the Convention should lead to the withdrawal of immunity for purposes of the arbitration in all other Parties to the Convention.” Further he states that “this joint operation of consent to arbitrate and treaty provisions to make it effective in a large number of States is not an undue extension of jurisdiction over States which have submitted to arbitration. It is entirely foreseeable for them and part of the legal framework accepted when consenting to arbitration.”¹⁵⁰

Although it is deemed that an agreement to arbitrate under the New York Convention regime can be interpreted as a waiver of sovereign immunity from jurisdiction,¹⁵¹ it is not clear whether the interpretation can be extended to being an implied waiver of sovereign immunity from execution. As illustrated earlier in the leading case of *Ipitrade*, the US court held that “a state’s agreement to adjudicate all disputes arising under the contract in accordance with Swiss law and by arbitration under International Chamber of Commerce Rules constitutes a waiver of sovereign immunity that could not be unilaterally revoked.”¹⁵² Further case law has relied on the *Ipitrade* decision, including *Verlinden BV v. Central Bank of Nigeria*. This is a case where the US Court held that:

“In *Ipitrade International v. Federal Republic of Nigeria* — yet another of the Nigerian

¹⁴⁹ See Art. I (2) of the New York Convention; See also S. Choi, ‘Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions’, 28 *International Law and Politics* 175 (1995-1996) pp. 188

¹⁵⁰ C. Schreuer, *State immunity : Some recent developments* (Grotius Publication, Great Britain 1988), pp 87.

¹⁵¹ See J.G. Wetter, ‘Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunals’, 2(1) *J. Int’l Arb.* 7 (1985); G. Kahale and M.A. Vega, ‘Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States’, *Colum. J. Transnat’l L.* 211 (1979-1980); J. S. McClendon, ‘Enforcement of Foreign Arbitral Awards in the United States’, 4 *Nw. J. Int’l L. & Bus.* 58 (1982); G. Kahale, ‘Arbitration and Choice-of-Law Clauses as Waivers of Jurisdictional Immunity’, 14 *International Law and Politics* 29 (1982-1982).

¹⁵² *Ipitrade International S.A. v Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978), at 826; 17 *ILM* 1395 (1978).

cement contract cases — a Swiss corporation sued in the United States District Court for the District of Columbia to enforce a final arbitration award against Nigeria pursuant to Swiss law and based upon the parties' agreement to submit all disputes to arbitration. Federal subject matter jurisdiction in *Iptrade*, however, existed by virtue of a treaty for the enforcement of foreign arbitration awards to which the United States was a signatory and which had been incorporated into federal law.”¹⁵³

In addition, the court further cited the Congressional Report, which states that:

“With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.”¹⁵⁴

The effect of this decision is notable, in that, where a foreign state has agreed to arbitration in another country, which is a party to the New York Convention, a foreign state has explicitly waived its objection to such enforcement actions.¹⁵⁵ As mentioned earlier in previous chapter, whereas the New York Convention does not provide any exceptions for the defence of sovereign immunity from execution, the most possible ground that the sovereign immunity could be recognised for refusing the enforcement of awards is not only the public policy exception under Article V(2)(b). The recognition could be also inserted itself into the New York Convention as ‘rules of procedure’ under Article III of the New York Convention. However, there would be serious consequences stemming from a reference to the public policy exception, under Article V (2) (b) as a waiver of sovereign immunity, in order to avoid an execution of arbitral awards. Therefore, this needs to be construed narrowly, as declared in the US case of *Parsons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier*, where the court held that public policy can be a ground for refusing the enforcement of arbitral awards

¹⁵³ *Iptrade International S.A. v. Federal Republic of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980), at 1300

¹⁵⁴ See H.R. Rep.No.94-1487, 94th Cong., 2d Sess. 6, reprinted in [1976] U.S.Code Cong. & Admin. News, at 6617.

¹⁵⁵ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 225; T.A. O’Brien, ‘The validity of the foreign sovereign immunity defense in suits under the Convention on the Recognition and Enforcement of Foreign Arbitral awards’, 7 *Fordham Int’l L.J.* 321 (1983-1984) 1, pp. 353; See G. Kahale, ‘Arbitration and Choice-of-Law Clauses as Waivers of Jurisdictional Immunity’, 14 *International Law and Politics* 29 (1982-1982).

“only where enforcement would violate the forum state’s most basic notions of morality and justice.”¹⁵⁶

Considering the ‘rule of procedure’ approach, it can be submitted that a sovereign immunity defence could be inserted as an exception in Article III of the New York Convention, which is subject to the procedural rules in a state where the arbitral award is sought. On the other hand, it can be contended that a defence of sovereign immunity is regarded as a substantive.¹⁵⁷ The insertion of sovereign immunity defence to Article III of the New York Convention as a substantive law was mentioned by the US Supreme court in the *Verlinden* case, which argued that sovereign immunity under the US FSIA is considered as a substantive, not simply a jurisdictional issue.¹⁵⁸ However, such an expansion of the interpretation of Article III would undermine the main objective of the New York Convention, which is to limit the grounds for refusing the enforcement of arbitral awards, expressly stated in Article V of the New York Convention.¹⁵⁹

In addition, another basis for a waiver of sovereign immunity could be found in Article I of the New York Convention, where it obliges a state party to recognise and enforce arbitral awards that fall within the Convention.¹⁶⁰ By committing to the obligations of a forum state under Article I (1), Chamlongrasdr argues that:

“the convention also applies to States which are not a party to the convention because Article I (1) requires recognition and enforcement of foreign arbitral awards on the condition that the forum State where the award is sought to be enforced and the State where the award was made are the parties to the convention- from the language of the convention, it does not require that the State against which award is sought to be enforced

¹⁵⁶ *Parsons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier*, 508 F.2d 971 (2d Cir. 1974), at. 973.

¹⁵⁷ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 232.

¹⁵⁸ *Verlinden B.V. v Central Bank of Nigeria*, 461 US 480 (1983), at 496.

¹⁵⁹ M. Feldman, ‘Waiver of Foreign Sovereign Immunity by Agreement to Arbitrate: Legislation Proposed by the American Bar Association’, 40(1) Arb. J. 24 (March 1985) pp. 30.

¹⁶⁰ *ibid* 29.

has to be a party to the convention.”¹⁶¹

Therefore, it could be said that Article I of the New York Convention does not focus on the nationality of the party seeking to enforce an arbitral award but mainly focus on the forum state where enforcement of the award is sought. However, Crawford disagrees to this proposition and provides a more restrictive view¹⁶² by referring to the principle of *pacta tertiis nec nocent nec present*, which has been stipulated in Article 34 of the Vienna Convention on the Law of Treaties. It says: “a treaty does not create either obligations or rights for a third State without its consent”¹⁶³ Therefore, it is believed that a third state party obligation under an agreement to arbitrate could be implicitly considered as a waiver of any objection to enforcement of arbitral awards on sovereign immunity defense only in the case that such a waiver is based on its good faith obligation to comply with an adverse award.¹⁶⁴

In this respect, although it is possible that the applicability of the New York Convention is mainly focused on the forum state where the arbitral award is sought, regardless the nationality of state parties and the situs of the arbitration, the New York Convention requires a jurisdictional link between the arbitration and the forum state court subject to the forum state law; which makes forum shopping more relevant. This situation is well illustrated by the proceedings regarding the attempt made by *LIAMCO*, in which it sought to execute an arbitral award against Libya’s assets in France, the United States, Switzerland and Sweden.

In France, whilst the court granted *exequatur* to the arbitral award, it rejected the attachment of the Libya’s assets on the ground of absolute immunity.¹⁶⁵ In the United

¹⁶¹ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 227; See also *SEEE v Yugoslavia*, Netherland Supreme Court (26 October 1973), 65 ILR 356, at 362; *SEEE v Yugoslavia*, Rouen Court of Appeal, (13 November 1984), 24 ILM 345, at 351.

¹⁶² See J. R. Crawfords, ‘A Foreign State Immunities Act for Australia?’, 8 Aust. YBIL 71 (1978-1980).

¹⁶³ Art. 34 of VCLT.

¹⁶⁴ M.B. Feldman, ‘Foreign Sovereign Immunity in the United States Courts 1976-1986’, 19 Van. J. Transnat’l L. 19 (1986), pp. 39; Bernini and Jan van den Berg, ‘The enforcement of arbitral awards against a state: The problem of immunity from execution’ in Lew (ed.), *Contemporary problems in international arbitration* (Queens Mary college 1986), pp. 360.

¹⁶⁵ *Procureur de la Republique v Societe LIAMCO*, T.G.I., Paris, 5 March 1979, Clunet 1979, T 857.

States, although the District Court of Columbia held that by an agreement to arbitrate in Switzerland regarding the dispute with *LIAMCO*, Libya had waived its sovereign immunity in which the court had a jurisdiction to recognise and enforce an arbitral award, the court declined its jurisdiction on the ground of the Act of State doctrine.¹⁶⁶ The Federal Tribunal in Switzerland refused to exercise jurisdiction and execute against Libya's assets on the ground that the underlying transaction and the arbitrator's choice of arbitration locus in Switzerland were not sufficient to establish a close connection with Switzerland.¹⁶⁷ In this respect, the nexus requirement under Swiss law creates another requirement to the enforcement of arbitral awards submitted under the New York Convention. This raises a question as to whether by submitting to an agreement to arbitrate under the New York Convention a sufficient legal relationship is created between the underlying transaction and the place where an arbitral award is sought, so that it could be deemed a waiver of sovereign immunity from execution¹⁶⁸

Lastly, *LIAMCO* had attempted to enforce an arbitral award in Sweden, where the Court of Appeals of Svea (Stockholm) held that by consenting to arbitration Libya had waived its immunity from jurisdiction and execution.¹⁶⁹ From the attempt of *LIAMCO* to enforce an arbitral award in many forums under the New York Convention, it could be said that a different forum would be subject to different requirements and result in different outcomes. This would be in line with an arbitral award rendered under the ICSID Convention, which surrenders the measures of execution to a municipal law on sovereign immunity.¹⁷⁰

Furthermore, the US practice is, by no means inclined to protect the rights of the third state. Such an argument was rejected in the award of *Creighton Ltd. v Government*

¹⁶⁶ *Libyan American Oil Company (LIAMCO) v Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980).

¹⁶⁷ *Socialist Libyan Arab Popular-Jamahiriya v. Libyan American Oil Company (LIAMCO)*, Swiss Federal Tribunal (19 June 1980), 62 ILR 228, at 234-236.

¹⁶⁸ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007), pp. 235.

¹⁶⁹ *Libyan American Oil Company v. Socialist People's Arab Republic of Libya*, C.A. Svea, 18 June 1980; ILM 20 (1981), at 893.

¹⁷⁰ G.R. Delaume, 'Foreign Sovereign Immunity: Impact on Arbitration', 38(2) Arb. J. 34 (1983), pp. 46-47

of the State of Qatar submitted to ICC arbitration. By reaffirming the decision of the US District court, the US Court of Appeal rejected an implied waiver of sovereign immunity from execution. This was based on the grounds that, as Qatar was not a signatory state to the New York Convention, an agreement to arbitrate in France by Qatar, which is a signatory state to the New York Convention, could not be considered or extended as an initial intention by Qatar of an implied waiver from execution in the United States.¹⁷¹ In addition, the court held that “the legislative history of the FSIA could not be read to subject foreign governments to US jurisdiction simply because they agreed to have contracts governed by another country’s law or they agreed to arbitrate in a country other than their own.”¹⁷² The US court of Appeal decision in *Creighton* is almost identical to the decision of the Paris Court of First Instance¹⁷³ and Court of Appeal¹⁷⁴ on the same grounds; it was held that “there is not evidence to show that the State of Qatar had waived its immunity from execution. Submission to arbitration was not deemed to be sufficient proof of such a waiver.”¹⁷⁵

The basis of both courts’ decisions in the *Creighton* case is referred to as the rule established in *Eurodif v Islamic Republic of Iran* decision, where the Court of Cassation held that “immunity from execution, which, as a matter of principle, benefits foreign states, may only be set aside if the property seized was used or intended for the economic or commercial private law activity which gave rise to the claim is based.”¹⁷⁶ The court further held that submission to arbitration does not constitute an implicit waiver of

¹⁷¹ *Creighton Ltd. v. Government of the State of Qatar*, 181 F. 3d 118 (DC Cir. 1999), at pp. 121-123; D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 140-141; N.B. Turck, ‘French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards’, 17(3) *Arb. Int’l.* 327 (2001) pp. 333-334.

¹⁷² *Creighton Ltd. v Government of the State of Qatar*, 181 F. 3d 118 (DC Cir. 1999) pp. 122.

¹⁷³ The Tribunal de Grande Instance de Paris, case no. 96/84282, 31 January 1997.

¹⁷⁴ The Paris Court of Appeal, Case no. 97/07089, 11 June 1998.

¹⁷⁵ This court decision was cited in N. Mayer-Fabre, ‘Enforcement of Arbitral Awards Against Sovereign States, A New Milestones: Signing ICC Arbitration Clause Entails Waiver of Immunity From Execution Held French Court of Cassation In *Creighton v. Qatar*, July 6, 2000, 15(9) *Mealey’s International Arbitration Report* 1 (September 2000), pp. 1 (Signing ICC Arbitration Clause Entails Waiver of Immunity From Execution).; Also see N.B. Turck, ‘French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards’, 17(3) *Arb. Int’l.* 327 (2001) pp. 329.

¹⁷⁶ *Societe Eurodif v Republic Islamique d’Iran (Eurodif v. Islamic Republic of Iran)*, Judgment of March 14, 1984, Cour de Cassation, France, 1984, *R.CDIP* 1984.644; reprinted and translated in 23 *ILM* 1062 (1984).

immunity from execution.¹⁷⁷ From the *Creighton's* appeal court decision and *Eurodif* decision, it could be summarised that a submission to arbitrate under the New York Convention is not considered as an implied waiver of sovereign immunity from execution in any Contracting states where a foreign state does not intend to waive its immunity.

(c) Institutional Arbitration Rules

According to the *Creighton* and the *Eurodif* decisions mentioned above, those decisions also covered ICC arbitration and were subject to ICC rules in which a municipal court of a forum state should consider whether the ICC rules provided for a waiver of sovereign immunity from execution. Those decisions referred to Article 24 (2) of the ICC rules of 1975,¹⁷⁸ which says:

“By submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal in so far as such waiver can validity be made.”¹⁷⁹

Thus, by submitting to arbitration under ICC Rules, a state should be deemed to have waived its immunity from jurisdiction, as well as immunity from execution, when it has signed an agreement to arbitrate under the ICC arbitration in order to undertake the recognition and enforcement of an arbitral award.¹⁸⁰ However, this proposition had been rejected in the case of *Eurodif*, where the court considered the separate regime of sovereign immunity in which a waiver of sovereign immunity from jurisdiction under Article 24(2) does not constitute an implied waiver of sovereign immunity of execution of the resulting award.

¹⁷⁷ *Islamic Republic of Iran v Societe Eurodif* 77 I.L.R. 513.

¹⁷⁸ The ICC rules has been amended to the current ICC rules, which are now in force from 1 January 2012. Article 24(2) of the ICC Rules of 1975 is substantially similar to Article 34(6) of the current ICC Rules, it reads:

“Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”

¹⁷⁹ Art. 24(2) of the ICC Rules of 1975.

¹⁸⁰ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 236.

The court further explained that “a waiver of immunity requires an unequivocal demonstration of the state’s intention to waive its immunity and does not result from simply executing an arbitration clause or from reference to the ICC Rules of Arbitration”¹⁸¹; therefore, “Article 24 of the said Rules merely contains an undertaking to voluntarily enforce the award and to recognize its binding nature, but does not include any reference to the issue of immunity.”¹⁸² The decision of the Paris Court of Appeal was affirmed by the Cour de Cassation.¹⁸³ The effect of the decisions of both the Paris Court of Appeal and the Cour de Cassation, it should be principally implied that a waiver of sovereign immunity from execution would only arise only from an explicit state’s manifestation, not by a mere inference.¹⁸⁴ Consequently, it can be summarised that an agreement to arbitrate is not considered to be sufficient to constitute any waiver of sovereign immunity from execution. Fox affirms this proposition that:

“The distinction between consent to jurisdiction to determine the dispute and consent to enforce the resultant award is generally observed by national courts and evidenced by a separate part.”¹⁸⁵

Breaking ground, the Cour de Cassation in *Creighton v Qatar* overruled the decisions of the Paris Tribunal de Grande Instance and the Paris Court of Appeal, following the precedent of the decisions of the Paris Court of Appeal and the Cour de Cassation in *Eurodif v Islamic Republic of Iran*. The Cour de Cassation in *Creighton v Qatar* held that:

“The obligation entered into by the State by signing the arbitration agreement to carry out

¹⁸¹ Republic of Iran v Eurodif, The Paris Court of Appeal, (21 April 1982); 65 ILR 93, at 98. See N.B. Turck, ‘French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards’, 17(3) Arb. Int’l. 327 (2001) pp. 327-328.

¹⁸² Republic of Iran v Eurodif, The Paris Court of Appeal, (21 April 1982); 65 ILR 93, at 98; See Signing ICC Arbitration Clause Entails Waiver of Immunity From Execution (n 170), pp. 2.

¹⁸³ Republic of Iran v Eurodif, The Cour de Cassation, (14 March 1984); 77 ILR 513.

¹⁸⁴ D.M. Orta and A.K. Hussain, ‘The Crossroads Between Enforcement and Execution of Arbitration Awards and Sovereign Immunity- A Primer for In-House-Counsel’, International Chamber of Commerce Members' Handbook, UK Edition, Spring 2006, pp. 44.

¹⁸⁵ H. Fox, ‘State Immunity and the New York Convention’ in E. Gaillard and D. Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, UK 2009) pp. 852.

the award according to Article 24 of the International Chamber of Commerce Arbitration Rules implies a waiver of the State's immunity from execution."¹⁸⁶

The court further explained that (in translation):

"The immunities of states only play a role insofar as they have not been waived. Immunity from execution, like immunity from jurisdiction, may be waived by the beneficiary. A waiver of immunity from execution may be inferred in particular by the state's acceptance, when signing an arbitration clause or arbitration agreement, of the final nature of the arbitration award. At the time of the conclusion of the contract... the [ICC Rules] explicitly stated that by submitting their dispute to ICC arbitration, the parties undertake to carry out the award without delay and that the arbitral award is final (Article 24)."¹⁸⁷

In this respect, the Cour de Cassation has clearly demonstrated that "an arbitral award against a state that has given its consent to submit certain disputes to arbitration should not be rendered ineffective simply because the state benefits from immunity from execution."¹⁸⁸ The *Creighton* decision is not the first case dealing with an implied waiver of sovereign immunity from execution by an agreement to arbitrate. The Court of Appeal of Rouen in 1996 in *Societe Bec Freres v Office des Cereales de Tunisie*, held that by submitting to arbitration it had waived its sovereign immunity from jurisdiction and, as in their good faith, its immunity from execution.¹⁸⁹ By considering the cases of *Creighton* and *Societe Bec Freres*, it should be emphasised that the court had based their decision on the 'principle of good faith'. This proposition places a state on the same footing as a private investor in arbitration proceedings in order to enforce an arbitral award when it enters the international market and submits itself under an agreement to arbitrate.¹⁹⁰

¹⁸⁶ *Creighton Limited v. Government of the State of Qatar*, The French Cour de Cassation, (6 July 2000), reported in XXV Yearbook of Commercial Arbitration 458 (2000).

¹⁸⁷ *Creighton v. Ministère des Finances de l'Etat du Qatar*, Cass. 1e civ, July 6, 2000, 127 J.D.I. 1054, 1055 (2000), cited in N. Pengelley, 'Waiver of Sovereign Immunity from Execution: Arbitration is Not Enough', 26(6) J. Int'l. Arb. 859 (2009) pp. 864-865.

¹⁸⁸ 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* (Juris Publishing, Paris 2008) pp. 180.

¹⁸⁹ *Societe Bec Freres v Office des Cereales de Tunisie*, Cour of Appeal of Rouen, 20 June 1996, Rev Arb. 263 (1997), at 267.

¹⁹⁰ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 242.

Prior to the *Creighton* decision, some municipal courts, in practice, were inclined to hold that an agreement to arbitrate by a state under the New York Convention was deemed a waiver of immunity, extending to proceedings for the confirmation or recognition of the resulting awards, for example, the Netherlands,¹⁹¹ the United States¹⁹² and France.¹⁹³ In addition, this trend of practice is not only found under the ICC rules, a similar trend can also be found in the rules of other arbitration institutions, such as, Article 34(2) of the UNCITRAL Arbitration Rules 2010¹⁹⁴ and Article 26(8) of the London Court of International Arbitration (LCIA) Arbitration Rules 2014.¹⁹⁵ By this effect, the *Creighton* decision has made a significant impact on the long arguable issue of sovereign immunity from execution as well as setting a new precedent in defining the scope of a waiver of sovereign immunity on the agreement to arbitrate ground. As the *Creighton* decision adopted a single regime of sovereign immunity, it is reasonable to limit the possibility to invoke a sovereign immunity defence to the execution stage as well as to reserve the parties' commitments and obligations under a principle of *pacta sunt servanda* regarding the contractual nature of arbitration agreement. On this point, it might be said that a party's obligation under an arbitration agreement prevails over the law on sovereign immunity.¹⁹⁶ Whereas some municipal courts have accepted this ideal approach of a waiver of immunity, it is doubtful whether it will be followed by other courts under different arbitration rules.

In this context, this trend of decisions could lead to contradictory results between

¹⁹¹ *N.V. Cabolent v National Iranian Company*, Hague Court of Appeal, 28 November 1968c, International Legal Materials 9, 161.

¹⁹² *Ipitrade International S.A. v Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978), 17 ILM 1395 (1978); *Libyan American Oil Co. v Socialist People's Libyan Arab Jamahriya (LIAMCO)*, 482 F. Supp. 1175 (D.D.C. 1980).

¹⁹³ *Ben Aiad v. Bey de Tunis*, Trib Civ. Seine, 30 June 1891, Clunet 1892, at 952; *Republique Malgache v Societe Bruynzeel*, Trib. Gr. Inst. Paris (referes), 3 May 1971, J.C.P. 1971, cited in G.R. Delaume, 'Foreign Sovereign Immunity: Impact on Arbitration', 38(2) Arb. J. 34 (1983) pp. 36.

¹⁹⁴ Article 34(2) of the UNCITRAL Arbitration Rules (as revised in 2010), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>

¹⁹⁵ Article 26(8) of the London Court of International Arbitration (LCIA) Arbitration Rules 2014, http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article%2026, (Art. 26(9) of LCIA 1998)

¹⁹⁶ E. Silva-Romero, 'ICC Arbitration and State Contract', 13(1) ICC Int'l Court Arb. Bull. 34 (2002), pp. 35

leading arbitration institutions. This is because an arbitration proceeding under the ICC may provide more advantage to an investor or private party over the ICSID and the New York Conventions when it comes to a sovereign immunity from execution as the ICC arbitration may supersede a municipal law on sovereign immunity. This may be in conflict with the ICSID Convention, which under Article 55, expressly preserves sovereign immunity from execution in any contracting state's municipal law on sovereign immunity.¹⁹⁷ However, it should be mentioned that although a state's agreement to arbitration implies that an award will be binding on the parties, and the parties undertake to carry out the award without delay under Article 24, the language of Article 24 does not mention any reference to the word enforcement or execution. Article 24 only refers to 'enforceability of the award' in the topic. Therefore, it might not be appropriate to interpret the enforcement and execution at the same stage. Mayer-Fabre provides a critique on this issue:

“The clause in Article 24-2 (now Article 28-6) of the ICC Rules, emphasizing that the award is binding on the parties and that the parties undertake to carry it out without delay, is a rather stereotyped and, one may even say, superfluous provision, but for its psychological effect. It does not include any reference to the immunity from execution that a party may be entitled to invoke. To read a waiver of such immunity between the lines of this clause is a far-fetched interpretation.”¹⁹⁸

Accordingly, it should be noted that the issue of sovereign immunity from execution only arises after recognition of the award is confirmed as *executur*. Therefore, a recognition of an arbitral award should be considered a preliminary phase of the execution, not the ultimate phase of the arbitration process. This is clearly illustrated in the provisions of the ICSID Convention.¹⁹⁹ Furthermore, the decision of *Creighton*, by the French Cour de Cassation, may not fit flawlessly with the UN Convention provisions, in which Article 19 and 20 specifically denote that a state must expressly consent to a

¹⁹⁷ N. Horn, 'Arbitration and the Protection of Foreign Investment: Concepts and Means' in N. Horn (ed.), *Arbitrating Foreign Investment Disputes Procedural and Substantive Legal Aspects*, (Kluwer Law International, The Netherlands 2004) pp. 30.

