CHAPTER 29

COMPLIANCE AND ENFORCEMENT

ALAN S ALEXANDROFF
IAN A LAIRD*

* The opinions expressed in this chapter are solely those of the authors and do not reflect the views of Fulbright & Jaworski LLP or its clients.

One of the most novel and exciting elements of the recent advent of international investment arbitration is that international law has become accessible in a manner never before available to investors. As international law has traditionally been a state-to-state activity, espousal of the claims of nationals by states was previously the only means by which an individual or legal person could receive some form of international justice. The foundation principle of international law has been that states, and not private parties, or individuals, are the subject of international law. International investment instruments, such as Bilateral Investment Treaties (BITs) and the ICSID Convention, have effectively turned this fundamental element of international law on its head.[1]

At this early stage of development, international investment arbitration law is moving slowly through many procedural issues. One of these issues, which has received little attention, is the problem of compliance and enforcement for investment arbitration awards. It appears necessary still to affirm that states that enter into international obligations, such as a BIT or the ICSID Convention, will comply in fact with the obligations set out in the Agreement. The principle of *pacta sunt servanda* and good faith are fundamental elements of a properly functioning international system.[2] Without such touchstones, it would be impossible to designate such a system as being one of 'law', rather than simply of politics or diplomacy.

As a more fully formed legal system, and one based procedurally to a great extent on international commercial arbitration, investors have an expectation that the system will be fair, efficient, and effective. One of the most important elements of an effective system of dispute resolution is that decisions must be enforceable.

However, there is an important distinction between compliance with international investment instruments and the procedural issues of enforcement, recognition, and execution of arbitral decisions. While compliance is an international treaty concept concerning the good faith performance of treaty obligations, the question of

[1] See J Paulsson, *Denial of Justice in International Law* (Cambridge, Cambridge University Press, 2005) at 55: '…once axiomatic declarations to the effect that only states may be subjects of international law fall on modern ears like an echo of an incomprehensible ancient dogma. Private parties are today participants, to a greater or lesser degree, in the international legal process.' Also see: I Brownlie, *Principles of Public International Law* (Oxford, Oxford University Press, 6th ed, 2003) at 65; S Toope, *Mixed International Arbitration: Studies in Arbitration Between States and Private Persons* (Cambridge, Cambridge University Press, 1990) at 244, citing Professor Andreas Lowenfeld in his previous incarnation as the US State Department Deputy Legal Adviser who suggested that the ICSID Convention would 'create a significant new body of international law…without the restriction of the traditional principle that only states and not private parties are the subject of international law'.

[2] The Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969. Entered into force on 27 January 1980. UN, TS vol 1155 at 331 (VCLT), puts particular emphasis on the importance of these principles: Preamble: '…Noting that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized', and Art 26: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Available at <http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>.

enforcement of arbitral awards has largely involved the challenge by state respondents to adverse investment awards in domestic courts. Although it is irritating to investors when a losing state respondent does not promptly pay the arbitral award, inviting accusations of 'non-compliance', investment instruments explicitly permit the further judicial review of arbitral awards prior to enforcement, and challenges to enforcement of awards.[3]

In the case of the ICSID Convention, this expectation by investors of compliance, especially with regard to enforcement of 'pecuniary obligations' of awards, is certainly justified when one examines Articles 53 and 54 of the Convention. In those articles, the drafters of the Convention were very clear that there should be a high level of deference by national courts concerning the enforcement of arbitral awards that have the status of 'a final judgment of a court' in that state.[4]

In the case of ad hoc arbitrations under the UNCITRAL Arbitration Rules, or the ICSID Additional Facility, the investment arbitration rules frequently provide for a minimal form of judicial review, not unlike the ICSID annulment procedure, and there is again a justified expectation of a high level of deference from national courts in the execution of these awards. However, the scope of an enforcement challenge under the UNCITRAL Model Law or New York Convention may be greater than the experience under the ICSID Convention as there is potential, for example, for the consideration of public policy.[5]

The question of treaty compliance is accordingly a separate issue from that of enforcement. The more empirical question of whether state respondents ultimately comply with adverse awards, following the exhaustion of judicial review or enforcement procedures, is one that has not been addressed in any substantive manner and is a matter that needs to be addressed, albeit in a future paper.[6] Some investment instruments do indeed include state-to-state mechanisms and remedies for those instances in which such non-compliance occurs, although there is no current

[3] The scope of this domestic review of investment awards has been the topic of much discussion in the context of whether international investment arbitration should be subject to a more fulsome appeal mechanism. See: I Laird and R Askew, 'Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System', 7(2) Appellate Practice and Process 286 (2005).

[4] ICSID Convention Art 54(1).

[5] With respect to the public policy issues facing an enforcement court, see: Committee on International Commercial Arbitration, 'Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards', International Law Association, New Delhi Conference (2002), available at <http://www.ila-hq.org/pdf/Int%20Commercial%20Arbitration/International%20Commercial%20Arbitration%202002.pdf>.

