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Article

OXFORD

State responsibility and the enforcement of arbitral awards

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ABSTRACT

The place of arbitration as a dispute resolution mechanism for disputes involving states and investors depends upon the value accorded to a valid award. Many states voluntarily comply with awards rendered against them. However, the occasions of non-compliance may result in the incurrence of international responsibility by states pursuant to both customary and treaty norms. This article considers some of these norms, as well as the bases on which states dispute responsibility for non-enforcement of arbitral awards or avoid execution. To this end, the various sections of this article examine: (i) the relevance of customary norms of state responsibility to investment arbitration; (ii) scenarios in which the refusal of national courts to enforce arbitral awards have been found to incur state responsibility by breaching an investment treaty; (iii) scenarios in which a state's refusal to respect an award rendered against it by an investment tribunal might incur international responsibility and relevant issues such as immunity; and (iv) the role of the International Court of Justice and, its predecessor, the Permanent Court of International Justice in upholding the integrity of arbitral proceedings, including by adjudicating the validity of arbitral awards rendered against states.

INTRODUCTION

One of the defining characteristics of arbitration is finality. Yet, as is made clear by the topical nature of discussions surrounding enforcement, finality is a term of art. The rendering of an award is not necessarily the end of the road. The losing party may choose to comply with the award voluntarily; it may choose to challenge the award (if there are available grounds and an available forum); or it may choose to reject or ignore its obligations under the award.

In such a scenario, enforcement therefore becomes an important consideration in upholding, not only the rights of the winning party, but the value of arbitration as a form of dispute resolution. These considerations are equally applicable to awards rendered against states.

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The customary international law of state responsibility dictates that a state incurs international responsibility if it carries out an internationally wrongful act. The latter is composed of an act or omission in breach of an international obligation that is attributable to that state.[1] To the extent that a state is under an international obligation to comply with, or to enforce, an arbitral award, the refusal or failure of a state or its courts (which un-controversially constitute an 'organ' of a state) to do so thus incurs international responsibility. This brings into play questions of circumstances precluding wrongfulness, and, should these prove inapplicable or inapposite, other important issues, such as the consequences of a breach, including obligations to cease and 'repair' the breach.

Specific wording that an arbitration award is final and binding on the parties (ie *res judicata* as to the issues adjudicated) and that the parties undertake to comply with the award may be found in investment treaties, other arbitration agreements and arbitral rules. Further, some commentators have suggested that there exists an obligation under general international law to fully comply with the award (distinct from that codified in treaties) based upon the nature of arbitration as a creature of consent.[2]

This article considers various norms and types of norms by which a state may incur responsibility for the non-enforcement of arbitral awards; the relevance of customary norms in determining, justifying, and repairing this responsibility; as well as examples of the practice of various tribunals (national and international), in adjudicating this responsibility. More specifically, it touches upon the following topics:

First, a general discussion about the reliance of international investment tribunals on customary norms of state responsibility, and particularly the International Law Commission's Draft Articles on the Responsibility of the States for Internationally Wrongful Acts (henceforth, the ILC Articles), to demonstrate that customary norms of state responsibility are relevant to investment arbitration.

Secondly, scenarios in which the refusal of national courts to enforce arbitral awards has been found to incur state responsibility by breaching an investment treaty, and the varied approach of international arbitration tribunals to adjudicating this responsibility.

Thirdly, specific obligations on the part of states to enforce awards and scenarios in which a state's refusal to respect an award rendered against it by an investment tribunal might incur international responsibility. Where the beneficiary of an arbitral award tries to recover on an award by enforcing it in foreign jurisdictions, issues of immunity of course become important. Such situations provide some insight into the approach of national jurisdictions to state responsibility for non-enforcement of arbitral awards.

1 International Law Commission, *Draft Articles on the Responsibility of the States for Internationally Wrongful Acts,* ILC Ybk 2001/II(2), 26 (henceforth *ILC Articles*), arts 1–3.

2 Lucy Reed and Lucy Martinez, 'Treaty Obligations to Honor Arbitral Awards' in Doak Bishop (ed), *Enforcement of Arbitral Awards Against Sovereigns* (JurisNet LLC 2009) 13 at footnote 5, relying on, *inter alia*, Schreuer, who states:

> The binding nature of the award in inherent in the concept of arbitration. It is often expressed in terms of *res judicata.* Since arbitration is based on agreement between the parties and this agreement includes a promise to abide by the resulting award, the award's binding force can also be based on the maxim *pacta sunt servanda*.

Christopher Schreuer, *The ICSID Convention: A Commentary* (CUP, 2nd edn, 2009) 1099.

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And, lastly, a mention of the roles of the International Court of Justice (ICJ), and its predecessor the Permanent Court of International Justice (PCIJ) in upholding the validity of arbitral awards rendered against states. There are limited examples of relevant cases, but, as our review shows, the stance taken by the PCIJ and ICJ provide an example of the importance attached by international courts to the 'finality' of arbitration, and thus its value as a mechanism for the resolution of disputes. The section ends with a brief examination of some of the ICJ's more recent interventions in arbitral proceedings involving states, to illustrate other ways in which it has been involved in protecting the integrity of arbitral proceedings.

2. RELIANCE OF INTERNATIONAL INVESTMENT TRIBUNALS ON CUSTOMARY NORMS OF STATE RESPONSIBILITY

Many in the legal sphere are familiar with the story of the ILC's codification and progressive development of the customary international law rules of state responsibility for internationally wrongful acts, drawn from inter alia state practice, the jurisprudence of international arbitral tribunals, and the judgments and opinions of the PCIJ and ICJ. The long journey of the ILC Articles is, in part, a reflection of their importance and the many scenarios in which they might potentially be applied.

But what is the relevance of the norms codified in the ILC Articles for the work of international investment tribunals, and particularly, why consider them in the context of enforcement?

As noted in the introduction, the foundational principles defining an internationally wrongful act, and the obligations that flow from such an act, play a key role in determining the existence and scope of state responsibility for non-enforcement.

A brief glance at the United Nations Legislative Series 2012 collection of Materials on the ILC Articles shows that the ILC Articles have been considered, relied upon and cited by multiple investment arbitration tribunals.[3] The submission is that, as the non-enforcement of arbitral awards may incur state responsibility under international law, an examination of the legal order relied upon and developed by the ILC Articles is relevant to the topic discussed in this article.

Although investment treaties tend to operate as a *lex specialis* and therefore may define a specific legal order, they do not operate in a vacuum. They are, by definition a creature of and governed by international law.[4] The use of the term 'treaty' is intended, specifically, to exclude agreements between states that are governed by national law.[5] International law norms 'act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international

3 See also Alain Pellet's 2013 Lalive Lecture, which looks at the invocation of ICJ Case Law by Investment Treaty tribunals, and notes that:

> with respect to the law of state responsibility, the ICSID tribunals rely much more on the 2001 International Law Commission (ILC) Articles than on the case law of the Court, which is less systematic by necessity.

Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration', (2013) 28(2) ICSID Review 223, 234.

4 art 2(1) of the Vienna Convention on the Law of Treaties.

5 International Law Commission, *Draft Articles on the Law of Treaties*, ILC Ybk 1966/II, 189 (para 6), Commentary to art 2(1).

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law is not a random collection of such norms. There are meaningful relationships between them'.[6]

Investment treaties usually contain an applicable law clause referring specifically to international law, thus empowering a court or tribunal resolving disputes under an investment treaty to apply international law. For example, Article 26(6) of the Energy Charter Treaty states:

> A tribunal established under paragraph (4) [providing for establishment of a tribunal under ICSID[7], the UNCITRAL Rules[8] or SCC[9] Rules to determine disputes under the investment chapter of the ECT] shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.

To give another example, Article 8(4) of the UK–Argentina bilateral investment treaty refers a tribunal constituted under the treaty to: (i) the terms of the treaty; (ii) the laws of the state party to the dispute (including its conflict of laws rules); (iii) the terms of any specific agreement relating to the investment; and (iv) 'the applicable principles of international law'.

Where a treaty does not make specific reference, a tribunal may be directed to apply international law to the dispute by a clause such as Article 42 of the ICSID Rules:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

It is clear that the specific protections that may be invoked before a tribunal are basically defined by the treaty itself, in the case of investor–state arbitration, classically a multilateral or bilateral investment treaty. However, unless the treaty explicitly covers issues such as attribution, reparation, justifications or defences, customary international norms (such as those set out in the ILC Articles, which are described as of 'residual' character) have a role to play in determining responsibility and its consequences.[10] Tribunals may, of course, refer not to the ILC Articles but to specific authorities accepted as setting out customary law, or a mixture of the two. A classic example would be the frequent reference to the PCIJ's holding in the *Chorzów Factory* case:

> The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the

6 International Law Commission, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, Ybk/2006/II(2), s 1, para 1.

7 The International Centre for Settlement of Investment Disputes, established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington, 18 March 1965 (or its Additional Facility if only one Contracting State is signatory to the ICSID Convention).

