Pepperdine Law Review

Volume 41 | Issue 1 Article 3

12-15-2013

Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution

Joseph M. Cardosi

Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution

I. INTRODUCTION

Winner winner, chicken dinner . . . right? Not so fast. The thrill a private investor experiences after prevailing against a sovereign state in arbitration can quickly turn to frustration when the state refuses to pay up; cashing in is not as easy as presenting the award to a cashier—but maybe it can be.

Investor–state arbitration is a dispute resolution procedure that offers a private investor a means to call upon a sovereign state to appear in a neutral forum and respond to investment-mistreatment claims that can lead to binding awards that carry worldwide enforceability.[1] This sovereign generosity is a product of the explosion of foreign direct investment over the last several decades that led to the rise of international investment agreements (IIAs) such as bilateral investment treaties (BITs) and free trade agreements (FTAs).[2] These instruments include dispute resolution provisions that, more often than not, call for arbitration of disputes arising out of the agreement.[3] In the event of a dispute governed by an arbitration clause, the provision provides for an arbitral tribunal with jurisdiction over the parties.[4] Although agreeing to submit to arbitration acts as a waiver of sovereign immunity as to jurisdiction, prevailing investors may encounter the obstacle of sovereign immunity following the arbitration when attempting to execute an award against a noncompliant state.[5] If a state refuses to comply with an award, investors must set off on a worldwide search for assets held by that state; if and when investors find state assets, they must overcome the obstacle of sovereign immunity laws governing access to those assets.[6]

---

1. CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 1–5 (2007).

2. *See* U.N. CONFERENCE ON TRADE AND DEV. (UNCTAD), WORLD INVESTMENT REPORT 2012: TOWARDS A NEW GENERATION OF INVESTMENT POLICIES, 84–86, U.N. Doc. UNCTAD/WIR/2012, U.N. Sales No. E.12.II.D.3 (2012) [hereinafter WORLD INVESTMENT REPORT 2012], *available at* http://www.unctad-docs.org/files/UNCTAD-WIR2012-Full-en.pdf.

3. *See, e.g.*, *infra* note 15 and accompanying text.

4. *See infra* notes 28–29 and accompanying text.

5. *See generally* 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 (2010).

6. *See infra* notes 148–165 and accompanying text (providing a very well-known example of

This Comment highlights the frustrating road that investors travel in search of assets when states do not honor arbitration awards and discusses how the World Bank Group can unify investor–state arbitrations to preclude such hollow victories for investors. Part II introduces the contemporary framework of investor–state arbitration, including an overview of the International Centre for Settlement of Investment Disputes (ICSID or the Centre), a summary of the scope of noncompliance with investor–state arbitration awards, and the unique ICSID enforcement mechanism used to address challenges to awards and noncompliance.[7] Part III provides examples of the challenges investors face in award execution proceedings in various jurisdictions with respect to amorphous sovereign immunity laws, and highlights the need for a non-judicial solution to the issue of award noncompliance.[8] Part IV explores the feasibility of using the World Bank Group affiliates to alleviate the need to seek out assets of recalcitrant states in efforts to satisfy arbitration awards.[9] Part V concludes.[10]

II. A BIT OF CONTEXT

Since the Netherlands and Indonesia signed the first BIT offering investor–state arbitration in 1968,[11] investor–state arbitrations have grown at an incredible rate.[12] Treaty-based dispute cases filed under IIAs rose dramatically after the turn of the century, trending from a cumulative fifty disputes in 2000 to 450 by the end of 2011.[13] These disputes have

this phenomenon).

7. *See infra* notes 11–65 and accompanying text.

8. *See infra* notes 66–175 and accompanying text.

9. *See infra* notes 176–248 and accompanying text.

10. *See infra* note 249–56 and accompanying text.

11. *See* Int'l Ctr. for Settlement of Inv. Disputes (ICSID), *Annual Report* 5 (2012) [hereinafter ICSID, *Annual Report 2012*], *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2012_Eng.

12. *See* UNCTAD, *IIA Issues Note: Latest Developments in Investor-State Dispute Settlement* 1 (April 2012) [hereinafter *IIA Issues Note 2012*], *available at* http://unctad.org/en/PublicationsLibrary/webdiaeia2012d10_en.pdf (noting that 2011 had the highest number of treaty-based disputes ever filed in one year); *see also* MCLACHLAN, ET AL., *supra* note 1, at 26–28 (providing an overview of the rise in IIAs).

13. *IIA Issues Note 2012*, *supra* note 12, at 3. This rise in disputes follows the rise in BITs over the past several decades. Approximately 500 BITs and other IIAs (such as FTAs with investment provisions) existed in 1990; an additional 1500 IIAs arose throughout the 1990s, and then another 1000 came to be in this past decade for a total of over 3100 at the end of 2011. WORLD

compelled eighty-nine countries to respond in accordance with the dispute resolution provision found in the underlying treaty or agreement,[14] typically through arbitration.[15] Although claimants may choose from a variety of institutions or pursue ad hoc arbitrations, the clear majority of investor–state arbitrations occur through ICSID.[16]

A. ICSID: From Birth to Boon

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) established ICSID

INVESTMENT REPORT 2012, *supra* note 2, at 84. The slowdown in pace of IIA growth is attributed to the rise of preferred regional agreements, which can do in one agreement what would otherwise require as many agreements as party pairs. *Id*. The shifting preference for regionalism is attributed to, *inter alia*, the increasingly controversial and politically sensitive nature of investor–state arbitrations. *Id*.; *see infra* Part III.B.

14. *IIA Issues Note 2012*, *supra* note 12, at 2. Twelve countries have responded to ten or more claims, and three have responded to over twenty claims, including Argentina (fifty-one cases), Venezuela (twenty-five cases), and Ecuador (twenty-three cases). *Id*. at 17.

15. *See* 2012 Model U.S. Bilateral Investment Treaty, art. 24 ("In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation: (a) the claimant . . . may submit to arbitration . . . ."), *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, art. 22 (Sept. 9, 2012) [hereinafter Canada–China BIT] ("A disputing investor who meets the conditions precedent . . . may submit the claim to arbitration . . . ."), *available at* http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-text-chine.aspx; Model UK Bilateral Investment Treaty, art. 8 ("Disputes between a national or company of one Contracting Party and the other Contracting Party . . . which have not been amicably settled shall . . . be submitted to international arbitration if the national or company concerned so wishes."), *available at* http://unctad.org/sections/dite/iia/docs/Compendium/en/69%20volume%203.pdf; North American Free Trade Agreement, U.S.-Can.-Mex., art. 1120, Dec. 17, 1992, 32 I.L.M. 289 (1993) ("[A] disputing investor may submit the claim to arbitration . . . ."), *available at* https://www.nafta-sec-alena.org/Default.aspx?tabid=97&ctl=FullView&mid=1588&language=en-US#A1120.

16. *Cf. IIA Issue Note 2012*, *supra* note 12, at 2 (noting that of the forty-six new disputes filed in 2011, thirty-four were filed with ICSID). Prominent international arbitration institutions include the International Chamber of Commerce (ICC) (Paris), the Stockholm Chamber of Commerce (SCC), the Permanent Court of Arbitration (PCA) (Netherlands), the London Court of International Arbitration (LCIA), and the International Centre for Settlement of Investment Disputes (ICSID) (Washington, D.C.). *See id*. Many international arbitrations are conducted ad hoc, without an institution. *Id*. The United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules are widely used in both institution arbitrations and, pursuant to their design, in ad hoc arbitration proceedings. *Id*. The majority of investor–state dispute settlements occur under ICSID or UNCITRAL by way of the PCA. *Id*. at 1–2.

in 1966.[17] The World Bank—or as it was known then, the International Bank for Reconstruction and Development (IBRD or Bank)—sponsored the ICSID Convention in response to increasing calls for the Bank to play a role in settling disputes related to its operations.[18] The goal of the ICSID system, as promulgated in the Convention's Preamble,[19] is to "promote much-needed international investment by offering a neutral dispute resolution forum both to investors that are (rightly or wrongly) wary of nationalistic decisions by local courts and to host States that are (rightly or wrongly) wary of self-interested actions by foreign investors."[20] The Centre's headquarters are

17. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

18. K.V.S.K. NATHAN, THE ICSID CONVENTION: THE LAW OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES 47–50 (2000). Eugene Black, who served as President of the World Bank in the early 1960s, advanced the idea of a separate investment dispute settlement entity following his experience mediating disputes between member states and other member states or nationals of member states, including the nationalization of the Anglo-Iranian Oil Corporation and expropriations of the Suez Canal Company by Egypt. *Id*. at 47–49. The ICSID Convention was thus a product of the Bank's interest in settling disputes arising out of Bank operations balanced against the restrictions to its authority. "Pressure mounted for the Bank to play a regular and effective role in settling disputes . . . but it was evident that the Bank would be stretching its mandate to do so and would be seriously diverted from its fundamental role of [reconstruction and development]." *Id*. at 49.

19. The ICSID Convention Preamble provides:

> The Contracting States **Considering** the need for international cooperation for economic development, and the role of private international investment therein; **Bearing in mind** the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States; **Recognizing** that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases; **Attaching particular importance** to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire; **Desiring** to establish such facilities under the auspices of the International Bank for Reconstruction and Development; **Recognizing** that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and **Declaring** that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration, **Have agreed** as follows:

ICSID Convention, *supra* note 17, Preamble.

20. LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 4–5 (2d ed. 2011). Exemplifying the nationalistic fears of foreign investors, an Ecuadorian judge recently

located at the World Bank in Washington, D.C.; despite its aim to be an autonomous institution, one may look no further than its Administrative Council (chaired by the President of the World Bank) to notice the inescapable influence of the World Bank.[21]

ICSID operates as an administering body, not a permanent court.[22] The Centre's staff assists parties and arbitrators in constituting and carrying out arbitrations, and adopts governing rules of procedure used to supplement the ICSID Convention.[23] A unique trait of the ICSID system is that the law governing the arbitration, the *lex arbitri*, is the Convention itself, and, thus, the same no matter where the arbitration takes place.[24] Unlike international commercial arbitration, the ICSID system of investor–state arbitration is "self-contained and hence delocalized."[25] Substantive law remains at the discretion of the parties, with deference to laws of the state party in the absence of an agreement.[26]

Chapter II of the ICSID Convention provides for the jurisdiction of ICSID,[27] which is interpreted as comprising five elements: "(1) a legal dispute; (2) arising directly out of an investment; (3) between a contracting

confessed to accepting a bribe of $500,000 from plaintiff-citizens for his efforts in orchestrating an $18 billion judgment against Chevron Corporation in an environmental trial in Ecuador. *See* Chevron, *Press Release: Former Ecuadorian Judge Admits Role in Orchestrating Fraudulent Judgment Against Chevron*, CHEVRON.COM (Jan. 28, 2013), http://www.chevron.com/chevron/pressreleases/article/01282013_formerecuadorianjudgeadmitsroleinorchestratingfraudulentjudgmentagainstchevron.news.

21. NATHAN, *supra* note 18, at 52–53. Overlap with the World Bank operations is also apparent upon review of the Notes to Financial Statements included in the ICSID 2012 Annual Report: "IBRD provides support services and facilities to the Centre including . . . [t]he services of staff members and . . . [o]ther administrative services and facilities, such as travel, communications, office accommodations, furniture, equipment, supplies, and printing." ICSID, *Annual Report 2012*, *supra* note 11, at 59.

22. NATHAN, *supra* note 18, at 51; *see also* REED, ET AL., *supra* note 20, at 9 ("The Centre itself does not conduct arbitration proceedings, but administers their initiation and functioning.").

23. REED, ET AL., *supra* note 20, at 11–12, 123.

24. *See* JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 53 (1997) (the seat of the arbitration typically provides the *lex arbitri* in international commercial arbitration, exposing the arbitration to varying degrees of judicial interference).

25. REED, ET AL., *supra* note 20, at 14; *see also* MCLACHLAN, ET AL., *supra* note 1, at 55.

26. *See* ICSID Convention, *supra* note 17, art. 42.

