Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-politicization of International Investment Disputes

21 AM. REV. INT’L ARB. 211 (2010)

It has been reproduced here by permission of the author, Andrea K. Bjorklund.
“Successful” claimants in investment arbitrations increasingly find that they have earned a hollow victory if the losing state refuses to pay the arbitral award voluntarily. Immunity inhering in the state's assets may prevent execution against them. This difficulty arises from the distinction between waivers of sovereign immunity with respect to jurisdiction and waivers of sovereign immunity with respect to execution. [FN1] By entering into investment treaties states have waived their jurisdictional immunity, but the argument that a state's waiver of jurisdictional immunity should encompass a waiver of immunity in sovereign assets themselves has so far been unsuccessful in the investment treaty context, and has met with only minimal success in cases involving state contracts. [FN2] Investors are left to proceed against a state's commercial assets, assuming they can locate them and defeat any arguments the state makes respecting their governmental function. These hurdles might prove too large for many investors to surmount. [FN3] Thus, the international community has created an elaborate international architecture with respect to investment protection but at the back end -- the stage of actual payment -- the edifice is built on shaky ground. [FN4]

The most frequent vehicles for enforcing investment arbitration awards are the ICSID Convention [FN5] and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. [FN6] The ICSID Convention specifically provides that states do not waive execution immunity by consenting to arbitration under ICSID. [FN7] The New York Convention does not address immunity, and therefore permits the argument of an implied waiver of execution immunity by virtue of an agreement to arbitrate. [FN8] In either case one could argue that investment treaties permitting investors to submit claims against states contain implied waivers of execution immunity, but winning this argument will be an uphill struggle. [FN9] Enforcement under either Convention in the event a respondent state does not pay voluntarily will take place in the domestic courts of the states party to the Convention, and the question of execution immunity will be decided by municipal law.

Municipal laws on sovereign immunity vary. In almost all cases, however, they distinguish between jurisdictional immunity and execution immunity, a distinction that finds support in both customary international law and international treaties on immunity. [FN10] Some jurisdictions have proved more receptive to the argument that a state's agreement to arbitrate a dispute necessarily includes an implied waiver of immunity from execution. Yet in most cases a claimant seeking execution of an award will need to locate commercial assets to satisfy it. State practice over the last several decades has shifted towards a restrictive theory of immunity with re-
spect to assets subject to execution, meaning that government-owned assets used for commercial purposes are not protected by state immunity law. [FN11] Thus, a successful investor might be able to execute his arbitral award against commercial assets of a state, assuming he is able first to identify those investments and second to overcome any argument made by the state that the assets are properly classified as used for government rather than for commercial purposes. In any event the investor's success will depend on the immunity law of the state in which he is seeking execution.

As yet it is early to tell how strong a threat state immunity from execution poses to the viability of investment arbitration. As the late Lou Henkin famously said, “Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” [FN12] Several recent refusals to pay, including those by Argentina, [FN13] Russia, [FN14] Kazakhstan, [FN15] Kyrgyzstan, [FN16] and Zimbabwe, [FN17] have been well publicized, and they join earlier isolated instances of state intransigence. [FN18] Yet Russia recently paid the Rosneft award -- a $400 million claim. [FN19] It is also heartening that states such as Bolivia and Ecuador have honored awards rendered against them, despite their decisions to withdraw from the ICSID *214 Convention and, in the case of Ecuador, from several investment treaties. [FN20] They have also continued to defend themselves in on-going arbitrations. Nonetheless, it is reasonable to ask what steps can be taken to address the problem of recalcitrant respondents, or there is a risk that states that have honored their obligations will begin to question whether doing so is a good idea. These steps might include: investors seeking to protect themselves in concession contracts; states including explicit waivers of execution immunity in investment treaties; the home states of investors asserting diplomatic protection claims against non-paying host states; and the international community sanctioning non-payers by ensuring the World Bank and other international organizations no longer give loans at favorable interest rates. Unfortunately, most of these steps are either unlikely to occur because states are unwilling to expose themselves to that degree of risk, or constitute a step backward to the era of diplomatic protection and power politics.

This “re-politicization” of investment disputes would be an unfortunate reversion to a time when power politics dictated the outcome of legal disputes. Drafting the ICSID Convention and setting up a network of investment treaties were ambitious and laudable attempts to rein in untoward political pressures stemming both from states hosting investments and from the investors' home states. It is not that investor-state dispute settlement has ever been entirely de-politicized. But the international investment regime attempted to limit political considerations in two essential ways: one was to “legalize” disputes by concretizing the obligations owed by host states to foreign investors and by providing a neutral forum for the resolution of legal claims; the second was to remove diplomatic protection. The legalization of disputes protected foreign investors from the vicissitudes of political decision-making in host states. Replacing diplomatic protection with investor-state arbitration established a forum in which weaker states were not at the mercy of the pressure brought to bear by politically powerful states; it also helped investors who were not politically well connected or were otherwise unable to convince their home governments to espouse their claims.

Part I will set forth briefly the structure of the investment law regime as it relates to enforcement of arbitral awards. Part II will focus on the law of sovereign immunity with respect to enforcement of arbitral awards and execution against state assets. In particular it will highlight the problems associated with the decoupling of immunity from enforcement proceedings and immunity from execution. Part III will identify and assess the viability of the options available to investors with arbitral awards against states that refuse to pay voluntarily and the steps states could take to ameliorate the problem. Part IV will discuss the serious risk of a return to the era of diplomatic protection, and the power politics that investor-state dispute settlement sought to eliminate, unless the international community finds a viable solution to award non-payment.
1. ENFORCEMENT OF INVESTOR-STATE ARBITRAL AWARDS

The two primary mechanisms an investor will use to enforce an investment arbitration award are the ICSID Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Each prescribes a different route to enforcement, but in the event of non-payment both routes lead to the municipal courts of the state parties to the Convention. This is where the distinction between waivers of sovereign immunity with respect to the arbitration itself, and waivers of immunity with respect to the execution of an award, will arise. A state's agreement to arbitrate, whether in a contractual investment dispute or under an investment treaty, is a waiver of sovereign immunity with respect to the arbitration. [FN21] It is also usually regarded as a waiver of sovereign immunity to the jurisdiction of a court that is charged with enforcing the award. [FN22] Except in rare circumstances, however, that waiver will not be deemed to extend to the immunity inherent in the state-owned assets themselves. The breadth and depth of that immunity will be governed by the municipal law on sovereign immunity in the jurisdiction where execution is sought.

A. Execution of Awards Under the ICSID Convention

The ICSID Convention requires that both states and foreign investors honor awards rendered under the Convention. Article 53 provides that awards have binding force as between the parties, and that parties to a dispute “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.” [FN23] Most investment treaties permit claims to be brought by foreign investors against host states, but do not expressly permit reciprocal claims by the state against a foreign investor on the basis of applicable treaty provisions. Awards imposing obligations on foreign investors are more likely in contractual disputes governed by the ICSID Convention. But in either case it is possible that closely linked counterclaims may go forward and lead to recovery against investors. [FN24]

The ICSID Convention also provides a compliance mechanism in the host courts of the contracting states in a trio of provisions. Article 53 requires that each state party enforce pecuniary obligations imposed by awards as if they were final judgments of the courts of that state. [FN25] ICSID Convention arbitral awards thus avoid any impediments to enforcement found in treaties or domestic laws applicable to the enforcement of foreign judgments or awards. [FN26] Theoretically, then, ICSID Convention awards are more readily enforceable than awards under the New York Convention. [FN27]

Article 54(1) refers both to the recognition of awards and to the enforcement of any pecuniary obligations contained therein. Recognition is often a step preliminary to the enforcement of an award (exequatur) and also confirms the award as res judicata. [FN28] Article 54(2) outlines the formal procedures that should govern recognition or enforcement in the state's courts. Finally, Article 54(3) provides that execution of the award is to be governed “by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.” [FN29]

In the English version of the text, Articles 54(1) and 54(2) both refer to “enforcement,” while Article 54(3) refers to “execution.” The equally authentic French and Spanish texts do not change the terms of reference between sections of Article 54. The leading authority on the ICSID Convention, Professor Christoph Schreuer, has suggested that the appropriate way to reconcile these differences under Article 33(4) of the Vienna Convention on the Law of Treaties is to conclude that the terms “execution” and “enforcement” are identical in meaning. [FN30] The result of that interpretation is that under Article 54 the obligation to recognize extends to all awards, whether they order restitution or other remedies, whereas the obligation to enforce extends only to pecu-
Article 55 is the last of the three provisions pertaining to the enforcement of ICSID Awards. It provides that “[n]othing 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.” [FN31] The drafters of the ICSID Convention were concerned that waiving immunity from execution would have *217 run into the determined opposition of developing countries and would have jeopardized the wide ratification of the Convention.”[FN32] This explicit retention of sovereign immunity with respect to execution makes it more difficult to argue that a state's agreement to arbitrate, whether found in a concession contract or in an investment treaty, should be read to imply a waiver of immunity with respect to execution.

