

State Sovereign Immunity in the Enforcement of Investor-State Arbitral Awards

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Abstract

This paper examines how sovereign immunity, especially immunity from execution, affects the enforcement of investor-State arbitral award. Its objective is to evaluate whether the current legal framework finds an adequate balance between award finality and sovereign immunity. We have used a doctrinal and comparative methodology. The research analyzes international legal instruments and domestic enforcement regimes in the United Kingdom, the United States and France. The results show that although States generally waive jurisdictional immunity by consenting to arbitration, they routinely rely on execution immunity to resist post-award enforcement. Both ICSID and New York Convention regimes ultimately defer to the law of the forum State, therefore producing significant jurisdictional divergence. The study points out that gap between legal recognition and actual enforcement undermines the predictability of investment arbitration. The study implies that a more coherent approach to execution immunity either through clearer treaty practice or harmonized domestic rules, is necessary to strengthen the credibility of the system.

Keywords: State immunity; immunity from jurisdiction; immunity from execution; investor-State arbitration; ICSID Convention; New York Convention.

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1. Introduction

The doctrine of State immunity occupies a central position in public international law, reflecting the principles of sovereign equality, independence, and mutual respect among States. It enables States and their organs to perform essential public functions without undue interference from foreign courts². As confirmed by both judicial practice and scholarly authority, State immunity has long been recognized as a rule of customary international law, deeply rooted in consistent State practice and *opinio juris*³.

In the context of international investment law, the role of State immunity has evolved in a particularly complex manner. It functions at two distinct stages of

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² James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), 470, <https://doi.org/10.1093/he/9780198737445.001.0001>.

³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 2012 I.C.J. Rep. 99, paras. 56–57, <https://www.icj-cij.org/case/143/judgments>.

investor–State dispute settlement: first, as immunity from jurisdiction, which may prevent a State from being brought before a foreign court or arbitral tribunal; and second, as immunity from execution, which may shield State assets from enforcement measures once an arbitral award has been rendered⁴. While the former has been significantly curtailed by the widespread acceptance of arbitration clauses in bilateral investment treaties and instruments such as the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), the latter continues to pose substantial obstacles at the post-award stage.

This disparity is heightened by the absence of a comprehensive and universally binding international convention that regulates State immunity. Neither the ICSID Convention⁵ nor the New York Convention⁶ expressly regulates the question of sovereign immunity, particularly with respect to execution. Although the United Nations Convention on Jurisdictional Immunities of States and Their Property provides a detailed framework, it has not yet entered into force, thereby limiting its practical effect⁷. Therefore, issues of immunity from execution are predominantly regulated by domestic legislation, leading to considerable differences among jurisdictions. This fragmentation has been noted in both early codification efforts and contemporary scholarship, which emphasize the lack of uniformity in the application of immunity rules⁸.

From the perspective of investors, this legal landscape generates a structural tension. On the one hand, international arbitration promises finality and enforceability of awards; on the other, the persistence of execution immunity often prevents effective recovery against State assets. This tension reveals a gap between the formal authority of arbitral awards and their practical realization, raising concerns about the overall effectiveness and legitimacy of the investment arbitration system⁹.

Against this background, the present study seeks to examine whether the current legal framework adequately reconciles the competing imperatives of award finality and State sovereignty. While considerable scholarship has examined sovereign immunity in international arbitration generally, comparatively limited attention has been devoted to the structural distinction between jurisdictional immunity and immunity from execution in the enforcement of investor–State arbitral awards. This study contributes to the existing literature by demonstrating that immunity from

⁴ Hazel Fox and Philippa Webb, *The Law of State Immunity*, 3rd ed. (Oxford: Oxford University Press, 2013), 32–35, <https://global.oup.com/academic/product/the-law-of-state-immunity-9780199647064>.

⁵ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature March 18, 1965, 575 U.N.T.S. 159 (entered into force October 14, 1966), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf (hereafter ICSID Convention).

⁶ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature June 10, 1958, 330 U.N.T.S. 38 (entered into force June 7, 1959), <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/1958nyconvention.pdf> (hereafter New York Convention).

⁷ *United Nations Convention on Jurisdictional Immunities of States and Their Property* adopted December 2, 2004, G.A. Res. 59/38, annex, https://treaties.un.org/pages/viewdetails.aspx?chapter=3&clang=_en&mt_dsg_no=iii-13&src=treaty.

⁸ International Law Commission, *Report of the International Law Commission on the Work of Its Thirty-Second Session, 5 May–25 July 1980*, U.N. Doc. A/35/10, para. 26 (1980), https://legal.un.org/ilc/documentation/english/reports/a_35_10.pdf.

