The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards Against States, in Diplomatic and Judicial Means of Dispute Settlement
Chapter Twelve

The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States

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1. Introduction

As a rule States comply with investment awards. Yet, in some cases, the enforcement of such awards has proved to be difficult. This contribution focuses on the interaction between judicial and non-judicial means of enforcing investment awards. Specifically, it analyses a variety of "alternative" or "non-judicial" means that can be used either as a supplement to the judicial framework for enforcement or on a stand-alone basis, when judicial enforcement has been pursued unsuccessfully.

The broad context of the topic is given by the legal framework governing the enforcement of investment awards. Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention") investment awards can be enforced before domestic courts through a rather simple mechanism leaving little or no room for review. Yet, when the loosing party is a State, an additional layer of complexity is added to the enforcement.


2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159; 4 ILM 532 (1965).

process. Certain assets of the State that are used for a public purpose are covered by the State's immunity of execution. Some other assets that are not used for a public purpose may also be out of reach if they belong to a separate entity organized by the State for the pursuance of certain economic activities. At a more practical level, the enforcement procedure before the domestic courts of a State may be organized in a way that allows for political interference.

These and other difficulties in enforcing investment awards against States have fostered the development of mechanisms that go beyond the conventional exequatur. The analysis of a number of investment cases where enforcement was particularly difficult or (so far) unsuccessful suggests that investors, debt-collection funds, home States, third States, international organizations (IOs) and arbitral institutions have been increasingly engaging in efforts to achieve compliance through the use of alternative, non-judicial means. Such means range from the simple negotiation of a post-award settlement to some of the most intrusive forms of economic or political coercion on the host State to comply or settle. The use of some of these means has been assessed empirically. Others, instead, have received little or no attention. After a brief overview of the basic enforcement framework of investment awards (II), this chapter analyses the potential of several non-judicial means either as a supplement to judicial enforcement or as a full alternative to it (III).

II. Enforcement before Domestic Courts

A. The Basic Legal Framework

There are two distinct regimes governing the enforcement of investment awards. The first regime applies to awards rendered under the aegis of the ICSID Convention, i.e., when both the host State and the investor's home State are party to this treaty. All the other cases, including cases governed by the ICSID Additional Facility Rules, are governed by the regime applicable to international commercial arbitration awards. We first discuss the latter regime (a) and then move to the specific regime laid out by the ICSID Convention (b).

(a) Non-ICSID Awards

The enforcement of non-ICSID investment awards, including those arising from ad hoc proceedings (typically under the UNCITRAL Arbitration Rules), those administered by virtually all arbitration institutions (e.g., the International Chamber of Commerce, the Stockholm Chamber of Commerce, the London Court of International Arbitration, etc.) and even those conducted under the ICSID Additional Facility Rules, is governed by the relevant national laws on arbitration and international conventions on the recognition and enforcement of international commercial awards. Among these conventions the most important one is the 1958 New York Convention, which has been ratified by 145 States. The New York Convention governs the recognition and enforcement of foreign arbitral awards and "non-domestic awards" which decide disputes of a commercial nature. Investment awards, both contract and treaty-based, are covered by the New York Convention.

Under the New York Convention, the enforcement of arbitral awards may be governed by some regional conventions such as the European Convention on International Commercial Arbitration, Geneva, 21 April 1961, 484 UNTS 364, the Inter-American Convention on International Commercial Arbitration, Panama, 30 January 1975, 1438 UNTS 245, the Riyadh Arab agreement for judicial cooperation, Riyadh, 6 April 1983, the OHADA Treaty for the harmonization of business law in Africa of October 17, 1993 in OHADA Journal officiel no. 4, 1 Nov 1997 de l'Ouverture pour l'Harmonisation en Afrique du Droit des Affaires (OHADA), available at http://www.ohada.com/ and a number of bilateral agreements, though their practical importance has declined as a result of the proliferation of multilateral conventions.

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This is subject to the reciprocity reservation (Art. 1 (3) of the New York Convention).


These grounds are limited to serious defects of the arbitral process or to a violation of the fundamental values of the State of enforcement. They include: (a) the inexistence or invalidity of the arbitration agreement; (b) lack of notice or violation of due process; (c) excess of power by the arbitral tribunal; (d) irregular composition of the arbitral tribunal; and (e) that the award has not yet become binding or has been set aside or suspended in the country of origin. See Art. V (1) of the New York Convention. In addition, the recognition and enforcement of an arbitral award may be refused if the subject matter of the dispute is considered non-arbitrable or contrary to the public policy of the country where enforcement is sought. See Art. V(2)(a)-(b). Letter (b) is sometimes considered as the "safety valve" under the Convention, preventing a totally unrestricted obligation to recognize and enforce.
It has been suggested that these grounds constitute a minimum threshold allowing States to be more liberal in the recognition of arbitral awards. One consequence of this view is the significant variation in the interpretation and application of the Convention from one State to another as well as the fact that, in certain countries, the control of the award is particularly limited. For example, in France the annulment of the award at the seat of the arbitration is not an obstacle to its enforcement, even though it constitutes a ground for refusal under Article V(1)(e). This said, it is generally accepted that the standard of review to be used by national courts when recognizing/enforcing foreign awards should be a deferential one, leading to a refusal only under exceptional circumstances.

A significant entry point for domestic law concerns purely procedural issues, which are governed by the procedural rules of the country of enforcement, "with the implied exception that any specific procedural rules contained in the Convention prevail". These procedural aspects include matters relating to the jurisdiction of the local court, time and cost of the enforcement of awards rendered under the aegis of ICSID is subject to a special regime set out by the ICSID Convention. Article 53(1) states the principle that an award rendered pursuant to the Convention is binding on the parties and not subject to any review procedure other than those provided for in the Convention itself. The latter are limited to interpretation (Article 50), revision (Article 51) and annulment (Article 52). Article 54 provides that: "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by a Court of final jurisdiction in the seat of the arbitration".

