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Enforcement of Investment Arbitration Awards: Problems and Solutions

Abstract

International investment arbitration is one of the main dispute resolution methods among investors and host states. It provides investors with a non-political way to obtain awards and enforce them. However, in the enforcement stage they experience some problems based on both international and national rules. Nowadays, different solutions are applied to avoid those problems and provide smooth enforcement of arbitral awards. In this article, the problems of enforcement of investment arbitration awards and solutions of those problems are analyzed based on the current statutory rules and practices. Although it is concluded that the current solutions are usually sufficient for avoiding of problems of enforcement, in order to avoid those problems entirely, especially the problem arising from State immunity bar of host states, the author suggests; adding provision on waiver of sovereign immunity from execution into both the ICSID Convention and the New York Convention; pursuing a negotiation of a post-award settlement.

Annotasiya

Beynəlxalq investisiya arbitrajı investorlar və dövlətlər arasındakı mübahisələri həll etmək üçün əsas həll metodlarından biridir. Bu investorlara münaqişələrin həlli üçün qərarları əldə etmək və onları icra etmək üçün qeyri-siyasi üsul təklif edir. Lakin həyata keçirilmə mərhələsində onlar müəyyən beynəlxalq və milli qaydalardan qaynaqlanan problemlərlə üzləşirlər. Günümüzdə bu problemlərin aradan qaldırılması və arbitraj qərarlarının maneəsiz həyata keçirilməsi üçün müxtəlif həll yolları təklif olunur. Məqalədə arbitraj qərarlarının icrası zamanı yaranan problemlər və bu problemlərin həlli mövcud qanunlar və hüquq praktikası əsasında təhlil olunmuşdur. Baxmayaraq ki, hazırki həll yolları bir çox hallarda icra problemlərini aradan qaldırmaq üçün kifayət edir, problemləri tamamilə aradan qaldırmaq, xüsusilə dövlətlərin toxunulmazlığından qaynaqlanan problemi həll etmək üçün müəllif ICSID və Nyu-York Konvensiyalarına suveren toxunulmazlığın həyata keçirilməsindən imtinanı nəzərdə tutan maddə daxil edilməsini və qərar sonrası qarşılıqlı razılaşma üçün danışıqların təşkilini təklif edir.

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Introduction

The modern world economy cannot be imagined without foreign investments. All states are in a competition with each others in order to attract foreign investment to their country. And the possibility of international disputes between investors and host states in respect of the invested assets has been increasing in accordance with an increasing number of investments. There are different dispute resolution methods such as diplomatic protection, suing host state in national courts, international investment arbitration, etc. which are used by investors. However, one of them, namely the international investment arbitration has more important role from the aspect of effectiveness than other methods.[1] International investment community started to use investment arbitration widely after signing various international treaties such as bilateral investment treaties (BITs) or multilateral treaties relating to arbitration[2] which pave the way for investors to access the international investment arbitration easily. Through those international instruments investors can obtain arbitral awards to compensate their losses arising from the actions or omissions of host states. In majority of cases the drafters of international treaties take the principle of *pacta sunt servanda* as one of the main principles of international law into consideration and expect that the contracting states will comply with their obligations arising from those treaties without failure. As stated by Aron Broches, 'there was no reason to believe that governments would not abide' by their undertakings arising from international agreement.[3] However, practice of some states showed that in order to gain a desirable compensation as provided by their awards investors need effective enforcement mechanisms as well.

[1] Christopher F. Dugan, Don Wallace, Noah D. Rubins and Borzu Sabahi, Investor-State Arbitration 77 (2008).

[2] The Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (ICSID Convention); the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention).

[3] Aron Broches, *Award Rendered Pursuant to the ICSID Convention, Binding Force, Finality, Recognition, Enforcement and Execution*, 2(2) ICSID Review – Foreign Investment Law Journal 287, 300 (1987).

Depending on the institution through which the arbitration is carried out winner can face with different types of problems in the enforcement stage of its arbitral award. In this regard, the following two of the international investment arbitration tribunals will be examined in this article: 1. International Centre for Settlement of Investment Disputes (ICSID) tribunal; 2. United Nations Commission on International Trade Law (UNCITRAL) tribunal in which the New York Convention is applied in order to enforce the arbitral awards.

As stated by Christoph Schreuer, in contrast with non-ICSID awards a domestic court or authority may not re-examine the ICSID tribunal's jurisdiction and the ICSID arbitral awards on the merits in the recognition and enforcement stage of the ICSID arbitral awards due to the self-contained nature of the ICSID Convention.[4] In this stage 'the domestic court's or other authority's task is limited to verifying the authenticity of the ICSID awards'.[5]

In contrast, while enforcing arbitral awards under the New York Convention winner cannot benefit the same degree of enforceability as mentioned above. Thus, according to Article III of the New York Convention 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles'. In other words, enforcement of any awards which is sought under the New York Convention depends on the local laws relating to the enforcement. As a result, national courts have an opportunity to interfere with the enforcement of awards by refusing recognition and enforcement of the award at the request of the debtor party in accordance with Article V of the New York Convention.

Although the mentioned weakness of the New York Convention increases the importance of the ICSID enforcement mechanism for investors in comparison with enforcement mechanism under the New York Convention which is applied in case of UNCITRAL tribunals' awards, enforcement under the ICSID Convention has also limitations such as annulment procedures, State immunity, etc.

There are different judicial and non-judicial (alternative) solutions which are used in order to enforce arbitral awards. Waiver of State immunity or providing "comfort letters" as implied waiver by host state, revival of diplomatic protection by investor are used as judicial means as well as

[4] Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, The ICSID Convention; A Commentary on the Convention on the Settlement of Investment Dispute between States and Nationals of Other States 1139 (2nd ed. 2009).

[5] Wang Dong, *Dispute Settlement in International Trade, Investment and Intellectual Property, binding force and enforcement* 12 (United Nations Conference on Trade and Development, New York and Geneva, 2003), http://unctad.org/en/Docs/edmmisc232add8_en.pdf (last visited Oct 6, 2016).

pursuing a negotiation of a post-award settlement, taking out an insurance or assigning its award to the third party by investor, inducement measure taken by home state, actions taken by international organizations are used as alternative solutions to solve the abovementioned problems of enforcement of investment arbitration awards. One of the questions relating to those solutions is whether the existing mechanisms can solve the problems of enforcement of international investment awards effectively or not. In this article, the effectiveness of the abovementioned solutions will be discussed in order to show that those wide ranges of opportunities of investors are sufficient for solving problems of enforcement in case of non-compliance by host states with arbitral awards.

In this article, various problems of timely and effective enforcement of an investment arbitration award as well as different judicial and non-judicial solutions available to winner will be analyzed. The article is divided into four Chapters. Chapter one will discuss the general nature of award and enforcement as well as limitations obstructing the efficient enforcement of investment arbitration awards such as annulment of awards and State immunity. In Chapter two the problems of ICSID and UNCITRAL arbitrations as well as the role of national courts of contracting States in the enforcement stage of an arbitral award will be discussed. Chapter three will engage in the different solutions of the mentioned problems of enforcement of award under different institutions. Chapter four will discuss about the author's recommendation relating to the options available to winner and conclusion of this article.

I. Award and Enforcement

1.1. Award in Investment Arbitration

Although one of the most important parts of international conventions such as the ICSID Convention or the New York Convention and rules such as UNCITRAL Arbitration Rules[6] is recognition and enforcement of arbitral awards for winning party, none of those instruments offer a precise definition of arbitral awards.[7] However, there is general agreement that because those Conventions are 'truly definitive alternative to the jurisdiction of domestic courts', awards rendered under them have 'the same legal force as a court

[6] UNCITRAL Arbitration Rules 2010 (UNCITRAL Rules).

[7] *See* Domenico Di Pietro, *What Constitutes an Arbitral Award under the New York Convention?, in* Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice, 139 (Emmanuel Gaillard and Domenico Di Pietro eds., 2008), Domenico Di Pietro, *Arbitral Awards under the New York Convention: What Are and What May Be* (*NYU Law Blog*, 14 November 2011), http://blogs.law.nyu.edu/transnational/2011/11/arbitral-awards-under-the-new-york-convention-what-are-and-what-may-be/ (last visited Oct 6, 2016).

judgment'.[8] A notable part of this definition is that an arbitral award is regarded as analogous to a national court's judgment. In other words, this definition appraises that 'arbitration has a powerful outcome and is not a poor alternative to court litigation'.[9]

By trying to list the main features of an arbitral award leading authors, namely Julian Lew, Loukas Mistelis and Stefan Kröll assert that an award:

1. concludes the dispute as to the specific issue determined in the award so that it has *res judicata* effect between the parties; if it is a final award, it terminates the tribunal's jurisdiction;
2. disposes of parties' respective claims;
3. may be confirmed by recognition and enforcement;
4. may be challenged in the courts of the place of arbitration.[10]

By adding the following statement to the abovementioned definitions and features of arbitral awards Loukas Mistelis states that 'an award is *de facto* and *de jure* a judgment with transnational effect'.[11] This opinion is also stipulated in the ICSID Convention[12] and the New York Convention.[13] Both Conventions 'clearly impose a public international obligation on their respective Contracting States to recognize and treat an award as if it were a decision of a local court.'[14]

Under the ICSID Convention, as stated by C.Schreuer, an award is the final decision of an arbitral tribunal. Through its award the tribunal disposes off all questions before it. One of the interesting points made by Schreuer is that making a decision on the merits of the case is not considered an absolute condition for an award. Thus, he states that 'A tribunal's finding that it does not have jurisdiction to decide on the dispute before it is also an award'.[15] Additionally, the ICSID Convention determines which decisions of an arbitral tribunal should be included in the definition of arbitral award for the purpose of recognition and enforcement of arbitral awards. Thus, Article 53(2) of the ICSID Convention provides that '"award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50,51 or 52'.

