THE INVESTMENT TREATY ARBITRATION REVIEW

SIXTH EDITION

Editor
Barton Legum

THE LAWREVIEWS

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PREFACE

This year's edition of *The Investment Treaty Arbitration Review*, like that of last year, goes to press under particular circumstances. Measures to contain the covid-19 pandemic around the world have confined many authors to quarters. Despite these constraints, the authors of this volume have delivered their chapters. The result is a new edition providing an up-to-date panorama of the field. This is no small feat given the constant flow of new awards, decisions and other developments over the past year.

Many useful treatises on investment treaty arbitration have been written. The relentless rate of change in the field rapidly leaves them out of date.

In this environment of constant change, *The Investment Treaty Arbitration Review* fulfils an essential function. Updated every year, it provides a current perspective on a quickly evolving topic. Organised by topic rather than by jurisdiction, it allows readers to access rapidly not only the most recent developments on a given subject, but also the debate that led to and the context behind those developments.

This sixth edition adds new topics to the *Review*, increasing its scope and utility to practitioners. It represents an important achievement in the field of investment treaty arbitration. I thank the contributors for their fine work in developing the content for this volume under the difficult conditions that continue to prevail today.

Barton Legum
Dentons
Paris
May 2021

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ENFORCEMENT OF AWARDS

Tom Sprange QC, Charlene Sun and Erin Collins[1]

I INTRODUCTION

International arbitration is an important protection afforded under investment treaties designed to attract foreign direct investment, as it provides a neutral forum for the resolution of disputes with the host state. Historically, the promise of investment arbitration has been bolstered by a relatively high rate of voluntary compliance with investment treaty awards.[2] However, a recent comprehensive study analysed state compliance with investment awards and found that 'non-payment can no longer be considered a theoretical possibility'.[3] Post-award litigation has become increasingly necessary to compel state compliance with investment awards, with 83 per cent of states seeking to annul investment awards issued against them.[4] Enforcement considerations have therefore taken on greater importance in the area of investment treaty arbitration, where voluntary compliance with arbitral awards can be mired down by political interests, and compulsory enforcement against the debtor state can be both challenging and time-consuming in light of the protections afforded to foreign states by applicable principles of sovereign immunity.

This chapter will provide an overview of the enforcement process and legal regimes that govern it, discuss factors that contribute to the time and cost of enforcing an investment treaty award, and recent and noteworthy developments in the enforcement of investment awards.

1 Tom Sprange QC is the managing partner at King & Spalding International LLP, and Charlene Sun is a partner and Erin Collins is an associate at King & Spalding LLP.

2 See, e.g., Alan S Alexandroff and Ian A Laird, 'Compliance and Enforcement', in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (2008), 1171, 1185 ('[A]necdotal evidence would suggest that state respondents . . . have . . . abid[ed] by final awards'); Pierre Lalive, 'Enforcing Awards', in *Sixty Years of ICC Arbitration* (ICC Publishing, 1984), 317, 319 (voluntary compliance with International Chamber of Commerce awards exceeds 90 per cent); Leslie Nelson, *International Joint Ventures*, 2-SPG INLEGP 75, 78 (1990) ('In any case, it is estimated that approximately 95% of international arbitration and conciliation awards are complied with voluntarily').

3 Emmanuel Gaillard and Ilija Mitrev Penusliski, *State Compliance with Investment Awards*, ICSID Review, 1, 48 (2021).

4 id. at 46.

II OVERVIEW OF ENFORCEMENT

i The legal regimes

The enforcement of investment treaty awards is facilitated by multilateral treaties designed to provide a streamlined and uniform framework for enforcing international arbitration awards in national courts around the world. There are generally three international treaty-based enforcement regimes that may be used to enforce investment treaty awards: (1) the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958 (the New York Convention); (2) the Inter-American Convention on International Commercial Arbitration, 30 January 1975 (the Panama Convention); and (3) the Convention on the Settlement of International Disputes between States and Nationals of Other States (the ICSID Convention).

The New York and Panama Conventions

The New York Convention, which entered into force in 1959, emerged to address the shortcomings of the 'double exequatur'[5] enforcement regime provided by the Geneva Protocol on Arbitration Clauses of 1923 and Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.[6] Commentators have described the New York Convention as 'a radically innovative instrument'[7] and the 'single most important pillar on which the edifice of international arbitration rests'[8] because it created the first 'comprehensive legal regime for the international arbitration process'[9].

Today there are 168 contracting parties to the New York Convention.[10] The New York Convention applies 'only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the [s]tate making such declaration'.[11] The framework of the Convention generally calls upon each contracting state to recognise and enforce foreign arbitral awards unless the award exhibits one or more enumerated defects.[12] Finally, the New York Convention envisions that the courts of the

5 The Geneva Conventions established an enforcement process requiring the award creditor to first obtain recognition of the award in the country where the award was issued before seeking recognition of the same award in another enforcement forum. This 'double exequatur' requirement created a burdensome hurdle to enforcement which the drafters of the New York Convention intended to abolish. See Travaux Préparatoires, United Nations Conference on International Commercial Arbitration, Recognition and Enforcement of Foreign Arbitral Awards, Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/3/Add.1, para. 7. See also Pieter Sanders, The Making of the Convention, in Enforcing Arbitration Awards under the New York Convention: Experience and Prospects (United Nations, 1999).