The enforcement of awards rendered under the aegis of ICSID is subject to a special regime set out by the ICSID Convention. Article 53(1) states the principle that an award rendered pursuant to the Convention is binding on the parties and not subject to any review procedure other than those provided for in the Convention itself. The latter are limited to interpretation (Article 50), revision (Article 51) and annulment (Article 52). Article 54 provides that: "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by

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11 Ibid., at 121-28.
12 The following states are not party to the New York Convention: Andorra, Burundi, Congo, Ethiopia, Guinea-Bissau, North Korea, Maldives, Nauru, Saint Lucia, Sierra Leone, Suriname, Timor-Leste, Tuvalu, Angola, Cape Verde, Democratic Republic of the Congo, Equatorial Guinea, Eritrea, Egypt, Eswatini, Falkland Islands, French Guiana, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Hungary, Iceland, Iran, Iraq, Israel, Jamaica, Japan, Jordan, Kenya, Kiribati, Korea, Lao People's Democratic Republic, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mexico, Central African Republic, Morocco, Mozambique, Namibia, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, São Tomé and Príncipe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Korea, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Syrian Arab Republic, Tajikistan, Tanzania, Tunisia, Turkey, Uganda, United Arab Emirates, United Kingdom, Uruguay, United States, Uzbekistan, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.
15 This was expressly acknowledged by the Svea Court of Appeal in the CME case when it found that Swedish law "has adopted a restrictive approach towards the possibilities to successfully have an arbitration award declared invalid or set aside based on a challenge" and that the "same approach" characterizes the rules in the New York Convention. Czech Republic v. CME Czech Republic BV, Svea Court of Appeal, 15 May 2005, 9 ICSID Reports, at 438-93.
that award within its territories as if it were a final judgment of a court in that State. The provision establishes two different obligations: (a) the obligation to recognize the res judicata effect of an ICSID award; and (b) the obligation to execute the pecuniary obligations arising out from the award as a final local judgment. Whereas the obligation to recognize the award as binding is unrestricted (unless the award has been annulled or its enforcement stayed), the obligation to execute is (by contrast to the system of the New York Convention) limited to pecuniary obligations excluding restitution or other forms of specific performance. This has not been an obstacle to the enforcement of ICSID awards because, in the overwhelming majority of cases, investment tribunals have awarded damages only.29 Yet, the main innovation of the ICSID Convention is that it equates arbitral awards to a “final judgment” of the courts of the State where enforcement is sought. This is intended not only to simplify the procedure of enforcement, but also to shield awards rendered under the ICSID Convention from potential interference by domestic courts, even when the award is contrary to public policy.30 Thus, Article 54(2) states that it is sufficient to present to the competent court or authority of a Contracting State a copy of the award certified by the Secretary-General of the Centre. As under the New York Convention, Article 54(3) of the ICSID Convention provides an entry point for the application of national procedural laws governing the execution of local judgments.

B. Additional Difficulties in Enforcing Awards against States

The enforcement of arbitral awards against sovereigns entails a number of additional difficulties. Two important difficulties arise from the host State's immunity from execution and the autonomy of certain State entities (a). In a 2008 survey on “Corporate Attitudes Towards Recognition and Enforcement of International Arbital Awards”, 61% of the 80 corporations consulted stated that they had encountered difficulties in enforcing arbitral awards31 and, out of this 61%, 68% indicated that they had been unable to identify and access the assets of the State.32 In addition, there are risks of a procedural and economic nature (b).

(a) State Immunities and the Autonomy of State Entities

Whereas accession to the ICSID Convention33 or to the New York Convention34 (or consent to international arbitration)35 may be considered as a waiver of the State’s immunity of jurisdiction, neither the New York Convention nor the ICSID Convention affect the rules on State immunity of execution. The latter point is expressly stated in Article 55 of the ICSID Convention and, although the New York Convention does not amount to a waiver of immunity of execution, as noted by the German Federal Supreme Court, Article III of the New York Convention merely requires that Contracting States recognize and enforce arbitral awards “in accordance with national rules of procedure” and such rules include principles of immunity of execution.36

31 Ibid.
32 See LETCO v. Liberia, District Court, S.D.N.Y., 12 December 1986, 2 ICSID Reports 385, at 388-09.
The specific scope of the rules on sovereign immunity significantly depends on the domestic law of the State of enforcement and it would be pointless to provide, in this chapter, a catalogue of the different legal regimes.38 The basic rule is that assets serving governmental purposes (iure imperii) benefit from immunity of enforcement, whereas assets serving commercial purposes (iure gestionis) do not.39 Overall, a rather restrictive view of the assets covered by sovereign immunity seems to prevail in practice,40 but this is not to say that awards against sovereigns are easily enforceable.41 Diplomatic,42 military,43 central bank,44 and cultural assets are, as a rule, excluded.45 Other assets, such as VAT refunds46 or third party charges for over-flight transit and landing rights47 have also been considered to be affected to governmental purposes and thereby shielded from enforcement procedures. Although a State may waive its immunity of execution, this is rare in practice48 and such waivers are interpreted restrictively.49

In addition, States often conduct their iure gestionis activities through separate legal entities. Commercial assets will often be the property of these entities, such as national companies or central banks. This makes it difficult for the investor to find assets that can be subject to attachment because the assets belong to a separate legal entity and not to the State itself. As noted by one commentator:

48 In AIG Capital Partners Inc. v. Kazakstan investors tried to enforce an ICSID award in the United Kingdom through a third-party debt and charging order against assets of the National Bank of Kazakhstan held by a private bank in London. The High Court found that, apart from belonging to a separate legal person, the assets were not commercial in nature. See AIG Capital Partners Inc. v. Republic of Kazakhstan (National Bank of Kazakhstan Intervening), High Court, Queen's Bench Division (Commercial Court), 20 October 2005, [2005] EWHC 2238 (Comm), 11 ICSID Reports 188. See also: U.S. FSIA (28 USC §1611(c)); the Canadian Act (Sec. 11(5)); the British Act (Sec. 14(1)), 17 ILM 722 (1986)); and Art. 21(1)(c) of the 2004 UN Convention, which provide that central bank assets are immune from execution.

49 Art. 211(1) of the 2004 UN Convention refers to "property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale"; see also Hafner and Kohler, "The United Nations Convention on Jurisdictional Immunities of States and Their Property", Netherland: Yearbook of International Law 3 (2004). D. P. Stewart, "The UN Convention on Jurisdictional Immunities of States and Their Property", Am. J. Int'l L. 99 (2005).