27. *See id*. art. 25. Consent of the parties to arbitrate excludes resort to any other remedy; however, the dispute resolution provision may require exhaustion of local remedies as a prerequisite to arbitration. *See id*. art. 26.

State; and (4) the national of another contracting State; and (5) which the parties to the dispute consent in writing to submit to ICSID."[28] The most notable aspect of the limited jurisdiction of ICSID arbitration is that it is not available for state–state arbitration or arbitration between private parties.[29] The latter disputes often fall under the auspices of the New York Convention,[30] a similar multilateral treaty that notably provides for the recognition and enforcement of foreign arbitral awards in any of its Contracting States.[31]

ICSID is the leading investor–state arbitration institution in the world in terms of caseload.[32] The number of states signatory to the ICSID Convention increased from 30 in 1965 to 158 as of June 30, 2012.[33] ICSID received a record thirty-eight case-filings in 2011, representing a clear majority of all investor–state disputes filed in that year.[34] While the basis of

28. MCLACHLAN, ET AL., *supra* note 1, at 56. The ICSID Convention is silent, or at best vague, as to the meaning of "legal dispute" or "investment." For further discussion on interpretations of the ICSID jurisdictional precursors, see generally NATHAN, *supra* note 18, at 99–154.

29. *See, e.g.*, ICSID Convention, *supra* note 17, art. 25 (explaining that the Centre's jurisdiction extends "to any legal dispute arising directly out of an investment, between a *Contracting State* . . . and a *national of another Contracting State*") (emphasis added). In 1978, ICSID adopted the ICSID Additional Facility Rules, which allow the Centre to administer conciliation and arbitration of investment disputes where one party to the dispute is not affiliated with a Contracting State. ICSID, *Annual Report 2012*, *supra* note 11, at 21–22. The Centre also administers investment arbitrations conducted under the UNCITRAL Arbitration Rules and may serve as either appointing authority in non-ICSID Convention cases or offer services pursuant to agreements with other international institutions. *See id*.

30. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (1968) [hereinafter New York Convention]. As of September 1, 2013, 149 countries have ratified the New York Convention. *New York Convention Countries*, NEWYORKCONVENTION.ORG, http://www.newyorkconvention.org/new-york-convention-countries/contracting-states (last visited Sept. 28, 2013).

31. *See* Giuliana Canè, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 AM. REV. INT'L ARB. 439, 440–45 (2004) (comparing enforceability of ICSID awards to the overlapping yet more restrictive provisions of the New York Convention).

32. *See IIA Issues Note 2012*, *supra* note 12, at 1–3.

33. ICSID, *Annual Report 2012*, *supra* note 11, at 9–15. Of the 158 signatories, 148 are Contract States, meaning those countries have deposited their instruments of ratification with the Centre. *Id*. at 9.

34. *Id*. at 5. *Compare id., with IIA Issues Note 2012*, *supra* note 12 (citing a total of 46 registered investor–state disputes in 2011). The spike in investor–state cases at ICSID is also apparent by review of the average number of cases filed over the last four decades: one per year in the 1970s, two per year in the 1980s, four per year in the 1990s, twenty-four per year in 2000–2009, and thirty-five per year from 2010 through November 2012. *See* ICSID, *Annual Report 2012*, *supra* note 11, at 7. The ICSID Convention governs both conciliation and arbitration, though the "vast

consent to ICSID proceedings can take many forms, over three-quarters of all cases filed with ICSID in its 2012 fiscal year derived from dispute resolution provisions within BITs and FTAs.[35] As there is a natural lag in the time between a dispute and the treaty or agreement it arises out of, the recent boon in ICSID cases is likely to persist despite the slowdown of new BITs and other IIAs.[36] However, with more claims come more dissatisfied parties; in the last several years, Bolivia, Ecuador, and Venezuela have withdrawn from the ICSID Convention (justifying the move on nationalistic interest and public policy).[37] Such acts threaten the integrity of the ICSID system and jeopardize future legal claims of current investors and the availability of foreign investment in those countries.[38]

B. Compliance Check

Investor–state arbitral awards carry higher compliance rates compared to awards from interstate or international commercial arbitration between private parties.[39] The ICSID system carries built-in incentives for compliance as well as easily identifiable risks accompanying noncompliance.[40] A state's act of ratifying the ICSID Convention and

---

majority of cases" are arbitrations. *Id*. at 22.

35. ICSID, *Annual Report 2012*, *supra* note 11, at 26.

36. *See supra* text accompanying note 13.

37. *See* WORLD INVESTMENT REPORT 2012, *supra* note 2, at 87. For a thorough analysis of the impact of ICSID denunciation following these acts by Bolivia, Ecuador, and Venezuela, see Diana Marie Wick, *The Counter-Productivity of ICSID Denunciation and Proposals for Change*, 11 J. INT'L BUS. & L. 239 (2012).

38. *See generally* Wick, *supra* note 37. Pending cases are not affected by denouncement, including those filed during the six month window between official announcement of denunciation and the date it takes effect. Sergey Ripinsky, *Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Apr. 13, 2012), http://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve.

39. *See* Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT'L ARB. 319, 359 (2008).

40. *See* REED, ET AL., *supra* note 20, at 186 ("[T]he [ICSID] system is largely self-enforcing because Contracting States presumably recognize that blocking the execution of awards against them would alienate the very investors they are trying to attract by ratifying the ICSID Convention."); *see also* ICSID Convention, *supra* note 17, art. 27(1) ("No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, *unless such other Contracting State shall have failed to abide by and comply with*

entering into a BIT or other agreement whereby it consents to ICSID proceedings is a signal to foreign investors that it intends to honor arbitral awards; compliance with awards provides a state with credibility and reduces political risk associated with foreign investment.[41]

In addition to goodwill and other positive externalities encouraging compliance, negative consequences abound and provide perhaps greater incentive to states to comply with awards.[42] By failing to honor an ICSID award, a state exposes itself to loss of credibility in the eyes of foreign investors and risks being ostracized by other Contracting States.[43] Furthermore, ICSID's affiliation with the World Bank serves as a ready reminder of the ramifications to developing countries that rely on loans from World Bank affiliates.[44]

While compliance is the norm in investor–state arbitration, exceptions persist.[45] Noncompliant states come in many shapes and sizes, from large economies such as Russia to poor countries like Zimbabwe.[46] Noncompliance occurs more often in non-ICSID cases than ICSID cases.[47] Noncompliance in ICSID cases nonetheless remains a threat, especially in light of the recent decisions of several countries to withdraw from the ICSID

the award rendered in such dispute." (emphasis added)).

41. *See* REED, ET AL., *supra* note 20, at 186. *See also* Anoosha Boralessa, *Enforcement in the United States and United Kingdom of ICSID Awards Against the Republic of Argentina: Obstacles that Transnational Corporations May Face*, 17 N.Y. INT'L L. REV. 53, 66–67 (2004).

42. *See* Canè, *supra* note 31, at 447 (finding that ICSID drafters thought investors were more likely to default than states, in light of the price of noncompliance to be paid by states through loss of international credibility).

43. *See* REED, ET AL., *supra* note 20, at 17.

44. Crina Baltag, *Enforcement of Arbitral Awards Against States*, 19 AM. REV. INT'L ARB. 391, 404 (2008); *see also infra* Part IV.

45. *See* Luke Eric Peterson, *How Many States Are Not Paying Awards Under Investment Treaties?*, INVESTMENT ARB. REP., May 7, 2010 (finding at least a half a dozen declining to pay final awards rendered in investor-state arbitrations); *see also* Baltag, *supra* note 44, at 405 (finding roughly 20% of those corporations surveyed who had arbitrated against states or state-entities had to go through enforcement proceedings against states).

46. *See* Peterson, *supra* note 45 (other noncompliant countries include Argentina, Kazakhstan, Kyrgyzstan, and Thailand); *see also infra* Part III.A.

47. *Cf.* REED, ET AL., supra note 20, at 186–89 ("[A]s of January 2010, foreign investors with favorable ICSID awards had pursued execution proceedings in only four cases.") (Congo, Senegal, Liberia, and Kazakhstan were the noncompliant states); Baltag, *supra* note 44, at 403–04, 409–12 (discussing the same cases involving execution proceedings). Data is not comprehensive on this subject due to the private nature of many arbitrations. Of the noncompliant states discussed in this article, six have refused to honor ICSID awards: Congo, Senegal, Liberia, Argentina, Kazakhstan, and Zimbabwe (for information on the latter three, see *infra* notes 60, 139, and 85, respectively).

system.[48] As the number of investor–state disputes continues to climb at record-setting pace,[49] the need to address solutions to noncompliance grows stronger. ICSID's enforcement mechanism, while more effective than alternatives, still allows states to have the last word as to whether they will comply with arbitration awards.[50]

C. ICSID's Enforcement Mechanism

The most notable benefit to ICSID arbitration over available alternatives is its unique enforcement mechanism.[51] This mechanism rests in Articles 53 and 54 of the ICSID Convention, which provide that an award is not subject to appeal and is treated in any Contracting State "as if it were a final judgment of a court in that State."[52] These provisions allow a prevailing

48. *See generally* Wick, *supra* note 37.

49. *See supra* note 13 and accompanying text.

50. *See infra* Part II.C.

51. *See* George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 702–04 (2008).

52. Articles 53 and 54 of the convention read as follows:

> Article 53
> (1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.
> (2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.
>
> Article 54
> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General . . . .
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such

party to take a certified copy of an award to a competent court in *any* Contracting State and automatically receive the same rights to execution as if it were a final judgment issued by that court.[53] This represents a significant improvement over the enforceability of awards under the New York Convention, where a court may deny enforcement of an award based on, *inter alia*, the public policy of the state wherein a party seeks enforcement.[54] The ability to bypass judicial recognition and enforcement proceedings represents "a major potential advantage" over alternative means of dispute settlement.[55]

ICSID does not completely tie the hands of parties following the issuance of an award; Section 5 of the Convention provides an avenue for interpretation, revision, or annulment of an award.[56] Article 52, the annulment provision, represents the only challenge a dissatisfied party may make on the grounds of error, and these grounds are narrow and primarily procedural in nature.[57] The review process is internal,[58] leaving no further avenue for appeal.[59]

Though greatly reducing the ability of a court to thwart arbitration results, the ICSID Convention does not go so far as to commandeer the sovereign immunity laws of a Contracting State. Whereas participation in ICSID arbitration waives sovereign immunity from suit,[60] Articles 54(3) and

---

execution is sought.

ICSID Convention, *supra* note 17, arts. 53–54.

53. *Id*. art. 54; *see also* Foster, *supra* note 51, at 703.

54. *See* Canè, *supra* note 31, at 444 ("Unlike the [ICSID] Convention, the New York Convention provides in Article V a list of grounds on which recognition and enforcement may be refused.").

55. Foster, *supra* note 51, at 703.

56. *See* ICSID Convention, *supra* note 17, arts. 50–52.

57. *See id*. art. 52 ("(1) Either party may request annulment of the award . . . on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.").

58. *See generally* arts. 50–52. An independent, ad hoc Committee conducts the internal review. *See id*. art 52(3).

59. *See* Foster, *supra* note 51, at 702 (noting that if an award is upheld following an annulment review, "there is no basis for a State on the losing end of the award to resist compliance").