8 Arbitration Rules of the United Nations Commission on International Trade Law.

9 Arbitration Institute of the Stockholm Chamber of Commerce.

10 ILC Articles (n 1), art 55, and Commentary to art 55, para 2.

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> illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed . . .[11]

The tribunal in *Desert Line v Yemen*, in providing for the award of 'moral' as well as 'material' damages under international law, referred to principles set out by the Umpire in the Lusitania case before the US–German Mixed Claims Commission in 1924 and considered in the codification of in the ILC Articles.[12] The tribunal was the second-ever ICSID tribunal to award moral damages.

2.1 Customary rules: circumstances precluding wrongfulness

Having set out the theoretical framework, we now turn to look at some more specific examples of the invocation and application of customary rules on state responsibility in investment treaty arbitration. Respondent states in investment arbitrations have invoked customary defences or justifications to limit the scope of their responsibility, including what the ILC Articles term circumstances precluding wrongfulness.

As illustrations, it will be useful to look at the ways in which two circumstances precluding wrongfulness (countermeasures and necessity) have been dealt with by investment tribunals when faced with arguments by states attempting to justify measures that have given rise to international responsibility.

Circumstances precluding wrongfulness raise interesting questions about the nature of an investor's rights under an investment treaty. As demonstrated by the cases discussed below, the way a tribunal characterises those rights determines the applicability of circumstances precluding wrongfulness. This characterization is also instructive in thinking about the role customary international law rules on state responsibility more generally.

2.2 Customary rules: countermeasures

Particularly interesting in this regard are the rules regarding countermeasures—in theory a response to the internationally wrongful actions of another state—and therefore, in an investor–state arbitration, not the party across the table.

Tribunals have come to different conclusions on a state's ability to invoke countermeasures in the context of an investor–state arbitration, as illustrated by three

11 *Case concerning the Factory at Chorzów (Germany v Poland) (Claim for Indemnity)* (Merits) 13 September 1928, PCIJ, Series A, No 17, (henceforth *Chorzów Factory*), 47. The passage continues:

> Restitution in kind, or if this is not possible, payment of a sum corresponding to the value which restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

For examples of cases relying upon this passage, as well as Article 31 of the ILC Articles (which draws upon this passage), see *Materials on the Responsibility of States for Internationally Wrongful Acts* (2012) UN Doc SST/LEG/SER.B/25, 213–15.

12 *Desert Line Projects LLC v Republic of Yemen*, ICSID Case No ARB/05/17 (Award, 6 February 2008) paras 286–91. ILC Articles (n 1), art 31 and commentaries to art 31, para 6.

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cases brought by US investors against Mexico under NAFTA Chapter 11—*ADM, Tate & Lyle, Corn Products*, and *Cargill*:

All three cases arose out of tax measures imposed on drinks that used a sweetener that was not made from cane sugar.

In all three cases the tribunal found one or more breaches of Chapter 11 protections (notably, in all cases, of NAFTA Article 1102 on National Treatment).

And, in all three cases, Mexico claimed that the offending measures qualified as legitimate countermeasures against actions taken by the USA to restrict exports of Mexican sugar.

Article 1131(1) of NAFTA empowers an arbitral tribunal to 'decide the issues in dispute in accordance with [NAFTA] and applicable rules of international law'.

In light of this clause, the tribunal in *Corn Products v Mexico* recognized that:

> the rules on State responsibility (of which, it is accepted, the most authoritative statement is to be found in the ILC Articles) are in principle applicable under the NAFTA save to the extent that they are excluded by provisions of the NAFTA as *lex specialis.*[13]

However, it decided that Mexico could not invoke the wrongdoing of the state of nationality of the investor (in this case the USA) to justify countermeasures against the investor in the context of a Chapter 11 NAFTA claim. The tribunal analysed the ILC Articles' provisions on countermeasures and the accompanying commentary, and noted, *inter alia*, that countermeasures are available only against the State 'responsible for the original wrong and not *vis-à-vis* any other party'.[14]

The tribunal in *Cargill v Mexico* was less certain of the customary status of the ILC Articles' articulation of the rules surrounding countermeasures:

> the ILC Articles on State Responsibility in part are a codification of custom and in part manifest a progressive development of international law. It is not always apparent whether a particular article should be viewed as the codification of custom or the progressive development of it. Moreover, the ILC articles dealing with countermeasures were among the most controversial for, and commented upon by, the States reviewing the drafts of the articles.

It nevertheless noted that countermeasures could, under customary international law, preclude the wrongfulness of an act, and that '[t]he ILC articles regarding countermeasures provide an important point of departure in ascertaining more precisely the content of that custom.'[15]

Like the tribunal in *Corn Products*, the *Cargill* tribunal drew a parallel between nationals of the allegedly offending state and non-party states, noting that countermeasures could only operate on obligations owed to the 'offending state' and not on

13 See *Corn Products International, Inc.* v *United Mexican States*, ICSID Case No ARB (AF)/04/1 (Award, 15 January 2008) paras 76ff.

14 See *ibid*, paras 161–79, 191.

15 *Cargill, Inc. v United Mexican States*, ICSID Case No ARB(AF)/05/2 (Award, 18 September 2009) para 420.

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those owed to non-party states.[16] Countermeasures could not, therefore, operate in the way that Mexico claimed in a NAFTA Chapter 11 context.

The decisions of the *Corn Products* and *Cargill* tribunals represented a departure from the first tribunal to address the issue—that in *ADM, Tate & Lyle v Mexico*—based upon a different way of characterizing the rights of investors under NAFTA Chapter 11.

The *ADM* tribunal found that, as NAFTA Chapter 11 'neither provides nor specifically prohibits the use of countermeasures', the issue was to be determined by reference to customary international law.[17] The tribunal deemed that section A of Chapter 11 (which includes the substantive investment protections) 'sets forth substantive obligations which remain inter-State, without accruing individual rights for the Claimants'.[18] By reference to Article 22 of the ILC Articles, the tribunal decided that countermeasures constituted a 'valid defence' to a breach of Chapter 11, but the measures in question must qualify as such by satisfying the necessary conditions set out under customary international law (and articulated by the ICJ in *Gabcikovo–Nagymaros Project*):

First, the measures in question must be a response to the wrongful act of another state and be directed against that state.

Secondly, the injured state must have asked the state committing the wrongful act to cease or make reparation for the wrongful act.

Thirdly, the countermeasures must be proportional, ie commensurate with the injury suffered, in light of the rights in question.

And Fourthly, the purpose of the measures must be to induce compliance, and thus must be reversible.[19]

The measures imposed by Mexico, according to the tribunal, did not satisfy these conditions.[20]

2.3 Customary rules: necessity

Another circumstance precluding wrongfulness that has been employed in the investor–state arbitration context is that of 'necessity', most frequently and visibly by Argentina in cases relating to measures taken in response to the economic crisis at the start of the 21st century. Around 40 cases have been brought against Argentina following the 2001 crisis.[21]

As the ICJ did in *Gabčíkovo–Nagymaros*, the tribunals in these cases recognised that the circumstance precluding wrongfulness of 'necessity' as codified in Article 25 of the ILC Articles has customary status.[22] One of the conditions codified in Article

16 ibid, para 422.

17 *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No ARB (AF)/04/5 (Award, 21 November 2007) para 120.

18 ibid, para 168.

19 ibid, paras 121 and 126.

20 ibid, para 180.

21 Christina Binder and August Reinisch, 'Economic Emergency Powers: A Comparative Law Perspective', in Stephan Schill (ed) *International Investment Law and Comparative Public Law* (OUP 2010) 509.

22 Jorge Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn, and Jorge Vinuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP 2014) 347.

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25 is that necessity may only be invoked where 'the international obligation in question does not exclude [this possibility]'. Interestingly for our purposes, Newcombe and Paradell concluded in 2009 that: '[t]he [International Investment Agreement] case law to date appears to support the principle that [International Investment Agreement]s should not be read as excluding the plea of necessity.'[23]

A key issue in several cases was the interrelationship between the so-called 'security exception' contained in some investment treaties, for example, Article XI of the US–Argentina bilateral investment treaty, and the customary justification of necessity. Tribunals reached different conclusions on this question. The *Sempra, CMS*, and *Enron* tribunals, for example, 'conflat[ed]' the two standards.[24] The *Ad Hoc* Committee in *CMS* took a different approach and distinguished the components and nature of the two norms and situations in which they could be invoked. It held that, if the security exception applied, it precluded a finding of breach under the treaty, but that the application of necessity was predicated on a finding of breach.[25]

The conditions for proving 'necessity' as codified in Article 25 of the ILC Articles are strictly defined and cumulative. A state must prove that the wrongful act was:

'The only way';

' . . . to safeguard an *essential interest*';

' . . . against a *grave and imminent peril*'; and

That it does not 'seriously impair an essential interest of the state or states towards which the obligation exists, or of the international community as a whole'.[26] (Emphasis added.)