It is suggested to use 'finality test'[16] in order to determine what can be

[8] *Ibid*, Domenico Di Pietro, *Arbitral Awards under the New York Convention: What Are and What May Be.*

[9] Loukas Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement*, 28(1) ICSID Rev. 64, 67 (2013).

[10] Julian D.M. Lew, Loukas Mistelis and Stefan M. Kröll, Comparative International Commercial Arbitration, § 24-13 (2003).

[11] Mistelis, *supra* note 10, at 70.

[12] The ICSID Convention, arts. 53 - 55.

[13] The New York Convention, arts. III - VI.

[14] *Supra* note 12.

[15] Schreuer et al., *supra* note 5, at 811-812.

[16] *See* Domenico Di Pietro and Martin Platte, Enforcement of International Arbitration Awards

considered an award under the New York Convention. According to this test, awards which finally adjudicate disputes sought resolution before an arbitral tribunal are qualified for recognition and enforcement under the New York Convention.[17] In addition to finality, Article I(2) of the New York Convention provides that the term "arbitral awards" shall include not only awards made by ad hoc tribunals, but also those made by permanent arbitral tribunals.

In addition to the definition and delimitations of arbitral award, one issue relating to the binding force of arbitral award should also be noted. Both Conventions[18] provides arbitral award with binding force. However, in practice winning party can face with different limitations obstructing the efficient enforcement of investment arbitration award such as annulment of awards and State immunity when it attempts to enforce its arbitral award.

1.2. Enforcement in Investment Arbitration

In most cases parties of investment arbitration voluntarily comply with arbitral awards.[19] In case of non-compliance by the losing party with an arbitral award the winning party will attempt to initiate the enforcement of that arbitral award through a national court. In such cases it is undisputable that the recognition and enforcement procedures come to play an important role for the winning party in order to obtain its compensation from the losing one. Although both the ICSID arbitration and the UNCITRAL arbitration play an important role for obtaining arbitral awards, the enforcement stage is the most distinctive stage in which the winners of both tribunals' awards seek to enforce the rendered award.[20]

For the purpose of enforcement, an UNCITRAL award is subject to recognition and enforcement provisions of the New York Convention. Thus, in order to enforce its arbitral award against the non-complying party any award winner under the UNCITRAL Rules should go to national court of one of the states, which are the contracting states to the New York Convention,[21]

– the New York Convention of 1958, 30-31 (2001).

[17] Di Pietro, *supra* note 8, at 150.

[18] The ICSID Convention, arts. 53(1) and 54(1); the New York Convention, art. III.

[19] See Susan Choi, *Judicial Enforcement of Arbitral Award under the ICSID and New York Convention*, 28 N.Y.U. J. Int'l L. & Pol. 175, 175 (1995); Emilia Onyema, *Formalities of the Enforcement Procedure (Articles III and IV), in* Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice, 601 (Emmanuel Gaillard and Domenico Di Pietro eds., 2008); Stanimir A. Alexandrov, *Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention, in* International Investment Law for the 21st Century Essays in Honour of Christopher Schreuer, 329 (Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich eds., 2009).

[20] Di Pietro & Platte, *supra* note 17, at 87.

[21] As of August 2016, the New York Convention has 156 member states. See UNCITRAL status report at
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

where there are available assets of the losing party to attach to the arbitral award. Article III of the New York Convention imposes a general obligation on contracting states that they shall recognize and enforce final arbitral awards. The party applying for recognition and enforcement shall supply the duly authenticated original award and the original agreement referred to in Article II of the New York Convention in order to obtain the recognition and enforcement of the arbitral award.[22] This simple procedure makes the enforcement stage under the New York Convention is attractive for the winning party, especially in case of investment arbitration for the investors. Additionally, 'Recourse against an award in relation to the merits of the dispute can be had only at the seat of arbitration, and the law of most developed countries tightly restricts grounds for such challenge'.[23] In addition to the mentioned provisions, Article V of the New York Convention provides the exhaustive list of procedural defects, one of which can be demonstrated by the losing party in order to convince the court of a contracting state to refuse the recognition and enforcement. Although it would be praised that the list of grounds for the refusal of recognition and enforcement is exhaustive, those grounds, especially two of them concerning the public policy and the arbitrability provided in Article V(2) of the New York Convention might be a major problem for the winning investor in the stage of recognition and enforcement of the arbitral awards, since the losing party is often a state or its subdivision or agency in international investment arbitration.[24] These grounds make it possible for national courts to review arbitral awards which will become a limitation for the effective enforcement of those awards. Moreover, mostly the courts of a contracting state are unwilling to enforce arbitral awards against the assets of another state because of sovereignty.[25]

In contrast with the New York Convention, the ICSID Convention establishes semiautomatic enforcement system which is completely separated this stage from the national courts' impacts on the enforcement of arbitral awards.[26] As Sir Elihu Lauterpacht observed:

> For the first time a system was instituted under which non-State entities – corporations or individuals – could sue States directly; in which State immunity was much restricted; under which international law could be applied directly to the relationship between the investor and the host State; in which the operation of the local remedies rule was excluded; and in which *the tribunal's award would be directly enforceable within the territories of*

(last visited Oct 6, 2016).

[22] The New York Convention, art. IV(1).

[23] Di Pietro & Platte, *supra* note 17, at 88.

[24] Vasily Shubin, *The Enforcement of ICSID Arbitral Awards, Practice and Problems*, 11 Korea U. L. Rev. 11 (2012).

[25] *Ibid.*

[26] Di Pietro & Platte, *supra* note 17, at 88.

the States parties.[27]

In case of non-compliance by the losing party, the winning party can choose to enforce the ICSID arbitral award in accordance with Article 54 of the ICSID Convention. Under the first paragraph of this article 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'. This means that the losing party does not have any chance to challenge the merits of the arbitral award[28] as well as this award cannot be refused to be recognized on any grounds such as law governing arbitral awards, public policy, non-arbitrability of the dispute, etc.[29] Except using the internal mechanism such as annulment of arbitral award (which will also be able to become a limitation for the effective enforcement of the arbitral award), that party cannot make any appeal against the arbitral award through the national courts as well.[30] However, as Aron Broches observed, although in respect of arbitration proceedings and awards, the ICSID Convention established jurisdictional system insulated from national law, it could not establish such a complete system in respect of recognition and enforcement of arbitral awards which 'inevitably required interaction of international and domestic law.'[31] Thus, Article 54(3) of this Convention provides that 'Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought'. Furthermore, Article 55 of the ICSID Convention enhances national courts' hands in case of application of national laws relating to sovereign immunity from execution.

Before finishing this section, it is notable to discuss about the concepts of "enforcement" and "execution". In the English text of Article 54 of the ICSID Convention those two words were used interchangeably. In equally authentic French and Spanish texts can only use one word to express both "enforcement" and "execution".[32] Although some authors[33] and cases (*e.g. Ioannis Kardassopoulos and Ron Fuchs v Georgia*,[34] Decision of the ad hoc Committee on the Stay of Enforcement of the Award) have made a distinction

[27] Elihu Lauterpacht, 'Foreword' to C.H.Schreuer et al.., The ICSID Convention; A Commentary on the Convention on the Settlement of Investment Dispute between States and Nationals of Other States (2nd ed. 2009) (emphasis added).

[28] Di Pietro & Platte, *supra* note 17, at 88.

[29] Choi, *supra* note 20, at 180.

[30] The ICSID Convention, art. 53(1).

[31] Broches, *supra* note 4, at 288.

[32] Schreuer et al., *supra* note 5, at 1134.

[33] *Id.* at 1135.

[34] *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case No. ARB/05/18 and ARB/07/15, 12 November 2010.

between these two words, as stated by Christoph Schreuer, taking Article 33(4) of the 1969 Vienna Convention on the Law of Treaties into consideration, 'A consistent use of the word "enforcement" as meaning the same as "execution" in the context of Art. 54 would have been more faithful to the Convention's trilingual character and would have avoided much confusion'.[35] Therefore, in this article, the word "enforcement" is used as meaning the same as "execution" in the context of Article 54 of the ICSID Convention unless indicated otherwise.

As indicated above, there are limitations and problems of enforcement in respect of both arbitral tribunals' awards. The limitations such as annulment of awards and State immunity will be discussed in the next section of this chapter. Moreover, the problems of the enforcement of both UNCITRAL arbitration awards under the New York Convention and ICSID arbitration awards relating to execution stage will be deeply analyzed in the next chapter of this article.

1.3. Limitations on the Enforcement of an Arbitral Award

Effective enforcement of an arbitral award is the most desirable part of the international investment arbitration in case the losing party does not voluntarily comply with the arbitral award. Through the effective enforcement procedure the winning party can obtain its compensation timely and does not spend extra costs for this process. However, in practice there are some limitations, which obstruct effective and timely enforcement of arbitral award, such as annulment of awards and State immunity. The following two subsections will discuss about these limitations.

