The Problem of Execution Immunities and the ICSID Convention

*Mees Brenninkmeijer* | ORCID: 0000-0001-9709-3001
Faculty of Law, University of Amsterdam, Amsterdam, The Netherlands; Faculty of Law, McGill University, Montreal, Canada
mees.brenninkmeijer@student.uva.nl

*Fabien Gélinas* | ORCID: 0000-0002-4200-6692
Faculty of Law, McGill University, Montreal, Canada
fabien.gelinas@mcgill.ca

**Abstract**

The prevailing view in international practice is that, by consenting to arbitration, a State does not waive its immunity from execution. Yet, in the context of arbitration administered by the International Centre for Settlement of Investment Disputes (ICSID) – as in the context of arbitration between States and private parties more generally – the problem of execution immunities is a very significant obstacle to the effective implementation of arbitral awards. When immunity from execution allows States to escape obligations they have freely undertaken, and when it withholds from claimants the fruits of a favourable award, the benefits of arbitration become illusory. This article contends that the prevailing view is no longer compelling. We argue that domestic courts can and should uphold the rule-of-law objectives and benefits of the ICSID Convention by adjusting their approach to immunity claims in the arbitral context: consent to arbitration should be interpreted as an implied waiver of immunity from execution.

**Keywords**

ICSID Convention – immunity from execution – implied waiver – mixed arbitration – rule of law
1 Introduction

It should come as no surprise to any student of international arbitration that its effectiveness ultimately depends on the enforcement machinery provided by State legal systems. This hard fact can be traced back to the structural weakness of the international legal system’s central institutions. In the absence of a truly international alternative, domestic courts have long been looked upon to ‘overcome this structural weakness’ and to help ‘fill the institutional vacuum’.\(^1\) In that role, some have come to perceive the domestic court as ‘an agent of an emerging international system ... an agent that accords precedence to the norms of international law when these norms come into conflict with the dictates of national policy’.\(^2\) Without entering the long-standing debate on the relationship between the two, it goes without saying that the domestic court is a place where the national and international legal orders frequently converge.

International arbitration is in this respect no exception. Despite aspirations of complete delocalization, domestic courts can intersect with the arbitral process throughout its various phases.\(^3\) A particularly striking intersection is seen when an award is rendered, and claimants seek to enforce it. It is here that State institutions may need to lend their sword to ensure the effectiveness and proper functioning of the international system.\(^4\) More precisely, using the enforcement mechanisms of a national legal system becomes a necessity if an arbitral award is ‘to be more than an unenforceable attempt at conciliation’.\(^5\)

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1. Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse UP 1964) xi, 172.
2. Richard B Lillich, ‘The Proper Role of Domestic Courts in the International Legal Order’ (1970) 11 Va J Intl L 9, 11 (citing Richard Falk, ‘The Interplay of Westphalia and Charter Conceptions of International Legal Order’ in Richard A Falk and Cyril E Black (eds), *The Future of the International Legal Order*, vol 1 (Princeton UP 1969) 69).
3. See especially the view of an ‘arbitral legal order’ often associated with French courts and commentators in Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhof 2010).
4. See eg Alan Redfern and Martin Hunter, *International Commercial Arbitration* (Sweet and Maxwell 1986) 231 (‘Arbitration tribunals have no sovereign powers equivalent to those of the state with which to enforce their awards; nor do they always have adequate powers to ensure the proper and efficient conduct of arbitration proceedings. For this reason, it has long been recognized that the effectiveness of the arbitral process is dependent upon a defined relationship, often described as a “partnership”, between arbitration and the courts’).
5. William W Park and Jan Paulsson, ‘The Binding Force of International Arbitral Awards’ (1983) 23 Va J Intl L 253, 253. See also the wording of the English Court of Appeal in *Dalmia Dairy Industries Ltd v National Bank of Pakistan* (1978) 2 Lloyd’s Rep 223 (CA) (‘Any award against a person who is unwilling to obey it can be enforced only by the machinery of some system of law’).
An important caveat, however, is that international arbitration is a process, which, due to its near-autonomous nature, only requires the intervention of domestic courts when their coercive authority is absolutely essential. Especially in connection with commercial arbitration, the need to invoke domestic enforcement mechanisms is not as pressing because the parties – usually private business entities – may be ‘more inclined to obey the award of a tribunal of their own choice than they are to obey the decision of a court’. Additionally, parties may fear reputational damage if they do not comply with the arbitral award.

Even though these considerations also apply to States that have entered into arbitration agreements, they do not always suffice to overcome the political and economic reasons behind a refusal to comply with an arbitral award. This makes the enforcement of awards a more pressing problem in the context of arbitrations held between States and foreign private parties than it is between private parties alone. Moreover, since the proceedings and awards resulting from these mixed arbitrations involve parties that are by definition from different juridical spheres, domestic courts will often face problems of international law when dealing with the recognition and, ultimately, the execution of arbitral awards. A notable example is the doctrine of State immunity. Despite the intense scrutiny and consequent modification it has undergone during the past

6 See eg George A Bermann, ‘The Self-Styled “Autonomy” of International Arbitration’ (2020) 36 Arb Intl 221. See also the comments of Thomas E Carbonneau, ‘Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce’ (1984) 19 Tex Intl L J 33; Henry P De Vries, ‘International Commercial Arbitration: A Substitute for National Courts’ (1982) 57 Tul L Rev 42; Albert Jan van den Berg, The New York Convention of 1958 (Kluwer 1981) 244.

7 JHC Morris, The Conflict of Laws, vol 1 (2nd edn, Stevens 1985) 1126.

8 See eg Moshe Hirsch, ‘Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and Multiple Theoretical Approach’ (2016) 19 JIEL 681. See also Alan S Alexandroff and Ian A Laird, ‘Compliance and Enforcement’ in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), The Oxford Handbook of International Investment Law (OUP 2008); Karl-Heinz Böckstiegel (ed), Acts of States and Arbitration (Heymanns 1997); Karl-Heinz Böckstiegel, ‘States in the International Arbitral Process’ (1986) 2 Arb Intl 22; Ernest K Bankas, The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts (Springer 2005). Though numbers on compliance are rare, a survey published in 2008 explains that corporations have not encountered major difficulties with respect to the recognition and enforcement of awards, suggesting counterparties generally comply with arbitral awards (see Queen Mary-University of London School of International Arbitration, ‘2008 Corporate Attitudes: Recognition and Enforcement of Foreign Awards’ (2008) <www.arbitration.qmul.ac.uk/media/arbitration/docs/lastudy_2008.pdf> accessed 22 November 2020).