There is thus a balancing act inherent within the test between the interests of the state claiming necessity and those of the state to whom the obligation is owed or of the international community as a whole. The commentaries to the ILC Articles states: 'the interest relied on must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective'.[27] In addition, the invocation of necessity must not be precluded by the obligation in question and the state must not have contributed to the situation of necessity.[28]

The jurisprudence on necessity in the context of economic crises has been described as 'inconsistent and confused'.[29] The jurisprudence reveals the difficulty of relying on and adjudicating a plea of necessity in practice, and, according to Binder and Reinisch, is 'evidence [of] the difficulties associated with relying on the necessity

23 Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties* (Kluwer 2009) 521.

24 See Jurgen Kurtz, 'Building Legitimacy through Interpretation of Investor-State Arbitration' in Douglas, Pauwelyn and Viñuales (n 22) 287. See also *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16 (Award, 28 September 2007) paras 378, 388.

25 *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8 (Annulment Proceeding), Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, paras 129–30, 133–34.

26 ILC Articles (n 1), art 25(1).

27 Commentary to art 25 of the ILC Articles, para 17.

28 ILC Articles (n 1), art 25(2).

29 Robert Sloane, 'On the Use and Abuse of Necessity in the Law of State Responsibility', (2012) 106 *Am J Int L* 447, 498.

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defence in situations of economic emergencies'.[30] Six tribunals considered cases brought under the 1991 US–Argentina bilateral investment treaty, all concerning the same emergency measures,[31] and came to different conclusions on the applicability of necessity. Tribunals differed on, *inter alia*, whether the crisis faced by Argentina qualified as a 'grave and imminent peril'. The *CMS, Enron*, and *Sempra* tribunals found that it did not, but the *LG&E* tribunal came to the opposite conclusion: that Argentina faced 'an extremely serious threat to its existence . . .'.[32] Another point of departure was whether or not Argentina's actions were the 'only way' for the state to safeguard its interests. The *LG&E* tribunal, for example, found that an economic recovery package was the only way to respond to the crisis.[33] The *CMS, Enron*, and *Sempra* tribunals, again, held otherwise. Newcombe and Paradell note that, given the role played by these tribunals in developing the jurisprudence on necessity, more detailed evidential references, including references to expert evidence, would have been desirable.[34] This would assist in understanding the variance in conclusions reached by the tribunals when the test was applied to the facts before them. The tribunals also came to different conclusions as to whether or not there was sufficient evidence to conclude that Argentina contributed to the crisis: the *CMS, Enron*, and *Sempra* tribunals concluding that it did; and the *LG&E* tribunal that it did not.

2.4 Other customary principles

It seems appropriate to note at this juncture that many of the investor–state awards discussed in the context of the review of national state awards (Section 3) also invoked customary rules to determine issues related to the definition and consequences of an internationally wrongful act. To give some examples: (i) the tribunal in *White Industries v India* relied directly on customary international law standards (as set out in the ILC Articles and ICJ jurisprudence) relating to attribution of conduct to a state to conclude that the actions of Coal India (White Industries' contractual partner) could not be attributed to India;[35] (ii) the tribunal in *Saipem v Bangladesh* turned to 'the relevant principles of customary international law and in particular to the principle set out by the Permanent Court of Justice in the *Chorzów Factory case*', to determine the appropriate standard of compensation for illegal expropriation, and it also referred to the ILC Articles in attributing the actions of the Bangladeshi courts to Bangladesh, which it deemed 'self-evident';[36] (iii) in *Frontier Petroleum Services v Czech Republic*, the tribunal, in determining its jurisdiction, examined whether the refusal to recognize and enforce an award constituted a 'measure' within the meaning of the investor–state dispute resolution provision of the

30 Binder and Reinisch (n 21) 513.

31 ibid, 509.

32 *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case N ARB/02/1, Decision on Liability, 3 October 2006, para 257. See also discussion at Newcombe and Paradell (n 23) 518–19.

33 ibid.

34 Newcombe and Paradell (n 23) 519–20.

35 *White Industries Australia Limited v The Republic of India* (UNCITRAL Award, 30 November 2011) paras 5.1.21–33.

36 *Saipem v Bangladesh*, ICSID Case No ARB/05/7 (Award, 20 June 2009) paras 190, 201–02.

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Canada–Czech Republic investment treaty. In reaching an affirmative answer to this question, the tribunal referred to customary international law principles of state responsibility—including analysing the ILC Articles and commentary, ICJ, and Iran–US Claims Tribunal jurisprudence—as well as investor–state jurisprudence, to determine that a state could be held responsible under international law on this basis.[37]

Having established that customary norms of state responsibility have a role to play in the investment treaty context, we next turn to look at:

3. THE INCURRENCE OF STATE RESPONSIBILITY UNDER AN INVESTMENT TREATY BY A STATE THAT HAS NOT ENFORCED AN ARBITRAL AWARD

It is accepted that international responsibility may be incurred as a result of actions of domestic courts, traditionally as a result of 'denial of justice', a basis of claim that requires first exhausting local remedies. However, claims for non-enforcement of arbitral awards have been brought under various investment treaty protections, including various components of the fair and equitable treatment protection, full protection and security, and expropriation protections.[38] Investment tribunals have adopted different approaches to dealing with these claims. This divergence is based on three main factors:

first, on the basis of whether or not the award in question, or the rights underlying the award, constitute an 'investment', thus giving the tribunal jurisdiction to hear the claim;

secondly, the specific protection invoked by the claimant and the wording of that protection;

thirdly, the interpretative approach adopted by the tribunal in considering the meaning of the treaty—especially the two points just mentioned:—the definition of 'investment' and the standard inherent in the relevant protection. Some tribunals have adopted a more literal stance on interpretation; others a more teleological approach. All tribunals have exhibited a degree of reluctance to act as an international *ad hoc* appellate body for national court decisions regarding the recognition and enforcement of awards and the extent of this reticence appears to be reflected in the interpretative approach adopted. There is a question running through the jurisprudence as to whether—by providing a forum for questioning a national court's treatment of the finality of an arbitration award—a tribunal may play an unwarranted role in arbitral system, and thus itself call into question the finality of that system.[39]

37 *Frontier Petroleum Services v Czech Republic* (UNCITRAL, Final Award) 12 November 2010, paras 223–30.

38 Although outside of the scope of this section, it is important to note that states have also incurred responsibility under regional human rights treaties for their non-enforcement of arbitral awards. See, for example, *Stan Greek Refineries and Stratis Andreadis v Greece*, 9 December 1994, ECHR Series A, No 301-B; *Case of Regent Company v Ukraine* (App no 773/03), 3 April 2008; *Case of Kin-Stib and Majkic v Servia* (App no 12312/15), 20 April 2010, and the discussion in Stephen Fietta and James Upcher, 'Public International Law, Investment Treaties and Commercial Arbitration: an emerging system of complementarity?' (2013) 29(2) Arb Int 187.

39 This concern was particularly evidence in *Kaliningrad v Lithuania*, in which the tribunal was asked to find that the national courts breached the Lithuania–Russia BIT by enforcing an LCIA award. See discussion of *Kaliningrad v Lithuania* in Gabrielle Kaufmann-Kohler, 'Commercial Arbitration before International Courts and Tribunals' (2010) 29(2) Arb Int 153, 165, in which the tribunal declined jurisdiction 'on the ground that to do otherwise would imply that it assumed the role of an appellate body scrutinizing the

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A few examples are discussed below to illustrate the variety of approaches adopted. The purpose is not to provide a detailed overview of the relevant jurisprudence, which has been thoroughly and clearly discussed elsewhere.[40] For the purposes of this article it is important to note the scope of potential obligations pursuant to which a state may incur responsibility for non-enforcement of an award by national courts, as well as the decisions taken by international tribunals to expand or narrow that scope.