1.3.1. Annulment and Enforcement

Review of arbitral awards is a part of investment arbitration which consists of two basic systems such as the annulment mechanism under ICSID Convention and the national courts-based review mechanism to which the New York Convention is applied.[36] Annulment is a self-contained mechanism which prevents national courts from reviewing an ICSID arbitral award.[37] Since 'the process has been used as a sword by losing state respondents, in essence to attempt to re-argue the case, rather than as a shield to defend an enforcement action by a claimant',[38] this mechanism is one of the main

[35] Schreuer et al., *supra* note 5, at 1136.

[36] Alan S. Alexandroff, Ian A. Laird, *Compliance and Enforcement; Recognition, Enforcement, and Execution of Investment Arbitration Awards, in* The Oxford Handbook of International Investment Law, 1174 (Peter Muchlinski, Federico Ortino, and Christoph Schreuer eds., 2008).

[37] Vincent O. Orlu Nmehielle, *Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7(1) Ann. Surv. Int'l & Comp. L. 21, 42 (2001).

[38] Alexandroff & Laird, *supra* note 37, at 1175.

limitations hindering the enforcement of an arbitral award in advance by nullifying that award. Under the ICSID Convention, either party may request annulment of the award on the following grounds that:

(a) the Tribunal was not properly constituted;
(b) the Tribunal has manifestly exceeded its powers;
(c) one of the members of the Tribunal was corrupt;
(d) there has been a serious departure from a fundamental rule of procedure; or
(e) the award has failed to state the reasons on which it is based.[39]

Through the implementation of UNCITRAL Model Law on International Commercial Arbitration[40] into the national legislation those grounds for annulment of arbitral awards are familiar to most jurisdictions. However, neither the ICSID Convention nor the UNCITRAL Model Law establishes an appeal mechanism through their review mechanisms based on those grounds. It is obvious that the annulment procedure of the ICSID Convention is not appeal,[41] although it was established to provide investment arbitration with a necessary review mechanism for the interest of justice.[42] There is no permanent committee to hear the annulment applications from the arbitral awards. Each annulment committee is appointed as an *ad hoc* committee.[43] This annulment committee 'has no power to revise an award on the merits'.[44]

Although the ICSID Convention makes it clear that the arbitral awards are not subject to any appeal,[45] whether annulment committees pursue the distinction between annulment and appeal in accordance with the ICSID Convention is a question.[46] It is argued that performing a substantive review of arbitral awards by some annulment committees might make it become a de-facto appeal mechanism.[47] Another question is whether an appeal is necessary for investment arbitration in the context of possibility of never-

[39] The ICSID Convention, art. 52(1).
[40] UNCITRAL Model Law on International Commercial Arbitration, General Assembly Resolution 40/72, 112th Plenary Meeting, 11 December 1985, http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf (UNCITRAL Model Law) (last visited Oct 6, 2016).
[41] The ICSID Convention, *supra* note, at 53(1).
[42] David Williams, *International Commercial Arbitration and Globalization – Review and Recourse against Awards Rendered under Investment Treaties*, 4 J. World Investment 251, 267 (2003).
[43] The ICSID Convention, art. 52(3).
[44] Williams, *supra* note 43, at 267.
[45] The ICSID Convention, art. 53(1).
[46] Christian J. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, Essays in Transnational Economic Law Working Paper, No 57, 9 (2006).
[47] *See Kloeckner Industrie Anlagen GmbH v. The United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Annulment Decision, 3 May 1985; and *AMCO Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Annulment Decision, 16 May 1986.

ending nature of annulment procedure and inconsistency between arbitral decisions. Susan Frank argues that investment arbitration needs an appeal structure, because the mentioned inconsistency might weaken the credibility of investment arbitration.[48] However, as stated by I.Laird and A.Rebecca, adding appeal procedure to the investment arbitration entirely weaken the benefits of system arising from its finality. Therefore, arbitrations will last longer and this will make it more expensive than the existing process.[49] Moreover, they argue that 'soft precedent in some form or another already exists in investor-state arbitration' and this provides consistency within the system.[50] To sum up, it should be stated that this debate on establishing a new appeal system for the investment arbitration has not been put to an end among scholars yet.

Another adverse effect of annulment mechanism is arising from Article 52(5) of the ICSID Convention. According to this article, enforcement of arbitral award shall be stayed on request of the applicants until the end of the annulment procedure. This article immediately delays the enforcement of arbitral award, although a stay of enforcement is not mentioned in Article 54 of the ICSID Convention. The *ad hoc* Committee in *MINE* showed the relationship between annulment procedure and stay of enforcement in the following paragraphs:

> 9. Article 53(1) provides that the award is binding on the parties and that 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 52(4) [*sic*] is one of those relevant provisions. Thus, if an *ad hoc* Committee grants a stay of enforcement, the obligation of the party against whom the Award was rendered to abide and comply with the terms of the Award is *pro tanto* suspended.
>
> 10. The first sentence of Article 54(1) provides that each Contracting State shall recognize an Award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by the Award within its territories as if it were a final judgment of a court in that State. Although the Convention does not explicitly so provide, it seems to be clear that suspension of a party's obligation to abide by and comply with the award necessarily carries with it suspension of a Contracting State's obligation (and for that matter its authority) to enforce the Award, even though during the pendency of the Committee's examination of the application for

[48] Susan Frank, *The Nature and Enforcement of Investor rights under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 UC Davis J. Int'l L. & Pol'y 47, 63-64 (2005).
[49] Ian Laird & Rebecca Askew, *Finality versus Consistency: Does Investor-State Arbitration Need an Appellate System?*, 7 J. App. Prac. & Process 285, 298 (2005).
[50] *Id.* at 299.

annulment the validity of the Award remains unaffected.[51]

On the other hand, Christoph Schreuer states that 'annulment proceedings that are not accompanied by a stay of enforcement under either the first and the second sentence of Art. 52(5) are neither a justification for non-compliance with the award nor a basis for domestic courts to withhold recognition or refuse enforcement'.[52] The fact of pending annulment proceedings is not sufficient to suspend the enforcement of arbitral award.[53] However, the possibility of a decision of annulment committee which can annul an arbitral award after the enforcement of that award, the winning party must be careful of any negative impact of that enforcement.

1.3.2. State Immunity and Enforcement

Under international law, states are entitled to some jurisdictional immunity. Thus, national courts of one state should decline jurisdiction over disputes to which other state is a party. However, as investment arbitration is taken place based on the consents of the parties in accordance with both the UNCITRAL Rules[54] and the ICSID Convention,[55] respondent states do not arise any question of immunity from jurisdiction as a plea where investment arbitration is taken place under both the aforementioned arbitral mechanisms.[56] However, this restrictive approach to State immunity has also 'uneven implications for investors who bring claims against states'.[57]

State immunity defences to enforcement of arbitral awards are not addressed by both the ICSID Convention and the New York Convention. The ICSID Convention explicitly provides that the national law of any contracting state relating to State immunity from execution is not affected by the enforcement provisions of the Convention.[58] Therefore, execution of the arbitral award depends on the immunity laws concerning the execution in the State in whose territories such execution is sought.[59] 'The Convention does not oblige a Contracting State to execute an ICSID award if an equivalent

[51] *Maritime International Nominees Establishment (MINE) v Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, 12 August 1988, § 9-10.

[52] Schreuer et al., *supra* note 5, at 1136.

[53] *Ibid.*

[54] UNCITRAL Rules, art. 1(1).

[55] The ICSID Convention, arts. 25 and 41.

[56] See Hazel Fox, *State Immunity and the New York Convention in* Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention, *in* Practice, 829 (Emmanuel Gaillard and Domenico Di Pietro eds., 2008); Schreuer et al., *supra* note 5, at 1153.

[57] Alexis Blane, *Sovereign Immunity as a Bar to the Execution of International Arbitral Awards*, 41(2) N.Y.U. J. Int'l L. & Pol. 453, 460 (2008).

[58] The ICSID Convention, art 55.

[59] *Id.* art. 54(3).

judgment of its own court could not be executed'.[60] As a result, the State immunity creates a limitation for the execution of the ICSID arbitral award by winning investors.

Although the New York Convention does not explicitly touch any matter relating to State immunity from execution of arbitral awards, State immunity from execution would arise in two ways.[61] The first way is an application of Article V(2)(b) of the Convention, because of public policy concerns of state where the enforcement is sought.[62] As stated by Stephen Toope, 'Either for reasons of international comity or of internal constitutional structure, it is believed that the courts should not complicate potentially sensitive foreign policy issues by "interfering" to order execution against property vested in a foreign State'.[63] The second way relates to the application of Article III of the Convention which provides that arbitral award shall be enforced in accordance with the laws of the territory where the enforcement of that arbitral award is sought. Therefore, national laws relating to State immunity affect the enforcement of those arbitral awards. Although in the context of the New York Convention investors can argue that states waive their immunity from execution when they agree with arbitration through which agreement they waive their immunity from jurisdiction, there are various possibilities depending on the national laws and states' membership to the New York Convention.[64] Waiver from execution can be used as one of the solution to the enforcement problem of arbitral awards. This solution in the context of both the New York Convention and the ICSID Convention will be analyzed in the third chapter of this article.