⁹ Christoph H. Schreuer et al., *The ICSID Convention: A Commentary*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 1154, <https://doi.org/10.1017/CBO9780511596896>.

execution remains the principal obstacle to effective enforcement despite the increasing acceptance of arbitral jurisdiction over States. The research employs a doctrinal and comparative methodology, integrating the examination of international legal instruments with an analysis of specific domestic legal frameworks, notably those of the United Kingdom, the United States, and France.

The study is oriented exclusively on the development of the doctrine of State immunity and its effects on the enforcement of investor–State arbitral awards within the ICSID and New York Convention frameworks. The scope of the study is limited to the evolution of the doctrine of State immunity and its implications for the enforcement of investor–State arbitral awards under the ICSID and New York Convention regimes. On the opposite of prior scholarship that treats jurisdictional and execution immunity as a single continuum, this study isolates the structural asymmetry between consent to adjudicate and resistance to execution, therefore offering a novel doctrinal lens. To bridge the gap between award finality and sovereign protection, the study argues for clearer treaty drafting on execution waiver and a gradual harmonization of domestic immunity statutes, while respecting the legitimate public-policy rationale underlying sovereign asset protection. The paper is structured in two main parts. The first examines the doctrinal evolution of State immunity and clarifies the distinction between jurisdictional immunity and immunity from execution. The second analyzes the enforcement regimes applicable to arbitral awards and explores how different legal systems address the issue of execution immunity in practice.

2. The Doctrinal Evolution of State Immunity

State immunity has evolved from the absolute immunity to restrictive with respect to commercial activities. The immunity implies the immunity from jurisdiction as well as the immunity from execution. This clarification is important because the immunity that our study is about concerns the latter. This dual nature of the immunity in the investment arbitration context, matters as often the waiver of the jurisdiction immunity does not necessarily imply the waiver of the immunity from execution.

2.1. From Absolute to Restrictive State Immunity

Historically, the foundation of the law of sovereign immunity is derived from the notion of sovereignty, independence, equality and dignity of states in international law¹⁰. As a result, the domestic courts of one state could not impermissibly exercise jurisdiction over foreign state and refuse jurisdiction over cases against another foreign sovereign state without their consent,¹¹ under the maxim *par in parem non habet*

¹⁰ Sompong Sucharitkul, “Immunities of Foreign States before National Authorities,” *Recueil des Cours* 149 (1976): 87–215, https://referenceworks.brill.com/display/entries/HACO/A978902860_4179-02.xml; Sompong Sucharitkul, *State Immunities and Trading Activities in International Law* (London: Stevens & Sons, 1959), 13; James Crawford, “International Law and Foreign Sovereigns: Distinguishing Immune Transactions,” *British Yearbook of International Law* 54, no. 1 (1983): 75–118, <https://doi.org/10.1093/bybil/54.1.75>.

¹¹ Christopher S. Miles, “Sovereign Immunity,” in *Enforcement of Arbitral Awards against Sovereigns*, ed. R. Doak Bishop (New York: JurisNet, 2009), 36.

*jurisdictionem*¹², meaning “*submission of one state to the jurisdiction of another would be derogatory to the former’s dignity and independence*”. Under this maxim, the status of each sovereign state is equally enjoyed by all independent states in order to protect states against interference by other states in an exclusive inter-state system¹³. Prior to the 19th century, this principle formed the basis of the doctrine of absolute immunity, which was initially aimed to protect representatives of foreign states, particularly heads of state, on the basis of diplomatic immunities, including diplomatic agents and warships¹⁴. This absolute character extended to the state and its property as well as to its agencies and instrumentalities regardless of the nature or purpose of activities, either sovereign acts or commercial acts.

The trend of restrictive sovereign immunity was first introduced in the Belgian courts in the middle nineteenth century¹⁵, when in 1879 the Court of Appeal in *The Havre*¹⁶ case regarding the freight on Peru’s guano shipped to Ostend, Belgium. The Court assumed jurisdiction in an action based on the commercial activity of state and denied a sovereign immunity with regard to the non-public acts irrespective of the respondents’ claim that the guano was the property of Peru and acting as its agents¹⁷. The more restrictive approach was found in the Italian court case of *Morellet c. Governo Danese*,¹⁸ based on the recognition of ‘the dual personality of the state’, either a public act of state as a sovereign power or a private act of state as a juristic person entering in a private law¹⁹.