9 For a major work on mixed arbitration, see Stephen J Toope, Mixed International Arbitration (Grotius 1990).
decades, the law of State immunity continues to place a significant obstacle to the effective implementation of mixed arbitral awards.\textsuperscript{10} What exacerbates this problem is that legislators, judges, and commentators alike wrestle with the current set of criteria under and by which immunities should be recognised or denied.\textsuperscript{11} As such, the perception of arbitration’s transportable enforceability may be fatally flawed in a situation where the foreign private party aims to execute an arbitral award against a recalcitrant State. After all, when immunity from execution allows States to escape their consensually assumed obligations, and when it allows for the fruits of a favourable award to be withheld from claimants, the promise of arbitration becomes, quite simply, a false promise.\textsuperscript{12}

The problem of execution immunities, however, should be distinguished from the related but already resolved question of immunity from jurisdiction. As far as the latter is concerned, the position is clear: a State’s consent to arbitration constitutes an implied waiver of any jurisdictional immunity.\textsuperscript{13}

\textsuperscript{10} The extensive literature on the subject includes Hazel Fox, ‘State Immunity and the New York Convention’ in Emmanuel Gaillard and Domenico Di Pietro (eds), \textit{Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice} (Cameron May 2008); Hazel Fox, ‘States and the Undertaking to Arbitrate’ (1988) 37 ICLQ 1; FA Mann, ‘State Contracts and International Arbitration’ (1967) 42 British YB Intl L (1967) 1; Christoph H Schreuer, \textit{State Immunity: Some Recent Developments} (Grotius 1988); James Crawford, ‘Execution of Judgments and Foreign Sovereign Immunity’ (1981) 75 AJIL 820; Georges R Delaume, ‘State Contracts and Transnational Arbitration’ (1981) 75 AJIL 784; Georges R Delaume, ‘Sovereign Immunity and Transnational Arbitration’ (1987) 3 Arb Intl 28; J Gillis Wetter, ‘Pleas of Sovereign Immunity and Act of Sovereignty Before International Arbitral Tribunals’ (1985) 2 J Intl Arb 7; Giorgio Bernini and Albert Jan van den Berg, ‘The Enforcement of Arbitral Awards Against a State: The Problem of Immunity from Execution’ in JDM Lew (ed), \textit{Contemporary Problems in International Arbitration} (Springer 1986); Emmanuel Gaillard and Jennifer Younan (eds), \textit{State Entities in International Arbitration} (Juris 2008); R Doak Bishop (ed), \textit{Enforcement of Arbitral Awards Against Sovereigns} (Juris 2009).

\textsuperscript{11} See eg James Crawford, ‘International Law and Foreign Sovereigns: Distinguishing Immune Transactions’ (1984) 54 British YB Intl L 75.

\textsuperscript{12} See eg Toope (n 9); Schreuer (n 10) 125. With respect to the perception of transportable enforceability, see most recently Andrea K Bjorklund, ‘Enforcement’ in Thomas Schultz and Federico Ortino (eds), \textit{The Oxford Handbook of International Arbitration} (OUP 2020) 186 (‘The ready enforceability of arbitral awards is the single strongest component of the architecture that undergirds international arbitration’).

\textsuperscript{13} A waiver of immunity from jurisdiction is deemed from submission to arbitration pursuant to, among others, the European Convention on State Immunity art 12, the UK State Immunity Act (signed 23 July 1978, entered into force 22 November 1978) s 9, and the US Foreign Sovereign Immunities Act of (signed 21 October 1976, entered into force 19 January 1977) s 1605(a)(1). See further Hazel Fox and Philippa Webb, \textit{The Law of State Immunity} (3rd edn, OUP 2013); Georges R Delaume, ‘Judicial Decisions Related to Sovereign Immunity and Transnational Arbitration’ (1987) 2 ICSID Rev – FILJ 403; Andrew Dickinson, Rae Lindsay and James P Loonam, \textit{State Immunity: Selected Materials and Commentary} (OUP
Alternatively, a better view might well be that there is – by default – no jurisdictional immunity in the context of arbitration, and that speaking of a ‘waiver’ is therefore misplaced. The reason for this is that arbitrators do not exercise their jurisdiction the way domestic courts do: arbitral jurisdiction is a creature of consent and a tribunal should consequently not be treated as a court at the seat of arbitration. If one further characterizes recognition proceedings before domestic courts as being concerned with the arbitral award itself, rather than with the State against which it was rendered, the exercise of such jurisdiction would also leave immunities out of play. Many, by contrast, argue that upholding a State’s immunity from execution is ‘entirely practical’ because, while proceedings leading to a judgment produce ‘no immediate hindrance’ to the conduct of State affairs, the eventual execution will involve a ‘use of force against a foreign state by the seizure of its assets’. In the context of arbitration, however, it can be argued that this argument is no longer compelling. Rather, an agreement to arbitrate should ultimately have the effect of waiving immunity from execution as well.

Although far too few commentators, much less judges, view the implied waiver of execution immunities as a favourable solution, it is a real possibility in the contractual context and under the auspices of the New York Convention. Building on this, the present article shows how the separate enforcement mechanism of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (‘the ICSID Convention’ or ‘the Convention’) can be read to align with the implied waiver we propose here. An initial reading of the literature may lead one to believe that participation

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14 See in support Nicolas Angelet, ‘Immunity and the Exercise of Jurisdiction – Indirect Impleading and Exequatur’ in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), The Cambridge Handbook of Immunities and International Law (CUP 2019) 81, 100–01. However, in line with the literature and practice, this article will adopt the widely used terminology of ‘waiving jurisdictional immunity’.

15 Hazel Fox, ‘Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity’ (1985) 34 ICLQ 115, 123. For the functional nature of immunity from execution, see also Mark A Cymrot, ‘Enforcing Sovereign Arbitral Awards – State Defences and Creditor Strategies in an Imperfect World’ in Ruys, Angelet and Ferro (n 14) 350 (‘Taking control of sovereign property is one of the most intrusive acts that one State can impose on another.’); The American Law Institute, Restatement (Fourth) of Foreign Relations Law of the United States, Sovereign Immunity, Council Draft No 3, 48. See further Ben Juratowitch, ‘Waiver of State Immunity and Enforcement of Arbitral Awards’ (2016) 6 Asian JIL 199; Jeremy Ostrander, ‘The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments’ (2004) 22 Berkeley J Intl L 541; Reinisch (n 13) 807; Fox and Webb (n 13) 481.
in the ICSID Convention cannot be interpreted as an implied waiver of immunity from execution because the Convention specifically preserves said immunity.\textsuperscript{16} But as will be seen, the provisions that do so are also considered to be ‘the Achilles heel’ of the International Centre for Settlement of Investment Disputes (ICSID) system.\textsuperscript{17}

Against this background, it may be opportune to examine whether an implied waiver of execution immunity can be made compatible with ICSID arbitration, and, if so, whether it may convince domestic courts to change their practice and to lift the execution immunities of foreign States in the arbitral context. In order to answer those questions, this article will first describe the Convention’s regime on the recognition and enforcement of awards (Section 2). It will then turn to the problem of execution which has entered the system as a result of the mixed juridical structure it inevitably requires (Section 3). From this, a principled conclusion will be drawn about the system’s compatibility with an implied waiver of execution immunity (Section 4). Finally, this article will set out the distinction between recognition and enforcement, on the one hand, and execution, on the other, and discuss why this causes domestic courts to reject the possibility of an implied waiver of immunity from execution (Section 5).

2 The Recognition and Enforcement of ICSID Awards

If the recognition and enforcement of arbitral awards under the New York Convention is usually rooted in a national law on arbitration, the ICSID Convention, by contrast, ‘provides for a comprehensive, self-sufficient system of truly international arbitration’.\textsuperscript{18} The Convention, seeking to maintain a careful balance between the interests of investors and those of States, prevents domestic courts from asserting jurisdiction or from taking any other action that might interfere with the autonomous and exclusive character of ICSID arbitration procedures. However, while the drafters of the Convention established an exclusive and closed jurisdictional system, insulated from national law, they were faced with the fact that awards resulting from ICSID proceedings would involve parties belonging to different juridical spheres, and that the

\textsuperscript{16} See eg Christoph H Schreuer and others, \textit{The ICSID Convention: A Commentary} (2nd edn, CUP 2009) 1173.

\textsuperscript{17} ibid 1154.

\textsuperscript{18} Albert Jan van den Berg, ‘Recent Enforcement Problems Under the New York and ICSID Conventions’ (1989) 5 Arb Intl 2, 3–4. See also Georges R Delaume, ‘ICSID Arbitration and the Courts’ (1983) 77 AJIL 784, 784 (‘The Convention … provides for a truly international arbitration machinery’).
Convention inevitably required the judicial assistance of domestic courts to recognize and enforce those awards. As such, the sole exception to this ‘rule of abstention’ and, thus, the sole role assigned to domestic courts relates to the recognition and enforcement of awards. In this regard, special attention needs to be given to Articles 53, 54 and 55.