¹⁹⁸ Signing ICC Arbitration Clause Entails Waiver of Immunity From Execution (n 170), pp. 3

¹⁹⁹ G.R. Delaume, 'Foreign Sovereign Immunity: Impact on Arbitration', 38(2) *Arb. J.* 34 (1983) pp. 45; See *Bevenuti & Bonfant v Congo*, Judgment of June 26, 1981, Cour d'Appel de Paris, 108 *Journal Du Droit International* 843 (1981).

waiver of its sovereign immunity from execution in order for an execution of an arbitral award against any foreign state's property. Therefore, the jurisprudence of an implied waiver in the *Creighton* decision, by the French Cour de Cassation under the ICC rules, might be out of line with the previous case law and statutes requiring an explicit waiver of execution immunity.

By a comparison of ICC rules, it is questionable whether by submitting to arbitration it can be assumed that a party, obliged under Article 24, waives its sovereign immunity from execution in the same manner as its sovereign immunity from jurisdiction. Such an assumption requires further clarification in the ICC rules. Currently the ICC rules do not provide any reference to a municipal law on sovereign immunity. In the context of the *Creighton* case, there are no statutory or treaty provisions governing sovereign immunity under French law in the same way as in UK or UK law. The French court decision is based on a subjective approach, employed by interpreting a foreign state's intention, rather than by an objective approach referring to defined provisions in the law on sovereign immunity.²⁰⁰

Therefore, the decisions by the French court could be adequately explained by the assumption rendered under the ICC arbitration for the purpose of the enforcement under the New York Convention. Although the French jurisprudence in respect to an implied waiver in the *Creighton* decision seems to be out of kilter with the French Court, subsequently, in *Embassy of the Russian Federation et.al v Compagnie NOGA d'importation et d'exportation (NOGA)*²⁰¹ the court tried to apply a stricter test with regards to a diplomatic immunity. Here it was determined that a general waiver of sovereign immunity from execution could not amount or extend to a waiver of diplomatic assets. Therefore, such assets could be attached only if was expressly and specifically waived in relation to targeted diplomatic assets. This issue will be discussed in more detail in the next chapter.

²⁰⁰ Signing ICC Arbitration Clause Entails Waiver of Immunity From Execution (n 170), pp. 3.

²⁰¹ *Embassy of the Russian Federation et.al v Compagnie NOGA d'importation et d'exportation (NOGA)*, Paris Court of Appeal (1st Ch. A), 10 August 2000, Case no. 2000/14157.

Another recent interesting case regarding a waiver of sovereign immunity from enforcement and execution before the French Supreme Court, which is not considered only a diplomatic asset but also a public asset, is *NML Capital Limited v Republic of Argentina* (NML).²⁰² In this case, Argentina made two bonds contracts with the Banker Trust Company, which contained a *pro forma* Argentinean waiver of immunity from execution, which was annexed to contracts. It provided as follows:

“To the extent that the republic or any of its revenues, assets or properties shall be entitled, in any jurisdiction in which any specified court is located in which any related proceeding may at any time be brought against it or any of its revenues, assets or properties, or in any jurisdiction in which any specified court or other court is located in which any suit, action or proceeding may at any time be brought solely for the purpose of enforcing or executing any related judgment, to any immunity from suit, from the jurisdiction of any such court, from set-off, from attachment prior to judgment, from attachment in aid of execution of judgment, from execution of a judgment of from any other legal or judicial process or remedy, and to the extent that in any such jurisdiction there shall be attributed such an immunity, the republic has hereby irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction... provided further that such agreement and waiver, in so far as it relates to any jurisdiction other than a jurisdiction in which a specified court is located, is given solely for the purpose of enabling the fiscal agent or a holder of securities of this series to enforce or execute a related judgment.”²⁰³

During 2001 and 2003, NML Capital Limited purchased some of these bonds from the New York Stock Exchange. Unfortunately, Argentina defaulted on its debts in 2001, which resulted in a claim by NML Capital against Argentina before the US Court in New York. The court found in favour of NML Capital for an amount of USD 284 million.²⁰⁴ Following this judgment, NML Capital initiated a series of international enforcement proceedings in multiple jurisdictions including France, United Kingdom,

²⁰² *NML Capital Limited v Republic of Argentina*, Cass civ 1, March 28 2013, No. 11-10-450.

²⁰³ A fiscal agency agreement between Argentina and Banker Trust Company as a Form of Registered Security on October 19, 1994.

²⁰⁴ *NML Capital Limited v Republic of Argentina*, No 05 Civ 2434, 2006 WL 1294853 (SDNY, May 10, 2006).

United States and Ghana.²⁰⁵ NML Capital first began to attach assets covered by diplomatic immunity before the French Court. On September 28, 2011, the French Supreme Court ordered the release of the attachment of diplomatic assets, on the ground that such assets were governed by special rules pursuant to the Vienna Convention; which requires that a waiver must be both express and specific to be effective.²⁰⁶

Apart from the attachment against diplomatic assets, NML Capital further attached against monies owed by Air France, BNP Paribas and Total Austral to Argentina, in regard to tax and social security claims; these being considered public assets.²⁰⁷ Both the Court of first instance and the Court of Appeal ruled for a release of the attachment of assets as Argentina's waiver of sovereign immunity did not unequivocally and specifically identify such tax and social claims; thus, those assets remained to be protected by Argentina's sovereign immunity from execution.²⁰⁸ Nevertheless, NML Capital appealed the case to the French Supreme Court, contending that Argentina purportedly agreed and waived such immunity, to the fullest extent permitted by the laws of such jurisdiction, pursuant to the bond contracts. On March 28, 2013, the French Supreme Court confirmed the Court of Appeal's decisions, holding that:

“according to customary international law, as reflected by the United Nations Convention of 2 December 2004 on the Jurisdictional Immunities of State and their Property, while States can waive, by written contract, their immunity from execution against assets or categories of assets used or destined to be used for public purposes, they can only do so in an express and specific manner, mentioning the assets or the category of the assets over which the waiver is granted.”²⁰⁹

In this respect, the French Supreme Court has recently taken a step further to

²⁰⁵ *NML Capital Limited v Republic of Argentina*, Cass civ 1, September 28, 2011, No 09-72.057; *NML Capital Limited v Republic of Argentina*, [2011] UKSC 31; *EM Limited v Republic of Argentina*, 473 F 3d 463 (2nd Cir 2007), cert denied, 552 US 818 (2007); *NML Capital Limited v Republic of Argentina*, Accra High Court Commercial Division, October 11, 2012, suit No RPC/343/12.

²⁰⁶ *NML Capital Limited v Republic of Argentina*, Cass civ 1, September 28, 2011, No 09-72.057.

²⁰⁷ See *NML Capital Limited v Republic of Argentina et Air France*, Cass civ 1, March 28 2013, No 11-13-323; *NML Capital Limited v Republic of Argentina et Total Austral*, Cass civ 1, March 28 2013, No 10-25938.

²⁰⁸ See E Kleiman, J Spinelli, ‘NML v Argentina: Supreme Court tightens waiver of sovereign immunity test’, < <http://www.lexology.com/library/detail.aspx?g=3b63767e-0978-452e-a447-20ff566c92b4>> .

²⁰⁹ *NML Capital Limited v Republic of Argentina*, Cass civ 1, March 28 2013, No. 11-10-450.

setting a new doctrine towards a greater protection of the doctrine of sovereign immunity by tightening the conditions and extending this approach to public assets; this is separate to the stricter test already applied to diplomatic assets in the *NOGA* case. By requiring an express and specific waiver of sovereign immunity to public assets or a category of public assets over which the waiver is granted, this French jurisprudence could be seen as the strictest approach applied to the waiver of sovereign immunity from execution, thus appearing more state friendly approach. However, this practice might undermine the bona fide intention of party to waive sovereign immunity from execution. Additionally, this approach will increase the difficulty, in practice, to execute an arbitral award in France, even in the event of an express waiver.

Furthermore, the Supreme Court's reference to the UN Convention as a ground to support its far-reaching proposition, that a waiver can be only effective if it is both expressly and specifically waived to assets or category of assets in which an execution is sought, appears questionable.²¹⁰ This is due to the fact that no provision of the UN Convention mentions this strict requirement. Rather, Article 19(a) of the UN Convention only requires that a consent by a state for the purpose of sovereign immunity from execution must be expressly waived in order to execute an arbitral award against a foreign state's property.

Yet, while the Supreme Court proposition might refer to the combination of Article 19(a) with Article 19(b) of the UN Convention in the event of earmarking where "the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding", these two exceptions should not be combined for a purpose of execution. The text of the UN Convention separates these two exceptions as alternatives rather than cumulative requirements.²¹¹ Therefore, the attempt of the French Supreme court to apply such a strict test will be debatable amongst practitioners when considering whether a general willing express waiver by a state binds a state for the

²¹⁰ E Kleiman, J Spinelli, 'NML v Argentina: Supreme Court tightens waiver of sovereign immunity test', <<http://www.lexology.com/library/detail.aspx?g=3b63767e-0978-452e-a447-20ff566c92b4>> .

²¹¹ *ibid*

purpose of sovereign immunity from execution. If the answer is no, a waiver would be deprived of its intention and practical effects.

The state practice of an implied waiver of sovereign immunity from execution can be concluded from the decision of *FG Hemisphere*²¹² before the Hong Kong Court of Final Appeal. The background of the case concerned the ICC awards made in Zurich and Paris against Congo in which the original beneficiary, Energoinvest, assigned the benefit of the award to FG Hemisphere. Due to the fact that Congo is not a party to the New York Convention, FG Hemisphere, therefore, had initiated several enforcement proceedings in other New York Convention Contracting States, including the US and Hong Kong. As mentioned earlier, the Hong Kong Court of Final Appeal reversed the Court of Appeal decision by declaring that Hong Kong was bound to follow the Mainland China approach of absolute immunity wherein Congo was entitled to claim sovereign immunity.²¹³ The court also considered whether an agreement to arbitrate is considered as a waiver of sovereign immunity from enforcing jurisdiction. Since Congo is not a signatory of the New York Convention, it should be noted that an implied waiver of sovereign immunity under the New York Convention and ICC Rules might not benefit FG Hemisphere. Although the fact in this case is similar to the *Creighton* case before the French Supreme Court, where both Qatar and Congo are not a party to the New York Convention, the Court of Appeal argued that;

“It cannot in my judgment be said that by entering upon an ICC arbitration agreement with a private party, a foreign state that is not a party to the New York Convention is going beyond the making of a representation to the private party and is making a representation to each Convention State that it consents to the enforcement against it in the Convention State of such arbitral award as may be made. It seems to me that jurisdiction in the forum state can, in such circumstances, only be conferred by legislation or by an express representation by the foreign State to the forum State.”²¹⁴

The Court of Final Appeal confirmed this position and held that although the ICC

²¹² *FG Hemisphere Associates LLC v Democratic Republic of the Congo*, FACV 5-7/2010

²¹³ *Ibid* 31

²¹⁴ *FG Hemisphere Associates LLC v Democratic Republic of the Congo*, CACV373/2008, CACV 43/2009, para 171.

rules require the parties to waive any forms of immunity, it should have “an unequivocal submission to the jurisdiction of the forum State at the time when the form State’s jurisdiction is invoked against the impleaded State.”²¹⁵ Therefore, it could summarise that a waiver must be made in a forum state by a foreign state, which follows the VCLT rule of *pacta tertiis* as mentioned earlier in order to protect a right of a third state.²¹⁶

In summary, although some municipal courts and arbitration institution rules accept an agreement to arbitration as constituting a waiver of sovereign immunity from execution, a party might face other difficulties when attempting to execute an arbitral award against a foreign state asset. This is due to the fact that most jurisdictions and their municipal laws on sovereign immunity limit the execution of an arbitral award to only property used for commercial activities.²¹⁷ Furthermore, even in the event that a state has expressly waived its sovereign immunity from execution, it is doubtful whether it means that such an execution could be applied to any or all foreign state assets, including those assets used for public purposes or diplomatic functions.

This controversial issue is not yet settled and will be discussed further in this thesis. Consequently, it can be said that a waiver of a sovereign immunity exception in itself does not resolve the problems related to sovereign immunity from execution. The main challenge is to determine whether the foreign state’s asset, claimed in a dispute, falls within the commercial activity exception provided in the relevant municipal law on sovereign immunity; as mentioned earlier in chapter 3. Therefore, the combination of an agreement to arbitrate exception and a commercial activity exception will be considered a main challenge to overcoming a defence of sovereign immunity in order to enforce arbitral awards. Moreover, such combinations of sovereign immunity exceptions may be

²¹⁵ *FG Hemisphere Associates LLC v Democratic Republic of the Congo*, FACV 5-7/2010, para 392. The court also refers to cases in paras 384-393 including *Svenska Petroleum Exploration AB v Lithuania and Another* [2006] EWCA Civ 1529; *Mighell v. Sultan of Johore* [1984] 1 QBD 149; *Duff Development Co. Ltd. v Government of Kelantan* [1924] AC 797; *A Company Ltd. v. Republic of X* [1990] 2 Lloyd’s Rep 520, where an implied waiver of sovereign immunity is not granted,

²¹⁶ *FG Hemisphere Associates LLC v Democratic Republic of the Congo*, CACV373/2008, CACV 43/2009, para 170.

²¹⁷ See the US FSIA Section 1610(a) and the UK SIA Section 13(4).

subject to certain restrictions, as to whether they are certain types of property, which are considered specially protected, and tests of jurisdictional nexus and the act of state doctrine, may not be easily applied. These restrictions added to the sovereign immunity defence exceptions would cause difficulty to an investor attempting to execute against those properties.

5. Concluding remarks

Although the precedent in *Creighton*, under ICC arbitration, has defined what conduct constitutes a waiver of immunity from execution, by an agreement to arbitrate, this does not allow execution against all property of foreign state but it is limited to commercial property. In addition, it will be difficult to execute against certain types of specially protected property, including bank account of diplomatic mission, military property, central bank property and cultural heritage property. This difficulty is reflected in the cases of *NOGA*, *NML* and *FG Hemisphere*, in which the Courts adopted a stricter rule to a waiver of sovereign immunity from execution. Therefore, this difficulty, towards a state-friendly approach, will challenge and undermine the effectiveness of arbitration and investors being able to satisfy arbitral awards. In turn this difficulty may lead to an increased need for cautious risk management when a party is considering whether to invest in a foreign state where the municipal court applies such a strict test.

In this context, while the exclusion of immunity from execution is regrettable for the ICSID Convention, Schreuer argues that “the impossibility to enforce an ICSID award as a consequence of the law concerning the execution of judgments in one or several states in no way affects the obligation of the party to the ICSID arbitration to abide by and comply with the award in accordance with Article 53(1).”²¹⁸ Failure to comply with this treaty obligation will result in the revival of the diplomatic right of protection under Article 27(1), as well as the possibility of taking the dispute to the ICJ under Article 64 under a state responsibility. This thesis supports this contention and will further examine this possibility in later chapters. This contribution will increase the effectiveness of the

²¹⁸ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009), pp 1149.

investor-state arbitration in combination with the most clear and certain solution of including the waiver of immunity from execution in BITs or municipal laws as seen in *NML* case that a limitation of an express waiver of any immunity specified only in the contract but not in the BITs or municipal laws. Consequently, the parties will possess a greater knowledge of the predictability of the execution of arbitral awards, relying on legal and political protection, which will in turn lead to economic benefits for both parties.

PART IV
CHALLENGES AND LIMITATIONS

Chapter 6

Challenges and Limitations to Enforcing Arbitral Awards against Foreign States

1. Introduction

Despite the uncertainty of the law on sovereign immunity, a number of domestic courts and their municipal sovereign immunity laws have clearly expressed the position that immunity from enforcement and execution is no longer absolute. Those views remain controversial as noted in scholarly literature.¹ As already noted, municipal laws require either an express or implied waiver of immunity from execution on certain types of state property, which may serve sovereign purpose.² In this context, whilst it is possible to waive sovereign immunity from execution in order to levy against both sovereign and commercial properties of a foreign state, it might be difficult to levy execution against certain types of property, which are protected despite a waiver of sovereign immunity from execution.³

As mentioned earlier, difficulties may arise in executing an arbitral award under the US FSIA, the UK SIA and the UN Convention due to the type of property involved, which are mostly considered as having a non-commercial purpose or being so-called ‘specially protected property’, such as, central bank account, diplomatic property and military property.⁴ In order to deal with this difficulty, the predominant focus situates on qualification, so as to decide whether such specially protected property serves sovereign or commercial purposes.

¹ A. Reinisch, ‘European Court Practice concerning state immunity from enforcement measures’ 17 EJIL 803 (2006) pp. 804. (European Court Practice)

² See L.J. Bouchez, ‘The nature and scope of state immunity from jurisdiction and execution’ Netherlands Y.B.I.L. 1 (1979)

³ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 260.

⁴ A. Boralessa, ‘Enforcement in the United States and United Kingdom of ICSID awards against the republic of Argentina: Obstacles that transnational corporations may face’, 17 N.Y. Int’l L. Rev 53 (2004) pp. 96. (Enforcement in the United States and United Kingdom)

As noted in Chapter 3, whereas the test for sovereign immunity from jurisdiction focuses on the nature of an activity in establishing jurisdiction to commercial activity, the test to distinguish between commercial property and sovereign property for sovereign immunity from execution usually concentrates on the purpose of property.⁵ Accordingly, this could imply that the limitations on the immunity from execution are somewhat less intrusive than in the field of immunity from jurisdiction.⁶ Therefore, a more cautious view is reflected in the codification of the law of sovereign immunity, at both a domestic and international level, by adopting a stricter test in order to protect a state property from execution, whether by section 1610 and 1611 of the US FSIA, section 13 of the UK SIA and Article 19 and 20 of the UN Convention.

Nevertheless, it is not always easy to adopt such a purpose test in the context of a property with a mixed commercial and sovereign purpose; this becomes particularly apparent in the case of a bank account. The execution against such sovereign property, belonging to a foreign state, would be sensitive to the international relations between states, as seen in the French case of *Embassy of the Russian Federation et.al v Compagnie NOGA d'importation et d'exportation (NOGA)*,⁷ the US cases of *Birch Shipping Co v The United Republic of Tanzania*⁸ and *LETCO v Liberia*⁹ and the UK case of *Alcom Ltd. v Republic of Colombia*.¹⁰ According to these cases, the legal basis of sovereign immunity, to protect this special property, can be primarily found in the municipal laws on sovereign immunity, treaties, and customary international law relating to diplomatic immunities. Nevertheless, some recent codifications of sovereign immunity allow execution against properties with such a mixed purpose or even specially protected properties with some differences in the degree of exception.¹¹

⁵ C. Schreuer, *State immunity: Some recent developments* (Grotius Publication, Great Britain 1988) pp. 145.

⁶ European Court Practice (n 1), pp. 804.

⁷ *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.

⁸ *Birch Shipping Co v Embassy of The United Republic of Tanzania*, D.C.C., 18 November 1980, 63 ILR 524 (1982).

⁹ *LETCO v Liberia*, United States District Court, the District of Columbia, Judgment, 16 April 1987, 2 ICSID Reports 390.

¹⁰ *Alcom Ltd. v The Republic of Colombia*, House of Lords (Court of Appeal), AC 580 (1984).

¹¹ See Sec. 16(1) of the UK SIA and Section 1610(a)(4)(B) and 1611(b) of the US FSIA.

However, the term ‘mixed purpose of foreign property’ specifically refers to the mixed purpose of an embassy bank account, which is particularly attached for the purpose of execution. In this context, a bank account of a foreign state should be treated differently and separately from an embassy bank account, in which the latter could be categorised as property of a diplomatic mission, being specially protected. Therefore, it is the purpose of this chapter to consider whether the exceptions provided in certain recent codifications have provided sufficient grounds in order to allow for execution against foreign property with a mixed purpose and of specially protected property.

Further difficulties arise during the process of execution concerning the jurisdictional nexus between the underlying claim (subject-matter) and the place where the award is sought, plus the nexus requirement between the underlying claim (subject-matter) and property sought to be executed. As shown in many cases, whilst a claim of sovereign immunity from execution is defeated by a commercial activity exception, provided under major codifications on sovereign immunity, some codifications add a specific link requirement in order for execution against a foreign state’s commercial property.¹² Consequently, it is difficult to establish or find this specific link since the majority of foreign states are unlikely to keep commercial property, which has a connection with a claim in a forum state.¹³ Accordingly, another proposition is whether the additional requirement of connection causes further difficulties and burdens in executing an arbitral award against a property of a foreign state.

Certainly, these difficulties have caused some potential challenges and limitations to enforcing arbitral awards against foreign states’ property, for both the municipal courts and investors. Nevertheless, various recent codifications have provided exceptions thereby improving the effectiveness of the execution of arbitral awards, albeit with a mixed degree of success.

¹² See Sec. 1610(1)(2) of the US FSIA.

¹³ Enforcement in the United States and United Kingdom (n 4), pp. 94.

2. Execution against Mixed Purposes and Specially Protected Foreign State Properties

As mentioned in Chapter 5, most municipal laws on sovereign immunity require an express or implied waiver of immunity from execution regarding certain types of state property, which are serving a sovereign purpose. However it remains difficult to categorise certain types of property, which are specially protected from execution in any situation, even in the case where a foreign state has expressly waived its sovereign immunity from execution.¹⁴ Moreover, this difficulty is also found in certain types of property, which serve both commercial and sovereign purposes. Therefore, it is a purpose of this section to identify some difficulties arising in cases dealing with bank accounts held by diplomatic missions, central bank funds and specially protected properties, as well as to show how municipal courts in major jurisdictions overcome these difficulties.

(a) Bank Accounts Held by Diplomatic Missions in the Executing Country

A bank account is a popular object for the execution of an arbitral award, as it is often not clearly designated for specific purposes and may be used for mixed sovereign and commercial activities.¹⁵ Accordingly, the underlying reason for this difficulty is the question of the future or intended use of property; being particularly difficult and uncertain. Therefore, it is submitted that a bank account, held by a foreign state in a forum state, is not necessarily used or is intended for the exclusive use of a sovereign purpose and thus could be exempt from an execution measure.¹⁶ Ideally, if such a bank account has been earmarked or allocated by a foreign state for a purpose of execution under a dispute, it would be easier for an investor to attach and satisfy against that bank account; as well as it being easier for a municipal court to treat such a bank account as non-immune property.¹⁷ In practice, it seems unlikely that a state would earmark or allocate property in such a way, for the satisfaction of an execution under a dispute in an

¹⁴ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 260.

¹⁵ G.R. Delaume, 'Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration', 2(2) *ICSID Review* 403 (1987) pp. 415.

¹⁶ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 268.

¹⁷ J. Crawford, 'Decisions of British Courts During 1984 Involving Questions of Public or Private International law' 55 *British Yearbook of International Law* 330 (1984) pp. 342.

agreement or contract.

At the outset, where a bank account is not destined for a specific purpose or is not used for a mixed purpose of both sovereign and commercial activities, it might be difficult for an investor to execute against a mixed purpose bank account. This is because municipal law provisions on sovereign immunity only allow execution against commercial property of foreign state in the absence of waiver. As mentioned earlier, Section 13(4) (b) of the UK SIA provides that a “property which is for the time being in use or intended for use for commercial purposes”¹⁸ might be subject to execution for the purpose of an enforcement of arbitral award. Similarly, Section 1610(a)(6) of the US FSIA provides that property of a foreign state in the United States “used for a commercial activity in the United States” is not immune from a sovereign immunity from execution upon a confirmation of a judgment of arbitral award.¹⁹

On this point, both codifications allow execution against the commercial property of foreign state in the absence of waiver. The US FSIA combines a commercial activity exception with a waiver exception; however, it also limits the execution to only commercial property. Accordingly, it can be acknowledged that it does not allow execution against a sovereign property even in the case of a waiver. In regards to a restrictive immunity, it should be highlighted that commercial property should not be immune from execution regardless of a waiver. This is because a waiver of sovereign immunity from execution only becomes relevant to property used for a sovereign purpose. In other words, a state cannot raise a sovereign immunity defence in respect to execution against commercial property of a foreign state. In turn, such a defence might be available in relation to foreign state property used for a sovereign purpose.

Therefore, it may be argued that “by incorporating the conditions set out in subsection 1-7 of section 1610 (a), the draftsmen have made the FSIA step backwards to

¹⁸ See Section 13(4)(b) of the UK SIA.

¹⁹ See Section 1610 (a)(6) of the US FSIA.

the less restrictive immunity from execution.”²⁰ In addition, the US FSIA imposes a further restriction on execution to “the commercial property upon which the claim is based” in pursuant to a nexus requirement.²¹ This is in contrast with the UK SIA, which allows a state to waive its immunity for property used for a sovereign purpose, requiring no nexus connection between a commercial property and an underlying claim.²² By this effect, the UK SIA separates or divides a commercial activity exception from a waiver exception, which appears easier for the investor when executing an arbitral award.²³

In this respect, it is important to consider whether the specific bank account in question is in use or used for a sovereign or commercial purpose. Schreuer suggests two contrasting ways in order to determine the purpose of a bank account, being that:

“One possible answer is to see bank accounts and other money credits as inherently commercial assets which cannot be regarded as directly serving sovereign purpose... The opposite argument sees the mere possibility of a future public use of financial assets as sufficient reason always to regard bank accounts belonging to foreign States as immune as a general precaution.”²⁴

Nevertheless, both extreme positions cannot answer the problem of qualification of property, since the origin of the property might be used in determining the nature of the property, as seen in the UN Convention,²⁵ which adopts both a nature and purpose test. As mentioned earlier, a bank account is not always solely used for a sovereign purpose. It is even more complex if the bank account in question is not destined for a specific purpose but is used for mixed purposes. Therefore, the main focus turns to the consideration of whether money is specially designated for a particular public function and whether the main portion of money in a bank account is used for a sovereign or commercial activity.