Different states like United States²⁰, United Kingdom²¹ will follow the restrictive doctrine making it widespread in the common law countries²². In *Trendex*, the court held that “*international law now recognised no immunity from suit for a government department in respect of ordinary commercial transactions as distinct*

¹² Hersch Lauterpacht, “The Problem of Jurisdictional Immunities of Foreign States,” *British Yearbook of International Law* 28 (1951): 220–72, at 221.

¹³ Ian Sinclair, “The Law of Sovereign Immunity: Recent Developments,” *Recueil des Cours* 167 (1980): 113–284, at 198, <https://referenceworks.brill.com/display/entries/HACO/A9789028629417-02.xml>.

¹⁴ Hazel Fox, *The Law of State Immunity*, 2nd ed. (Oxford: Oxford University Press, 2008), 201–4.

¹⁵ Sucharitkul, “Immunities of Foreign States,” 132; Fox, *Law of State Immunity*, 224.

¹⁶ Sucharitkul, *State Immunities and Trading Activities*, 243; *Rau, Vanden Abeele et Cie v. Duruty*, P.B. 1879-II-175, 176.

¹⁷ Sucharitkul, *State Immunities and Trading Activities*, 243–44; Sucharitkul, “Immunities of Foreign States,” 132; Gamal M. Badr, *State Immunity: An Analytical and Prognostic View* (The Hague: Martinus Nijhoff, 1984), 21–24, <https://brill.com/display/title/9655>.

¹⁸ *Morellet v. Governo Danese*, Giur. It. 1883-I-125, 130–31; Sucharitkul, “Immunities of Foreign States,” 127.

¹⁹ Badr, *State Immunity*, 24.

²⁰ David Gaukrodger, “Foreign State Immunity and Foreign Government Controlled Investors,” OECD Working Papers on International Investment, no. 2010/02 (Paris: OECD Publishing, 2010), 11, <https://doi.org/10.1787/5km91p0ksqs7-en>.

²¹ Rosalyn Higgins, “Asser Institute Lectures on International Law: Certain Unresolved Aspects of the Law of State Immunity,” *Netherlands International Law Review* 29, no. 2 (1982): 265–76, at 266, <https://doi.org/10.1017/S0165070X0001278X>; *The Charkieh* (1873) L.R. 4 A. & E. 59; *The Parlement Belge* (1880) 5 P.D. 197; *The Cristina* [1938] A.C. 485; *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan* [1975] 1 W.L.R. 1485.

²² Peter D. Trooboff, “Foreign State Immunity: Emerging Consensus on Principles,” *Recueil des Cours* 200 (1986): 235–432, at 271, <https://referenceworks.brill.com/display/entries/HACO/A9789024736447-03.xml>.

from acts of a government nature.”²³

The shift from absolute immunity to restrictive immunity has not entirely solved all problems in this area of law. However, a state practice shows that many states have considered a commercial activity exception to distinguish between public act of state and private act of state under a restrictive approach in which it only grants immunity to only public act of state.

2.2. Distinction of the Immunity from Jurisdiction and Immunity from Execution

The separation regime of sovereign immunity has made a distinction between the plea of adjudication or jurisdiction immunity and enforcement immunity. The plea of jurisdictional immunity has been seen from the first stage of the arbitration process to the final stage in order to refuse the exercise of jurisdiction of a forum court state or arbitral tribunal²⁴.

The principle can be found in the *Schooner Exchange v. McFaddon*²⁵. As the maxim expressed *par in parem non habet jurisdictionem*²⁶, it conveys the idea of the equality and independence of a state from the national court of another state. The investor cannot directly sue the state before any jurisdiction or court if the state didn't give explicitly its consent to be sued and has waived its immunity from jurisdiction. The jurisdictional immunity, consequently, is not limited to the territory of the forum state, but extends to a person or an act of nationality outside the territory of the forum state²⁷. The exercise of sovereign power, regarding the territorial jurisdiction, applies only to the relationship between the court of a forum state and a foreign state party or its asset²⁸. To allow the immunity to be ineffective, states sometimes explicitly or implicitly waive this immunity either during the ratification of international convention such as the ICSID, or Bilateral Investment Agreements or Treaties.

On the other hand, the immunity from execution or enforcement intervenes not on the recognition phase of the award but the execution phase. Whilst jurisdictional immunity relates to adjudication by means of a judgment and declaration of rights and obligations on the territorial basis, enforcement immunity relates to the measure of constraint against the property of foreign state, either for the purpose of enforcing post-award execution or pre-award attachment (provisional measures) resulting from the exercise of jurisdiction²⁹. The problems relating to a sovereign immunity defense could arise at any enforcement step; however, a private party is likely to face a problem at the execution step when it comes to executing an arbitral award against sovereign assets³⁰.