6 See e.g., Gary Born, The New York Convention: A Self-Executing Treaty, 40 *Michigan Journal of International Law* 115, 117 (2018).

7 ibid.

8 Lucy Greenwood, 'A New York Convention Primer', American Bar Association, 12 September 2019 (quoting 'noted British lawyer and judge Michael Mustill (Lord Mustill of Pateley Bridge.').

9 Gary Born, The New York Convention: A Self-Executing Treaty, 40 *Michigan Journal of International Law* 115, 118 (2018).

10 See 'Contracting States – List of Contracting States', New York Arbitration Convention, available at www.newyorkconvention.org/list+of+contracting+states (last accessed 26 March 2021).

11 id., Article III.

12 Specifically, Article V of the New York Convention permits enforcing courts to decline to recognise an arbitral award where: (1) the agreement is not valid; (2) the party against whom the award is invoked was

arbitral seat (or under the law of which the award is made)[13] will retain exclusive authority to annul the award. An award's annulment constitutes a ground upon which other enforcing courts may refuse recognition of that award.[14]

The Panama Convention is substantially similar to the New York Convention, and was designed to mirror the New York Convention and promote international commercial arbitration in Latin America.[15] While there are a few differences between the treaties,[16] United States courts called upon to apply the Panama Convention have stated the goal of achieving the same result as if the award was being enforced under the New York Convention.[17]

The ICSID Convention

The ICSID Convention was designed to provide investment protection from unilateral actions taken by host states.[18] The ICSID Convention establishes its own arbitral rules and procedure, its own annulment process, and a unique, streamlined feature for the enforcement of ICSID arbitral awards. An ICSID award is enforceable in any contracting state as if it was a final judgment of a court of that state.[19] Unlike the New York and Panama Conventions, the ICSID Convention itself provides no grounds upon which national courts may refuse recognition of an ICSID award. Nor are ICSID awards subject to annulment by national

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not given proper notice; (3) the award addresses issues outside the scope of the arbitration agreement; (4) the arbitral tribunal was not composed or conducted in accordance with proper procedure; (5) the award is not yet binding, or has been set aside or suspended; (6) the subject matter of the dispute is not capable of settlement by arbitration; or (7) recognising the award would be contrary to public policy. New York Convention, Article V.

13 Courts and commentators have construed this phrase – found in Article V(2)(b) of the New York Convention – to refer to the parties' choice of procedural law to govern the arbitration, not the substantive law to apply to the merits of the parties' dispute. See, e.g. *International Standard Electric Corporation v. Bridas Soceidad Anonima Petrolera*, Industrial Y Comercial, 745 F. Supp. 172, 177 (SDNY 1990); Noah Rubins, The Enforcement and Annulment of International Arbitration Awards in Indonesia, 20 American University International Law Review 359, 387-91 (2005).

14 See New York Convention, Article V(2)(b).

15 See e.g., Timothy G. Nelson, The Strange Case of the Invisible Treaty: The 1975 Panama Convention on International Commercial arbitration, V(19) *Revisita Brasileria de Arbitragem* 101, 103 (2008).

16 Most notably, the Panama Convention does not include specific procedures for enforcing awards – in contrast to Article IV of the New York Convention discussed above – and the Panama Convention requires that the Rules of Procedure of the Inter-American Commercial Arbitration Commission apply 'in the absence of an express agreement between the parties'. See also Timothy G. Nelson, *The Strange Case of the Invisible Treaty: The 1975 Panama Convention on International Commercial arbitration*, V(19) Revisita Brasileria de Arbitragem 101, 115–116 (2008)

17 See e.g., *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) (stating that the 'legislative history of the Inter-American Convention's implementing statute clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention').

18 See Vincent O. Orlu Nmehielle, Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention), 7(1) *Annual Survey of International and Comparative Law* 21, 23 (2001).

19 ICSID Convention, Article 54(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 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.').

courts; rather, review of an ICSID award is entirely self-contained through the ICSID annulment process.[20] Although contracting states are legally bound by an ICSID award, the ICSID Convention does not purport to abrogate any sovereign immunity from execution to which a debtor state may be entitled in the recognising forum.[21]

ii The process for enforcing arbitral awards

Enforcing an arbitral award generally requires two steps. First, the award must be 'recognised' and converted into a domestic judgment. Second, the resulting judgment may be enforced through domestic procedures governing the execution of judgments.