[6] Anecdotal evidence suggests that state respondents generally have been compliant when faced with adverse arbitral awards. For example, in the NAFTA context, both Mexico and Canada have promptly paid out on awards after the exhaustion of judicial review processes. However, there is also evidence that certain states, such as Russia, have been aggressively avoiding enforcement and execution of certain awards. The *Sedelmayer v Russian Federation* BIT case (see the description of the case later in this chapter) is a well-known example to participants in the OGEMID internet discussion group of a frustrated claimant who has been unable, until recently, to execute on the 1998 award in that arbitration.

example in which such a challenge to a state's failure to comply with an investment award has occurred. This question is addressed at the end of this chapter.

There are two basic systems in international investment arbitration concerning the review of arbitral awards—the internal annulment system under Article 52 of the ICSID Convention[7] and the national court-based review system permitted under many BITs.[8] The court judicial review process is largely based on the model developed with respect to international commercial arbitration. The New York Convention[9] and the national adoption of the UNCITRAL Model Law[10] are examples of rules applied to this type of judicial review of arbitral awards.[11]

The jurisprudence that has arisen in the context of investor–state, or 'mixed', arbitration with respect to the review of arbitral awards has been relatively small in contrast to the similar jurisprudence that has developed concerning the review of international commercial arbitration awards.[12] It is not the purpose or intention of this chapter to delve into that specific topic area, which is being dealt elsewhere in the present publication.[13] The focus of this chapter is on those awards arising from international investment instruments and related jurisprudence concerning the challenge of domestic enforcement and execution.

[7] See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, ICSID/15/Rev.1, January 2003 (hereinafter 'ICSID Convention', but also known as the 'Washington Convention'). The World Bank Group International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations and Rules (available at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>). The Convention entered into force on 14 October 1966, when it had been ratified by 20 countries. As of 25 May 2005, 142 countries have ratified the Convention to become contracting states. The World Bank Group International Centre for Settlement of Investment Disputes, ICSID List of Contracting States (available at <http://www.worldbank.org/icsid/constate/c-states-en.htm>).

[8] For example, NAFTA Article 1136(3)(b) provides that, in the three-month period from the date of the award, a party may seek to revise, set aside, or annul the award by a local court.

[9] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, (10 June 1958) (available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf>. (hereinafter 'New York Convention'). The Convention is now in force in over 130 countries. Also see D Di Pietro and M Platte, *Enforcement of International Arbitration Awards—The New York Convention of 1958* (London, Cameron May, 2001).

[10] UNCITRAL Model Law on International Commercial Arbitration, General Assembly Resolution 40/72, 112th Plenary Meeting, 11 December 1985 (available at <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/ml-arb-e.pdf>) (hereinafter 'UNCITRAL Model Law'). The UNCITRAL Model Law has been adopted in its entirety into the Canadian Commercial Arbitration Act, RS, 1985, c 17 (2nd Supp) available at <http://laws.justice.gc.ca/en/c-34.6/35646.html>.

[11] For a complete discussion of these issues, see N Rubins, 'Judicial Review of Investment Arbitration Awards', in Todd Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (London, Cameron May, 2004).

[12] The commercial abbitration jurisprudence involving the enforcement of court judgments or arbitral awards against state parties is a voluminous one, and is not the basis of this chapter. Instead, the focus is on investment treaty jurisprudence. Although many comparisons and similarities exist, the treaty-based nature of investment awards leads to a separate treatment of enforcement as set out in this chapter.

[13] See Balas, 'Review of Awards', Ch 27 above.

Amongst those awards that have been subject to annulment proceedings under the ICSID, or judicial review before national courts, the process has been used as a sword by losing state respondents, in essence to attempt to re-argue the case, rather than as a shield to defend an enforcement action by a claimant. In comparison, those relatively few cases which have dealt directly with a claimant's enforcement action have involved the use of domestic enforcement laws by respondents as a shield. With respect to awards under the ICSID Convention, there have only been four court decisions involving challenges by states to the enforcement and/or execution of investment awards in national courts. With respect to ad hoc arbitrations under the ICSID Additional Facility or UNCITRAL Arbitration Rules, there has been only one recent case of note addressing the enforcement or execution of a BIT arbitration award. These five domestic court decisions are the main subject of this chapter.

(1) Recognition, Enforcement, and Execution of Investment Arbitration Awards

ICSID Convention Articles 53 and 54 make very clear the intention of the drafters that ICSID awards should be given high deference by national courts when the time came to enforce such awards.[14] Article 53 states as follows:

(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.
(2) For the purposes of this Section, 'award' shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 53(1) states that the award of an ICSID tribunal 'shall be binding' on the disputing parties and 'shall not be subject to any appeal or to any other remedy except those provided in the Convention'. This clause makes clear the finality of an ICSID

[14] The drafting history of the Convention supports this position. See: C Schreuer, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001) at 1129. Also, see both van den Berg and Broches who confirm that there should be no possible resistance to enforcement: AJ van den Berg, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', 2 ICSID Rev–FILJ 439 (1987) and A Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution', 2 ICSID Rev–FILJ 287 (1987).

award, the absence of any external review, and the binding force of the award on the parties to an arbitration.

Article 54 provides as follows:

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
(2) 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.