Though it gives the state the opportunity to assert an immunity claim to resist enforcement of the award as against particular assets, Article 55 has no bearing on the award's status; states have a compliance obligation under Article 53 regardless of an investor's ability to enforce that obligation as against any particular assets. [FN33]

The drafters of the ICSID Convention were not especially concerned that Article 55 would prove an impediment for investors to collect monies due them because they did not expect states to fail to abide by their obligations. [FN34] In fact, the original motivation for providing an explicit mechanism for the enforcement of awards was to ensure that states would be able to recover against investors who might be loath to pay awards rendered against them.

The result is that the holder of an unpaid ICSID Convention award can seek enforcement in the courts of any ICSID Convention country, but its ability to recover will be limited by municipal laws on sovereign immunity.

B. Execution of Awards Under the New York Convention

In non-ICSID Convention cases, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is likely to govern enforcement of investor-state arbitral awards. The New York Convention is fundamental to the success of international arbitration. [FN35] It is a “double” convention which establishes a uniform regime for the enforcement of agreements to arbitrate as well as the enforcement of ensuing arbitral awards. Unlike the ICSID Convention, the New York Convention was designed primarily to permit the enforcement of arbitral awards in arbitrations between *218 private parties. [FN36] Though nothing in the Convention explicitly refers to states, there is no doubt that it permits enforcement against sovereign states. [FN37]

The New York Convention's adoption by 145 state parties means that, at least theoretically, a successful claimant with an award made in a New York Convention state has multiple places to go to seek enforcement. [FN38] In practice, however, enforcement under the Convention against a state might be uncertain due to the Convention's silence on the topic of state immunity. [FN39]

The success of the New York Convention is traced to the limited grounds on which a court may refuse enforcement of an award. [FN40] State immunity is not one of *219 them. It is clear, however, based on the negotiating history of the Convention, that the delegates did not intend to preclude an immunity-based argument in enforcement actions against states. [FN41]

Municipal state immunity law has inserted itself into the New York Convention in two ways. First, Article
III of the New York Convention provides that contracting parties “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon [i.e. the enforcing state] ....” Accordingly, municipal immunity laws have been treated as preliminary matters of procedure which claimants seeking to execute awards must overcome. [FN42] Enforcement of arbitral awards against states thus remains “firmly under the control of the country of the place of enforcement with great institutional variety, subject to local practice and culture and often inefficiency and even corruption. [FN43]

Second, state immunity law can be considered via the public policy exception in Article V(2)(b). [FN44] The argument in favor of extending the exception to encompass immunity is that the basic justifications for recognizing state immunity are effectively public policy concerns: “Either for reasons of international comity or of internal constitutional structure, it is believed that the courts should not complicate potentially sensitive foreign policy issues by ‘interfering’ to order execution against property vested in a foreign state.” [FN45]

It is not out of the question that state immunity could be raised as a defense to the enforcement of an award via other avenues as well. A state could argue that its initial agreement to arbitrate was invalid, and that the resulting award was unenforceable, due to lack of capacity on the part of the state official who authorized the initial arbitration agreement. [FN46] Any waiver of immunity in the agreement, whether implicit or explicit, would thus fail. Similar arguments could *220 be made with respect to arbitrability of the underlying dispute, or a decision going beyond the scope of the subject matter the state agreed to submit to the arbitral tribunal. While state immunity is not a necessary component of these arguments, its insertion could help to remind an enforcing court of the political considerations implicit in the enforcement of the award. [FN47]

Claimants seeking enforcement of awards under the New York Convention have argued, with a mixed degree of success, that the agreement of a state to arbitrate found in an investment treaty or in a concession contract encompasses an implied waiver of a claim of immunity from the jurisdiction of the enforcing court and from the execution of any resulting award. [FN48] The implied waiver argument is easier under the New York Convention because it contains no explicit reservation of waiver with respect to execution, such as that found in Article 55 of the ICSID Convention. The success of both arguments, however, again depends on municipal state immunity law.

II. MUNICIPAL STATE IMMUNITY LAWS

State immunity law combines customary international law, municipal law, and to a limited extent treaty law. [FN49] In many nations state immunity law has been codified; oddly, the common-law countries have tended towards codification, while civil-law countries tend towards a case-by-case approach. [FN50] The passage of the U.S. Foreign Sovereign Immunities Act of 1976 started the trend towards codification. [FN51] The United Kingdom, [FN52] Australia, [FN53] and others followed. There are also two international conventions on immunity, only one of which is in force. The European Convention on State Immunity has been adopted by eight countries and entered into force in 1976. [FN54] The U.N. Convention on Jurisdictional *221 Immunities of States and Their Property was adopted by the General Assembly on December 2, 2004, but has not entered into force. [FN55]

Although they are informed by customary international law on state immunity, municipal immunity practices vary. Even countries with broadly similar approaches to state immunity, such as Australia and the United Kingdom, nonetheless differ in detail. [FN56] This essay is not the place to undertake a detailed examination of the various state immunity practices. [FN57] Rather, it examines some of the most common approaches to execution
immunity to illustrate the obstacles state immunity poses to claimants in investment cases brought under the IC-SID and New York Conventions.

**A. Establishing Jurisdiction Over States for Enforcement Purposes**

The starting assumption is that foreign states are immune from the jurisdiction of national courts absent waiver or other acts giving rise to jurisdiction, such as engaging in commercial activity. Article 54 of the ICSID Convention effectively waives a state's jurisdictional immunity for recognition proceedings. [FN58] The New York Convention, on the other hand, does not include a similar provision. This silence caused several hiccups along the way as different courts adopted competing theories as to when and whether states, by agreeing to arbitrate a dispute, had waived jurisdictional immunity in subsequent New York Convention enforcement proceedings.

It is now widely, though not universally, accepted that a state's agreement to arbitrate in a forum leading to a New York Convention award constitutes a waiver of immunity for jurisdictional purposes in any enforcement action. [FN59] This was the approach taken by the U.S. Foreign Sovereign Immunities Act (“FSIA”) after different U.S. courts had decided cases in inconsistent ways. [FN60] Prior to 1988, courts *222 had differed over whether states that had agreed to arbitration had concomitantly waived immunity for enforcement of any award rendered by the arbitral tribunal. In 1988 the FSIA was amended to include an explicit exception to immunity for cases brought either to enforce an agreement to arbitrate, 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, [or] (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 ....” [FN61] This provision was quite clearly meant to permit enforcement of awards under the New York Convention and the Inter-American Convention on International Commercial Arbitration “by clarifying that a foreign state's agreement to submit a dispute to international commercial arbitration amounts to a waiver of sovereign immunity in any suit to enforce arbitral awards relating to such agreements.” [FN62]

This is the approach taken by the U.N. State Immunity Convention as well. The Convention contains an arbitration exception providing that written agreements to arbitrate effectuate waivers of immunity in court proceedings supporting the arbitration, including enforcement measures, so long as the arbitration agreement relates to a “commercial transaction.” [FN63] The Convention's drafters included in the understanding annexed to the Convention their view that “[t]he expression ‘commercial transaction’ includes investment matters.” [FN64]

**B. Establishing Jurisdiction Over State Assets**

A waiver of jurisdictional immunity is not usually interpreted as extending to execution immunity. Thus, even if a municipal court will assert jurisdiction over the respondent state in the enforcement proceeding, most municipal immunity laws will regard a state's assets as having their own separate immunity. Both the European and the U.N. Conventions on Immunity follow the custom of distinguishing between immunity from jurisdiction and immunity from execution. [FN65]