The first of these articles addresses the binding force of an ICSID award. In fact, the language used in Article 53 is nothing but a restatement of the principles of *pacta sunt servanda* and *res judicata*. Their implementation into the Convention was dictated by a lingering doubt as to the unqualified acceptance of these principles in State practice. And understandably so, since States often questioned or denied the binding force of international undertakings between States and foreign private parties. As losing State parties in State-to-State arbitration had sometimes refused to comply with an award, it was suggested during the Convention’s initial discussions that the binding force of arbitration agreements should be recognized in an intergovernmental agreement.

This suggestion – to recognize the binding force of an arbitration agreement and, as a necessary consequence, the binding force of an award under the Convention – was first formulated in the Working Paper in the Form of a Draft Convention. One of the provisions of the Draft Convention stated that an ‘undertaking to have recourse to arbitration constitutes a legal obligation and must be carried out in good faith’, while another addressed the parties more specifically, stating that the ‘award shall be final and binding on the parties [and that] each party shall abide by and comply with the award.'

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19 See Aron Broches, ‘Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution’ (1987) 2 ICSID Rev – FILJ 287. For the legislative history, see ICSID, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – Documents Concerning the Origin and the Formulation of the Convention (1973)* (History).

20 Delaume (n 18) 784–85. See also *Maritime International Nominees Establishment v The Republic of Guinea*, US DC Cir Court, 693 F 2d 1094 (1982). It is this role of judicial assistance that has given rise to the Convention's rigorous finality, and that has created an enforcement mechanism with a status that is unique among dispute settlement systems (see eg Lucy Reed, Jan Paulsson and Nigel Blackaby, *Guide to ICSID Arbitration* (Kluwer Law International 2011) 179–90).

21 So far as relevant, art 53 reads as follows:

‘(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 …’

22 See eg Broches (n 19) 289 (where he presents these principles by reference to art 37 of the Hague Convention for the Pacific Settlement of International Disputes of 1907 and the *Socobel* case of the Permanent Court of International Justice).

23 ibid 289–91.

24 See History (n 19) vol II-1, 19–46.
immediately’.25 Though it is true that these two provisions overlap in part, the former enunciating a principle and the latter a specific rule, the binding force of an award, as well as the consequent rule mandating compliance with it, have found expression in all subsequent drafts leading to the Convention.26

Once the Convention had removed any doubt as to the legally binding character of both agreement to arbitrate and award, there was no reason to believe that States would not abide by them.27 Although the legislative history acknowledges the effect of the doctrine of State immunity on the enforcement of awards, there seemed no need to exaggerate the importance of this problem. As Broches put it, the difficulty concerned ‘the implementation of agreements to arbitrate rather than refusal to comply with an award once rendered’.28 Besides, in the unlikely event that a State would fail to comply with an award rendered against it, the Convention backed up the binding force of the award with two types of legal sanctions. First, investors could seek the diplomatic protection of their own government and, second, that government could bring an international claim before the International Court of Justice.29 However, as noted by certain Executive Directors, this highlighted a lack of balance; whereas private parties could ensure compliance through the international sanctions under the Convention, a State could not do the same when its private counterpart refused to comply. It was this imbalance, rather than the fear of State non-compliance, that made it necessary to create a special enforcement regime for Convention awards.30

Article 54, which is one of the Convention’s key provisions and one of its most striking innovations, provides for exactly this. It provides for the recognition and enforcement of ICSID awards by the courts of all State parties to the Convention.31 Though it was intended to give recourse against defaulting private parties (ie States would be the main beneficiaries), Article 54 does not distinguish between the enforcement of awards against private parties on the one side, and States on the other.32 Moreover, the obligation to recognize and

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25 ibid 23, 42 (art II s 3 and art VI s 10 respectively).
26 See Schreuer and others (n 16) 1100, 1106.
27 See Broches (n 19) 300. See also History (n 19) vol II-1, 10–11.
28 ibid.
29 ibid 294 ([art 27(1)] ‘bars the exercise of that right ... unless the other Contracting State shall have failed to abide by and comply with the award’).
30 ibid 301.
31 art 54(1) reads as follows:
‘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 ...’.
32 See History (n 19) vol II-1, 58, 60, 64. See further Broches (n 19) 301.
enforce awards applies to all States party to the Convention. It applies, in other words, not just to the State party to the proceedings and to the State whose national was a party to the proceedings.\(^33\) Now, without discussing the drafting in more detail, one may legitimately assert that Article 54 expresses a core idea of the Convention. After all, it has created a regime that equates an ICSID award ‘for the purposes of recognition and enforcement in the territories of a Contracting State ... with a final decision of the judiciary of that State’\(^34\). What this establishes is enforceability.\(^35\) More importantly, it establishes enforceability with rigorous finality. Compared to the situation under, for example, the New York Convention, domestic courts have no discretion to review an award once its authenticity has been ascertained; not even public policy provides a ground for denying enforcement.\(^36\) However, the Convention's remaining provisions and their legislative history make clear that ‘notwithstanding the final character of the awards which was to be respected by the courts of Contracting States, their forcible execution would be governed by the laws of the execution forum’.\(^37\)

Indeed, Article 54 states that the law of the State where execution is sought governs the execution of an award.\(^38\) Consequently, this law includes the law on State immunity.\(^39\) In introducing Article 55, Broches explained that it had been inserted ‘merely to make clear that the Convention did not seek

\(^{33}\) See Schreuer and others (n 16) 1123–24. Note that art 53, by contrast, refers only to the obligation of the parties to the arbitration to comply with the resulting award. See also History (n 19) vol II-1, 162 (‘[Article 54] requires each Contracting State, whether or not it or its national was a party to the proceedings, to recognize awards of tribunals pursuant to the Convention as binding and to enforce them as though they were final judgments of its own courts, irrespective of the treatment under its law of other arbitral awards’). For a more detailed account of the drafting history on this point, see Broches (n 19) 301–02, 305, 307–10, 313–14.

\(^{34}\) Broches (n 19) 316.

\(^{35}\) ibid 320.

\(^{36}\) See Schreuer and others (n 16) 1140–41.

\(^{37}\) Broches (n 19) 328.

\(^{38}\) art 54(3) reads in full:

‘Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought’.

\(^{39}\) art 55 reads as follows:

‘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’.

See also Broches (n 19) 328 (Article 55 provides that ‘the rules concerning sovereign immunity from execution that are found in the national law of the enforcing jurisdiction remain applicable’).
to change’ the contracting States’ domestic laws in relation to immunity.40 Here, two important distinctions need to be made. First, this provision only applies to immunity from execution; the immunity from jurisdiction does not at all arise in the context of the Convention.41 Second, Article 54 rather than Article 55 governs the recognition of an award by a domestic court. Under the combined force of Articles 54 and 55, the law of the enforcing State governs only execution.42 Therefore, State immunity cannot be called upon to thwart the recognition of an ICSID award, but will only come into play when actual measures of execution are taken to enforce an award’s pecuniary obligations.