²⁰ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 261.

²¹ See Section 1610(a)(2) of the US FSIA.

²² See Section 13(3)(4) of the UK SIA.

²³ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988) pp.68-69.; Enforcement in the United States and United Kingdom (n 4), pp. 105.

²⁴ *ibid* 149; See also C. Schreuer, ‘Some Recent Developments in the Law of State Immunity’, 2 Comparative Law Yearbook 215 (1978) pp. 233.

²⁵ See Art. 2(2) of the UN Convention.

However, it is impractical to find an actual intention for the use of money in an account, as well as the future purpose of money, which hardly possible to predict. Although a practical and uniform test is not settled among recent codifications, the UK SIA provides a solution by allowing the Head of the foreign State's diplomatic mission to issue a certificate as sufficient evidence for confirmation as to whether such a property is in use or intended for a sovereign purpose use.²⁶ The practice in the United Kingdom appears to be a solution for this problem of qualification, but it is not entirely shifting the burden of proof onto the foreign state. In fact, it is placing the burden of proof on an investor to find evidence of the commercial purpose of foreign property in order to disapprove the Head of the foreign State's diplomatic mission's certificate.²⁷ This problem is even more complex when considering a mixed purpose of an embassy bank account, which is the main focal point for execution of an award, and also the main focus in this section.

Generally speaking, as a rule of customary international law, the privileges and immunities of diplomats and their properties are protected by the Vienna Convention on Diplomatic Relations of 1961 ('The Vienna Convention'). In this respect, such privileges and immunities are not affected by the provisions of a municipal law on sovereign immunity before a municipal court for the purpose of execution.²⁸ The UK SIA²⁹ and the European Convention³⁰ have clearly expressed a saving clause in their provisions

²⁶ See Sec. 13(5) of the UK SIA.; See also G.R. Delaume, 'The State Immunity Act of the United Kingdom', 73(2) AJIL 185 (1979) pp.196.; K.P. Knierim, 'Sovereign Immunity from Judicial Enforcement: The Impact of the European Convention on State Immunity', 12 Colum. J. Transnat'l L. 130 (1973).; I.M. Sinclair, 'The European Convention on State Immunity', 22 Int'l & Comp. L.Q. 254 (1973).

²⁷ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988) pp.152-153.; D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 266-267.

²⁸ See Sec.16(1) of the UK SIA; Sec. 1604, 1609 and 1611 of the US FSIA; Art. 32 and 33 of the European Convention; Art. 21 and 26 of the UN Convention.

²⁹ Sec. 16(1) of the UK SIA, it reads:

"(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968."

³⁰ Art. 32 of the European Convention, it reads:

"Nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them."

regarding the preservation of diplomatic immunities.³¹ Such a saving clause has been explained in the Explanatory Report on the European Convention on State Immunity:

“Diplomatic and consular immunities and privileges are already governed by rules of international law, notably those contained in the Vienna Conventions of 18 April 1961 and 24 April 1963, and in bilateral agreements. The considerations which underlie these privileges and immunities are different from those underlying the present Convention. The Convention cannot prejudice diplomatic and consular immunities, directly or indirectly. It is clear from Article 32 - and this is confirmed by Article 33 - that in the event of conflict between the present Convention and the instruments mentioned above, the provisions of the latter shall prevail.”³²

Therefore, sovereign immunity law or state immunity law should not be mixed up with a diplomatic law. Whilst the former governs states, in order to protect their jurisdictional immunities and their property, the latter governs the protection of diplomatic premises,³³ their furnishings and other property thereon, the means of transport of the mission,³⁴ the archives and documents of the mission,³⁵ diplomatic bags³⁶ and especially diplomatic agents and their properties.³⁷

³¹ H. Fox, ‘Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity’ 34(1) ICLQ 115 (1985) pp. 126.

³² The Explanatory Report on the European Convention on State Immunity 1972, para 117, U.K.T.S. No. 31

³³ Art. 21 (1) of the Vienna Convention, it reads:

“1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.”

³⁴ Art. 21 (3) of the Vienna Convention, it reads:

“3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.”

³⁵ Art. 24 of the Vienna Convention, it reads:

“The archives and documents of the mission shall be inviolable at any time and wherever they may be.”

³⁶ Art. 27 (3) of the Vienna Convention, it reads:

“3. The diplomatic bag shall not be opened or detained.”

³⁷ Art. 29 of the Vienna Convention, it reads:

“The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”

Art. 30 of the Vienna Convention, it reads:

“1. The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission.

2. His papers, correspondence and, except as provided in paragraph 3 of Article 31, his property, shall likewise enjoy inviolability.”

A bank account held in the name of a foreign diplomat mission or so-called ‘embassy bank account’ has been ranked amongst the most frequent property to be executed in enforcement cases, however, the Vienna Convention does not expressly mention it in any of its provisions. Although the Vienna Convention makes no provision for immunity to the bank account of a diplomatic mission, one can refer to two provisions involving personal immunity of the diplomatic agent and his property under Article 29 and 30(2), plus the immunity of property attached to the premises of the diplomatic mission under Article 22 and 24. In this context, it could be, therefore, said that an embassy bank account could be considered as a property of the diplomatic agent, as well as a property of a diplomatic mission. In fulfilling a lacuna in the Vienna Convention, Denza argues that “although under Article 24 of the Convention the archives of a mission are inviolable ‘wherever they may be’, Article 22.3 gives immunity from search, requisition, attachment, or execution only to property on the premises of the mission, and accounts are not held on the premises.”³⁸ Furthermore, Fox provides additional reasoning as to the inclusion of an embassy account as immune property, being that:

“to grant immunity to the bank account of the diplomatic mission would, therefore, be to accord immunity to the bank account of the State... the Vienna Convention included no provision relating to bank accounts of the diplomatic mission because they were considered to be covered by general State immunity, and the law relating to general State immunity so far as property in diplomatic use is concerned looks to the Vienna Convention and the protection of diplomatic immunities to afford immunity.”³⁹

By referring to the law on state immunity, it is assumed that state practice tends to apply the law of state immunity together with the diplomatic law when it is required to consider the immunity of an embassy’s bank accounts before a municipal court. This rationale between the law on sovereign immunity and diplomatic law lies primarily on a customary and conventional diplomatic and consular law in protecting the ability of

³⁸ E. Denza, *Diplomatic Law Commentary on the Vienna Convention on Diplomatic Relations* (3rd ed) (OUP, UK 2007) pp. 156-157.

³⁹ H. Fox, ‘Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity’ 34(1) ICLQ 115 (1985) pp. 127-128.

diplomatic missions to serve their diplomatic functions.⁴⁰ Certain significant codifications on the law of sovereign immunity have provided separate and specific provisions and exceptions to particularly deal with a diplomatic immunity for a special protection.⁴¹

For instance, whilst the US FSIA only specifically allows execution relating to a judgment establishing rights in immovable property, not used for purposes of maintaining a diplomatic and consular mission,⁴² the UK SIA has expressly preserved immunities or privileges conferred by the Diplomatic Privileges Act of 1964 or the Consular Relations Act of 1968.⁴³ Notwithstanding the fact that the US FSIA and the UK SIA do not expressly refer to an immunity for the bank account of a diplomatic mission, the UN Convention has expressly stated in Article 21(1) (a) that “property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State”⁴⁴ shall not be recognised as property used for commercial purposes. Accordingly, a bank account of diplomatic mission is immune from an execution. Thus, the overlap between the law on sovereign immunity and diplomatic law becomes more evident since many investor-state arbitration cases have attempted in executing against embassy bank accounts. This is demonstrated in the cases of *Philippine Embassy Bank Account*, *Alcom* and *Birch*.

The proposition and the inclusion of the bank account of a diplomatic mission as immune property were considered by the German Federal Constitutional Court in the landmark decision of the *Philippine Embassy Bank Account* case, where the court noted that:

⁴⁰ European Court Practice (n 1), pp. 811-812.

⁴¹ C. Schreuer, *The ICSID Convention: A commentary* (CUP UK 2009) pp.1169.

⁴² Sec. 1610 (a)(4)(B) of the US FSIA, it reads:

“(a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(4) the execution relates to a judgment establishing rights in property—

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or”

⁴³ Sec. 16(1) of the UK SIA.

⁴⁴ See Art. 21 of the UN Convention.

“This and similar treaty provisions confirm the general rule of international law that property used by the sending State for the performance of its diplomatic function in any event enjoys immunity even if it does not fall within the material or spatial scope of the inviolability provisions in Article 22 of the Vienna Convention.”⁴⁵

By extending the scope of the inviolability and immunity to an embassy bank account, the German Federal Constitutional Court held that “claims against a general bank account of the embassy of a foreign state which exists in the State of the forum and the purpose of which is to cover the embassy costs and expenses are not subject to forced execution by the State of the forum.”⁴⁶ The court further accepted that a general current bank account might be used by a foreign state as a shield for financial transactions, which are not directly related to the functions of a diplomatic mission.⁴⁷ In this context, by claiming immunity over a bank account of embassy, a proof of a specific threat in running the embassy was not necessary, only an ‘abstract danger’ was sufficient.⁴⁸

Similarly, the UK Court determined, on very similar facts, whether money in a mixed account was used or intended for use commercially in *Alcom Ltd. v. Republic of Colombia* case. In order to determine a purpose of money, a commercial exception under section 13 (4) must be considered, as well as a certificate of the head of the diplomatic mission under section 13 (5). Pursuant to the UK SIA, such a certificate is sufficiently proved as an evidence for the use or intended use of property, unless the contrary is proved. Therefore, a burden of proof is left to a creditor to challenge the conclusiveness of a certificate issued by the head of the diplomatic mission.⁴⁹

Although the Colombian Ambassador had submitted a certificate to the lower court confirming that the funds in question were not used for commercial purposes but

⁴⁵ *The Philippine Embassy Bank Account*, German Federal Constitutional Court (13 December 1977), 46 BVerfGE 342 (1977), at 317; 65 ILR 146 (1984).

⁴⁶ *ibid* 187.

⁴⁷ *ibid* 317; 65 ILR 146 (1984) at 190; See E. Wiesinger, ‘State Enforcement from Enforcement Measures’ University of Vienna (July 2006) pp. 18.

⁴⁸ C. Schreuer, *State Immunity: Some Recent Developments* (Grotius, Cambridge 1988) pp.153.

⁴⁹ G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987) pp. 416-417.

they were used for the day-to-day expenditures in running the embassy, the Court of Appeal refused a certificate on the grounds that such a certificate was not accepted as a conclusive evidence and that an account being used for daily expenses running the embassy could not be deemed as protected property.⁵⁰ On this point, Delaume highlights that while “Alcom acknowledges the right of the creditor to challenge the conclusiveness of official certificate..., in practice,... a creditor will be prevented from reaching State property, unless that property has been clearly earmarked by the State for commercial use.”⁵¹ Therefore, such a certificate issued by the head of a diplomatic mission would act as a bar to reaching a remedy by a creditor as well as providing a ‘blanket protection’ to the UK SIA, in which the drafters intended to remove such argument by providing an exception at Section 13(4).⁵²

While Donaldson MR in the Court of Appeal additionally suggested that the nature of the transaction should be taken into an account in order to determine the property in question⁵³, the House of Lords unanimously reversed the decision and held that:

“Even though the type of accounts involved might be used to pay for the supply of goods or services to a diplomatic mission, such accounts were intended to meet many other expenditures falling outside the scope of the concept of “commercial purpose”, and that, therefore, the monies in these accounts could not be subject to measures of execution.”⁵⁴

The decision of the House of Lords restored the balance of a restrictive approach

⁵⁰ C. Schreuer, *State Immunity: Some Recent Developments* (Grotius, Cambridge 1988) pp.154.

⁵¹ G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987), pp. 417

⁵² H. Fox, ‘Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity’ 34(1) ICLQ 115 (1985) pp. 122.

⁵³ *Alcom Ltd. v Republic of Colombia*, 1 All ER 1 [1984], at 5; ILM 22 (1983) p. 1307, the Court of Appeal stated:

“The purpose of money in a bank account can never be “to run an embassy”. It can only be to pay for goods and services or to enter into other transactions which enable the embassy to be run.”;

D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 280.

⁵⁴ Quoted in G.R. Delaume, ‘Sovereign Immunity and Transnational Arbitration’, 3(1) Arb. J. 28 (1987), pp. 40; *Alcom Ltd. v. Republic of Colombia*, House of Lords, 12 April 1984, 2 All E.R. 6 [1984]; 2 W.L.R. 750 [1984]; ILM 23 (1984); See also H. Fox, ‘Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity’ 34(1) ICLQ 115 (1985) pp. 120.

towards sovereign immunity and the protection of functional immunity of diplomatic mission. In determining the concept of commercial purpose, the House of Lords disagreed with the Court of Appeal's approach on looking at the nature of the transaction; instead, it relied on the overall purpose of the bank account. Fox has pointed out that "the test in the Act by the use of the words "purpose" and "intended for use" concentrates on present use and future destination rather than the origin of the funds."⁵⁵ Therefore, although some of the money in the bank account might be used for a commercial purpose, such a bank account of diplomatic mission, used for mixed purposes or not designated exclusively for a commercial purpose is exempt and immune from execution. In this case, Lord Diplock followed the reasoning of the German Federal Constitutional Court in the *Philippine Embassy Bank Account* case. In this context, although the Vienna Convention does not specifically refer to an embassy bank account, it can refer to Article 3⁵⁶ and Article 25⁵⁷ of the Vienna Convention in which it respects the full facilities for the performance of the diplomatic function, considered as a customary international law of diplomatic immunity.⁵⁸

In contrast, the US district court in *Birch Shipping Corp v Embassy of the United Republic of Tanzania*⁵⁹ adopted a different approach from the *Philippine Embassy Bank Account* and *Alcom* cases, when dealing with the purpose test of an embassy account. In this case, the court considered whether the property in question was used for a

⁵⁵ H. Fox, 'Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity' 34(1) ICLQ 115 (1985) pp. 134.

⁵⁶ Art. 3 of the Vienna Convention, it reads:

- "1. The functions of a diplomatic mission consist inter alia in :
- (a) representing the sending State in the receiving State;
 - (b) protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
 - (c) negotiating with the Government of the receiving State;
 - (d) ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
 - (e) promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.
2. Nothing in the present Convention shall be construed as preventing the performance of consular functions by a diplomatic mission."

⁵⁷ Art. 25 of the Vienna Convention.

⁵⁸ C. Schreuer, *State Immunity: Some Recent Developments* (Grotius, Cambridge 1988) pp.154.

⁵⁹ *Birch Shipping Corp v Embassy of the United Republic of Tanzania*, 507 F.Supp. 311 (D.D.C. 1980).

commercial or sovereign purpose. The court based its decision on the nature test rather than the purpose test in distinguishing the property of a foreign state. The US court held that:

“The only significant question, then, is whether it is proper to attach an account which is not used solely for commercial activity. Certainly the statute [the FSIA] places no such restriction upon property which may be attached nor is there anything in the legislative history indicating that Congress contemplated such a limitation... Indeed, a reading of the Act which exempted mixed accounts would create a loophole, for any property could be made immune by using it, at one time or another, for some minor public purpose. Defendant asserts, however, that failure to find this property immune will make it impossible for foreign countries to maintain embassies. Even if it could be shown this was actually a problem, the solution would not be the broad immunity defendant asks, but segregation of public purpose funds from commercial activity funds. Holding otherwise would defeat the express intention of Congress to provide, in case of commercial litigation such as this, that ‘a judgment creditor [would have] some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.’ H.Rep.No. 94-1487, at 6606. Accordingly, the property at issue here is not immune from attachment, and the motion to quash the writ is denied.”⁶⁰

In determining a commercial exception, although an account of an embassy is immune under Section 1609 of the US FSIA, the use of the account fell within the term ‘commercial activity’ under the Section 1603 of the US FSIA, which is not immune from execution in the event that a foreign state has waived its immunity from execution either explicitly or by implication. In this respect, the District Court considered an agreement to arbitrate by Tanzania could be considered as an implied waiver of immunity from execution under the US FSIA. Accordingly, the court confirmed that it would create a loophole in the FSIA by removing mixed accounts from the reach of a State’s creditors as well as it would undermine the expressed intention of Congress to provide a remedy for a creditor if a foreign state failed to satisfy its final judgment.⁶¹ On this basis, the US court allowed execution against a foreign embassy bank account in the United States, which was not used solely for a commercial purpose and therefore, the mixed purpose bank

⁶⁰ *ibid* 313.

⁶¹ *ibid* Citing H.Rep. No.94-1487, at 6606.

account of a foreign state was not immune from execution.

The reasoning in both *Alcom* and *Birch* shows the difficulties in executing against an embassy bank account,⁶² which is not used wholly or substantially for the public function of embassy but used for mixed purposes. It is suggested by the US District Court that the segregation of an account used for a public purpose from a commercial purpose would be preferable for a foreign state. This would prevent the restraint of the maintenance of embassy if an embassy account is sought to be executed by a creditor.

However, the US District Court reversed the *Birch* decision in *LETCO v Liberia*. After the unsuccessful execution of an arbitral award in New York,⁶³ *LETCO* made a further attempt in executing the same award before the US District Court for the District of Columbia in Washington D.C.⁶⁴ In following a general trend of international law on sovereign immunity from execution with regards to embassy accounts, the court affirmatively held that:

“The Court presumes that some portion of the funds in the bank accounts may be used for commercial activities in connection with running the Embassy, such as transactions to purchase goods or services from private entities. The legislative history of the FSIA indicates that these funds would be used for a commercial activity and not be immune from attachment. The Court, however, declines to order that if any portion of a bank account is used for a commercial activity then the entire account loses its immunity... On the contrary, following the narrow definition of “commercial activity”, funds used for commercial activities which are “incidental” or “auxiliary”, not denoting the essential character of the use of the funds in question, would not cause the entire bank account to lose its mantle or sovereign immunity.”⁶⁵

⁶² See I. Goldner, ‘States and State-Controlled Corporations in International Commercial Arbitration’, 7 CROAT. ARB. Y.B. 159 (2000) pp. 169; M. Leigh, ‘Sovereign Immunity- United Kingdom Act- Garnishment of Embassy Bank Account- Definition of “Commercial Purpose”’, 79 AM. J. INT’L L. 143 (1985) pp. 143-144.

⁶³ *Liberia Eastern Timber Corporation v Liberia*, The District Court for the Southern District of New York, 650 F. Supp. 73 (1986).

⁶⁴ *Liberia Eastern Timber Corporation v Government of the Republic of Liberia*, 16 April 1987, 2 ICSID Reports 390; V. O. Nmehielle, ‘Enforcing arbitration awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)’, 7 Annual Survey of International & Comparative Law 21 (2001) pp.33.

⁶⁵ *Liberia Eastern Timber Corporation v Liberia (LETCO)*, 16 April 1987, 2 ICSID Reports 395.

In reaching this conclusion, that a mixed account is immune from execution, the court's reasoning relied on both diplomatic law and state immunity law. On the one hand, whilst the Vienna Convention has no specific provision regarding an embassy bank account, Article 25 of the Vienna Convention provides that "the receiving State shall accord full facilities for the performance of the functions of the mission."⁶⁶ In this context, an embassy bank account is included for the purposes of the Vienna Convention and is required to have protection in order to support the full facilities for the performance of the diplomatic functions.⁶⁷ On the other hand, the court held that a bank account did not qualify as a property used or intended to be used for a commercial activity under the US FSIA, but was utilised for the maintenance of the full facility of diplomatic function. By respecting the interaction between a diplomatic law and state immunity law, the District Court summarised that "the US Congress did not intend the FSIA to affect diplomatic immunity under the Vienna Convention because the FSIA was enacted subject to existing international agreements to which the US is the party at the time of enactment of this act..."⁶⁸

On these grounds, the court found that an embassy bank account used for mixed purposes is immune from execution, in accordance with both diplomatic law and state immunity law.⁶⁹ In this respect, the reasoning of the US court allowed diplomatic considerations to interfere with the sovereign immunity doctrine.⁷⁰ By this proposition, it can be seen from the cases of *Alcom* and *LETCO* that the court considered the primary purpose of the property; being the use to support the main function of diplomatic mission, in order to determine that the funds in a bank account were held by the diplomatic

⁶⁶ Art. 25 of the Vienna Convention.

⁶⁷ *Liberia Eastern Timber Corporation v. Liberia (LETCO)*, 16 April 1987, 2 ICSID Reports 392/3; D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 278; C. Schreuer, *The ICSID Convention: A commentary* (CUP UK 2009) pp.1170.

⁶⁸ *Liberia Eastern Timber Corporation v Liberia*, The District Court for the Southern District of Columbia, 659 F. Supp. 606 (D.C.C. 1987), at 608.

⁶⁹ *ibid* 607.; V. O. Nmehielle, 'Enforcing arbitration awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)', 7 Annual Survey of International & Comparative Law 21 (2001) pp.33.

⁷⁰ G.R. Delaume, 'Contractual Waivers of Sovereign Immunity: Some Practical Considerations', 5(2) ICSID Review-FILJ 232 (1990) pp. 253.

mission rather than the subsidiary purpose, which was the use of certain necessary commercial activities in running the diplomatic mission.⁷¹

Apart from the difficulties seen in the UK and US cases regarding the execution against an embassy bank account, French case-law has proven to have more difficulties and limitations regarding execution against embassy bank accounts.⁷² In *Noga v Russian Federation*⁷³, Noga, a Swiss company, had made a loan agreement with the government of the Russian Federation in order to guarantee the sale of petroleum products. In pursuing a matter between both parties, the sequence of two contracts in 1991 and 1992 demonstrated that the Russian Federation had not only signed an arbitration clause but also expressly waived its right to any immunity from suit, execution and attachment, which was entitled by principles of customary international law as well as international conventions.⁷⁴

In considering a waiver clause of all immunities by the Russian Federation, the French court was more cautious in interpreting such a waiver of sovereign immunity from execution clause in a strict and narrow manner. This was due to the fact that *NOGA* had attached against the bank accounts of the Russian embassy, which was considered diplomatic property in need of special protection, in accordance with diplomatic immunity law.⁷⁵ In this connection, despite the Russian Federation having made an express waiver from all immunities, including diplomatic immunity, the Paris Court of Appeal held that “such a waiver did not extend to the diplomatic immunities from execution guaranteed by the 1961 Vienna Convention and by customary international law, which are governed by specific rules distinct from those applicable to foreign States’

⁷¹ *Alcom Ltd. v Republic of Colombia*, 2 Lloyd’s Rep 31 (QB) 35 [1984]; *Liberia Eastern Timber Corporation v Liberia*, The District Court for the Southern District of Columbia, 659 F. Supp. 606 (D.C.C. 1987), at 610; See H. Fox, *The Law of State Immunity* (OUP, New York 2008) pp. 298,368.

⁷² J. Paulsson, ‘Sovereign Immunity from Jurisdiction: French Caselaw Revisited’ 19 *International Law* 277 (1985) pp 284-285.

⁷³ *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.

⁷⁴ N.B. Turck, ‘French and US Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards’, 17(3) *Arb. Int’l.* 327 (2001) pp. 332

⁷⁵ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 292.

sovereign immunities.”⁷⁶

Accordingly, a determination of a waiver of diplomatic immunity must refer to the Preamble⁷⁷ and Article 3⁷⁸ of the Vienna Convention in which it preserves the privileges and immunities of diplomatic as well as the protection of full facilities of diplomatic functions. Although the Paris Court of Appeal accepted that the Vienna Convention does not specifically refer to a bank account of diplomatic mission, the Court relied on Article 25 of the said Convention.”⁷⁹

In summary, it can be concluded that an express waiver of all immunities on a contractual basis cannot extend to diplomatic immunities, which is a special regime and requires a separate and unambiguous intention of the foreign state for such a waiver to be effective.⁸⁰ Therefore, most courts tend to interpret a waiver of sovereign immunity from enforcement provided for in the contract with a limited scope, in order to avoid a possible conflict, which may arise from a special protection of diplomatic immunity pursuant to consular and diplomatic law.⁸¹ Carrier explains on this point that “diplomatic immunity and State immunity are independent of one another originates from the fact that the character of the former is too specific and too high for it to be enough to transform itself into a waiver of the latter.”⁸²

In considering the decision of *NOGA*, it is unavoidable to make reference and

⁷⁶ This court decision was cited in N. Mayer-Fabre, ‘Enforcement of Arbitral Awards Against Sovereign States, A New Milestones: Signing ICC Arbitration Clause Entails Waiver of Immunity From Execution Held French Court of Cassation In *Creighton v. Qatar*, July 6, 2000, 15(9) Mealey’s International Arbitration Report 1 (September 2000) pp. 4.