*223 Executing against a state's assets is commonly possible in one of three ways. First, an investor can seek execution against a state's property if he can demonstrate a waiver of immunity with respect to execution. [FN66] Second, a variation of an explicit waiver of immunity involves a state's having earmarked certain assets
to satisfy any eventual award. Third, in the absence of any waiver or earmarking, an investor must locate a state's commercial assets. Even then laws might impose additional limitations. For example, in the United States the FSIA requires that the property be "used for a commercial activity in the United States." [FN67]

Different municipal laws will sometimes add additional conditions, such as requiring an explicit and/or written waiver of execution immunity, and limitations, such as expanding the list of sovereign properties that are never reachable. In the United States, the FSIA permits execution only against property that is used for a commercial activity, even if a state has waived execution immunity. [FN68]

1. Waiver of Execution Immunity

The New York Convention says nothing about a state's waiver of execution immunity. Any waiver must be found elsewhere. Article 55 of the ICSID Convention, on the other hand, says explicitly that agreeing to arbitrate under the Convention does not constitute a waiver of execution immunity. Yet that language does not preclude a state from making that waiver elsewhere, for example in an investment treaty or in a concession contract. Most investment treaties, however, do not contain waivers of execution immunity. A victorious investor is thus left to argue that implicit in the investment treaty is a waiver of execution immunity. Such an argument would be an uphill battle given the well-entrenched nature of execution immunity in customary international law. [FN69] The *224 success of an implied waiver argument will depend on the municipal state immunity law in the jurisdiction where the victor seeks to enforce the award.

A few states have accepted, with some limitations, that a state's agreement to arbitrate in a New York Convention state means a state has waived both jurisdictional immunity and execution immunity. Switzerland has been one jurisdiction hospitable to this argument. Generally, however, Switzerland requires that there be a connection between the assets and the subject matter of the dispute, though it is not clear that this connection is required with respect to New York Convention awards. [FN70] Moreover, it appears that the assets could not be devoted to clearly sovereign purposes.

Another possibility is that an agreement to arbitrate under a specific set of rules constitutes waiver of execution immunity for purposes of enforcement under the New York Convention. This was the case in an award rendered under the ICC Rules and enforced in France. The Court of Cassation held that by agreeing to arbitrate under the ICC Rules, which provided "les parties s'engagent à executer sans délai la sentence à intervenir et renoncent à toute voies de recours auxquelles elles peuvent renoncer," [FN71] Qatar had impliedly waived immunity from execution. [FN72] This ruling seems to have overturned a line of cases requiring an explicit waiver of execution immunity, at least in the context of ICC arbitration. [FN73]

As far as execution immunity is concerned, neither of these approaches is widely accepted and practice is far from uniform. Agreements to arbitrate under investment treaties have not so far led to different results than agreements to arbitrate in concession contracts. If a court is reluctant to find an implied waiver of execution immunity in a state contract, where there is a specific object of dispute in mind, it is likely to be even more reluctant to find an implied waiver of immunity from execution in an investment treaty, under which a state undertook to arbitrate a non-specific class of disputes giving rise to unknown amounts of liability.

*225 One could nonetheless argue that guarding execution immunity is inconsistent with the whole structure of the international investment regime. Yet the principle of execution immunity is so firmly entrenched in state practice that the argument of an implicit waiver of it is unlikely to prevail. Professor Sompong Sucharitkul, the
Special Rapporteur for the International Law Commission's project on the codification of the law of state immunity, has described state immunity from execution as “the last fortress, the last bastion of State immunity.” [FN74] It seems unlikely that states would have dispensed with that “last bastion” without having made clear their intent to do so.

2. Commercial Assets

The restrictive theory of immunity -- that sovereigns are only immune for their activities quaque sovereign, and not for their activities qua commercial actor -- is fairly widely accepted and is increasingly applied to execution immunity. [FN75] The availability of commercial assets to satisfy claims against states is a welcome alternative for investors to pursue. [FN76] Yet it will not always be easy for investors to proceed against a state's commercial assets.

First, an investor has to locate the state-owned assets. Second, she will have to show that the assets, or some portion of them, are not entitled to immunity. Both steps may be difficult and may require considerable ingenuity on the part of creditors and their counsel. [FN77]

Creditors may seek property that is actually possessed by the state, or may seek an asset owned by the state but under the control of a third party. [FN78] For example, Mr. Sedelmayer succeeded in forcing the sale of a Cologne apartment complex that had been used by the KGB in the Soviet era; he fortuitously learned of the complex’s existence from Russian spy friends. [FN79] Creditors might also try to identify some debt owed by a third party to the sovereign, and seek to attach payments as they come due. [FN80] Mr. Sedelmayer attempted to attach in Germany the overflight fees owed by Lufthansa to the Russian government, but a German court held the payments to be made for sovereign, rather than commercial, purposes and thus unavailable. [FN81]

Locating the property alone is insufficient to ensure the creditor will secure funds to satisfy his award; the property must not be used for governmental functions. There is widespread agreement that certain types of property can never be considered commercial. Examples include property held for its own account by a foreign central bank or monetary authority or property that is intended to be used in connection with a military activity. [FN82] Difficulties arise, however, when the funds result from apparently commercial activity that the state engages in for a public purpose. The distinction between acts jure imperii and jure gestionis has bedeviled courts seeking to apply the restrictive theory of immunity for jurisdictional purposes, and the status of the proceeds derived from, or intended to be used for, those activities is no different. For example, are the monies received by the government for the exploitation of natural resources governmental or commercial? In many states the government retains sole ownership over natural resources and controlling their exploitation is seen as a quintessential governmental act. Yet entering into a contractual relationship to exchange goods for money is also a quintessential commercial transaction.

One approach to resolving this problem is to look at the “nature” of the act, rather than its “purpose.” Thus, if the government is acting not as the regulator of the market, but “in the manner of a private player within it,” the acts are commercial. [FN83] The focus is on whether the transaction is one that could be engaged in by a private entity. The Australian Act appears to preclude reference to the “ultimate purpose” of the property, so that property apparently vacant or not in use shall be considered to be used for commercial purposes. [FN84] The U.K. State Immunity Act specifically provides that a commercial transaction includes any contract for the supply of goods or services, whether or not the contracts enable a foreign state to exercise its authority in an undeniably sovereign manner. [FN85] Thus, the revenues received by Chad for selling its oil and held by a bank in
London were not immune from attachment to pay an award won by a private party in an ICC arbitration. [FN86] Even courts that focus on the nature of the act, however, have given some consideration to the purpose in assorted cases. [FN87]

The U.N. State Immunity Convention has compromised between a nature and purpose approach. [FN88] After stating that a “commercial transaction” means, *inter alia*, “any commercial contract or transaction for the sale of goods or supply of services,” the Convention provides:

> In determining whether a contract or transaction is a “commercial transaction” under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction. [FN89]

This hybrid approach provides less than clear direction to state parties and courts seeking to implement the Convention. Moreover, the referral to existing municipal practice virtually assures a continued divergence in approach. While the potential for divergent interpretation represents a missed opportunity for the clarity and consistency of application that one might expect would be goals of an international Convention, the reference to municipal law achieved the compromise necessary to finalize the Convention and permits the continued development of an *228* area about which there is no clear consensus. [FN90] From that perspective it is likely beneficial to investors seeking the enforcement of their arbitral awards as they will have more opportunity to find jurisdictions that interpret “commercial” in an expansive way.