53 In Cameron v. Wilkow Bank & Trust, the Paris Court of Appeals considered that a waiver drafted in broad terms does not entail that the State waived its immunity from execution on diplomatic assets. See CA Paris, 26 September 2001, République du Cameroun v. Wilkow Bank & Trust, Dalloz, I.R. 3017 (2001). See also: Schreuer, The ICSID Convention, at 1175; regarding other cases and Art. 23 of the European Convention on State Immunity, II ILM 478 (1972). However, in Creighton v. Ministre des Finances de l'Etat de Qatar, the French Court de cassation held that an agreement in arbitrage implied a waiver of immunity of execution; Cass. 1e civ. 6 July 2000, (2000) IDs, at 1054.
[the] end result is that the State will be effectively shielded from its creditors: when creditors try to enforce a decision against a State through assets allocated to jure imperii activities, the State will raise its immunity from execution; when creditors try to seize assets allocated to jure gestioni activities, they will be told that they are not pursuing the right debtor. Moreover, in some cases, a link between the dispute and the assets to be attached has been considered as a necessary requirement.

When these entities lack independence or are the alter ego of the State, the principle of autonomy may be tempered. This said, domestic courts are reluctant to find these entities as mere façade and pierce the corporate veil. Moreover, in some cases, a link between the dispute and the assets to be attached has been considered as a necessary requirement.

Enforcing awards before the courts of the host State has its own specific problems. The potential hostility of the local authorities, including domestic courts, makes investors reluctant to pursue this avenue. In Azurix v. Argentina and CMS v. Argentina (subsequently acquired by Blue Ridge), the investors explored several avenues to enforce two ICSID awards but they seemed to have low expectations with respect to the possibility of seeking enforcement before Argentine courts.

(b) Procedural and Economic Difficulties
The enforcement of investment awards also presents procedural and business-related difficulties. Aside from the risk that the court seized may refuse recognition or enforcement, some other procedural difficulties include excessive delays, high expenses and the potential disclosure of confidential information. Although the costs of enforcement proceedings vary from one case to the other, the estimated duration of such proceedings tends not to exceed 1 year. Yet, the difficulties involved in enforcing awards against States make such proceedings longer, more complex and therefore more expensive. In some cases, investors may have to initiate several proceedings in different countries where they find assets of the host State. This can be illustrated with the Sedelmayer saga, where the investor was able to seize assets of the Russian Federation only after 10 years of trying and some 20 enforcement proceedings. Moreover, some investment disputes are confidential and bringing them before a national court in an enforcement proceeding could make their existence and some related information public.

The enforcement of investment awards may also be constrained by business-related difficulties. Investors may wish to preserve a reasonably good business relationship with either the host State or a third State linked to the latter. In this context, enforcement proceedings may be prejudicial to the business relationship. In some cases, investors may go as far as to avoid


L. Mistelis and C. Boloys, "Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards. Special Section" at 351.
resources to arbitration altogether. This was the case of many oil companies exploiting heavy oil in the Orinoco belt in Venezuela after the forced conversion of oil production sharing contracts into mixed companies controlled by the State in 2007.46 Or, if the investor has pursued arbitration proceedings, it may prefer to negotiate a post-award settlement in order to maintain the business relationship.48

The difficulties discussed in the foregoing paragraphs suggest that the basic judicial framework available for the enforcement of investment awards may have to be supplemented by some alternative methods of enforcement. In some cases, such other methods may even provide the most suitable enforcement avenue.

III. Enforcement through Alternative Means

A survey of investment disputes where enforcement was difficult or unsuccessful suggests that creditors are increasingly resorting to a variety of alternative means. As noted in the introduction, these means range from the mere negotiation of a post-award settlement to some sophisticated forms of economic or political coercion on the host State. They can be used either as a supplement to enhance the effectiveness of judicial means or on a standalone basis, when judicial means seem (or have proved to be) ineffective. Although the investor or, more specifically, the creditor always plays a key role, some measures may require the involvement of other actors. Here are some examples: (a) the investor could enter into negotiations for a post-award settlement; (b) public relations campaigns targeting the creditworthiness of the host State; (c) arbitral institutions can also make representations or, depending on the circumstances, even exercise diplomatic representations or, on the light of current practice, we discuss some of these alternative means in the light of current practice. We discuss how to pursue enforcement may sell its award at a discount to a ‘vulture’ or other funds. While the judicial enforcement of awards assigned to such funds could be potentially refused in some jurisdictions on public policy grounds,39 these funds tend to pursue more creative strategies. Thus, the award in CMS v. Argentina was assigned to a fund, Blue Ridge, which displayed an aggressive strategy of diplomatic pressure, including the request of hearings before the United States Trade Representative (USTR) to exclude Argentina from the list of beneficiary countries under the Generalized System of Preferences (GSP) program or lobbying efforts of the US Congress to vote for the withdrawal of World Bank loans. We understand that, so far, these efforts have been unsuccessful. But the ability of these funds to mobilize diplomatic and political pressure to force the debtor to comply with an award must not be underestimated. Their very specialization in distressed debt gives them means and know-how that regular investors often lack.

In the following paragraphs, we analyze some of these alternative means in the light of current practice. We discuss how to pursue enforcement may sell its award at a discount to a ‘vulture’ or other funds. While the judicial enforcement of awards assigned to such funds could be potentially refused in some jurisdictions on public policy grounds,39 these funds tend to pursue more creative strategies. Thus, the award in CMS v. Argentina was assigned to a fund, Blue Ridge, which displayed an aggressive strategy of diplomatic pressure, including the request of hearings before the United States Trade Representative (USTR) to exclude Argentina from the list of beneficiary countries under the Generalized System of Preferences (GSP) program or lobbying efforts of the US Congress to vote for the withdrawal of World Bank loans. We understand that, so far, these efforts have been unsuccessful. But the ability of these funds to mobilize diplomatic and political pressure to force the debtor to comply with an award must not be underestimated. Their very specialization in distressed debt gives them means and know-how that regular investors often lack.