In *White Industries v India*, the arbitral tribunal decided that India had breached the India–Australia BIT due to non-enforcement of an arbitral award. Unlike many other examples, this was not a case in which the courts had made a final decision not to enforce an award; rather, the concern was one of delay. The tribunal concluded that White Industries' operation pursuant to the underlying contract constituted an investment, and the rights embodied in the un-enforced award were a crystallization of its contractual rights and thus part of its original investment. The tribunal noted the similarity in its reasoning to that of the *Saipem* tribunal (discussed further below).[41]

The tribunal found that India's actions did not amount to a denial of justice as there was 'no suggestion of bad faith'. Neither did India's actions amount to illegal expropriation, nor a breach of the claimant's legitimate expectations. Regarding the latter, the tribunal determined that, *inter alia*, at the time of entering the Contract, the claimant 'could not legitimately have expected that India would "apply the [New York] Convention properly and in accordance with international standards" as such standards were understood by White' and further, in relation to timely enforcement, the claimant knew or ought to have known at the time it entered into the Contract that the domestic court structure in India was overburdened.[42] However, the lengthy delay of the Indian court system in dealing with White's challenge to the Calcutta High Court's jurisdiction to hear set-aside proceedings (over nine years) and the Supreme Court's inability to hear a jurisdictional appeal (over five years) amounted to 'undue delay'. It was thus a breach of India's obligation to provide an investor with 'effective means' of 'asserting claims and enforcing rights'.[43] The 'effective means' clause was not included in the applicable India–Australia BIT, but the tribunal found that White Industries was entitled to invoke the protection contained in the India–Kuwait BIT by virtue of the MFN (most-favoured nation) clause in the India–Australia BIT.[44] In determining the damage caused by the breach, the tribunal examined each ground invoked by the other party to Indian court proceedings (Coal

correctness of domestic decisions applying the New York Convention'. Kaufmann-Kohler notes that '[t]here is an obvious difficulty with this reasoning. Indeed, by adopting this view, the tribunal failed to exercise its jurisdiction under the BIT.'

40 See, for example, Jose Alvarez, 'Crossing the "Public/Private" Divide: Saipem v Bangladesh and Other Crossover Cases' in Albert Jan van den Berg (ed), *International Arbitration: the Coming of a New Age?* (ICCA Congress Series, Kluwer Law International, vol 17, 2013) 400–30. Kaufmann-Kohler (n 39). Stephen Fietta and James Upcher, 'Public International Law, Investment Treaties and Commercial Arbitration: An Emerging System of Complementarity?' (2013) 29(2) Arb Int 187.

41 *White Industries Australia Limited v The Republic of India* (UNCITRAL Award, 30 November 2011) paras 7.6.10 and 7.4.19.

42 ibid, paras 10.3.9–16 .

43 ibid, paras 11.4.16–19.

44 ibid, para 4.4.6.

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India) on which it asked the Indian courts to refuse enforcement. It concluded that the award was enforceable under Indian law.[45] The tribunal's decision on jurisdiction and on the merits has been the subject of much discussion and has proved controversial in some quarters.[46]

The claim in *Saipem v Bangladesh* was based on the Italy–Bangladesh BIT, which provided for international arbitration for claims regarding compensation for expropriation only.[47] Similarly to the tribunal in *White Industries* (which, it should be noted, issued its decision four years after the *Saipem* tribunal issued its jurisdictional award), the *Saipem* tribunal held that the ICC award in question crystallized the parties' rights and obligations under the original contract, where the latter constituted an investment under the Italy–Bangladesh BIT. It deliberately left open the question of whether or not the award itself qualified as an investment.[48]

The claim arose out of an ICC arbitration between Saipem and Petrobangla (Bangladesh Oil & Gas Corporation), during which the latter sought and was granted a 'revocation decision' in the Bangladeshi courts, thereby revoking the authority of the ICC tribunal. The arbitration continued regardless and an award was rendered. When Petrobangla applied for the award to be set aside in the High Court Division of the Supreme Court of Bangladesh, the latter declared that the award 'non-existent' as the ICC tribunal's authority had been revoked.[49]

Like the decision reached in *White Industries*, the *Saipem* tribunal's decision—that a failure to recognize the existence of an ICC arbitral award amounted to an expropriation—has provoked its share of controversy.[50] However, the tribunal did exhibit a degree of reticence in characterizing the failure to recognize the existence of an award as an expropriation. The tribunal decided that substantial deprivation of an investor's ability to enjoy its award was not sufficient for a finding of expropriation in the case of annulment of an award—'illegality' was an additional prerequisite to ensure that annulment by a competent authority on legitimate grounds was not actionable.[51] Ultimately, the arbitral tribunal found that the Bangladeshi courts had

45 The tribunal pointed out that it had the parties' agreement to conduct such a review. See Kaufmann-Kohler (n 39) 166.

46 See, eg Sumeet Kachwaha 'The *White Industries Australia Limited – India* BIT Award: A Critical Assessment' (2013) 29(2) Arb Int, 275 (opining that the award is 'erroneous' and should not be adopted as a precedent in future investment arbitrations).

47 *Saipem v Bangladesh* ICSID Case No ARB/05/7, *Decision on Jurisdiction and Recommendation on Provisional Measures*, 21 March 2007, para 116. For a more detailed discussion of the facts and reasoning, as well as of the perceived intersection between the treaty and contract claim in this case, see Ruth Teitelbaum, 'Case Report: *Saipem v Bangladesh*' (2010) 26 Arb Int 313.

48 ibid, para 127.

49 ibid, paras 1–51 (Summary of the Relevant Facts).

50 See, eg Arthur Rovine, *Contemporary Issues in International Arbitration and Mediation* (Brill 2012) 179 quoting Promod Nair, 'State responsibility for non-enforcement of arbitral awards: revisiting Saipem two years on' (*Kluwer Blog*, 25 August 2011) <http://kluwerarbitrationblog.com/blog/2011/08/25/state-responsibility-for-non-enforcement-of-arbitral-awards-revisiting-saipem-two-years-on/> accessed 10 June 2014; Alvarez (n 40); Andrew Newcombe, 'When is Court Interference in Arbitration Proceedings Expropriatory?' (Kluwer Blog, 7 July 2009) <http://kluwerarbitrationblog.com/blog/2009/07/07/when-is-court-interference-in-arbitration-proceedings-expropriatory/> accessed 31 August 2015.

51 *Saipem* (n 36) paras 133–34.

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'abuse[d] [their] rights' as the courts of 'supervisory jurisdiction' and breached Bangladesh's obligations under the New York Convention.[52] Further, in concluding that the Respondent had substantially deprived the claimant of its rights, it noted the significance of the absence of assets outside of Bangladesh with which the ICC award could have been satisfied.[53]

As mentioned previously, the cases tend in both directions. We now turn to examples of cases where claimants were unsuccessful in their arguments that non-enforcement of an award breached an investment treaty:

In *Romak v Uzbekistan*, the tribunal's interpretation of 'investment' was influenced by its concern that a 'mechanical application' of certain investment categories would result in all awards in favour of the national of a Contracting Party qualifying as an investment. This conclusion would thus give rise to a 'new instance of review of State court decisions concerning the enforcement of arbitral awards'.[54] The potential consequences of accepting such an interpretation, in light of the presumed intentions of the Contracting Parties, led the tribunal to reject the 'literal' interpretation of investment urged by the claimant as 'untenable under international law'. Such an approach would entail accepting that Switzerland and Uzbekistan had, by entering into the BIT:

> renounced, in respect of every contract entered into with a national of the other Contracting Party, the application of domestic (or the chosen governing) law, and surrendered the jurisdiction of their own domestic courts (or the chosen dispute-resolution forum), even if the contract is a simple one-off sales transaction.[55]

In *GEA Group Aktiengesellscharft v Ukraine*, the tribunal adopted a relatively strict approach in interpreting whether an award qualified as an investment. While accepting the claimant's argument that its agreement to supply goods (a conversion contract) constituted a protected investment under the Germany–Ukraine investment treaty (and rejecting its argument that the same applied to a settlement agreement), it emphasised the distinction between an award and the investment out of which the award arose:

> . . . the Tribunal considers that 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.[56]

The *GEA* tribunal opined that, even if it had found that the award constituted an investment, the actions of the Ukraine courts in respect of an ICC award could not constitute an expropriation as the actions were not:

egregious;

52 ibid, paras 159–61, 170, 173.

53 ibid, para 130.

54 *Romak S.A. v Republic of Uzbekistan*, PCA Case No AA280 (Award, 26 November 2009) para 186.

55 ibid, paras 187–88.

56 *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No ARB/08/16 (Award, 31 March 2011) paras 161–62.