60. *See, e.g*., Blue Ridge Invs., L.L.C. v. Republic of Argentina, 902 F. Supp. 2d 367, 374–75 (S.D.N.Y. 2012) (finding waiver of sovereign immunity as to jurisdiction) ("Given its status as a Contracting State to the [ICSID] Convention, as well as its participation in the ICSID arbitration, Argentina must have contemplated enforcement actions in . . . the United States as a signatory to the

55 preserve a noncompliant State's claim to sovereign immunity from execution.[61] The scope of sovereign immunity varies based on the jurisdiction in which an investor seeks execution.[62] Article 55 provides: "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."[63] Thus, the Convention's enforcement mechanism takes the prevailing party to, but stops short of, the execution phase.[64] In the event of noncompliance, execution of an award requires assistance of a competent court in a Contracting State.[65]

III. SOVEREIGN IMMUNITY OBSTACLES IN ARBITRATION AWARD EXECUTION

The rendering of an award in investor–state arbitration is not the end-point in a dispute; receiving an award is merely winning a battle, whereas receiving payment is winning the war. Indeed, while an ICSID award represents a major victory in the dispute, it may be a hollow victory in the event of nonpayment by the losing party. In such instances, the awardee must scour the globe in search of assets in an ICSID Contracting State and determine if that state's laws on sovereign immunity do not shield the assets from attachment in aid of execution.[66] This costly and often fruitless search and seizure of state assets frustrates the goal and simplicity of the ICSID system.[67]

ICSID's model clauses provide an opportunity for investors to bypass the sovereign immunity obstacle of award execution by way of explicit

Convention." (internal quotation marks and citations omitted)), *aff'd*, No. 12-4139-cv, 2013 WL 4405316 (2d Cir. 2013).

61. *See* REED, ET AL., *supra* note 20, at 186; *see also supra* note 52 and accompanying text.

62. *See* Bjorklund, *supra* note 5, at 215.

63. ICSID Convention, *supra* note 17, art. 55.

64. REED, ET AL., *supra* note 20, at 182–84.

65. *See id*.

66. *See* Bjorklund, *supra* note 5, at 217 ("The result is that the holder of an unpaid ICSID Convention award can seek enforcement in the courts of any ISCID Convention country, but its ability to recover will be limited by municipal laws on sovereign immunity."); *cf*. ICSID Convention, *supra* note 17, art. 55 (ICSID award execution yields to foreign sovereign immunity laws in the forum in which the awardee seeks execution).

67. *See infra* Parts III.A.1–2.

waiver of immunity from execution;[68] however, states are reluctant in theory[69] and obstinate in practice to agree to such a stipulation.[70] Even when a waiver is present, a court may acknowledge the waiver in fact yet ignore it in law, according deference to either binding national sovereign immunity

68. For example:

> Once [an] award is issued . . . the Convention does not alter or supersede the applicable national law of sovereign immunity from enforcement and execution of the award against the State. In other words, the host State's consent to arbitrate, although a waiver of immunity from suit, does not necessarily amount to a waiver of immunity from execution.
>
> It is therefore imperative that foreign investors attempt to obtain from the host State an express waiver of sovereign immunity from enforcement and execution in the arbitration agreement. ICSID Model Clause 15 provides possible language: The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.

REED, ET. AL., *supra* note 20, at 50 (internal quotation marks omitted).

69. Consider the following hypothetical: ABC Corp., based in the country of Eurmerica, negotiates a contract with the country of Atlantis' Ministry of the Interior whereby ABC Corp. harvests deep-water pearls from Atlantis waters. Atlantis agrees to include a waiver of immunity from execution of an arbitration award rendered pursuant to the existing BIT between Eurmerica and Atlantis. Atlantis expropriates ABC Corp.'s assets, giving rise to ICSID arbitration, in which the arbitral tribunal issues an award of $10 million to ABC Corp. If Atlantis refuses to make payment on the award, the waiver of sovereign immunity may allow ABC Corp. to seek execution through the Eurmerican courts using the Atlantis Embassy as assets.

This hypothetical demonstrates an extreme end of the effects of waiver of immunity from execution. Under the Foreign Sovereign Immunities Act, diplomatic assets such as embassies or other assets used to support diplomatic functions are protected assets subject to immunity. *See* Liberian E. Timber Corp. v. Gov't of Republic of Liberia, 659 F. Supp. 606, 610 (D.D.C. 1987) (finding the bank accounts of the Liberian embassy immune from attachment in aid of execution of an ICSID award); *see also* Foster, *supra* note 51, at 679. *But see* Thai Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic, No. 10 Civ. 5256(KMW), 2011 WL 4111504, at *1–2 (S.D.N.Y. Sept. 13, 2011) (allowing discovery of bank accounts held by the state's embassy in the United States). Similarly, it is likely that courts in other countries would tread lightly with respect to seizing the embassy of a sovereign state or assets supporting those diplomatic or consular functions, given the political ramifications. *See, e.g.*, *infra* note 71 and accompanying text. This, in turn, lends support to using a multilateral non-judicial solution, which relieves the courts in the forum of execution of the political risks inherent in the presence of a waiver of sovereign immunity from execution of an ICSID award. *See infra* Part III.A.1 (introducing the Foreign Sovereign Immunities Act); Part IV (introducing non-judicial solutions).

70. *See* Bjorklund, *supra* note 5, at 223 ("Most investment treaties . . . do not contain waivers of execution immunity."); *see also* REED, ET. AL., *supra* note 20, at 188 ("The practical—and political— reality is that States and State entities, although willing to waive their immunity from suit in contracts by agreeing to ICSID arbitration, are reluctant to take the next step and waive the immunity of State assets from attachment by foreign investors.").

laws or international laws of comity.[71] Thus, notwithstanding waiver of immunity from execution of an ICSID award, a prevailing investor shoulders the burden of locating state treasure, then determining its accessibility given the sovereign immunity laws in the particular forum, and ultimately litigating against the defense of sovereign immunity raised either by the state or *sua sponte* by the court.[72] If the court finds in favor of the state, an investor may go back to the drawing board and repeat the process as many times as he or she is willing and financially able to bear.[73]

A. The Quest for Reachable Assets

In simplest terms, sovereign immunity from execution in investor–state arbitration protects sovereign assets from seizure by investors seeking arbitral award satisfaction.[74] The landscape of sovereign immunity laws resembles a living patchwork quilt; some patches represent unique designs of different states (codified law) while others are in a steady state of alteration, representive of states that approach sovereign immunity issues on a case-by-case basis (common law or civil law).[75] While there have been efforts to transform the quilt into a uniform blanket, such efforts require states to abandon national law (and the accompanying volumes of instructive precedent) and adopt international law; unsurprisingly, little success has transpired.[76] Additional efforts abound to reform existing codifications in

71. *See* REED, ET AL., *supra* note 20, at 188–89 ("Even when the relevant State or State entity (usually) is prepared to provide a waiver of execution immunity, the investor must also obtain advice confirming the validity of such a waiver under the sovereign immunity laws of possible enforcement jurisdictions."); *see also* Alexis Blane, *Sovereign Immunity as a Bar to the Execution of International Arbitral Awards*, 41 N.Y.U. J. INT'L L. & POL. 453, 496–500 (2009) (noting the Ninth Circuit's application of the Foreign Sovereign Immunities Act in Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080 (9th Cir. 2007), despite the presence of a waiver of immunity from execution of an arbitral award); August Reinisch, *European Court Practice Concerning State Immunity From Enforcement Measures*, 17 EUR. J. INT'L L. 803, 818 (2006) (discussing the practice of national courts in Europe interpreting waivers of immunity from enforcement in such a way as to avoid conflict with diplomatic immunity provisions such as those found in the Vienna Convention on Diplomatic Relations).

72. *See* Bjorklund, *supra* note 5, at 212–13.

73. *See infra* notes 148–65 and accompanying text.

74. *See* Foster, *supra* note 51, at 671.

75. *See* Bjorklund, *supra* note 5, at 220–21.

76. *See id*. ("The U.N. Convention on Jurisdictional Immunities of States and Their Property was adopted by the General Assembly on December 2, 2004, but has not entered into force.").

order to ease the burden on creditors, such as arbitral-awardees, yet these efforts remain within the confines of secondary sources.[77] The resulting tapestry of laws exposes investors to "judicial risk" and produces varying results in states with codified and uncodified sovereign immunity laws alike.[78] The idiosyncrasies in codified and uncodified sovereign immunity laws qualify the judicial risk problem and add weight to the already formidable sovereign immunity obstacles.

1. Encounters in the U.S.

The Foreign Sovereign Immunities Act[79] (FSIA) codified the shift from absolute to restrictive sovereign immunity and serves as the means for courts to assess jurisdiction over foreign states to determine what property is available to satisfy U.S. court judgments.[80] Federal courts are the only avenue in the United States through which investors may seek a judgment and writ of execution against sovereign assets.[81] U.S. courts have consistently treated sovereign property as presumptively immune, making attachment the exception and not the rule.[82] The FSIA provides that

77. *See, e.g.*, Foster, *supra* note 51, at 719–21; Bjorklund, *supra* note 5, at 229–32.

78. As used in this Comment, "judicial risk" describes the uncertainty inhering in execution proceedings brought by investors in jurisdictions with amorphous sovereign immunity laws. *See infra* Part III.A.1–2.

79. Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in scattered sections of 28 U.S.C.).

80. *See* Erin Nelson, *Does an Individual Foreign Official Qualify as a Foreign State for Purposes of the Foreign Sovereign Immunities Act?,* 57 CATH. U. L. REV. 853, 863–67 (2008). The shift from absolute sovereign immunity (meaning just that—complete immunity from suit in the court of another sovereign) to restrictive sovereign immunity is attributed to increased international commerce involving states or state actors or affiliates. *Id.* The contrasting interpretations of restrictive sovereign immunity, as seen in the laws of different states, presents the bulk of the challenge to investors and their legal counsel in attempts to classify activities or properties as traditional sovereign functions and thereby protected from seizure or commercial and thereby subject to attachment in aid of execution of a court judgment. *Id.*; *see also infra* note 83 (text of 28 U.S.C. § 1610(a)). For a more detailed analysis of the FSIA and its implications for investors seeking to execute an ICSID award in a Contracting State, see Foster, *supra* note 51, at 671–84.

81. 28 U.S.C. § 1610(c) (2012) ("No attachment or execution . . . shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment . . . ."); *see also* Foster, *supra* note 51, at 713–14 (addressing the policy rationale of this requirement of waiting a reasonable time and noting that states must be afforded time to make voluntary payment and may need time to pass legislation in order to do so).

82. *See, e.g.*, Rubin v. Islamic Republic of Iran, 637 F.3d 783, 799 (7th Cir. 2011), *cert. denied*, 133 S. Ct. 23 (2012).

property in the United States belonging to a foreign state and used for commercial activity is not immune under certain conditions and is therefore subject to attachment in aid of execution of a court judgment.[83] Additionally, any property in the United States belonging to an instrumentality or agent of a state engaged in commercial activity in the United States is attachable under certain conditions.[84]

Investors must identify the assets they wish to use for attachment before seeking writs of execution.[85] The first step, therefore, is identifying property used for commercial activity.[86] The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and further explains that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of

83. 28 U.S.C. § 1610 provides:

> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
>
> > (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or
> >
> > (2) the property is or was used for the commercial activity upon which the claim is based, or
>
> . . .
>
> > (6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement . . . .

Id.

84. *Id*. § 1610(b) provides:

> (b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
>
> > (1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver . . . .

Id.

85. *See* Funnekotter v. Republic of Zimbabwe, No. 09 Civ. 8168(CM), 2011 WL 666227, at *3, (S.D.N.Y. Feb. 10, 2011) (denying writ of execution against state instrumentalities due in part to failure of ICSID-awardee to identify property on which to execute).

86. *See* Boralessa, *supra* note 41, at 93.

conduct or particular transaction or act, rather than by reference to its purpose."[87] The "'rule of thumb'" courts use to determine commercial versus public activity is "'if the activity is one in which a private person could engage, it is not entitled to immunity.'"[88] Thus, the nature of the conduct, as opposed to the purpose, places the focus on the means and not the ends. Accordingly, it matters not that the purpose is a traditional sovereign function (such as clothing a state's military); if the materials are procured in the same manner as a private actor engaged in international commerce, it is likely that the procurement will be treated as commercial activity.[89] A state need not *possess* the property in question, but may simply retain ownership of it while in control of a third party.[90]

The burden lies on the plaintiff-awardee to prove discovered assets are used for commercial activity and that an exception under §§ 1610 or 1611 applies.[91] While the standard for commercial activity is the same for arbitral-awardees and any other party that holds a judgment against a state, the FSIA provides a clear route to execution when "the judgment is based on

87. 28 U.S.C. § 1603(d) (2012).