Some, on the other hand, have regretted the express provision. Their argument is that the concern for effectiveness – to which the Convention bears witness – is strongly counter-balanced, if not eliminated, by the room given to the operation of immunity from execution. To Broches, ‘[t]hese critics overlook the fact that Article 55 does no more than acknowledge State practice as regards immunity from execution. Accordingly, the scope of Article 54 will evolve along with State practice’.43 To give an example of such criticism, the note written by Professor Oppetit may be highlighted: ‘if one may explain the insertion of such a reservation by the concern to facilitate the ratification of the Convention by States, one must on the other hand dread the lack of effectiveness of which the awards may as a result suffer’.44 However, this note is misleading in two ways: the first is the failure to recognise the crucial importance of Article 53 and the corresponding idea that Article 54 forms the basis for enforcement against States especially, and the second is the suggestion that Article 55 constitutes a reservation.45 As Broches clearly explains, the provision ‘merely acknowledges the existence of a principle of public international

40 Broches (n 19) 330.
41 See Schreuer and others (n 16) 1153. See also Georges R Delaume, ‘Contractual Waivers of Sovereign Immunity: Some Practical Considerations’ (1990) 5 ICSID Rev – FILJ 232; Delaume (n 13); Andrea Giardina, ‘L’exécution des sentences du Centre international pour le règlement des différends relatifs aux investissements’ (1982) 71 RCDIP 273.
42 ibid.
43 Aron Broches, ‘The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States’ (1972) 136 Recueil des Cours 331, 404.
44 Benvenuti and Bonfant v Congo, CA Paris (26 June 1981) 108 JDI 843, 845 (note Bruno Oppetit) 847 (English translation cited from Broches (n 19) 332).
45 See Broches (n 19) 332. As for the relationship between arts 53 and 54 in more detail, see Stanimir A Alexandrov, ‘Enforcement of ICSID Awards: Articles 53 and 54 of the ICSID Convention’ in Christina Binder and others (eds), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (OUP 2009).
law that would govern unless waived ... Article 55 was no more than a clarification of what would have been the case in any event’.46

Importantly, however, Oppetit’s explanation for the Article’s adoption, namely, that it would facilitate ratification of the Convention by States, does hold to some extent.47 Undoubtedly, any attempt to include a multilateral waiver of immunity from execution ‘would have run into the determined opposition of developing countries and would have jeopardized the wide ratification of the Convention’.48 Moreover, the suggestion that the Convention were to provide for exactly such an implied waiver was raised only once and the question was barely discussed during the Convention’s drafting.49 It was simply impossible at the time of drafting ‘to deal with the problem in any significant way through a multilateral treaty’.50 The position that the law of State immunity should remain unaffected was therefore consistently supported and, as a result, the availability and extent of execution now depend entirely on the domestic laws – including those governing State immunity.

If the ICSID Convention, as suggested at the time of drafting, would remove any doubt as to the legally binding character of an agreement to arbitrate, there was no reason to believe that governments would not abide by such undertakings.51 Presumably, the problem as then perceived related to the implementation and enforceability of such agreements, not to the execution of resulting awards. That, however, seems to no longer track reality. Instead, many now acknowledge that the Convention’s Achilles heel, its greatest weakness, is a problem of execution. Indeed, the room left by Article 55 for the operation of State immunity laws may be seen as a true flaw in the ICSID system. To illustrate this in more authoritative terms, ‘the otherwise effective machinery of arbitration has its weak point when it comes to the actual execution against States of pecuniary obligations under awards’ because ‘the self-contained nature of the procedure, which excludes the intervention of domestic courts, does not extend to the stage of execution’.52

46 ibid.
47 For a thorough discussion of the Convention’s ratification, see Taylor St John, ‘The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences’ (OUP 2018) 146–180.
48 Schreuer and others (n 16) 1154.
49 See eg Broches (n 19); Schreuer and others (n 16) 1153.
50 ibid 333. See further History (n 19) vol II-1, 345, 575.
51 See ibid vol II-1, 11.
52 Schreuer and others (n 16) 1154.
3 The Problem of Execution

The view that there is no need to exaggerate the importance of State immunity may have been optimistic to begin with, but is, with the problem of execution immunities brought into the ICSID system, startling at present.53 The reasons for the tendency to do away with an absolute immunity from execution have been repeatedly stated.54 It is unnecessary, in this paper, to elaborate on these reasons in detail. However, the main source of opposition to execution immunity has been the realization that absolute immunity is obsolete and productive of injustice at a time when States enter the commercial sphere, extending their operations beyond political activity. Today, as a result of treaty, statutory and judicial developments, the restrictive doctrine of immunity has gained broad acceptance, especially in countries where the execution of arbitral awards is often sought. Described in simple words, this restrictive approach grants immunity from execution to a State’s purely governmental properties, but not to State property with a non-governmental purpose.

The problem with execution based on this restrictive approach is that it relies on a distinction that seems impossible of definition and – given the varying approaches of domestic courts and the inconsistencies in their decisions – of application. The instances where the impact of execution immunities on ICSID awards has materialized show that the likelihood of a successful invocation of immunity from execution is high, and that award creditors should have no illusions as to the effective enforcement of awards by domestic courts. Following the award rendered in LETCO v Liberia, for example, execution against Liberian assets was sought before the US courts.55 The assets in question concerned various registration fees and taxes owed to the Government of Liberia as well as bank accounts of the Liberian Embassy in Washington DC. With regard to both types of assets, the US courts quashed the execution orders because the assets did not fall within the commercial activity exception for which the US Foreign States Immunities Act (FSIA) provides.56 These assets were, in other words, immune from execution because they were sovereign, and not commercial assets. With regard to the Embassy bank accounts in particular, the Court ruled that their incidental use for commercial activities

53 The view that there was no need to exaggerate the problem of state immunity is expressed in Broches (n 19) 300 (where he refers to History (n 19) vol II-1, 10–11).
54 See most notably Fox and Webb (n 13).
55 Liberian Eastern Timber Corp v Government of the Republic of Liberia (LETCO v Liberia), 650 F Supp 73 (SDNY 1986), reprinted in (1987) 2 ICSID Rev – FILJ 188.
56 See eg Reed, Paulsson and Blackaby (n 20); Delaume (n 41) 252–54.
in support of embassy operations ‘did not deprive the entire bank accounts of the mantle of sovereign immunity’.\footnote{ibid 188.}

The issue of execution also arose in France. In \textit{Benvenuti and Bonfant v Congo}, attempts to execute against the assets of a Congolese bank allegedly controlled by the Government failed.\footnote{Benvenuti and Bonfant v Congo (n 44).} After the Court of Appeal had held that the Convention limits the functions of a recognizing court to ascertaining an award’s authenticity, and that the order granting recognition should not concern itself with immunity from execution, the \textit{Cour de cassation} rendered its decision on the issue of execution. It ruled, in no uncertain terms, that the bank was a separate entity, with its own juridical personality, and that its assets could therefore not be attached in order to satisfy any claim against the Government.\footnote{See Delaume (n 41) 254.} Execution efforts in another case, \textit{SOABI v Senegal}, led to similar results.\footnote{SOABI v Senegal, CA Paris (5 December 1989) [1990] 117 JDI 141.} On the ground that a lower court’s order of \textit{exequatur} did not in itself amount to an act of execution, the Senegalese Government was ultimately entitled to its sovereign immunity.