⁷⁷ The Preamble of the Vienna Convention, which concerns “...the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations,... Realizing that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States,...”

⁷⁸ Art. 3 of the Vienna Convention.

⁷⁹ Art. 25 of the Vienna Convention; *Embassy of the Russian Federation et.al v Compagnie NOGA d’importation et d’exportation (NOGA)*, Paris Court of Appeal (10 August 2000), reported in (2001) XXVI Yearbook of Commercial Arbitration 273, at 275.

⁸⁰ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 294.

⁸¹ European Court Practice (n 1), pp. 818.

⁸² R. Carrier, ‘France: Shrinking of Immunity from Execution and Discovery of Diplomatic Immunity from Execution’, 18(1) Mealey’s International Arbitration Report 46 (January 2003) pp. 49.

comparison with the reasoning in *Creighton*.⁸³ This would raise a concern of the practical consequence of the *Creighton* jurisprudence as to whether an implied waiver, resulting from a reference to an agreement to arbitrate under the ICC Rules, could be extended to all properties belonging to a foreign state, including those which are used for a sovereign purpose or even for a diplomatic function. As the *NOGA* decision adopted a stricter test, in order to shield a property used for a diplomatic function and specially protected by the diplomatic law,⁸⁴ it cannot be said that the *Creighton* decision has established a universal norm or precedent regarding such an implied waiver for immunity from execution.

In this respect, it is necessary to consider municipal law on sovereign immunity, which provides protection for an embassy bank account in a different degree. The reasoning in the *NOGA* case is closely consistent with the UN Convention, which expressly excludes a bank account used or intended for use in the performance of the functions of the diplomatic mission of the State from a measure of constraint,⁸⁵ unless a foreign state has specifically consented by express waive from immunity from execution or allocated or earmarked the property in that respect.⁸⁶ However, the court in the *NOGA* case appears to have interpreted a narrower scope of protection over certain properties than in the UN Convention, even though the foreign state had waived immunity from execution. More importantly, this express reference to a bank account, provided for in the UN Convention, does not clearly clarify mixed purposes of embassy bank account. This raises a question as to whether such a mixed purpose of embassy bank account could be

⁸³ *Creighton Limited v. Government of the State of Qatar*, The French Cour de Cassation, (6 July 2000), reported in XXV Yearbook of Commercial Arbitration 458 (2000).

⁸⁴ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 296.

⁸⁵ See Art. 21(1)(a) of the UN Convention.

⁸⁶ See Art. 19(a) and (b) of the UN Convention, it reads:

“No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or”

attached.

It is difficult to find a solution to this problem in any other codifications, since most municipal codifications on sovereign immunity,⁸⁷ as well as the Vienna Convention,⁸⁸ are silent on the issue. Therefore, the issue of mixed purposes of an embassy bank account shall depend on a municipal court's interpretation, due to the fact that there is no uniform practice in this matter. There was an attempt to amend the US FSIA in 1988 when dealing with a bank account. This attempt was by adding a final paragraph at Section 1610 (a), reading that:

“This subsection shall not apply to property that is used for purposes of maintaining a diplomatic or consular mission or the residence of the chief of such mission, including a bank account unless that bank account is also used for commercial purposes unrelated to diplomatic or consular functions.”⁸⁹

In this respect, the proposed amendment of the US FSIA aimed to protect from execution a bank account with a mixed purpose, which was not only used for a sovereign purpose but also for necessary commercial activities in running the diplomatic mission. It should be highlighted that such an amendment does not protect the bank account of a diplomatic mission used for commercial activities, which is not related to the diplomatic function. Accordingly, the effect of the amendment would provide a greater confidence to both investor and sovereign state in dealing with sovereign immunity issue and providing a fairness of arbitration mechanism.⁹⁰ Nevertheless, it is regretted that the proposed amendment was not incorporated in the current text of the US FSIA. In this context, it would be desirable to enact the proposal into the law of sovereign immunity amongst major countries in order to provide clear provisions specifically when dealing with mixed

⁸⁷ Section 16 of the UK SIA only preserves any privilege and immunity to the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968, not mentions the bank account, whereas Section 1611 of the US FSIA does not include a bank account in certain types of property immune from execution.

⁸⁸ The mere wording of Article 22 of the Vienna Convention excludes the bank account from protection.

⁸⁹ M.B. Feldman, 'Amending the Foreign Sovereign Immunities Act: The ABA Position', 20 International Law 1288 (1986) pp. 1301; T.B. Atkeson and S.D. Ramsey, 'Proposed Amendment of the Foreign Sovereign Immunities Act', 79 AJIL 770 (1985) pp. 788.

⁹⁰ T.B. Atkeson and S.D. Ramsey, 'Proposed Amendment of the Foreign Sovereign Immunities Act', 79 AJIL 770 (1985) pp. 783.

purposes of embassy bank accounts. It is submitted that a development of the law in this area is required to move closer to the intentions of the UN Convention, and would be a realistic right step on the issue.

More importantly, it is suggested that in regards to the burden of proof onus, concerning the commercial use of property, the burden of proof should be shifted to a foreign state in clarifying whether the property in question is used for sovereign or diplomatic purposes. Without this change a private party is left with a difficult or even impossible task in locating sufficient evidence in order to prove that an embassy bank account is used for a commercial purpose. Accordingly, as in the words of Schreuer, “the German Constitutional Court’s concept of an abstract danger should be replaced by the criterion of an immediate and genuine threat to the foreign State’s official functions.”⁹¹

As the position of an embassy bank account with a mixed purpose is quite uncertain in relation to diplomatic property in both state immunity law and diplomatic law, major codifications on state immunity law and diplomatic law expressly refer to certain kinds of property, which enjoy a special protection of sovereign immunity from execution.⁹² These certain kinds of properties include diplomatic property, military property, central bank property and cultural heritage property, which require special protection. In addition, these specially protected properties are always considered as property specifically used by a state for sovereign or diplomatic functions. They are always immune from execution and not subject to forced execution regardless of any commercial activity exception. This is in contrast with other foreign state properties, which are destined a sovereign purpose; however, they can be subject to execution in the case where a foreign state has either explicitly or implicitly waived a sovereign immunity from execution.

⁹¹ C. Schreuer, *State Immunity: Some Recent Developments* (Grotius, Cambridge 1988) pp.155.

⁹² See. Section 1611 of the US FSIA, Section 14(4) and 16(1) of the UK SIA, Section 31(4) and 32(3)(a) of the Australian FSIA, Section 12(3) and (4) of the Canadian SIA and Article 21 of the UN Convention.

From the cases mentioned above, it should be noted that a state practice on the execution of arbitral award against an embassy bank account with a mixed purpose remains uncertain and varies from country to country. It is evident that there is no actual case law dealing with the execution of embassy bank accounts with mixed purposes in the investment-related area. This is possibly due to the fact that it is very difficult for a creditor to attach to any diplomatic assets, which are always considered immune as sovereign assets, by diplomatic law and municipal law. Accordingly, a state practice in regards to a mixed purpose of an embassy bank account is excessively deferential to a foreign state in preserving the performance of diplomatic functions and state sovereignty.⁹³ This would, however, affect the legitimate interest of foreign investors. Thus, it is important that future court of tribunal cases adopt a proportionality test in order to balance the measure of sovereign immunity and the aim to pursue and maintain international stability.⁹⁴

More importantly, this approach could also be used to achieve the legitimate interests for state and foreign investors by considering whether an express waiver of immunity from execution is possible in relation to specially protected properties or embassy bank accounts' with mixed purposes, under significant codifications. It is argued that although some codifications do not clearly mention waiver of sovereign immunity from execution with regards to specially protected property, such a waiver of sovereign immunity from execution remains possible, but only with an express intention regarding specific property.⁹⁵

(b) Central Bank Funds

Apart from the mixed purpose of embassy bank account, this section will discuss the controversy arising from the attachment and execution against a central bank, which is an additional attractive option for a private party. Generally speaking, central banks frequently have funds or accounts aboard with a bank of another country for official

⁹³ C. Ryngaert, 'Embassy Bank Accounts and State Immunity from Execution: Doing Justice to Financial Interests of Creditors, 26 *Leiden Journal of International Law* 73 (2013) pp. 73.

⁹⁴ *ibid* 87.

⁹⁵ C. Schreuer, *The ICSID Convention: A commentary* (CUP UK 2009) pp.1171.

purposes, especially, a bank reserve.⁹⁶ It can be said here that central bank accounts or funds are always immune from execution. However, this immunity also extends to a central bank account used to facilitate commercial transactions of a foreign state or its entity.⁹⁷ Without any doubt, this special protection, granted to a central bank fund or account as a privilege status, is clearly regarded differently than that of an embassy bank account with a mixed purpose.

Before the enactment and entry into force of municipal laws on sovereign immunity, some municipal courts did not treat central bank accounts differently from ordinary bank accounts. In the *Trendtex* case, the Court of Appeal, based its decision on customary international law,⁹⁸ considering that the Central Bank of Nigeria was not entitled to immunity from execution on the ground that the Central Bank of Nigeria was not an entity or constituent subdivision of the state, which is entitled to claim immunity.⁹⁹ The same approach is found in *Hispano Americana Mercantil S.A. v Central Bank of Nigeria* in which sovereign immunity was refused to the Central Bank of Nigeria on similar grounds.¹⁰⁰

Subsequently, the most recent codifications on sovereign immunity provide a central bank with a privileged immune status, requiring special protection from execution. Section 14(4) of the UK SIA provides special protection for central banks, in that the “property of a State’s central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes...”¹⁰¹ In this context, whereas a measure of execution can be executed against the commercial property of foreign state, provided for in section

⁹⁶ C. Schreuer, *State Immunity: Some Recent Developments* (Grotius, Cambridge 1988) pp.156.

⁹⁷ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 308.

⁹⁸ European Court Practice (n 1), pp. 826.

⁹⁹ *Trendtex Trading Corporation v Central Bank of Nigeria*, CA, 13 January 1977 [1977] 2 WLR 356; 64 ILR 111.

¹⁰⁰ *Hispano Americana Mercantil S.A. v Central Bank of Nigeria*, United Kingdom, Court of Appeal, Civil Division, 25 April 1979; 64 ILR 221.

¹⁰¹ Sec. 14(4) of the UK SIA.

13(4), a central bank's property is not subject to section 13(4),¹⁰² which requires special protection, provided for in section 14(4). Special protection provided for in section 14(4) has become a key reason court decisions concerning the consideration of immunity from bank accounts. For instance, the English court in *Banca Carige* case stated that:

“The immunity from enforcement proceedings of a central bank (section 14(4) State Immunity Act), is a relevant factor for a Court to consider when dealing whether to exercise a discretion allowing proceedings to be served outside the jurisdiction.”¹⁰³

The adoption and entering into force of the UK SIA would now produce different results in the cases of *Trendex* and *Hispano Americana Mercantil*, given that the UK SIA provides that a central bank account receives a special protection. Reading section 14(3)¹⁰⁴ together with 14 (4)¹⁰⁵ of the UK SIA it can be assumed that the aim is to provide a special protection of full immunity to all property of a central bank. Without this the specific property would be subject to execution and treatment under the same rules as in the case of a foreign state or its separate entity, which is able to be sued.¹⁰⁶ Therefore, a central bank, whether its status is not distinguishable from state or operating as a separate entity, is not to be regarded as in use or intended for use for a commercial purpose in any case.¹⁰⁷ In addition, since the wording of section 13(4) together with 14 (4) excludes a property of a central bank, categorised as being used for a commercial

¹⁰² Sec. 13 (4) of the UK SIA.

¹⁰³ *Banca Carige SpA Cassa di Risparmio Geneva e Imperia v Banco National de Cuba and another*, Ch.D. (Companies Court), 11 April 2001, 3 All ER 923 [2001]; 2 Lloyd's Rep. 147 [2001].

¹⁰⁴ Sec. 14(3) of the UK SIA, it reads:

“(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.”

¹⁰⁵ Sec. 14(4) of the UK SIA.

¹⁰⁶ Section 14 (1) of the UK SIA, it reads:

“(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

- (a) the sovereign or other head of that State in his public capacity;
- (b) the government of that State; and
- (c) any department of that government,

but not to any entity (hereafter referred to as a “separate entity”) which is distinct from the executive organs of the government of the State and capable of suing or being sued.”

¹⁰⁷ G.R. Delaume, ‘The State Immunity Act of the United Kingdom’, 73(2) AJIL 185 (1979) pp.190-197.

purpose, even though it is actually used for a commercial purpose, it would be difficult to determine the purpose of a property and whether it falls within a commercial activity exception, so as to be executed against. Therefore, an execution against the property of a central bank is only possible when a foreign state has explicitly and specifically waived its immunity from execution to the property of the central bank in question.¹⁰⁸

Apart from the UK SIA, section 1611 (b) (1) The US FSIA upholds the immunity from execution for a property in a possession of a foreign central bank or monetary authority held for its own account.¹⁰⁹ The wording “held for its own account” intends to distinguish funds used to perform functions of actual central bank activities from those to finance commercial transactions of foreign states or other entities.¹¹⁰ In this respect, it means that only funds or accounts held for its own account in the name of a foreign central bank and used to perform the functions of central bank are immune from execution.¹¹¹ However, as in the case of a mixed purpose normal bank account, some central bank accounts have been used for both genuine central bank activities and certain commercial activities.

In this situation, the US court considered in the case of *Weston* that if “property used for commercial activity and property of a central bank held for its own accounts are not mutually exclusive categories”¹¹², such a central bank account used in connection

¹⁰⁸ C. Schreuer, *The ICSID Convention: A commentary* (CUP UK 2009) pp.1174.

¹⁰⁹ Sec. 1611(b)(1) of the US FSIA, it reads:

“(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”;

See E.T. Patrikis, ‘Foreign Central Bank Property: Immunity from Attachment in the United States’, *University of Illinois Law Review* 265 (1982), pp. 277; P.L. Lee, ‘Central Banks and Sovereign Immunity’, 41 *Colum. J. Transnat’l L.* 327 (2002-2003).

¹¹⁰ A. Dickinson et.al. (eds), *State Immunity: Selected Materials and Commentary* (OUP, New York 2004) pp. 325-326; C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1171.

¹¹¹ *Weston Compagnie de Finance et d’Investissement, S.A. v La Republica del Ecuador*, 823 F. Supp 1106 (SDNY 1993) at. 1112.

¹¹² *ibid*

with commercial activity by a foreign state or its entities could not be regarded as a commercial activity, in which it is not immune from execution.¹¹³ Therefore, a central bank account used for mixed purposes will not invalidate the entire account from immunity from execution.¹¹⁴ On the contrary, by “the mere placing of funds not used for a central bank function in an account of a foreign state bank account”¹¹⁵, a central bank account of foreign state is not immune from execution. Combining these two propositions, if the funds in a central bank account could be distinguished between funds held for the central bank’s own account and other funds,¹¹⁶ a court could consider a segregation of funds in order to permit execution against property or funds of a central bank account used for a commercial activity, whereas the rest of fund or property used for the function of central bank would remain immune from execution. This segregation of funds approach was adopted in the case of *LETCO*¹¹⁷ when dealing with the mixed purpose of embassy bank account.

Making a comparison between the UK SIA and the US FSIA, it could be pointed out that the UK SIA provides a wider scope of protection for the property of a central bank than in the US FSIA. This is because the UK SIA specifically defines a fund or the property of a central bank as non-commercial activity, whilst the US FSIA is limited to a fund or property of central bank, which is held for its own account. The English High court applied this broad interpretation of sovereign immunity from execution for a central bank funds in *AIG Capital Partners v Kazakhstan*.

In this case, AIG requested that the English court execute against Kazakhstan funds, held by third parties (ABN AMRO Mellon Global Security Services BV), pursuant to a global custody agreement with the National Bank of Kazakhstan in order to satisfy an

¹¹³ *ibid* 1113; See also *Olympic Chartering, S.A. v Ministry of Industry and Trade of Jordan*, 134 F. Supp. 2d 528 (SDNY 2001) at 533.

¹¹⁴ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 304.

¹¹⁵ *Weston Compagnie de Finance et d’Investissement, S.A. v La Republica del Ecuador*, 823 F. Supp 1106 (SDNY 1993) at 1114.

¹¹⁶ *ibid*

¹¹⁷ *Liberia Eastern Timber Corporation v Liberia (LETCO)*, 16 April 1987, 2 ICSID Reports 395.

ICSID award against Kazakhstan.¹¹⁸ Pursuant to the UK SIA, the court ruled that “property of a State’s central bank or monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes.”¹¹⁹ Accordingly, the court further found that the question of the intended use of central bank property was irrelevant.¹²⁰ Therefore, notwithstanding Article 54(1) of the ICSID Convention to enforce an arbitral award, AIG was unable to execute an arbitral award against Central bank assets because those funds were immune from the enforcement before the English court.¹²¹ Similarly, this wider scope of protection can also be seen in Article 21 of the UN Convention.¹²² Pursuant to the UK SIA and the UN Convention, it can be assumed that sovereign immunity from execution for a central bank fund remains absolute, in which any investment activities of a central bank could likely benefit from immunity owing to a very broad definition of central bank assets.

This special treatment for central bank funds under the sovereign immunity doctrine could imply that central bank funds have become an increasingly popular target of award for creditors. As seen above, the rules on sovereign immunity from execution in relation to central bank funds vary as to the degree of protection in each jurisdiction. However, one common rule between jurisdictions is to hold its assets as immune property serving a sovereign purpose. The main aspect behind this, under the US FSIA and the UK SIA, is to attract foreign investment into the jurisdictions of New York and London, respectively, as financial and banking centers.¹²³ Moreover, this could be coupled with the trend of governments increasingly getting involved in foreign investment as a state-

¹¹⁸ A. Alexandroff and I. Laird, ‘Compliance and Enforcement’ in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (2008)(OUP, UK 2008) pp. 1181-1182.

¹¹⁹ *AIG Capital Partners Inc. and another v Republic of Kazakhstan (National Bank of Kazakhstan Intervening)*, High Court, Queen’s Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2239 (Comm); 11 ICSID Reports 141, para 57.

¹²⁰ *ibid* paras 57, 61; C. Schreuer, *The ICSID Convention : A commentary* (CUP UK 2009) pp.1172.

¹²¹ *AIG Capital Partners Inc. and another v Republic of Kazakhstan (National Bank of Kazakhstan Intervening)*, High Court, Queen’s Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2239 (Comm); 11 ICSID Reports 141, paras 90-91.

¹²² H. Fox, *The Law of State Immunity* (OUP, New York 2008) pp. 646.

¹²³ D. Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working papers on international investment, 2010/2, OECD Publishing (2010) pp. 24; See also, M. Waibel, *Sovereign Defaults before International Courts and Tribunals* (CUP, UK 2011) pp. 19-20.

controlled investor, such as in Sovereign Wealth Funds ('SWFs') and State-Owned Enterprises ('SOEs'). Such a state involvement in SWFs could be linked in some form to their national central banks, either created as a part of central bank or managed by a central bank to invest in a foreign state.¹²⁴ Therefore, whilst this trend might provide some significant benefits for both home and host states in terms of capital flows and economy expansion, it raises some concerns and difficulties for private parties to pursue a legitimate aim against them with regard to the enforcement of an arbitral award. With regard to a reasoning of the UK court in the *AIG* case, it would create a risk for foreign investors and set a precedent for future cases, which would undermine the effectiveness of the investor-state arbitration.

(c) Specially Protected Property

Another significant question might be raised as to whether an express waiver of sovereign immunity from execution has an effect in relation to specially protected property. With regards to the central bank account, the US FSIA specifically allows by Section 1611(b) (1) the central bank or authority or its home foreign government to expressly waive its immunity from execution of central bank property.¹²⁵ This position would be the same in regards to the UK SIA. Although the UK SIA does not expressly mention a waiver of sovereign immunity of a central bank property, it is possible to refer to Section 13(3),¹²⁶ which requires the written consent of a state so as to apply to a limited extent or generally to a property in question, including a property of a central bank clarified in Section 14(4).¹²⁷

¹²⁴ D. Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working papers on international investment, 2010/2, OECD Publishing (2010) pp. 24

¹²⁵ Sec. 1611(b)(1) of the US FSIA.

¹²⁶ Sec. 13(3) of the UK SIA, it reads:

“(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.”

¹²⁷ Section 14 (4) of the UK SIA, reads:

“Property of a State’s central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity

With regard to a pre-judgment attachment (provisional measures of constraint), the purpose is to secure the assets of a party before a final judgment for a post-judgment execution, in order to avoid a situation where a losing party tries to frustrate an execution.¹²⁸ The use of pre-judgment attachment seems to be very limited in most codifications due to the fact that it may raise a conflict in relation to the immunity from execution doctrine.¹²⁹ Therefore, a differentiation has to be made between pre-judgment attachment and post-judgment attachment, in which the former requires the measure of a written consent or explicit waiver by a party.

The possibility of a waiver of immunity from execution for central bank assets, under subsection 1611(b)(1) of the US FSIA, does not include mention of a waiver in respect to a pre-judgment attachment. Therefore, this means that a foreign central bank or monetary authority could expressly waive a sovereign immunity from execution for its property or fund held in its own account only for a post-judgment attachment.¹³⁰ This limitation is less restrictive in the case of property falling into the commercial activity exception under Section 1610 (d), which allows for a pre-judgment attachment, provided that there is express consent.¹³¹ This circumstance might be different for a post-judgment attachment, which allows a foreign state to waive “its immunity from attachment in aid of

subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.”

¹²⁸ European Court Practice (n 1), pp. 834.-835.

¹²⁹ J. Ostrander, ‘The last bastion of sovereign immunity: A Comparative look at immunity from execution of judgments’, 22 Berkeley J. Int’l L. 451 (2004) pp. 553.

¹³⁰ *Weston Compagnie de Finance et d’Investissement, S.A. v La Republica del Ecuador*, 823 F. Supp 1106 (SDNY 1993), at. 1111; A. Dickinson et.al. (eds), *State Immunity: Selected Materials and Commentary*, (OUP, New York 2004) pp.326.

¹³¹ Sec. 1610 (d) of the US FSIA, it reads:

“d) The property of a foreign state, as defined in section 1603 (a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.”

execution or from execution either explicitly or by implication”¹³² provided under Section 1610(a)(1). Yet, a pre-judgment attachment for a central bank’s property is permissible under the Section 13(3) of UK SIA and Article 18 of the UN Convention,¹³³ but only with express consent.¹³⁴

Therefore, it could be seen that in relation to pre-judgment attachments, provisional measures and injunctions might be further obstacles when attempting to secure funds or properties made prior to the adjudication of a decision on the merits concerning an execution of an arbitral award. Municipal laws and international codifications on sovereign immunity tend to allow pre-judgment attachments with a requirement that the express consent by a foreign state has been provided.¹³⁵ In this context, such a pre-judgment measure is easier to utilise when dealing with commercial property of a foreign state, and not a central bank or sovereign property, which evoke sensitivities concerning the international relations between countries.¹³⁶

(d) Concluding Remarks

In summary, both central bank and specially protected property are not considered as commercial property falling within the commercial activity exception. However, the execution against such property remains possible with the provision of an express

¹³² Sec. 1610 (a)(1) of the US FSIA

¹³³ Art. 18 of the UN Convention, it reads:

“No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

- (a) the State has expressly consented to the taking of such measures as indicated:
 - (i) by international agreement;
 - (ii) by an arbitration agreement or in a written contract; or
 - (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.”;

H. Fox, *The Law of State Immunity* (OUP, New York 2008) pp. 616-618.

¹³⁴ C. Schreuer, *The ICSID Convention: A commentary* (CUP UK 2009) pp.1178; D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 311.

¹³⁵ See Sec. 1610(d) of the US FSIA, Sec. 13(2)(a) and 13(3) of the UK SIA, Sec. 10(1) of the Canadian SIA, Art. 23 of the European Convention and Art. 18 of the UN Convention.

¹³⁶ See C. Schreuer, *State immunity: Some recent developments* (Grotius Publication, Great Britain 1988) pp. 162; G.R. Delaume, ‘Foreign Sovereign Immunity: Impact on Arbitration’, 38(2) Arb. J. 34 (1983) pp. 41-42; European Court Practice (n 1),) pp. 834.

consent. In this respect, the situation of a central bank is clearer than in the case of diplomatic and military properties, which are still uncertain and need more consideration in accordance with municipal law and diplomatic law. As seen in certain cases and codifications, whilst a waiver of immunity from execution is possible in principle, certain types of property, for example, diplomatic and military property, require a specific express waiver in relation to the property in question. Additionally, the property is subject to specific conditions under municipal law or even diplomatic law, as in the case of *NOGA* where an express waiver could not extend to diplomatic property, which is specifically protected and governed by the Vienna Convention. To overcome this difficulty, municipal laws and international codifications should include clear specific provisions dealing with immunity from execution and the waiver required in regards to embassy accounts, diplomatic property, military property and other specially protected properties. As states appear to get significantly and increasingly involved in foreign investments, the development of law in this area would be very important in order to deal with more complex issues for future investment claims. Currently, the UN Convention appears to be the most practical contemporary codification, which deals with this complicated issue and provides the best solution and outcomes for both states and private parties, albeit that it has not yet been entered into force.