Bank accounts are a frequently sought-after asset, but whether any or all of the funds in a particular account are “commercial” or “non-governmental” is not always easy to discern. Embassy accounts exclusively dedicated to running the embassy are generally immune from execution. [FN91] Often, however, the assets will be commingled, with some dedicated to clearly sovereign functions and others to commercial activity. Proving the mixed nature of the account will be difficult. Again, states have taken divergent approaches to this situation. If any of the assets are sovereign they might all be treated as sovereign. [FN92] Second, if the account is not denominated as intended to serve a public purpose, it might be attachable, even in its entirety. [FN93] Third, those assets that are commercial might be attachable, whereas those assets that are governmental are protected by immunity. [FN94]

The hurdle in many cases will be proving that some of the assets are properly classified as commercial. In many cases the burden of proving that some of the funds are used for commercial purposes lies on the party seeking execution of an award. [FN95] In keeping with imposing the burden of proving assets are not entitled to immunity, a U.S. appellate court has recently confirmed that a court may raise *sua sponte* the question of immunity. [FN96] Some states provide a low evidentiary standard for the defendant state to satisfy. The U.K. State Immunity Act, for example, provides that the head of a state’s diplomatic mission has the authority to give “his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes ...” and that the certificate “shall be accepted as sufficient evidence of that fact unless the contrary is proved.” [FN97] It is difficult to see what evidence a creditor might amass to contradict this testimony when presumably much of the information is under the control of the state and might or might not be susceptible to discovery. [FN98]

### III. SOLUTIONS -- OR MORE PROBLEMS?

If execution immunity continues to be a problem, what changes might be in order to address it? Potential solutions range from changing international law to encouraging investors to seek protections as they negotiate concession contracts. Unfortunately, solutions involving amendments to international law are unlikely given the entrenched nature of execution immunity and the general trend towards retrenchment in investment agreements. Legal solutions in municipal courts are slightly more likely. Yet execution immunity is recognized in a large number of states. If and when states implement the U.N. State Immunity Convention, the distinction between waivers of jurisdictional immunity and execution immunity will be solidified. Small steps, such as reversing the burden of proof with respect to the commercial nature of state assets, are still likely to be achievable. Negotiation-driven solutions require the states which have retained execution immunity to agree to waive it; they are unlikely to do so. Even a state willing to abide by its obligations might well wish to have control over which assets it uses to satisfy the debt. This leaves political resolution as a likely approach.

A. Changes in International Law

The most effective response to the problem of execution immunity involves changes to the applicable legal regimes. One response could be to include waivers of execution immunity in investment treaties. This would very likely be hard to accomplish, given what seems to be a narrowing trend in the obligations found in newly negotiated BITs. A more limited but nonetheless effective route would be to incorporate in an investment treaty a provision requiring a state to earmark certain assets for the payment of an award or lose execution immunity. A variation on this approach would be to require the posting of security for an award once a dispute had commenced. Achieving a state's agreement on that score is also unlikely in the current climate.

A second possibility would be to draft a model law on the execution of awards, as suggested by Lady Hazel Fox, or even a convention on the enforcement of arbitral awards against states. Strictly speaking, a Model Law would be implemented by states as part of their municipal law, though the impetus for the adoption would come from the international community, whereas a convention would indeed be an international instrument. Such instruments would likely still limit the ability of investors to reach “core” assets of a state, such as a central bank account, but might otherwise broaden the kinds of assets available to satisfy an award.

It seems unlikely that any such instrument will be forthcoming in the near future. The recently finalized U.N. State Immunity articles could have been the vehicle for establishing such a regime, yet they adopted the distinction between execution immunity and jurisdictional immunity and expanded the types of assets designated as governmental non-commercial property. Though it is not yet in force, the Convention was approved by the General Assembly and represents the recent agreement of a large number of states on these issues. States do not appear interested in dismantling the last bastion of state immunity.

B. Changes in Municipal Law

The variety of the municipal laws on immunity demonstrates the potential for inventive solutions to problems presented by execution immunity in the investment context. The most likely recourse comes from nuanced approaches that honor a state's interests in maintaining the inviolability of certain sovereign assets but also require states to abide by their obligations.

The most promising approach centers around municipal laws relating to commercial property. States are able
to disguise commercial assets by commingling them with sovereign assets. An embassy bank account is a good example of such an approach. Requiring that a state demonstrate that its assets are used for sovereign rather than commercial purposes, as opposed to requiring that the investor bear the opposing burden, would facilitate recovery while nonetheless respecting the inviolability of certain assets. [FN102] Shifting the burden of proof might seem a small step, but it could represent an enormous benefit to creditors who will find it difficult to establish the commercial nature of assets absent the cooperation of the state.

Another approach could be to refine and narrow the category of assets that are defined as governmental non-commercial and thus cloaked with execution immunity. This, too, could be difficult given the U.N. State Immunity Convention's enhancement of the widely accepted categories of immune assets [FN103] to include cultural heritage property and “property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.” [FN104] This is not to criticize adding those categories to the list of protected assets; [FN105] it is merely to remark on the expansive, rather than restrictive, nature of the codification of immune assets in the Convention. On the other hand, the Convention's failure to delineate specifically what constitutes a commercial transaction leaves room for the progressive development of the law in that area.

*232 A relatively unexplored procedural device could be a court's freezing of a state's sovereign assets pending the state's payment of any award in the event of persistent and continued refusals to honor awards rendered against it. The state would have time to identify the funds it wanted to use to pay but would have the incentive to do so without delay. This approach would represent a significant departure from practice, of course. The U.N. Convention did not address whether, in the event of persistent actions “in contravention of generally applicable norms of international law,” a state could be held to have implicitly waived its jurisdictional or execution immunity. [FN106] The United States has taken this approach with its terrorism exception, though this position is not uncontroversial. [FN107]

Taking a broader view of waiver is possible but also unlikely. Other courts could follow the lead of Switzerland and France in being more flexible about interpreting waivers of jurisdictional immunity to encompass waivers of execution immunity. The decisions also illustrate the limits of this approach. Switzerland's requirement that the assets be linked to the subject matter of the dispute circumscribes an otherwise expansive doctrine. For investment arbitration, it means that the approach would almost never be viable given that there might be no state property linked to an investment dispute within a state's territory. France's approach might be useful in an ICC arbitration, but would not be helpful in cases brought under rules that did not contain similar language respecting enforcement. [FN108] Moreover, several states require an explicit discrete waiver, and it is not clear that the ICC rules would satisfy that standard. And the argument will become more difficult if states begin to ratify the U.N. State Immunity Convention, which requires explicit waiver of execution immunity.

Claimants have also argued in U.S. courts, generally without success, that human rights or jus cogens norms should support an implied waiver of immunity. [FN109] Extending such arguments to refusals to pay monetary judgments rendered in favor of foreign investors is unlikely in the near (or even distant) future, but it is an intriguing idea. [FN110] Given the blatant refusals by Argentina, Kazakhstan, Russia, and Zimbabwe to honor awards, there could be a window of opportunity in state approaches to execution immunity. Courts may be more receptive to arguments regarding shifting the burden of proof regarding the proper designation of assets or taking an expansive view of what constitutes a “commercial” asset when confronted with examples of persistent non-payment.
*233 C. Changes in Investors’ Strategies

Investors have limited abilities to protect themselves. One of the functions of investment agreements was to protect investors from the asymmetry in their relationships with sovereign states who had the capability of changing laws or expropriating property in a manner disadvantageous to investors.

One possible strategy investors will employ if debtor states avoid their obligations in significant numbers is to shift their investments away from states viewed as risky places to invest and which are unlikely to pay in the event of a dispute. This approach would be more successful in cases where the investment is of a portable nature; less so if the investor's business involves rare or desirable natural resources. [FN111] Investors could also attempt to negotiate a higher return on investment to compensate for the risks involved. This is likely to be most successful in cases where the investor has technology or other resources that are essential to the exploitation of the assets, or when an investor has other leverage to use against the host state. One of the cables released by “Wikileaks” describes the favorable deal that Italian oil company ENI was able to negotiate with Venezuela due to the reluctance of most oil companies to do business with President Chavez and state-owned PDVSA in the aftermath of widespread nationalization of broad portions of the oil industry. [FN112]

An investor can also try to take steps to secure enforcement prior to the onset of any dispute. These steps are most useful when the investor is in a strong negotiating position and seeks to enhance the likelihood of enforcing an award prior to any dispute arising. One strategy is to include in concession contracts provisions regarding waiver of immunity from execution for any dispute arising from the concession contract. An example of a waiver of immunity of a state enterprise can be found in the Nam Theun 2 Hydro Electric Power Project in Laos: “The Company irrevocably and unconditionally ... waives all rights of immunity in respect of it or its assets.” [FN113] Yet states are likely to be reluctant to agree to those waivers. As competition for business proliferates, companies have *234 less leverage to try to gain waivers of immunity. [FN114] In addition, states would be extremely unlikely to agree to waive execution immunity for any investment treaty claims related to the concession contract.

Another possibility would be to obtain insurance. Insurance possibilities fall into two categories: political risk insurance and BIT award insurance. Political risk insurance involves insuring against the loss of the property due to the actions of the host state. [FN115] Political risk insurance has usually guarded against asset appropriation or breach of contract. [FN116] If a government’s interference with the investment falls short of an outright taking the insurance company has no obligation. [FN117] Moreover, some insurance policies, such as those offered by the World Bank’s Multilateral Investment Guarantee Agency and the United States’ Overseas Private Investment Corporation, permits recovery of only the book value of the investment, rather than going concern value, in the event of an expropriation. [FN118] Availability of the insurance might be limited by the insurer's view of the potential for liability.