²³ *Trendtex Trading Corp. v. Central Bank of Nigeria* [1977] Q.B. 529.

²⁴ Dhisadee Chamlongrasdr, *Foreign State Immunity and Arbitration* (London: Cameron May, 2007), 79; Albert Jan van den Berg, “The New York Arbitration Convention and State Immunity,” in *Acts of State and Arbitration*, ed. Karl-Heinz Böckstiegel (Cologne: Carl Heymanns, 1997), 49, <https://legal.un.org/avl/faculty/vandenberg.html>.

²⁵ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135–37 (1812).

²⁶ Lauterpacht, “Problem of Jurisdictional Immunities,” 221.

²⁷ Fox, *Law of State Immunity*, 70–74.

²⁸ Chamlongrasdr, *Foreign State Immunity and Arbitration*, 81.

²⁹ Fox, *Law of State Immunity*, 35; Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), 342.

³⁰ Renata Brazil-David, “International Commercial Arbitration Involving a State Party and the Defense of

The understanding of both immunity is important in the context of investment dispute settlement. The dual nature shapes the pre- and post- awards in investor-State dispute settlement.

2.3. The Dual Nature of Immunity in the Investment Arbitration Context

In investment arbitration, this distinction becomes especially visible because the State has usually consented to arbitration by treaty, contract, or statute, which is commonly understood as a waiver of immunity from adjudication for the arbitral process itself and often for subsequent recognition/enforcement steps. Yet, even where a State accepts adjudication, it may still retain immunity at the execution stage unless it has separately waived execution immunity or the assets targeted fall within a domestic-law exception³¹.

In the pre-award phase, the core function of jurisdictional immunity is to determine whether proceedings can be entertained at all, either before domestic courts or in the arbitral process via the State's consent. In practice, investment arbitration turns heavily on consent: once a State has offered consent through an investment treaty and the investor accepts it, the dispute is typically removed from the State's claim to be free from adjudication, at least for the arbitral forum and closely connected court assistance³².

This is why post-award litigation often treats jurisdictional immunity as largely "spent" for purposes of recognizing an award: courts in many jurisdictions view recognition/enforcement proceedings, especially for ICSID awards, as not reopening merits review and as compatible with the State's prior consent to the regime. The point is not that sovereignty disappears, but that sovereignty is expressed through consent to adjudication mechanisms that substitute for domestic litigation³³.

After an award, the dispute shifts from adjudication to satisfaction, and immunity from execution becomes the principal obstacle when voluntary compliance fails. The ICSID system crystallizes this: Article 54 requires each Contracting State to recognize an ICSID award as binding and enforce its pecuniary obligations "as if it were a final judgment" of that State's courts, but execution steps remain governed by local law³⁴.

A recurring doctrinal controversy is whether a waiver of jurisdictional immunity should imply a waiver of immunity from execution measures ("double waiver"), or whether execution immunity requires a separate, specific waiver. The International Court of Justice has been cited in scholarship for the proposition that waiver of jurisdictional immunity does not automatically entail waiver from

State Immunity," *American Review of International Arbitration* 22, no. 2 (2011): 241–70, at 260, <https://aria.law.columbia.edu/issues/22-2/international-commercial-arbitration-involving-a-state-party-and-the-defense-of-state-immunity-vol-22-no-2/>.

³¹ Katherine Reece Thomas and Doğan Gültutan, "Enforcement of ICSID Awards and State Immunity: Should Immunity Trump All? Analysis of the English Court of Appeal's *ISL / Border Timbers Conjoined Judgment*, Advocating for a Domestic Teleological Interpretation," *Arbitration International* 41, no. 3 (2025): 607–32, <https://doi.org/10.1093/arbint/aiae053>.

³² Philippa Webb, "Double Waiver of Immunity and Ripple Effects," *ICSID Review—Foreign Investment Law Journal* 40, no. 3 (Fall 2025): 587–644, <https://doi.org/10.1093/icsidreview/siaf022>.

³³ Webb, "Double Waiver of Immunity," 587–644.

³⁴ ICSID Convention, art. 54.

enforcement against State property, a view that supports the “separate waiver” approach³⁵.