Article 54 again makes clear that the ICSID drafters intended that awards given by arbitral tribunals should be fully enforceable, just like a 'final judgment of a court in that State'. The only matter in which some discretion is left to the local courts, as set out in Article 54(3), concerns the execution of the award in the state in whose territories the execution is sought.

However, Article 55 of the Convention provides that 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'. In other words, sovereign immunity defences are applicable to the domestic execution of ICSID awards.

As mentioned above, there are five examples of cases in which the enforcement of investment arbitration awards have been challenged by state respondents involving four ICSID Convention arbitrations and one ad hoc arbitration. The four ICSID cases are: *Benvenuti & Bonfant v Congo*,[15] *SOABI v Senegal*,[16] *LETCO v Liberia*,[17]

[15] *SARL Benvenuti & Bonfant v People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980, (1993) 1 ICSID Rep 330 ('*Benvenuti & Bonfant*'). On 23 December 1980, the Paris *Tribunal de grande instance* refused enforcement and execution of this tribunal's award, but the decision was not published. However, a good review of the key elements of the decision are located at (1993) 1 ICSID Rep 368. On 26 June 1981, the claimant's appeal to the *Cour d'appel* was successful with the adverse decision of the *Tribunal de grande instance* overturned. See 1 ICSID Rep (1983) at 369–72.

[16] *Société Ouest Africaine des Bétons Industriels* (*SOABI*) *v Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, (1991) 6 ICSID Rev–FILJ 125 (1994) 2 ICSID Rep. 114 (*SOABI*). Again, the decision against the claimant of the *Tribunal de grande instancé* has not been published. The *Cour d'appel* provided its decision in favour of the claimant on 5 December 1989 and reports of that decision may be found at 2 ICSID Rep 337 (1989). The decision of the *Cour de cassation* was issued on 11 June 1991 and is reported at 6 ICSID Rev–FILJ 598 (1991), 2 ICSID Rep 341 (1994).

[17] *Liberian Eastern Timber Corporation* (*LETCO*) *v Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, (1994) 2 ICSID Rep 346 ('*LETCO*'). There are three US District Court decisions published in regard to the *LETCO* enforcement proceedings: (1) US District Court, Southern District

and *AIG Partners v Kazakhstan*.[18] The fifth recent case involving an ad hoc arbitration is that of *Sedelmayer v Russia*.[19]

(a) *Benvenuti & Bonfant v Congo* and *SOABI v Senegal*

The first two cases, *Benvenuti & Bonfant* and *SOABI* were before the Paris *Tribunal de grande instance* (Court of First Instance) and the *Cour d'appel* (Court of Appeal). The ICSID awards were rendered in 1980 and 1988, respectively, with the court decisions regarding enforcement and execution following shortly thereafter. In both cases, it was clear that there was some confusion in the French courts as to whether they were obliged to provide the high level of deference to ICSID awards contemplated by commentators and the ICSID Convention drafters. As noted by Schreuer, '. . . the problems encountered by the French courts with ICSID awards are primarily due to the fact that the laws concerning the execution of judgments were erroneously applied to the recognition of the awards'.[20] However, in both cases, the less deferential views of the lower court were not upheld after appeal to a higher court.

In 1973, Benvenuti & Bonfant, an Italian company, entered into an agreement with the government of the People's Republic of the Congo to set up a company to manufacture plastic bottles and produce mineral water. The relationship between the government and the claimant ~~quickly~~ broke down after two years, resulting in a nationalization of the investment and other breaches of the investment agreement. An ICSID arbitration was launched and an award was subsequently rendered in favour of the claimant. However, because the Congo refused to pay, the claimant took the step of locating assets of the Congo in France and attempted to have the award enforced and executed there.

The Paris *Tribunal de grande instance* recognized the award with the grant of an *exequatur* (leave for enforcement) on 23 December 1980; however, the court order was made subject to a condition that the claimant would need to obtain prior authorization for any measures of execution in order to ensure the immunity of sovereign public assets.[21]

of New York, 5 September 1986, 2 ICSID Rev–FILJ 187 (1987), 2 ICSID Rep 384 (1994); (2) US District Court, Southern District of New York 12 December 1986, 650 FSupp 73 (SDNY) (1986), 2 ICSID Rep 385 (1994); (3) US District Court, District of Columbia, 16 April 1987, 659 FSupp 606 (DDC) (1987), 2 ICSID Rep 391 (1994).

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

[19] *Sedelmayer v Russian Federation* (Germany/Soviet Union BIT), Decision on Jurisdiction and Final Award, 7 July 1998. The Sedelmayer arbitration was conducted under the Stockholm Chamber of Commerce Arbitration Rules.

[20] Schreuer, above n 14 at 1140.

[21] The reservation of the Court stated that: 'No measure of execution, or even conservatory measure, shall be taken pursuant to the said award, on any assets located in France without the prior authorization of this Court'. See 1 ICSID Rep 370 (1993).