Insurance is also available for the non-payment of a BIT award. In some ways BIT award insurance is superior to political risk insurance in that it covers an award rendered due to a violation of any BIT provision, rather than just an outright expropriation. [FN119] It covers the entire value of the BIT award, though the insured typically retains an obligation to cover ten percent of the loss. [FN120] It is usually cheaper than expropriation coverage as well. [FN121] Yet the market capacity is typically limited to $1 billion to $1.5 billion in any one country, and often tribunals award investors amounts significantly less than the market value of their investment. [FN122] Moreover, it might be difficult to obtain coverage of acts, such as denials of justice, which thwart the arbitration process. [FN123] BIT coverage needs to *235 be obtained early. The farther the dispute has pro-
gressed the more difficult and expensive it will be to obtain.

Once a dispute has arisen, an investor could try to get interim measures of protection pending enforcement, either from the tribunal or from a competent court should they be available. [FN124] The U.N. Convention would only permit prejudgment measures of constraint if a state consents or has earmarked particular property. [FN125] Arbitral tribunals do not have the authority to bind third parties, such as banks. [FN126] In an ICSID case a municipal court has no authority to order interim measures of protection. [FN127] Even in a non-ICSID case, however, a significant difficulty will likely be finding commercial assets against which an injunction could issue, as in most states pre-judgment attachments, assuming they are available, can issue only against commercial assets. [FN128] Obtaining an order early might help to prevent the disguising of commercial assets or their transfer to a jurisdiction more hostile to interim measures of protection.

A state's assets might also be subject to conservatory measures while any enforcement measure or set-aside proceeding is pending. A Stockholm City Court, for example, has ordered the seizure of Russian commercial property to ensure that it not be removed from the jurisdiction in order to avoid the payment of debts that are the subject of enforcement proceedings. [FN129]

An investor seeking the municipal confirmation or enforcement of an award can seek to have assets attached while the enforcement proceedings are pending in order to forestall the transfer of assets out of the jurisdiction. [FN130] In the event a *236 losing state seeks set-aside in the court of the place of arbitration or annulment in an ICSID Convention proceeding, it will commonly ask the appropriate tribunal to stay execution of the judgment pending the outcome of the challenge to the award. [FN131] It is not uncommon for the stay to be granted. [FN132] In appropriate circumstances, such as when the state has announced its intention not to pay an award or the investor has already been waiting multiple years to have its dispute resolved, the investor might convince the tribunal to grant the stay on the condition that a respondent state post security in order to ensure payment once the judgment becomes final and the stay is lifted. [FN133]

Investors could even steer away from investment arbitration as a way to resolve investment disputes. Cases are expensive to bring, and if an ex ante risk analysis demonstrates that in the event of a dispute an investor is likely to have difficulty securing payment of any eventual victory, one could see a return to local courts or greater refuge in political risk insurance, as described above. This is perhaps why Christoph Schreuer described execution immunity as the “Achilles' heel of the [ICSID] Convention.” [FN134]

None of these options are altogether palatable. One of the reasons treaties include investor-state dispute settlement is that local court options are not seen as viable dispensers of justice. [FN135] Insurance, whether guarding against the political action itself or against non-payment of an award, has limitations, though the products available are increasing in sophistication and desirability. It is nonetheless expensive and, depending on the perceived risk in the relevant state, might be prohibitively so.

Finally, investors could seek espousal or other political assistance from their home states, as described below.

D. Home State Assistance

Though investor-state dispute settlement has largely replaced diplomatic protection, a government could still take up a claim on behalf of its national for a *237 state's failure to pay. Article 27 of the ICSID Convention ex-
plicitly lifts the bar to espousal that remained in force during the investor's pursuit of her ICSID arbitration. [FN136] A reversion to diplomatic protection would be available in non-ICSID Convention cases as well. [FN137] The ability of a state to exercise diplomatic protection does not mean it will choose to do so.

Individual states may also attempt to influence a foreign government's actions. For example, in the United States, the 1961 Foreign Aid Act (modified by the 1994 Helms Amendment), limits foreign aid to any country that has “nationalized or expropriated the property of any United States person” and has not “provided adequate and effective compensation ..., as required by international law.” [FN138] The suspension of aid will not occur so long as the expropriating country has either compensated the U.S. investor or has agreed to submit the dispute to arbitration under the ICSID Convention or other comparable agreement. [FN139] If, however, the claim has not been settled within three years of the date on which the claim was filed (or from other triggering dates depending on the circumstances), the prohibition on funding resumes. [FN140] In addition, the Act provides that the President “shall instruct the United States Executive Directors of each multilateral development bank and international financial institution to vote against any loan or other utilization of the funds of such bank or institution for the benefit of any country” that is subject to the suspension of U.S. foreign aid under the section's provisions. [FN141]

*238 Recent reports suggest that the United States is considering revoking Argentina's eligibility to have some of its export products qualify for duty-free status under the Generalized System of Preferences. Two dissatisfied investors have petitioned the Office of the United States Trade Representative to consider Argentina's non-payment of awards in deciding whether or not to renew Argentina's GSP status. [FN142] This proposal will not be without opponents. Representatives of the FMC Corporation oppose the revocation of GSP status because of the adverse effect it would have on its ability to sell at favorable prices the lithium it imports from Argentina. [FN143] The U.S. government will have to weigh competing demands from different constituencies in its decision about GSP status. The final calculus will very likely depend on political rather than legal considerations.

E. Multilateral Pressure

A criticism frequently levied at international law is that it lacks enforcement mechanisms available to punish scofflaws or compel a state to perform its obligations. Sanctions, and in particular economic sanctions, are one technique the international community uses to try to persuade states to honor their obligations. Sanctions are more effective and are viewed as more legitimate when a larger number of states participate in imposing them.

Intergovernmental organizations are potential sources of multilateral pressure. Non-payment of investor-state arbitral awards is unlikely to be viewed as an international crisis severe enough to warrant Security Council attention or the widespread imposition of sanctions. Yet the international community should consider other avenues through which they could place pressure on non-paying states. One possibility might be the International Monetary Fund taking account of non-payment in its assessment of the credit-worthiness of recalcitrant states. Regional lending bodies such as the Inter-American Development Bank or the European Bank of Reconstruction and Development could do likewise.

Another source of pressure in an ICSID Convention case might be found in ICSID's connection to the World Bank. Although not a strategy under the control of the investor, the Secretary General of ICSID (who until late 2008 was also General Counsel of the Bank itself) can communicate officially with non-paying parties to remind them of “their international obligation to respect the result of a process to which they have given their consent.” [FN144]
IV. A RE-POLITICIZATION OF INVESTMENT DISPUTES?

The preceding section is disheartening. A very likely response to the nonpayment of awards by foreign states is a return to diplomatic protection, whether in the guise of espousal or other pressure a home state might be able to put on a host state. These tactics would represent a re-politicization of investment disputes with all of the attendant disadvantages.

In the absence of investor-state dispute settlement, a foreign investor would have two options to seek recovery in the event a host state expropriated his property or otherwise interfered with him or his investment. The first was to seek relief in the local courts or administrative tribunals of the host state. In the past, investors seeking such redress often ran into problems, such as sovereign immunity or a non-independent judiciary that could be influenced by the prospect of negative repercussions should a judge decide in favor of the foreign investor. If domestic courts were functionally unavailable, a foreign investor's only remaining hope was to convince his home government to espouse his claim. For investors from powerful states this could be a powerful weapon indeed, particularly when a government made fundamental changes to its policies towards foreign investment. [FN145] In extreme cases this could involve military intervention whether in the form of “gunboat diplomacy” or even full-fledged attack. [FN146] Abuses of diplomatic protection gave rise to complaints from less powerful states, particularly those in Latin America, that foreign investors should not be entitled to such special privileges. [FN147] Yet even powerful states would prove reluctant to intervene on behalf of an investor should higher political considerations dictate. For example, a state interested in maintaining a close relationship with another to further military goals, such as overflight permission or the lease of property on which to construct a naval base, might not risk undermining those foreign policy goals in order to assist an investor to settle a financial dispute. For a small investor lacking political clout in a one-off dispute, the hurdle to obtain espousal could be very high indeed. [FN148]