In investment arbitration practice, the position varies by legal system and instrument: some jurisdictions have been more receptive to arguments that arbitration consent carries consequences for enforcement, while the ICSID framework expressly preserves execution immunity via Article 55, making an implied waiver of execution harder to sustain as a matter of treaty interpretation. As a result, award creditors frequently win “recognition/enforcement” (in the sense of converting the award into an enforceable title) yet still face difficulty identifying non-immune, executable State assets³⁶.

3. The Sanctity of Arbitral Awards and the Enforcement Regimes

The purpose of an arbitral award is to be executed and allows the expectation of the investor to be fulfilled. This finality called award sanctity of the award contrasts with countries public interests. The enforcement regime of investor-State awards is laid down under ICSID convention as well as New York Convention for non-ICSID awards.

3.1. The Sanctity of Arbitral Awards

The notion of ‘sanctity’ and normative expectation of finality from investors and capital exporting countries. The “sanctity” of arbitral awards in investment dispute settlement describes a normative commitment to treating the award as authoritative, stable, and effectively final, so that investors can rely on it when allocating capital across borders. In the ICSID system, that expectation is expressed in unusually strong terms: Article 53(1) provides that an ICSID award is binding on the parties and “shall not be subject to any appeal or to any other remedy except those provided for in this Convention”³⁷, which frames finality not merely as a practical goal but as a structural rule of the regime. United Nations Conference on Trade and Development (UNCTAD)’s³⁸ synthesis of ICSID’s “binding force and finality” underscores the same idea: ICSID awards are final and binding and are insulated from review outside the Convention’s self-contained remedies, reinforcing predictability for investors and, historically, for capital-exporting States that favor reliable dispute resolution to reduce political risk³⁹.

Tension between finality and public interest of respondent states. The

³⁵ Tamlyn Mills, “Recognition, Enforcement and Recovery of Investment Treaty Awards: Part II,” Norton Rose Fulbright, November 1, 2022, <https://www.nortonrosefulbright.com/en/knowledge/publications/b3c54d16/recognition-enforcement-and-recovery-of-investment-treaty-awards-part-ii>.

³⁶ ICSID Convention, art. 55.

³⁷ ICSID Convention, art. 53(1), https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf.

³⁸ United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement: International Centre for Settlement of Investment Disputes, Module 2.9: Binding Force and Enforcement*, U.N. Doc. UNCTAD/EDM/Misc.232/Add.8 (2003), https://unctad.org/system/files/official-document/edmmisc232add8_en.pdf.

³⁹ Aceris Law LLC, “Resisting the Enforcement of Arbitral Awards: Article V(1)(a) of the New York Convention,” October 6, 2018, <https://www.acerislaw.com/resisting-the-enforcement-of-arbitral-awards-article-v1a-of-the-new-york-convention/>.

investment context makes the commitment to finality politically and legally contested because awards can implicate regulation, budgetary priorities, and democratic policy choices of respondent States. The tension is therefore not simply between “law” and “politics”, but between two legitimate public values: stability of adjudication (which underpins the rule-of-law promise offered to investors, and the respondent State’s public interest in preserving core regulatory choices and fundamental legal principles. This tension is visible in post-award control mechanisms: while ICSID limits remedies to those inside the Convention (e.g., annulment on defined grounds), non-ICSID awards may face resistance at the enforcement stage where a court considers that enforcement would violate the forum’s public policy under Article V(2)(b) of the New York Convention⁴⁰.

The public-policy “safety valve”, however, is itself constrained by a countervailing concern: if “public interest” becomes a general license to revisit merits, the finality that makes arbitration valuable is eroded. Commentary on public policy in enforcement practice often stresses that the exception should be interpreted narrowly so it does not become a disguised appeal, precisely because the legitimacy of arbitration depends on a balance between autonomy/ efficiency and the State’s interest in safeguarding fundamental principles of justice. The resulting equilibrium is imperfect but deliberate: investment arbitration systems seek to protect the sanctity of awards through rules of finality, while conceding limited gateways, internal review in ICSID or public policy/non-arbitrability in New York Convention settings, through which a State may defend core public interests without converting every award into a provisional decision⁴¹.

3.2. The Enforcement Regimes

The enforcement regime of investor-State awards, except the bilateral investment agreements regime of enforcement, are mostly based on the ICSID convention (a) and the New York convention (b). The enforcement regime under both regimes is facing the immunity challenges. In this part, we will address the enforcement regime and the question of immunity that could be arisen during the enforcement.

3.2.1. ICSID Awards Enforcement Regime

ICSID article 54 obligation. Article 54 of the ICSID Convention entrusts the matter of execution of the award to the respective national laws of the State in which execution is sought in these terms: “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”.