Recognition of the award

Recognition confers upon an arbitral award, after finding it free of fundamental defects, judicial imprimatur, and renders it capable of enforcement through compulsory measures. Under the United States Federal Arbitration Act – the second chapter of which contains the implementing legislation for the New York Convention – the act of recognition is also referred to as 'confirmation'.[22]

Procedures for recognition may vary as between awards governed by the New York/Panama Conventions and the ICSID Convention. In the United States, for example, arbitral awards governed by the New York and Panama Conventions may be confirmed through a summary proceeding,[23] which is generally narrow in scope, does not require discovery or a trial, and is adjudicated on an expedited timeline. The United States' implementing legislation for the enforcement of ICSID awards, however, does not expressly specify the procedures to be followed in seeking recognition of an ICSID award, which led to some inconsistencies among the procedures applied by US courts. Several early cases involving the confirmation of ICSID awards permitted the recognition of such awards and entry of judgment on an *ex parte* basis.[24] However, more recent US court decisions have found that the use of *ex parte* procedures for recognising an ICSID award violates the procedural protections afforded to foreign states under the US Foreign Sovereign Immunities Act (FSIA), and have held that a party seeking to enforce an ICSID award against a foreign state must initiate a plenary lawsuit and comply with the personal jurisdiction and service requirements of the FSIA.[25]

By contrast, in the United Kingdom, actions seeking confirmation of an arbitral award (whether governed by the New York or ICSID Convention) may be commenced without notice to the award debtor, subject to the duty of 'full and frank disclosure', which requires the applicant's disclosure of all material facts regarding the case as well as the specific legal

20 ICSID Convention, Article 52.

21 ICSID Convention, Article 55.

22 9 United States Code (USC) Section 207.

23 9 USC Section 6 ('Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.').

24 See, e,g,, *Liberian Eastern Timber Corp v. Government of the Republic of Liberia*, 650 F Supp 73, 75 (SDNY 1986); *Sempra Energy Int'l v. Argentine Republic*, M-82 (SDNY, 14 November 2007); *Enron Corp v. Argentine Republic*, M-82 (SDNY, 20 November 2007).

25 See *Mobil Cerro Negro, Ltd v. Bolivarian Rep of Venezuela*, 863 F 3d 96, 124 (2d Cir 2017).

arguments that the respondent would likely have made had it been aware of the proceeding.[26] The judgment will not be enforceable, however, until the respondent has been served and given the opportunity to challenge enforcement of the award.[27]

Many civil law jurisdictions – France, for example – also permit *ex parte* recognition of an arbitral award through an *exequatur* proceeding. *Exequatur* proceedings typically do not afford full review of the award by the judge at the first instance level; rather, the award will be enforced pursuant to Article 1514 CCP (3) once the award creditor proves the existence of the award and demonstrates that enforcement of the award would not violate French international public order.[28] Once the *exequatur* proceeding is complete and the award debtor is served with a copy of the judgment, and the award debtor may then seek to vacate the exequatur decision. However, in contrast to English procedure, an exequatur order is still enforceable pending the award debtor's challenge of that order.[29]

Execution

Once an arbitral award is recognised by the enforcing forum, the resulting judgment may then be enforced through domestic procedures governing the execution of judgments. Such procedures may include mechanisms for the restraint and turnover of identified property deemed suitable for execution and post-judgment discovery designed to locate such assets. The process of executing an investment treaty award is largely limited by applicable principles of sovereign immunity in the enforcing forum, which will be discussed in greater detail in the following section.

III TIME AND COSTS OF ENFORCEMENT

Among the major factors impacting the time and cost of enforcing investment awards are defending the debtor state's attempts at annulment and the procedural protections afforded to states by sovereign immunity, which typically limit the categories of sovereign assets that may be executed against and often impose additional notice requirements which build delays into the execution process.

i Annulment

A recent study surveying state compliance with investment awards found that of '[o]f the 170 disputes resulting in damages awards [examined], States have initiated annulment or setting-aside proceedings in 141, or 83 percent of the cases'.[30] These statistics demonstrate a growing trend of states resisting immediate compliance with investment awards issued against them in favour of first exhausting potential avenues for challenging the award.

26 England & Wales Civil Procedure Rules, 62.18; The Commercial Court Guide, para. F2.5(a). See, e.g., *Gold Reserve v. Venezuela* [2016] EWHC 153.

27 England & Wales Civil Procedure Rules, 62.18(9); State Immunity Act 1978, Section 12(2) (if the respondent is a state).

28 See, e.g., Detlev Kühner, 'Annulment and Enforcement of Arbitral Awards in France', in *Annulment and Enforcement of Arbitral Awards from a Comparative Law Perspective* (2018), at 34–35.

29 See id. (citing Article 1526 CCP (1)).

30 Emmanuel Gaillard and Ilija Mitrev Penusliski, State Compliance with Investment Awards, *ICSID Review* 1, 47 (2021).

Annulment of New York Convention awards

As previously discussed, the forum and grounds for annulment will depend on the enforcement framework that governs the award. New York and Panama Convention awards may be annulled, or set aside, by the courts of the seat of the arbitration or country under the law of which the award was made.[31] While the New York and Panama Conventions do not purport to regulate local law for annulling a domestic award, most states' grounds for annulment will mirror those set forth in the UNCITRAL Model Law on International Commercial Arbitration (1985) (Model Law).[32] While states adopting the Model Law generally consider these grounds to be exhaustive,[33] some states including the United States, United Kingdom, Singapore, China and Brazil permit annulment on additional grounds.[34] And, despite the prevalence of the Model Law, a limited number of jurisdictions provide for different approaches. For example, in Portugal and Argentina, arbitral awards are subject to the same judicial review as a domestic court judgment.[35] And in Belgium and Switzerland, the courts have recognised the parties' ability to waive their right to seek annulment.[36]