It is easy to see why the establishment of ICSID and the negotiation of a network of investment treaties providing protections for foreign investors seemed *240 a better alternative than relying on the uncertainties of diplomatic protection. Dispute settlement in a neutral forum offered investors the possibility of a fair hearing before a tribunal unencumbered by domestic political considerations and able to focus on the legal issues in the dispute. It also offered them the possibility of submitting a claim without convincing their home governments to espouse the claim and to control the arbitration. Host states with less political power saw neutral dispute settlement as a better alternative than submitting to the strong-arm tactics of a powerful home state. [FN149]

Yet the goal of de-politicization has always been somewhat aspirational. Insofar as removing the requirement of espousal is concerned, it is focused primarily on one political player -- the home state of the investor. Removing the home state releases the host state from the political pressure a home state can apply, and it releases the investor from the need to convince his home state that his investment dispute is worth spending political capital to settle. But other political considerations remain. First, in the event a dispute arises from a concession contract, the parties involved will in many cases have an eye to the future and the possibility of working together again. A host government may be able to pressure an investor to renegotiate a concession agreement with terms it views as too favorable to the investor with the promise of future agreements. Or, notwithstanding the availability of a neutral forum in which to decide a dispute with respect to an existing contract, an investor may decide that submitting a claim would effectively destroy the possibility of working with, or even in, the state in the future. Second, pressures within the host state to take politically expedient action, such as the nationalization of key natural resources, do not evaporate with the signing of the ICSID Convention or the ratification of an investment treaty. If, to withstand those pressures, a government “blames” an international agreement for limiting
its powers, dissatisfaction shifts to the international agreement itself. This results in close scrutiny of the agreement and the process it establishes -- investor-state dispute settlement -- to settle the dispute. [FN150]

Reinserting diplomatic protection at the back end of an investment arbitration is not a desirable response to failure to pay. De-politicization of investment disputes has always been a chimerical goal, but the one political player to some degree neutralized by the establishment of investor-state dispute settlement is the investor's home state. If the best strategy for an investor seeking payment of an award is to seek the assistance of his home state, one of the key achievements of investor-state arbitrations will have been lost. Supplementing the legal resolution of disputes with a legal means of ensuring payments of awards is essential to avoid a reversion to apolitical form of dispute settlement.

*241 V. CONCLUSION

Execution immunity is a part of the international investment regime, notwithstanding the apparent inconsistency of permitting claimants to submit claims directly against host states without providing any guarantees that successful claims will be paid. One solution to that problem is to interpret agreements to arbitrate as incorporating broad waivers of execution immunity as well as jurisdictional immunity. This solution, however, is in tension with practice under both municipal and international law that requires explicit waivers of execution immunity. Gentler solutions include using procedural devices such as shifting burden of proof regarding the nature of state assets to the owning state, thereby making it easier for courts to enforce payments to the holders of arbitral awards rendered against sovereign states. The international community, too, could exert more pressure on recalcitrant states to encourage payment.

The instances in which states have refused to pay are still rare. But there is significant danger that they will become more widespread, particularly if it seems that non-payers suffer few if any sanctions as a result of their disavowal of their international commitments. States that have willingly paid their awards to honor the system might well re-think their approach. [FN151] Knowledge that a state might successfully resist execution for months, or even years, could cause investors to accede to settlement offers drastically below the amount won in the arbitration. Absent strengthening the mechanisms for enforcing awards or designing multilateral sanctions against states who refuse to pay, there is a significant danger that there will be a reversion to the political expedient of diplomatic protection that the international investment regime was designed to replace. Investors will again be subject to political considerations before their home states will consider whether to press for an award to be honored. Assuming they can get espousal, investors from powerful states will be better placed to achieve victory than investors from less powerful states. And, indeed, the incentive of investors to seek a “legal” solution to their disputes will be diminished if they have to seek espousal at the end of their arbitral process. This re-politicization of investment arbitration would be an unfortunate and reversionary step back to the era of power politics and gunboat diplomacy.

[FNa1]. Professor of Law & Martin Luther King, Jr. Scholar, University of California, Davis, School of Law. J.D. Yale Law School; M.A. New York University; B.A. University of Nebraska. I am grateful to Seán Duggan, Toni Henneke, Meg Kinnear, John Major & Tom Sikora, and to participants in the PCA/Houston International Arbitration Club/University of Texas Symposium: “Arbitration and National Courts: Conflict and Cooperation” (May 13-14, 2010), for helpful suggestions and comments. Any errors, of course, remain my own.


[FN3]. A persevering investor might eventually be able to find and secure the monies coming to him. Franz Sedelmayer, who won an investment treaty arbitration against Russia in 1998, has spent most of the last 12 years seeking to locate Russian commercial assets against which the award could be executed. For a description of the Sedelmayer saga, see Bjorklund, *State Immunity*, supra note 1, at 314-16.

[FN4]. CHRISTOPH SCHREUER, STATE IMMUNITY: SOME RECENT DEVELOPMENTS 125 (1988) [hereinafter SCHREUER, STATE IMMUNITY]. As Professor Schreuer has noted: “[A]llowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution may put them into the doubly frustrating position of having been lured into expensive and seemingly successful lawsuits only to be left with an unenforceable judgment plus legal costs.” See also Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT'L & COMP. L. 21 (2001) (“[I]t is preposterous that a private party, after having put all efforts into arbitration against a state and obtaining judgment or leave to enforce an award, finds himself (or itself) unable to collect money to which that party is entitled”).


[FN7]. ICSID Convention, supra note 5, Art. 55.


[FN9]. See the text accompanying notes 69-74, infra.


[FN11]. This is a reflection of the inroads made by the restrictive theory of immunity in the jurisdictional context. Fox, STATE IMMUNITY, supra note 10, at 604-609.


[FN23]. ICSID Convention, supra note 5, Art. 53(1).


[FN25]. ICSID Convention, supra note 5, Art. 54(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”).

[FN26]. CHRISTOPH SCHREUER, THE ICSID CONVENTION 1100-01 (2001) [hereinafter SCHREUER, IC-
SID CONVENTION).

[FN27]. The New York Convention could still apply to an ICSID Convention award when enforcement is sought in a non-ICSID Convention state. The New York Convention also applies to awards rendered under the ICSID Additional Facility Rules, which are not Convention awards.


[FN29]. ICSID Convention, supra note 5, Art. 54(3).


[FN31]. ICSID Convention, supra note 5, Article 55.

[FN32]. SCHREUER, ICSID CONVENTION, supra note 26, at 1145 (citing Aron Broches, The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 RECUEIL DES COURS 331, 403 (1972)); Delaume, supra note 1, at 800 (noting that the solution “is to be regretted” but was unavoidable due to the “lack of consensus on the meaning and scope of immunity from execution”).

[FN33]. Stanimir Alexandrov, Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, in INTERNATIONAL INVESTMENT LAW FOR THE TWENTY-FIRST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER, supra note 1, at 322; SCHREUER, ICSID CONVENTION, supra note 26, at 1087.

[FN34]. SCHREUER, ICSID CONVENTION, supra note 26, at 1087-88, 1142.


[FN37]. Id. Some states, including the United States, specified that they would only apply the Convention to differences arising out of legal relationships “which are considered as commercial under the national law of the State making such declaration.” New York Convention, supra note 6, Art. 1(3). Thus, U.S. investment agreements contain provisions directing that awards made under them should be deemed to arise out of a “commercial” relationship for purposes of enforcement under the New York Convention. See, e.g., NAFTA, Art. 1136 (“A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention and Article 1 of the InterAmerican Convention”). North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 298.

[FN38]. The number 145 was accurate as of October 27, 2010. The parties are listed at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

[FN39]. Hazel Fox, State Immunity and the New York Convention, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN

[FN40]. Article V provides in Section 1 that recognition and enforcement of the award may be refused only if the party challenging the awards offers proof that

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration ...; or

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

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Section 2 provides that recognition and enforcement may be refused if

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, supra note 6, Art. V.


[FN43]. Id. at 832.


[FN45]. TOOPE, supra note 44, at 141.