3. The Nexus Requirement

Another challenge and limitation with regard to immunity from execution remains the question as to whether the nexus requirement between property, which is sought to be executed against and the underlying claim, or the entity upon the matter is really based, presents a further hurdle for a denial of immunity in the execution of an arbitral award. The underlying reason behind this requirement can be traced back to the jurisdictional rules in which a court could not exercise a jurisdiction over a foreign state in a forum state unless a foreign state had waived sovereign immunity or satisfied other exceptions, for example, commercial activity exception, the acts done at the forum, the contract made in a forum state, the nationality of the parties and the agreement to arbitrate. In this context, a foreign state may be exposed to litigation in unexpected countries, taking into account that a party may take the approach of forum shopping approach in order to defeat

jurisdictional rules.¹³⁷ The cases of *Iptrade International, S.A. v Federal Republic of Nigeria*¹³⁸ and *Libyan American Oil Co. v Socialist People's Libyan Arab Jamahriya (LIAMCO)*,¹³⁹ demonstrate that cases may be rendered in several jurisdictions on the basis that an agreement to arbitrate applies as an implied waiver of sovereign immunity from jurisdiction, regardless of jurisdictional territorial connection.

In order to anticipate this situation, some countries have required that a minimum contact or jurisdictional link between a jurisdiction of the court and the subject-matter of the transaction exists, in order to exercise a jurisdiction and execution over a claim and property. In the absence of this nexus requirement, it is impossible for a private party to execute against foreign property, which has no connection with the subject-matter of a claim or with a state party to the dispute. In some codifications, the nexus requirement is seen as an additional important condition to be met after a commercial activity exception has been established in the case of forced execution.¹⁴⁰ Contrary to the strict approach, some codifications require no nexus requirement between the property to be executed and the underlying claim.¹⁴¹ Accordingly, states have adopted various extreme approaches when dealing with a minimum contact requirement in their municipal law as well as in international codifications, which has led to different results arising from the specific court practice in a specific situation. By imposing this requirement, the property of a foreign state would be more protected by placing a further parameter to restrain the availability of property; this would also provide a better way of predicting situations when considering execution.¹⁴²

Nevertheless, the additional condition of a nexus requirement would undermine the effectiveness of the arbitration mechanism, by leaving a private party without a remedy.

¹³⁷ G.R. Delaume, 'Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration', pp. 418.

¹³⁸ *Iptrade International, S.A. v Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) at 826.

¹³⁹ *Libyan American Oil Co. v Socialist People's Libyan Arab Jamahriya (LIAMCO)*, 482 F. Supp. 1175 (D.D.C. 1980).

¹⁴⁰ See Sec. 1610(a)(2) of the US FSIA, Art. 19(c) of the UN Convention; Enforcement in the United States and United Kingdom (n 4), pp. 93.

¹⁴¹ See Sec. 13(4) of the UK SIA

¹⁴² D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 317.

Chamlongrasdr argues that “by imposing the requirement of the connection between the property and the underlying claim, not only does it cause difficulties for courts in determining the attachable property, but also private parties seeking execution against the property of a foreign state have to face with unnecessary burdens.”¹⁴³ Therefore, it is a purpose of this section to determine the effect of a nexus requirement, which is adopted in many municipal and international laws on sovereign immunity.

The strictest requirement is found at Section 1610(a) (2) of the US FSIA, which requires a connection between the property and the underlying claim under a two-tier test. After it has been found that property is of a commercial type, a private party must prove that such commercial property is used for a commercial activity and has a minimum connection with the underlying claim in the United States.¹⁴⁴ Therefore, this provision limits the availability of attachable property, as not all commercial property of a foreign state located in the United States is used for a commercial activity and has a connection with the underlying claim. However, it is important to note that this nexus requirement provision is applicable only to the property of a foreign state, and not to the property of state instrumentalities, which do not require a nexus requirement.¹⁴⁵ Therefore, the execution against the property of state instrumentalities is a simpler option when attempting execution against the property of a foreign state; allowing execution against any commercial property of state instrumentalities in the United States.¹⁴⁶

¹⁴³ *ibid* 318.

¹⁴⁴ Section 1610 (a) of the US FSIA.

See C. Schreuer, *State immunity: Some recent developments* (Grotius Publication, Great Britain 1988), pp. 130; G.R. Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’, 2(2) ICSID Review 403 (1987) pp. 414.

¹⁴⁵ See Sec. 1610(b)(2), it reads:

“(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605 (a)(2), (3), or (5) or 1605 (b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or”

¹⁴⁶ J. Ostrander, ‘The last bastion of sovereign immunity: A Comparative look at immunity from execution of judgments’, 22 Berkeley J. Int’l L. 451 (2004) pp. 558-559.

In establishing a nexus requirement between arbitration and the forum state, the US courts have interpreted an agreement to arbitrate as an implied waiver for the jurisdictional requirement. Since a nexus requirement is only combined with a commercial activity exception under the US FSIA, a waiver exception under Section 1610(a) (1) does not refer the nexus requirement to the United States.¹⁴⁷ Accordingly, the US court practices had tended to exercise a jurisdiction regardless of the place of arbitration and nexus requirement. This can be seen in the cases of *Ipitrade*¹⁴⁸ and *LIAMCO*.¹⁴⁹

As already discussed in chapter 5, separate to the US Court declining jurisdiction in *LIAMCO*,¹⁵⁰ the *LIAMCO* award was additionally rendered in Switzerland. In Switzerland, the court “declined to exercise jurisdiction and refused to permit execution against the assets of Libya located in Switzerland on the ground that the underlying transaction... bore no contact with Switzerland other than the fact that the sole arbitrator had elected to locate the seat of arbitration in Geneva.”¹⁵¹ Therefore, the Swiss court practice weighted its decision on the significant connection with the Swiss territory.¹⁵² The US court also adopted a significant contact approach in the case of *Verlinden B.V. v Central Bank of Nigeria*.¹⁵³ In this case, the court required a specific link to the United States in order to exercise a jurisdiction over a foreign arbitration. The court refused to interpret an agreement to arbitrate as an implied waiver of immunity, stating that:

“...where a foreign state agrees to submit its disputes with another, non-American private party to the laws of a third country, or to answer in the tribunals of such country, it does

¹⁴⁷ C. Schreuer, *State immunity: Some recent developments* (Grotius Publication, Great Britain 1988), pp. 81.

¹⁴⁸ *Ipitrade International, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978), at 826.

¹⁴⁹ *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya (LIAMCO)*, 482 F. Supp. 1175 (D.D.C. 1980).

¹⁵⁰ *Libyan American Oil Company (LIAMCO) v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980)

¹⁵¹ *Socialist Libyan Arab Popular-Jamahiriya v. Libyan American Oil Company (LIAMCO)*, Swiss Federal Tribunal (19 June 1980), 62 ILR 228, at 234-236.

¹⁵² J.F. Lalive, ‘Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State’, 10 Neth. Y.B. Int'l L. 153 (1979).

¹⁵³ *Verlinden B.V. v. Central Bank of Nigeria*, 488 F. Supp. 1284 (S.D.N.Y. 1980)

not implicitly waive its immunity to jurisdiction of the courts of the United States.”¹⁵⁴

However, the effectiveness of arbitration rendered under the New York Convention is reliant on the cooperation of the municipal courts ensuring enforcement and execution of an arbitral award against the attachable property of foreign state. In this context, Schreuer has provided that “its [the New York Convention] function in our context is to create an obligation of courts of Parties to the Convention to enforce arbitral agreements and awards rendered in other States Parties to the Convention. It thereby creates the necessary jurisdictional nexus to the forum state to make submission to arbitration operative as a waiver of immunity.”¹⁵⁵

In the framework of the ICSID arbitration, it should be borne in mind that although an agreement to arbitrate could be interpreted as an implied waiver of immunity from jurisdiction and enforcement, provided in Article 54 of the ICSID Convention, Article 55 of the ICSID Convention preserves the immunity from execution subject to the municipal law on sovereign immunity where the execution is sought. This reasoning was clarified in *LETCO v Liberia*, where the court specifically referred to a waiver of immunity to recognition and refused execution, where the court had no authority.¹⁵⁶ Therefore, a submission to the ICSID Convention could provide a necessary jurisdictional link to a forum state in enforcing an arbitral award, but not at the execution stage, which is subject to municipal law.

In this context, the 1988 amendment of the US FSIA would make it easier to execute ICSID awards. Section 1610(a) (6) provides that the property of a foreign state used for a commercial activity in the United States shall not be immune from a sovereign immunity from execution upon a confirmation of a judgment of arbitral award. Accordingly, although it still requires the commercial property of a foreign state in the United States, for the purpose of the execution of an arbitral award, it does not require any jurisdictional

¹⁵⁴ *ibid* 1302.

¹⁵⁵ C. Schreuer, *State immunity: Some recent developments* (Grotius Publication, Great Britain 1988) pp. 87.

¹⁵⁶ C. Schreuer, *The ICSID Convention: A commentary* (CUP UK 2009) pp.1173.

nexus between the commercial property of a foreign state and the subject-matter of the underlying claim, unlike in the case of an execution of judgments against the property of foreign state. It could, therefore, be said that the amendment of the US FSIA is more generous to arbitral awards than to the judgments of the US courts.¹⁵⁷

The requirement of a connection between the property to be executed and the underlying claim is also adopted in the French court practice. The Cour de Cassation in *Eurodif* case ruled that “property of a foreign State could be subject to measures of execution provided that the property sought to be executed had been allocated for an economic or commercial activity of a private law nature, which had given rise to the subject matter of the claim at issue.”¹⁵⁸ Following this decision, the Cour de Cassation in *Sonatrach* also affirmed the requirement for a connection between the property to be executed and the subject-matter of the claim. The court held that “the assets of a foreign state, which are in principle subject to garnishment, with exceptions, especially when they are intended for economic or commercial activities of a private nature from which the claim of creditor arises.”¹⁵⁹ In addition, the French court made a distinction between property held by a foreign state itself and held by foreign state instrumentalities, in which a nexus requirement does not extend to the latter. This approach is in the same line with the US FSIA to revoke a nexus requirement for an instrumentality.¹⁶⁰

Interestingly, the UN Convention provides a further type of nexus requirement by modifying the link criteria between a commercial serving commercial purpose and the state entity against which the proceeding was directed. This new nexus requirement eliminated the nexus requirement concerning the underlying claim, provided in the 1991

¹⁵⁷ *ibid* 1161; See G.R. Delaume, ‘Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies’, 8 ICSID Review-FILJ 29 (1993) pp.42.

¹⁵⁸ *Republic of Iran v Eurodif*, French Cour de Cassation (14 March 1984), 77 ILR 513, at 515, quoted in D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 323.

¹⁵⁹ *Sonatrach v. Migeon*, French Court de Cassation (1 October 1984), 26 I.L.M. 998 (1987), at 1003.

¹⁶⁰ J. Ostrander, ‘The last bastion of sovereign immunity: A Comparative look at immunity from execution of judgments’, 22 Berkeley J. Int’l L. 451 (2004) pp. 561.

ILC's Draft Articles on Jurisdictional Immunities of States and Their Property.¹⁶¹ In pursuant to Article 19(c), a post-judgment measure of constraint is possible in the case only of an execution against the commercial property of a foreign state in connection with the entity against which proceedings refer.

The Annex to the Convention, provides that the 'entity' under Article 19 means "the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality."¹⁶² In order to fulfill this requirement, the UN Convention treats the state and its constituent subdivisions and agencies of the foreign state in the same way to the situation where an arbitral award has been directed against the entity of a foreign state and must be executed against the property owned by the same entity.¹⁶³ O'Keefe and Tams point out that:

"the final limb of Article 19 (c) stipulates that, when it comes to post-judgment measures of constraint, the State of the forum must ensure that its court respect the 'segregation' or division of foreign State property among the various, separate legal persons recognized by the municipal law of that foreign State."¹⁶⁴

Accordingly, the UN Convention might provide a broader scope of execution in comparison to the US FSIA, since it permits execution against all commercial properties of the entity involved in the proceedings, and is not limited to the execution of

¹⁶¹ See Article 18(1)(c) of the ILC's Draft Articles on Jurisdictional Immunities of States and Their Property of 1991; 30 ILM 1563 (1991), it reads:

"1. No measures of constraint, such as attachment, arrest and execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(c) the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum and has a connection with the claim which is the object of the proceeding or with the agency or instrumentality against which the proceeding was directed.";

See L.W. Lowe, 'The International Law Commission's Draft Articles on the Jurisdictional Immunities of States and Their Property: The Commercial Exception', 27 Colum. J. Transnat'l L. 657 (1988-1989).

¹⁶² The UN Convention. Annex to the Convention, Understandings with respect to certain provisions of the Convention, with respect to article 19.

¹⁶³ See C. Schreuer, *The ICSID Convention: A commentary* (CUP UK 2009) pp.1166.

¹⁶⁴ R. O'Keefe and C. J. Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property A Commentary* (OUP, UK 2013) pp. 324.

commercial property, which has a connection with the subject-matter of the claim. In this respect, the new requirement under the UN Convention is similar to the approach adopted in the UK SIA, which permits execution against the commercial property of a foreign state with no nexus requirement. Section 13 (4) of the UK SIA permits execution against property, which is “for the time being in use or intended for use for commercial purpose.” Therefore, execution is possible when it is an execution against any commercial property of a foreign state; this is due to the fact that the UK SIA does not require any nexus requirement to the underlying claim.

Following this trend, The Australian SIA¹⁶⁵ and the Canadian SIA¹⁶⁶ have adopted this approach, where there is no nexus requirement. In the French case of *Creighton* in the Paris Court of Appeal, the court, however, was silent on the matter of a nexus requirement when executing an arbitral award against a property of the state entity of Qatar not the State of Qatar itself. This was when the property of the state entity of Qatar had no connection with the underlying claim.¹⁶⁷ By this reasoning of the Court of Appeal in *Creighton*, the approach of endorsing a nexus requirement, adopted in *Eurodif* and *Sonatrach*, appears to be overturned.¹⁶⁸ Therefore, it can be assumed that this precedent would bring the French court practice on sovereign immunity from execution closer to the United Kingdom practice, which requires no connection between the property and the underlying claim, but only a commercial character of the property.¹⁶⁹

¹⁶⁵ See Section 32(3)(a) of the Australian SIA, it reads:

“(3) For the purposes of this section:

(a) commercial property is property, other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purposes; and”

¹⁶⁶ See Section 12(1)(b) of the Canadian SIA, it reads:

“(1) Subject to subsections (2) and (3), property of a foreign state that is located in Canada is immune from attachment and execution and, in the case of an action *in rem*, from arrest, detention, seizure and forfeiture except where

(b) the property is used or is intended to be used for a commercial activity or, if the foreign state is set out on the list referred to in subsection 6.2(2), is used or is intended to be used by it to support terrorism or engage in terrorist activity;”

¹⁶⁷ *Creighton v. Qatar*, Paris Cour de Appel, 12 December 2002 [2003] *Revue de l'arbitrage* 417, at 527.

¹⁶⁸ See G.R. Delaume, ‘Recent French Cases on Sovereign Immunity and Economic Development Activities’, 2(1) ICSID Rev. 152 (1987).

¹⁶⁹ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 324.

In summation, although the nexus requirement is not endorsed in all state practices for the purpose of execution, it remains one of the greatest hurdles for a private party in order to satisfy its arbitral award. Moreover, it also causes more difficulties for a municipal court to establish or define a connection between a property and the underlying claim. Such a practice can obviously be found in the US FSIA, in which a private party and a municipal court have found it difficult when executing an arbitral award. Therefore, since sovereign immunity from execution is no longer absolute, it should be possible that the property of a foreign state, used for a commercial activity, can be subject to a forced execution without any further nexus requirement. To hold otherwise, both parties would be confronted by an unnecessary and excessive burden, which might undermine the effectiveness of arbitration process.

4. Concluding remarks

The challenges and limitations in executing against a bank account, diplomatic and military property, as well as a mixed purpose bank account of a diplomatic mission appear to be significant hurdles to the enforcement of arbitral awards. This is because these specially protected properties are not only subject to conditions and exceptions of municipal law on sovereign immunity, but are also specifically governed by the Vienna Convention; making it more difficult to execute against these properties. Furthermore, certain municipal laws add a further requirement of a jurisdictional link between the specific property and the underlying claim. Such a practice can be identified easily in the US FSIA, whereby private parties and the municipal courts have found it extremely difficult to execute arbitral awards. However, since the 1988 amendment of the US FSIA excludes the applicability of a nexus requirement and the act of state doctrine in the context of arbitral agreement, it has become easier to enforce an arbitral award in the United States.

In many cases, a private investor is left without any remedy and state responsibility; therefore, the main concern here is how to protect a private investor in order to enable satisfaction of an arbitral award, without any violation of the sovereignty of state in order to protect its sovereign property and public interest. Without doubt, it is a challenge for

both the state and the investor, especially a court to adopt a public law concept of proportionality analysis, in order to strike a fair balance between investor rights under the treaty or agreement and sovereign rights under municipal or international law on sovereign immunity. To overcome this difficulty, municipal laws and international codifications should include clear specific provisions dealing with immunity from execution and waivers in regards to embassy accounts, diplomatic property, military property and other specially protected properties; providing a lucid approach in dealing with mixed purposes of those properties.

PART V
CONCLUSIONS

Chapter 7

Practical Considerations and A Way Forward

1. Introduction

Despite the fact that there are various possibilities in overcoming limitations and challenges whilst executing against both sovereign and commercial properties, the difficulties remain significant for both state and private investor. Further solutions are required to conquer this situation. These solutions range from the amendment of international conventions, providing a reliable and effective mechanism to reforming municipal laws on sovereign immunity, to the provision of a realistic and practical approach going forward. At a domestic level, the domestic courts and sovereign immunity laws have expressed the clear position that immunity from enforcement and execution is no longer absolute. Nonetheless, the approach towards immunity from execution is unclear. Significantly, a vigorous effort by states to pursue reform, at the international level, is unlikely to be achievable given the sensitive nature of execution and its possible impact on international relations between states.

To achieve an amiable environment relating to investment treaty arbitration between a host state and the foreign investor, it is necessary to consider the interrelationship between international sovereign immunity laws plus the rules on enforcement of international investment arbitration awards.¹ This is due to the special character of investment treaty arbitration as a public-private regime. Such a dynamic perspective could possibly provide a thorough analysis of the protection of private economic rights obliged by provisions under international investment law and state sovereignty obliged by law under sovereign immunity. Within this framework, it is a challenge for a court to strike a fair balance between the investor rights under treaty or agreement and the sovereign's rights under the municipal or the international law relating to sovereign

¹ S. Schill, 'International Investment Law, the Law of State Immunity, and Human Rights: A Case Study in Cross-Regime Analysis as an Instrument of Defragmentation', Available at <http://works.bepress.com/stephan_schill/1>, pp. 3-4. (International Investment Law, the Law of State Immunity, and Human Rights)

immunity. On this basis, the Investor-State Dispute Settlement (ISDS) has been established to bridge the gap between the two international areas in order to support the enforceability of investment arbitration awards.²

Nonetheless, it is against this backdrop that the host state's municipal court will frequently be ill positioned when enforcing and/or executing a state's obligations under investment treaties vis-à-vis foreign investors by claiming a defence of sovereign immunity.³ By allowing a host state to breach its investment treaty obligations, before a municipal court, it is unable to serve and support the ISDS mechanism, thus not providing an efficient and effective institution that could assist enforcement of an arbitral award. Therefore, even though the ISDS mechanism ensures the enforceability of arbitral awards, it is unlikely to achieve this without municipal court's support. Accordingly, sovereign immunity law is inevitably placed between international law and municipal law, giving rise to an increased debate and staunch challenges from scholars and practitioners concerning its interpretation and implementation.⁴ In this chapter, it must be considered that sovereign immunity law should be treated no differently from other defences, which are stipulated in investment treaties e.g. public policy and other procedural grounds, denying access to court or justice in a municipal court of a host state.

Accordingly, as most international conventions, concerning the enforcement of arbitral

² A. Reinisch, 'The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a more Effective System? Some Reflections From the Perspective of Investment Arbitration' in: I. Buffard/J. Crawford/A. Pellet/S. Wittich (eds), *International Law between Universalism and Fragmentation – Festschrift in Honour of Gerhard Hafner* (Leiden – Boston, Martinus Nijhoff Publishers, 2008), pp. 111.

³ S. Schill, 'Enabling Private Ordering-Function, Scope and Effect of Umbrella Clauses in International Investment Treaties', 18 *Minn. J. Int'l L.* 1 (2009), pp.21.

⁴ B. Kingsbury and S. Schill, 'Investor-state arbitration as Governance: Fair and equitable treatment, proportionality and the emerging global administrative law', New York University Public law and legal theory working papers (2009), Available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1146&context=nyu_plltwp&sei-redir=1#search=%22Investor-state+arbitration+as+governance:+Fair+and+equitable+treatment,+proportionality+and+the+emerging+global+administrative+law%22, pp.1 (Investor-state arbitration as Governance); See also M. Sornarajah, *The international law on foreign investment* (CUP, UK 2010); See also Gus Van Harten & Martin Loughlin, 'Investment treaty Arbitration as a Species of Global Administrative Law', 17 *EUR. J. INT'L L.* 121, 128 (2006); See also Gus Van Harten, *Investment treaty Arbitration and Public Law* (OUP, New York 2007),

awards, do not deal with the issue of sovereign immunity from execution and subject to a consideration of municipal law, a state's breach of its obligations with regard to foreign investors is a matter for the municipal court and its municipal law on sovereign immunity. Consequently, a sovereign immunity defence could be utilised by a host state refusing the enforcement and execution of an arbitral award, thus leaving a foreign investor without any remedy or state responsibility. Professor Schreuer has highlighted 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."⁵ Therefore, sovereign immunity from execution could be seen as the 'Achilles Heel' of ISDS.⁶

It could be assumed that reliance on solely investment treaty standards might be insufficient to bridge the gap between the international investment law and municipal sovereign immunity law providing a fair balance between investor and sovereign interest. In this regard, although substantive standards of investment protection may increase protection against a defence of sovereign immunity, applied in a municipal court, such investment obligations may be of limited value against the application of sovereign immunity. International conventions, including the New York and ICSID Convention, do not offer an ideal solution in relation to a conflict of laws. As seen in the previous chapters, a pure economic approach of investment treaty arbitration system has failed to balance the rights under investment protection of foreign investors with rights to regulate of a host state as well as it is perceived as a threat to the effectiveness of other legal regimes. More importantly, both Conventions are silent on a post-award remedy in the event of non-voluntarily compliance by a respondent state, which leaves a private investor with no effective remedy to execute an arbitral award by themselves, irrespective of a traditional recourse to a home state's diplomatic protection and state responsibility.

When dealing with the public and private interest concerns, a public law concept under a

⁵ C. Schreuer, *State immunity : Some recent developments* (Grotius, Cambridge 1988), at 216.

⁶ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009), pp.1154.

‘proportionality analysis’ could, therefore, become a last resort when addressing the issues arising between the public and private interest, as well as accommodating a non-investment matter within the system of international investment law and arbitration⁷ since it is deemed to be methodologically workable as a means to compare and balance the interests by a court or tribunal. Moreover, it could also be an effective tool to deal with the theoretical tension between conflicting legal concepts. In pursuing this approach, an investment treaty tribunal and municipal court would be able to weight a regulatory measure or sovereign immunity defense raised by state against the economic damage done to a private investor by that regulatory measure or defense.⁸ A proportionality analysis is adopted as an interpretation method in the European Court of Human Rights (‘ECtHR’) to resolve tensions between private and public interest. This is especially so regarding international investment and human rights law. Therefore, the analysis could also develop into a tool when resolving the tensions between international investment and sovereign immunity laws, as in the law of human rights. Put differently, whereas such a method of interpretation could protect both public and private interests, it could be implemented to diminish the abuse of sovereign power, especially when invoking unjustified sovereign immunity, as well defending the public interest in a claim for the protection of a private interest.⁹

In this context, this chapter intends to provide two fundamental frameworks. Firstly, a practical considerations section, which will offer potential solutions, ranging from international law to municipal law including an amendment of international conventions; an inclusion of an express waiver regarding the execution of sovereign immunity; the development of municipal law. Secondly, a way forward section will further analyse the doctrinal framework of the relationship between international investment and sovereign

⁷ B. Kingsbury and S. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest- The Concept of Proportionality’ in S. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, New York 2010), pp. 77.; See Moshe Hirsch, ‘Interactions between investment and non-investment obligations in international investment law’, (The Hebrew University of Jerusalem, 2006) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=947430>

⁸ B. Kingsbury and S. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest- The Concept of Proportionality’ in S. Schill (ed.), *International Investment Law and Comparative Public Law* (OUP, New York 2010), pp. 77

⁹ International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 25-26.

immunity law and the enforcement of an arbitral award under the investor-state arbitration, which leads to a state responsibility

This cross-fertilisation of combining two fundamental sets of frameworks would provide potential practical considerations as well as uniting the two areas of international law; being the so-called ‘defragmentation’ of international law towards a harmonised development.¹⁰ Consequently, this will result in an efficient and effective investor-state arbitration dispute process in which a municipal court could play an important role in executing an arbitral award without relying on the old rule of diplomatic protection intervening by a home state of foreign investor. It is not the intention of the mechanism to recall a re-politicisation of investment dispute.