Finally, in the decision of the English High Court in \textit{AIG Capital Partners v Kazakhstan}, the broad immunity from execution of foreign central bank assets was decisive.\footnote{AIG Capital Partners v Republic of Kazakhstan [2005] EWHC 2239 (Comm).} The Claimants attempted to enforce an ICSID award by obtaining a third-party debt and ordering execution against assets held by various London banks but belonging to the National Bank of Kazakhstan. The High Court granted the National Bank’s request to discharge the orders based on the UK State Immunity Act (SIA), which provides that ‘[p]roperty of a State’s central bank or monetary authority shall not be regarded … as in use or intended for use for commercial purposes’.\footnote{State Immunity Act 1978 (n 13) s 14(4).} As a result of this wording, the English Court found that the question of the intended use of the central bank’s property was irrelevant: if the central bank and the State of that central bank have an interest in the same property, ‘the relevant property is immune … whether the property concerned is in use or intended for use for commercial purposes or not’.\footnote{AIG Capital (n 61) 57.}

In effect, these decisions achieve the same result as those reached in the large number of cases that deal with the execution of non-ICSID awards.\footnote{Though it is beyond the scope of this paper to provide an in-depth analysis of non-ICSID cases, an overview may be provided by the literature in supra n 10.}
By making it virtually impossible for investors to prove that State property is, or may be, used for commercial activities, ‘these decisions restore, for all practical purposes and for the benefit of foreign States, the absolute doctrine of immunity that modern immunity rules are intended to supersede’. In the case of ICSID, as in other cases, it may thus become necessary – in order to overcome the burden of near-absolute execution immunities – to turn to waivers of immunity. When consenting to submit disputes to ICSID arbitration, parties have the opportunity to provide that the State involved waives its immunity from execution in connection with the enforcement of the award. Despite the many variations among legal systems, these waivers are most often required to be express. Short of earmarking specific assets for commercial purposes, there is thus no complete assurance that this type of waiver will always accomplish its intended purpose. An important question, therefore, is whether submission to arbitration can be regarded as an implied waiver of immunity. As far as jurisdictional immunities go, an affirmative answer is given by most treaty and statutory provisions as well as judicial decisions. In some countries, however, certain jurisdictional considerations condition such a waiver upon the existence of a territorial or other nexus between the arbitration and the forum. With regard to immunity from execution, the clear and prevailing view in current practice is that, by consenting to arbitration, a State does not waive this immunity. In other words, renunciation by a foreign State to its immunity from execution must arise out of a separate, specific, and unequivocal consent.

65 Delaume (n 41) 253.
66 See Delaume (n 18) 830. ICSID provides the following model clause for a waiver of immunity from execution of the award:

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.

See ICSID Model Clauses Doc ICSID/5/Rev 2 (1 February 1993) reprinted in 8 ICSID Rev – FILJ 134, 146.

67 For a concise overview of comparative materials with regards to State immunity rules, see supra n 13.

68 For the problem of waiver clauses, see Samarth Sagar, ‘Waiver of Sovereign Immunity Clauses in Contracts: An Examination of Their Legal Standing and Practical Value in Enforcement of International Arbitral Awards’ (2014) 31 J Intl Arb 609.

69 This is most notably the case in the United States and Switzerland (see eg Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela, US 2nd Cir, 863 F 3d 96 (2017); Banque Bruxelles Lambert (Suisse) SA et huit consorts v République du Paraguay, Swiss Federal Tribunal, ATF 124 III 382 (20 August 1998)).

70 See most recently Frédéric Dopagne, ‘Waivers of Immunity from Execution’ in Ruys, Angelet and Ferro (n 14). See also Reinisch (n 13) 817; Fox and Webb (n 13).
In this respect, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI) deserves brief consideration, as it has aimed to assist in the transition of a law of State immunity based on the positions of the world’s preferred forums to a more generally accepted law. Though it may seem improbable that the UNCSI will come into force in the near future, and though it remains debatable whether all provisions of the Convention reflect customary international law, it is relevant in the search for an international consensus on the fundamental questions of State immunity, ‘bearing in mind [their] day-to-day practical importance’. Under the Convention’s provisions, entering into an arbitration agreement will ‘waive immunity from the jurisdiction of a court, but it will not waive a foreign state’s immunity from execution against its assets’. So, for the sake of clarity, whether it concerns pre-judgment or post-judgment measures of constraint, waiving immunity from execution under the UNCSI requires express consent by international agreement, by an arbitration agreement, or by a declaration from the State directly before the courts. But unless and until the UNCSI enters into force, it remains a proposed reflection of State practice, and, thus, the rules of State immunity as they have been developed in national courts and statutory provisions will continue to prevail.

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71 United Nations Convention on Jurisdictional Immunities of States and Their Property (2 December 2004) adopted by A/Res/59/38, available in annex ‘Official Records of the General Assembly, Fifty-Ninth Session, Supplement No 49’ (14 September–23 December 2004) (A/59/49).

72 Roger O’Keefe and Christian J Tams (eds), The United Nations Convention on Jurisdictional Immunities of States and Their Property (OUP 2013) xxxvii. See in support Hazel Fox, ‘The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status’ in Ruys, Angelet and Ferro (n 14) 31 (‘Although in 2018 it may seem improbable that the UNCSI will shortly come into force as a treaty, [the Convention’s provisions, current application, and its ratification] must surely rank the UNCSI as a significant source of international law.’). However, it remains debatable whether the Convention – in particular its section on measures of constraint – truly codifies customary international law. See most notably Jurisdictional Immunities of the State (Germany v Italy, Greece Intervening) (Judgment) [2012] ICJ Rep 99, para 117.

73 Juratowitch (n 15) 214 (referring to UNCSI art 20: ‘consent to the exercise of jurisdiction ... shall not imply consent to the taking of measures of constraint’. See in contrast UNCSI art 17: ‘If a state enters into an agreement ... to submit to arbitration differences relating to a commercial transaction, that state cannot invoke immunity from jurisdiction before a court of another state.’).

74 See UNCSI arts 18 and 19: ‘[No pre- or post-judgment measures of constraint] ... may be taken in connection with a proceeding before a court of another State unless and except to the extent that ... the State has expressly consented to the taking of such measures’. (emphasis added)).
Some courts, however, have been willing to interpret consent to arbitration more broadly. In a sign that views on State immunity continue to change, these courts have taken a first step in holding that consent to arbitration implies a State’s waiver of immunity from execution as well as from jurisdiction. In this context, no decision has taken the matter further than that of the French Cour de Cassation in Creighton Ltd v Qatar. The case involved the execution of an award under the ICC Rules against Qatar, after it expelled Creighton from a construction project. The Court relied on Article 24(2) of the 1988 ICC Arbitration Rules, and recognized that an agreement to arbitrate under these rules constituted not only a waiver of immunity from jurisdiction, but also a waiver of immunity from execution. Though the Court ruled on an arbitration agreement under the ICC Rules, its solution was broad enough to cover agreements referring to any arbitration rules containing a similar obligation.

In support of this, Lady Hazel Fox has suggested that arbitration agreements under rules such as those of the ICC or commitments to other instruments, which impose obligations on parties to honour an award rendered, argue for ‘an even stronger case of implied waiver of immunity from execution of the award’. French commentators, however, have long been divided as to the

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75 Swiss courts have long taken an independent line on the basis that a judgment imports enforceability (Greece v Julius Bar and Co, Swiss Federal Tribunal (6 June 1956) 23 ILR 195, 198; Egypt v Cinetel, Swiss Federal Tribunal (20 July 1979) [1981] 65 ILR 425, 430). In the specific context of an implied waiver of immunity from execution, however, other decisions have made the argument much clearer.

76 Société Creighton v Qatar, Civ 1re (6 July 2000) [2001] Rev Arb 114. See further Société Creighton v Qatar, CA Paris (12 December 2001) [2003] Rev Arb 477; Libyan American Oil Co v Libya, Swedish Court of Appeal (18 June 1980) 62 ILR 225; Walker International Holdings Ltd v Republic of Congo, 5th Cir, 395 F 3d 229 (2004) (Though this decision found immunity to be waived ‘explicitly’, it can still be placed in the same category as Creighton for the proposition that agreement to the ICC Arbitration Rules constitutes a waiver of immunity from execution.).