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A. By Investors and Debt-Collection Funds

The most frequent means pursued by investors and debt-collection funds include: (a) the negotiation of a post-award settlement; (b) public relations campaigns targeting the creditworthiness of the host State; and, in some

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47. Arturo G. Baltag, "Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards: Special Section" at 339-40.
48. Under the common law rules of maintenance and champerty it is contrary to public policy to give financial support for litigation when there is no legitimate interest in the claim. Although the doctrine has been interpreted restrictively in the US in Elliott v. Banco de la Nación and the Republic of Peru, admitting assignments of claims where the lawsuit is incidental to full payment of the debt assigned, when the enforcement of arbitral awards is assigned and the investment stays in the hands of the investor, it is difficult to consider the lawsuit, the executar, incidental, D. Seckin, Stop Vulture Fund Lawsuits: A Handbook (Commonwealth Secretariat, 2010), at 35. Similarly, in the UK, according to Trendtex Trading Corp v. Credit Suisse, champerty would prohibit assignments where the assignee has no genuine commercial interest in taking the assignment and in enforcing it for his own benefit or when the cause of action is not ancillary to the right or interest assigned. However, champerty would not work as a defense to the action unless there is an abuse of process. In other words, the doctrine would only make the assignment unenforceable between the parties, at 16-554 and 19-049.
cases, (c) the initiation of new arbitration proceedings to put pressure on the host State to comply with a previous award.

(a) Post-Award Settlements

According to the aforementioned survey on “Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards” post-award settlements are not uncommon. Some 40% of the corporations surveyed have negotiated post-award settlements. Although these numbers are applicable to international arbitration in general, not only mixed arbitrations, a settlement of an award rendered against a sovereign has advantages for both the investor and the host State. Whereas the investor will avoid spending time and money in enforcing the award, the host State will comply with its obligation at a discount or in instalments. The risks associated with the enforcement of an award against States together with the relative bargaining power of the parties have an impact on the value of the award and represents the value at which the creditor would be willing to settle or sell. When an investor anticipates that it will be difficult and/or expensive to find attachable assets, a post-award settlement may offer a suitable alternative. In the abovementioned survey, 54% of the corporations interviewed said that they had negotiated a settlement at an amount between 50% and 75% of the value of the award whereas only 15% of them settled for an amount above 75% of the value of the award.

Settlements can be achieved by direct negotiations between the parties or assisted by other means through the intervention of conciliators or mediators. Technically, a settlement is an agreement whereby the parties relinquish their rights in favour of a compromise on the amount and modalities of payment of the award. A settlement does not necessarily involve direct cash payments. It may instead involve creative solutions with forward-looking terms, such as declaratory relief and future benefits, such as tax benefits or regulatory dispensations. The agreement may also include other terms, such as the release of guarantees and obligations regarding the investment (e.g., the release of certain machinery or the completion of certain works).

At the treaty level, it has been considered that economic and physical coercion exercised by the host State over the investor to conclude an unfair post-award settlement is null and void and a violation of the fair and equitable treatment standard (FET). In Desert Line Projects LLP v. Republic of Yemen, the investor had failed to enforce a previous award against Yemen. In a context characterized by bankruptcy proceedings and a variety of threats and attacks, the investor agreed to sign a post-award settlement in which the claimant relinquished over 50% of the value of the award. Yemen did not pay and the investor initiated a treaty-based arbitration against Yemen for violation of the applicable BIT, arguing that the settlement was null and void due to economic and physical duress and that the measures adopted by Yemen were contrary to the BIT. The tribunal found that although financial pressure per se does not render a settlement null, some element of abuse by the other contracting party does. The measures challenged had been abusive depriving the post-award settlement of any ‘international effect’ and breaching the fair and equitable treatment standard of the BIT. Yemen was ordered to
pay the initial award. It is noteworthy that the tribunal considered that the relinquishment of 50% of the value of the award in a post-award settlement is unfair. In this connection, it held that a settlement is a standard of contractual practice where each party waives its rights and claims arising out of a dispute on a *quid pro quo* basis, and given that the domestic arbitration had already decided the dispute there was no longer a dispute. Thus "to accept that the amount awarded be amputated by half, falls well short of minimum standards of international law and cannot be the result of an authentic, fair and equitable negotiation." This said, the amount at which the parties settled was not the only element considered by the tribunal in reaching its conclusion.

(b) Reputational Damage
Another option is a public relations campaign targeting the refusal of the State to honour the arbitral award. According to one commentator "some investors apparently believe this may be their best leverage in collecting an award." Bad publicity might affect the reputation of the host State, its investment climate, and its credit worthiness.

Non-compliance with awards may have an impact on the country's credit risk ratings. Credit-rating agencies, such as Moody’s, Standard & Poor’s and Fitch, regularly carry out sovereign risk rating exercises in which the capacity and willingness of States to service their debt in accordance with the conditions agreed with the creditors are taken into account. The determinants for payment capacity and willingness to repay the debt are of a different nature, reflecting macroeconomic variables, such as stock of foreign currency reserves and balance of payments flows, economic growth prospects and capacity to generate tax receipts, a variety of political factors, etc. Raising the awareness of the public and of credit-rating agencies about unpaid awards may influence the assessment of the unwillingness of the sovereign to pay its private debt. Countries with risky sovereign ratings may experience difficulties in accessing private capital markets. And even if the country does not borrow money internationally, sovereign ratings are used by analysts to impute a country risk premium to be included in the cost of capital computations. Such costs are then used for foreign direct investment evaluation.

For these reasons, information on non-compliance is a significant instrument to induce a State to comply with an award. An illustration is provided by the post-award settlement concluded between Azurix and Argentina (further discussed below) where the investor undertook to assist Argentina in communicating to credit-rating agencies and banks Argentina’s compliance with its credit obligations.

Such public relations campaigns could, however, violate confidentiality undertakings. This issue arose in *Amco v. Indonesia*, where the investor conducted a campaign against Indonesia while the arbitration was pending. The host State requested provisional measures from the tribunal to restrain the investor from making the dispute public based on confidentiality grounds. However, the tribunal found that neither the ICSID Convention nor the arbitration rules impose an obligation on the parties to maintain confidentiality of the arbitral proceedings.