88. Liberian E. Timber Corp. v. Gov't of Republic of Liberia, 659 F. Supp. 606, 610 (D.D.C. 1987) (quoting Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1549 (D.C. Cir. 1987) and Tex. Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 309 (2d Cir. 1981)).

89. *See* Foster, *supra* note 51, at 673–74 (utilizing Supreme Court opinions and legislative history of the FSIA to interpret the "commercial activity" definition in 28 U.S.C. § 1603). Non-commercial activity is likely to involve some sort of regulatory act or expropriation, whereas commercial activity involving state actors or affiliates can be anything from the sale of airline tickets or spices to foreign customers to the purchase of military supplies. *Id*. at 674–75 (citing MOL, Inc. v. Peoples Republic of Bangladesh, 736 F.2d 1326 (9th Cir. 1984) (export licensing deemed a regulatory act); LNC Invs., Inc. v. Republic of Nicaragua, 228 F.3d 423 (2d Cir. 2000) (imposing taxes deemed a regulatory act); Garb v. Republic of Poland, 440 F.3d 579 (2d Cir. 2006) (expropriation), Kirkham v. Société Air Fr., 429 F.3d 288 (D.C. Cir. 2005) (airline ticket sales); Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 616 F. Supp. 660 (W.D. Mich. 1985) (sale of spices); Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 385 F.3d 1206 (9th Cir. 2004) (purchase of military equipment), *rev'd on other grounds*, 546 U.S. 450 (2006)).

90. *See* 28 U.S.C. § 1610(a) (governing exceptions for immunity from execution of property belonging to states themselves); *id*. § 1610(b) (immunity regarding property belonging to an "agency or instrumentality" of a foreign state); s*ee also* Bjorklund, *supra* note 5, at 225–26 (referencing the forced sale of a Russian-owned but third-party-controlled apartment complex in Germany identified by the investor-state arbitration-awardee to whom Russia refused payment).

91. *See infra* note 95 and accompanying text. Section 1611 of the FSIA addresses exceptions notwithstanding § 1610, such as central banks or property used for military purposes. *See* 28 U.S.C. § 1611 (2012).

an order confirming an arbitral award rendered against the foreign state."[92] Thus, the critical hurdle is proving that state-owned assets are used for commercial activity.[93]

Investors often receive little help from U.S. courts in efforts to identify foreign assets held in the United States.[94] In *Rubin v. The Islamic Republic of Iran*, the Seventh Circuit held:

> [U]nder the FSIA a plaintiff seeking to attach the property of a foreign state in the United States must identify the specific property that is subject to attachment and plausibly allege that an exception to § 1609 attachment immunity applies. If the plaintiff does so, discovery in aid of execution is limited to the specific property the plaintiff has identified.[95]

The plaintiffs in *Rubin* received a judgment against Iran[96] but had to conduct "[a] nationwide search for attachable Iranian assets" in efforts to satisfy the judgment.[97] Plaintiffs identified ancient artifacts in a museum in Chicago, Illinois and sought attachment pursuant to § 1610.[98] After Iran argued that sovereign immunity protected the assets, the plaintiffs went a step further and requested production of "[a]ll documents, including without limitation any communication or correspondence, concerning any and all tangible and intangible assets, of whatever nature and kind, in which Iran and/or any of

92. 28 U.S.C. § 1610(a)(6) (2012). Prior to the FSIA amendment in 1976, creditors were required to find commercial assets linked to the underlying claim. *See* Canè, *supra* note 31, at 453–54.

93. This hurdle may carry more weight as a symbol than a milestone, as the majority of claims settle before investors present arguments in U.S. courts, thus providing incentive to the few states that do refuse to pay ICSID awards to wait out investor demands for payment until presented with a lower settlement figure. *See* Baltag, *supra* note 44, at 413–14.

94. *See infra* note 95 and accompanying text.

95. 637 F.3d 783, 799 (7th Cir. 2011), *cert. denied* 133 S. Ct. 23 (2012).

96. *See* Campuzano v. Islamic Republic of Iran, 281 F. Supp. 2d 258, 272–73 (D.D.C. 2003).

97. *Rubin*, 637 F.3d at 786. The judgment at issue arose from a suit filed in the district court for the District of Columbia for injuries suffered from a terrorist attack in Jerusalem executed by the terrorist group Hamas (sponsored by Iran). *Id.* While the underlying dispute was not arbitrated and did not involve investors but rather tort claimants, *see id.*, ICSID awards are recognized and enforced as if they were a final judgment of the court, *see* ICSID Convention, *supra* note 17, art. 54(1). Therefore, the sovereign immunity exceptions as to the judgment in *Rubin* and an ICSID award are in equipoise as they relate to the FSIA. *Compare* ICSID Convention, supra note 17, art. 54(1), *with* 28 U.S.C. § 1605(a)(6) (2012).

98. *Rubin*, 637 F.3d at 786–87.

Iran's agencies and instrumentalities has any legal and/or equitable interest, that are located within the United States."[99] The holding in *Rubin* reversed the district court's order granting the plaintiffs' motion for general asset discovery,[100] leaning on the political deference and international comity that serves as the foundation of the FSIA.[101]

While courts have not endorsed blank-check discovery with respect to sovereign assets, they may grant parties discovery of identified assets notwithstanding superficial showings of sovereign activity.[102] Courts have even imposed limited sanctions against sovereigns that do not comply with discovery orders.[103] *Thai-Lao Lignite* involved a discovery dispute that arose following the district court's confirmation of an arbitral award under the New York Convention.[104] The arbitral-awardee, a Thailand-based company, requested—and the magistrate approved—discovery of U.S. bank accounts held by the Laotian Embassy, claiming discovery was necessary to determine whether the assets were immune under the FSIA.[105] While the court recognized the "aim [of protecting] . . . sovereigns from the burdens of litigation, including . . . discovery,"[106] it believed "[t]he mere fact that assets are held in an account used by a state's embassy does not *per se* render the entire account immune from attachment or discovery."[107] The standard for determining whether to compel discovery of sovereign assets instructs lower courts to "proceed with caution, taking into account the 'comity concerns' implicated in the 'delicate balancing'" of the search for attachable assets by creditors and the statutory immunity claims of foreign sovereigns—hardly a

99. *Id*. at 788 (internal quotation marks omitted).

100. *Id*. at 801. The district court, upon remand, settled on a more limited discovery plan, which as of October 16, 2013, has yet to conclude. *See* Opinion, Rubin v. Islamic Republic of Iran, No. 1:03-cv-09370 (N.D. Ill. Aug. 2, 2012), ECF No. 610.

101. *Id*. at 792–97.

102. *See* Thai-Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic (*Thai-Lao Lignite*), No. 10 Civ. 5256(KMW), 2011 WL 4111504, at *1–2 (S.D.N.Y. Sept. 13, 2011).

103. *See* Thai-Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic, No. 10 Civ. 05256(KMW)(DCF), 2012 WL 5816878, at *12 (S.D.N.Y. Nov. 14, 2012).

104. *Thai-Lao Lignite*, 2011 WL 4111504, at *1–2.

105. *Id*.

106. *Id*. at *3 (internal quotation marks and citations omitted); *see also Rubin*, 637 F.3d at 796–97 ("Discovery orders that are broad in scope and thin in foundation unjustifiably subject foreign states to unwarranted litigation costs and intrusive inquiries about their American-based assets. One of the purposes of the immunity codified in § 1609 is to shield foreign states from these burdens.").

107. *Thai-Lao Lignite*, 2011 WL 4111504, at *4.

bright line.[108] Finding that the limited grant by the magistrate struck such a balance, the district court overruled Laos's objection to the order.[109]

The only ICSID award-execution disputes to reach final judgment in the United States involve the same plaintiff—Liberian Eastern Timber Corporation (LETCO).[110] The LETCO trials remind investors that no matter how long a court lets one count and categorize state treasure, unless the court grants a claim to the treasure, it is all for naught.[111] The underlying dispute involved a concession agreement between LETCO and Liberia, reached in 1970, allowing LETCO to harvest and exploit Liberian timber.[112] The concession agreement included an arbitration clause that directed the parties to settle disputes through ICSID.[113] Liberia eventually terminated the concession, which prompted LETCO to register a dispute with ICSID in 1983.[114] The arbitration proceeded ex parte, as Liberia refused to participate

108. *Id*. at *5 (quoting First City Tex.–Hous., N.A. v. Rafidain Bank, 150 F.3d 172, 176 (2d Cir. 1998).

109. *Id*. at *7. As of August 3, 2013, this contentious discovery process has yet to conclude. and the district court has yet to rule on whether the bank accounts meet the commercial activity exception within § 1610 of the FSIA. *See* Docket, Thai-Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic, No. 1:10-cv-05256-KMW-DCF (S.D.N.Y. Aug. 3, 2013).

110. *See* Liberian E. Timber Corp. v. Gov't of the Republic of Liberia (*LETCO I*), 650 F. Supp. 73 (S.D.N.Y. 1986), *aff'd* 854 F.2d 1314 (2d Cir. 1987); Liberian E. Timber Corp. v. Gov't of the Republic of Liberia, 659 F. Supp. 606 (D.D.C. 1987). For ongoing controversies surrounding execution of investment arbitration awards against states, see Cont'l Cas. Co. v. Argentine Republic, 893 F. Supp. 2d 747, 754 (E.D. Va. 2012) (confirming jurisdiction but transferring to the District Court for the District of Columbia for "the sole proper venue"); *Thai-Lao Lignite*, 2011 WL 4111504; Funnekotter v. Republic of Zimbabwe, No. 09 Civ. 8168(CM), 2011 WL 666227, at *3 (S.D.N.Y. Feb. 10, 2011).

Continental Casualty Co. presented a unique finding collateral to this discussion: the court analyzed Argentina's challenge to venue under 28 U.S.C. § 1391(f) (governing where a civil action against a foreign state may be brought) and held that because events giving rise to the claim occurred abroad (and that other subsections of § 1391(f) also did not apply), "the United States District Court for the District of Columbia is the sole proper venue for this case." 893 F. Supp. 2d at 754. This finding may be attributed to the odd basis of the action, wherein the plaintiff-investor sought only confirmation, and not enforcement, of an ICSID award rendered in its favor and identified no property or other assets it sought to attach in aid of execution. *See id*. at 748. Venue may still be proper in "any judicial district in which . . . a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(f)(1).

111. *Compare Thai-Lao Lignite*, 2011 WL 4111504, at *7 (granting discovery), *with LETCO I*, 650 F. Supp. at 77–78 (denying attachment).

112. *See LETCO I*, 650 F. Supp. at 74.

113. *Id*. at 74–75.

114. *Id*. at 74; *see also List of Concluded Cases*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (last updated Sept. 30, 2013)

and instead initiated parallel proceedings in the Liberian courts in an effort to resolve the dispute.[115] LETCO received an award of nearly $9 million,[116] which the corporation immediately sought to execute in a federal district court in New York.[117] LETCO received a writ of execution to serve on agents of Liberia that enabled it to collect registration fees and taxes due to Liberia; however, Liberia filed a motion to vacate the executions alleging the property was immune under the FSIA.[118] Analyzing the nature of conduct to determine whether the fees and taxes were property used for a commercial purpose, the court found "[t]he levy and collection of taxes intended to serve as revenues for the support and maintenance of governmental functions are an exercise of powers particular to a sovereign."[119] The court sent LETCO back to the drawing board, noting it could seek satisfaction of the ICSID award elsewhere so long as the identified property met the narrow exceptions of the FSIA.[120]

LETCO later recorded its judgment in the U.S. District Court for the District of Columbia and received writs of execution to seize bank accounts held by the Embassy of Liberia in Washington, D.C.[121] Liberia again claimed sovereign immunity over the property and again prevailed.[122] The court found the property to be immune from attachment not only under the

(listing the LETCO ICSID case as number fifteen on a list of 271 cases and providing details about the case).