77 The relevant extract of the decision held that ‘l’engagement pris par l’État signataire de la clause d’arbitrage de la Chambre de commerce internationale impliquait renonciation de cet État à l’immunité d’exécution’. (Art 24(2), which currently corresponds to art 35(6) of the 2017 ICC Arbitration Rules, provided that: ‘by submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made’.

78 See eg UNCITRAL Arbitration Rules art 32(2) (‘[T]he award shall be made in writing and shall be final and binding on the parties ... The parties undertake to carry out the award without delay.’).

79 Fox and Webb (n 13) 388. See further Juratowitch (n 15) 226 (‘[The decisions in Creighton and Walker] are both authority for the proposition that agreement to the ICC Arbitration Rules constitutes implied waiver of immunity from execution’).
wisdom, legal grounds, and scope of this liberal solution. So, ‘[t]hough welcomed as honouring the principle of good faith and strengthening resort to arbitration, it has been criticized as contrary to the earlier ruling of the Court of Cassation in *Eurodif*, and as undermining the requirement that waiver of immunity be express and certain.’

As things stand now, these cases, which significantly rely on the principle of good faith and recognize the possibility of a double waiver, are still the exception to the rule. The view that immunity from execution is a separate affair, even when States consent to arbitration, continues to dominate the practice. In addition, the argument is normally presented in a contractual context and under the auspices of the New York Convention; in the context of ICSID arbitration, the argument for an implied waiver of execution immunities is normally rejected. Understandably, this problem was impossible to deal with at the time of drafting the Convention. Any attempt to lay down a multilateral rule of waiver of immunity from execution ‘would have encountered objections from all sides’.

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80 See eg Fleur Malet-Deraedt, ‘The New French Legislation on State Immunities from Enforcement’ (2018) 36 ASA Bull 332 (referring to Philippe Théry, ‘Feu l’immunité d’exécution’ (2001) Gaz Pal i8, and Philippe Leboulanger, ‘Clause compromissoire et renonciation à l’immunité d’exécution de l’Etat : une évolution attendue’ (2001) Rev Arb 114); Nathalie Meyer Fabre, ‘Enforcement of Arbitral Awards Against Sovereign States, a New Milestone: Signing ICC Arbitration Clause Entails Waiver of Immunity from Execution Held French Court of Cassation in *Creighton vs Qatar*, July 6, 2000’ (2000) 15 Intl Arb Rep 1; Sarah François-Poncet, Brenda Horrigan and Lara Karam, ‘Enforcement of Arbitral Awards Against Sovereign States or State Entities – France’ in Doak Bishop (n 10) 369–72.

81 Fox and Webb (n 13) 489–90 (referring to *Société Eurodif v Iran*, Civ 1re (14 March 1984) 23 LIM 1062). It is important to note that, with the enactment of new legislation, France seems to have reinstated this requirement for a waiver to be both express and specific, embracing a distinctly more protective approach than that in UNCSI. See in this respect *Loi no 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique*, JO (10 December 2016) 0287 (Loi Sapin II); *Commisimpex v Congo*, Civ 1re (10 January 2018) Bull civ no 16-22494; Malet-Deraedt (n 80); Nathalie Meyer Fabre, ‘Waivers of Immunity from Execution: A New Turn By The French Court of Cassation’ (2015) 30 Intl Arb Rep 1.

82 See eg Andrea K Bjorklund, ‘Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes’ (2010) 21 Am Rev Intl Arb 211, 225 (‘One could … argue that guarding execution immunity is inconsistent with the whole structure of the international investment regime. Yet the principle of execution immunity is so firmly entrenched in state practice that the argument of an implicit waiver of it is unlikely to prevail.’).

83 See eg Van den Berg (n 18) 14. See also Schreuer and others (n 16) 1173.

84 Michael M Moore, ‘International Arbitration Between States and Foreign Investors – The World Bank Convention’ (1966) 18 Stan L Rev 1359, 1378.
namely, the assimilation of a foreign State’s agreement to ICSID arbitration with a waiver of its immunity from execution, appears on the face of it to be far-reaching and drastic. Yet, the harsh reality for creditors of ICSID awards is that they are burdened with an unworkable immunity doctrine and with a system that preserves it.

4 A Principled Call for the Implied Waiver

The following conclusions may provisionally be drawn from what has been said in the preceding sections of this paper: (1) the Convention prevents domestic courts from taking any action that might interfere with the exclusive and autonomous character of ICSID arbitrations, and requires them to treat awards rendered pursuant to it as a final judgment; (2) this comprehensive and self-sufficient system does not, however, extend to the execution of such awards, which leaves the availability and extent of execution completely dependent on the domestic laws of State immunity; (3) in so far as these two stages are separated, the general problem of execution immunities enters the Convention and – given the unworkable nature of the restrictive approach – can be pointed to as the system’s true Achilles heel; and (4) it has already been suggested outside the ICSID system that a realistic solution to this problem would be to interpret a State’s consent to arbitration as an implied waiver of its immunity from execution.

The practical consequence following from these conclusions would seem to involve acceptance of that same solution, and to justify a call for recognition of the implied waiver of execution immunities in the context of ICSID arbitrations. Though many believe it to be impossible due to the Convention’s preservation of the immunity doctrine, this end can be achieved by a departure from the existing practice of domestic courts or, what is one and the same thing, by a change in their view of State immunity laws.85 This contention

85 The argument is, in effect, to shift the default position: consent to arbitration should be deemed a clear evidence of waiving immunity from execution – that is, unless this presumption can be rebutted. Additionally, shifting the default position would make the argument compatible with the decision in ELSI, where the Court found itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so (Elettronica Sicula SPA (ELSI) (Judgment) [1989] ICJ Rep 15, para 50). If immunity from execution can truly be considered a rule of customary international law (see supra n 72), an arbitration agreement would – under the new default position – make clear an intention to do away with it.
The Problem of Execution Immunities and the ICSID Convention

does not have to be perceived as ‘an undue predominance’ of the protection of private justice over the dignity and sovereign authority of States; it should rather be seen as ‘the reasonable consequence of the legal – and moral – obligation to respect the rule of law to which the sovereign itself defers’.86 In that direction, so far as contractual arbitration agreements under the New York Convention are concerned, reasons have been given why, subject to certain safeguards, domestic courts can be incited to further encroach on the execution immunities of foreign States.87 It may now be convenient to outline the principled reasons why this can also be done under the ICSID system.

Firstly, the Convention neither grants nor confirms immunity. The statement in Article 55 is purely negative. This must mean two things. First, as has already been discussed, the availability and extent of execution depends on the domestic law and its application by the courts. An award becomes a final judgment by virtue of the self-sufficient ICSID system but, like other judgments, it will only be executed to the extent that immunity from execution is not granted or that execution is limited under the local law of the State where it is sought.88 The second – more important – consequence of this negative formulation is that it does not freeze the local laws on State immunity.89 The Convention’s drafter has explained that Article 55 does no more than acknowledge state practice as regards immunity from execution. Accordingly, the scope of Article 54 will evolve along with state practice.90 To the extent that immunity from execution evolves over time, the possibilities for the execution of ICSID awards against States evolve as well. So, the Convention may safeguard the operation of domestic law recognizing immunity from execution, but it cannot prevent that law from undergoing changes.