The remaining aspect of State immunity from execution is a difference between two approaches; the doctrine of absolute immunity and the theory of restrictive immunity. In difference with the doctrine of absolute immunity according to which no enforcement is possible against state property, the doctrine of restrictive immunity permits enforcement of arbitral awards against state property.[65] In this context the question is to what extent state property can be executed by national courts for the enforcement of arbitral awards. In other words, the question is which assets of state can be used for the satisfaction of arbitral awards. 'Nature of funds' test is applied by many

[60] Lucy Reed, Jan Paulsson and Nigel Blackaby, Guide to ICSID Arbitration 185 (2nd ed. 2011).
[61] Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards, in* International Investment Law for the 21st Century Essays in Honour of Christopher Schreuer, 308 (Christina Binder, Ursula Kriebaum, August Reinisch, and Stephan Wittich eds., 2009).
[62] *Ibid.*
[63] Stephen J. Toope, Mixed International Arbitration: Studies in Arbitration between States and Persons 141 (1990).
[64] Bjorklund, *supra* note 62, 309.
[65] Di Pietro & Platte, *supra* note 17, at 193.

countries and enforcement against commercial assets is allowable.[66] However, there is no clear line between the commercial and non-commercial assets. For example, in *AIG Capital Partners Inc and another v Republic of Kazakhstan*,[67] the British High Court held that the assets of a State's Central Bank was subject to State immunity under Section 14(4) of the State Immunity Act 1978 and could not be used to satisfy an ICSID award, even if such assets was being held by third parties on behalf of the Central Bank of Kazakhstan. It should be stated that in reality a great number of assets such as diplomatic and military property as well as central banks' reserves are excluded from the list of commercial assets.[68] Moreover, the UN Convention on the Jurisdictional Immunities of States and their Property 2004 (the UNSCI)[69] adds two new categories to the list of immune assets, namely 'property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale',[70] and 'property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale'.[71]

At the end, although the losing state, which relies on the State immunity from execution in order to avoid to satisfy arbitral awards, is still in violation of its international obligations arising from the respective conventions, it can be stated that State immunity 'might well be the Achilles' heel in the body of investor-State dispute settlement',[72] taking the persistence of State immunity into consideration.

II. Analysis of the Problems of Enforcement

In this chapter, problems of enforcement of arbitral awards issued by two different arbitral tribunals, namely the ICSID tribunals and ad hoc tribunals applying the UNCITRAL Rules will be analyzed (respectively, the first and the second sections). Since the enforcement stage of arbitral awards is in interaction with the national courts, the third section of this chapter will also discuss about this interaction.

2.1. Problems of Enforcement under ICSID

Two separate obligations were provided by the ICSID Convention in respect to the recognition and enforcement of arbitral award. While the parties

[66] *Ibid.*

[67] *AIG Capital Partners Inc and another v Republic of Kazakhstan (National Bank of Kazakhstan intervening),* ICSID Case No. ARB/01/6 [2005] EWHC 2239 (Comm), (2006) 1 All ER 284 (QBD).

[68] Fox, *supra* note 57, 858.

[69] As of October 6, 2016, the UNSCI is not yet in force.

[70] The UNSCI, art. 21(1)(d)

[71] *Id.* art. 21(1)(e).

[72] Bjorklund, *supra* note 62, at 321.

of dispute are encumbered with the first obligation, namely to abide by and comply with the arbitral award, the contracting states are encumbered with the second obligation, namely to recognize and enforce that arbitral award in their territories. Since 'States overwhelmingly have complied with awards rendered against them, without claimants needing to pursue enforcement',[73] the exact distinction between those obligations arising from Articles 53 and 54 of the ICSID Convention are not determined until recent cases against Argentina. However, recent ICSID tribunals examined that distinction very deeply.

Moreover, the application of Articles 54 and 55 of the ICSID Convention by national courts also showed other problems of enforcement in national level. In case of application of those articles, although national courts recognized the respective investment arbitration awards, their judgments prohibited the execution of those awards.

In order to analyze the mentioned problems of enforcement of arbitral awards issued under the ICSID Convention it is necessary to look at interpretation of those articles construed by both scholars and cases taken place in both international arbitration tribunals and national courts.

2.1.1. The Interrelation between Articles 53 and 54 of the ICSID Convention

Before looking at the interpretation of the interrelation of Articles 53 and 54 of the ICSID Convention it is necessary to pay attention to the texts of those articles. While Article 53(1) states that '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 54(1) states that 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State'. As seen from the text of those articles, distinct obligations are imposed by them. However, in recent cases, namely *CMS*,[74] *Azurix*,[75]

[73] Alexandrov, *supra* note 20, at 323.

[74] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, (Rule 54 of the ICSID Arbitration Rules), 1 September 2006.

[75] *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12 (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 28 December 2007.

Siemens,[76] *Enron*[77] and *Vivendi II*,[78] Argentina claimed that Article 54 is a condition of obligation under Article 53. Argentina's approach was that any winning investor must initiate the enforcement procedure in accordance with Article 54 before it demands from the losing state to abide by and comply with the arbitral award in accordance with Article 53.

Although Argentina contended its position relating to such an interrelation of those articles that Article 53 is subject to Article 54, the preparation history and the textual interpretation of the ICSID Convention respectively show different purpose and relation of those articles.

As stated by Stanimir Alexandrov, drafters' 'concern was that the binding force of awards under Article 53 of the Convention would not create a symmetrical obligation between States and investors' and 'Article 54 was created to respond to this concern'.[79] However, Article 54 can also be used by investors against States which are not complying with arbitral awards. By supporting this opinion Christoph Schreuer states that:

> A provision on enforcement was seen as necessary to balance the situation in favour of the host State, should the investor not comply with an award. But all the drafts leading to the Convention refer to recognition and enforcement against the parties in equal terms, without distinguishing between investors and host States, and it is clear that this was also the intention of the drafters.[80]

Aron Broches also emphasizes that the importance of Article 53 should not be weakened by the text of Article 54.[81] On Broches' opinion, while 'Article 53 affirmed the absolute binding force of the award on the international law level, Article 54 affirms its external finality, i.e., vis-à-vis domestic courts'.[82] As seen from the mentioned opinions, those two articles impose different obligations and Article 54 does not affect the application of Article 53.

From the aspect of textual interpretation of the ICSID Convention, it can be stated that the obligation under Article 53 is in connection with the supportive

[76] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Annulment Decision, 28 September 2009.

[77] *Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the Arbitration Rules), 7 October 2008.

[78] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (Second Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award Rendered on 20 August 2007 (Rule 54 of the ICSID Arbitration Rules), 4 November 2008.

[79] Alexandrov, *supra* note 20, at 328.

[80] Christoph H. Schreuer, The ICSID Convention: A Commentary (2001).

[81] Broches, *supra* note 4, at 302.

[82] Aron Broches, *The Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 136 Hague Recueil des cours 331, 400 (1972).

mechanisms of Articles 27 and 64 of the ICSID Convention.[83] Firstly, while providing investors with additional tools, namely diplomatic protection, the text of Article 27(1) provides the same words which are used by Article 53 such as 'to abide by and comply with the award'. As stated by Stanimir Alexandrov, 'Had a losing party's obligation to comply with an award been predicated on a prevailing party first taking steps under Article 54, the language of Article 27(1) surely would have paralleled the "recognize and enforce" language of Article 54, rather than the "abide by and comply with" language of Article 53'.[84] In other words, by using the verbatim language of Article 53, Article 27(1) shows that Article 53 does not depend on condition upon the prior application of Article 54.

Additionally, neither Article 27 nor Article 64 stipulates that the winning investor should initiate enforcement mechanism under Article 54 before recourse to those mechanisms in case of failure of compliance obligation by host state.

In practice, this problem had been touched by the abovementioned cases against Argentina. During *CMS* and *Azurix* annulment proceedings this concern of investors could not be satisfied by the annulment committees, because they were satisfied by a "comfort letter" on which Argentina stated that it will comply with its international obligation regardless of the result of annulment proceedings.[85] As those annulment committees, *Siemens* annulment committee did not look through the relationship between the discussed articles as well. However, during *Siemens* annulment preceding the United States of America rejected Argentina's approach to the interrelation between Article 53 and Article 54 by stating the following approach:

> [A] State is obligated to abide by and comply with an award rendered against it irrespective of an investor's enforcement efforts under Article 54. Argentina's position to the contrary is an incorrect interpretation of Articles 53 and 54 of the ICSID Convention.[86]

First time this concern of investor had been fully addressed by the *Enron* annulment committee. The committee rejected Argentina's interpretation by urging the following reasons. Firstly, the committee emphasized the texts of those two articles by stating that their language does not create any basis for Argentina's approach.[87] Secondly, as stated by *Enron* annulment committee obligations under those articles 'are addressed to different subjects'.[88] While

[83] See Alexandrov, *supra* note 20, at 325.

[84] *Ibid.*

[85] See *CMS*, § 28; *Azurix*, § 36 and 38.

[86] Letter from United States Department of State to Ms Claudia Frutos-Peterson, Secretary of the Ad Hoc Committee (*Siemens*), 1 May 2008, 3 http://www.italaw.com/documents/Siemens-USsubmission.pdf (last visited Oct 6, 2016).

[87] *Enron* at § 61.