115. *LETCO I*, 650 F. Supp. at 75.

116. All monetary values in this article are expressed in United States Dollars (USD) unless otherwise stated.

117. *LETCO I*, 650 F. Supp. at 75.

118. *Id*. at 75, 77. Liberia also challenged the jurisdiction of the court to issue the judgment enforcing the ICSID award. *Id*. at 75. The court found that Liberia, an ICSID Contracting State, waived its jurisdictional immunity when it agreed to settle any dispute under the concession agreement under ICSID. *Id*. at 76 (citing Article 54 of the ICSID Convention).

119. *Id*. at 77–78. LETCO argued that the portion of the gross receipts from collections retained to pay for the services of U.S. corporations and citizens represented commercial activities within the meaning of the FSIA. *Id*. at 77. The court rejected this argument, however, finding the nature of collections to be constant regardless of the chosen method of collection. *Id*.

120. *See id*. at 78. This decision preceded the 1988 amendment to 28 U.S.C. § 1610(a) that resulted in what is now § 1610(a)(6). *See supra* note 83.

121. Liberian E. Timber Corp. v. Gov't of the Republic of Liberia (*LETCO II*), 659 F. Supp. 606, 607–08 (D.D.C. 1987). The writs authorized LETCO to seize "any credits other than wages, salary, commissions or pensions of the defendant, The Government of the Republic of Liberia . . . The Embassy . . . or any of their agencies, that are used for commercial activities . . . ." *Id*. at 607 (internal quotation marks omitted).

122. *Id*. at 606, 611.

FSIA but also under the Vienna Convention.[123] Liberia stated it used the bank accounts in question "to perform its diplomatic and consular functions" such as "payment of salaries and wages of diplomatic personnel and various ongoing expenses . . . necessary to the proper functioning of the Embassy."[124] The court deemed the "essential character" of the funds was public, as "only a governmental entity may use funds to perform the functions unique to an embassy."[125] While recognizing that some of the funds may be used for commercial activities and therefore available for attachment, the court found the hardship to the foreign mission outweighed the interest of the investor.[126]

In sum, investors face a path that proves difficult to reconnoiter in their hunt for state treasure. Applications of the FSIA are inconsistent and based on an amorphous standard of discretion that dashes hopes of reversal on appeal. Judicial and political deference to international comity, as demonstrated in the above case studies, occurs with equal frequency abroad.

2. Encounters in the E.U.

Investors may find a less chafing path towards award-execution abroad;[127] indeed, parties to over three-quarters of the ICSID awards that are accompanied by national court decisions chose to call on court systems found outside the United States.[128] The same issues complicating award execution in the United States, however, similarly plague execution efforts abroad: investors must not only locate state treasure but also overcome the

123. *Id*. at 608–11. While the court conceded that no specific provision of the Vienna Convention afforded immunity to bank accounts used for the diplomatic mission, the court determined that allowing attachment would be "inconsistent with . . . the intention of the parties to the Vienna Convention." *Id*. at 608; *see* Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, *available at* http://www.state.gov/documents/organization/17843.pdf.

124. *LETCO II*, 659 F. Supp. at 610 (internal quotation marks omitted).

125. *Id*.

126. *Id*. The court also opined that requiring diplomats to segregate public from commercial funds in order to avoid attachment of public funds (and consequently aiding attachment of commercial funds) was not wise as it was hard enough for courts to make such classifications. *See id*.

127. *See* Boralessa, *supra* note 41, at 93 (comparing laws regarding execution immunity in the U.S. and U.K.).

128. *See List of Concluded Cases*, *supra* note 114 (seven out of nine concluded ICSID cases that are accompanied by national court decisions were pursued in courts outside of the United States).

defense of sovereign immunity.[129] Similar to the United States, most European states have evolved from an absolute immunity concept with respect to enforcement measures against foreign states.[130] For example, the State Immunity Act (SIA) of 1978 codified sovereign immunity law in the United Kingdom and replaced the practice of quasi-absolute immunity found in the English common law.[131] The pertinent section of the Act for purposes of this discussion is Section 13, which provides that state property "[that] is for the time being in use or intended for use for commercial purposes" is not immune from "any process for the enforcement of a judgment or arbitration award."[132] Outside of the United Kingdom, many multilateral endeavors to create a uniform approach to sovereign immunity have transpired over the past several decades, yet few codifications amount to statutory law and thus they largely remain only persuasive authority.[133] Nevertheless, contemporary European case law suggests a trend in sovereign immunity laws of allowing execution against "property clearly serving non-

129. Bjorklund, *supra* note 5, at 225–29.

130. *See* Reinisch, *supra* note 71, at 804–07. The slow adoption of the restrictive immunity theory first applied to jurisdictional immunity, yet many states continued to view immunity from execution as absolute. *Id*. at 804 (citing "the more intrusive character of enforcement measures" vis-à-vis adjudicatory powers as the basis for the hesitation of states to abandon an absolute view of execution immunity).

131. *See* State Immunity Act, 1978, c. 33 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1978/33; *see also* AIG Capital Partners, Inc. v. Republic of Kazakhstan (*AIG, Inc*.), [2005] EWHC (Comm) 2239, [22], [2006] 1 W.L.R. 1420 (Eng.).

132. Section 13 of the State Immunity Act provides, in part:

> (2) Subject to subsections (3) and (4) below—
>
> (a) relief shall not be given against a state by way of injunction or order for specific performance or for the recovery of land or other property; and
>
> (b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
>
> (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.
>
> (4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes . . . .

1978, c. 33, § 13 (U.K.).

133. Reinisch, *supra* note 71, at 804–06 (citing the 1972 European Convention on State Immunity, the 1982 Draft Convention on State Immunity, the 1991 IDI Resolution, and the 2004 UN Convention on Jurisdictional Immunities of States and Their Property).

governmental purposes."[134]

Property serving a public purpose, such as embassy premises, embassy bank accounts, cultural centers, military equipment in use as such, and central bank funds, has been held immune from attachment.[135] Each category of property, however, does not carry absolute immunity; pragmatically, instances of mixed-use movable and immovable property require sensitive judicial inquiry into the affairs of foreign missions.[136] This inquiry may carry a risk-averse deference to international comity.[137] Indeed, state-owned property carries a rebuttable presumption in favor of public purpose in various countries including Germany, Austria, France, England, Italy, Belgium, and the Netherlands.[138]

In *AIG Capital Partners, Inc. v. Republic of Kazakhstan*, England's High Court of Justice denied execution of AIG's ICSID award of nearly $10 million through the attachment of cash and securities held in London by the National Bank of Kazakhstan (NBK) through a private third party.[139] The parties disputed whether securities held by the third party were property of the NBK (which, in turn, would render the assets immune under Section 14 of the SIA[140]), and if not, whether, because the assets were invested in

134. *Id.* at 835; *see id.* at 836 ("[T]he law of state immunity from enforcement has proved to be a field of positive judicial cross-fertilization."); *see, e.g.*, *id.* at 833 (discussing failed attempts by a party seeking enforcement of an arbitral award in France by attachment of overflight charges owed to the debtor state Yugoslavia by the French national airline; the court held the assets were not subject to attachment due to the direct relationship with the exercise of Yugoslavia's sovereignty). For a detailed review of recent case law across Europe addressing matters of enforcement and execution immunity, see generally *id.* at 807–34.

135. *See id.* at 824–33.

136. *See id.* at 829 ("Many European courts have been very reluctant to question the characterization of the purpose of assets provided by defendant states.").

137. *See id.* at 831 (citing an opinion of the Dutch Council of State wherein they defended their reliance on a declaration by the Turkish government that assets subject to attachment were for public purposes as a sufficient basis for affording immunity by noting that to request a detailed accounting of the Turkish mission would amount to an "unjustified interference in the internal affairs of [the] mission."); *see also* State Immunity Act, 1978, c. 33, § 13(5) (U.K.) (providing the authority to the head of a state's diplomatic mission to certify that assets are public, and that such certification shall create a rebuttable presumption that immunity applies).

138. *See* Reinisch, *supra* note 71, at 829–33.

139. AIG Capital Partners, Inc. v. Republic of Kazakhstan (AIG, Inc.), [2005] EWHC (Comm) 2239, [1], [2006] 1 W.L.R. 1420 (Eng.).

140. Section 14(4) provides:

> Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity

actively traded securities, they were "in use or intended for use for commercial purposes."[141] The court focused on the meaning of "property" within the construction of the SIA and defined the term broadly, holding that any asset in which a state's central bank has a legal, equitable, or contractual interest is immune from use in enforcement proceedings.[142] In dicta, the court noted how this categorical bar on execution against property of a central bank preserves good relations between states and avoids the intrusiveness that would accompany attempts to classify funds as commercial.[143]

Notwithstanding the assets being property of the central bank, the court also found they were not used for commercial purposes under Section 13(4) of the SIA.[144] The court rejected the claimants' argument that a portion of the assets were used in financial transactions with the aim of making profits and therefore met the SIA definition of commercial purposes[145] and instead viewed the transactions as part of the exercise of sovereign authority.[146] Adding insult to injury, the court found the certificate provided by the Ambassador that stated the assets were not used for commercial purposes provided "clear and unambiguous" evidence of that fact.[147]

The saga of Franz Sedelmayer is perhaps the most widely publicized story in investment arbitration and offers one of the few (and likely most hard fought) victories by an investor against a recalcitrant state.[148] Mr. Sedelmayer, a German businessman, filed a dispute with the SCC, pursuant to the existing Germany–Russia BIT, claiming expropriation of his investments in Russia.[149] The SCC rendered a $2.3 million award in favor of

---

subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

State Immunity Act, 1978, c. 33, § 14 (U.K.).

141. *AIG Inc*., [2005] EWHC (Comm) 2239, [27], [2006] 1 W.L.R. 1420 (Eng.).

142. *Id*. at [45].

143. *Id*. at [82].

144. *Id*. at [92].

145. *Id*.*; see* State Immunity Act 1978, c. 33, § 13(4) (U.K.); *accord id*. §§ 3, 17.

146. *AIG Inc*., [2005] EWHC (Comm) 2239, [92], [2006] 1 W.L.R. 1420 (Eng.).

147. *Id*.

148. *See infra* notes 149–65 and accompanying text.

149. *See* Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2011-07-01 Ö 170-10 (Swed.) (*Sedelmayer v. Russian Federation*) (unofficial translation), *available at* http://www.arbitration.sccinstitute.com/files/108/1081823/%C3%96170-10_eng%20(3).pdf; *accord* Baltag, *supra* note 44, at 411–12 (summarizing Mr. Sedelmayer's legal proceedings against Russia

Mr. Sedelmayer in 1998, which Russia immediately challenged in Swedish courts, but to no avail.[150] That failed challenge led to an extended battle—lasting over ten years—in the Swedish courts while Mr. Sedelmayer sought to execute the court order awarding costs against Russian-owned property.[151]

In *Sedelmayer v. Russian Federation*, the Supreme Court of Sweden upheld the decision by the Svea Court of Appeal that a property in Sweden, owned by the Russian Federation but used mainly for purposes non-official in nature, was not immune from attachment.[152] The Supreme Court relied heavily on the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (UN Convention), which the Swedish government voted in favor of adopting in 2009 but does not yet carry the force of law.[153] The UN Convention provides that sovereign-held property may be subject to enforcement measures if the property is "*specifically* in use or intended for use by the State for other than government non-commercial purposes."[154] The court interpreted this provision to mean state property "which is to a substantial extent . . . used as premises for the state's officials (or for a different official use . . .) should be covered by immunity from enforcement measures."[155] However, where property is used in part for official purposes but mainly for "other purposes represented by the foreign state, [or] purposes that are a prerequisite to or consequence of a state run operation that is commercial or otherwise non-official in nature," the question becomes whether the different purposes "together make up the specific nature that is required to safeguard the property."[156] The court, thus, broke from the traditional commercial/noncommercial dichotomy and held that state-owned property used for noncommercial uses may not be immune from attachment.[157]

---

in Germany).