The recognition of the ICSID award is automatic⁴² and cannot be refused by

⁴⁰ New York Convention, art. V(2)(b).

⁴¹ Aceris Law LLC, “Resisting the Enforcement of Arbitral Awards.”

⁴² R. Doak Bishop, ed., *Enforcement of Arbitral Awards against Sovereigns* (New York: JurisNet, 2009), 22.

the competent courts. Therefore, the State cannot prevent recognition of the award in national courts on the basis of the sovereign immunity defense. Even if the state attempts to do so, the courts should rely on the clear-cut enforcement provisions of the Convention and reject such attempts⁴³. The drafters' achievement of the Convention is that they have managed to insulate the recognition mechanism of the ICSID awards, including against the sovereign immunity defense, and thereby achieving the finality of the ICSID awards. Investors trying to recognize ICSID awards are thus arguably in a better position than investors with the non-ICSID awards.

ICSID article 55 implications on States immunity. In light of Article 55 of the Convention, the rules on sovereign immunity may theoretically play a role only during the second stage of enforcement proceedings, i.e., the stage of execution of the award. The Convention is very explicit in allowing the State to use the sovereign immunity defense under national laws to avoid attachment of assets⁴⁴. The state whose courts refuse the claim for attachment on the basis of sovereign immunity defense will thus not be in violation of the Convention⁴⁵. However, even if the recalcitrant state is successful in raising its immunity defense, it will still be in violation of its duty to comply with the award under Article 53 of the Convention⁴⁶.

In the same vein, Article 54 seems to have been designed mainly as a tool for States to act against losing investors, rather than the other way around⁴⁷. At the same time, Article 55 makes it clear that the Convention does not directly deal with sovereign immunity from execution, but instead leaves this issue to national laws⁴⁸. This implies that, when it comes to enforcement, ICSID awards are not given any special treatment regarding sovereign immunity compared to non-ICSID awards.

3.2.2. Non-ICSID Awards Enforcement Regime

New York Convention structure. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)⁴⁹ does not expressly mention state immunity, leaving this question to national laws. This silence is structurally significant for non-ICSID investment awards because it means the Convention supplies the transnational "recognition and enforcement" framework, while questions of whether a state can be sued in enforcement proceedings and whether particular State assets can be attached (execution immunity) are typically governed by the forum's immunity statute and related procedural rules⁵⁰.

Within the Convention's structure, the central obligation is in Article III: each Contracting State "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied

⁴³ Anastasiia Filipiuk, "Enforcement of ICSID Arbitration Awards and Sovereign Immunity" (LL.M. short thesis, Central European University, 2016), 17, https://www.etd.ceu.edu/2016/filipiuk_anastasiia.pdf.

⁴⁴ ICSID Convention, art. 55, https://icsid.worldbank.org/sites/default/files/documents/ICSID_Convention.pdf.

⁴⁵ Schreuer et al., *ICSID Convention*, 1154.

⁴⁶ Schreuer et al., *ICSID Convention*, 1154.

⁴⁷ Schreuer et al., *ICSID Convention*, 1154.

⁴⁸ Schreuer et al., *ICSID Convention*, 1154.

⁴⁹ New York Convention.

⁵⁰ New York Convention, art. III.

upon”⁵¹, subject to the Convention’s conditions, and without imposing “substantially more onerous conditions” than those applied to domestic awards⁵². In practical terms for investment awards, Article III is often read as establishing a pro-enforcement presumption (recognition/enforcement is the default), but it also deliberately reserves the mechanics of enforcement to domestic law, covering issues such as the competent court, filing requirements, time limits, and interim measures⁵³. This reservation is precisely where national doctrines on state immunity can enter: the enforcing court may treat immunity as part of its procedural/jurisdictional framework when deciding whether it can entertain enforcement proceedings against a sovereign respondent at all, and later whether coercive measures can be taken against sovereign property⁵⁴.

The Convention then cabins the situations in which enforcement may be refused to the grounds in Article V, dividing them between party-invoked objections⁵⁵, such as invalid arbitration agreement, due process defects, or excess of authority) and forum-controlled objections Article V (2), such as non-arbitrability and public policy⁵⁶. For non-ICSID investment awards, this matters because respondent States sometimes attempt, explicitly or implicitly, to reframe objections as falling within Article V so as to resist enforcement, even though Article V is not a merits appeal and is typically treated as exhaustive⁵⁷. At the same time, where a State relies on immunity, that defense is conceptually distinct from Article V: Article V determines when an award should be recognized/enforced as a matter of the Convention, whereas immunity determines whether and how the forum’s courts may exercise authority over the State and its assets under domestic law⁵⁸.