(c) A New Arbitration as Bargaining Strategy
Another alternative is to initiate a new arbitration arguing that the non-enforcement of (or non-compliance with) an award amounts, as such, to a breach of investment disciplines. The investor could pursue this as a strategy to pressurise the host State to comply with the award or to conclude a post-award settlement while the new arbitration is pending. If the State pays the award, the arbitral proceedings would be discontinued; if a settlement is achieved, it could be incorporated into the new award.

As a rule, award creditors are unwilling to initiate a new arbitration against the very same respondent for rather obvious reasons. However, such a strategy may be useful when the new arbitration benefits from a more favourable regime of enforcement than the one applicable to the unpaid award. By

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71 Ibid., point no. 3 of the dispositive part of the award.
72 Ibid., at 5 176.
73 Ibid., at 5 779.
77 Ibid.
way of illustration, this would be the case of a domestic award (by contrast to an international award) or of one where the losing party is a State entity (by contrast to the State itself). These cases are generally triggered in situations where the investor holds an award against a bankrupt State entity or a State entity that only has assets in the host State where local courts make particularly difficult the enforcement of the award.\footnote{As to awards against bankrupts' states entities these include: GEA Group Altersgesellschaft v. Ukraine, Award, (ICSID Case No. ARB/08/16) 31 March 2011 [GEA v. Ukraine] (ICC award against Orion which was bankrupt); Petroleurs Ltd v. Kyrgyzstan, Award (ICC Case No. 120/2003), 29 March 2005 [Petroleurs v. Kyrgyzstan] (award of the Kyrgyz court of arbitration against RSM, the government obtained a suspension of enforcement proceedings 3 months before it was declared bankrupt). As to non-bankruptcy situations but where assets exist only in the host State is Saipem v. Bangladesh, Award (ICSID Case No. ARB/05/17) 11 March 2009 [Saipem v. Bangladesh] (ICC award against Petrobangla but domestic courts of Bangladesh revoked arbitrators powers and annulled the award).}

According to this tribunal an arbitral award and the arbitration clause (as a contractual remedy) are part of the investment as an overall operation and, as such, may be protected by the investment treaty.\footnote{The Tribunal said "the rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties' rights and obligations under the original contract." The tribunal did not consider necessary to determine whether the award constituted an investment as such, Saipem v. Bangladesh, Ibid., at § 127.} In FPS v. Czech Republic, the investments were the contractual rights transformed into new rights in the award whose investment character was maintained by virtue of Article 1(1) of the applicable BIT.\footnote{Saipem v. Bangladesh, at § 110.} The tribunal in GEA v. Ukraine took a more restrictive stance and rejected the argument that an ICC award was an investment because the rights it declared resulted from a settlement which was not itself an investment.\footnote{This article provides that "[a]ny change in the form of an investment does not affect its character as an investment", Frontier Petroleum Services Ltd v. Czech Republic, Final Award, (PCA – UNCITRAL Arbitration Rules IIC 465) 12 November 2010 [FPS v. Czech Republic] at § 231.} The tribunal further noted in arguendo that, even if the settlement were to be seen as an investment, the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal's view, the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall – itself – within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention.\footnote{GEA v. Ukraine, at § 161.}

The rights arising out of an award relating to an investment are first and foremost pecuniary obligations. They are a remedy against damage suffered in the investment rights, be these contractual or not. This obligation is ancillary to and separate from the investment per se. It is ancillary because as a remedy, its existence depends on the existence of a contractual or property right (the investment) and its violation will affect the effectiveness of such right. It is separate from the investment because the pecuniary debt can, as such, be waived or assigned to third parties independently from the investment. The assignment of the rights arising out of an award relating to an investment to third parties does not make these parties the new owner of the investment. Therefore, a debt-collection fund who acquires the rights arising from an award could not launch a new arbitration as an enforcement strategy because it does not have an investment. Arguably a distinction should be made between situations where the investment continues to exist and situations where the investment no longer exists. In the former case, the investment and the award-related rights would be more easily distinguished than in the latter case, where the award-related rights embody the value of the initial investment. In those cases where the award transforms the rights of the parties, e.g. by changing their contractual rights into a settlement, the award itself would arguably embody the investment. By way of illustration, in FPS v. Czech Republic the original contractual rights (i.e. payments made to MA and Davidová) were transformed in the arbitral award into an entitlement to a first secured charge.\footnote{FPS v. Czech Republic, at § 231.}

With respect to (ii), for this strategy to be pursued non-compliance with or the non-enforcement of an award would have to amount (prima facie and after the assessment of the merits) to a breach of a BIT. In Saipem v. Bangladesh, the tribunal concluded – quite debatably\footnote{The possibility of expropriating arbitral awards by its non-enforcement has been confirmed by the ECHR in Stan Greek Refineries and Stratis Andreas v. Greece, 9 December 1994 (Application No. 13427/87), Kin-Stib & Majkic v. Serbia, 2010, (Application No. 39591/10).} – that the non-enforcement...
of an ICC award by Bangladeshi courts amounted to an expropriation of the rights declared by the award. But this case is exceptional and, as a rule, a refusal of enforcement or a challenge before domestic courts would not amount to a violation of investment disciplines. Such was the conclusion of the tribunals in FPS v. Czech Republic and GEA v. Ukraine, where a refusal by domestic courts to enforce an award was considered to be in conformity with the BIT because no "egregious" mistreatment nor any arbitrariness, discrimination or bad faith could be discerned in the conduct of the local courts. For these reasons, this strategy should be limited to situations where non-compliance and non-enforcement of the award are blatantly unfair.

One important consideration in deciding whether to initiate new arbitration proceedings as a tool to facilitate the enforcement of an unpaid award lies in the nature of the arbitration. Specifically, when the new arbitration is formally conducted under the ICSID Convention, rather than helping this approach may delay collection of the amounts claimed. Article 26 of the ICSID Convention provides indeed that ICSID arbitration is an exclusive remedy, which may have the effect of freezing parallel enforcement proceedings. This can be illustrated by reference to MINE v. Guinea, where the

**B. By the Investor's Home State or Other Third States**

Historically, the main avenue available for the investor's home State to protect the interests of its nationals was diplomatic protection (a). In contemporary practice, home States and other relevant third States (e.g., the State of the seat of the arbitration or the home State of the parent company) have resorted to other means of enforcement such as diplomatic exchanges or retorsion measures (b).