150. *See Sedelmayer v. Russian Federation* ¶¶ 1, 25.

151. *See generally* Pal Wrange, *Sedelmayer v. Russian Federation*, 106 AM. J. INT'L L. 347, 347–53 (2012). As an important aside, had the Germany–Russia BIT called for ICSID arbitration, Russia would not have had the ability to challenge the award in court, and the decade-long battle to receive costs as ordered by the Swedish court would not have ensued. This is a clear example of how ICSID is a more efficient system compared to forums such as the SCC. *See supra* Part II.C.

152. *Sedelmayer v. Russian Federation* ¶¶ 17–25.

153. *Id.* ¶¶ 12–16.

154. *See id.* ¶ 13 (emphasis added) (referencing the Convention).

155. *Id.* ¶ 15.

156. *Id.* ¶ 16.

157. *See* Wrange, *supra* note 151, at 349.

Mr. Sedelmayer identified property previously used to house the Russian trade delegation but at the time of assessment served as a housing property consisting of forty-eight apartments, only seventeen of which were used for diplomatic purposes.[158] The court determined the remaining apartments, rented at cost by students and researchers from Russia or by Russians with official business in Sweden, "were of non-commercial, but also non-official nature."[159] In sum, the property was not used to a substantial extent for official purposes, and the cumulative effect of the non-official uses was not "of such specific nature as to grant the property immunity from enforcement."[160]

Prior to the ruling by the Swedish Supreme Court, Mr. Sedelmayer initiated a host of legal proceedings in German courts.[161] Mr. Sedelmayer failed in his attempts to attach the Russian embassy's tax return claims and in a separate attack on Russian claims for overflight fees against the airline Lufthansa—German courts held both assets were protected on grounds of sovereign immunity.[162] In 2006, Mr. Sedelmayer finally received a court order allowing seizure of rental payments from a former KGB property converted into an apartment complex.[163] Mr. Sedelmayer, as of early 2012,

158. *Sedelmayer v. Russian Federation* ¶¶ 19, 21.

159. *Id.* ¶ 22.

160. *Id.* ¶¶ 23–24 (finding claims for rent paid to the Russian Government to be of a commercial nature and not for official use). During the pendency of this decision, the Russian Federation submitted that plans existed to restrict residency in the property to those who had diplomatic immunity. See *id.* ¶ 19. The court deferred to the international customary law practice of using the assessment of the Enforcement Authority from 2005, issued in response to the original claim, and did not take into consideration what one could view as attempts to decommercialize the property in efforts to preserve immunity. *See id.* ¶ 20. The court's ruling paved the way for Mr. Sedelmayer to collect payment due to him by distraint of the property itself or the rental payments from residents therein. *See id.* ¶ 25.

161. *See* Baltag, *supra* note 44, at 411–12; *see also* Noah Rubins & Azizjon Nazarov, *Investment Treaties and the Russian Federation: Baiting the Bear?*, 9 BUS. L. INT'L 100, 106–07 (2008) (using the Sedelmayer saga as an example of the very limited success investors have had in settling disputes with the recalcitrant Russian Federation).

162. *See* Baltag, *supra* note 44, at 411–12.

163. *See* Rubins & Nazarov, *supra* note 161, at 107. With his success in Germany, Mr. Sedelmayer earned the distinction of being one of the few foreign creditors of Russia to receive payment. *See also* James Kimer, *Russian Property Seized for Auction in Germany*, ROBERTAMSTERDAM.COM (Mar. 21, 2008), http://robertamsterdam.com/2008/03/russian_property_seized_for_auction_in_germany/ (the German court authorized a public auction of the apartment building in Cologne in 2008). Interestingly, Russian media in a 2010 article referred to the auction and confused matters by alleging a Kremlin-controlled firm won the auction and avoided payments with Kremlin-provided funds. Nikolaus von Twickel, *Swedish Judge Orders Seizure of State Assets*,

claimed he had only recuperated approximately $1.6 million dollars, and says he has over $6 million to go in order to settle all Russian debts owed to him.[164] His treasure hunt continues.[165]

B. The Need for a Non-Judicial Solution

Sovereign immunity evidently presents a formidable obstacle in the path of investors seeking the fruit of their arbitral award. The ICSID enforcement mechanism, while more streamlined than any competing alternatives,[166] stops short of providing reliable means of award satisfaction.[167] Dependence on national courts offers awardees access to the full force of the law, so long as an investor can successfully identify state assets and overcome the defense of sovereign immunity.[168] Although aesthetically pleasing to most states, the amorphous sovereign immunity landscape is an eyesore for investors.[169] There is movement in the direction of uniformity, yet uniformity in sovereign immunity law may prove to be an oxymoron; *Sedelmayer v. Russia* provides fair warning of the idiosyncratic interpretations that are likely to take place in different jurisdictions adopting

---

ST. PETERSBURG TIMES, Oct. 19, 2010, http://sptimes.ru/index.php?action_id=2&story_id=32743. The article quoted a spokesman from the Office for Presidential Affairs who reported that "the Russian state has not paid Sedelmayer 'a single kopek.'" *Id.* The same spokesman believed the decision of the Svea Court of Appeals in Sweden, which was later affirmed in 2011 by the Swedish Supreme Court, represented "a lowest-tier decision that will hardly be upheld." *See id.*

164. James Kimer, *How to Make Russia Pay its Debts: An Interview with Franz Sedelmayer*, ROBERTAMSTERDAM.COM (Feb. 1, 2012), http://robertamsterdam.com/2012/02/how-to-make-russia-pay-its-debts-an-interview-with-franz-sedelmayer/.

165. *See id.* (discussing a failed attempt in Germany in 2011 where a court held the Russian House of Science and Culture, 90% of which Mr. Sedelmayer alleged was utilized for commercial activities of companies and retailers, was immune from attachment); *see also* Robert Amsterdam, *Sweden Buckles Under Russian Pressure on Arbitration*, EURASIAREVIEW.COM (Apr. 18, 2012), http://www.eurasiareview.com/18042012-sweden-buckles-under-russian-pressure-on-arbitration-oped/ (highlighting diplomatic tension between Sweden and Russia caused by the ordered auction of the property subject to seizure in Stockholm).

166. *See supra* Part II.C.

167. *See* REED, ET AL., *supra* note 20, at 190.

168. As Mr. Sedelmayer has shown, where there is a will (and sufficient financial resources), there is a way. *See supra* notes 148–165 and accompanying text.

169. *Compare supra* note 87 and accompanying text (noting how the FSIA focuses on the nature of conduct, and not its purpose, in defining commercial property), *with supra*, note 132 and accompanying text (noting how the SIA focuses on the purpose of a transaction or activity in classifying property as commercial or non-commercial), *and supra* note 156 and accompanying text (breaking from the commercial/non-commercial dichotomy all together).

any such "uniform" law.[170]

In addition to producing inconsistent and unpredictable results, reliance on the courts implicates the foreign policy of the state where investors seek execution.[171] National courts often undertake the sensitive balancing of international comity with justice for injured parties in the course of civil adjudication, but without an injured party having some connection to the forum the scales of justice are prone to imbalance.[172] Under the ICSID system, a national court in a Contracting State has no choice but to avail itself of the dispute between a recalcitrant state and a foreign investor who maintains no connection whatsoever with the forum.[173] The choices are to grant the foreign investors access to state-owned assets held in the country—no doubt implicating the foreign relations with the debtor-state—or shield the assets of the recalcitrant state that are in one way or another contributing to the economy of the nation therein.[174] The likelihood of successful execution of an award, therefore, may be tied to the degree of independence of the judiciary and the susceptibility thereof to political pressure to protect the employed assets of sovereign states.[175]

IV. JUDGE, JURY, AND EXECUTOR: TAKING ICSID AWARDS TO THE (WORLD) BANK

ICSID's success is anchored by its unique a-national arbitration model.

170. *See supra* notes 153–60 and accompanying text.

171. *See supra* Parts III.A.1–2.

172. *Cf., e.g.*, Chabad v. Russian Federation, 915 F. Supp. 2d 147, 147–49, 153–55 (D.D.C. 2013) (granting a motion for civil contempt sanctions against the Russian Federation notwithstanding the statement of interest by the United States claiming an award of sanctions would "risk damage to significant foreign policy interests").

173. *See* ICSID Convention, *supra* note 17, art. 54.

174. Even if the assets are public, such as embassy bank accounts used to finance the foreign mission, positive economic externalities abound (most noticeably from the activities of the employees of the mission as well as the physical properties themselves).

175. *But see* Basil Katz, *Tweak to U.S. Bill on Iran Sanctions Opens Door to Damages*, REUTERS (Aug. 24, 2012), http://www.reuters.com/article/2012/08/24/us-usa-iran-idUSBRE87N0TM20120824 (describing the rare legislation Congress passed that created a statutory exception to the normal sovereign immunity framework under the FSIA thereby facilitating attempts of identified creditors of Iran currently seeking to execute a $1.75 billion judgment against Iranian assets held in the United States) (citing Peterson v. Islamic Republic of Iran, No. 10-cv-04518 (S.D.N.Y. filed June 8, 2010)). Commentators believe Iran may be able to challenge the statute as a violation of separation of powers given the appearance of legislative interference with judicial matters. *See id.*; *cf.* Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214 (2012).

The ICSID Convention allows investors and Contracting States to settle their disputes in an independent forum that minimizes the nationalist fears of investors and the capitalist fears of host states.[176] Although the ICSID process allows an investor to take the dispute out of the host state, due to the lack of an execution mechanism, the host state never quite loses control over the dispute. Ultimately, a state decides whether it will honor an arbitral award, and if it says, "go fish," the investor is on his or her own. Thus, the nationalist fears held in abeyance by ICSID can quickly come crashing down on an investor. Although proposed solutions on how to alleviate the sovereign immunity obstacles to award satisfaction abound,[177] the simplest and most effective solution may be to solve the problem "in-house" by supplementing the ICSID enforcement mechanism with a World Bank Group execution mechanism.

A. Compliance Check Revisited: Characteristics of Recalcitrant States

An effective solution must account for the source and scope of the issue. This Comment identifies ten countries that have refused to comply with investment arbitration awards rendered through either ICSID or alternative arbitration forums: Congo,[178] Senegal,[179] Liberia,[180] Russia,[181] Argentina,[182] Kazakhstan,[183] Kyrgyzstan,[184] Thailand,[185] Laos,[186] and Zimbabwe.[187] Other countries, particularly those that recently denounced the ICSID Convention—Bolivia, Ecuador, and Venezuela—may also prove reluctant to honor the potentially crippling amount of liability resulting from the number

176. REED, ET. AL., *supra* note 20, at 4–5.

177. *See, e.g.*, Bjorklund, *supra* note 5, at 229–38 (suggesting changes in international law, changes in municipal law, changes in investors' strategies, home state assistance, and multilateral pressure); Foster, *supra* note 51, at 724–29 (providing proposed amendments to the FSIA and, alternatively, an international convention to pay amounts due to creditors).

178. *See supra* note 71.

179. *See supra* note 47.

180. *See supra* note 110.

181. *See supra* note 149.

182. *See supra* note 60.

183. *See supra* note 139.

184. *See supra* note 46.

185. *See supra* note 46.

186. *See supra* note 102.