2. Practical Considerations

In spite of the limitations and challenges when executing an arbitral award, it could be said that the investor-state arbitration remains the most useful instrument to assure the enforceability of arbitral award to foreign investors, compared with a municipal court, which provides no guarantee for foreign investors. This is because the modern national or international law of arbitration and sovereign immunity have developed to the point that the mechanism could provide some assurances for sovereign states and foreign investors.¹¹ Nonetheless, these modern codifications do not clearly stipulate the state’s obligations and the investor’s rights when sovereign states are unwilling to comply with the award of an arbitrator or to abide concerning the obligations under investment treaties and / or international conventions.¹²

¹⁰ C. Schreuer, ‘The Relevance of Public International Law in International Commercial Arbitration: Investment Disputes’, < www.univie.ac.at/intlaw/wordpress/pdf/81_csunpublpaper_1.pdf >, pp. 9; See also Anne Van Aaken, ‘Fragmentation of International law: The case of International investment protection’, (University of St. Gallen Law School, Law and Economics Research Papers Series, Working Paper No. 2008-1, 2008), pp. 2.

¹¹ G.R. Delaume, ‘Enforcement of State Contract Awards: Jurisdictional Pitfalls and Remedies, 8 ICSID Review-FILJ 29 (1993), pp.29.

¹² L. Reed and L. Martinez, ‘Treaty Obligations to Honor Arbitral Awards and Diplomatic Protection’ in Enforcement of Arbitral Awards D. Bishop (eds), *Enforcement of Arbitral Awards Against Sovereigns*, (Jurisnet, New York 2009), pp.13.

As discussed earlier, successful investors have run into difficulties in the attempt to enforce awards, despite the protection provided by arbitration clauses in BITs.¹³ In order to overcome these difficulties, and provide a fair balance between investor benefits and public interests, most leading jurisdictions are attempting placate the investor-state arbitration by developing their sovereign immunity laws with a restrictive approach on sovereign immunity from execution. Under this approach, the basic concept is to allow the execution against the foreign state's commercially used property; being at the core of most modern municipal and international laws on sovereign immunity. Whilst a doctrine of sovereign immunity has evolved in less restrictive way, it is worth noting that the waiver of an immunity from jurisdiction does not include a waiver of immunity from enforcement; requiring a separate waiver. Nevertheless, a more liberal approach can be observed in the decisions of the French court. The court has interpreted an agreement to arbitrate in ICC arbitration as an implied waiver from the sovereign immunity. The proposition was clearly set out in the *Creighton* case, which has had a substantial impact in relation to the interpretation of an agreement to arbitrate clause, not only regarding the ICC arbitration, but also other arbitration tribunals.¹⁴

As observed above, the approach of the municipal courts to the interpretation of sovereign immunity laws is insufficient, by itself, to solve the problem of a sovereign immunity from execution. Accordingly, the investment treaty arbitration mechanism requires some practical considerations to close the loophole that a sovereign immunity defence has fashioned in the execution and /or enforcement of an arbitral award. With this intention, this thesis currently provides two possible ways that various changes can be made:

¹³ H. Booyen, 'The Municipal Enforcement of Arbitral Awards against States in Terms of Arbitration Conventions, with special reference to the New York Convention- Does International Law Provide for a Municipal Law Concept of an Arbitrable Act of State?', 12 South African Yearbook of International Law 73 (1986/87), pp. 74.

¹⁴ See chapter 5 at page 180-190 for a detail of an implied waiver of sovereign immunity from execution in *Creighton* case before a French Supreme Court under the ICC arbitration; D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007), pp. 246.

- a) The amendment of international conventions
- b) The development of municipal laws regarding sovereign immunity.

(a) Amendment to international conventions and investment treaties to include an express waiver of sovereign immunity from execution

It is proposed that an initial practice consideration should be to amend international conventions including the ICSID and New York Convention. This amendment should create an amiable atmosphere by providing a substantial degree of enforceability of arbitral awards. Accordingly, the amendment should ensure that host countries can attract foreign investment with a guarantee that their dispute resolution will be protected.¹⁵

In relation to the ICSID Convention, the inclusion of a sovereign waiver from execution was considered during the drafting process of the Convention. However, the Convention drafters were concerned that “it would have run into the determined opposition of developing countries and would have jeopardized the wide ratification of the Convention.”¹⁶ At this point, the drafters believed that it was not the right time for such a drastic step. Therefore, Article 55 does not affect the law on sovereignty immunity.¹⁷ In contrast to a strict interpretation of the ICSID Convention, there is a possibility of waiving sovereign immunity from execution by an agreement to arbitrate clause, demonstrated by the case of *Creighton*.¹⁸ Here a state agreement to arbitrate under

¹⁵ J. Paulsson, ‘ICSID’s Achievements and Prospects’, 6(2) ICSID Review 380 (1991); P. Lalive, ‘Some Threats to International Investment Arbitration’, 1(1) ICSID Review 26 (1986); D. Soley, ‘ICSID Implementation: An Effective Alternative to International Conflict’, 19 International Law 522 (1985); 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).

¹⁶ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009), pp. 1154, Citing on A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 Recueil des Cours 331, 403 (1972-II).

¹⁷ A. Boralessa, ‘Enforcement in the United States and United Kingdom of ICSID awards against the republic of Argentina: Obstacles that transnational corporations may face’, 17 N.Y. Int’l L. Rev 53 (2004) 114. (Enforcement in the United States and United Kingdom)

¹⁸ *Creighton Limited v. Government of the State of Qatar*, The French Cour de Cassation, (6 July 2000), reported in XXV Yearbook of Commercial Arbitration 458 (2000).

the ICC rules to “have undertaken to carry out resulting award without delay”¹⁹ could be implicitly interpreted to extend such a waiver to immunity from execution, which supplanted a municipal law on sovereign immunity.

The decision of *Creighton* set a new judicial precedent as to the implied waiver of sovereign immunity. Maniruzzaman explains that “such a tendency may be attributed to the consideration for effectiveness of arbitral award and the State’s intention to comply with the arbitral award in good faith by its agreement to arbitrate.”²⁰ Nevertheless, it should be noted that such a precedent is still not widely adopted or applied at an international level under a different rule and tribunal of arbitration, as it would derogate a sovereignty of state in protecting its rights and sovereign properties. Accordingly, this precedent could be thus limited to commercial properties of a foreign state, not extending to property used for sovereign activities as well a diplomatic mission’s property and embassy bank account. This limitation had been highlighted by the French case of *NOGA*, in which the French court determined that “although Russian Federation had explicitly waived any rights of immunity, such a general waiver of sovereign immunity from execution did not explicitly express the state’s intention to waive its diplomatic immunity guaranteed by the Vienna Convention and customary international law.”²¹ Therefore, it could be summarised that the French court reasoning in *Creighton* has interpreted the text of the ICC arbitration beyond the intention of parties and drafters, being that the ICC rules do not make any express reference to a waiver of sovereign immunity.

On this basis, the most effective solution to the issue would be to include a

¹⁹ The ICC rules has been amended to the current ICC rules, which are now in force from 1 January 2012. Article 24(2) of the ICC Rules of 1975 is substantially similar to Article 34(6) of the current ICC Rules.

²⁰ A. Maniruzzaman, ‘Sovereign Immunity and the Enforcement of Arbitral Awards against State Entities: Recent Trends in Practice’ in *American Arbitration Association Handbook on International Arbitration Practice* (Jurisnet LLC, New York 2010), pp. 348; See 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* (Juris Publsihing, Paris 2008).

²¹ *Embassy of the Russian Federation et.al v. Compagnie NOGA d’importation et d’exportation (NOGA)*, Paris Court of Appeal (10 August 2000), reported in (2001) XXVI Yearbook of Commercial Arbitration 273, at 275.

specific waiver of the immunity from execution to any applicable law, which concerns the enforcement and execution of an arbitral award, including international conventions and investment treaties. Regarding the ICSID Convention, as Article 55 stipulates that the immunity from execution is subject to a municipal law on sovereign immunity where an arbitral award is sought, the limitations and exceptions might be diverse depending on the particular law on sovereign immunity, which changes over time. In this manner, foreign investors will not be assured under Convention that an award would be satisfied in the forum state, instead accepting the uncertain municipal law and its unforeseen consequences.²² This would in no doubt lead to a forum shopping for the most preferred municipal law, and result in ICSID arbitration becoming an unpredictable and unreliable mechanism.

Accordingly, the ICSID Convention requires amendment to reformulate the policy on the execution of ICSID awards, so that not only recognition and enforcement of arbitral award is guaranteed, but additionally the implementation of awards. This could be based on the proposition that when a state has waived a sovereign immunity from jurisdiction, it should imply a waiver of sovereign immunity from execution²³ as reflected in the ICC arbitration rules,²⁴ LCIA arbitration rules²⁵ and UNCITRAL arbitration rules.²⁶ Decisions supporting the implied waiver of immunity from execution are

²² Bernini and A. Jan van den Berg, 'The enforcement of arbitral awards against a state: The problem of immunity from execution' in Lew (eds.), *Contemporary problems in international arbitration* (Queens Mary college 1986), pp. 360.; C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009), pp. 1157.

²³ V. O. Nmeielle, 'Enforcing arbitration awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)', 7 *Annual Survey of International & Comparative Law* 21 (2001), pp.35.

²⁴ Art. 34(6) of the ICC Arbitration Rules.

²⁵ Art. 26(9) of the LCIA Arbitration Rules, it reads;

"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 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."

²⁶ Art. 34(2) of the UNCITRAL Arbitration Rules, reads;

"2. All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay."

available in France,²⁷ Switzerland,²⁸ Germany²⁹ and the United States.³⁰

Nevertheless, it could be argued that although some codification changes regarding sovereign immunity towards a restrictive immunity of sovereign immunity from execution make it possible to enforce against sovereign state property. It is in part doubtful if the issue of sovereign immunity in this forum should be left to the prudence of a municipal court and its law. If this is the case, an arbitral award might not be subject to only municipal court discretion, but also interference by the political influence of the host state's domestic policies and laws. Therefore, the ICSID award could not be considered as having finality and de-politicisation.³¹

In this regard, an initial attempt by the ICSID drafters to create a depoliticised mechanism for a settlement of investment disputes would be undermined by government intervention and diplomatic protection. Latin America Countries first attempted to adopt a Calvo Doctrine and Drago Doctrine to restrain an abuse of diplomatic protection and occupation of armed forces (or so-called government intervention) by more powerful foreign governments against weaker governments. The implication of these doctrines is obliged foreign investments and investors to the exclusive jurisdiction with the host country by the domestic laws and tribunals rather than those of their home countries.³² However, the effectiveness of the Calvo and Drago doctrines should not be overstated, not being able to totally dispose of government intervention and diplomatic protection given their applicability has only inhibited Latin America countries. Moreover, a powerful state is still able to intervene on behalf of its investor to protect its national interest. Therefore, a diplomatic protection by the espousal of claims of its national against other

²⁷ See *Creighton Limited v. Government of the State of Qatar*, The French Cour de Cassation, (6 July 2000), reported in XXV Yearbook of Commercial Arbitration 458 (2000).

²⁸ See *Arab Republic of Egypt v. CINETEL*, Federal Tribunal, 20 July 1979, 65 ILR 425 (1984), at 430.

²⁹ See *Central Bank of Nigeria*, Landgericht Frankfurt, 2 December 1975, 65 ILR 131 (1984), at 135.

³⁰ See *Birch Shipping Co v. Embassy of the United Republic of Tanzania*, 507 F.Supp. 311 (1980), at 312.; *Walker International Holdings Ltd. v. Republic of Congo*, 395 F. 3d 229 (5th Cir. 2004), at 234.

³¹ See D. Schneiderman, 'Revisiting the Depoliticization of Investment Disputes' in K.P. Sauvant (eds.), *Yearbook on International Investment Law & Policy 2010-2011* (OUP, New York 2012), pp. 693.

³² I.F.I. Shihata, 'Towards a greater depoliticisation of Investment disputes: The roles of ICSID and MIGA', 1 ICSID Review- Foreign Investment law journal 1 (1986), pp.2

states remains significant when a state deems such action is necessary and appropriate.³³

For this reason, it is the main objective of the establishment of the ICSID to create a framework under *travaux preparatoires*. This could carefully stabilise the interests of all parties and depoliticise the settlement of investment disputes.³⁴ This would provide increased effective protections and enhanced solutions for foreign investors, where they receive direct access to an international remedy, “rather than relying on the uncertainties of diplomatic protection”.³⁵ On this basis, a dispute settlement would not be embedded within a political mechanism once the state and an investor provided consent to such arbitration. This obligation is stipulated in Article 27 of the Convention, disempowering contracting states from providing diplomatic protection or pursuing an international claim on behalf of nationals. Accordingly, the heritage of the ICSID arbitration could be viewed as an effective mechanism to remove a home state control, either by government intervention or diplomatic protection. Shihata proposed that “an examination of the ICSID Convention’s provisions on the exhaustion of local remedies, the application of domestic law, and diplomatic protection should show that the ICSID Convention indeed offers developing countries benefits that may not be obtained even from a wider application of the Calvo Clause.”³⁶

Yet, the goal of the ICSID arbitration towards a ‘de-politicisation’ could not be literally achieved. Insofar, the ICSID arbitration recalls the path of the Calvo and Drago doctrines by reinserting a municipal court consideration regarding an enforcement of arbitral award plus the diplomatic protection. Whereas Article 27 of the ICSID Convention is initially intended to remove state intervention, it later provides an exception for state intervention when a contracting state fails to abide or comply with an ICSID award. Here, the amendment of the Convention is imperative in order to take a

³³ *ibid* 4

³⁴ *ibid*

³⁵ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009), pp. 416; A. Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes’, 21 *Am.Rev.Int’l. Arb.* 211 (2010), pp. 239-240.;

³⁶ I.F.I. Shihata, ‘Towards a greater depoliticisation of Investment disputes: The roles of ICSID and MIGA’, 1 *ICSID Review- Foreign Investment law journal* 1 (1986) pp.13.

step towards achieving a goal of de-politicisation.

The amendment of any international convention is not an easy task due to the fact that it requires the approval of all contracting states; such a consensus being difficult to reach in a short time.³⁷ Further, it may be difficult to persuade developing countries to include such an express waiver as seen in the drafting's Convention period.³⁸ Therefore, a more effective route would be to include such an express waiver in investment treaties or on a contractual basis, which would reduce the importance of the particular parties involved to almost a bilateral matter.³⁹ In this context, it could be said that a contractual waiver would be easier than a treaty-based waiver because it relates to only a particular contract, not having an affect on every investor of that contracting states like the case of a treaty-based waiver.⁴⁰

Such a waiver could be written to specify the scope and the attachable property involved, including sovereign property and diplomatic mission's property once a dispute had commenced.⁴¹ Delaume emphasised the importance of drafting "in order to increase the effectiveness of waivers of immunity, their scope should be widened to include also the type of provisions which are commonly found in private law contracts in the form of choice-of-forum and arbitration clause."⁴² To strengthen the bargaining power of a private party to execute an arbitral award, the ICSID Center has recommended a model clause of 1981 that;

"The [name of Contracting State] hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from service of

³⁷ Enforcement in the United States and United Kingdom (n 16), pp. 119.

³⁸ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp. 1154.

³⁹ Alexis Blane, 'Sovereign immunity as a bar to the execution of international arbitral awards', 41 JILP, 453 (2009) pp. 496.

⁴⁰ *ibid* 498.

⁴¹ A. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes', 21 Am.Rev.Int'l. Arb. 211 (2010), pp. 230.

⁴² G.R. Delaume, 'Contractual Waivers of Sovereign Immunity: Some Practical Considerations', 5(2) ICSID Review-FILJ 232 (1990) pp. 233.

process, immunity from jurisdiction of any court, and immunity of any of its property from execution.”⁴³

The formula of this model clause would raise the question whether a waiver extends to any property used for sovereign and commercial activities. Moreover, it would limit a foreign investor to reach specially protected property of the foreign state, for example, the central bank and/or diplomatic property, which is protected by the Vienna Convention. Moreover, a mixed purpose of a bank account is also a very attractive but problematic object to execute. Accordingly, the scope of waiver should be specified by the willingness of parties. Schreuer has provided a consolidated version, which includes all possible property to be executed that;

“The Host State hereby irrevocable waives any rights of sovereign immunity as to it and any of its property, regardless of the commercial or non-commercial nature of this property, in respect of the enforcement and execution of an award rendered by an Arbitral Tribunal constituted pursuant to this agreement. Such property includes any bank account belonging to the Host State whether held in the name of diplomatic mission or otherwise. This waiver extends to property, including bank accounts belonging to the Host State’s central bank or other monetary authority.”⁴⁴

From the above proposed clause, the detailed scope of waiver can be widened or narrowed depending on negotiation between both parties. Despite an express waiver of immunity from execution, provided for in investment treaties and contracts, the US courts still apply the US FSIA. This limits the execution of foreign property used for commercial activities.⁴⁵ Although the US FSIA respects “international agreements to which the United States is a party”,⁴⁶ as well as arbitration agreement,⁴⁷ such a blanket waiver might not be workable and must fall within the exceptions provided in the US FSIA. Accordingly, since an express waiver might not provide a greater assurance to the investor in the US jurisdiction, an express waiver clause might be more effective in other

⁴³ Clause XIX of the ICSID Model Clauses of 1981, 1 ICSID Reports 207.

⁴⁴ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp. 1181.

⁴⁵ *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d. 1080 (9th Cir. 2007) 1087.

⁴⁶ Sec. 1609 of the US FSIA.

⁴⁷ Sec. 1610(a)(6) of the US FSIA.

jurisdictions,⁴⁸ as the United Kingdom, where it allows execution regarding both sovereign and commercial property. Where a state and a private party have agreed to arbitration and enforcement, the opportunity of an express waiver of the sovereign immunity raise concerns, in that the state has an obligation to meet its liabilities to private parties whom enter into commercial transactions.

More importantly, a model clause could be seen as a pre-judgment measure of constraint or a conservatory measure, where a state could earmark certain property for the purpose of execution, prior to the adjudication. Once again, most international and municipal laws on sovereign immunity are more restricted to some limitation regarding a pre-judgment attachment, which has been previously discussed. The waiver of an immunity from a pre-judgment attachment needs to not be confused with the opposing waiver of an immunity from execution; being a different matter and subject to alternative requirements.⁴⁹ Consequently, the waiver of immunity from a pre-judgment attachment must be express and clear in order to secure certain properties for the purpose of execution.⁵⁰

Furthermore, it is submitted that the adoption of the UN Convention would provide a unified regime of execution of arbitral awards under a restrictive approach towards a customary international law. However, it could not be achieved to represent as a state practice to bind on non-parties to the treaty.⁵¹ This is due to the fact that each state adopts a different degree to a restrictive approach of sovereign immunity, which shows a considerable divergence among states. This can be concluded that a restrictive approach is widely though not universally recognised in which such state practices are very

⁴⁸ Alexis Blane, 'Sovereign immunity as a bar to the execution of international arbitral awards', 41 JILP, 453 (2009), pp. 500.

⁴⁹ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp. 1179.

⁵⁰ G.R. Delaume, 'ICSID and the Transnational Financial Community', 1 ICSID Review-FILJ 237 (1986), pp. 250.

⁵¹ L. F. Damrosch, 'Changing the International Law of Sovereign Immunity Through National Decisions', 44 Vanderbilt Journal of Transnational Law 1185 (2011), pp. 1189-1191.

difficult to interpret.⁵²

More importantly, some provisions in the UN Convention are not congruent with the existing sovereign immunity laws and state practices, which might provide more favours to states. Accordingly, the attempts for an international convention on sovereign immunity could not be successful, which leaves the usefulness of the UN Convention open to doubt. Accordingly, it is highly unlikely that a state party to the New York Convention and ICSID Convention would adopt the UN Convention to create a uniform regime of sovereign immunity from execution in a near future.

Instead of amending international conventions and international treaties or creating a uniform regime of rules on sovereign immunity, a more practical and realistic way is to create a *lex specialis* set of soft law instruments regarding the minimum international standard on sovereign immunity from execution. Fox suggested a creation of rules relating to an attachment of a property of state in an enforcement of arbitral award through an UNCITRAL Model law. He proposed that “the advantage of such an initiative is that it would separate the much less controversial topic of enforcement of arbitral awards to which a state is a party from the general question of proceedings in national courts concerning state activities.”⁵³ Therefore, a state could adopt a Model law into their municipal law, which has a *lex specialis* status within a regime of international investment law. This could further supplement to the rules and principles provided in the UN Convention and also support to the development of existing rules in a municipal law on sovereign immunity.

From the above situation, the amendment of international conventions or international treaties may only be achievable in certain jurisdictions, and may be subject to particular restrictions under the municipal law. Therefore, it is additionally necessary to have a parallel amendment of municipal law regarding sovereign immunity in each

⁵² D. Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working papers on international investment, 2010/2, OECD Publishing (2010) pp. 11.

⁵³ 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

country, in order to secure the execution of an arbitral award before a municipal court, plus support the applicability of international conventions. In achieving this, a model law, as mentioned above, should be incorporated in the same way as international conventions.⁵⁴

(b) Development in the interpretation of municipal law on sovereign immunity

In the light of the above, it would be illusory to amend the international conventions or investment treaties. Although a contractual waiver might be a more practical and effective route, such a waiver might be subject to various requirements stipulated in municipal laws on sovereign immunity. In order to avoid a shopping forum and an unattached arbitral award, it is necessary to harmoniously amend the sovereign immunity from the execution rule at a municipal law level. The law on sovereign immunity in each country has evolved to reflect its own tradition, therefore, being various interpretation approaches, making it difficult to uniform a rule on sovereign immunity from execution.⁵⁵ At present, most municipal laws on sovereign immunity provide a promising approach by their reliance concerning the commercial property of foreign state under a restrictive approach.⁵⁶ However, foreign investors might find it difficult to satisfy and locate the availability of attachable commercial property due to the burden of proof.

As previously noted, under the US FSIA and UK SIA, foreign investors are required to demonstrate that the property in question is used for a sovereign or commercial purpose. Predominately, the UK SIA permits that the head of the diplomatic mission has the authority to issue a certificate confirming that a property is not used nor

⁵⁴ 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.

⁵⁵ A. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes', 21 *Am.Rev.Int'l. Arb.* 211 (2010) pp. 230.

⁵⁶ 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; A. Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The re-politicization of International Investment Disputes', 21 *Am.Rev.Int'l. Arb.* 211 (2010), pp. 231.

intended for use commercially, unless the contrary is proven by foreign investor.⁵⁷ In this context, the burden of proof is left with a foreign investor to classify the particular property. However, it is a complex task to clarify a cross-examination of the head of diplomatic mission's certificate, this being prohibited by Article 31(2) of the Vienna Convention.⁵⁸ Accordingly, it is recommended that a shifting of burden of proof to a state would be preferable, in which a state would clarify whether the property is used for a sovereign purpose. At the same time, a state would be able to protect its inviolability of certain properties, which require special protection. By shifting the burden of proof onto a state, a foreign investor is no longer presented with the difficult circumstance of attempting to clarify the purpose of property in question. Even in a more complicated case of mixed purposes of property, a state can better protect its sovereign property. As Fox suggests: "it might go so far, as does Swiss law, to reverse the burden of proof where the party seeking enforcement has a valid award against a state so as to require the state to prove that the property sought to be attached is not governmental in nature or that it is in non-commercial use."⁵⁹

An additional potential solution is to specify and narrow a list of non-commercial immune property, which is not subject to an execution. Most codifications in this area do not provide a clear list of certain types of state property; including the diplomatic central bank and military property, which are always immune from execution as well as a possibility of waiver of state property and those specially protected property. Although the UN Convention seems to be closest to this, the list of specially protected property under Article 21 is almost expansive rather than restrictive in scope. Further, it is silent on properties with mixed purposes, such as, the mixed purposes of a bank account. Therefore, a proposed amendment of the 1988 US FSIA, which was not incorporated in the text, should be a consideration for other states to amend their municipal law.⁶⁰

⁵⁷ Section 13(5) of the UK SIA.

⁵⁸ See Art. 31(2) of the Vienna Convention, it reads;

"A diplomatic agent is not obliged to give evidence as a witness."

⁵⁹ 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.