Benvenuti & Bonfant objected to the condition as making the execution of the award effectively impossible and confusing the distinct concepts of recognition and enforcement as against execution. The claimant appealed to the higher court. The appeal was allowed by the *Cour d'appel* regarding the restrictive condition on 26 June 1981. The lower court's order was amended, confirming that Article 54 of the ICSID Convention had laid down a simplified procedure for obtaining recognition of ICSID tribunal awards and that municipal courts were limited to ensuring that the award before them was authentic and properly certified by the Secretary-General of the ICSID. The appeal court acknowledged the distinction between the first-stage process of granting *exequatur*, which it characterized as simply a preliminary measure of recognition, and that of the second-stage measure of execution, at which point the court could become involved in addressing the question of immunity.

Although it was not an issue at the *Cour d'appel*, the lower court showed a further lack of deference when it incorporated a public policy standard as part of its conclusion. The court noted in its decision that the ICSID Award 'does not contain anything that is in conflict with law and public order ["*aux lois et à l'ordre public*"] we rule that the said decision shall be executed according to its form and tenor . . .'.[22]

In the final result, the claimant unsuccessfully sought to obtain an attachment order over funds held by a French bank on behalf of the Banque Commerciale Congolaise (BCC). In a judgment of 12 March, 1985 the *Cour d'appel* held that the attachment was void; the BCC could not be liable for payment of the award since the award was against Congo and BCC was not a subdivision or agency of Congo.[23] Ultimately, Congo paid the sum due under the award.[24]

In 1982, an ICSID arbitration was instituted by SOABI against the Republic of Senegal over a dispute concerning a project for the construction of low-income housing in Dakar, as well as a related project to build and operate a factory for the prefabrication of reinforced concrete. The tribunal made an award in favour of SOABI on 25 February 1998, and the claimant subsequently obtained from the *Tribunal de grande instance* an order recognizing the award with the grant of *exequatur* on 14 November 1988. However, in this instance, Senegal appealed the grant of *exequatur* to the *Cour d'appel* which vacated the court decision on 5 December 1989, holding in particular that Senegal '. . . did not waive its right to invoke its immunity from execution' and that SOABI had not demonstrated that execution of the award in France would affect assets which were not subject to the principle of sovereign immunity from execution. In addition, the public policy (or 'ordre public') issue 'raised its head again' in the decision of the *Cour d'appel*. The court

[22] As translated by Broches, above n 14 at 318–19 156.

[23] See Schreuer, above n 14 at 1081. *Benvenuti and Bonfant Srl v Banque Commerciale Congolaise*, France, Cour de cassation, 21 July 1987, 1 ICSID Rep 373 (1993).

[24] As noted by Schreuer, above n 14 at 1118. Also see Broches, 'Avoidance and Settlement of International Investment Disputes', 78 ASIL Proceedings 38 (1984) at 55.

found that the execution of the award in France would be contrary to public policy since it would violate the principle of immunity.

The *Cour d'appel*'s decision in *SOABI* has been subject to much criticism for its failure to acknowledge the distinction between recognition and enforcement as against immunity from execution—which the same court readily acknowledged in its decision in *Benvenuti & Bonfant* in 1981.[25] SOABI then appealed the vacated order of the *Cour d'appel* to the *Cour de cassation* and the decision of the *Cour d'appel* was quashed and annulled.[26] The *Cour de cassation* held that under the ICSID Convention a foreign state must accept that an award will be granted *exequatur* and that such a grant does not in itself constitute an act of execution which could give rise to immunity from execution. As summarized by Schreuer, 'The Court added that the ICSID Convention had in its Articles 53 and 54 created an autonomous and simplified regime for recognition and execution which excluded the otherwise applicable provisions of the Code of Civil Procedure and the remedies provided therein'.[27]

Again, similar to the case of Benvenuti & Bonfant, the French upper courts have drawn a distinction between the recognition of an award and its execution.[28] Moreover, it was confirmed that there is no sovereign immunity with respect to recognition. As Schreuer notes with respect to these cases, 'The French courts do not seem to be fully aware of their lack of power to review ICSID awards'.[29] Despite the suitably deferential final result of these two cases, there remains still some scope for concern that other courts in other contexts may take the opportunity to ignore the plain meaning of Articles 53 and 54 and inject a higher level of review than permitted by the Convention.

(b) *LETCO v Liberia*

The third case is that of *LETCO v Liberia* in which US courts have, like to the French courts, distinguished between the recognition of awards and their execution. The *LETCO* arbitration involved a forestry concession granted by the Liberian government to LETCO in 1970. The concession operated from 1972 to 1980, at which time,

[25] NG Ziadé, 'Introductory Note to *SOABI* Award', 6 ICSID Rev–FILJ 119 (1991) at 124, citing A Broches, 'Note' Revue de l'arbitrage 164 (1990); E Gaillard, 'The Enforcement of ICSID Awards in France: The Decision of the Paris Court of Appeal in the *SOABI* Case', 5 ICSID Rev–FILJ 69 (1990); and NG Ziadé, 80 Revue critique de droit international privé 124 (1991).

[26] Cour de cassation, 11 June 1991, 2 ICSID Rep 341 (1994).

[27] Schreuer, above n 14 at 1119.