[88] *Id.* at § 62

parties under obligation to abide by and comply with arbitral awards are on the one hand host state and on the other hand investor.[89] In contrast, obligation under Article 54 is encumbered to 'each Contracting State' of the Convention, 'whether or not that Contracting State is a party to the award in question'.[90] Thirdly, the committee emphasized the equivalency of the language of Article 27(1) and Article 53(1).[91] It pointed out the following conclusion:

> If a Contracting State was entitled to require an award creditor to use enforcement mechanisms established under Article 54(1) as a precondition to compliance with the award, the Committee considers that the final words of Article 27(1) would have reflected the language of Article 54(1), rather than that of Article 53(1).[92]

Moreover, the annulment committee concluded that in case of acceptance of the suggested interpretation of Argentina, 'the result could be that there would never be an obligation to comply with non-pecuniary obligations in an award', since Article 54 covers only pecuniary obligations.[93]

In addition, two policy reasons were concluded by the committee. Firstly, it was concluded that enforcement mechanisms are not usually provided to give an opportunity to losing party to reject compliance with awards; in contrast, they are usually created to support winning party in case of failure of losing party.[94] Secondly, since the intention of the ICSID mechanism was to create an international tool for investment arbitration, 'it would be inconsistent with the purpose of the ICSID Convention if an award creditor had to bring proceedings pursuant to national law enforcement mechanisms established under Article 54(1) as a prerequisite for compliance with the award by the award debtor'.[95]

Vivendi II annulment committee also concluded the same approach against Argentina's interpretation with *Enron* annulment committee. Additionally, this committee concluded that 'Any possible intervention by a judicial authority in the host State is unacceptable under the ICSID Convention, as it would render the awards simply a piece of paper deprived from any legal value and dependent on the will of state organs'.[96]

As a result, *Enron* and *Vivendi II* committees emphasized the distinct character of Articles 53 and 54 of the ICSID Convention and confirmed that

[89] *Ibid.*
[90] *Ibid.*
[91] *Id.* at § 65.
[92] *Ibid.*
[93] *Id.* at § 66.
[94] *Id.* at § 67.
[95] *Id.* § 68.
[96] *Vivendi II*, § 36.

these two articles determined different obligations. Thus, Article 54 cannot be used as a precondition for the application of Article 53. Therefore, Argentina's attempt to avoid compliance of arbitral awards has not become one of the problems of enforcement of investment arbitration awards.

2.1.2. Enforcement under Articles 54 and 55 of the ICSID Convention

Enforcement procedure under Article 54 of the ICSID Convention starts when losing party fails to comply with arbitral award voluntarily. Firstly, contracting state to the ICSID Convention where enforcement of arbitral award is sought shall recognize that award.[97] However, 'a holder of a recognized ICSID award has only an executory title'.[98] Since national courts are entitled to execute the award in accordance with the local legislation relating to execution[99], while intending to execute the recognized award winning party faces with problems arising from Article 54(3) in combination with Article 55 of the ICSID Convention. Thus, Article 55 provides that 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution'. Therefore, losing state party can get an opportunity to use its sovereign immunity from execution as a shield against execution of arbitral awards in other states' territory. This opinion is supported by the following statement from the stay decision of *ad hoc* Committee in *MINE*:

> [W]hile the Convention imposes an obligation on parties to abide by and comply with an award and on Contracting States to enforce the pecuniary obligations imposed by an ICSID award, the question of forcible execution is left expressly subject to the law of the State of the execution forum, including in particular the immunity from execution which a foreign State might enjoy under that law.[100]

In practice, attempts of winning investors to enforce their awards in the territory of other contracting states can show clearly the mentioned problem of enforcement. One of those cases is *Benvenuti & Bonfant v Congo*[101] in which the Paris *Tribunal de grande instance* recognized the ICSID award after ascertaining its compliance with the public policy of France and made prior authorisation as a precondition for execution.[102] On the appeal of the investor the Court of Appeal held that the recognition and the execution are distinct stages and state immunity from execution should not come into play until

[97] The ICSID Convention, art. 54(1).

[98] Nmehielle, *supra* note 38, at 30.

[99] The ICSID Convention, *supra* note at 54(3).

[100] *MINE*, § 24.

[101] *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980.

[102] Choi, *supra* note 20, at 182 (footnotes omitted).

after the recognition of the ICSID award.[103] However, since the Court of Appeal did not touch the public policy review of the lower court for the recognition, as stated by Susan Choi, 'other French courts might refuse to recognize an ICSID award because of conflicts with French public policy'.[104]

As Benvenuti & Bonfant obtained attachment against the assets of the Banque Commerciale Congolaise, it could not be compensated because of the decision of French court which determined that this Bank was not a debtor and it had a distinct legal personality from People's Republic of the Congo.[105]

In other French case concerning enforcement of another ICSID award, namely *SOABI v. Senegal*[106] the Court of Appeal rejected the direct recognition of the ICSID award by applying the French public policy instead of the automatic regime of recognition, although the Paris *Tribunal de grande instance* had recognized the ICSID award.[107] However, the French Supreme Court held that the ICSID awards should be recognized without restricting by immunity from execution.[108] As stated by Christoph Schreuer, 'The Court added that the ICSID Convention had in its Articles 53 and 54 created an autonomous and simplified regime for recognition and execution which excluded the otherwise applicable provisions of the Code of Civil Procedure and the remedies provided therein'.[109] In difference with the prior French case, this position of the French Supreme Court provided the 'smooth enforcement' of the ICSID arbitral awards in France.[110] However, it should be stated that execution of arbitral awards still remains as one of the problems for enforcement because of the immunity matter.

The abovementioned difference between recognition and execution which made by the French Supreme Court was supported by American case, namely *LETCO v. Liberia*[111] in which while the Federal District court of the Southern District of the New York recognized the award by applying Article 54 of the ICSID Convention, by referring to Article 55 of that Convention that court rejected the request of LETCO on execution of the award by attaching it to the immune assets of Liberia.[112]

Taking all those cases into consideration, it can be stated that since 'A

[103] *Ibid* (footnotes omitted).
[104] *Ibid.*
[105] *Ibid* (footnotes omitted).
[106] *Société Ouest Africaine des Bétons Industriels* (*SOABI*) *v. Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988.
[107] Choi (footnotes omitted).
[108] Alexandroff & Laird, *supra* note 37, at 1179.
[109] Schreuer, *supra* note 81, at 1119.
[110] Choi, *supra* note 20, 184.
[111] *Liberian Eastern Timber Corporation* (*LETCO*) *v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986.
[112] Alexandroff & Laird (footnotes omitted).

private party may not be able find assets which both belong to the state and are not immune from execution under national law',[113] execution of arbitral awards remains as a problem of enforcement under the ICSID Convention. However, it should be stated that almost all states' legislations have refused to follow the doctrine of absolute immunity and it is possible to enforce arbitral awards against foreign state's assets which are used for commercial purposes.[114] As stated by August Reinisch, while only 'Russian courts will accord absolute immunity from enforcement measures'[115] in absence of explicit waiver, 'Turkish courts generally refuse to grant immunity from execution to foreign states'.[116] Therefore, it will be argued in this article that the movement of states' legislations to the theory of restrictive immunity and the suggested solutions of this problem in the next chapter of this article are sufficient to avoid this problem.

2.2. Problems of Enforcement under UNCITRAL

In difference with the ICSID arbitration, the arbitration under UNCITRAL Rules does not have its own enforcement procedures for rendered arbitral awards under these Rules. Because of this reason, for the purpose of enforcement an UNCITRAL award is subject to recognition and enforcement provisions of the New York Convention. Although Article III of the New York Convention demands from Contracting States to recognize and enforce arbitral awards, the enforceability of those awards is subject to the exhaustive list of grounds provided in Article V of that Convention. According to the first paragraph of that article, national courts may refuse recognition and enforcement of the arbitral award if the requested party proves the following grounds:

(a) incapacity of a party or invalidity of the arbitration agreement;
(b) violation of due process;
(c) arbitrators' actions beyond their authority;
(d) irregularity in the procedure or composition of the arbitral tribunal; and
(e) award not binding, set aside or suspended in the country where the award was made.[117]

This group of grounds 'furthers the loser's right to a fair arbitration, by allowing courts to reject awards tainted with excess of authority and

[113] Choi, *supra* note 20, at 183.

[114] Inna Uchkunova and Oleg Temnikov, *Enforcement of Awards under the ICSID Convention – What Solutions to the Problem of State Immunity?*, 29(1) ICSID Rev. 187, 201 (2014).

[115] August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17(4) Eur. J. Int. Law 803, 807 (2006).

[116] *Id.* at 813.

[117] See Lew et al., *supra* note 11, at 707-720.

procedural irregularity'.[118] However, as stated by Lew et al.., application of those grounds is in discretion of national courts[119] and those courts can even enforce any part of an award if 'the decisions on matters submitted to arbitration can be separated from those not so submitted'.[120]

In addition, the second paragraph of Article V provides further grounds for resistance of enforcement of arbitral award. Article V(2) stipulates that:

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The first of those grounds – arbitrability has not been used widely by national courts in order to refuse the enforcement of arbitral awards.[121] But based on the second one any UNCITRAL award is subject to the national court's review, although Article 34(2) of the UNCITRAL Rules provides that the 'awards ... shall be final and binding on the parties'. It is argued that the public policy exception is the "safety valve" of the New York Convention, because each national court or legislative body can interpret the definition of the public policy differently.[122] However, as there is a distinction between domestic and international public policy in respect of the arbitral awards,[123] it should be stated that the scope of public policy is applied narrowly. As argued by E.Gaillard and J.Savage:

> Not every breach of a mandatory rule of the host country could justify refusing recognition or enforcement of a foreign award. Such refusal is only justified where the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value.[124]

[118] William W. Park, *Duty and Discretion in International Arbitration*, 93 Am. J. Int'l L. 805, 810 (1999).