⁶⁰ M.B. Feldman, 'Amending the Foreign Sovereign Immunities Act: The ABA Position', 20 *International*

Lastly, the most generous and preferred approach is to jurisdictionally extend the waiver of sovereign immunity, which encompass a waiver of sovereign immunity from execution. This approach can be identified in many cases in the United States, Switzerland and France, in which a state's initial agreement to arbitrate could constitute a complete waiver of sovereign immunity, even at the stage of enforcement.⁶¹ Bowett confirms the proposition that "in most jurisdictions, a Sovereign State's agreement to arbitrate is deemed to be a waiver of immunity for the purposes of arbitration and, in addition, the waiver is generally regarded as extending to enforcement and execution of any award."⁶² Such a waiver is based on the basic premise that "consent to arbitration excludes all other remedies."⁶³ This exclusion of any other remedy is also stipulated in Article 26 of the ICSID Convention.⁶⁴

Nevertheless, neither international conventions nor municipal law on sovereign immunity has adopted a broad approach of implied waiver of sovereign immunity. Although this practice is not yet adopted in a municipal law, it could be found in cases rendered under the ICC arbitration and enforced by the New York Convention, which allow an explicit waiver from immunity from execution by an agreement to arbitrate. A wide adoption of such a broad approach is unlikely to take place in the near future as it appears to be too drastic for states to waive any immunity and any property of foreign state to be executed. It is noteworthy that such a practice will definitely undermine the sovereignty of state.

Law 1288 (1986) pp. 1301, which suggested an amendment of Section 1610 (a) of the US FSIA, it reads:
 "This subsection shall not apply to property that is used for purposes of maintaining a diplomatic or consular mission or the residence of the chief of such mission, including a bank account unless that bank account is also used for commercial purposes unrelated to diplomatic or consular functions."

⁶¹ S. Toope, *Mixed International Arbitration Studies in Arbitration between States and Private Persons* (Cambridge, Grotius 1990) pp. 148.

⁶² Bowett, 'Contemporary Developments in Legal Techniques in the Settlement of Disputes', 180 Hague Recueil 169 (1983), pp. 220.

⁶³ R. Luzzatto, 'International Commercial Arbitration and the Municipal Law of States', 157 Recueil Des Cours 13, (1977) pp. 93.

⁶⁴ See Art.26 of the ICSID Convention.

A more practicable way would be to limit such an implied waiver of sovereign immunity from execution to solely commercial property whilst including certain restrictions, such as a jurisdictional link. This broad approach, with a limitation to jurisdictional nexus, can be seen in Switzerland, where it allows the execution of an arbitral award, but a foreign investor has to find a legal relationship between an arbitral award and Switzerland.⁶⁵ In this way, whilst a foreign state receives more protection by narrowing the scope of municipal law on sovereign immunity and avoiding non-compliance of the arbitral award by the defence of sovereign immunity, a state could be able to maintain its state sovereignty as well as to protect its sovereign property including specially protected property and its obligations under investment treaties. Not all proposed interpretation approaches of municipal law on sovereign immunity might be adopted into codifications in this area soon; however, some of them are already implemented in the interpretations of certain courts. This can be identified as a small step for a development of the interpretation approach into municipal law, but it is better than no development. In this way, no matter how a state frustrates an enforcement of an arbitral award, when raising immunity from execution, it will raise a presumption that a state responsibility for its breach of the investment treaty obligations, by a certain extent, will not be remedied and remains.

3. A Way Forward: Reform and the Use of Proportionality?

The non-compliance of an arbitral award would likely lead to a state responsibility. It is doubtful whether by treaty obligations, diplomatic protection should be the last resort in the enforcement of an arbitral award, in the perspective of investor-state arbitration. This is because a state consents to arbitration under the investment treaty or agreement contract in which the obligation to comply with an arbitral award exists, independently of any enforcement measures.⁶⁶ Accordingly, the defence of sovereign immunity, raised to refuse the enforcement of an arbitral award, would only be a procedural bar to execution,

⁶⁵ Enforcement in the United States and United Kingdom (n 17), pp. 120.

⁶⁶ 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).

which has no effect on the binding nature of an arbitral award.⁶⁷ As Schreuer contends: “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.”⁶⁸

Moreover, most tribunals have frequently referred to the rules of State Responsibility, relying on the 2001 ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts (the 2001 ILC’s Articles) when it awards damages as compensation. Article 31 of the 2001 ILC’s Articles provides that “the responsible State in under an obligation to make full reparation for the injury caused by the internationally wrongful act.”⁶⁹ However, this practice of the tribunals might be theoretically questioned. As explained by Marboe, “the rules on state responsibility have developed in inter-state relationships, thus between sovereign states on the basis of equality under international

⁶⁷ Enforcement in the United States and United Kingdom (n 16), pp. 109-110.

⁶⁸ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp. 1107. This reasoning can be seen in the Ad Hoc Committee in *MINE v. Guinea*, Interim Order No.1, 12 August 1988, para 25, it reads;

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

The same reasoning is affirmed by the ad hoc Committee in *Mitchell v. DR Congo*, Decision on the stay of enforcement of the award, 20 November 2004, para 41 reads;

“The immunity of a State from execution (Article 55 of the Convention) does not exempt it from enforcing the award, given its formal commitment in this respect following signature of the Convention. If it does not enforce the award, its behavior is subject to various indirect sanctions. Precisely, reference is made to Articles 27 and 64 of the Convention. The investor’s State has the right, according to Article 27, to exercise diplomatic protection against the State which does not respect its obligation to enforce an arbitral award of the Centre; but also, according to Article 64, to have recourse to the International Court of Justice. Moreover, a State’s refusal to enforce an ICSID award may have a negative effect on this State’s position in the international community with respect to the continuation of international financing or the inflow of other investments.” ;

See also B. Juratowitch, ‘The Relationship between Diplomatic Protection and Investment Treaties’, 23(1) ICSID Review-FILJ 10 (2008).

⁶⁹ Art. 31 of the 2001 ILC’s Articles.

law.”⁷⁰ Since the nature of investment treaty arbitration is a relationship between a state and foreign investor governed by the rules in a form of global administrative law, it, therefore, raises a question whether the rules on state responsibility are appropriate to deal with a particular legal relationship between a state and a private investor. Yet, the 2001 ILC’s Articles does not apply to a case brought by an individual against a state.⁷¹ In this regard, although investment treaty arbitration provides the advantages of procedural remedies for private investors independent from a home state’s diplomatic protection, private investors could not directly claim against a respondent state before the ICJ in case of non-compliance but inevitably recourse to a home state to exercise a diplomatic protection and submit a dispute to the ICJ.

In this circumstance, the failure to abide and/or comply with an arbitral award is an abuse of its agreement to arbitrate and the state’s responsibility pursuant to international treaty obligations.⁷² Therefore, a state is obligated to honour an arbitral award under its treaty obligations pursuant to the New York Convention⁷³ or the ICSID Convention,⁷⁴ where it may be party.⁷⁵ If this statement holds true, the system of investor-state arbitration would potentially revert to the re-politicisation. This scenario may undermine one of the fundamental aims of investor-state dispute settlement, which is attempting to suspend the right to diplomatic protection plus contributing to the de-politicization of investment disputes.⁷⁶ The potential of re-politicisation will raise concerns as to the legitimacy and

⁷⁰ I. Marboe, ‘State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests’ in S. Schill (eds), *International Investment Law and Comparative Public Law* (OUP, New York 2010) pp. 377.; See also K. Hober, ‘State Responsibility and Attribution’ in P. Muchlinski et al (eds), *The Oxford Handbook of International Investment Law* (OUP, UK 2008), pp 552.

⁷¹ D. Gaukrodger and K. Gordon, ‘Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community’, OECD Working Papers on International Investment, 2012/03, OECD Publishing (2012), available at <<http://dx.doi.org/10.1787/5k46b1r85j6f-en>>, pp. 26.

⁷² A.R. Parra, ‘The Enforcement of ICSID Arbitral Awards’ in R.D. Bishop (eds.), *Enforcement of Arbitral Awards Against Sovereigns* (Jurisnet, New York 2009) pp. 134.

⁷³ See Art. III of the New York Convention.; Also see Chapter 4 of this thesis, pp. 121-122.

⁷⁴ See Art. 53 of the ICSID Convention.; Also see Chapter 4 of this thesis, pp. 113-119.

⁷⁵ 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).

⁷⁶ I. Shihata, ‘The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA’, 1(1) AM. U. Int’l L. Rev. 97 (1986) pp. 103.; 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) pp. 33

suitability of the existing system when dealing with an enforcement of arbitral award.⁷⁷

As already mentioned in chapter 4, such an assessment and interpretation would only depend on a municipal court and its municipal law on sovereign immunity. In practice, a municipal court, however, has an inadequate reference to investment treaty obligations and investment treaty standards. Therefore, it could not disregard the potential tension among international investment and sovereign immunity law. Accordingly, the interests underlying the investor-state arbitration are the shield of private economic rights provided under investment treaty obligations, on the one hand, and state sovereignty provided under sovereign immunity law, on the other.⁷⁸ This tension would inevitably lead to the municipal court becoming a review mechanism, as in the case of arbitral tribunals, in order to strike a fair balance between investor and public interest for the enforcement of an arbitral award.⁷⁹

In the case of arbitral tribunals, the system of investment treaty arbitration combines public international law with the private arbitration rules mechanism, used for resolving disputes between private parties in commercial arbitration as the procedural law.⁸⁰ Not surprisingly, this hybrid model of investment treaty arbitration is currently in a unique category of public law adjudication. The hybrid model and its mechanism have been understood by many scholars⁸¹ as public regulatory or administrative law, which is developing into a form of ‘global governance’. In the sphere of global governance, it demands the legitimate exercise of power. Given the public-private characteristic of

⁷⁷ B. Kingsbury and S. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest- The Concept of Proportionality’ in S. Schill (eds), *International Investment Law and Comparative Public Law* (OUP, New York 2010) pp. 77

⁷⁸ International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 4

⁷⁹ Investor-state arbitration as Governance (n 4), pp. 1

⁸⁰ See S. Schill, ‘Crafting the International Economic Order: The Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator’, 23 *Leiden J. Int’l L.* 401 (2010) pp.402

⁸¹ V. Greiman, ‘The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships’, 32 *Whittier L. Rev.* 395, 404 (2010-2011). See also G. Van Harten and M. Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’, 17 *Eur. J. Intl. L.* 121, 123 (2006); Van Harten, ‘The Public-Private Distinction in the International Arbitration of Individual Claims Against the State’, 56 *ICLQ* 371 (2007), pp. 372; See also Van Harten, ‘Private Authority and Transnational Governance: The Contours of the International System of Investment Protection’, 12 *Rev. Intl. Pol. Eco.* 600 (2005).

investment treaty arbitration, it becomes the system of hybridisation,⁸² where neither public international law nor private transnational dispute resolution can separately rationalise its mechanism.

In the attempt to adopt this public-private approach, balancing public and private interests, the mechanism is not well-aligned with the enforcement immunity of an arbitral tribunal. Schill observes that;

“the balance that the procedural framework on investor-state arbitrations strikes between private and public interests by leaving enforcement immunity untouched also allows States to refuse enforcement of investment treaty awards for purely opportunistic motives... In that regard, enforcement immunity is antagonistic to the objective of international investment law to promote and protect foreign investors.”⁸³

At a domestic level, although it is suggested that municipal courts adopt some investment treaty obligations and standards, including fair and equitable treatment and full protection and security when dealing with sovereign immunity issue, the issue is far from settled. Moreover, a municipal court may refuse to develop certain special rules for the enforcement of an arbitral award, but then adhere to principles applicable in juridical proceedings.⁸⁴ Therefore, a cross-fertilization of the assessment between investment treaty obligations and sovereign immunity law at a municipal court level is preferable, in which it could have the potential to resolve a tension between international investment and sovereign immunity law.

Therefore, when there is a tension between investment law and sovereign immunity law, a sovereign immunity law should not be considered as a specific rule under international law in order to avoid a fragmentation of international law on sovereign immunity. Rather, it is apparent that the general law of sovereign immunity has moved towards a restrictive

⁸² See Z. Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', 74 Br. Y.B. Int'l L. 151 (2003).

⁸³ International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 5

⁸⁴ H. Fox, 'State Immunity and the New York Convention', in E. Gaillard and D. Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, UK 2008) pp. 860.

approach in commercial areas, in order to reverse the risk of undermining international investment law remedies. Consequently, this change of the general rule on sovereign immunity from execution, in relation to international investment law, could reflect the defragmentation of international law.

In pursuing a cross-fertilisation assessment of investment treaty obligations and sovereign immunity law, a proportional analysis under public law may adequately result in striking a fair balance between investment protections and public concerns, in order to respect and accommodate investment and non-investment obligations. In the words of Kingsbury and Schill, “proportionality analysis is a method of legal interpretation and decision-making in situations of collision or conflicts of different principles and legitimate public policy objective.”⁸⁵ Such a legal interpretation could analyse conflict issues on the basis of ‘more or less’ rather than ‘all-or-nothing fashion’.⁸⁶

In the context of this thesis, a proportionality analysis could assist in weighing the claim of a sovereign immunity defence, raised by a state to decline the execution of an arbitral award, and the investor’s rights under investment treaty obligations, to have an arbitral award satisfied. This may best facilitate both the interests of the investor and state; both being protected by two diverse principles of law in a harmonious way. The outcome of such an execution would best serve both parties on a proportional basis, in which the execution would not lead to a total loss of interest of either party, resulting in the increased acceptability and neutral outcome of the award.

So far, the practice or proportionality analysis is infrequently seen in arbitral tribunals’ jurisprudence in order to directly deal with sovereign immunity law. Additionally, municipal courts, when domestically applying sovereign immunity law, are not regularly

⁸⁵ B. Kingsbury and S. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest- The Concept of Proportionality’ in S. Schill (eds), *International Investment Law and Comparative Public Law* (OUP, New York 2010) pp. 79.

⁸⁶ Ursula Kriebaum, ‘Privatizing human rights : The interface between international investment protection and human rights’ in A. Reinisch & U. Kriebaum (eds), *The law of international relations – Liber Amicorum Hanspeter Neuhold* (Eleven International Pub. 2007), pp. 189.

referred to investment treaty standards, as a jurisdictional bar or to the enforcement of an arbitral award. From a jurisprudence of the ICSID, it, however, has adopted a form of proportionality analysis in the consideration of if the grant of a sovereign immunity, at a domestic level, constitutes a breach of certain investment treaty obligations. This can be observed in *Desert Line v Yemen*,⁸⁷ *Saipem v Bangladesh*⁸⁸ and *Mondev v United States*,⁸⁹ where the tribunals found that there had been a violation of certain investment treaty obligations and declared that the enforcement of an arbitral award is undeniable. Among these cases, the tribunal's reasoning in *Mondev v. United States* particularly demonstrates consideration by way of a proportionality analysis, observing that;

“The function of the present Tribunal is not, however, to consider hypothetical situations, or indeed any other statutory than that for tortious interference with contractual relations. This was the immunity relied on by BRA and upheld by the trial judge and the appeal courts. In that specific context, reasons can well be imagined why a legislature might decide to immunize a regulatory authority, mandated to deal with commercial redevelopment plans, from potential liability for tortious interference. Such an authority will necessarily have both detailed knowledge of the relevant contractual relations and the power to interfere in those relations by granting or not granting permissions. If sued, it will be able to plead that it was acting in a good faith and in the exercise of a legitimate mandate- but such a claim may well not justify summary dismissal and will thus be a triable issue, with consequent distraction to the work of the Authority.”⁹⁰

By reference to a good faith and legitimate mandate, the tribunal considered that the legitimate government regulation of a host state could be weighted in the consideration of a tribunal confining access to the domestic court in certain situations. To put it another way, although it could be assumed that the application of sovereign immunity regarding jurisdictional immunity could affect investment treaty obligations, in order to prevent an access to a domestic court, the application can be subject to a host state's limitation

⁸⁷ *Desert Line Protect LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 5 February 2008, para 193.

⁸⁸ *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, paras 6-51.

⁸⁹ *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 139-156.

⁹⁰ *ibid* 153.

because of legitimate public policy grounds.⁹¹ A breach of investment treaty obligations, by domestic court interference, can also be seen in *Saipem v. Bangladesh*, concerning the enforcement of arbitral awards. In this case the ICSID tribunal considered the issue as to whether an illegal interference by a domestic court in ICC arbitration could lead to a breach of the Italy-Bangladesh BIT pursuant to an expropriation provision. As a matter of fact, the Bangladeshi court interfered with the ICC arbitration by revoking the authority of the ICC tribunal and arbitrators, as well as declaring that the ICC award was a nullity and unenforceable. In this matter, the ICSID tribunal seized the matter and confirmed its jurisdiction by reference to Article 9(1)⁹² of the Italy-Bangladesh BIT. The ICSID tribunal found that the actions of the Bangladeshi court constituted an expropriation:⁹³

“Because, by the Respondent’s own submission, the ICC award could not be enforced outside Bangladesh, the intervention of the Bangladeshi courts culminating in the declaration of the Supreme Court that the ICC Award was “non-existent” substantially deprived Saipem of its rights and thus qualifies as a taking.”⁹⁴

Apart from the BIT breach on expropriation, the tribunal considered that a violation of Article II of the New York Convention, regarding the recognition of an arbitration agreement, has occurred. Although Bangladesh contended that the New York Convention was not relevant as Bangladesh had not so far adopted it into its national legislation, the fact was that a violation of the Convention would lead to Bangladesh’s international responsibility, according to Article 27 of the Vienna Convention on the Law of Treaties. The Vienna treaty provides that “a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”⁹⁵ Additionally, Article 3 of the International Law Commission’s Articles on State Responsibility for Internationally

⁹¹ International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 22.

⁹² Art. 9(1) of the Italian-Bangladesh BIT, reads;

“Any disputes arising between a Contracting Party and the investors of the other, relating to compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments shall be settled amicably, as far as possible.”

⁹³ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, paras 97.

⁹⁴ *ibid* 130.

⁹⁵ Article 27 of the VCLT, quoted in *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, para 165.

Wrongful Acts confirms that “the characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.”⁹⁶ Thus, the tribunal concluded that “the revocation of the arbitrators’ authority was contrary to international law, in particular to the principle of abuse of rights and the New York Convention.”⁹⁷ In this sense, although the tribunal’s reasoning did not concern a sovereign immunity defence, raised in a domestic court to refuse an enforcement of arbitral award, it could be compared to the principles and issues considered in this case.⁹⁸

Resulting from the above-mentioned cases, investment treaty tribunals have practically determined a variety of investment treaty obligations when dealing with the situation of an investor being prevented access to a domestic court or having an arbitral award domestically enforced. Nevertheless, it should be noted that neither a jurisdictional immunity doctrine nor an enforcement immunity doctrine has been specifically adopted or raised in the consideration of a domestic court’s defence against investment treaty obligations. With regards to the effectiveness of arbitral awards, an access obstacle to the domestic court should have the equivalent effect to the application of the sovereign immunity doctrine, restricting jurisdiction and/or enforcement. In this respect, Schill summarises that “as regards the rights granted under investment treaties, sovereign immunity, in principle, should be treated no differently from other instruments resulting in a denial of access to courts or other obstacles to enforcement.”⁹⁹

On this presumption, it does not follow that a state could always raise a sovereign immunity defence without any state liability. Rather, a state is, by all means, responsible regarding a breach of investment treaty obligations if such a conduct cannot be considered as made in good faith and by legitimate mandate. In interpreting investment

⁹⁶ Art. 3 of the International Law Commission’s Articles on State Responsibility for Internationally Wrongful Acts, quoted in *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, para 165.

⁹⁷ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/7, Award, 30 June 2009, paras 1370.

⁹⁸ International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 23-24.

⁹⁹ *ibid* 25.

treaty obligations before a tribunal or a domestic court, the legitimate conduct of a state could, thus, be used as a weight against a sovereign immunity defence, in order to balance public and private interests. In consequence, investment treaty tribunals are inclined to apply some kind of proportionality analysis, even if this is still in a small number of cases.

Against the above tribunal jurisprudence, the proportionality analysis is widely adopted in the jurisprudence of the ECtHR, so as to resolve tensions between international investment law and sovereign immunity law. The ECtHR's jurisprudence has mostly dealt with sovereign immunity and protection of investor rights, in a context of human rights law. However, it can also be adapted and used as guidance in dealing with the relationship between international investment law and sovereign immunity law, in order to determine whether the state raised defence of sovereign immunity, used to refuse an execution of arbitral award, may be considered a breach of investment treaty obligations under international investment law.

In the ECtHR jurisprudence, most cases have relied on Article 1 of the Protocol¹⁰⁰ regarding the right to property and Article 6(1) of the ECHR¹⁰¹ as to a fair trial in order to deal with the matters of sovereign immunity. The ECtHR has interpreted Article 6(1) of the ECHR not just as guaranteeing an individual access to justice before a domestic

¹⁰⁰ Art. 1 of the Protocol of ECHR, it reads;

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

¹⁰¹ Art. 6(1) of the ECHR, reads;

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

court¹⁰² but additionally granting individuals a right to judicial decisions enforced.¹⁰³ Therefore, this particular reasoning goes much further than the investment treaty tribunals' proportionality analysis method, which predominately considers a matter of access to a domestic court, when considering a matter of sovereign immunity. In *Fayed v. United Kingdom*, the court considered the issue of sovereign immunity from jurisdiction, used as a bar to the right of access to court. The court observed that:

“Certainly the Convention enforcement bodies may not create by way of interpretation of Article 6(1) a substantive civil right which has no legal basis in the State concerned. However, it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 para.1 (art.6-1)...if...a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons”¹⁰⁴

In this respect, the ECtHR considered that the individual's access right to court under Article 6(1) of the ECHR is not absolute, but may be subject to a state imposed limitation, which satisfies a legitimate aim and proportionality.¹⁰⁵ The court applied the proportionality analysis as well as a margin of appreciation to balance the defence of immunity from jurisdiction, raised by a state to protect public interest, and the rights of individual to access the court with legitimate and necessary means. It should be noted that a proportionality analysis could be used as a method to balance the interests of both parties, which is not only in favour of a foreign state to protect public interest¹⁰⁶ as in the cases of *McElhinney*¹⁰⁷, *Forgarty*¹⁰⁸ and *Al-Adsani*,¹⁰⁹ but can be also served in the interest of the individual to protect its rights by limiting the interference of foreign state

¹⁰² *Golder v United Kingdom*, ECtHR Application no. 4451/70, Judgment, 21 February 1975, para 28.

¹⁰³ *Hornsby v Greece*, ECtHR Application no. 18357/91, Judgment, 19 March 1997, para 40; *Lithgow and Others v. United Kingdom*, ECtHR Application no.9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment, 8 July 1986, para 201.

¹⁰⁴ *Fayed v United Kingdom*, Judgment, ECtHR Application no. 17101/90, Judgment, 21 September 1990, , para 65.

¹⁰⁵ *Ibid*, which is quoting *Lithgow and Others v United Kingdom*, ECtHR Application no.9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment, 8 July 1986, para 194.

¹⁰⁶ International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 35

¹⁰⁷ *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001, para 36.

¹⁰⁸ *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001, para 35.

¹⁰⁹ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 55.

to pursue a legitimate aim, as seen in *Cudak v. Lithuania*.¹¹⁰

Since all three cases of *McElhinney*,¹¹¹ *Forgarty*¹¹² and *Al-Adsani*,¹¹³ have been rejected by the respondent state courts, in the exercise of jurisdiction over a claim against a third state, on the ground of a state sovereign immunity from suit, the ECtHR had to consider whether a failure of the respondent states to exercise a jurisdiction over such claims ultimately constituted a breach of the claimants' rights under Article 6(1) of the ECHR, as to a right of access to court.¹¹⁴ In this respect, it raised an important issue before the ECtHR regarding the relationship between the right of access to court and a fair trial under Article 6(1) of the ECHR and the law of sovereign immunity. When considering the relationship between these two laws, the ECtHR applied a proportionality analysis in order to interpret and balance the individual's right to court access and sovereign immunity law. The court proceeded on a proportionality analysis, considering the applicability of Article 6(1) of the ECHR. It noted that:

“The right of access to court is not, however, absolute, but may be subject to limitation; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 (1) if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”¹¹⁵

By such reasoning, the ECtHR confirmed an application of a margin of appreciation in

¹¹⁰ *Cudak v Lithuania*, ECtHR Application no.15869/02, Judgment, 23 March 2010, para 60-75.

¹¹¹ *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001, para 36.

¹¹² *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001, para 35.

¹¹³ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 55.

¹¹⁴ E. Voyiakis, 'Access to Court v State Immunity', 52(2) ICLQ 297 (Apr. 2003) pp. 297.