The divergence national approaches to immunity from execution. National approaches to immunity from execution diverge because most legal systems accept, at least in principle, a restrictive theory of state immunity, yet they operationalize “execution” through different statutory thresholds, different conceptions of waiver, and different levels of judicial control over attachment of sovereign property.⁵⁹ The divergence matters acutely in investment arbitration because an award creditor may succeed in recognition (or obtain judgment on an award) but still fail at the next step: locating assets that domestic law classifies as non-immune and procedurally reachable⁶⁰. What follows is therefore less a disagreement about the legitimacy of arbitration and more a conflict between two domestic policy choices: safeguarding sovereign functions by insulating certain categories of property, and protecting the effectiveness of adjudication by preventing immunity from becoming a practical veto over awards.

In the United Kingdom, the State Immunity Act 1978 draws a sharp line

⁵¹ New York Convention, art. III.

⁵² New York Convention, art. III.

⁵³ New York Convention, art. III.

⁵⁴ New York Convention, art. III, <https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/1958nyconvention.pdf>.

⁵⁵ New York Convention, art. V(1).

⁵⁶ New York Convention, art. V(2).

⁵⁷ New York Convention, art. V; Aceris Law LLC, “Resisting the Enforcement of Arbitral Awards.”

⁵⁸ New York Convention, art. V.

⁵⁹ State Immunity Act 1978, c. 33, § 13 (UK), <https://www.legislation.gov.uk/ukpga/1978/33/section/13>.

⁶⁰ 28 U.S.C. § 1610, <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title28-section1610&num=0&edition=prelim>.

between adjudicative jurisdiction and enforcement measures, and it does so in highly formal terms.⁶¹ Section 13(2)(b) provides that “the property of a State shall not be subject to any process for the enforcement of a judgment or arbitral award”, which embeds a strong presumption against execution even where the State has participated in arbitration or has lost on the merits⁶². The principal statutory escape route is written consent: section 13(3) allows enforcement processes where the State has “consented in writing”, and recent English discussion of the case law emphasizes that UK courts treat execution immunity as distinct and not automatically waived by agreeing to arbitrate or by accepting that an award is “final and binding”.⁶³ This approach is analytically coherent (it preserves the autonomy of execution immunity) but it produces a practical premium on careful drafting, because broad arbitration clauses or generic “final and binding” language may be held insufficient unless it can be characterized as clear written consent to execution.⁶⁴

The United States adopts a more enumerated, exception-based technique in the Foreign Sovereign Immunities Act (FSIA), which still starts from a baseline of immunity but expressly lists when property “in the United States” of a foreign state may be attached or executed upon⁶⁵. Under 28 United States Code (USC) § 1610(a)(1), execution immunity is lifted where the foreign state has waived it “explicitly or by implication”, while other subsections key execution to the commercial use of the property (and other specified links), reflecting a legislative judgment that the nature and use of the asset, rather than only the nature of the underlying dispute, should drive attachability⁶⁶. Most directly relevant to arbitration creditors, § 1610(a)(6) provides an exception where the judgment is based on an order confirming an arbitral award rendered against the foreign state, subject to consistency with the arbitral agreement; this makes the FSIA’s execution regime more tightly integrated with arbitration enforcement than systems that require a separate, specific consent to execution in all circumstances.⁶⁷ Even so, the US model remains territorially and asset-focused: it does not promise satisfaction, but rather opens a pathway conditioned on the asset being within the United States and within a statutory exception.

France illustrates a third model: a procedural “gatekeeping” approach combined with statutory tightening of the waiver and asset-category analysis, particularly following reforms associated with the “Sapin II” law.⁶⁸ As described in

⁶¹ State Immunity Act 1978, § 13.

⁶² State Immunity Act 1978, § 13.

⁶³ Slaughter and May, “Enforcement of Awards against States: Exceptions to State Immunity,” May 1, 2025, <https://www.slaughterandmay.com/insights/new-insights/enforcement-of-awards-against-states-exceptions-to-state-immunity/>.

⁶⁴ Slaughter and May, “Enforcement of Awards against States.”

⁶⁵ 28 U.S.C. § 1610.

⁶⁶ 28 U.S.C. § 1610(a)(1), <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title28-section1610&num=0&edition=prelim>.

⁶⁷ 28 U.S.C. § 1610(a)(6), <https://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title28-section1610&num=0&edition=prelim>.