[119] Lew et al., *supra* note 11, at 707.

[120] The New York Convention, art. V(1)(c).

[121] Lew et al., *supra* note 11, at 721.

[122] Heather R. Evans, Note, *The Nonarbitrability of Subject Matter Defense to Enforcement of Foreign Arbitral Awards in United States Federal Courts*, 21 N.Y.U. J. Int'l L. & Pol. 329, 334-335 (1989).

[123] Bernard Hanotiau & Olivier Caprasse, *Public Policy in International Commercial Arbitration, in* Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice, 789 (Emmanuel Gaillard and Domenico Di Pietro eds,. 2008).

[124] Emmanuel Gaillard & John Savage (eds.), Fouchard, Gaillard Goldman on International Commercial Arbitration, 996 (1999)

This position was also supported by the U.S. court in *Parsons & Whittemore*,[125] determining the U.S. standard in respect of the public policy, in which it was held that 'the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions morality and justice'.[126] Although Article V(2)(b) of the New York Convention does not explicitly provide the distinction between domestic and international public policy, it can be undoubtedly stated that the drafters of the Convention intended to refer to the international public policy of host state while providing the reference to public policy.[127]

In addition to narrow interpretation of public policy exception, it should be stated that the language of Article V is permissive rather than mandatory.[128] Thus, applicability of the abovementioned grounds depends on the courts' discretion. This approach was also stated by the Hong Kong Supreme Court that:

> … the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing Court to achieve a just result in all the circumstances.[129]

However, B.Hanotiau and O.Caprasse argue that 'discretion left to courts in Article V should not be overstated', because it would not be rational that courts based on their discretionary power refuse to accept any ground while the same courts have confirmed that the discussed ground affected the award.[130]

In spite of the opposite opinions, it can be concluded that since, on the one hand, exceptions under Article V of the New York convention are narrowly construed, on the other hand, overwhelming majority of awards are complied with voluntarily,[131] enforcement of arbitral awards rendered under UNCITRAL Rules is not difficult for winning party in the context of the New York Convention.

Furthermore, UNCITRAL awards have another problem relating to review of those awards by national courts not arising from the enforcement procedure under the New York Convention. Thus, in *Ecuador v. Occidental*,[132]

[125] *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

[126] *Ibid.*

[127] Gaillard & Savage, *supra* note 125, at 996.

[128] Hanotiau & Caprasse, *supra* note 124, at 802.

[129] *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co Ltd*, [1994] 3 HKC 375, Hong Kong Supreme Court, 13 July 1994.

[130] Hanotiau & Caprasse, *supra* note 124, at 803.

[131] David D. Carron and Lee M. Caplan, The UNCITRAL Arbitration Rules; A Commentary, 85 (2nd ed. 2013).

[132] *Republic of Ecuador v. Occidental Exploration & Production Company* [2005] EWHC 774 (Comm).

it was held by the English court that national courts could review the UNCITRAL awards in accordance with Arbitration Act 1996.[133] As stated by S.Jagusch and J.Sullivan:

> [A]lthough the UNCITRAL Rules provide no right of *appeal*, it may well be that if other jurisdictions follow England's example, the *lex arbitri* will provide a right of review which was never intended. This would be in addition to the grounds for refusal of enforcement under the New York Convention.[134]

Therefore, in order to avoid such a refusal mechanism mentioned by the English court it is important for the parties to choose the appropriate seat of arbitration while agreeing on arbitration.

Place of arbitration also has other effect on enforcement of arbitral awards relating to reciprocity reservation under Article I(3) of the New York Convention. This means that any Contracting State may declare that 'it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State'.[135] As the majority of contracting states signed the New York Convention with the mentioned reservation,[136] it is vital important for winning party to choose any of the contracting states as a place of arbitration in order to secure the enforcement of arbitral award.

2.3. National Courts' role in Enforcement

Traditionally, investors have always hesitated to submit their investment claims to national courts, because they 'fear a lack of impartiality'[137] from national courts of the host state. That's why they prefer to international investment arbitration in order to diminish any opportunity of national courts to intervene with this process.[138] However, as stated by C.Dugan et al.., governments' persistent mistrust against such 'a purely private footing' and 'lack of coercive police power' of investment arbitration in difference with national courts make national courts 'an essential component of successful international arbitration'.[139] Investment arbitration awards rendered under both the ICSID Convention and the UNCITRAL Rules need

[133] *Ibid*.

[134] Stephen Jagusch, Jeffrey Sullivan, *A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern, in* The Backlash against Investment Arbitration Perceptions and Reality, 104 (Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin eds., 2010).

[135] The New York Convention, *supra* note at I(3).

[136] Carron and Caplan, *supra* note 132, at 86.

[137] Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 426 (2nd ed. 2012).

[138] Dugan et al., *supra* note 2, at 77.

[139] *Ibid.*

a national courts' action to be executed in a state where enforcement of those awards is sought. However, sometimes national courts abuse their power in respect of arbitration. For example, *Himpurna v. Indonesia*[140] can be considered as one of the extreme example in which the respondent state obtained an injunction from Jakarta District Court.[141] Therefore, national courts' excessive interference decreases effectiveness of investment arbitration by slowing the process and increasing the expenses of parties.[142]

Except such extreme examples, there is also possibility that national courts review arbitral awards in accordance with their laws. As analyzed in the aforementioned sections of this chapter, while the ICSID Convention prohibits any review by national courts, awards which are intended to be enforced under the New York Convention can be reviewed by national courts.[143]

As a result, although national courts have an important role in the execution of arbitral awards, it is not acceptable by international investment community that they can review all arbitral awards deeply and refuse their enforcement based on different grounds arising from national laws. Because of this reason, while the New York Convention provides exhaustive list of grounds for refusal, the ICSID Convention encumbers each Contracting State to recognize and enforce arbitral awards without further review by eliminating all problems, except State immunity which is restricted within the theory of restrictive immunity in recent decades, in front of enforcement of arbitral awards.

III. Solutions of the Problems of Enforcement

In order to enforce its arbitral award different judicial and/or non-judicial (alternative) solutions are used by winning party. In this chapter, revival of diplomatic protection by investor under the ICSID Convention (the first section), waiver of State immunity or providing "comfort letters" as implied waiver by host state, pursuing a negotiation of a post-award settlement, taking out an insurance or assigning its award to the third party by investor, inducement measure taken by home state, actions taken by international organizations (the second section) will be discussed as solutions to the problems of enforcement of investment arbitration awards discussed in the prior chapters.

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[140] *Himpurna California Energy Ltd (Bermuda) v. Republic of Indonesia* (UNCITRAL Interim Award of September 26, 1999, and Final Award of October 16, 1999) 25 YB Comm. Arb. 11 (2000).

[141] Dugan et al., *supra* note 2, at 77.

[142] *Ibid.*

[143] See Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts* in *Investment Law*, 4 Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 71 (2011).

3.1. Solution under ICSID

The ICSID Convention provides diplomatic protection in Article 27 for winning investor as 'an alternative and supplement to the judicial enforcement of awards'[144] under Article 54 of the Convention. Thus, although in the course of the ICSID Convention's drafting, the drafters considered the exclusion of diplomatic protection necessary in order to open a way for arbitration, protect host states from multiple claims and claimants and remove the dispute from the realm of politics and diplomacy,[145] the ICSID Convention remains door open for revival of diplomatic protection which is applied by home state of investor against host state in order to espouse the claim of its investor. Article 27(1) of the Convention provides that:

> 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.

As seen from this article, once host state fails to abide by and comply with the award, winning investor may resort to diplomatic protection of its home state. In case of espousal of investor's claim, home state of that investor may submit the dispute to the International Court of Justice under Article 64 of the ICSID Convention.[146]

However, there are at least three reasons which proved diplomatic protection unworkable for business interests.[147] Firstly, espousing of investor's claim is at discretion of home state of that investor.[148] Thus, as based on its discretion home state may be unwilling to take its investor's claim or even intend to dissuade investor to continue its claim,[149] because of different political reasons, it is not guarantee for the investor that it will be protected by its home state in order to enforce its award in all cases.

Secondly, application of diplomatic protection depends on some conditions such as establishing of nationality of investor or exhaustion of all local remedies.[150] However, 'It is not entirely clear the extent to which this

[144] Schreuer et al., *supra* note 5, at 426.
[145] *Ibid.*
[146] Uchkunova & Temnikov, *supra* note 115, at 206.
[147] Jan Paulsson, *Arbitration without Privity*, 10(2) ICSID Rev. 232, 255 (1995).
[148] Andrew Newcombe & Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment, 6 (2009).
[149] Jorge E. Viñuales, Dolores Bentolila, *The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States, in* Diplomatic and Judicial Means of Dispute Settlement, 268 (Laurence Boisson de Chazournes, Marcelo G. Kohen, and Jorge E. Viñuales eds., 2012).
[150] Schreuer et al., *supra* note 5, 415.

latter condition applied in the context of investment disputes'.[151] It is argued that the exclusion of any other remedies in the context of Article 26 of the ICSID Convention shall also apply to the discussed case.[152]

Finally, as showed by Permanent Court of International Justice in the *Mavrommatis Palestine Concessions case*,[153]

> By taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his 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.[154]

Therefore, there is no guarantee that home state will transfer any amount obtaining from host state to investor's account.[155]

As a result of those reasons, until today diplomatic protection under the ICSID Convention has never been used by any home state.[156] However, as argued by Christoph Schreuer, compliance obligation of losing state with arbitral awards was backed up by 'the revival of the right to diplomatic protection by the investor's State of nationality'.[157] The possibility of revival of diplomatic protection plays a supplementary role for guaranteeing of enforcement of arbitral award by losing host state. Therefore, provision stipulated in Article 27 of the ICSID Convention is important for winning investors, although it has never been used.