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discriminatory (in that they amounted 'to anything other than the application of Ukrainian law'); or

deliberate attempts to thwart GEA's ability to recover on the awards.[57] It distinguished the factual situation before it from the 'particularly egregious' acts of the Bangladeshi courts adjudicated in *Saipem*.[58]

Interestingly, the tribunal in *White Industries* determined that the *GEA* tribunal's approach to characterising an award—that awards arising out of disputes concerning 'investments' by 'investors' could not 'represent a continuation or transformation of the original investment'—was a 'departure' from a 'developing jurisprudence'.[59]

The tribunal in *Frontier Petroleum Services v Czech Republic* also exhibited a concern that it should not act as a *de facto* appellate court for national court decisions. The tribunal decided that the original investment, consisting of payments, was 'transformed into an entitlement to a first secured charge' in an arbitration award issued by a Stockholm tribunal pursuant to a shareholders' agreement.[60] The Czech courts had refused to enforce the award in question on public policy grounds. The tribunal did not accept the Czech Republic's argument that Frontier Petroleum's attempt to 'impeach' the Czech courts should be characterized as a denial of justice claim.[61] The tribunal, in effect, reviewed the decision of the Czech courts to establish whether the decision constituted an abuse of rights, but in so doing noted the 'margin of appreciation' afforded to states in determining their conception of international public policy. The tribunal decided that, on substantive grounds, the interpretation of the international public policy of the Czech Republic was 'reasonably tenable', and that procedurally, there was no indication that the courts acted: (i) arbitrarily; (ii) discriminatorily; or (iii) in bad faith.[62]

This brief survey of some of the relevant jurisprudence reveals the scope of obligations that have been invoked following the decisions by national courts not to enforce arbitral awards.[63] It further demonstrates the various positions adopted by tribunals to the claims presented, although all of the tribunals examined demonstrated a degree of concern about 'opening the floodgates' to the creation of a system of supranational appeals. It will be interesting to see whether, in future, similar claims

57 ibid, para 236.

58 ibid, para 234.

59 *White Industries Australia Limited v The Republic of India* (UNCITRAL Award, 30 November 2011) para 7.6.8.

60 *Frontier Petroleum Services v Czech Republic* (UNCITRAL Final Award, 12 November 2010) para 231.

61 ibid, para 487.

62 ibid, paras 527, 529

63 We note that, in many cases, BITs will often not provide a route to protest non-enforcement. In the context of discussion of breach of the New York Convention, William Park notes:

> [i]n some instances, investment treaties offer a way to close the gap between theory [of avoiding undue interference by national judicial decisions of awards protected by the New York Convention] and practice, permitting investors to bring private actions against a host country rather than relying on government-to-government measures. Not all failure to respect the New York Convention fits within the framework of investment treaties. Many clear Convention violations remain without remedy, due to the absence of any relevant 'investment' providing the jurisdictional hook on which to hang a claim.

William Park, 'Convention Violations and Investment Claims' (2013) 29(2) Arb Int 175, 175–76.

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are presented on a more frequent basis, as well as the direction taken by tribunals seized by these claims.

4. THE OBLIGATION TO COMPLY WITH AND ENFORCE AWARDS

Incorporated into the arbitration clauses of many investment treaties is an obligation to comply with and enforce any award rendered pursuant to the arbitration clause. As mentioned above, the obligation may be spelled out in the arbitration clause itself or included in arbitral rules incorporated into the clause, or both.[64] It may also be deemed a customary obligation. As such, a state against whom an award is rendered may be subject to concurrent obligations to enforce an award.

Non-enforcement of an award rendered under such treaty clauses would thus qualify as a breach of an international obligation and incur state responsibility (with the corollary obligation to 'cease' the breach and make reparation for any damage caused). The obligation to comply with, apply or enforce an award flows from the binding nature of arbitration as a form of dispute settlement and also the finality of the procedure. However, where there are applicable grounds and an available forum, awards may still be subject to review and annulment proceedings (in the case of ICSID Awards under the ICSID Annulment Procedures only).[65] Further, should a party request recognition and enforcement of an award in one of the 156 (and growing) states parties to the New York Convention, the respondent state may resist the action on the basis of the limited grounds contained therein.[66]

The exact content and contours of the obligation varies depending on the language of the specific clause, with, for example, some clauses referring to enforcement in accordance with the domestic law, others that the parties will 'comply with and abide by' the award, others that the parties will 'carry out without delay' any award, etc.

On the issue of compliance, Article 19(3) of the Australia–Mexico bilateral investment treaty, for example, states:

> [t]he decision of an arbitral tribunal in an arbitration under [the articles providing for investor-state arbitration and consolidation] of this Agreement shall be binding on the parties to the dispute with respect to the particular case. The parties shall abide by and comply with the terms of the award.

NAFTA, paragraph 1136, provides (as do many bilateral investment treaties, for example the UK–Mexico treaty) that the award has binding force only between the

64 See, for example, art 19(3) of the Australia–Mexico BIT, art 1136(4) of NAFTA, art 53(1) of the ICSID Convention and art 34(2) of the 2010 UNCITRAL Rules.

65 Pursuant to art 52(5) of the ICSID Convention, the applicant to the annulment procedure may request stay of enforcement of the award and a provisional stay is automatically granted until the Annulment Commission rules on the request.

66 To the extent that the award in question qualifies under the terms of the New York Convention. The New York Convention applies to 'international commercial' awards. Although containing no specific reference, the 'Convention has invariably been applied' to awards to which a state is a part. Albert Jan van den Berg, 'Recent Enforcement Problems under the New York and ICSID Conventions' (1989) 5 Arb Int L 2, 10.

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disputing parties in respect of the particular case. With this caveat, paragraphs 1136(2) and (4) provide:

> 2. Subject to paragraph 3 [regarding revision and annulment proceedings] and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
> . . .
> 4. Each Party shall provide for the enforcement of an award in its territory.

On the matter of enforcement, NAFTA paragraphs 1136(5), (6), and (7) then set out different mechanisms through which enforcement may be sought. This includes the state of nationality requesting the Commission to establish an arbitral panel from whom the requesting state may seek: 'a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement' and 'a recommendation that the Party abide by or comply with the final award'. In 2009, Lucy Reed and Lucy Martinez note that this mechanism has not been invoked by a state as all NAFTA awards had been complied with.[67]

The obligation to respect an award is also found in many applicable arbitration rules:

Article 34(2) of the 2010 UNCITRAL Rules states:

> All awards shall be made in writing and shall be final and binding on the parties. The parties shall carry out all awards without delay.

Article 28(6) of the ICC Arbitration Rules 1998 reads:

> Every Award shall be binding on the parties. 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.

Article 53(1) of the ICSID Convention provides:

> The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

Article 64 of the ICSID Convention provides that any dispute between Contracting States regarding the 'interpretation and application' of the Convention (and not settled by negotiation) may be submitted for resolution to the ICJ by one of the parties to the dispute. A case could theoretically therefore be submitted by the

67 Lucy Reed and Lucy Martinez, 'Treaty Obligations to Honor Arbitral Awards' in Doak Bishop (ed), *Enforcement of Arbitral Awards Against Sovereigns* (JurisNet LLC 2009) 17.

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state of nationality of an aggrieved investor against another Contracting State in the case of non-enforcement of an award. Schreuer has stated a third state may also submit the dispute to the ICJ if it can show a 'legal interest' in compliance with the award.[68] While these remain theoretical possibilities, in practice, no case has been brought before the ICJ pursuant to Article 64.

4.1 Why do National Courts choose to enforce or not enforce awards?

States claim, and their courts accept, various reasons for not enforcing awards, whether as part of, or outside of, review, annulment or enforcement proceedings. As discussed above, there are various circumstances precluding wrongfulness that a state may invoke as mechanisms to preclude international responsibility for not enforcing awards. Greece invoked a species of this doctrine before the PCIJ in a case discussed further below, although due to the limited scope of the PCIJ's jurisdiction in that case it did not reach a position on Greece's argument.

One interesting case to look at in this regard is that of *Yukos Capital v Rosneft*, largely because of the interplay of domestic court decisions and the grounds for those decisions. Yukos obtained four awards against Rosneft,[69] which were set aside by the Russian courts. Rosneft is an entity owned by the Russian state. The Russian courts based their decision on their findings that:

the tribunal did not appear independent and impartial;

it violated the applicable rules of procedure; and

the proceedings were conducted in such a way as to violate the right to equal treatment.[70]

Yukos applied to the Dutch courts for enforcement of the awards. The Amsterdam Court of First Instance refused to enforce the awards on the basis that they had been set aside at the seat of the arbitration (and thus fell within Article V(1)(e) of the New York Convention). However, the Court did note that in 'exceptional circumstances', a lack of due process and independence on the part of the courts setting aside an award could constitute an exception to Article V(1)(e). In this case, the Court found that Yukos had not submitted sufficient evidence to satisfy these criteria.

The Dutch Court of Appeals disagreed with the Court of First Instance, deciding that the evidence submitted, taken together with external reports, showed that it was very likely that the Russian courts' decision was 'the result of an administration of

68 Schreuer, *The ICSID Convention: A Commentary* (CUP, 1st edn, 2001) 1090.

69 Rosneft is a state-owned entity, but it does not automatically follow that it was the 'state' presenting these arguments before the Russian courts. Attribution is a matter of context, to be examined on a case-by-case basis, as was recognized in the subsequent arbitrations between Yukos and the Russian state: see, eg *Hulley Enterprises Limited (Cyprus) v The Russian Federation*, PCA Case No AA 227 (Final Award, 18 July 2014) 1468ff. It will be interesting to see how the interplay of domestic court decisions on enforcement affect these three awards.