Annulment of ICSID awards

By contrast, ICSID awards can only be annulled through the self-contained ICSID annulment process. Under the ICSID Convention, contracting states have agreed to unconditionally enforce ICSID awards unless annulled by an ICSID annulment panel.[37] In further contrast to the framework provided by the New York and Panama Conventions – which contemplate and accept some degree of variance in the grounds for annulment applied by each contracting state to its own domestic awards – the ICSID Convention creates a uniform set of grounds for annulment to be applied to every ICSID award.[38]

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31 See, e.g., Gary Born, *International Commercial Arbitration* (3rd edn), p. 3431 (2021) ('[T]he Inter-American Convention adopts essentially the same approach as the New York Convention (in Article 5), and is susceptible to precisely the same interpretation with regard to implied international limits on the grounds for annulment (focusing on Article 1).').

32 These grounds for annulment set forth in the Model Law are: (1) there was no valid arbitration agreement; (2) the award-debtor failed to provide proper notice of the appointment of an arbitrator, the proceeding, or was not given an opportunity to present its case; (3) the award addresses issues outside the scope of the agreement to arbitrate; (4) the tribunal was not composed in accordance with the parties' agreement; (5) the subject-matter of the dispute was not capable of settlement by arbitration under the law at the seat; or (6) the award conflicts with the public policy of the law at the seat. See UNCITRAL Model Law on International Commercial Arbitration, 1985 (with amendments as adopted in 2006), Article 34(2); see also Gary Born, *International Commercial Arbitration* (3rd edn), p. 3423 (2021).

33 Gary Born, *International Commercial Arbitration* (3rd edn), pp. 3434–35 (2021).

34 id. at 3632–33.

35 id. at 3446.

36 id. at 3658, 3661–62.

37 id. at 3431–32.

38 An ICSID annulment committee may annul an award if: (1) the tribunal was not properly constituted; (2) the tribunal manifestly exceeded its powers; (3) there was corruption on the part of a tribunal member; (4) the was a departure from a fundamental rule of procedure; or (5) the award failed to state the reasons on which it was based. ICSID Convention, Article 52(1).

Timing of annulment proceedings

ICSID's most recent Background Paper on Annulment reported that the average duration of annulment proceedings from 2010 through 2016 was approximately 22 months from the date of registration.[39] Although the timing of domestic set-aside proceedings will necessarily vary according to jurisdiction, set aside proceedings before national courts may last even longer when factoring in potential appeals.

The timing of annulment can affect the timing of enforcement to the extent that enforcing courts are empowered to stay their own proceedings pending the adjudication of annulment proceedings. Each of the New York, Panama, and ICSID Conventions permit a discretionary stay of enforcement proceedings pending the adjudication of an annulment application.[40] ICSID's 2016 Updated Background Paper on Annulment reported that a stay of enforcement was requested in approximately 50 per cent of annulment applications,[41] and that over 83 per cent of stay requests were granted by ICSID annulment committees.[42] In sum, these data show that an award debtor's filing of an annulment application can cause significant delay to an award creditor's enforcement efforts.

ii Sovereign immunity

Although the multilateral enforcement treaties discussed in this chapter have streamlined the process for recognising arbitral awards, principles of sovereign immunity applicable in the enforcing forum will still regulate and limit how enforcement proceeds against a foreign state. These limitations can have the effect of prolonging enforcement proceedings by necessitating extensive asset discovery.

Immunity from recognition of an arbitral award

Most states now follow a 'restrictive theory' of immunity, which shields a sovereign state from the jurisdiction of the courts of another state with respect to sovereign acts, but not commercial activities.[43] States that follow the restrictive theory of immunity and are parties to one or more of the multilateral enforcement treaties discussed in this chapter are likely to recognise an 'arbitration exception' to sovereign immunity, ensuring that foreign states cannot use sovereign immunity as a defence to the recognition of an arbitral award.

For example, the US FSIA, which governs all claims brought against foreign states and their instrumentalities in US state and federal courts, embodies a restrictive theory of immunity.[44] The FSIA provides two separate forms of immunity to foreign states: first, it

39 Updated Background Paper on Annulment for the Administrative Council of ICSID, May 2016, available at https://icsid.worldbank.org/sites/default/files/publications/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf, para. 61.

40 New York Convention, Article VI; Panama Convention, Article 6; ICSID Convention, Article 52(5); ICSID Arbitration Rule 54(1).

41 Updated Background Paper on Annulment for the Administrative Council of ICSID, May 2016, available at https://icsid.worldbank.org/sites/default/files/publications/Background%20Paper%20on%20Annulment%20April%202016%20ENG.pdf, at 20.

42 id., para. 58.

43 See generally, Charlene Sun & Aloysius Llamzon, Acta iure gestionis and acta iure imperii, in *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford Constitutional Law 2018).