3.2. Other solutions

In this section, various solutions to enforcement of arbitral awards will be discussed. First of them is waiver of immunity from execution by host state which assists investor to avoid the immunity bar in the execution stage of its arbitral award. Waiver of immunity may be stipulated in either investment agreement between the host state and the investor or in BITs.[158] However, entering such a provision into the investment agreement depends on the bargaining power of the investor.[159] In addition, because of condition on reciprocity relating to waiver of immunity from execution,[160] this provision is

[151] Viñuales & Bentolila, *supra* note 150, at 269.
[152] Martins Paparinskis, *Investment Arbitration and the Law of Countermeasures*, 79(1) B.Y.I.L. 264 (2008).
[153] *Mavrommatis Palestine Concessions* (Greece v. United Kingdom) (1924), PCIJ, Series A, No 2.
[154] *Ibid.*
[155] Viñuales, Bentolila, *supra* note 150.
[156] Uchkunova & Temnikov; See also Giuliana Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 Am. Rev. Int'l Arb. 439, 458 (2004).
[157] Schreuer et al., *supra* note 5, at 1119.
[158] Uchkunova & Temnikov, *supra* note 115, at 202.
[159] Choi, *supra* note 20, at 214; Uchkunova & Temnikov, *supra* note 115, at 202.
[160] Uchkunova & Temnikov, *supra* note 115, at 202.

usually not added into text of BITs by states.[161] Therefore, including provision on waiver of immunity in agreements is not 'generally adopted in practice'.[162]

However, where any private party has sufficient negotiation power to include such provision in its investment agreement concluded between it and host state, then in case of execution of arbitral awards rendered on disputes arising from that agreement, the host state may not invoke its sovereign immunity as bar to execution. For those cases the ICSID Centre has suggested the following model clause:

> The [name of contracting state] hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a Tribunal constituted pursuant to this Agreement, including, without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of any of its property from execution.[163]

As stated by George Delaume, this type of waivers from execution compels a state to look for a friendly settlement with a winning investor rather than enforcement procedure in national court.[164]

In the context of the New York Convention, investor can also argue the existence of implied waiver of host state from execution which was made by investment agreement in which that host state waived its immunity from jurisdiction. However, there are different possibilities depending on the national laws and states' membership to the New York Convention. Those possibilities of this type of implied waiver were explained by Andrea Bjorklund set out below:

> One possibility is that a respondent State's agreement to arbitrate in a State that is party to the New York Convention, such that any award is governed by the Convention, is an implied waiver of immunity in any subsequent enforcement action, regardless whether the respondent State is itself a party to the Convention. A second variation is that only if the respondent State itself is a party to the Convention would such a waiver be implied, regardless whether the award itself was rendered in a New York Convention State and was thus subject to enforcement under the Convention.[165]

Although some national courts accept the implied waiver of sovereign immunity from execution, under their immunity laws they will require an

[161] Blane, *supra* note 58, at 498.

[162] Cane, *supra* note 157, at 457.

[163] ICISD Model Clauses, Doc. ICSID 5/Rev. 1, at cl. XIX, reprinted in Pieter Sanders (ed) Yearbook Commercial Arbitration (Volume 9, 1984).

[164] George R. Delaume, *Contractual Waivers of Sovereign Immunity: Some Practical Considerations*, 5(2) ICSID Rev. 232, 255 (1990).

[165] Bjorklund, *supra* note 62, at 309.

explicit waiver of sovereign immunity from execution in case of attachment of arbitral awards to non-commercial property.[166]

It should also be noted that, according to national laws, it may not possible for national court to attach arbitral award to the diplomatic or military property based on a waiver of immunity from execution.[167] For example, *Af-Cap, Inc v Chevron Overseas (Congo) Ltd*, the US Court of Appeals held that waiver of immunity relating to all of its property by any state is not valid in the territory of the United States of America[168] and the creditor should prove commercial nature of the discussed property before attachment.[169]

As stated by Christoph Schreuer, 'the reference of Art. 55 to the law of the respective country means that any limitation in that law to the validity of a waiver would have to be respected … [I]t is doubtful whether a waiver that goes beyond that provision would be effective'.[170] However, in the context of commercial property which 'does not enjoy immunity anyway',[171] 'it would be illogical additionally to require a waiver'[172] in respect of that commercial property taking the fact that enforcement on commercial property is allowed by national immunity laws of most states.[173]

Finally, it can be stated that 'A weak point of this solution is that it does not solve the problem of unavailability of assets or their (possible) subsequent conversion from commercial to non-commercial'.[174]

The second solution to avoid immunity bar in case of enforcement of award is "comfort letter" provided by host state within the process of annulment. For example, during the *CMS* annulment proceeding Argentina provided such a letter stating that 'it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event that annulment is not granted'.[175] It is argued that this type of "comfort letter" can be considered as an implied waiver of immunity from execution, in spite of the fact that it has not been tested in practice yet.[176]

Investors can also use the following three means as solutions to enforcement of arbitral awards: 1. pursuing a negotiation of a post-award settlement; 2. taking out insurance; 3. assigning its award to the third party.

Various factors affect investor to decide whether to pursue a negotiation of

[166] *Ibid.*

[167] Uchkunova & Temnikov, *supra* note 115, at 203.

[168] *Af-Cap, Inc v Chevron Overseas (Congo) Ltd*, 475 F3d 1080, 1087 (9th circuit 2007).

[169] Blane (footnotes omitted).

[170] Schreuer et al., *supra* note 5, at 1179.

[171] *Ibid.*

[172] Uchkunova & Temnikov. *supra* note 115, at 203.

[173] *Ibid.*

[174] *Ibid.*

[175] *CMS*, § 28.

[176] Uchkunova & Temnikov, *supra* note 115, at 204.

a post-award settlement. This settlement may be suitable for both parties of dispute from different perspectives. By explaining those perspectives L.Mistelis and C.Baltag indicate in their survey on "Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards"[177] that:

> For the non-prevailing party it might be more suitable to substitute damages for specific performance or to pay a substantial amount over a period of time. For the winning party, renegotiating the arbitral award might be more profitable than spending time and money in enforcing it.[178]

Usually, an investor decides based on its bargaining power and difficulties such as time and expenses in enforcement of its arbitral award.[179] Risk in respect of enforcement of arbitral awards against state and negotiating power of both parties determine the final value at which winning investor would like to settle or sell its award.[180] If the investor concludes that the post-award settlement is more beneficial for it than starting an enforcement procedure, then it starts negotiations with host state in order to obtain maximum benefit from this settlement. As a result of such settlement, parties of dispute reach a new agreement on payment of arbitral award of investor which includes not only cash payment, but also future benefits for investor such as tax benefits or other regulatory exemptions.[181]

However, it should also be noted that economic and physical compulsion applied by host state to compel investor to agree with an unfair post-award settlement is null and void.[182] In *Desert Line Projects LLC v. The Republic of Yemen*,[183] the Arbitral Tribunal held that:

> The settlement agreement according to which the prevailing party in an arbitral proceeding renounces half of its rights without due consideration can only be valid if it is the result of an authentic, fair and equitable negotiation. In the case at hand, the rejection of the outcome of a mechanism for the resolution of the claims rendered in a local arbitration by two arbitrators selected by the Parties, and assisted in their deliberations by a local Yemeni magistrate; coupled with the subjection of the Claimant's

[177] Loukas Mistelis & Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards: Special Section: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 Am. Rev. Int'l Arb. 319, 319 (2008).

[178] *Ibid.*

[179] Viñuales & Bentolila, *supra* note 150, at 260.

[180] *Ibid.*

[181] R. Doak Bishop, *Introduction: The Enforcement of Arbitral Awards against Sovereigns, in* Enforcement of Arbitral Awards against Sovereigns, 5 (Doak Bishop ed., 2009).

[182] Viñuales & Bentolila, *supra* note 150, at 261.

[183] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.

> employees, family members, and equipment to arrest and armed interference, as well as the subsequent peremptory "advice" that it was "in [his] interest" (Exh. CM-113) 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.[184]

As seen from this statement of the Arbitral Tribunal, for concluding valid agreement after post-award settlement negotiation between parties should be authentic, fair and equitable. Otherwise, the state party would have failed to comply with its fair and equitable treatment obligation under BIT concluded between that state and the home state of investor.

To sum up, it can be stated that as the post-award settlement is suitable for investor who feel that the enforcement procedure will not be smooth and will take long time, this mean is used by many corporations. This view is supported by the abovementioned survey which indicates that 40% of interviewed corporate counsels confirmed that their companies had negotiated with the opposing party after receiving award.[185]

One of the options available to investors is insurance for non-payment of BIT award.[186] In difference with political risk insurance, BIT award insurance covers the entire value of arbitral award by applying 10% of franchise deductible.[187] However, as observed by Andrea Bjorklund, BIT award insurance is costly as well as it is not easily available to investors to gain entire coverage.[188]

One of the solutions to problem of enforcement is an assignment of its award by the investor to the third party. For example, CMS Gas Transmission Company assigned its award to Blue Ridge Investments, LL.C. as a possible solution to Argentine immunity defence.[189] Argentina objected this assignment by stating that it was improper assignment.[190] Christoph Schreuer also stated that 'Only a party to the original ICSID arbitration proceeding may initiate the procedure under Art. 54(2). This would exclude action by an interested third party'.[191] However, the US District Court for the Southern

[184] *Id.* at § 179.