70 Albert Jan van Den Berg, 'Enforcement of Arbitral Awards annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 28, 2009', (2010) 27(2) J Int Arb 179 and Patricia Nacimiento, 'Recognition and enforcement of annulled arbitral awards – the Yukos Capital decision' (*Kluwer Blog*, 14 October 2009) <http://kluwerarbitrationblog.com/blog/2009/10/14/recognition-and-enforcement-of-annulled-arbitral-awards-%E2%80%93-the-yukos-capital-decision/> accessed 10 June 2014.

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justice which should be qualified as partial and dependent'.[71] The Court of Appeals granted enforcement of the awards.

Yukos also brought proceedings in the English courts to recover post-award interest of more than US$160 million.[72] Before the English courts, Rosneft argued, again, that the awards had been set aside at the seat of the arbitration and, further, that the doctrines of act of state and/or non-justiciability prevented the English courts from adjudicating allegations of bias made by Yukos.[73]

The English Commercial Court decided that the Dutch decision estopped Rosneft from claiming that the awards did not exist and or that the setting aside was not partial or dependent. Further, that the act of state or non-justiciability doctrines did not apply in this case.[74]

On appeal, the Court of Appeal upheld the Commercial Court's conclusion that the act of state doctrine was not applicable, noting that, contrary to Rosneft's claim: 'the act of state doctrine does not prevent an investigation of or an adjudication upon the conduct of the judiciary of a foreign state . . .'.[75] The Court of Appeal dismissed, however, the Commercial Court's conclusion that the Dutch judgment estopped Rosneft's from relying on the annulment decision. The Dutch courts had reached their decision based on public policy grounds. It was for the English courts to determine the issue based on the English public order.[76]

4.1.1 Sovereign immunity

While it is interesting to consider the range of arguments that states will invoke to challenge motions for recognition and enforcement of awards, when before foreign national courts states will often invoke sovereign immunity. Sovereign immunity is a foundational doctrine of international law. It derives from the principle of sovereign equality, and, in essence, is a procedural bar to the pursuit of a sovereign state before the courts of another state, rather than speaking to responsibility *per se*.[77]

The doctrine encompasses immunity at two distinct points in time: immunity from jurisdiction and immunity from execution. The general view (although, as noted below, not universally held) is that by submitting to arbitration, a state gives its consent to suit and thus waives its right to immunity from jurisdiction. It also consents to comply with any final award resulting from the arbitration.[78] Immunity from

71 *Yukos Capital SARL v OJSC Rosneft Oil Company* [2012] EWCA Civ 855, para 21. See also van den Berg, ibid, 180 and Mike McClure, 'Enforcement of Arbitral Awards that have been Set Aside at the Seat: The Consistently Inconsistent Approach across Europe' (*Kluwer Blog*, 26 June 2012) <http://kluwerarbitrationblog.com/blog/2012/06/26/enforcement-of-arbitral-awards-that-have-been-set-aside-at-the-seat-the-consistently-inconsistent-approach-across-europe/> accessed 10 June 2014.

72 *Yukos Capital SARL v OJSC Rosneft Oil Company* [2012] EWCA Civ 855, para 12.

73 ibid, paras 25, 29–37.

74 ibid, para 39.

75 ibid, paras 86–87, 91.

76 ibid, paras 156–57, 163.

77 See *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (2012) 99, *Judgment,* ICJ Rep, 123–24, 143.

78 'If a State agrees to arbitration, it must be deemed to have accepted all its consequences, including compliance with an unfavourable award'. van den Berg (n 66) 12.

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execution, however, is a different matter. The *Ad Hoc Committee* in *MINE v Guinea* summarized the position as follows:

> State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award.[79]

The extent to which a state benefits from immunity from execution depends upon the law of the jurisdiction where execution is sought. The picture is not consistent: some states accord absolute immunity from execution and others take a restrictive approach, distinguishing between assets that are used for 'sovereign' and 'commercial' purposes.

Article 53(1) of the ICSID Convention indicates an enclosed system—there is no possibility for appeal of the award in a national court. Article 54(1) obliges states to recognize ICSID awards as binding and to 'enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'. However, Articles 54(3) and 55 clarify that this is without prejudice to doctrines of state immunity regarding execution, thus, again limiting in accordance with the laws of the place of execution, the possibility to enforce an award against the assets of a debtor state. Awards rendered under the UNCITRAL rules do not qualify for the same enclosed annulment procedure, but will usually be subject to challenge proceedings in accordance with the New York Convention. They are also subject to the laws on state immunity from execution in the place where execution is sought.

Although the trend is towards states adopting more restrictive doctrines of immunity, there are still states that hold to absolute doctrines. In 2009, the Hong Kong Court of Appeal handed down a decision upholding the immunity of the Democratic Republic of Congo (DRC) in an action brought by a US investor to enforce an award against the DRC's assets to satisfy outstanding amounts under two ICC awards.[80] At issue in the case was the doctrine of absolute state immunity (from suit and execution) practiced in the People's Republic of China and whether, post-1997, Hong Kong could diverge from this approach.[81] The Court of Final Appeals decided that it could not. Further, that Article 28(6) of the ICC rules of Arbitration 1998 (as set out above) did not constitute a waiver of immunity before the courts of another state; in Hong Kong, a waiver must be served on the court itself. The DRC was thus immune from suit and execution, regardless of the nature of the transaction.[82]

79 *MINE v Guinea (Ad Hoc Committee)* as quoted in UNCTAD, 'Course on Dispute Settlement: International Center for Settlement of Investment Disputes - Binding Force and Enforcement', (2003) UN Doc UNCTAD/EDM/Misc.232/Add. 8.

80 See David Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors', OECD Working Papers on International Investment, *2010/2,* 12–13; Shen Wei, 'FG Hemisphere Associates v. Democratic Republic of the Congo' (2014) 108(4) Am J Int L 776; Teresa Cheng and Adrian Lai, 'Lessons learned from the FG Hemisphere *v* DRC and HuatianLong Case' <http://www.arbitration-icca.org/media/1/13234276446270/6-lessons_learned_from_the_fg_hemisphere_vs_drc_and_huatianlong_case.pdf> accessed 10 June 2014.

81 Cheng and Lai, ibid.

82 Wei (n 80) 780–81.

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Enforcing against assets in a jurisdiction that follows a restrictive doctrine of immunity is no guarantee of success. Most assets kept by states in foreign jurisdictions serve a public purpose[83] and successfully executing against foreign state property remains difficult for private parties.[84] In *AIC Ltd. v Nigeria* and *Alcom Ltd. v Republic of Colombia*, the English courts determined that accounts containing funds used for both commercial and sovereign purposes were to be treated as immune. In *Alcom*, the House of Lords held that a sovereign's account could be attached to satisfy an award only if 'it can be shown by the judgment creditor . . . that the bank account was earmarked by the foreign state solely (save for *de minimis* exceptions) for being drawn upon to settle liabilities incurred in commercial transactions . . .'.[85] Further, in *AIG v Republic of Kazakhstan*, the English courts considered that assets invested in securities by a sovereign wealth fund were immune from execution to satisfy an ICSID award that had been registered as a judgment in the UK. The general purpose of the sovereign wealth fund's activities was to accumulate assets in the public interest, and thus the sovereign wealth fund was engaged in a sovereign activity.[86] Although highlighting the potential hurdles to overcoming sovereign immunity, this is not to suggest that it is a lost cause. Claimants are successful in proving the commercial nature of state transactions. In *NML Capital v Argentina*, the UK Supreme Court characterized bonds issued by Argentina in 2000 as 'commercial transactions' for the purposes of the 1978 State Immunity Act.[87]

Immunity from execution thus still forms a potential hurdle to recovering what is due under an award. Stephen Schill has termed it a 'loophole in the efficient protection of investors'.[88] And where a state refuses to comply with an award, execution is a key step in upholding the award's value.

5. THE ROLE OF THE ICJ IN ENFORCING STATE-TO-STATE ARBITRATION AWARDS

Lastly, we turn to the role of the ICJ in enforcing arbitral awards. The essence of this article is a focus on the enforcement of awards rendered against states and in favour of foreign investors. However, given the jurisdiction of the ICJ, and its potential role in hearing diplomatic protection claims (discussed further below), whether under Article 64 of the ICSID Convention or otherwise, it is instructive to examine the ICJ's attitude to the enforcement of arbitral awards against states.

The ICJ hears contentious cases presented only *by states against states* and, furthermore, only pursuant to state consent. Turning to the ICJ for assistance in the face of non-enforcement is thus not a guaranteed avenue of resort.

83 Stephan Schill, 'International Investment Law and the Law of State Immunity: Antagonists or Two Sides of the Same Coin', in Rainer Hofmann and Christian Tams (eds), *International Investment Law and General International Law* (Nomos 2011) 250.