44 See 28 USC Section 1602 et seq.

confers '[i]mmunity of a foreign state from jurisdiction',[45] or immunity from liability; and second it confers '[i]mmunity from attachment, arrest, and execution of property of a foreign state'.[46] Each type of immunity may be abrogated if one or more expressly enumerated exceptions to immunity are demonstrated. One such exception exists for litigation to recognise and enforce arbitral awards governed by an enforcement treaty to which the United States is a contracting party.[47]

The English State Immunity Act 1978 (SIA) likewise embodies a restrictive theory of sovereign immunity. As explained by Lord Denning MR in *Trendtex Trading v. Central Bank of Nigeria* [1977] QB 529, '[g]overnments everywhere engage in activities which although incidental in one way or another to the business of government are in themselves essentially commercial. It is, therefore, only in respect of its sovereign activities that a state may reasonably expect to be immune from proceedings in a foreign court'. English law also distinguishes between jurisdictional immunity and immunity from execution. As regards the former, a state will not be immune in cases where it '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'.[48]

By contrast, states such as China maintain a system of absolute immunity. Under this approach, foreign states enjoy an absolute immunity to suit – including those seeking to merely enforce an arbitral award – absent explicit, contemporaneous waiver of such immunity. As explained by the Hong Kong Court of Final Appeal in *FG Hemisphere v. Congo*, the longstanding Chinese state policy of granting foreign states absolute immunity does not permit a finding of implicit waiver by virtue of the foreign state award debtor's agreement to arbitrate.[49]

Immunity from execution and attachment

Notwithstanding the abrogation of sovereign immunity for purposes of recognising an arbitral award, debtor states typically retain sovereign immunity from execution or attachment against state assets. The ICSID Convention, for example, requires contracting states to recognise ICSID awards, but expressly preserves principles of sovereign immunity from execution that may apply in the enforcement forum.[50] The same principle can be found in most national

45 See 28 USC Section 1604.

46 See 28 USC Section 1609.

47 See 28 USC Section 1605(a)(6)('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.').

48 State Immunity Act 1978, Section 9(1).

49 See *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* [2011] HKCFA 41.

50 ICSID Convention, Article 55.

systems, which recognise the immunities from liability and execution as independent from one another. As a result, there may be circumstances where a state may be subject to suit but immune from execution of any judgment rendered against it.[51]

Moreover, even once a foreign state's immunity from execution is abrogated, sovereign immunity statutes may nonetheless limit the categories of sovereign property against which a judgment may be satisfied. For example, in the United States, US courts may only execute against a foreign state's 'property used for a commercial activity in the United States'.[52] The English SIA operates similarly in respect of immunity from execution, which does not apply to property which is 'for the time being in use or intended for use for commercial purposes'.[53]

Identifying a foreign state's property and proving its commercial use, however, can prove quite difficult and often requires extensive discovery. In *Aurelius Capital Partners v. Argentina*,[54] the judgment creditors of Argentina identified and restrained certain funds held by US investment managers on behalf of Argentine workers and pensioners, arguing that such funds were being used for a commercial activity by earning revenues in the United States. The creditors restrained those assets while they were in the United States, just prior to their scheduled repatriation to the Argentine social security administration (Administration).[55] The Court of Appeals for the Second Circuit ultimately vacated the restraint because the judgment creditors had not proven that, at the time of the attachment, the property was used for a commercial activity in the United States when in the hands of the sovereign. Specifically, the court explained that '[t]he commercial activities of the private corporations who managed these assets' before they were transferred to Argentina were 'irrelevant', and found that because the funds were restrained at the very moment that title over the funds was transferred to the Administration, 'neither the Administration nor the Republic had the opportunity to use the funds for any commercial activity whatsoever'.[56] Absent evidence that the funds were to be used for commercial activity in the United States by Argentina after gaining possession of those funds, the funds were released.

IV RECENT DEVELOPMENTS: INTRA-EU DISPUTES

An area of investment award enforcement in a current state of flux involves the enforceability of awards involving parties from European Union (EU) Member States in light of a decision from the European Court of Justice (CJEU) – constitutionally designated as the apex judicial authority on questions of EU law in accordance with the Treaty on the Functioning of the European Union (TFEU) – declaring that the arbitral dispute resolution provision contained within a bilateral investment treaty between two EU Member States was contrary to EU law.

51 See, e.g., *Walters v. Industrial and Commercial Bank of China, Ltd*, 651 F 3d 280, 289 (2d Cir 2011) (recognising that 'the FSIA reflects a deliberate congressional choice to create a "right without a remedy" in circumstances where there is jurisdiction over a foreign state for purposes of obtaining a judgment, but its property is immune from attempts to execute the judgment'), citing *De Letelier v. Republic of Chile*, 748 F 2d 790, 799 (2d Cir 1984).

52 See 28 USC Section 1610(a); see *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 251 (5th Cir. 2002) (finding that the assets must be (1) used for a commercial activity, and (2) used in the United States).

53 State Immunity Act 1978, Section 13(4).

54 584 F.3d 120, 130-31 (2d Cir. 2009).

55 id. at 124–25.

56 ibid.