¹¹⁵ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 53; *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001, para 33; *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001, para 34.; See *Waite and Kennedy v Germany* [GC], ECtHR Application no. 26083/94, Judgment, 18 February 1999, para. 59.

limiting a right of access to a court by a legitimate aim and proportionality. In pursuing a legitimate aim, the ECtHR determined that “the grant of sovereign immunity to a State in civil proceedings pursues a legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State’s sovereignty.”¹¹⁶ After achieving a legitimate aim, the ECtHR further considered whether the grant of sovereign immunity to a respondent state was a proportionate measure under the ECHR. The ECtHR supplemented this determination by a reference to international law, particularly, the customary law of treaty interpretation as codified in Article 31 (3)(c) of the VCLT, which provides that the treaty interpretation should be taken into account with “any relevant rules of international law applicable to the relations between the parties.”¹¹⁷ In this aspect, the ECtHR applied the international law aspects of the sovereign immunity doctrine to the ECHR by observing that:

“The Convention, including article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must be take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.”¹¹⁸

It follows from this that measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restricting on the right of access to court as embodied in Article 6(1). Just as the right of access to court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.”¹¹⁹

¹¹⁶ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 54; *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001, para 34; *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001, para 35.

¹¹⁷ Art. 31(3)(c) of the VCLT.

¹¹⁸ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 55; *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001, para 35; *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001, para 36

¹¹⁹ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 56; *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001, para 36; *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001, para 37

By the simultaneous consideration of the interpretation of the ECHR and sovereign immunity law, it may be stated that a right of access to a court and a fair trial, under the ECHR, would not impair a state's right to raise a sovereign immunity defence under international law, if it pursues a legitimate aim and acts proportional, plus complies with the international law, promoting comity and good relations between states. By this reasoning of the ECtHR, the court held in *McElhinney*,¹²⁰ *Forgarty*¹²¹ and *Al-Adsani*¹²² that the respondent state's action of giving sovereign immunity was not a breach of the right of access to a court, guaranteed by Article 6(1) of the ECHR. Although all three cases were argued distinct grounds regarding the court's unequal restriction on a right of access to court against a sovereign immunity from suit, the ECtHR reached the same decision. However, the jurisprudence of the ECtHR does not always find that there has been no infringement to the right to access to court under ECHR by the grant of state sovereign immunity. It could be argued that the ECtHR decisions in *McElhinney*,¹²³ *Forgarty*¹²⁴ and *Al-Adsani*¹²⁵ did not employ an in-depth investigation into a proportionality analysis when balancing the right of access to court and sovereign immunity.¹²⁶ Therefore, this jurisprudence has been challenged by a decision of *Cudak v. Lithuania*,¹²⁷ where the court did not rule in support of the state, but for the individual.

In this case, the ECtHR was required to consider whether the dismissal of a claim by a local staff member of the Polish Embassy from the Lithuanian Court, based on a sovereign immunity defence constituted a breach to the applicant's right to court access. The court first followed the previous jurisprudence to consider that "the grant of immunity to a state in civil proceedings pursues the legitimate aim of complying with

¹²⁰ *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001, para 36.

¹²¹ *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001, para 35.

¹²² *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 55.

¹²³ *McElhinney v Ireland*, Judgment, ECtHR Application no. 31253/96, Judgment, 21 November 2001, para 36.

¹²⁴ *Forgarty v United Kingdom*, ECtHR Application no. 37112/97, Judgment, 21 November 2001, para 35.

¹²⁵ *Al-Adsani v United Kingdom*, ECtHR Application no. 35763/97, Judgment, 21 November 2001, para 55.

¹²⁶ A. Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', 17(4) EJIL 803 (2006) pp. 816.

¹²⁷ *Cudak v Lithuania*, ECtHR Application no.15869/02, Judgment, 23 March 2010, para 60-75.

international law”.¹²⁸ However, the court additionally referred to the United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004 noting that although the application of absolute immunity had been eroded, immunity still applied to both the diplomatic and consular staff, which was seen as customary law.¹²⁹ The applicant in this case did not execute any particular tasks associated to the exercise of governmental authority, diplomatic or consular officer; being just a switchboard operator at the Polish Embassy.¹³⁰ Accordingly, the UN Convention and customary international law did not extend to immunity regarding the applicant’s duty, which was not considered a governmental or diplomatic function. Therefore, the court held that;

“By upholding in the present case an objection based on State immunity and by declining to hear that applicant’s claim, the Lithuanian courts, in failing to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the applicant’s right of access to a court.

Accordingly, there has been a violation of art 6(1) of the Convention.”¹³¹

The jurisprudence of the ECtHR provides that a proportionality analysis is not only used as a method to protect a state or public interest, but can also be extended to protect an individual or private interest. In this way, to assist in interpretation, a court can have recourse to other potential sources or rules of international law, including customary international and general principles of law, provided for in Article 31(3)(c) of the VCLT. Consequently, a proportionality analysis can be consistent with the rules of interpretation for an application regarding the investment treaty obligations.¹³² However, it does not mean that a proportionality analysis is proposed as an alternative to the rules provided for in the VCLT; instead, it assists the VCLT in harmonising a conflict between competing rights and interests of both parties through interpretation, when the rule of interpretation does not indicate the priority of laws in conflict.¹³³

¹²⁸ *ibid* 60.

¹²⁹ *ibid* 64-67.

¹³⁰ *ibid* 69.

¹³¹ *ibid* 74-75.

¹³² Investor-state arbitration as Governance (n 4), pp.23

¹³³ B. Kingsbury and S. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest- The Concept of Proportionality’ in S. Schill (eds), *International Investment*

Consequently, a proportionality analysis, as adopted in the jurisprudence of the ECtHR, could be additionally compatible for investment treaty arbitration, in the balance of public-private interests arising from investor rights under investment treaty obligations and state sovereignty under sovereign immunity law. By treating investment treaty obligations similar to a right granted under the ECHR, it may be used to reduce the scope of the defence of sovereign immunity doctrine in a municipal court interpretation. Therefore, a proportionality analysis may possibly be a win-win solution for both state and foreign investor, where a state would be limited in its exercise of a legitimate public interest, and a foreign investor would be afforded the best possible protection of its private interest. In this situation a defragmentation of international law would exist, where international investment law and sovereign immunity law could peacefully work together to pursue legitimacy and consistency in investment treaty arbitration when balancing public and private interests.

More importantly, as investment treaty arbitration leaves the execution stage to the determination by a municipal court, it would not escape from judicial consideration or preference. A proportionality analysis could be satisfied in a municipal court interpretation to ensure that a sovereign immunity defence is not abused in order to frustrate the legitimate and proper expectations of foreign investors. In this changing paradigm, states are obliged under investment treaty arbitrations as well as foreign investor protections, and being limited in their restrictions, thus providing a sufficient leeway for a state to protect public interest. In this context, a state is willing to enforce an arbitral award and a foreign investor is able to satisfy an arbitral award, since it provides a more appropriate balance between public and private interests, on a more or less basis, not an all or nothing fashion. Accordingly, on the one hand, a foreign investor does not need to place reliance on a diplomatic protection by a home state if a state refuses to enforce and execute an arbitral award; on the other hand, a home state does not have to

Law and Comparative Public Law (OUP, New York 2010) pp. 78.; See Anne van Aaken, 'Defragmentation of Public International Law Through Interpretation: A Methodological Proposal', 16 *Indiana Journal of Global Legal Studies* 483 (2009).

put itself in a risk position potentially affecting diplomatic relations when dealing with a dispute on an interstate matter. Under this approach, the investment treaty arbitration could maintain a mechanism of de-politicisation combined with a proportionality analysis to balance and harmonise public and private interests in a de-fragmentation regime of international law.

4. Concluding remarks

In the light of these practical considerations, a sovereign immunity defence raised by a state does not necessarily undermine or constrain investment treaty obligations. Instead, these two bodies of international law could be harmoniously interpreted and co-exist in order to develop an appropriate framework, where an appropriate balance can be provided for concerning the protection of an investor's private economic rights and the state's responsibility relating to the public interest, in the light of the competing international obligations in disputes.¹³⁴ As Ursula Kriebaum has summarised “a balancing between the investors and the host states interests that does not lead to ‘all or nothing’ decisions, as is currently the case, could be helpful.”¹³⁵ For this reason, the balancing of state obligations and investor rights could be considered an effective tool in promoting investment for both capital exporting countries and capital importing countries towards a fair and impartial forum. Last but by no means least, this attempt would require the parallel development of international conventions and municipal laws on sovereign immunity so as to secure the execution of an arbitral award before a municipal court, as well as to support the applicability of international conventions. In answering the central research question of this thesis, as to whether the defence of sovereign immunity doctrine is fully available to a state or is it subject to the limitations specifying in the municipal sovereign immunity law of the country in which the enforcement is sought?, the thesis holds that a foreign investor can be successful in the enforcement and execution of its

¹³⁴ Jasper Krommendijk and John Morijn, ‘Proportional by what measure (s)? Balancing Investor interests and human rights by way of applying the proportionality principle in investor-state arbitration’ in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human rights in international investment law* (Oxford University Press, Oxford 2009) pp.423.

¹³⁵ Ursula Kriebaum, ‘Privatizing human rights : The interface between international investment protection and human rights’ in A. Reinisch & U. Kriebaum (eds), *The law of international relations – Liber Amicorum Hanspeter Neuhold*, (Eleven International Pub. 2007), pp. 189.

arbitral awards against the commercial assets of a sovereign state with certain limitations specified in the municipal sovereign immunity law. Thus, this would limit the excessive or unjustified claims of sovereign immunity as a defence against the enforcement of an arbitral award, in which state responsibility could not be avoided for the breach of investment treaty obligations towards private investors.

Chapter 8

Concluding Remarks

The development of the sovereign immunity doctrine has shifted from the practice of absolute immunity to restrictive immunity before a municipal court in order to uphold the balance of interests between a state and a private party.¹ Under the restrictive doctrine, a commercial exception to immunity is considered the hallmark of a restrictive approach,² in which it only grants immunity to public acts of states (*acta jure imperii*) whilst denying immunity to their private acts (*acta jure gestionis*). This could be seen as an initial step to balance the public and private interest on account of the proportionality analysis; used as a tool to increase the balance court decision-making.

With regards to the investor-state dispute settlement, many states have also adopted a restrictive immunity doctrine to distinguish between sovereign activity and commercial activity, as well as the separation between property used for public purposes and property used for commercial purposes, in order to determine jurisdiction and enforcement powers. In this respect, the separate regime of immunity from enforcement and execution from immunity from jurisdiction is considered by most states and reflected in the New York Convention and the ICSID Convention. It is submitted that once a state is a party to the Conventions and consents to submit the dispute to a tribunal, which is so called “an agreement to arbitrate”, it is deemed to have waived its immunity from jurisdiction, raised during the recognition and enforcement procedures before the tribunals and courts.³

This position was also adopted in the US FSIA, the UK SIA and the UN Convention, but

¹ C. Schreuer, ‘Some Recent Developments in the Law of State Immunity’, 2 *Comparative Law Yearbook* 215 (1978) pp. 215; G.M. Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff, The Hague 1984) pp.22.

² D. Gaukrodger, *Foreign state immunity and foreign government controlled investors*, OECD Working papers on international investment, 2010/2, OECD Publishing (2010) pp. 18.

³ Bernini and Van Den Berg, ‘The Enforcement of Arbitral Awards against a State: the Problem of Immunity from Execution’ in JDM Lew, *Contemporary Problems in International Arbitration* (Queen Mary College, UK 1996) pp. 359.

with considerable variations.⁴ In these circumstances, it, however, appears that immunity from execution is considered to be unclear and absolute in which it could be said that sovereign immunity from execution continues to be the “Achilles Heel” of investor-state arbitration. Therefore, the municipal court and municipal law on sovereign immunity itself does not provide a sufficient legal protection for foreign investors against sovereign acts or the regulatory acts of host states.

The ICSID Convention and the New York Convention are the most frequent vehicles in determining and providing for the enforcement of arbitral awards against the state. The current mechanism of investment treaty arbitration and the network of multilateral treaties and conventions ensure the enforceability of international arbitral awards in multiple jurisdictions by limiting the challenges in a municipal court. On the one hand, the New York Convention fails to limit the role of municipal court to determine and interpret the merit of the award by providing the grounds to deny the enforcement of arbitral awards. On the other hand, the ICSID Convention requires the municipal court to treat and enforce its awards as a final judgment in that state but it leaves the execution stage to be determined by a municipal court and law. By their terms, even though both Conventions have a different route in enforcing arbitral awards, it has to come to the municipal court to determine and interpret in accordance with municipal law. Thus, the attempt to delocalise the mechanism of investment treaty arbitration could not be achieved without a careful concern on municipal laws on sovereign immunity.

Although the trend of codifications on sovereign immunity follows a similar approach to restrictive sovereign immunity, a state practice, however, shows that it seems to be more cautious about the withdrawal of immunity from execution. This is because it might have more harmful effect on the relations between the forum state and home state of foreign investor in both political and economical considerations.⁵ Furthermore, this situation is much less clear with regards to the enforcement of arbitral awards under the non-ICSID

⁴ C. Schreuer, *State immunity : Some recent developments* (Grotius Publication, Great Britain 1988) pp. 63.

⁵ L.J. Bouchez, ‘The Nature and Scope of State Immunity from Jurisdiction and Execution’ (1979) Netherlands Y.B.I.L. 1, pp. 19.

Convention rules, particularly the New Convention. In the context of the New York Convention arbitration, it allows a judicial intervention made on the basis of a municipal law of a forum state since the first stage of establishing the jurisdiction over a dispute through the final stage of execution against state assets.⁶

On the contrary, the ICSID arbitration goes a step further by introducing a state and state sovereignty into a public dimension through a private law model of the arbitration mechanism in order to solve a public law question. Consequently, it could be said that the ICSID Convention is considered as a public-private model of arbitration in a way to bring some form of proportionality to protect the interest of both investor and state. By any means, this raises concern as to whether international conventions can overrule a defence of sovereign immunity from execution provided under a municipal law.

With regards to the ICSID Convention, a waiver of sovereign immunity from execution by an agreement to arbitrate under the ICSID Convention is hardly possible because Article 55 preserves a sovereign immunity from execution according to the relevant municipal law on sovereign immunity where an execution is sought. However, this does not mean that a sovereign immunity from execution is an absolute bar to the enforcement of arbitral awards.⁷ Rather, it could be possible to execute an arbitral award if the municipal law on sovereign immunity, where an execution is sought, allows for an execution to be assumed from an agreement to arbitrate.⁸ In addition, such a possibility is limited to certain form of conditions such as, jurisdictional nexus, commercial activity and specially protected property. Therefore, although a waiver either expressly or implied is an exception to sovereign immunity from execution, it might be subject to or combined with other exceptions.

Nevertheless, the combination of these exceptions is particularly found in the US FSIA, in which a waiver of sovereign immunity from execution is not independent but subject

⁶ C. Schreuer, *State Immunity: Some Recent Developments*, (Grotius, Cambridge 1988), pp.86-91.

⁷ D. Chamlongrasdr, *Foreign state immunity and arbitration* (Cameron May, London 2007) pp. 224.

⁸ C. Schreuer, 'Commentary on the ICSID Convention', 14 ICSID Review 46 (1999) pp. 151.

to a commercial activity exception. This situation is different under the UK SIA, the UN Convention and the European Convention, where a waiver of sovereign immunity from execution is independent from the commercial activity exception of a foreign property concerned.⁹

Considering the New York Convention, the New York Convention also does not provide any waiver of sovereign immunity from execution in any provisions. However, the defence of sovereign immunity from execution could be raised on the public policy exception under Article V(2)(b). The recognition could be also inserted itself into the New York Convention as ‘rules of procedure’ under Article III of the New York Convention, which is subject to the procedural rules in a state where the arbitral award is sought. However, an arbitral award sought under the New York Convention may often be refused by the country’s competent authority in the event that the recognition and enforcement of arbitral award would be contrary to the public policy of that country.¹⁰ In addition, the concept of international public policy has come as having a limiting effect on the application of public policy exception, which is not necessarily the same with the domestic public policy. Since a purpose of the New York Convention is to oblige a court to comply and enforce an arbitral award with little discretion for interpretation, that immunity from execution might not be accepted as easily as an exception for proceedings to enforce an arbitral award under Article V of the New York Convention.

In addition, another basis for a waiver of sovereign immunity could be found in Article I of the New York Convention, where it obliges a state party to recognise and enforce arbitral awards that fall within the Convention. From the *Creighton*’s US Appeal Court decision and *Eurodif*’s French Supreme Court decisions, it could be summarised that a submission to arbitrate under the New York Convention is not considered as an implied waiver of sovereign immunity from execution in any Contracting states where a foreign

⁹ C. Schreuer, *The ICSID Convention : A commentary*, (CUP UK 2009) pp.1174.

¹⁰ H. Booyesen, ‘The Municipal Enforcement of Arbitral Awards against States in Terms of Arbitration Conventions, with special reference to the New York Convention- Does International Law Provide for a Municipal Law Concept of an Arbitrable Act of State?’, 12 South African Yearbook of International Law 73 (1986/87) pp. 98.

state does not intend to waive its immunity.

More interestingly, those decisions were also submitted to the ICC arbitration and subject to ICC rules in which a municipal court of a forum state should consider whether the ICC rules provided a provision to constitute a waiver of sovereign immunity from execution. The Cour de Cassation in *Creighton v Qatar* held that an implied waiver of sovereign immunity from execution could be found by an agreement to arbitrate. It should be emphasised that the court had based their decision on the ‘principle of good faith’. This proposition places a state on the same footing as a private investor in arbitration proceedings in order to enforce an arbitral award when it enters the international market and submits itself under an agreement to arbitrate.

Although the precedent in *Creighton*, under ICC arbitration, has defined what conduct constitutes a waiver of immunity from execution, by an agreement to arbitrate, this does not allow execution against all property of foreign state but it is limited to commercial property. In addition, it will be difficult to execute against certain types of specially protected property, including bank account of diplomatic mission, military property, central bank property and cultural heritage property. This difficulty is reflected in the cases of *NOGA* and *NML*, in which the French Supreme Court adopted a stricter test to a waiver of sovereign immunity from execution. Meanwhile, in the recent case of *FG Hemisphere* before Hong Kong Courts, it is found that an agreement to arbitrate under the ICC Rules was not tantamount to an implied waiver of sovereign immunity from execution. Therefore, this difficulty, towards a state-friendly approach, will challenge and undermine the effectiveness of arbitration and investors being able to satisfy arbitral awards.

The challenges and limitations in executing against a bank account, a diplomatic and a military property as well as a mixed purpose bank account of diplomatic mission appears to be an important hurdle to an enforcement of arbitral awards. This is because these specially protected properties are not only subject to conditions and exceptions to a municipal law on sovereign immunity but it also specifically governed by the Vienna

Convention, which makes it more difficult to execute against these properties. Furthermore, some municipal laws further add another requirement of jurisdictional link between the property and the underlying claim. Such a practice can be obviously found in the US FSIA in which a private party and a municipal court have found a hard time in executing an arbitral award. However, since the amendment of the US FSIA in 1988 excludes the applicability of nexus requirement and act of state doctrine in the context of arbitral agreement, it becomes easier to enforce an arbitral award in the United States.

Despite the fact that there are various possibilities in overcoming limitations and challenges whilst executing against both sovereign and commercial properties, the difficulties remain significant for both state and private investor. Further solutions are required to conquer this situation. These solutions range from the amendment of international conventions, providing a reliable and effective mechanism to reforming municipal laws on sovereign immunity, to the provision of a realistic and practical approach going forward. At a domestic level, the domestic courts and sovereign immunity laws have expressed the clear position that immunity from enforcement and execution is no longer absolute. Nonetheless, the approach towards immunity from execution is unclear. Significantly, a vigorous effort by states to pursue reform, at the international level, is unlikely to be achievable given the sensitive nature of execution and its possible impact on international relations between states.

This difficulty could be seen from the amendment of any international convention, which is not an easy task. This is due to the fact that it requires the approval of all contracting states; such a consensus being difficult to reach in a short time.¹¹ Therefore, a more effective route would be to include such an express waiver in investment treaties or on a contractual basis, which would reduce the importance of the particular parties involved to almost a bilateral matter.

¹¹ A. Boralessa, 'Enforcement in the United States and United Kingdom of ICSID awards against the republic of Argentina: Obstacles that transnational corporations may face', 17 N.Y. Int'l L. Rev 53 (2004) pp. 119.

A more practicable way would be to limit such an implied waiver of sovereign immunity from execution to solely commercial property whilst including certain restrictions, such as a jurisdictional link. This broad approach, with a limitation to jurisdictional nexus, can be seen in Switzerland and the UN Convention, where they allow the execution of an arbitral award, but a foreign investor has to find some forms of legal relationship. In this way, whilst a foreign state receives more protection by narrowing the scope of municipal law on sovereign immunity and avoiding non-compliance of an arbitral award by the defence of sovereign immunity, a state could be able to maintain its state sovereignty as well as to protect its sovereign property including specially protected property and its obligations under investment treaties in parallel with a restrictive sovereign immunity doctrine adopted in most jurisdictions..

This practical consideration should be coupled with a change of practitioners' perception including judges, arbitrators and public international lawyers towards a modern investor-state arbitration regime. Under this regime, it attempts to distinguish an application of sovereign immunity doctrine upon an enforcement of arbitral awards from court judgments. This is due to the fact that arbitral awards and court judgments should be treated differently in a way that an arbitral award is an outcome of commercial or investment dispute resolution where both parties are committed in a business relationship on the same footing as a private person to waive a sovereign immunity.

However, it is apparent that while the ICSID Convention treats an arbitral award as a final judgment of a court, the New York Convention treats foreign arbitral award to the same standard of foreign judgment. In addition, a municipal law and municipal court are not willing to develop a special rule for the enforcement of arbitral award.¹² Therefore, as long as the practitioners continue to apply the same degree of sovereign immunity doctrine to the enforcement of arbitral awards as court judgments, a problem of sovereign immunity raised before a municipal court would remain as a barrier in enforcing an

¹² H. Fox, 'State Immunity and the New York Convention' in E. Gaillard and D. Pietro (eds.), *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, UK 2009) pp. 860-861.

arbitral award. In this way, an investor-state arbitration mechanism could not be considered as an alternative method to enforce an arbitral award, but it stands as a dependent system of dispute resolution to a municipal court.

In parallel, it should be noted that an investor-state dispute settlement is not based on a form of reciprocal dispute settlement between an investor and a state.¹³ Instead, it should be analysed as a structure of “global governance”, being a mechanism of an adjudicative evaluation in public law.¹⁴ From this perspective, this issue becomes a matter of public-private distinction, with many doctrines in public international law coming into play in tandem with international investment law in order to understand and classify this distinction.

Faced with this particular interaction of legal concepts, there is a close relationship and mutual influence between these two areas of international law; the analysis of international investment law in certain specific issues, referring to the doctrines of public international law, and public international law affected by the development of international investment law. This highlights the cross-fertilisation and integration of international investment law with other areas of international law in relation to the interpretation and application of legal concepts by an arbitral tribunal in pursuant to a system of hybridisation, pertinently covering the concept of state immunity, state responsibility and treaty interpretation. In this regard, the interconnections between international investment law and other areas of international law will develop on the basis of harmonisation or defragmentation rather than fragmentation through treaty interpretation methods as clarified in the VCLT’s systematic integration principle.

In the context of this thesis, a proportionality analysis could assist in weighing the claim of a sovereign immunity defence, raised by a state to decline the execution of an arbitral award, and the investor’s rights under investment treaty obligations, to have an arbitral award satisfied. This may best facilitate both the interests of the investor and state; both

¹³ Gus Van Harten, *Investment treaty Arbitration and Public Law* (OUP, New York 2007), pp. 45

¹⁴ *ibid*

being protected by two diverse principles of law in a harmonious way. The outcome of such an execution would best serve both parties on a proportional basis, in which the execution would not lead to a total loss of interest of either party, resulting in the increased acceptability and neutral outcome of the award.

In abandoning an absolute approach of sovereign immunity from investment treaty arbitration by a proportionality analysis, a sovereign immunity defense raised by a state does not necessarily undermine investment treaty obligations. Instead, these two bodies of international law could be harmoniously interpreted and co-exist in developing a framework towards a defragmentation of international law to find an appropriate balance between the investor protection of private economic rights and the state responsibility of public interest in the light of the competing of different international obligations in disputes.¹⁵ For this reason, the balancing of state obligations and investor rights could be considered as an effective tool to promote the investment for both capital exporting countries and capital importing countries towards a fair and impartial forum.

For future research on this topic, it is necessary to have a more consideration on whether a proportionality analysis can be effectively adopted in investment treaty arbitrations as in the case of ECtHR in order to balance rights of foreign investors with host states' right to regulate. This is due to the fact that most arbitral tribunals are not willing to adopt such approach as an interpretative method and treating a sovereign immunity defence differently from other procedural defences. However, with a limited number of case study, it could be argued that the structure of investment treaty arbitration and the substantive provisions in the BITs might not be able to fully support the adoption of proportionality analysis.¹⁶ Therefore, it is important to particularly look at this concern on future cases in order to provide a more thorough analysis.

¹⁵ Jasper Krommendijk and John Morijn, 'Proportional by what measure (s)? Balancing Investor interests and human rights by way of applying the proportionality principle in investor-state arbitration' in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human rights in international investment law* (Oxford University Press, Oxford 2009), pp.423.

¹⁶ P. Ranjan, 'Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal', 3(3) *CJICL* 853-883 (2014).

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