84 See Gaukrodger (n 80) 23.

85 Craig Miles 'Sovereign Immunity' in D Bishop (n 2) 64–65, referring to *AIC Ltd. v Nigeria & Anor* [2003] EWHC 1357 (QB) (13 June 2003) para 47 and *Alcom Ltd. v Republic of Colombia* [1984] 1 AC 560, 580.

86 Gaukrodger (n 80) 21–23. *AIG Capital Partners* v *Kazakhstan* 129 ILR 589, 623ff.

87 *NML Capital Limited v Republic of Argentina* (2011) 147 ILR 575, 576 (eg 621).

88 Stephan Schill (n 83) 250.

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5.1 State-state arbitral awards

However, the ICJ has acted as a forum in which states have disputed the validity of awards rendered in state-to-state arbitrations. In such cases, subject to fulfilment of the necessary jurisdictional requirements, the ICJ is in a position to adjudicate whether or not a state's failure to comply with the terms of an arbitral award would amount to a breach of its international obligations.

The precedents to date show the ICJ refusing to re-review the award as if a court of appeal and upholding the validity of award in the face of objections. This crystallizes the obligation to comply with the award.

5.1.1. Case concerning the Arbitral Award made by the King of Spain on 23 December 1906

In 1958, Honduras filed with the Court an application against Nicaragua in *the Case concerning the Arbitral Award made by the King of Spain on 23 December 1906* regarding the validity of an arbitral award determining the land boundary between the two states.

In 1894, Nicaragua and Honduras concluded the Gámez–Bonilla Treaty, establishing a Mixed Boundary Commission to effect demarcation of their boundary and agreeing that unsettled issues would be submitted to arbitration. Ultimately, this led to King Alfonso XII of Spain delivering an arbitral award regarding the frontier that led towards the Atlantic. The terms were favourable to Honduras and Nicaragua contested the validity of the award and occupied the disputed territory. Negotiation and mediation were unable to resolve tensions and skirmishes took place within the disputed territory.

Following the facilitation of a ceasefire and recommendations by the Council of the Organisation of American States regarding methods of peaceful settlement of the dispute, the parties agreed to refer the dispute to the ICJ (although the ICJ's jurisdiction was ultimately based on the optional declarations of both states as well as the Washington Treaty rather than special agreement, as the parties were unable to agree on specific enough terms for referral to the Court). In 1958, Honduras applied to the ICJ for a decision that the arbitral award was valid and bound Nicaragua to its terms.

Nicaragua argued that King Alfonso had been improperly appointed as arbitrator and the Gaméz–Bonilla Treaty lapsed before he agreed to act as arbitrator. The ICJ rejected Nicaragua's challenge to King Alfonso's jurisdiction: Nicaragua had 'by express declaration and by conduct, recognized the Award as valid'—it had participated in the proceedings without raising such challenges—and the Court decided Nicaragua could not now challenge the validity of the award on that basis.[89]

The Court noted that, even had it not found that Nicaragua was 'debar[red]' from disputing the validity of the award, it would still have recognized the award as valid. Nicaragua had failed to prove its claims that the award was a nullity. In making

89 *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua) (1960) 192, Judgment of 18 November 1960, ICJ Rep, 213–14.

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its determination, the Court applied the following considerations as to the applicable standard of review:

> the Court will observe that the Award is not subject to appeal and that the Court cannot approach the consideration of the objections raised by Nicaragua to the validity of the Award as a Court of Appeal.[90]

It continued:

> The Court is not called upon to pronounce on whether the arbitrator's decision was right or wrong. These and cognate considerations have no relevance to the function that the Court is called upon to discharge in these proceedings, which is to decide whether the Award is proved to be a nullity having no effect.[91]

The ICJ thus upheld the finality of arbitration as a means of dispute settlement, refusing to re-review the merits of the award or to second-guess the analytical framework or methods employed by the King of Spain. In addition, the Court decided that Nicaragua was obliged to give effect to the award. It thus went further than confirming the validity of the award; it articulated the legal consequences of its finding.

In February 1961, Nicaragua requested the assistance of the Inter-American Peace Committee in resolving questions arising from the execution of the ICJ judgment. A mixed commission was established to assist with implementing the judgment in the face of certain practical concerns relating to resettlement, nationality, property rights, and the demarcation of the land border.[92] The work of the commission was ultimately successful.

5.1.2. Case concerning the Arbitral Award of 31 July 1989

In the *Case concerning the Arbitral Award of 31 July 1989*, the Court again upheld the validity of an arbitration award, this time between Senegal and Guinea-Bissau regarding their maritime boundary.

The award in question confirmed that the 1960 Agreement between France and Portugal regarding the delimitation of part of the maritime boundary between Senegal and Guinea-Bissau 'ha[d] the force of law in the relations between [Senegal and Guinea-Bissau]'. [93] The arbitral decision was based on a 2-1 majority, with the President of the Tribunal forming part of the majority. The President also issued a Declaration, which, in Guinea-Bissau's view, contradicted his vote. On this basis, Guinea-Bissau asked the ICJ to find that there was no award.

In the alternative, Guinea-Bissau argued award was null and void on the grounds of *excès de pouvoir*, including the tribunal's failure to draw the determined line on a map as required by the arbitration agreement, as well as insufficient and invalid

90 ibid, 214.

91 *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment, ICJ Rep 1991, 74.

92 Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (OUP 2004) 129–31.

93 *Arbitral Award of 31 July 1989* (n 91) 64, para 30.

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reasons supporting the tribunal's approach and interpretation of the arbitration agreement.

The Court dismissed all of Guinea-Bissau's arguments, noting that, in its view, there was no contradiction in the President's position, but, even if there had been, 'such contradiction could not prevail over the position which President Barberis had taken when voting for the award'.[94]

Here, again, we see the Court refusing to act as a court of appeal in the context of state-to-state arbitration The Court recognized an arbitral tribunal's power to determine its own jurisdiction (*competence-competence*) and affirmed that the scope of review available to the Court was limited in this regard. The Court noted that:

> a rule consistently accepted by general international law in the matter of international arbitration [is] . . . that in the absence of any agreement to the contrary, an international tribunal has the right decide as to its own jurisdiction and has the power to interpret for this purpose the instrucments which govern that jurisdiction. [95]

The Court found that it was not its role to determine whether the tribunal had chosen the most preferable interpretation of the arbitration agreement. Rather, that the proceedings should be characterized as a *recours en nullité* in which the ICJ was to 'ascertain whether by rendering the disputed Award the Tribunal acted in manifest breach of the competence conferred on it by the Arbitration Agreement, either by deciding in excess of, or by failing to exercise, its jurisdiction'. [96] The wording of the judgment mirrors the language in Article V(c) of the 1958 New York Convention on the recognition and enforcement of Foreign Arbitral Awards, setting out the grounds on which a court can refuse to recognize and enforce a *foreign* arbitral award.

The ICJ looked at possible interpretations of the arbitration clause in question and concluded that the Tribunal had not acted outside of its jurisdiction in adopting its chosen interpretation and approach. Further, the reasoning, although 'brief', was 'sufficient' to explain to the Parties (and Court) the Tribunal's reasoning. [97]

In the last operative paragraph of its Judgment, the Court emphasized that the award was valid and binding on Senegal and Guinea-Bissau and that they had the 'obligation to apply it'. [98] Further, the Court 'consider[ed] it highly desirable that the elements of the dispute that were not settled by the Arbitral Award of 31 July 1989 be resolved as soon as possible, as both Parties desire'.[99]

In 1991, before the conclusion of the 1989 case before the Court, Guinea-Bissau filed an application commencing separate proceedings, requesting that the Court clarify its maritime boundary with Senegal.[100] The arbitral award was, according to

94 ibid, 64.
95 ibid, 69, para 46, quoting *Nottebohm* (Preliminary Objection) (1953) Judgment, ICJ Rep, 119.
96 *Arbitral Award of 31 July 1989* (n 95) 69, para 47.
97 ibid, 74, para 63.
98 ibid, 76.
99 ibid, 75.
100 *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal)* (1991), Application of Guinea-Bissau dated 12 March 1991, 11.

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Guinea-Bissau, an 'impediment' to the delimitation of the parties' maritime boundary with the consequence that the 'expressed wish' of the parties, 'to arrive at a delimitation of the whole of their maritime territories . . . [would] remain unsatisfied'.[101] Following the Court's decision in the *Case concerning the Arbitral Award of 31 July 1989*, the parties negotiated and agreed upon a maritime boundary, and the 1991 case was removed from the list by order of the Court in November 1995.[102]

5.2 Diplomatic protection

The ICJ may also play a role in upholding the validity of arbitral awards in the context of a diplomatic protection claim, in which a state asks the ICJ to declare that another state has breached its international obligations by refusing to respect an award rendered in favour of one of its nationals. The state of the injured national thus invokes its indirect interest in the case, based on the principle, as framed by Vattel in the 18th Century that: '[q]uiconque maltraite un citoyen offense indirectement l'état qui doit protéger ce citoyen.'[103] However, the contemporary investor–state investment protection regime has largely replaced the use of diplomatic methods: avoiding the escalation of inter-state tensions that could result from a state seeking to protect its national's interests (so-called 'gunboat diplomacy') was an impetus behind the evolution of the current regime.