[FN46]. A similar argument -- that the requisite consent to investment arbitration was never secured notwithstanding repeated approvals of the investment -- has been made to a New York court in a proceeding to enforce an award against Thailand under the Germany-Thailand BIT. Walter Bau v. Thailand, S.D.N.Y Case #10-cv-2729, as reported by Luke Eric Peterson, *Thailand asks U.S. Court to dismiss investor's efforts to confirm and enforce $40 million BIT awards; government says arbitrators erred in permitting arbitration*, 17:3 INVESTMENT ARBITRATION REPORTER (Nov. 4, 2010) (reporting Thailand's defense).
In discussing ICSID Convention arbitrations, Professor Schreuer has suggested that many investment disputes would allege wrongdoing by states in acts taken in their sovereign capacity. The governmental character of those acts would permit states to claim sovereign immunity from the jurisdiction of national courts. SCHREUER, ICSID CONVENTION, supra note 26, at 1148-49.


SCHREUER, STATE IMMUNITY, supra note 4, at 4.

Id. See also James Crawford, Australian Legislation on Foreign State Immunity, in JAMES CRAWFORD, INTERNATIONAL LAW AS AN OPEN SYSTEM 453 (2002) (listing other states with sovereign immunity codifications, including South Africa, Canada, and Singapore) [hereinafter Crawford, Australian Legislation].


State Immunity Act 1978 (c. 33) (as amended) [hereinafter U.K. State Immunity Act].


European Convention on State Immunity, May 16, 1972, ETS No. 74 [hereinafter European State Immunity Convention]. This number was accurate as of November 6, 2010.


Crawford, Australian Legislation, supra note 50, at 458, 460, 462.

For an excellent overview of recent state immunity practice in Europe, see August Reinisch, European Court Practice Concerning State Immunity from Enforcement Measures, 17 EUROPEAN J. INTL L. 803 (2006) [hereinafter Reinisch, European Court Practice]. For a general survey of immunity practices, see DHISADEE CHAMLONGRASDR, FOREIGN STATE IMMUNITY AND ARBITRATION (2007). I am also grateful to Toni Henneke for her exhaustive survey of the variations in immunity practice in multiple jurisdictions, which she presented at the PCA/Houston International Arbitration Club/University of Texas Symposium: Arbitration and National Courts: Conflict and Cooperation (May 13-14, 2010).

SCHREUER, ICSID CONVENTION, supra note 26, at 1115-21.

PETROCHILOS, supra note 21, at 291-92.


Indeed, waiver is the only route to enforcement under the European Convention. European State Immunity Convention, *supra* note 54, Art. 23.

28 U.S.C. § 1610(a). Courts are split about whether this requires that a state itself intended to use the funds for commercial activity in the United States, or whether it merely means that the funds must have been paid to the state in conjunction with commercial activity, including one engaged in by a third party. George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT’L & COMP. L. 665, 681 (2008). The U.K. State Immunity Act requires only that the property be “for the time being in use or intended for use for commercial purposes.” U.K. State Immunity Act, *supra* note 52, § 13(4).


Schneider & Knoll, *supra* note 2, at 43-45.

The current version of Article 28 remains the same: “By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.” ICC RULES OF ARBITRATION (in force as from January 1, 1998), Rule 28(6), available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf (last visited Nov. 12, 2010).


2004). Annacker and Greig note that this ruling is inconsistent with the requirements of the U.N. State Immunity Convention, which would require express consent to immunity from execution.

[FN74] Sompong Sucharitkul, Commentary to ILC Draft Articles, Article 18, ¶ 1, C/AN.4/L/452/Add.3.

[FN75] Reinisch, European Court Practice, supra note 57, at 813-17. In addition, different and often less restrictive rules will apply to state instrumentalities. Crawford, Execution, supra note 69, at 866. For example, under the U.S. FSIA, in the event a state instrumentality engages in a non-immune activity, all property belonging to that instrumentality will be subject to execution. 28 U.S.C. § 1610(b)(2).

[FN76] See Delaume, supra note 1, at 797 (noting new trend (as of 1983) in France towards permitting execution against commercial property provided claimants could meet the burden of proof to show that the property was indeed commercial) & 800 (noting general trend towards restrictive doctrine of immunity in the enforcement context in countries home to the world’s leading financial centers); A.F.M. Maniruzzaman, State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends, 60:3 DISPUTE RESOLUTION J. 1, 4 (Aug-Oct. 1985); Crawford, Execution, supra note 69, at 854-55.


[FN79] See, e.g., Bjorklund, State Immunity, supra note 1, at 315-16.

[FN80] Id. at 681.


[FN82] 28 U.S.C. § 1611(b). In order to fall within the military exception, the property must be used or be intended for use in connection with a military activity and be of a military character or under the control of a military authority. Id. It is interesting to note that the act of purchasing military equipment has been held to be commercial for purposes of asserting jurisdiction. Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 385 F.3d 1206, 1219-20 (9th Cir. 2004), rev’d on other grounds, 546 U.S. 450 (2006).

[FN83] Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992). “Conduct that has been held to constitute commercial activity in the United States includes a State’s issuance of bonds to U.S. investors, a national space agency’s obtaining and assertion of U.S. patents, a national airline’s sale of tickets to U.S. passengers, a defense ministry’s purchase of military supplies, a State art gallery’s publication of books and advertising of exhibitions in the United States, a State commission’s entry into a contract with a U.S. company for the sale of an aircraft, and a State instrumentality’s sale of spices to, and purchase of supplies from, U.S. companies.” Foster, supra note 67, at 674-75 (internal citations omitted). See also Maniruzzaman, supra note 76. at 3 & n. 21.


[FN86]. Orascom Telecom Holding S.A.E. v. Republic of Chad, [2008] App. L.R. 07/28, ¶¶ 20-25. Yet in an earlier case U.K. courts were less certain that a joint venture agreement relating to the exploitation of oil reserves within the territory of a sovereign state was a “commercial” transaction. The judge in the court of first instance had concluded the transaction was commercial, yet the appellate court found the question to be much closer. Svenska Petroleum Exploration A.B. v. Lithuania, [2006] E.W.C.A. Civ. 1529. The court ultimately disposed of the case without reaching a conclusion. Id. ¶ 133.

[FN87]. For a description of Canadian practice, see Bachand, supra note 64, at 65-67.

[FN88]. Stewart, supra note 55, at 199 (describing the compromise leading to the adoption of Article 2(2)).

[FN89]. U.N. State Immunity Convention, supra note 21, Art. 2(2).

[FN90]. Cf. Lady Hazel Fox, In Defence of State Immunity: Why the UN Convention on State Immunity Is Important, 55 INT'L & COMP. L. Q. 399, 400 (2006) (noting that the broad categories of commercial activity in Article 2(1) will ordinarily be sufficient to decide whether a transaction is non-immune, and that the reference to state practice should play only a residual role); Richard Gardiner, UN Convention on State Immunity: Form and Function, 55 INT'L & COMP. L. Q. 407, 408 (2006) (noting that the flexibility within the Convention permits continued development in the distinction between commercial and non-commercial transactions).

[FN91]. Reinisch, European Court Practice, supra note 57, at 828-33.

[FN92]. Id. at 830 (describing Austrian case holding that unless the creditor could prove that an embassy bank account was only used for the exercise of private functions the account was immune).

[FN93]. Crawford, Execution, supra note 69, at 863 (describing U.S. case permitting attachment of the entirety of a “mixed fund”).


[FN95]. Reinisch, European Court Practice, supra note 57, at 829 (noting crucial nature of the evidentiary rules in enabling the proper characterization of state-owned property and the general presumption in favor of immunity); Crawford, Execution, supra note 69, at 863-64. Some have suggested that this appears to be true in the case of the U.N. State Immunity Convention, which provides that no post-judgment measures of constraint may be taken unless “it has been established” that the property is in use for or intended to be used for other than government non-commercial purposes. Schneider & Knoll, supra note 2, at 346.

[FN96]. Peterson v. Islamic Republic of Iran, No. 08-17756, 2010 U.S. App. LEXIS 24709 (9th Cir. Dec. 3, 2010). The dissenting judge would have held execution immunity to be an affirmative defense waived by a state's failure to raise the issue.

Foreign states are often not required to produce documents, yet it is possible for a “robust” court to draw adverse inferences in the event of a state's failure to provide information. See Mann, supra note 85, at 59. Diplomats are, however, ordinarily immune from cross examination. Blane, supra note 94, at 504. In a recent case, the D.C. Circuit confirmed that a lower court could order discovery with respect to a state’s assets. Its ability to force compliance with the order was, however, limited. F.G. Hemisphere Assocs., LLC v. Democratic Republic of Congo, No. 10-7040, 2011 WL 871174 (D.C. Cir. Mar. 15, 2011).