Specifically, in the case of *Achmea B.V. v. Slovak Republic*,[57] the CJEU ruled that agreement to arbitrate contained within 1991 bilateral investment treaty between The Netherlands and Slovakia (Netherlands–Slovakia BIT) was invalid because it did not provide a mechanism by which the CJEU could provide preliminary rulings on matters of EU law in accordance with Article 267 of the TFEU. The *Achmea* decision called into question the enforceability of dozens of investment treaty awards rendered against EU Member States, and has been cited by many of those states as a basis for resisting compliance with arbitral awards issued under multilateral treaties such as the Energy Charter Treaty (the ECT). The European Commission (EC) has further taken a position that any arbitral award issued pursuant to an investment treaty between intra-EU parties must be considered illegal 'state aid', and contrary to EU law to the extent that such law vests the EC with sole authority to require the payment of subsidies between and among EU Member States. These recent developments have upended investor–state arbitration in the EU and leaves substantial uncertainty for EU investors with unsatisfied arbitral awards against EU Member States. The following section discusses these defences to enforcement and recent decisions of national courts addressing them.

i CJEU review of EU law

Background

The Achmea decision

Achmea concerned an award issued against Slovakia in favour of Dutch investors. In set-aside proceedings commenced in Germany, Slovakia contended that the tribunal lacked jurisdiction to hear the dispute because the arbitration agreement contained within the Netherlands–Slovakia BIT was incompatible with Article 267 of the TFEU. Specifically, Slovakia argued that because (1) any dispute between an EU-based investor and an EU Member State would involve the application and interpretation of EU law, and (2) Article 267 of the TFEU mandated that the CJEU must be the final authority on questions of EU law, the BIT's agreement to arbitrate violated EU law because an arbitral tribunal's decision on issues of EU law were not directly reviewable by the CJEU.[58] The first instance court summarily rejected these arguments, but on appeal, the German Federal Court of Justice chose to refer several questions to the CJEU, including whether the arbitration remedy set forth in the Netherlands–Slovakia BIT was consistent with EU law.[59] On 6 March 2018, the CJEU sided with Slovakia. It held that because an arbitral tribunal could not be considered a 'court or tribunal of a[n EU] Member State' within the meaning of Article 267 of the TFEU – and therefore could not refer preliminary questions of EU law to the CJEU – the arbitral dispute resolution provisions in bilateral investment treaties would impermissibly undermine and circumvent the judicial review mechanism provided by the TFEU,[60] and could not ensure 'the full effectiveness of EU law, even though [it] might concern the interpretation or application of that law'.[61]

57 CJEU Case No. C-284/16, ECLI:EU:C:2018:158 (hereinafter, *Achmea*).

58 *Achmea*, para. 12.

59 See id. para. 7(i).

60 id. paras 58, 60.

61 id. paras 53–56.

The Energy Charter Treaty

Like many bilateral investment treaties, the ECT also permits the investor to resolve its disputes through arbitration, before either: (1) an ICSID tribunal;[62] (2) a sole arbitrator or ad hoc arbitration established under the Arbitration Rules of the United Nations Commission on International Trade Law;[63] or (3) an arbitration proceeding under the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[64] Several EU Member States have argued that the arbitration mechanism set forth in the ECT must also be invalidated based on the CJEU's reasoning in *Achmea*.

There are several arguments for why *Achmea* would not necessarily dictate that result. First, the CJEU's decision in *Achmea* was based, in part, on the fact that the Netherlands–Slovakia BIT would likely require the arbitral tribunal to apply the substantive law of one or more of the parties (which would necessarily include EU law) in resolving the dispute.[65] The ECT, on the other hand, requires the arbitral tribunal to 'decide the dispute in accordance with [the ECT] and applicable rules and principles of international law'.[66] Further, the CJEU remarked in *Achmea* that an agreement to arbitrate contained within a multilateral treaty would not per se be incompatible with EU law, particularly where the EU itself is party to that treaty,[67] noting that '[t]he competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements'.[68] Such 'competence' should therefore arguably be respected in connection with the ECT, to which the EU itself is a contracting party.[69]

Nonetheless, there are currently at least 11 ECT awards being challenged in annulment proceedings on the basis of the *Achmea* ruling.[70] The EC has largely backed Member States' efforts to annul intra-EU investment awards by seeking to appear as amicus curiae in connection with those proceedings.

62 The Energy Charter Treaty and Related Documents (ECT), Article 26(4)(a).

63 id., Article 26(4)(b).

64 id., Article 26(4)(c).

65 id. paras 39–42.

66 id., Article 27(g).

67 id. para. 57 (finding that 'international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the [CJEU], is not in principle incompatible with EU law.').

68 ibid.

69 See 'Energy Charter Treaty Signatories', available at https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/.

70 (1) *Novenergia II – Energy * Environment (SCA), Société d'Investissement à Capital Risque v. Kingdom of Spain*; (2) *Infrastructure Services Luxemburg S.à.r.l. v. Kingdom of Spain*; (3) *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*; (4) *Foresight Luxembourg Solar 1 S.à.r.l. and others v. Kingdom of Spain*; (5) *9Ren Holding S.à.r.l. v. Kingdom of Spain*; (6) *Nextera Energy Global Holdings B.V. V. Kingdom of Spain*; (7) *Greentech Energy Systems A/S (now known as Athena Investments A/S) and others v. Italian Republic*; (8) *CEF v. Italian Republic*; (9) *RREFF Infrastructure Services v. Kingdom of Spain*; (10) *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*; (11) *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*.