[28] A note of caution is warranted in the use of the terms 'recognition', 'enforcement', and 'execution'. As noted by Schreuer, some authors conflate all or some of these concepts and some amount of confusion is created. See Schreuer, above n 14 at 1123–24.

[29] Schreuer, ibid at 1129.

based on LETCO's alleged shortcomings of and concern over conservation and proper utilization of timber resources, Liberia drastically reduced the scope of the concession, and then later terminated the concession entirely. An ICSID arbitration was instituted and on 31 March 1986, an award of almost US$9 million was made in favour of the claimant.

On 5 September 1986, the US District Court, Southern District of New York, following the form of ICSID Convention Article 54, confirmed that the award '… be docketed and filed by the Clerk of this Court in the same manner and with the same force and effect as if it were a final judgment of this Court…' and made an *ex parte* order directing entry of the judgment for the amount specified in the award. A writ of execution was issued by the US Marshal in the Southern District of New York on 25 September 1986.

The Liberian government moved to vacate the judgment, or in the alternative, to vacate the execution of the judgment on its property located in the USA. The basis of Liberia's argument was that the *ex parte* judgment violated its sovereign immunity, which it did not waive. In its judgment of 12 December 1986, the same court rejected Liberia's request to have the recognition of the award vacated. The Court discussed the impact of ICSID Convention Article 54 in detail, confirming that:

> …Liberia, as a signatory to the Convention, waived its sovereign immunity in the United States with respect to the enforcement of any arbitration award entered into pursuant to the Convention. When it entered into the concession contract with LETCO, with its specific provision that any dispute thereunder be settled under the rules of ICSID and its enforcement provision thereunder, it invoked the provision contained in Article 54 of the Convention which requires enforcement of such an award by Contracting States.[30]

On the second issue of Liberia's motion to vacate the writ of execution issued against Liberia's property or assets, the Court confirmed Liberia's immunity from execution as provided under Article 55. As noted by the Court, US law provides '… exceptions to the immunity of a foreign state from execution upon a judgment entered by a Court of the United States if the property is or was "used in commercial activity in the United States" '.[31] In its decision, the Court indicated the assets in question, fees and taxes, were sovereign rather than commercial. The Court granted Liberia's motion to vacate the executions and directed the Marshall to release the funds at issue.

As with the French cases, the US courts in *LETCO* followed Article 54 by distinguishing between the recognition of awards and their ultimate execution. However, when the US laws on sovereign immunity were applied, the claimants were unsuccessful in having their executions enforced.

[30] 2 ICSID Rev–FILJ 188 (1987) at 190–1.
[31] Ibid at 191.

(c) *AIG Partners v Kazakhstan*

More recent cases suggest the difficulty of enforcement, or more precisely execution, where the state has refused to comply with investment arbitration awards. In *AIG Partners v Kazakhstan*, the fourth and most recent ICSID case, notwithstanding Article 54(1) of the ICSID Convention, the claimant found itself unable to execute against certain assets in the face of sovereign immunity principles.

AIG Partners v Kazakhstan arose following the seizure of the property of a construction joint venture owned by AIG Capital Partners (AIG) and the Republic of Kazakhstan (RoK). The City of Almaty transferred all project property to itself and provided no compensation. AIG and another claimant brought an arbitration claim before ICSID and pursuant to the US–Kazakhstan BIT, alleging violations of the BIT. In October 2003, the tribunal rendered a decision where the RoK was found to have breached the bilateral investment agreement, failing to compensate the claimant. The RoK was ordered to pay AIG damages of US$9.9 million.

The RoK failed to satisfy the award granted to AIG. The claimant then sought leave to register the award in the High Court of Justice in the United Kingdom. Having been granted leave, the claimant obtained interim charging orders and third-party debt orders in respect of certain securities and cash, respectively held by third parties (ABN AMRO Mellon Global Security Services BV) pursuant to a global custody agreement with the National Bank of Kazakhstan (NBK). The NBK then intervened in the proceedings and sought to discharge the interim orders, arguing that the property was the property of the NBK and immune from execution under section 14(4) of the State Immunity Act, 1978 (UK) (SIA). Section 14(4) provides that the property of a central bank is deemed not to be in use, or intended for use, for commercial purposes. Section 13(4) of the SIA is itself an exception to sovereign immunity claims based on the property in question at the time being in use, or intended for use, 'for commercial purposes'.

The principal question before the High Court of Justice, Queens Bench Division, then was whether the assets held by ABN MRO, as custodian and banker for the ultimate beneficiary of the RoK constituted 'property of the a State's central bank' within the meaning of section 14(4) of the UK SIA.

The central bank advanced two grounds to defeat the interim orders of AIG. The first ground advanced was that the property (cash and securities) was properly the NBK's and not the RoK's and therefore not subject to enforcement pursuant to sections 13(2)(b) and 14(4) of the SIA. The second argument advanced was that the court had no jurisdiction to make a third-party debt order under the rules of procedure as the debt was a debt due to NBK. The claimant, on the other hand, argued that the assets were the property of the RoK and intended for use for commercial purposes and thus fell to the exception to sovereign immunity under section 13(2)(b) of the SIA. In addition, the claimant argued the RoK was the beneficial owner of these

assets and they constituted a debt due or accruing to the RoK, thus providing the necessary jurisdiction to the court to issue a third-party debt order.