A similar (and likely similarly unwelcome) idea would be to establish a sort of “judgment fund” into which states would pay, and out of which awards rendered against them would be satisfied. For a description of such a mechanism, see Foster, supra note 67, at 727-28.


Lady Fox has suggested following the lead of Switzerland in reversing the burden of proof “so as to require the state to prove that the property sought to be attached is not governmental in nature or that it is in non-commercial use.” Id. at 93. See also Foster, supra note 67, at 723-25 (suggesting a far-reaching overhaul to the U.S. FSIA that would result in sovereign assets, with very limited exceptions, being presumptively available unless the state showed they were intended for sovereign purposes); Blane, supra note 94, at 504.

The categories are:

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

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

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

U.N. State Immunities Convention, supra note 21, Art. 21 (a)-(c).

U.N. State Immunities Convention, supra note 21, Art. 21(d) & (e).

A recent U.S. case highlights the potential importance of conferring immunity on cultural heritage items. The University of Chicago’s Oriental Institute has been studying ancient Persian artifacts, on loan from Iran, for many years. Plaintiffs who won a court judgment against Iran as a backer of state-sponsored terrorism have now sought to attach those items. Laina C. Wilk Lopez, Should Cultural Heritage Be on the Judicial Auction Block?, THE KEY REPORTER 8-9 (Spring 2010). The U.S. FSIA contains an exception from immunity for items owned by governments designated by the U.S. government as state sponsors of terrorism and who are found to have engaged in acts such as torture, extrajudicial killing, aircraft sabotage, or hostage taking. 28 U.S.C. § 1605(7); 28 U.S.C. § 1610(7). The U.S. Government has suggested that using these assets would be inappropriate, but nothing in the current U.S. FSIA seems to prohibits their seizure. Wilk Lopez, supra, at 9.
[FN106]. Stewart, supra note 55, at 205-06.

[FN107]. Id. at 206. See also note 105 supra.

[FN108]. See the text accompanying notes 71-73.

[FN109]. Stewart, supra note 55, at 206 & n. 68.

[FN110]. I am indebted to Tom Sikora for this suggestion. He suggested it during his thoughtful examination of the problems faced by companies holding unpaid awards during the panel discussion Argentine Impasse: Enforcing Awards Against State Parties, PCA/Houston International Arbitration Club/University of Texas Symposium: Arbitration and National Courts: Conflict and Cooperation (May 13-14, 2010).


[FN112]. Rory Carroll, WikiLeaks cables: Oil giants squeeze Chávez as Venezuela struggles, GUARDIAN.CO.UK (Dec. 9, 2010). ENI reportedly demanded and got last-minute changes to the contract it was negotiating with PDVSA by threatening to walk away from the deal thirty minutes before the ceremony that was to commemorate its completion. Id.

[FN113]. Common Terms Agreement, Nam Theun 2 Hydro Electric Power Project in Lao PDR, Art. 35.2 (May 3, 2005). The agreement also waives jurisdictional immunity. My gratitude to Albert T. Chandler, of Chandler and Thong-Ek, for discussing the project with me and giving me copies of the project financing documents.

[FN114]. An investor could also seek the agreement of the state to earmark assets. Again the success of this endeavor would depend on the negotiating power of the investor.


[FN116]. Id. at 110.


[FN118]. RUBINS & KINSELLA, supra note 115, at 76.


[FN120]. Id.

[FN121]. Id. Mr. Major estimated that BIT award insurance costs 30 percent less than expropriation insurance.

[FN122]. Id. While $1.5 billion is a great deal of money, it might represent only a portion of the investment
made in one country by an energy developer.

[FN123]. Id.

[FN124]. Crawford, Execution, supra note 69, at 868-69 (comparing the apparent unavailability of attachment in the United Kingdom and the unavailability of attachment absent the state's explicit waiver in the United States with the process of saisie conservatoire practiced by many Continental jurisdictions); accord Reinisch, European Court Practice, supra note 57, at 834-35. For an overview of the authority of arbitrators to award interim measures of protection, see JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRöLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 586-604 (2003). The ad hoc annulment committee in the long-running dispute between Vivendi and Argentina sought Argentina's assurance that in the event the tribunal's decision is not annulled it will pay any award within 30 days of Vivendi's formal attempt to enforce the award. Luke Eric Peterson, Argentina ordered to provide heightened written assurances of prompt payment of award in long-running investment treaty dispute with Vivendi, 1:14 INVESTMENT ARBITRATION REPORTER (Nov. 12, 2008). It is not altogether clear, however, what this commitment added to Argentina's existing obligation.

[FN125]. U.N. State Immunity Convention, supra note 21, Art. 18.


[FN127]. SCHREUER, ICSID CONVENTION, supra note 26, at 1171-72.


[FN130]. See, e.g., Alexander Yanos, Daina Bray & Cassandra Marshall, Getting the Money: When Can a Sovereign's Assets Be Attached Before a Judgment Has Been Obtained on a Successful Arbitral Award?, 21(8) INT'L ARB. REP. 14 (2006). Article VI of the New York Convention explicitly provides that an enforcing court has the authority to require security during the pendency of an enforcement procedure if the losing party has moved to set aside the award in the place of arbitration.

[FN131]. States have sought stays of execution in many ICSID proceedings that have proceeded to annulment. SCHREUER, ICSID CONVENTION, supra note 26, at 1052.

[FN132]. Id. The municipal analogue is to require the posting of a supersedeas bond, a common requirement that stays execution of the judgment pending appeal.

[FN133]. Id. at 1058-60. A recent example is Ioannis Kardassopoulos and Ron Fuchs v. Georgia, ICSID ARB/05/18 & ARB/07/15 (Decision of the Ad Hoc Committee on the Stay of Enforcement of the Award).

[FN134]. SCHREUER, ICSID CONVENTION, supra note 26, at 1144.

given the effective unavailability of municipal courts due to concerns that they are not neutral).

[FN136]. ICSID Convention, supra note 5, Art. 27 (“No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting States shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.”) The failure to honor the obligation under Article 53 would also permit the home state of the national to refer the matter to the International Court of Justice. Id. Art. 64.


[FN139]. 22 U.S.C. § 2370a(a)(2). A United States person is “any United States citizen or corporation, partnership, or association at least 50 percent beneficially owned by United States Citizens.” Id. at (h)

[FN140]. 22 U.S.C. § 2370a(c). Although the law does not expressly say that if the claims are not settled after three years funding under the Foreign Assistance Act would be prohibited, that is the implication of the provision.

[FN141]. 22 U.S.C. § 2370a(b). The United States appoints by right one of the Executive Directors on the board of the World Bank by virtue of its shares in the institution. That same director also serves on the board of the International Finance Corporation. There are 24 Executive Directors in total, 19 of whom are elected. The elected Directors are ordinarily elected to ensure balanced and widespread geographic representation. http://tinyurl.com/r5bgfu. Thus, the ability of the United States Director to influence the outcome of a funding decision simply by voting is limited.


[FN145]. Diplomatic protection was by no means a certain remedy; investors had to overcome a series of obstacles in order to even qualify for espousal, which was still only exercised at the discretion of the state. See Andrea K. Bjorklund, Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims, 45 VA. J. INT’L L. 809, 821-25 (2005) [hereinafter Bjorklund, Reconciling State Sovereignty].

[FN146]. See Ibrahim F.I. Shihata, Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA, 1 ICSID REV.-FOREIGN INVESTMENT L.J. 1, 1 n.1 (justifying French armed intervention into Mexico by the alleged non-payment of a debt).

[FN147]. Id. at 1-2.

[FN149]. See Bjorklund, Improving the Regime, supra note 111, at 235 (citing Roberto Echandi, Ambassador from Costa Rica to the European Union).


[FN151]. See, e.g., statements of Hugo Perezcano Díaz, regarding Mexico's willingness to honor its obligations under NAFTA by paying the Metalclad award. Roundtable Discussion on Domestic Challenges if Multilateral Investment Treaties are Interpreted to Expand the Compensation Requirement for Regulatory Expropriations Beyond a Signatory State's Domestic Law, 11 N.Y.U. ENVI’L L. J. 208, 221, 241 (2002); Petersen, How many states?, supra note 16 (noting states that have paid awards, even of significant size).

END OF DOCUMENT