Subsequent actions taken by EU Member States

In the wake of *Achmea*, on 15 January 2019, 22 EU Member States jointly issued a declaration 'on the legal consequences of the judgment of the Court of Justice in Achmea and on investment protection in the European Union' (the Declaration), in which they declared that 'all investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable'.[71] Moreover, the Declaration stated that '[a]rbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States', and that '[i]nterpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied'.[72]

On 5 May 2020,[73] 23 EU Member States signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union (BIT Termination Treaty), by which the contracting parties agreed to terminate more than 120 bilateral investment treaties concluded between EU Member States.[74]

ii EU 'state aid'

Several EU Member States and the EC have also sought to challenge intra-EU BIT and ECT awards by characterising them as impermissible 'state aid'. Article 107(1) of the TFEU defines 'state aid' as a measure 'granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods . . . in so far as it affects trade between Member States'. Article 108 of the TFEU vests the EC with authority to regulate and approve all state aid within the EU after assessing its compatibility with the 'internal market'. From these principles, the EC has taken the position that treaties providing investment protections between certain EU Member States create an uneven playing field and frustrate the EC's sole authority to regulate intra-EU investments.

In November 2017, the EC issued State Aid Decision 2017/7384 concerning certain Spanish renewable energy subsidies (State Aid Decision). In the State Aid Decision, the EC declared that 'any provision [of an investment treaty] that provides for investor-State arbitration between two Member States is contrary to [European] Union law'.[75] The EC further asserted that 'any compensation which an Arbitration Tribunal were to grant to an investor' in respect of the subsidies that were the subject of Spain's regulatory reforms in the energy sector 'would constitute in and of itself State aid', and barred Spain from paying without the EC's prior authorisation of the legality of such State aid.

71 See Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 15 January 2019, available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

72 ibid.

73 https://www.asil.org/insights/volume/24/issue/18/european-union-member-states-sign-treaty-terminate-intra-eu-bilateral.

74 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, 5 May 2020, Art. 1, Annex A, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01).

75 id. para. 160.

V JUDICIAL RECEPTION OF OBJECTIONS TO ENFORCEMENT OF 'INTRA-EU' INVESTMENT AWARDS

While the BIT Termination Treaty and State Aid Decision have rendered intra-EU investment awards virtually unenforceable within the EU, intra-EU award creditors have flocked to New York and ICSID Convention signatory countries outside the EU, such as the United States, Australia and the United Kingdom, to enforce their awards. In the United States, for example, at least 10 actions have been commenced for the purpose of recognising and enforcing intra-EU investment awards against various EU Member States, including Spain, Italy and Romania.[76] To date, most of these cases have been stayed pending adjudication of annulment applications before ICSID Annulment Committees or national courts at the seat of the arbitration, none of which have yet ruled on the intra-EU *Achmea* and state aid objections raised to date.[77] There have, however, been some early breakthroughs in the Australian and English courts with respect to the enforcement of intra-EU ICSID awards, which are discussed below.

i Micula v. Romania

On 19 February 2020, the Supreme Court of the United Kingdom recognised an ICSID award rendered against Romania in favour of the Micula claimants pursuant to the 2003 bilateral investment treaty between Romania and Sweden (Romania–Sweden BIT). Romania argued that enforcement of the award would be unlawful both on the basis of the *Achmea* decision and because it constituted unlawful state aid. The lower courts stayed enforcement pending a decision from the CJEU on whether payment of the award would violate Romania's EU law obligations.[78]

The Supreme Court lifted the stay of enforcement upon finding the stay contrary to the United Kingdom's treaty obligations under the ICSID Convention. Taking note specifically of the fact that the United Kingdom had acceded to the ICSID Convention prior to joining the EU, the court held that principles of EU law could not override the United Kingdom's pre-existing treaty obligations 'to implement the ICSID Convention and to recognise and

76 *Novenergia II – Energy * Environment (SCA), Société d'Investissement à Capital Risque v. Kingdom of Spain*, 1:18-cv-1148 (DDC filed 16 May 2018); *Infrastructure Services Luxemburg S.à.r.l. v. Kingdom of Spain*, 1:18-cv-1753 (DDC filed 27 July 2018); *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, 1:18-cv-2254 (DDC filed 28 September 2018); *Foresight Luxembourg Solar 1 S.à.r.l. and others v. Kingdom of Spain*, 1:20-cv-925 (DDC transferred on 7 April 2020, filed in the Supreme Court of the State of New York 14 December 2018); *9Ren Holding S.à.r.l. v. Kingdom of Spain*, 1:19-cv-1871 (DDC filed 25 June 2019); *Nextera Energy Global Holdings B.V. V. Kingdom of Spain*, 1:19-cv-1618 (DDC filed 3 June 2019); *Greentech Energy Systems A/S (now known as Athena Investments A/S) and others v. Italian Republic*, 1:19-cv-03444 (DDC transferred on 15 November 2019, filed in the Supreme Court of the State of New York on 5 Apr 2019) *CEF v. Italian Republic*, 19-cv-3443 (DDC transferred on 15 November 2019, filed in the Supreme Court of the State of New York Aug. 16, 2019); *RREFF Infrastructure Services v. Kingdom of Spain*, 1:19-cv-3783 (DDC filed 19 December 2019); *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*, 1:20-cv-1081 (DDC filed 24 April 2020), *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, 1:20-CV-01708 (DDC filed 23 June 2020).