The court was definitive in the judgment issued. It concluded that the wording of section 14(4) was 'clear and imperative' and extends to all property of a central bank, notwithstanding how the central bank holds the property or the purpose to which it is held. Further, the court argued, central bank property shall not be regarded as in use or intended for use for commercial purposes and the intent of the section was to provide 'complete immunity from the enforcement process in the UK courts'. In addition, the court determined that even if the assets were those of the RoK, they were property of the state which was not for commercial purposes, since the management of the state's economy and revenue constitutes a sovereign activity. Finally, the court determined that there was no jurisdiction to grant an interim order for these assets, as had been done where the judgment debtor was the RoK. The courts assessed that the RoK had no contractual rights against the third party holding the cash accounts and that there was no relationship of debtor and creditor required by the civil procedure rules.

(d) *Sedelmayer v Russia*

In *Sedelmayer v Russia*, a non-ICSID or ad hoc tribunal case, the claimant faced similar sovereign immunity arguments raised by the state party as seen in *AIG Partners*. While the tale is factually far more complicated, it appears that through the continuing, even dogged, efforts of the particular claimant, he was ultimately able to satisfy the outstanding award.

The claimant in this dispute was one Franz Sedelmayer, a German citizen who owned a US corporation called the Sedelmayer Group of Companies International Inc. (SGC). The case arose following Sedelmayer's relocation to St Petersburg, Russia.[32] There Sedelmayer through his company negotiated a 25-year lease on a villa previously used as a retreat by Soviet ministers. In August 1991, SGC and the Leningrad police entered into a joint venture called Kammenjj Ostrov (KO). After significant renovations, Sedelmayer opened the villa as a conference centre and training facility for security personnel. The joint stock company was, among other things, to produce police equipment and to provide for transportation and protection services for foreign and Russian citizens. Difficulties arose soon thereafter with a Russian court proceeding that determined that the joint venture's registration was null and void In December 1994, a presidential decree directed that the assets of the joint venture were to be transferred to a 'Procurement Department'. Though it took

[32] The German–Soviet BIT contemplates that where an investor makes investment through a company incorporated in a third country, a tribunal should apply the theory of control to determine where that investor may claim under the treaty.

some time (not until 1996), authorities in addition finally barred Sedelmayer from the facility as well.

As a result of the Russian governmental action, Sedelmayer filed a claim under the 1989 German–Soviet BIT with the Arbitration Institute of the Stockholm Chamber of Commerce. Sedelmayer alleged expropriation. The tribunal ruled that the Russian Federation had expropriated the property and ordered a payment to Sedelmayer in the amount of US$2,350,000, plus interest, in the July 1998 award. In turn, Sedelmayer had the 1998 award declared enforceable under the New York Convention by the German Superior Court of Justice (Kammergericht) in Berlin.

Though Mr Sedelmayer's case and award were not untypical of other claims by Western businessmen who had lost investments in Russia, his persistence in attempting to satisfy the award of the international tribunal was not. As Mr Sedelmayer has described the Russian government efforts to block payment: 'They tried every trick to thwart me, but a building can't run away'.[33] Mr Sedelmayer's first step to execute the award was to attempt to impound Lufthansa Airlines' payments to Russia for overflights of Russian airspace. To accomplish this, Mr Sedelmayer brought an action to execute against these assets in the municipal court (Amtsgericht Köln) of Cologne. The partial award granted was some €511,000.[34] In turn, the Russian Federation and the third-party debtor lodged appeals against the order and the municipal court overruled its earlier decision, annulling the order on the basis of public purpose. Although it had overruled its earlier order, the municipal court permitted Sedelmayer to appeal to the Federal Court of Justice on grounds of law.

The case was then heard by Germany's highest court.[35] The Federal Court of Justice determined that the German courts had no international jurisdiction in execution proceedings against the Russian Federation concerning these overflight rights. Overflight rights, including both the transit and entry fees, were deemed to be of a public character and not private law contract-type claims and were, therefore, not subject to internal execution. The German court stated that the determination of whether such assets as these fees were of a public character had to be determined

[33] David Crawford, 'Businessman vs. Kremlin: War of Attrition: His Assets Seized in 1990s Russia, Mr. Sedelmayer Finally Scores a Legal Win', *Wall Street Journal* (6 March 2006) at A6.

[34] Mr Sedelmayer was very unhappy with the behaviour of the local German bailiffs. In one instance—Sedelmayer suggests that he initiated over 30 different executions against the Russian Federation in Germany—Sedelmayer sought to execute against assets—in this instance, computers, cameras, and security equipment being displayed at the Russian government stand—at an industrial trade fair in Hannover in April 2005. What followed was a series of efforts to get a bailiff to act and refusals by several to do so. Though Mr Sedelmayer brought actions and complaints in several courts in Han[illegible]nd Lower Saxony, he finally launched an action against the Republic of Germany in the European Court of Human Rights for failure of Germany's judiciary to equally apply the law. See FJ Sedelmayer, 'Sedelmayer vs. Germany, European Court of Human Rights' 2(5) TDM (2005).