Secondly, as the Convention allows for such change to occur, the competing interests of State sovereignty and private justice can be more readily accommodated than they currently are – both in judicial decisions and in legislation. As was successfully argued in respect of jurisdictional immunities, it is undeniable that an absolute rule of immunity from execution is incompatible with

86 Carlo de Stefano, ‘Arbitration Agreements as Waivers to Sovereign Immunity’ (2014) 30 Arb Intl 59, 90.
87 See eg Fox (n 10); Hazel Fox, ‘State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property?’ (1996) 12 Arb Intl 89.
88 See again History (n 19) vol II-1, 520, 575.
89 See eg Schreuer and others (n 16) 1155.
90 Broches (n 43) 404.
the subjection of a sovereign State to the rule of law.\textsuperscript{91} As to its alternative, considering the wide coverage of the shift towards a restrictive approach, it suffices to say that there is no consensus in current State practice as to the proper characterization of governmental and non-governmental activities. In fact, as Brownlie rightly observed, there is a logical contradiction in seeking to distinguish them: ‘the concept of acts \textit{iure gestionis}, of commercial, non-governmental, or less essential activity requires value judgments, which rest on political assumptions as to the proper sphere of state activity and of priorities in state policies’.\textsuperscript{92} Hence, the many accounts of issues arising out of this commerciality exception illustrate that it may have been right to say that an approach based on this distinction is impossible of definition and, therefore, of application.\textsuperscript{93}

That is why the question of whether ‘the uncertainty by [domestic court] decisions, the inconsistencies, and the resulting absence of an ascertainable standard capable of general application ought to be perpetuated’ should, persuasively, be answered in the negative.\textsuperscript{94} That is not to say, however, that these problems under the restrictive approach are to be disregarded altogether. But in the context of international arbitration, the law on execution immunities should – and can – be placed on a footing different from both the absolute doctrine and the existing concession that subjects investors to an unworkable distinction. The call for an implied waiver, if accepted, would do away with the presumption of State immunity and, as such, it would do away with the effectively absolute barrier to execution. An implied waiver would effectively shift the default position and create more transparency: consent to ICSID arbitration should be deemed to constitute clear evidence of waiving immunity from execution – that is, unless this presumption can be rebutted by the State.

It would be cynical to defend a State that ‘screens itself behind the shield of immunity in order to defeat a legitimate claim’, but a balance or safeguard can nevertheless be struck with regard to the dignity of foreign States.\textsuperscript{95} Instead

\textsuperscript{91} See Hersch Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’ (1951) 28 British YB Intl L 220.

\textsuperscript{92} Ian Brownlie, \textit{Principles of Public International Law} (3rd edn, Clarendon 1979) 330–31 (cited from Crawford (n 11) 89). See to similar effect Lauterpacht (n 91) 224–26.

\textsuperscript{93} For accounts on the commercial activity exception, see Fox and Webb (n 13); Crawford (n 11); David W Rivkin and Christopher K Tahbaz, ‘Attachment and Execution on Commercial Assets’ in Bishop (n 10); Cedric Ryngaert, ‘Embassy Bank Accounts and State Immunity from Execution: Doing Justice to the Financial Interests of Creditors’ (2013) 26 LJIL 73; Kelsey A Rose, ‘When Immunity Means Impunity: Lessons for Canada from Recent Cases on State Immunity from Execution’ (2018) 55 Can YB Intl L 1.

\textsuperscript{94} Lauterpacht (n 91) 225 (though with reference to the problem of restricting jurisdictional, rather than execution, immunities).

\textsuperscript{95} ibid 235.
of accepting the restrictive approach as a sole and sufficient basis for future law, it would be preferable to salvage from it what appears to be sound and practicable. One could argue that the rules needed to achieve this, namely, that certain categories of State property must remain non-executable, is already in place. Practically every legal system accepts that, for example, warships and other military property, central bank property, and the property in use by diplomatic missions are given a reinforced immunity.\textsuperscript{96} With the interest of States in mind, the reinforced immunity would be a proportionate and already accepted limitation to the scope of the solution proposed, as it places a burden of proof on the States, while providing them with all the dignity and protection they can legitimately and in good faith expect when they have agreed to arbitrate and to abide by the resulting decision.\textsuperscript{97}

Thirdly, in order to successfully call for an implied waiver of execution immunities under the ICSID Convention, such waiver, too, must be derived from a State’s consent to arbitration. When considering the opposing view, it must now be clear that, though immunity is preserved, its availability and extent may evolve over time. The other element on which the main opposition rests is that participation in the Convention cannot be interpreted as an implied waiver.\textsuperscript{98} This, admittedly, is true. Participation, on the part of a contracting State, is ‘only an expression of its willingness to make use of the ICSID machinery’.\textsuperscript{99} It does not, as such, constitute an obligation to use that machinery. As a matter of fact, a State would be perfectly free to sign the ICSID Convention without ever intending to refer to it. In this respect, the importance of consent to the arbitration itself – in addition to the State’s consent to the ICSID Convention – cannot be overemphasized.\textsuperscript{100} Only after a State

\textsuperscript{96} In particular relation to embassy bank accounts, see the following: \textit{Philippine Embassy Bank Account Case}, German Federal Constitutional Court (13 December 1977) 65 ILR 146; \textit{Russia v NOGA Import/Export Co}, CA Paris (10 August 2000) 127 ILR 155; \textit{Republic of ‘A’ Embassy Account Case}, Austrian Supreme Court (3 April 1986) 77 ILR 489; \textit{Alcom v Republic of Colombia}, UK House of Lords (12 April 1984) AC 580; \textit{The Netherlands v Azeta BV}, District Court of Rotterdam (14 May 1998) 128 ILR 688; \textit{Sedelmeyer v Russia}, Sweden Supreme Court (11 July 2011) [2012] 106 AJIL 347.

\textsuperscript{97} Internationally, this safeguard of a reinforced immunity and the acceptance that certain categories of State property must remain non-executable can most clearly be found in UNCSII art 21.

\textsuperscript{98} See eg Schreuer and others (n 16).

\textsuperscript{99} Georges R Delaume, ‘ICSID Arbitration: Practical Considerations’ (1984) 1 J Intl Arb 101, 104.

\textsuperscript{100} See ‘Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, International Bank for Reconstruction and Development’ (18 March 1965) (cited from Guiguo Wang, ‘Consent in Investor-State Arbitration: A Critical Analysis’ (2014) 13 Chinese JIL 335, 337).
specifically agrees to submit itself to arbitration under the Convention can the obligation to make use of its machinery arise.\footnote{See Delaume (n 99).}

To say of arbitration that it is consensual is of course commonplace. A claimant initiates arbitration because it has agreed with the defendant to resolve any dispute between them accordingly. The ICSID Convention, too, was intended to serve this traditional vision: for parties to submit to arbitration, Article 25 requires them to ‘consent in writing’ and holds consequently that, once they have given their consent, ‘no party may withdraw its consent unilaterally’.\footnote{See in this regard Matteo M Winkler, ‘Arbitration Without Privity and Russian Oil: The Yukos Case Before the Houston Court’ (2006) 27 U Pa J Intl L 115, 127.} Yet, in the world of investment arbitration, parties need not have a direct contractual relationship to establish an agreement to arbitrate. Even without a contract, the State may have previously given its consent through either a unilateral promise contained in a national investment law or provisions in bilateral and multilateral investment treaties. This principle, namely, that national investment legislation or treaty may contain an ‘offer to arbitrate’ is well-known.\footnote{See among others Jan Paulsson, ‘Arbitration Without Privity’ (1995) 10 ICSID Rev – FILJ 232; Winkler (n 102); Wang (n 100); James Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 Arb Intl 351.} However, it bears repeating that, on its own, the offer does not constitute an agreement to arbitrate; the private investor must still accept it. By simply initiating the ICSID arbitration, the investor is able to formally manifest its consent. Only then is there ‘a perfected agreement to arbitrate between a qualified investor and the host state’.\footnote{Crawford (n 103) 360. See in support Republic of Ecuador v Occidental Exploration and Production Co [2005] EWCA Civ 116, 33 (‘Further … the agreement to arbitrate which results by following the treaty route is not itself a treaty. It is an agreement between a private investor on the one side and the relevant state on the other.’). See more recently and in the context of ICSID enforcement proceedings Gold Reserve Inc v The Bolivarian Republic of Venezuela [2016] EWHC 153 (Comm) para 17 (where Justice Teare noted that ‘[t]he mechanism by which the BIT can give rise to an agreement in writing for the purposes of section 9 of the State Immunity Act 1978 is to regard the consent of the State to arbitrate claims by an investor (as defined in the BIT) as a unilateral offer to an investor to arbitrate, which offer is accepted by the investor when he commences arbitration against the State.’).}

