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State Immunity and the Enforcement of Investor-State Arbitral Awards

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Investor-State arbitration makes it possible for investors to bring claims against foreign governments that play host to investments; it does not necessarily make it easy for them to claim the fruits of any of their successful arbitral endeavours. Study of investment awards tends to end with the publication of any award; the difficult of enforcing the ensuing award receives less attention. For example, Christoph Schreuer's magisterial treatise on the ICSID Convention runs some 1290 pages, yet the provisions relating to the enforcement of awards occupy only 104 of them. While the assumption may be that those awards get paid, such is not always the case. A lingering issue, in ICSID arbitration, as well as in any arbitration against a State, is the problem of State immunity and the obstacle it poses to the enforcement⁴ of arbitration awards rendered against sovereign States.

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

The rationale for maintaining immunity from execution is that certain State assets, such as central bank reserves and military and diplomatic property, are integral to the business of government and should not be subject to seizure. Yet in concession contracts and in investment treaties States have acquiesced in the creation of international arbitral tribunals before which foreign investors can seek relief. Decoupling the waiver of immunity from jurisdiction from a waiver of immunity from execution seems inconsistent with the purpose of making a forum available to the foreign investor.

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

The enforcement provisions in both of these Conventions are usually heralded as a powerful tool in the hands of investors, who, if they win, will have in hand arbitral awards readily recognized

around the world. The ICSID Convention requires that State parties to the Convention recognize and enforce ICSID awards as if they were final awards of their own courts. Yet it also makes clear that waivers of immunity from jurisdiction do not encompass waivers of immunity from execution; actual execution of awards is subject to the laws, including those on State immunity, of the State in which execution is sought. New York Convention awards are enforceable in 142 countries and are often more readily enforceable than municipal court judgments from other States. Yet they, too, are subject to the immunity laws of the place of enforcement. Because those immunity laws vary greatly, enforceability is much less certain than might be inferred from a cursory review of the enforcement provisions.

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

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