[35] See Beschluss des VII Zivilsenats vom 4.10.2005–VII ZB 9/05. Bundesgerichtshof (German Federal Supreme Court) found at 2(5) TDM (2005). We would like to thank Christoph Schreuer and an anonymous student from his faculty for summarizing the German language court decisions in the *Sedelmayer* case.

according to German law. The fees, according to the court, arose out of the territorial sovereignty of a foreign state and were a benefit for a public function carried out by the Russian Federation and were, therefore, public in nature. An additional factor was that the assets were located in Russia and not Germany. The court concluded that the Russian Federation was not subject to German jurisdiction and that sovereign immunity applied.

Significantly, the court in its decision held that the arbitration clause implied no waiver of immunity for execution proceedings. The German court asserted that immunity in proceedings on the merits has to be treated in a different manner from immunity in execution proceedings. The BIT only regulates proceedings on the merits. For the Federal Court, the agreement pursuant to Article 10 of the German–Soviet BIT that the award was to be recognized and enforced in accordance with the New York Convention did not raise a waiver of immunity in execution proceedings such as those before the German courts. The BIT is designed to encourage investment activities and raises the prospect that an award will require execution against a state party. However, an execution against assets that are identified as being for public purpose is not necessary to achieve the purposes of the BIT.

Notwithstanding the refusal of German courts to order execution against these landing rights, Mr Sedelmayer has remained undeterred and continues to seek execution of his award. As a postscript, Mr Sedelmayer has traced Russian real estate assets in Germany. In Cologne, Mr Sedelmayer came across a former KGB compound near the downtown of the city. At first Sedelmayer was unable to act since the registered owner on title was the defunct Soviet Union. Sedelmayer continued to check the ownership every few months and was rewarded in late 2002 with a change in ownership to the Russian Federation. At that point, Mr Sedelmayer filed against the real property. While allegedly there have been threats against Sedelmayer and his family, Sedelmayer has begun to collect against the rent payments amounting to some $29,000.00 per month while he awaits sale and disposition of the revenues from the eventual sale of the property.[36]

What all of these recent cases strongly suggest is that there continue to be difficulties in achieving complete claimant satisfaction in the enforcement and execution of investment arbitration awards. All of the cases discussed above, and the

[36] Crawford, above n 33 at A6. And a final footnote, in an email to the OGEMID discussion group dated 3 December 2006, Mr Sedelmayer advised: 'Dear OGEMID members, This is to inform you that in the case Franz J. Sedelmayer vs. The Russian Federation, the Frankfurt City Court (Amtsgericht Frankfurt am Main) has issued an order to seize the business bank accounts of the Russian Federation held with the Dresdner Bank AG, the VTB Bank Deutschland AG (formerly called the Ost-West Handelsbank AG) and the Deutsche Bank AG. The registration number of the court order is 82 M 20481/06. A couple of days ago the Dresdner Bank AG and the Deutsche Bank AG have acknowledged the existence of bank accounts and declared their willingness to cooperate with the creditor . . . Cordially, Franz J. Sedelmayer.' See: OGEMID Archive, December 2006, 'Sedelmayer vs. Russian Federation: More Russian Federation Bank Accounts Seized—MinFin and Russian House in Berlin'.

Sedelmayer case in particular, are cautionary tales for those claimants. Ultimately, as experience with the enforcement and execution of awards grows, it may be necessary to re-examine the application of sovereign immunity by domestic courts and ask the question as to whether the current system set in place, whether under the ICSID Convention or other arbitral settings, is satisfactory as an effective system of international justice for investors and their investments.

Concluding Remarks

At this point in time, subject to a more empirical study, anecdotal evidence would suggest that state respondents in investment arbitrations have complied with their international obligations by abiding by final awards. However, there are a number of examples in which respondents have aggressively resisted execution in domestic courts. This raises a potentially serious question about the future of investor-state arbitration, in particular whether it is an effective system of 'justice'.

In the French and US ICSID cases of the 1980s, clearly there was a certain amount of confusion on the part of the courts as to the proper scope of their powers, and ultimately what the appropriate level of deference was when faced with a request for enforcement through the processes of recognition and then execution. The end result is that a clear distinction, as envisioned by the drafters of the ICSID Convention in Articles 53 and 54, between recognition and execution has been recognized, though not without some difficulty. Since that time, there have been very few cases. The two most recent cases clearly demonstrate the major weakness in the system for enforcement of investment awards—the continued role sovereign immunity plays in limiting the means by which investors may execute against 'State' assets under domestic legal systems.

With the maturity of investment arbitration, and with more final awards in the future, the issue of enforcement and particularly execution will become increasingly important. It raises the spectre of a rising set of actions by recalcitrant state respondents determined to avoid enforcement of awards. The risk that investment arbitration will become potentially ineffective is accordingly higher than in the past.[37]

For investment arbitration to be a complete system of justice, the enforcement of the will of the arbitral decision-makers is a critical and final element of that system.