187. *See supra* note 85.

of pending ICSID claims.[188] To categorize these countries in a uniform manner is a difficult task. For example, gross domestic product (GDP) at purchasing power parity (PPP), as reported by the CIA World Factbook, varies from roughly $2.7 billion (Liberia) (ranked 185 out of 229 measured economies) to over $2.5 trillion (Russia) (ranked seventh).[189] Adjusting for population, these countries do not fare as well: none of the ten recalcitrant states remain among the top fifty world economies, and the majority fall into the bottom half.[190]

One bright line of demarcation between compliant and noncompliant states is that no state that has rebuffed an award is considered a developed economy according to UNCTAD.[191] Indeed, the identified countries are all either developing or transitioning economies and are found in either Africa (Liberia, Senegal, Congo, Zimbabwe), Asia (Laos, Thailand, Kazakhstan, Kyrgyzstan, Russia), or South America (Argentina, Bolivia, Ecuador, Venezuela).[192] Another identifier all these countries share is that they are all members of—and have paid-in capital stock with—the International Bank for Reconstruction and Development (IBRD).[193] Additionally, as either developing or transitioning economies, the majority of the countries identified herein as noncompliant states also maintain outstanding loans with IBRD or the International Development Association (IDA).[194]

B. The Role of the World Bank Group

The World Bank Group comprises five institutions (collectively, the Bank) that function together to accomplish the enduring mission of

188. *See* Ripinsky, *supra* note 38.

189. *GDP Purchasing Power Parity*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2001rank.html (last visited Oct. 2, 2013).

190. *Id.*; *GDP-Per Capita (PPP)*, CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html (last visited Oct. 2, 2013).

191. *See* WORLD INVESTMENT REPORT 2012, *supra* note 2, at ii (describing, *inter alia*, which countries are "developed").

192. *See, e.g.*, WORLD INVESTMENT REPORT 2012, *supra* note 2, at Annex table I.1 (FDI flows, by region and economy, for the period of 2006–2011).

193. *See* INT'L BANK FOR RECONSTR. & DEV., WORLD BANK, MANAGEMENT'S DISCUSSION & ANALYSIS AND FINANCIAL STATEMENTS 55–58 (2012) [hereinafter IBRD MDA], *available at* http://treasury.worldbank.org/cmd/pdf/IBRD_MDA_and_Financial_Statements_June_2012.pdf.

194. *See id.* at 52–53.

promoting economic growth and eradicating poverty.[195] In addition to ICSID, World Bank Group affiliates include the two development banks—IBRD and IDA—as well as the Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC).[196] With its diversity of services and depth of financial strength, the World Bank Group stands in a unique position to offer the international community a delocalized, a-national approach to removing the sovereign immunity obstacles that encumber the free flow of foreign direct investment. Indeed, the Bank offers prophylactic and remedial measures to mitigate the risk of noncompliance with arbitration awards.[197] But the Bank can do more to achieve a multilateral execution mechanism, particularly for awards rendered by its own institution, ICSID.[198]

1. MIGA: A Carrot for Investors

MIGA's mission "is to promote foreign direct investment (FDI) into developing countries."[199] MIGA offers investors a prophylactic measure to protect against political risks that threaten foreign investments, such as expropriation, breach of contract, terrorism, or war.[200] Political risk is listed as the number one constraint for FDI in developing countries over the next three years—higher than access to financing, macroeconomic stability, infrastructure capacity, and others.[201] Expropriation and breach of contractual obligations—including non-payment of arbitral awards—stand out as two issues that "remain the major preoccupations among foreign investors with operations in developing countries."[202] In the throes of the

195. *See* Joseph E. Stiglitz, *The World Bank at the Millennium*, 109 ECON. J. 577, 580 (1999).

196. *See About*, WORLD BANK, http://www.worldbank.org/en/about (last visited Oct. 3, 2013).

197. *See infra* Parts IV.B.1–2.

198. *See infra* Part. IV.B.2.

199. MULTILATERAL INV. GUAR. AGENCY, WORLD BANK, WORLD INVESTMENT AND POLITICAL RISK 1 (2011) [hereinafter WIPR], *available at* http://www.miga.org/documents/WIPR11.pdf.

200. *See generally id*. at 21 ("Political risk broadly defined is the probability of disruption of the operations of companies by political forces and events, whether they occur in host countries or result from changes in the international environment.").

201. *Id*. at 19.

202. *See id*. at 7. Expropriation is defined as "the loss of investment as a result of discriminatory acts by any branch of the government that may reduce or eliminate ownership, control, or rights to the investment either as a result of a single action or through an accumulation of acts by the government." *Id*. at 21. Expropriation is a broad-based category that includes regulatory takings, creeping expropriation, and nationalization. *Id*. at 7; *see also id*. at 10 ("Political risk remains a

global economic recovery, data show expropriation is on the rise, and many investors believe these risks will continue to escalate.[203] The impacts of these risks are tangible: in a recent survey,[204] nearly 40% of international firms said they suffered a loss from non-payment of arbitral awards or other forms of breach of contract, and roughly 20% say both breach of contract and expropriation have a "very high impact" on their current activities.[205]

MIGA insures against the very problem this article addresses—non-payment of arbitral awards.[206] This avenue for satisfaction of arbitration awards represents a readily available execution mechanism for investors to consider as an alternative to the treasure hunt.[207] Although this solution comes at a price up front—insurance premiums—the costs may prove smaller than that required to pursue judicial attachment and execution proceedings.[208] Thus, MIGA can serve as a dispute settlement mechanism a

salient constraint to investment in developing countries, becoming more prominent over the next three years as current concerns about the global economy subside.").

203. *Id*. at 18. The WIPR highlights increased expropriation in countries such as Belize, the Democratic Republic of Congo, and Venezuela. *See also id*. (noting a 41% jump in expropriations in Venezuela from 2010 to 2011). *But cf*. WORLD INVESTMENT REPORT 2012, *supra* note 2, Annex table I.1 (showing Venezuela attracted nearly five times the amount of FDI in 2011 compared to 2010).

204. The survey contains the responses of over 300 senior executives from multinational enterprises investing in developing countries. WIPR, *supra* note 199, at 58.

205. *Id*. at 64.

206. *See Investment Guarantees: Types of Coverage*, MULTILATERAL INV. GUAR. AGENCY, http://www.miga.org/investmentguarantees/index.cfm?stid=1797 (last visited Oct 3, 2013); *see* also WIPR, *supra* note 199, at 45 ("[Political Risk Insurance] protects against losses arising from a host government's breach or repudiation of a contractual agreement with an investor. Claims are usually payable only after an investor has invoked a dispute resolution mechanism (such as arbitration), has obtained an award for damages, and the host government has failed to honor the award.").

207. *See, e.g*., MULTILATERAL INV. GUAR. AGENCY, SAMPLE CONTRACT FOR GUARANTEE OF EQUITY INVESTMENT 19 (2012) ("The guarantee against Breach of Contract shall cover a Loss that is a direct result of: (a) the inability of the Guarantee Holder or the Project Enterprise (on behalf of the Guarantee Holder) to enforce an Award rendered in its favor against the Host Government ('Arbitral Award Default'), provided that the Guarantee Holder and/or the Project Enterprise, as applicable, have made all reasonable efforts to enforce the Award against the Host Government, including initiating and participating in appropriate judicial proceedings, for the duration of the Waiting Period . . . ."). The terms of this coverage are vague and it is unclear what the standard is for "all reasonable efforts" during the time specified as the waiting period (which, in the SAMPLE CONTRACT, is 180 days). *Id*. at 2.

208. Indeed, investors are increasingly turning to political risk insurance as a safeguard for their investments. From 2008 to 2010, political risk insurance as a ratio to FDI flows into developing countries increased from 9-14%. WIPR, *supra* note 198, at 39. As a baseline, empirical studies have provided that costs in investment arbitration can amount to more than 10% of the average

priori by way of reimbursing losses incurred by expropriation;[209] or, investors may find they can receive higher damages through arbitration and, in the instance of noncompliance, present their award to MIGA for ex post facto relief.[210]

2. IBRD & IDA: A Stick for Noncompliant States

IBRD and IDA work together towards the goal of "promoting sustainable economic development and reducing poverty in its developing member countries."[211] IBRD offers low-interest loans and guarantees to middle-income and credit-worthy lower income countries, whereas IDA offers no-interest loans and grants to the poorest of the Bank's member countries.[212] IBRD is owned and operated by its 188 member states,[213] and as of June 30, 2012, had approximately $140 billion in outstanding loans and guarantees to developing countries and over $12 billion in paid-in capital.[214] The IBRD Articles of Agreement, to which each member country of the World Bank must subscribe, guide the policies of the Bank.[215] Bank policy for overdue and non-performing loans is strict; non-payment leads to suspension of disbursements on all loans to the member country, and no new

award, which amounts to over one million dollars—before enforcement and execution. *See* Susan D. Franck, *Rationalizing Costs in Investment Treaty Arbitration*, 88 WASH. U. L. REV. 769, 776 (2011); *id*. at 812 (showing, with a sample size of seventeen, tribunal costs alone averaged over $500,000).

209. *See* Ibrahim F.I. Shihata, The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA, 1 AM. U. J. INT'L L. & POL'Y 97, 113–15 (1986).

210. Types of Coverage, *supra* note 206.

211. *See* IBRD MDA, *supra* note 193, at 3. IBRD and IDA share the same staff and headquarters and apply the same standards in evaluating projects. *See What Is IDA?*, INT'L DEV. ASS'N, http://www.worldbank.org/ida/what-is-ida.html (last visited Oct. 3, 2013).

212. *See What Is IDA?*, *supra* note 211.

213. *See Member Countries*, WORLD BANK, http://www.worldbank.org/en/about/leadership/members (last visited Oct. 3, 2013).

214. IBRD MDA, *supra* note 193, at 25. IBRD raises most of its funds on global financial markets, whereas IDA relies heavily on contributions from developed countries. *See IDA Replenishments*, INT'L DEV. ASS'N, http://www.worldbank.org/ida/ida-replenishments.html (last visited Oct 3, 2013). Membership of IDA is conditioned on membership in IBRD. *Member Countries*, *supra* note 213.

215. *See generally* INT'L BANK FOR RECONSTR. & DEV., ARTICLES OF AGREEMENT (2012) [hereinafter IBRD ARTICLES OF AGREEMENT], *available at* http://siteresources.worldbank.org/EXTABOUTUS/Resources/IBRDArticlesOfAgreement_links.pdf.

loans are available to the member country or any borrower in that country until the member clears all arrears.[216] If a member chooses to withdraw from the World Bank, or if the Bank suspends membership and does not restore the membership within one year, the Bank can use funds from a member's capital account to settle debts as they come due.[217] The Bank treats remaining losses from default as "country credit risk" and covers the losses with equity held by the Bank.[218]

Of the thirteen countries identified in Part IV.A, all are members and shareholders of the Bank; six countries have loans outstanding from IBRD and seven have loans or credits outstanding from IDA.[219] Because the same states that are refusing to honor arbitration awards are Bank shareholders or loan recipients,[220] the Bank has the unique ability to offer either direct or indirect methods of effectuating award compliance. Although the Bank is free to consider the political risk of the country along with other variables in determining whether to provide a loan or guarantee to a borrower,[221] using the Bank to satisfy awards directly may require multilateral agreement.[222]

---

216. *See* IBRD MDA, *supra* note 193, at 26 (Box 2: Treatment of Overdue Payments). For example, the World Bank has suspended financial assistance to Zimbabwe due to arrears. *Zimbabwe*, WORLD BANK, http://www.worldbank.org/en/country/zimbabwe (last visited Oct. 3, 2013).

217. *See* IBRD ARTICLES OF AGREEMENT, *supra* note 215, arts. VI §§ 1–4.

218. IBRD MDA, *supra* note 193, at 25; *see also* IBRD ARTICLES OF AGREEMENT, *supra* note 215, art. IV § 7.

219. *See* IBRD MDA, *supra* note 193, at 55–58.

220. *Compare id., with supra* notes 185–94 and accompanying text.

221. World Bank Operating Policy 7.40 provides:

> 2. If the Bank receives notice that a member country is unwilling to take steps to resolve a dispute over its failure to service external debt and if the Bank deems such failure to have a significant effect on the member's creditworthiness or on its ability to implement Bank-financed projects/programs or service Bank loans, the Bank examines the procedures followed by the parties in addressing the issue and determines what action, if any, it should take.
>
> 3. If the Bank is seriously dissatisfied with the position taken by the member country, it may, at its discretion, decide not to make new loans to or with the guarantee of the member country until the country takes certain actions to rectify the situation. In making its decision, the Bank considers whether the circumstances of the default give rise to concerns about the member country's creditworthiness for continued Bank lending.