Attempts to depoliticize the protection of foreign investment reflect the difficulties that are often associated with a diplomatic protection claim. Diplomatic protection is not a guaranteed method of recourse for an investor. There are political, diplomatic and economic considerations for the state in question and it may exercise its discretion not to espouse the claim. Further, should the state choose to do so, the investor is likely to lose control over the claim. In his seminal article 'Arbitration without Privity', published in 1995, Jan Paulsson wrote that diplomatic protection 'has proved itself unworkable as a way of protecting business interests in the context of contemporary economic life'.[104]

Many investment treaties thus exclude the possibility for a diplomatic protection claim in respect of a dispute that falls within their terms, once the parties have consented to the dispute. However, this exclusion is circumscribed and such treaties tend to allow for diplomatic protection claims where the host state does not comply with an award rendered under the treaty. It seems logical to presume that consent to arbitrate is predicated on the assumption of compliance with the obligations set out

101 ibid.

102 *Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v Senegal)* (1995), Order of the Court, dated 8 November 1995, ICJ Rep, 425.

103 E de Vattel, *Le Droit des Gens; ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* 289 (1773). See also *The Mavrommatis Palestine Concessions Case* (1924) PCIJ Rep Series A No 2, 12 (30 August 1924), where the PCIJ stated : '. . . By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on its behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law'.

104 Jan Paulsson, 'Arbitration without Privity' (1995) 10 ICSID Rev—Foreign Invest L J 232, 255.

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in the award. This approach is reflected in the ICSID Convention, which, in Article 27 states:

> 1. 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 State 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.
> 2. Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

This is also an approach explicitly adopted in many multilateral and bilateral investment treaties, for example, the Mexico–Australia bilateral investment treaty (referred to above).[105] In some cases, the clauses are prescriptive as to the institutional context in which diplomatic protection will be exercised. For example, the mechanism set out in NAFTA paragraph 1136 above, which is an express acknowledgement of the right of a state to initiate arbitration proceedings against the host state should the latter refuse to enforce an award against it.

The ICJ has not been called upon by a state exercising its rights of diplomatic protection to enforce an award rendered under an investment treaty. However, Belgium invoked this right before the PCIJ, in respect of an award arising out of a contract-based arbitration. In 1938, Belgium commenced judicial proceedings against Greece under a bilateral conciliation treaty following Greece's effective failure to pay certain sums due to a Belgian company under the award. In *Société Commerciale de Belgique (Belgium v Greece)*, Belgium asked the PCIJ to pronounce on the validity of the award and that Greece was bound 'in law' to execute the award. Greece, while recognizing that the awards had the force of *res judicata*, invoked the doctrine of *force majeure*. It asked the Court to judge that execution was 'materially impossible' in light of the financial crisis that Greece was experiencing at the time.[106]

The PCIJ noted that to rule upon Greece's request would require 'verif[ying] . . . that the alleged position really existed and. ascertain[ing] the effect which the execution of the awards would have upon that position', which the parties agreed was outside the scope of the proceedings. The Court 'admitted the submissions of the

105 art 19(8) of the Mexico–Australia states:

> If a disputing Contracting Party fails to abide by or comply with a final award, on delivery of a request by a Contracting Party whose Investor was a party to the arbitration, an arbitral tribunal under Article 21 [Settlement of Disputes between Contracting Parties] may be established. The requesting Contracting Party may seek in such proceedings:
>
> (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement, and
>
> (b) a recommendation that the Contracting Party abide by or comply with the final award.

106 *Société Commerciale de Belgique (Belgium v Greece)*, PCIJ, Series E-No 15, 1938–39, A./B. 78, 165, 167–68.

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Parties respecting the definitive and obligatory character of the arbitral awards', but denied the other submissions on the basis that, in light of the scope of the bilateral conciliation treaty and absent special agreement of the parties, the Court did not have authority to rule upon them. It urged the parties to settle the issue:

> the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement in which regard would be had, amongst other things, to Greece's capacity to pay. Such a settlement is highly desirable.[107]

5.3 Recent interventions

While not addressing the question of the validity (and enforceability) of an arbitral award, it is worth briefly considering a few examples of the ICJ's more recent interventions in relation to arbitral proceedings involving states. These serve to illustrate various other ways in which the ICJ and its members can contribute to upholding the integrity of arbitral proceedings involving states, as well as re-confirming the role of customary international law in resolving these disputes. Several BITs list an ICJ Judge (usually the President) as the appointing authority where the parties, or party-appointed arbitrators, are unable to reach agreement on this point.[108] Zachary Douglas notes that, when it comes to state–state disputes, BITs 'almost without exception' refer to *ad hoc* arbitration with the President of the ICJ as the appointing authority.[109] Various BITs also bestow this power in relation to investor–state disputes, for example, the China–Philippines BIT. Article 10(3) provides for the President of the ICJ to act as the appointing authority, unless the President is a national of either state, in which case the next most senior member of the Court, who is not a national, shall fulfil this function. [110] In *Sancheti v UK*, brought under the India–UK BIT, the Vice-President of the ICJ appointed the Chairman of the Tribunal (H.E. Dr. Francisco Rezek). [111]

Parallel proceedings were recently issued before the ICJ requesting the Court to preserve the integrity of a state–state arbitration. On 23 April 2013, Timor-Leste instituted arbitral proceedings against Australia under the Timor Sea Treaty 2002 in relation to a dispute about the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS). In December 2013, agents of Australia seized information (documents and electronic data) from the premises of one of Timor-Leste's legal advisors. This information contained (at least in part) lawyer–client communications and information relevant to the arbitration, or possible future negotiation of a maritime boundary.[112] Timor-Leste issued proceedings against Australia before the ICJ,

107 ibid, 177–78.

108 ICJ Judges have often been appointed as arbitrators in state–state and investor–state arbitrations, but acting in their personal capacity, rather than playing a role by virtue of their position at the Court.

109 Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 5.

110 China–Philippines BIT, signed 20 July 1992, entered into force 9 September 1995.

111 See *The Mayor and Commonality of Citizens of the City of London v Aschok Sancheti* [2008] EWCA Civ 1283, para 13.

112 This fact was not disputed between the parties: '[t]he Court begins by observing that it is not disputed between the Parties that at least part of the documents and data seized by Australia relate to the Timor

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and requested provisional measures to preserve the confidentiality of the information. The Court deemed Australia's undertaking to the Court: that the data and documents would not be used for any purpose other than national security purposes, insufficient to protect Timor-Leste's rights. The Court proceeded to issue provisional measures, observing the potential for prejudice to 'the right of Timor-Leste to conduct arbitral proceedings and negotiations without interference', ordering that the information be kept under seal and that there be no further interference in confidential communications relevant to the arbitration, the Court proceedings or related negotiations.[113] Following negotiations between the parties, Australia returned the documents and data, and, in June 2015, Timor-Leste requested the removal of the case from the ICJ's docket. In its request, Timor-Leste noted that the purpose of its application had been achieved. With agreement from Australia, the Court granted Timor-Leste's request.[114]

6. CONCLUSIONS

While most states voluntarily comply with awards rendered against them, the occasions of non-enforcement of a valid award undermine the strength of arbitration as a mechanism to resolve disputes involving states. In this article, consideration is given to some of the norms by which states incur, or dispute, responsibility for non-enforcement of arbitral awards, as well as tools to avoid execution. The landscape is varied, but there is a place for customary norms alongside treaty norms in determining responsibility, as well as in influencing recovery in respect of that responsibility.

In addition, as some of the examples provided in this article demonstrate, the impact of having a forum to adjudicate states' reasons for refusal to enforce an award can be significant. However, it is not only availability, but also the practice and approach of the relevant fora to the finality of arbitration and enforcement of awards, and the place of doctrines such as immunity, that are important. The *King of Spain* case is one illustration of how far the consequences can extend.

Sea Treaty Arbitration or to possible future negotiations on maritime delimitation between the Parties, and that they concern communications of Timor-Leste with its legal advisers.' *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, (Request for the Indication of Provisional Measures: Order), 3 March 2014 <http://www.icj-cij.org/docket/files/156/18078.pdf> (accessed August 2015) para 27.

113 *Questions relating to the Seizure and Detention*, ibid, paras 42–47.

114 ibid, 11 June 2015 <http://www.icj-cij.org/docket/files/156/18694.pdf> (accessed August 2015).

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