[37] See E Baldwin, M Kantor, and M Nolan 'Limits to Enforcement of ICSID Awards' 23 J of Int Arb 1 (2006). The authors canvass the numerous means which disappointed state respondents may employ that may not have been contemplated by the drafters of the ICSID Convention to avoid enforcement of an arbitral award.

The international law delict of denial of justice places a basic requirement on domestic systems that the judgments of courts must be enforceable.[38] No less a standard may apply to international investment arbitration. Applying the concept of denial of justice to international investment arbitration, there is a strong argument that state parties to a BIT or the ICSID Convention have no less an obligation to maintain a 'decent' and available system of justice with respect to the investment arbitration system they have created. Although there is yet to be an example, the question should be raised whether there may be an independent action for an investor to make a new claim against the respondent for failure to enforce the original award. The question would, of course, remain as to how that award would become enforceable.

Continuing with this situation in which the execution of an award is effectively impossible, what if an investor completely exhausts the opportunities for the execution of its award against a non-compliant respondent? Does it have a remedy? Under the ICSID Convention, the obligation under Article 53(1) to abide by and comply with the award remains. BIT instruments, like Article 1136(2) in NAFTA's Chapter 11, similarly include this international obligation. However, these are international obligations between the state parties to the instruments in question.

For example, under NAFTA Article 1136(5), if a disputing state party fails to comply with a final award, a further arbitral panel may be established to determine whether such failure to comply is, '…inconsistent with the obligations of the Agreement'. The ultimate remedy by the panel is a recommendation that such Party 'abide by or comply with the final award'. Under the ICSID Convention, a refusal by a state to abide by and comply with an award in accordance with Article 53 could potentially result in two types of legal sanction. The first type of legal sanction involves the right of espousal, which would otherwise be barred under Article 27(1). Clearly, a claimant's state could espouse an independent international claim. Secondly, Article 64 provides for referral to the International Court of Justice (ICJ) with respect to the 'interpretation and application' of the Convention. This could conceivably lead to a traditional state-to-state dispute concerning one state's failure to comply with an award under the Convention after the exhaustion of all means to enforce and execute the award.

As investment arbitration grows and develops, there will be a question that is likely to be raised with respect to enforcement: is international investment arbitration effective? And then the corresponding practical question for investors and potential claimants is: does it provide a remedy that is finally enforceable?

As the present case-review has indicated, domestic courts that have been seized with the issue of enforcement and execution of final awards have been largely deferential, if somewhat confused at times. In the context of challenges to recognition of ICSID awards, there has been no successful challenge. The problems that have

[38] As noted by Paulsson, above n 1 at 168: 'Denial of justice includes the failure to enforce a final judgment'.

arisen have related to the application of the sovereign immunity defence, which is endorsed in ICSID Convention Article 55. As we have seen elsewhere in this book,[39] although a number of respondents have argued that courts should not be deferential to investment arbitration awards, courts have rejected those arguments and maintained a high level of deference. Whether this high-level deference by domestic courts to arbitral awards continues will remain an open question for the foreseeable future. More critical though is the difficulty placed in front of claimants where the respondent state party refuses to satisfy the award and the claimant has been forced to identify assets that can withstand the sovereign immunity claims raised by state respondents. Thus, enforcement and execution remain problems for claimants.

Select Bibliography

Baldwin, E, Kantor, M and Nolan, M, 'Limits to Enforcement of ICSID Awards', 23 J Int'l Arb 1 (2006)

Broches, A, 'Avoidance and Settlement of International Investment Disputes', 78 ASIL Proceedings 38 (1984)

——, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution', 2 ICSID Rev 287 (1987)

Brownlie, I, *Principles of Public International Law* (Oxford, Oxford University Press, 6th ed, 2003)

Crawford, D, 'Businessman vs. Kremlin: War of Attrition: His Assets Seized in 1990s Russia, Mr. Sedelmayer Finally Scores a Legal Win', *Wall Street Journal* A6 (6 March 2006)

Di Pietro, D, and Platte, M, *Enforcement of International Arbitration Awards—The New York Convention of 1958* (London, Cameron May, 2001)

Laird, I, and Askew, R, 'Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System', 7(2) J Appellate Practice and Process 286 (2005)

Paulsson, J, *Denial of Justice in International Law* (Cambridge, Cambridge University Press, 2005)

Rubins, N, 'Judicial Review of Investment Arbitration Awards', in T Weiler (ed), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (London, Cameron May, 2004)

Schreuer, C, *The ICSID Convention: A Commentary* (Cambridge, Cambridge University Press, 2001)

Sedelmayer, FJ, 'Sedelmayer vs. Germany, European Court of Human Rights', 2(5) TDM (2005)

Toope, S, *Mixed International Arbitration: Studies in Arbitration between States and Private Persons* (Cambridge, Cambridge University Press, 1990)

van den Berg, AJ, 'Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions', 2 ICSID Rev–FILJ 439 (1987)

Ziadé, NG, 'Introductory Note to *SOABI* Award', 6 ICSID Rev–FILJ 119 (1991)

[39] See Balas, 'Review of Awards', Ch 27 above.