(a) Diplomatic Protection

Diplomatic protection is a concept of customary international law whereby a State espouses the claim of its national against another State and pursues it in its own name. In the course of the ICSID Convention's drafting, the exclusion of diplomatic protection was considered necessary in order to give full effect to arbitration, avoid a multiplicity of claims and claimants and remove the dispute from the realm of politics and diplomacy. This resulted in the introduction of Article 27(1), which excludes the right to resort to diplomatic protection or to bring an international claim in respect of a dispute to which the State and the investor had consented to arbitration, unless such other Contracting State fails to abide by and comply with the award rendered in such dispute. Many BITs include similar provisions suspending the exercise of diplomatic protection unless the award is not complied with.

In this context, the exercise of diplomatic protection, widely understood, may take different forms, from negotiation to the institution of dispute
settlement proceedings or even the adoption of countermeasures.\textsuperscript{92} The dispute could also be referred to an international tribunal, such as the ICSID,\textsuperscript{93} or several other mechanisms (e.g., a panel under Article 1136 of the NAFTA).\textsuperscript{94} Diplomatic protection can be either an alternative or a supplement to the judicial enforcement of investment awards.\textsuperscript{95} It has been suggested that, during the negotiations of the ICSID Convention, the possibility to resort to diplomatic protection as a \textit{ultima ratio} was seen as a necessary check on the shield provided to host States by their immunity of execution.\textsuperscript{96} However, this mechanism proved to be unworkable for at least three reasons.\textsuperscript{97}

First, the exercise of diplomatic protection entirely depends on the discretion of the home State.\textsuperscript{98} The government may refuse to take up the claim or it may waive it or, still, it may decide to discontinue the proceedings. Moreover, the home State may be unwilling to espouse the claims of their nationals. This is illustrated by the Sedelmayer saga. After many unsuccessful attempts to seize Russian assets before German courts, Mr. Sedelmayer asked the German government to espouse his claim. However, Germany refused and, according to Sedelmayer, the German government even tried to dissuade him from seeking the attachment of Russian assets brought to Germany for an international aviation show.\textsuperscript{99}

Second, the formal exercise of diplomatic protection is subject to certain conditions.\textsuperscript{100} The aggrieved natural or juridical person has to be a national of the State exercising diplomatic protection,\textsuperscript{101} the host State must have committed an internationally wrongful act and the investor is required to exhaust the legal remedies available in the host State.\textsuperscript{102} It is not entirely clear the extent to which this latter condition applies in the context of investment disputes. It has indeed been suggested that the exclusion of the exhaustion of local remedies in Article 26 of the ICSID Convention also applies among Contracting Parties in cases of diplomatic protection for non-enforcement.\textsuperscript{103}

Third, the remedies available in case of diplomatic protection are remedies in favour of the home State, not the investor.\textsuperscript{104} Therefore, even if diplomatic protection is invoked by the home State, this would not guarantee that the investor will collect his award. This is the case not only when the home State seeks (or is eventually granted) merely declaratory relief but also when it is granted compensation, since there is no guarantee that it will transfer the compensation received to the aggrieved national.\textsuperscript{105}

(b) Diplomatic Exchanges and Measures of Retorsion

As mentioned above, the ICSID Convention does not preclude Contracting States from undertaking diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute at any time. These exchanges may include simple attempts to facilitate the settlement of the dispute amicably\textsuperscript{106} but they may also take more intrusive forms.

An example is provided by Autoven v. Venezuela where Mexico, the home State of Autoven's parent company, took a number of diplomatic steps to facilitate an amicable solution of the dispute between Venezuela and the investor, such as writing letters to the Venezuelan Ministry of Foreign Affairs or meeting with government officials to explore a viable and mutually acceptable solution.\textsuperscript{107} Although these exchanges took place before the award was rendered, they illustrate the type of means – short of diplomatic protection – that
a State may resort to. An example of diplomatic exchanges relating more specifically to a situation where the host State has failed to comply with an existing award is provided by *Petrobart v. The Kyrgyz Republic.* For several years, the Kyrgyz Republic had refused to pay an award rendered under the Energy Charter Treaty in favour of Petrobart Limited, a Cypriot energy trader. What is particularly noteworthy in this case is that the initiative to start diplomatic exchanges came neither from the investor’s home State nor the home State of its parent company but from Sweden, the State were the arbitration institution that handled the proceedings was located. Sweden considered indeed that it had an interest in ensuring the respect of awards rendered by the Stockholm Chamber of Commerce. Interestingly, following a number of diplomatic exchanges, the Kyrgyz Republic finally agreed to pay the award.

Other examples of diplomatic manoeuvring to induce a host State to comply with an investment award are provided by the Azurix and CMS cases. Here, the creditors (which included a debt-collection fund, Blue Ridge, the assignee of CMS) filed petitions with the United States Trade Representative in order to review the eligibility of Argentina as a beneficiary of the U.S. GSP. Under this program, 129 developing countries (including Argentina) benefited from preferential duty-free entry for thousands of products. To be eligible for the program, countries must meet a number of criteria that can be regularly reassessed. The list of beneficiaries is subject to revision and any person may present a petition to the GSP Subcommittee to request modifications to the list of eligible countries for the GSP. It is under this mechanism that the creditors requested that Argentina’s designation as a Beneficiary Developing Country under the GSP be suspended or withdrawn. They argued that Argentina had failed to comply with its obligations under the relevant investment awards and that, as a result, it no longer met the eligibility requirements to benefit from the GSP. Further, the creditors argued that even if the President has the power to waive the mandatory criteria of US Code § 2462 when this is “in the national economic interest of the US”, the situation did not fall within the scope of this exception. To understand the stakes of this initiative, one must keep in mind that the delisting of Argentina could have significant economic repercussions for its export industry, which, according to estimates, had amounted to more than USD 500 million in benefits in 2010. This may explain why, a few days after the petition was filed, Argentina agreed to negotiate with Azurix the conditions for the payment of the award. According to Azurix, an agreement was indeed reached but it:

...including significant advantages for Argentina, as it included a reduction in the amount of the Award and interest. The agreement also specified that, upon payment, all pending claims and disputes between Azurix and Argentina would be concluded, and that Azurix would withdraw its December 4, 2009 petition to the GSP Subcommittee. Finally, Azurix also offered in good faith to assist

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108 Another example of the use of political pressure at an even earlier stage of the dispute is provided by *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica Award (ICSID Case No. ARB(AF)/06/01) 17 February 2000,* at §§ 24-26. In this case, the United States, as the investor’s home State, pushed Costa Rica to consent to arbitration. This was done through the so-called ‘Helms Amendment’ prohibiting foreign aid to any country that had expropriated property of US citizens or corporations of which US citizens owned at least 50% of it, unless the country provided an effective remedy including ICSID arbitration. This law was invoked by the US Government to request the delay of a loan to Costa Rica by the Inter-American Development Bank, until Costa Rica consented to ICSID arbitration. Eventually, Costa Rica consented to arbitration.

109 L. E. Peterson, “Lengthy debt collection battle ends, as former Soviet state pays arbitral award; unusual form of diplomatic assistance seen” (29 September 2011).

110 According to reports "[a source familiar with this process tells IAReporter that the Swedish Foreign Office took the view that it should advocate for payment of a ‘Swedish arbitral award’ notwithstanding any other Swedish connection to the case. Consequently, the unpaid award was raised on at least 6 discrete occasions in bilateral diplomatic talks", L. E. Peterson, “Lengthy debt collection battle ends, as former Soviet state pays arbitral award; unusual form of diplomatic assistance seen”. See also, Peterson "As new arbitral claim is brought against Kyrgyzstan, an ICSID award remains unpaid” (29 September 2011).

111 These conditions may include: maximum per capita annual income level; geopolitical requirements (certain countries with communist regimes, e.g. China and Vietnam, or with links to terrorist groups, e.g. Libya and Iran, are excluded from the system); ‘good conduct’ requirements (e.g. States that have seized property of Americans without compensation can be ineligible); etc. See GSP Guidebook, available at www.ustr.gov/webfo_send/2880, 20-21 (last accessed 1 March 2012).

112 Based on the annual review conducted by GSP Subcommittee. See U.S. Code § 2462.


114 Azurix Pre-Hearing Brief, at 14.

115 U.S. Code § 2462 “The President shall not designate any country a beneficiary developing country under this subchapter if any of the following applies...” D(2)(E). Such country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of United States citizens or a corporation, partnership, or association which is 50 percent or more beneficially owned by United States citizens, which have been made by arbitrators appointed for each case or by permanent arbitral bodies to which the parties involved have submitted their dispute.

116 Azurix Pre-Hearing Brief, at 15-17.


118 Azurix Pre-Hearing Brief, at 8.
Argentina, following payment, in communication with credit rating agencies and international banks with regard to Argentina’s compliance with ICSID awards.\(^\text{127}\)

In response to the creditors’ strategy, Argentina sent a letter to the US Government stating that it was in full compliance with its international obligations under the ICSID Convention because, in order to be enforced, ICSID awards must first brought before Argentine domestic courts in accordance with Article 54 of the ICSID Convention. It also noted that should there be any disagreement on this point, it contemplated the possibility of submitting the case to the International Court of Justice.\(^\text{128}\) Notwithstanding this, in March 2012 Argentina’s designation as beneficiary under the GSP was suspended “because it has not acted in good faith in enforcing arbitral awards in favour of United States citizens”.\(^\text{129}\)

C. By International Organizations or Private Institutions

A number of alternative means of enforcement can be pursued by international organizations or private institutions. Among these, two are particularly noteworthy. First, arbitration institutions, either inter-governmental (e.g. ICSID) or private (e.g. the International Chamber of Commerce) may play a role in the enforcement of arbitral awards by reminding the debtor of its obligation to comply with the arbitral award or by facilitating the negotiation of a settlement (a). Second, international development banks, such as the World Bank or other regional banks, may play a significant role in the enforcement of arbitral awards through a variety of channels (b).

(a) Arbitral Institutions

Arbitral institutions may play a role in the enforcement of investment awards in several ways. They may, for instance, host post-award settlement discussions\(^\text{130}\) or, more frequently, remind the debtor of its obligation to comply with the award. According to some commentators, despite the absence of a clear legal basis in the ICSID Convention, the ICSID Secretariat sometimes reminds recalcitrant award debtors of the importance of payment, if only to avoid the accrual of further interest on the outstanding amount of the debt.\(^\text{131}\)

Another possibility is to make non-compliance public. By way of illustration, in the context of the Grain and Feed Trade Association ("GAFTA"),\(^\text{132}\) the Arbitration Rules specifically provide that:

In the event of any party to an arbitration... neglecting or refusing to carry out or abide by a final award of the tribunal [...] the Council of GAFTA may post on the GAFTA Notice Board, Web-site, and/or circulate amongst Members in any way thought fit notification to that effect.\(^\text{133}\)

The Rules add in this connection that:

[b]efore ‘posting’, GAFTA communicates with the defaulter and asks whether there is anything to be said — for instance, whether there is an outstanding balance due to him from the successful party. However, where GAFTA is satisfied that there is a default, its members are informed.\(^\text{134}\)

The reasons why making an award public may incite the debtor to comply have already been discussed in connection with the question of reputational damage. Suffice it to add here that arbitral institutions benefit from a legitimacy that the creditor cannot claim. Although an arbitral institution may not go as far as pursuing an awareness campaign on unpaid awards, their mere posting of the information on unpaid awards facilitates the efforts of creditors and may add a measure of objectivity to their claims.

(b) The World Bank

The World Bank is an important source of financial assistance to developing countries. The access of these countries to international financial markets is often difficult or very expensive (in terms of the interest rates they have to pay to borrow in international markets). This situation places the World Bank in a key position as a provider of financial and technical assistance as a result of which the Bank may exercise substantial leverage over its clients.\(^\text{135}\)

\(^{127}\) Ibid., at 9.