⁶⁸ Code monétaire et financier [Monetary and Financial Code] art. L.153-1 (Fr.), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000025033230; Code des procédures civiles d’exécution [Code of Civil Enforcement Procedures] arts. L.111-1-1 and L.111-1-2 (Fr.), https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033563436 and https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033563438.

commentary on the French Code of Civil Enforcement Procedures, enforcement measures against foreign State property now require prior judicial authorization (often on an *ex parte* basis), which shifts France from a relatively creditor-driven attachment practice to a judge-supervised system that filters execution at the front end⁶⁹. Substantively, Article L.111-1-2 has been summarized as requiring, among other possibilities, the foreign State's express consent to the measure, or that the property has been specifically reserved/allocated for satisfaction of the claim; and the reforms also differentiate sensitive categories such as diplomatic/consular assets, signaling a legislative intent to prevent opportunistic seizures that could disrupt core sovereign functions.⁷⁰ The French approach therefore increases predictability for States (by insisting on express consent and judicial control) but simultaneously increases transaction costs and evidentiary burdens for award creditors, who must not only locate assets but also persuade a judge, before attachment, that the statutory conditions are satisfied⁷¹.

These divergences generate strategic forum-selection effects in post-award practice.⁷² Where one jurisdiction demands particularly explicit consent (as under the UK's written-consent emphasis) or imposes prior authorization hurdles (as in France), creditors may prioritize jurisdictions whose statutes provide more clearly articulated execution exceptions tied to commercial assets or arbitral award confirmation. At the same time, even creditor-friendlier statutory text does not eliminate the structural constraint that execution is always asset-specific: states can and do structure ownership and use of property to preserve immunity, and domestic courts often interpret immunity rules with sensitivity to reciprocity and diplomatic consequences⁷³. The result is a fragmented enforcement landscape in which the "same" investment award can be practically effective in one forum and largely symbolic in another, not because the award's validity changes, but because national execution immunity rules define different pathways from legal entitlement to actual recovery.

4. Conclusion

This study has shown that the doctrine of State immunity continues to play a decisive role in the enforcement of investor-State arbitral awards. Although the transition from absolute immunity to restrictive immunity has allowed greater judicial scrutiny of State conduct, it has not produced a coherent international framework capable of ensuring the effective enforcement of arbitral awards against sovereign States. In practice, the distinction between immunity from jurisdiction and immunity from execution remains fundamental. While states frequently accept arbitral jurisdiction through treaties or arbitration agreements, they continue to rely on

⁶⁹ Marie Danis, "Sovereign Immunity: A Convenient Amendment to the Sapin II Law?," August Debouzy, January 4, 2017, <https://www.august-debouzy.com/en/blog/943-sovereign-immunity-a-convenient-amendment-to-the-sapin-ii-law>.

⁷⁰ Herbert Smith Freehills, "A Law on Immunity from Enforcement in France," December 1, 2016, <https://www.hsfkramer.com/notes/publicinternationallaw/2016-12/a-law-on-immunity-from-enforcement-in-france>.

⁷¹ Danis, "Sovereign Immunity."

⁷² 28 U.S.C. § 1610.

⁷³ Herbert Smith Freehills, "A Law on Immunity from Enforcement in France."

execution immunity to resist enforcement measures directed against State assets.

The analysis of the ICSID and New York Convention regimes reveals an important structural imbalance. The ICSID Convention establishes a particularly strong system for the finality and recognition of awards through Articles 53 to 55, yet it deliberately preserves domestic rules on execution immunity. The New York Convention adopts a similarly pro-enforcement approach for non-ICSID awards, but remains silent on the question of sovereign immunity, leaving domestic courts to determine the extent to which State assets may be attached or executed against. As a result, enforcement ultimately depends less on the existence of an arbitral award than on the content of national immunity laws.

The comparative examination of the United Kingdom, the United States, and France further demonstrates the fragmented nature of the current legal landscape. Each jurisdiction has developed its own approach to execution immunity, reflecting different understandings of the balance between investor protection and sovereign interests. These divergences create uncertainty for award creditors and encourage forum shopping, since the enforceability of the same award may vary considerably from one jurisdiction to another.

Ultimately, the study confirms that immunity from execution remains one of the principal obstacles to the practical effectiveness of investment arbitration. While State immunity continues to serve legitimate public purposes linked to sovereignty and the protection of public assets, its inconsistent application weakens the predictability and credibility of the investment arbitration system. Greater coherence in the treatment of execution immunity, whether through clearer treaty practice or more harmonized domestic approaches, would contribute to reducing the gap between the legal recognition of arbitral awards and their effective enforcement.

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