OP 7.40—Disputes Over Defaults on External Debt, Expropriation, and Breach of Contract, WORLD BANK, (Mar. 2012) [hereinafter WBOP], http://go.worldbank.org/WBOMT5JTU0.

222. The Board of Governors that manages the World Bank Group comprises appointed representatives from each member country, who together "have the ultimate decision-making power within the organizations on all matters, including policy, financial or membership issues." *Member*

The Bank can attack noncompliance of any investment arbitration award through indirect means by suspending financing to the noncompliant member, similar to the penalties incurred by members for non-payment of Bank loans.[223] Specifically for ICSID awards, treating the obligation to honor an award under Article 53 of the ICSID Convention as an obligation to the Bank would allow the Bank to impose the same penalties on members of the World Bank who default on awards as it does on those who default on loans.[224] More directly, the Bank might be able to honor the presented awards and treat the amount either as an additional obligation owed to the Bank on top of existing outstanding loans of the noncompliant state or as a debit to the member's capital account.[225] However, converting the Bank into an ICSID award clearinghouse likely requires amending the Articles of Agreement; Article III provides: "The resources . . . of the Bank shall be used exclusively for the benefit of members . . . ."[226] Those member states who would suffer from such an award execution mechanism would argue that use of Bank resources to satisfy awards is a breach of this provision. However, the counter-argument would be that mitigating political risk by satisfying awards does benefit member countries by increasing the supply of foreign investments.[227] The Bank's Executive Directors handle disputes regarding interpretation of the Articles of Agreement;[228] if the clearinghouse

Countries, *supra* note 213. The number of votes each member country holds is dependent upon the number of shares held by the country. *See generally* IBRD ARTICLES OF AGREEMENT, *supra* note 215, art. V § 3(a).

223. *See supra* note 221 and accompanying text. The Operating Policy allows the Bank to discriminate based on non-payment of investor–state arbitration awards in their loan-making decisions with member countries. *See supra* note 221.

224. *Compare* ICSID Convention, *supra* note 17, art. 53, *with* IBRD ARTICLES OF AGREEMENT, *supra* note 215, art. VI §§ 2, 4.

225. Giuliana Canè proposed an analogous solution—treating awards as a bond issued by the noncompliant state, which could be traded in financial markets. *See* Canè, *supra* note 31, at 461. Under Canè's approach, the Bank could serve as a purchaser of the "junk bond" and recoup the expenses either through direct debit of the noncompliant member's capital account, or, more gradually, through higher interest rates on subsequent loan applications. *See id*. Similarly, George Foster proposed a solution entailing "a mechanism whereby eligible debts owed by member states would be automatically satisfied, without the need for recourse to judicial enforcement." *See* Foster, *supra* note 51, at 729.

226. IBRD ARTICLES OF AGREEMENT, *supra* note 215, art. III § 1(a).

227. *See* Foster, *supra* note 51, at 728 (discussing the likelihood of increased investment flows following the creation of an execution mechanism that assured investors their losses would be recoverable).

228. *See* IBRD ARTICLES OF AGREEMENT, *supra* note 215, art. IX.

function proved to be *ultra vires*, a vote of three-fifths of Bank members carrying eighty-five percent of the voting power could amend the Articles of Agreement to allow the new function.[229]

C. The Feasibility and Risk of Flexing the World Bank's Muscles

Many attribute the low noncompliance rate of ICSID awards to the fear of falling out of favor with the World Bank and the implications on access to future loans.[230] As the previous section details, the World Bank can apply the collective efforts of its affiliated organizations to effectuate ICSID award satisfaction in a number of ways.[231] Nevertheless, noncompliance persists.[232]

Consider application of these mechanisms to the dispute between AIG and Kazakhstan.[233] AIG could have—and perhaps may have—purchased political risk insurance from MIGA to cover the risk of expropriation that did eventually give rise to the claim registered with ICSID.[234] With a MIGA insurance policy, AIG could have filed a claim with MIGA and sought compensation for its losses.[235] Alternatively, AIG could have pursued ICSID arbitration and, following non-payment, could have filed a claim with MIGA seeking compensation for the non-honored award.[236] Kazakhstan also happens to hold nearly 3000 shares in IBRD, for which it has paid in nearly $20 million.[237] Additionally, Kazakhstan is currently borrowing approximately $5 million from IBRD.[238] The Bank could suspend consideration of all future loan proposals by Kazakhstan pending payment of the award to AIG.[239] If the Bank treats the obligation to ICSID as an

229. *See id*. art. VIII. *But see infra* Part IV.C.

230. *See, e.g*., Baltag, *supra* note 44, at 403–05.

231. *See supra* Part IV.B.

232. *See* Baltag, *supra* note 44, at 403–05.

233. For the original discussion of this dispute, see *supra* notes 139–147 and accompanying text.

234. *Cf*. AIG Capital Partners, Inc. v. Republic of Kazakhstan (*AIG, Inc*.), [2005] EWHC (Comm) 2239, [22], [2006] 1 W.L.R. 1420 (Eng.) (noting that the ICSID award held that the actions of the Republic of Kazakhstan amounted to expropriation).

235. *See supra* Part IV.B.1.

236. *See supra* Part IV.B.1.

237. IBRD MDA, *supra* note 193, at 56 (Statement of Subscriptions to Capital Stock and Voting Power).

238. *Id*. at 52 (Summary Statement of Loans). Of the $5 million, $1.1 million has been approved but is not yet effective, $1.6 million is pending disbursement, and the remaining $2.3 million is outstanding. *Id*.

239. *See supra* text accompanying notes 223–28.

obligation to the Bank, it could suspend loans not yet effective or amounts of loans in effect but not yet disbursed.[240] If Kazakhstan remained obstinate, the Bank could pay the award out of its equity and debit Kazakhstan's capital account.[241]

Supposing the World Bank *can* offer all of these multi-layered solutions to investors, the question of whether it *should* do so remains. Bank satisfaction of ICSID awards creates a perverse incentive for investors not to purchase political risk insurance from MIGA.[242] A "less-carrot/more-stick" solution to this problem of mixed motives may include the adoption of a policy of equitable subrogation, whereby MIGA satisfies non-honored awards held by policyholders and holds the state liable for the award through its Bank accounts.[243]

Additional questions arise for the Bank when presented with a situation such as the one posed by Zimbabwe,[244] where the Bank has already ceased lending operations due to default on Bank loans—the amount of which is over twenty times greater than Zimbabwe's amount paid in capital.[245] Although the Bank could add the amount of an ICSID award to the arrears that must be cleared prior to Zimbabwe obtaining another loan from the Bank, such a policy may quickly erode the financial strength of the Bank.[246] For countries whose paid-in capital is not impaired by loan obligations, they may choose to withdraw from the Bank and take their business elsewhere.[247]

240. *See supra* Part IV.B.2.

241. *See supra* Part IV.B.2.

242. Investors may query why they should pay for what they can get for free.

243. The Operational Regulations of MIGA provide for subrogation and assignment of rights. *See* MULTILATERAL INV. GUAR. AGENCY, OPERATIONAL REGULATIONS Ch. 4, § 3 (2012), *available at* http://www.miga.org/documents/Operations-Regulations.pdf.

244. For the background on this dispute, see generally Funnekotter v. Republic of Zimbabwe, No. 09 Civ. 8168(CM), 2011 WL 666227 (S.D.N.Y. Feb. 10, 2011).

245. *See* IBRD MDA, *supra* note 193, at 53, 58.

246. Opponents of this guaranteed ICSID execution mechanism might argue that it creates a set of incentives by both future investors and countries like Zimbabwe that is lose-lose for the Bank. Investors may have a greater incentive to invest in Zimbabwe because they know if a dispute arises, and they prevail, the Bank will honor the award. From Zimbabwe's point of view, it may be incentivized to continue to expropriate assets and refuse to pay arbitration awards that follow. This is a grim scenario indeed; however, it is likely both parties' respective incentives are overstated because investors invest to earn a profit, not recover losses in disputes (which they still must pay for out of their own pockets, and administrative costs of arbitration can be in the millions of dollars). *See* Baltag, *supra* note 44, at 400–01; *see also supra* text accompanying note 222.

247. Alternative development banks include: the Brazilian Development Bank, the Asian Development Bank, the Inter-American Development Bank, the African Development Bank, and the

If withdrawing membership from the Bank is too costly for the member state, an alternative step might be to withdraw from the ICSID Convention. ICSID already stirs fears of bias among developing states; enveloping the Centre with Bank policies may cause these fears to fester and infect the autonomy of the institution to such a degree that more and more states choose to denounce the Convention.[248]

V. CONCLUSION

Matters are not improving for ICSID awardees.[249] In the twenty-five years following the publication of the first ICSID award, investors initiated execution proceedings with respect to ICSID awards on only three occasions.[250] Since 2000, investors sought judicial assistance in "cashing in" their ICSID awards against at least three additional countries.[251] Not accounting for cases still pending,[252] post-filing settlement rates for ICSID cases have declined by nearly 50%.[253] For the sixty-nine concluded ICSID cases filed between 1978 and 1999, 38% settled before the tribunal rendered a final award.[254] For the 184 concluded ICSID cases filed between 2000 and 2012, 20% settled.[255] In sum, more countries are refusing to honor awards while the number of disputes continues to rise and comparative settlement

European Bank for Reconstruction and Development. For more on these institutions, see generally John W. Head, *Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks*, 90 AM. J. INT'L L. 214 (1996).

248. *See* Ripinsky, *supra* note 38, at 2. For a more detailed discussion of the perceived bias of ICSID, see generally Susan D. Franck, *The ICSID Effect? Considering Potential Variations in Arbitration Awards*, 51 VA. J. INT'L L. 825 (2011) (finding that, on the whole, ICSID awards are not statistically different from those rendered by alternative arbitration forums).

249. *See supra* notes 45–50 and accompanying text.

250. *See* REED ET AL., *supra* note 20, at 187–88 (discussing cases brought against the Congo, Senegal, and Liberia).

251. *See supra* notes 85 (Zimbabwe in 2011), 110 (Argentina in 2012), and 139 (Kazakhstan in 2005).

252. As of October 3, 2013, there are 176 pending cases registered with ICSID. *See List of Pending Cases*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last updated Oct. 3, 2013).

253. *See List of Concluded Cases*, ICSID, https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (last updated Oct. 3, 2013).

254. *See id*.

255. *See id*. Twenty-three percent of cases concluded between 2000 and 2012 were discontinued for various procedural reasons. *See id*.

rates fall.[256]

Rather than watching investors struggle to circumnavigate the obstacles of sovereign immunity and grapple with the judicial risk accompanying execution efforts in different venues, the international community may be able to offer a transparent solution. The World Bank possesses the ability to treat a multilateral problem with a multilateral solution. Utilizing the collective strength and expertise of the World Bank Group can streamline award payments and help parties to investor–state disputes help themselves. Doing so will minimize sovereign immunity obstacles while simultaneously stoking the supply of foreign investments that ultimately promote the dual goals of the World Bank: promoting sustainable economic growth and eradicating poverty.

Joseph M. Cardosi*

256. Note, however, that the settlement rates cited represent cased filed with ICSID and do not account for settlements reached between parties before filing a case with ICSID.

* J.D. Candidate, 2014, Pepperdine University School of Law; B.S. in Economics and International Affairs, 2005, Florida State University. I thank Kelsey Waples for her guidance during the drafting of this Comment, as well as the editors and staff of the *Pepperdine Law Review* for their thoughtful editing. I also thank Professor Jack J. Coe, Jr., for assisting me in developing the topic of this Comment. Most importantly, I thank Val Delp, for her unrelenting encouragement, love, and support. All mistakes in this article are my own, and I welcome comments and critiques at joseph.cardosi@gmail.com.

This comment received the 2013 Ronald M. Sorenson Memorial Writing Award for the *Pepperdine Law Review*'s best student article.