\(^{129}\) Proclamation by President Barack Obama to modify duty-free treatment under the GSP and for other purposes (25 March 2012) available at www.globalarbitrationreview.com/cdu/files/gar/articles/White_House_statement.pdf (last accessed 3 April 2012), § 2.

\(^{130}\) According to reports, ICSID has hosted such negotiations at least once. See A. R. Parra., "The Enforcement of ICSID Awards", Enforcement of Arbitral Awards against States, in ed. Doak Bishop (JurisNet, 2009), at 138.

\(^{131}\) Ibid.

\(^{132}\) GAFTA official website available at http://gafta.com/ (last accessed 8 February 2012).

\(^{133}\) GAFTA Arbitration Rules, Art. 22(1).

\(^{134}\) Ibid.

For present purposes, the question is to what extent the World Bank may use this leverage to incite borrowers to comply with unpaid arbitral awards. According to the World Bank's Operational Manual there are three types of disputes between a member country and the nationals of other member countries in which the Bank takes an interest: (a) disputes over a failure to service external debt; (b) disputes over compensation to aliens when their property has been expropriated; and (c) disputes over the breach of governmental contracts. When a borrower country is unwilling to take steps or make necessary efforts to resolve or settle these disputes, the World Bank may be led to withhold or suspend lending to the country until such disputes have been solved. The decision of the Bank must be based on an assessment that the conduct of the borrower country is 'substantially harming' its credit worthiness. Under such circumstances, the Bank 'may not appraise proposed projects in such a country unless it has good grounds for believing that the obstacles to lending will soon be removed.' The Bank may also call on the parties to find a settlement or otherwise seek to promote a prompt and adequate settlement. When the dispute concerns a project financed by The World Bank's funds, the Bank may even assist in the negotiation of a settlement.

Although non-compliance with arbitral awards is not specifically listed as a motive to withhold loans or to urge the parties to settle the dispute, it could arguably be seen as failure to take the necessary steps or make appropriate efforts to reach a fair settlement between the parties. Given the institutional links between ICSID and IBRD and IDA, which are all part of the World Bank's Group, it has been suggested that this connection could play a significant role in fostering compliance with ICSID awards. It is, however, unclear if (and the extent to which) ICSID's affiliation with the World Bank Group implies an institutional gravitas that creates an incentive for sovereigns to comply with ICSID awards, lest they have difficulty securing future World Bank financing.

The World Bank has used this leverage in the post-war nationalisations of the 1960s or in the withholding of funds during the Anglo-Persian Oil Company dispute of the late 1940s or, still, in the Suez Canal dispute in the early 1950s, there is little practice in connection with unpaid ICSID awards. In Azurix v. Argentina and CMS v. Argentina, the lobby efforts of Azurix and Blue Ridge led the US government to sanction Argentina for the unpaid arbitral awards by voting in the World Bank and the Inter-American Development Bank to withdraw or suspend loans to Argentina. This strategy could potentially affect certain applications for credit made by Argentina amounting to some USD 1.600 millions.

IV. Conclusion

The foregoing analysis suggests that the enforcement of investment awards can be pursued through a variety of avenues in addition to (or aside from) the basic legal regime for the recognition and enforcement of arbitral awards. This may be good news for aggrieved investors seeking to recover, as they would be able to avail themselves of a wider palette of means. However, from a policy perspective this chapter leads to a more nuanced conclusion.

The investment arbitration regime was specifically developed to limit the incidence of inter-State politics on the resolution of investment disputes, but it left open the possibility to resort to diplomatic protection to overcome the difficulties on the enforcement of arbitral awards due to immunity of execution. Yet, diplomatic protection has proved to be a difficult option in practice because: (i) as a general matter States seem increasingly reluctant to exercise diplomatic protection; (ii) such exercise is, in all events, subject to state practice because:

3. Azurix v. Argentina.
4. CMS v. Argentina.
to rather demanding conditions; and (iii) the remedies available— including potential compensation—are entirely in the hands of the home State, not the investor. The alternative means discussed in this article are perhaps a better option to collect a debt arising from an award. They mobilize a variety of actors (States, IOs, private institutions) and measures (affecting creditworthiness, influencing the operation of certain IOs or the availability of a GSP) and, thereby, they rely on different pressure strategies. In practice, these means can achieve a reasonable level of effectiveness. This effectiveness is sometimes due to the involvement of debt collecting funds, which can mobilize (i) specific know-how in the enforcement of arbitral awards, (ii) an institutional structure facilitating the adoption of enforcement measures and (iii) effective lobbying strategies. Investors with limited resources or coming from States with fewer means of political persuasion may sell their awards to these entities. The market has thus created an alternative fall back mechanism to enforce arbitral awards where the bargaining power of the investor is insufficient to collect the value of the award. The investor will certainly have to pay a price for it, but it will dispose of an alternative mechanism to the volatile institution of diplomatic protection.

Of course, the use of these alternative means to enforce awards is sometimes problematic. An excessively intrusive strategy may be very disruptive to the economy of the country and to wider social interests. An example would be the triggering of a lower sovereign credit rating due to disproportional reputational damage. In addition, in cases of defaulting States, such as Argentina in 2005, sovereign debt creditors compete with award creditors. While default often requires complex restructuring of sovereign debt, award creditors, in particular vulture funds, will pursue the full value of the debt through independent channels, as did Elliott Fund with respect to Peruvian debt in the 1990s. This might be disruptive to the restructuring of the sovereign debt of the host State, in particular after the Abaca1at decision on jurisdiction, where an arbitral tribunal asserted jurisdiction over the claims of 60,000 Argentine sovereign bondholders. While some concerns have been raised in connection with litigation to collect sovereign debts against Zambia and Liberia, which led to the Highly Indebted Poor Countries initiative (HIPC) limiting the collection of debts by vulture funds, enforcement of investment arbitral awards remains an area where further regulation is needed. The best avenue remains the negotiation of post-award settlements, which despite their many intricacies, offer an option adapted to the parties circumstances and needs. Post-award settlements will normally entail a reduction of the value of the award, but the adoption of intrusive stances and measures affecting wider social interests will be more easily avoided.