77 The applicability of the *Achmea* ruling to the ECT has been referred as a preliminary question to the CJEU in the case of *Athena Investments and Others*, CJEU Case No. C-155/21.

78 *Micula and others v. Romania* [2020] UKSC 5, para. 37 (Romania argued that 'it is contrary to EU law for the [UK] Court of Appeal as an emanation of the State to create a situation whereby the authority of the EU institutions could be wholly circumvented.').

enforce the award under Articles 54 and 69 of the ICSID Convention'.[79] The court further found that there was no basis to stay enforcement of the award 'in deference to the EU courts on this issue, which is not one of EU law, simply because of the speculative possibility of infringement proceedings in the future'.[80] The Supreme Court's decision is noteworthy to the extent it deemed the question of the ICSID award's compatibility with EU law to be irrelevant for purposes of the United Kingdom courts' obligation to recognise and enforce ICSID awards.

ii Eiser and infrastructure services v. Spain

On 24 February 2020, the Federal Court of Australia (the Federal Court) issued a decision in *Eiser Infrastructure Ltd. v Kingdom of Spain* [2020] FCA 157 concerning the enforcement of two ECT ICSID awards.[81]

The primary question before the Federal Court was whether 'a foreign state [is] immune from the recognition and enforcement of an arbitral award made under the [ICSID Convention] . . .'.[82] The Federal Court held that Spain had waived its sovereign immunity in respect of recognition and enforcement of the ICSID award by giving 'its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of [Article 26 of the ECT]',[83] and becoming a party to the ICSID Convention, which 'expressly provides for the automatic recognition and enforcement of awards in Contracting States'.[84] Upon finding that Spain's sovereign immunity had been abrogated, the Federal Court recognised the ICSID awards and ordered Spain to comply with the pecuniary obligations set forth in those awards.

The Federal Court's decision was thereafter partially vacated by a Full Court of the Federal Court of Australia (the Full Court)[85] to the extent that it ordered Spain to pay the ICSID awards. Specifically, the Full Court found that although the Federal Court had jurisdiction to recognise the ICSID awards, it had not accounted for Spain's immunity from execution, which would shield it from compulsory enforcement of the awards.[86] Notably, however, the Full Court expressed little interest in Spain's argument that the arbitration mechanism contained in Article 26 of the ECT was incompatible with EU law, dismissing the argument as irrelevant since 'the question is not whether Art 26 of the ECT effects a submission to jurisdiction; it is whether Art 54(2) of the ICSID Convention does'.[87]

Together, these decisions signal an early reluctance by courts of some ICSID Convention signatory countries to wade into the politically sensitive issues relating to the enforceability of intra-EU ICSID awards under EU law. It may be more difficult, however, for national courts to avoid these issues in respect of investment awards governed by the New York Convention, which – unlike the ICSID Convention – expressly provides grounds for nonrecognition

79 id. para. 113.

80 id. paras. 116, 118.

81 The second award arose out of *Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar B.V. v. Spain*, ICSID Case No. ARB/13/31.

82 *Eiser Infrastructure Ltd. v. Kingdom of Spain* [2020] FCA 157, para. 2.

83 id. para. 178 (citing ECT, art. 26(3)(a)).

84 id. para. 169.

85 *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l.* [2021] FCAFC 3.

86 id. (citing Kronke H, Nacimiento P, Otto D, Port NC (eds), *Recognition and enforcement of foreign arbitral awards: a global commentary on the New York convention* (Kluwer Law International, 2010) pp. 7–8).

87 id. para. 111.

through which EU Member States' intra-EU objections may be heard by local enforcement courts. The resolution of these objections by ICSID and domestic national court annulment proceedings will set important precedents in defining the enforceability of intra-EU investor–state awards.

Appendix 1

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Tom Sprange QC is the managing partner of the London Office of King & Spalding. He provides advocacy and strategic advice in significant, high-value and complex disputes. A partner in our trial and global disputes practice, Tom acts in a wide range of disputes under local, private and public international law. He is described by his peers as: 'a unique coming together of legal insight, commercial nous and practical living/implementation', 'a superb advocate', 'class act', 'remarkable', a 'super lawyer', 'a real star', 'fantastic', 'a very sharp legal mind', 'an excellent advocacy choice across dispute resolution forums', 'a sharp intellect' who praise 'the precision, energy and tenacity he projects in front of tribunals and judges' and describe him as an 'A-star advocate, he just walks in and understands everything', and highlight his 'great cross-examination skills'. Tom frequently appears in the Chancery and Queens Bench divisions of the High Court and the Court of Appeal in England and in the DIFC in a broad array of disputes. Tom has acted as counsel in more than 200 international arbitrations in the leading arbitration institutes, including the International Chamber of Commerce, London Court of International Arbitration, American Arbitration Association, Stockholm Chamber of Commerce and the International Centre for Settlement of Investment Disputes. He also regularly sits as an arbitrator.

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