[185] Mistelis & Baltag, *supra* note 178, at 339.

[186] Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor – State Arbitral Awards: The Re-politicization of International Investment Disputes*, 21 Am. Rev. Int'l Arb. 211, 234 (2010).

[187] *Ibid.*

[188] *Ibid.*

[189] Yas Banifatemi, *Enforcement of Arbitral Awards in Investment Arbitration: Taking Stock and Way Forward* (Second Symposium on International Investment Agreements, Paris, 2010), 97 http://www.oecd.org/investment/internationalinvestmentagreements/49893996.pdf (last visited Oct 6, 2016).

[190] Uchkunova & Temnikov, *supra* note 115, at 207 (footnotes omitted).

[191] Schreuer, *supra* note 81, at 1146.

District of New York concluded that, taking into consideration that the national law should apply to enforcement procedure, 'nothing in … New York law prevents an assignee from seeking recognition and enforcement of an ICSID Convention award'.[192]

In addition to investor's actions, home state also takes some measures such as inducement in order to compel host state to comply with an arbitral award. For example, under the US Foreign Assistance Act of 1961, 'none of the funds … may be provided to a government or any agency or instrumentality thereof, if the government of such country ... has ... nationalized or expropriated the property of any United States person … and … has not … provided adequate and effective compensation for such property in convertible foreign exchange or other mutually acceptable compensation equivalent to the full value thereof, as required by international law'.[193] By threatening to invoke this provision, which is so-called the "Helms Amendment", the US Government compelled the government of Costa Rica to give its unilateral consent to the ICSID arbitration[194] in *Santa Elena*[195] case. However, it is clear that there are few countries in the world which have sufficient economic power to use such type of inducement. Nevertheless, regardless of home state's inducement power, non-complying host state loses its creditworthiness in the international community. This view is also stated by the annulment committee in *Mitchell v. Congo*[196] that 'a State's refusal to enforce an ICSID award may have a negative effect on this State's position in the international community with respect to the continuation of international financing or the inflow of other investments'.[197] Therefore, this fear is also effective over host states' decision on whether to comply with arbitral award or not.

Other mechanism which can become a solution to enforcement of arbitral awards is an effective intervention of international institutions. As observed by J. Viñuales and D. Bentolila, 'When a borrower country is unwilling to take steps or make necessary efforts to resolve or settle' disputes on compensation to foreign investors in case of expropriation of their property, the World Bank as one of the important financial source of many countries 'may be led to

[192] US District Court for the Southern District of New York, Order of 30 September 2012, 10 Civ 153 (PGG), 20 http://www.italaw.com/sites/default/files/case-documents/italaw1102.pdf (last visited Oct 6, 2016).

[193] U.S. Foreign Aid Act of 1961, 22 U.S.C. § 2370a(a)(1)(A) and 22 U.S.C. § 2370a(a)(2)(B).

[194] Charles N. Brower, Jarrod Wong, *General Valuation Principles: The Case of Santa Elena, in* International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law, 752 (Todd Weiler ed., 2005).

[195] *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, and Rectification of Award, 8 June 2000.

[196] *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 (Annulment Proceeding), Decision on the Stay of Enforcement of the Award, 30 November 2004.

[197] *Id at* § 41.

withhold or suspend lending to the country until such disputes have been solved'.[198] Although this remedy is out of control of investors,[199] this pressure made by the World Bank is also one of the effective means to compel non-complying host state to solve any problems with investors in order to restore its creditworthiness among international community.

Taking all the above mentioned means into consideration, it can be stated that those means assist winning party to achieve its final goal, namely obtaining compensation indicated in arbitral award. Although each of those solutions has their weak side, winning investor can sufficiently use them jointly or separately to enforce its arbitral award.

IV. Recommendation and Conclusion

As analyzed in the aforementioned chapter, there are various solutions to the problems of enforcement of arbitral awards. While in some cases it is sufficient for winning party to use one of those solutions to enforce its arbitral award, in other cases that winning party have to invoke some of those solutions together to reach its compensation goal. In this chapter, two of those solutions will be described as recommended solutions to problems of enforcement of arbitral awards rendered under the arbitration mechanisms discussing in this article (the first section). Moreover, this chapter will be finished with the conclusion of the article (the second section).

4.1. Recommendation

In this section, two solutions are suggested to avoid problems of enforcement of arbitral awards: 1. adding provision on waiver of sovereign immunity from execution into both the ICSID Convention and the New York Convention; 2. pursuing a negotiation of a post-award settlement.

Waiver of sovereign immunity from execution is very desirable by investors in case of execution of arbitral awards against non-complying host state. However, as stated in the previous chapter, obtaining such a waiver from state party depends on different factors such as bargaining power of investor, willingness of state parties to BITs, etc. As a result, such situation creates obscurity in respect of waiver of immunity from execution by making the fate of execution of arbitral award depended on the behaviour of the different parties. Therefore, although it is argued that the fate of arbitral awards should not be depended on the conduct of the parties of dispute, 'it may be worthwhile to amend the ICSID Convention to eliminate the impact of sovereign immunity in the execution of awards'.[200] This type of elimination

[198] Viñuales & Bentolila, *supra* note 150, at 274.
[199] Uchkunova & Temnikov, *supra* note 115, at 207.
[200] Nmehielle, *supra* note 38, at 47-48.

would also be beneficial for winning investors whose awards are enforced under the New York Convention. However, it is argued that 'due to the lack of political consensus' among states, at present it would not be possible to make any amendment in respect of waiver of immunity from execution.[201]

Establishing an appellate mechanism within the ICSID Centre in exchange for waiver of sovereign immunity from execution could be a solution for the problem of consensus among states on this matter in multilateral level. This appellate body must have the following characteristics:

1. It must be a permanent body;
2. It must consist of certain number of arbitrators (depending on the workload of the ICSID Centre) appointed by group of states based on their regional origin determining in the list of the United Nations Regional Groups of Member States;[202]
3. It must have the power to review the cases and make a final decision on those cases. However, it may only change a decision of arbitration tribunal only in case of existence of grounds stipulated in Article 52(1) of the ICSID Convention. Otherwise, it should confirm arbitral award rendered by the first instance arbitral tribunal;
4. It must be bound by facts determined by the first instance arbitral tribunal.[203]

This type of appellate body can be in interest of both parties of dispute because of different reasons. From the states' aspect, this amendment will have given a power to the Contracting States to the ICSID Convention to establish a separate body from arbitral tribunal which will not be interfered by investors. This fact will make those States convinced to agree with this amendment, because they will obtain the control of appointment of the appellate body's stuff and therefore, will not be able to object from arbitrators that they take sides of business community. From the investors' aspect, establishing this type of appellate body will eliminate annulment procedure which possibly has a never-ending nature. In addition, since states will waive their immunity from execution in exchange for the mentioned appellate structure, investors will be able to enforce their arbitral awards by easily avoiding immunity bar.

It should be noted that although provision on waiver of sovereign immunity from execution could be added to the New York Convention, it is not possible to establish this type of appellate system under this Convention in order to achieve consensus among the Contracting States to that

[201] Cane, *supra* note 157, at 460.

[202] See United Nations Regional Groups of Member States at http://www.un.org/depts/DGACM/RegionalGroups.shtml (last visited Oct 6, 2016).

[203] See Tams, *supra* note 47, at 6.

Convention based on the aforementioned arguments. That's why the following solution would be more suitable for investors than this one. Nevertheless, it can be stated that the following solution is also suitable for investors whose awards have been rendered under the ICSID Convention at present day.

As stated in the previous chapter, pursuing a negotiation of a post-award settlement is one of the solutions using by winning investor to avoid any possible obstacles in the enforcement stage of arbitral award. Since this settlement may be suitable for both parties of dispute from different perspectives such as saving time and expenses by investor and paying some part of award or even substituting cash payment with other types of benefits by losing state, it is argued in this article that it would be very beneficial for any winning investor to pursue a negotiation of a post-award settlement rather than starting enforcement procedure against the respective host state in case of non-compliance by that host state with arbitral award.

4.2. Conclusion

As seen from the previous chapters, winning party have to make an effort in order to enforce its investment arbitration award against non-complying party. Different types of problems come into play after rendering award by arbitral tribunal such as annulment procedure, State immunity, etc. However, as observed by L.Mistelis and C.Baltag in their survey on "Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards", voluntary compliance with arbitral awards is around 90% of the cases.[204]

Although non-compliance with arbitral awards is not issue for investors in most cases, investors suffer from some problems, especially State immunity from execution in some cases where losing state does not intend to comply with the arbitral award. That's why wide ranges of solutions discussed in the third chapter of this article are used by different subjects in order to make compensation available for the winning investor. It should be noted that those solutions are usually sufficient for solving those problems of enforcement in case of non-compliance by host states with arbitral awards. However, in order to avoid immunity bar of host state entirely the recommendations suggested in the previous section of this chapter can be taken into consideration by the respective authorities and investors.

[204] Mistelis & Baltag, *supra* note 178, 357.