The essence of such direct action is that it allows the true claimant to face the true defendant. Consent to ICSID arbitration therefore has the immense merit of clarity and realism, which are obvious prerequisites of confidence in the legal process.\footnote{See most notably Paulsson (n 103) 256.} The aim, as illustrated by Paulsson, is not to take anything away from States, but to ensure there is faith in their promises: ‘The objective is not arbitration that favors the foreigner, but one that simply favors
neutrality'.\textsuperscript{106} By contrast, the idea of a neutral arbitration does not always correspond with reality. In practice, it can so happen that creditors of ICSID awards, having put all their efforts in the arbitration and in securing an order to enforce the favourable award, are left empty-handed when States claim their immunity from execution.\textsuperscript{107} Even in those States where the restrictive doctrine, based on the distinction between governmental and non-governmental matters, is applied – that is, if these tests are functional at all – it appears to favour States. The paramount consideration of neutrality is, in other words, overshadowed by an archaic deference to State immunity. So, unless the position of investors improves by way of a general waiver of immunity implied from consent to arbitration ‘the main principle governing the commercial world, \textit{pacta sunt servanda}, will always and undoubtedly be violated, and this confused and confusing situation will be perpetuated’.\textsuperscript{108} Therefore, once a State agrees to arbitration, ‘it must be deemed to have accepted all its consequences, including compliance with an unfavourable award’.\textsuperscript{109} Put differently, consent to arbitration should ultimately have the effect of waiving immunity from execution; it is nothing but an application of the principle of \textit{pacta sunt servanda}.

5 Is There a Way Forward?

Based on the observations above, an implied waiver of execution immunities can be made compatible with ICSID arbitration – something which in itself is an important conclusion. As a preceding section supports in more detail, Article 53 ‘establishes a complete parallelism’ between, on the one hand, the legally binding nature of the arbitration agreement and the obligation to comply with the award, and ‘the possibility of the enforcement of that obligation through domestic courts’, on the other.\textsuperscript{110} Thus, a use of the Convention’s enforcement mechanism inevitably means one of two parties to the arbitration has failed to comply with its obligation. But it was assumed at the time that States would comply. The current problem of execution immunities produces results that, when it comes to the effectiveness of ICSID awards, were not intended nor foreseen by the drafters. Fortunately, in inciting domestic courts to broaden their interpretation, ‘[t]he obligation of governments to abide by

\begin{itemize}
\item \textsuperscript{106} ibid.
\item \textsuperscript{107} See eg van den Berg (n 18).
\item \textsuperscript{108} Bernini and van den Berg (n 10) 373.
\item \textsuperscript{109} van den Berg (n 18) 13.
\item \textsuperscript{110} Broches (n 19) 294. See in more detail Alexandrov (n 45).
\end{itemize}
awards remains unaffected by the limitations on their forcible execution'.\textsuperscript{111} It is, in other words, the international origin of the system that must take back all its importance.\textsuperscript{112}

Admittedly, however, such a change in the interpretation of domestic courts has not yet taken place. As things stand now, the view that immunity from execution is a separate affair, even when States consent to arbitration, continues to dominate the practice.\textsuperscript{113} The instances in which courts have recognized the possibility of a double waiver remain the exception to the rule.\textsuperscript{114} Entering into an arbitration agreement will, in other words, ‘waive immunity from the jurisdiction of a court, but it will not waive a foreign state’s immunity from execution against its assets’.\textsuperscript{115} The current reluctance of domestic courts to expand the scope of existing restrictions of State immunity seems to be grounded in political and economic considerations, and is part and parcel of the various conceptualizations of a restrictive approach.\textsuperscript{116} It is, in that respect, a reflection of the idea that the pronouncement of a judgment is much less of an interference with a foreign State’s freedom to manage its own affairs than is enforcement against its property.\textsuperscript{117}

The reluctance to change may also be explained in part by the prevailing distinctions between ‘recognition’, ‘enforcement’, and ‘execution’.\textsuperscript{118} The three terms are often used interchangeably in practice, though they describe

\begin{footnotesize}
\textsuperscript{111} ibid 302.
\textsuperscript{112} The situation has been correctly summarized by Giardina in the following words:
'Dans le préambule de la convention il est déclaré que l’accord arbitral impose l’obligation d’exécuter la sentence éventuelle, et l’article 53 de la convention confirme que la sentence est obligatoire pour les parties en cause et qu’elle doit être exécutée dans les délais prescrits. La non-exécution constitue donc une violation de cette obligation spécifique permettant l’utilisation, au niveau interétatique, des mécanismes internationaux traditionnels, tels que ceux de la protection diplomatique et de la tutelle juridictionnelle directe devant la Cour internationale de justice’ (Giardina (n 41) 292).
\textsuperscript{113} See eg Bjorklund (n 82).
\textsuperscript{114} In fact, the reason why the Creighton decision was criticized so heavily is because it arguably conflated ‘the recognition by the parties of the binding force of the award and the determination of the actual assets against which the latter can be enforced’ (see Dopagne (n 70) n 48). In support of Dopagne, see Emmanuel Gaillard, ‘Convention d’Arbitrage et Immunités de Juridiction et d’Exécution des États Étrangers et Organisations Internationales’ (2000) 18 ASA Bull 471, 479.
\textsuperscript{115} Juratowitch (n 15) 214.
\textsuperscript{116} For a clear expression of this reluctance, see Orascom Telecom Holding SAE v Republic of Chad [2008] EWHC 1841 (Comm).
\textsuperscript{117} See eg Fox (n 15) 123 (to effect that enforcement, ‘the forum court requires the assistance of the executive arm of government and the friction such seizure is likely to cause in relations between the two countries has produced a rule of wide immunity from execution’).
\textsuperscript{118} See eg Toope (n 9) 246.
\end{footnotesize}
distinct steps in the final phases of the arbitral process.\textsuperscript{119} Some, for example, assimilate ‘enforcement’ to ‘recognition’ and use the terms more or less synonymously.\textsuperscript{120} However, even those with the most intimate knowledge of the Convention’s drafting are not entirely clear on the subject. As noted by Schreuer, Broches seems in one place to suggest that enforcement covers both recognition and execution, while dismissing that idea in a different context.\textsuperscript{121} That is not to say that the different uses are inherently correct or incorrect, but categorising these terms is a necessary step in the search for an accurate and coherent understanding of the arbitral process and the place State immunities have therein.

Recognition is generally accepted to be the stage in the process that accords \textit{res judicata} to an award and that precedes enforcement.\textsuperscript{122} Yet, when it comes to the stage of enforcement, there is disagreement as to whether – for the purposes of the ICSID Convention – it is the same as execution, or whether there exists a distinction between these stages.\textsuperscript{123} A notable example of the former view is presented by Schreuer, who argues that enforcement and execution are identical under the Convention.\textsuperscript{124} Broches, on the other hand, makes a distinction between the two, holding that a slightly different formulation of the Convention ‘would have brought out more clearly the distinction between enforceability which is governed and decreed by the Convention and its implementation by execution which is governed by domestic law.’\textsuperscript{125} Many

\begin{footnotesize}
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\item[119] See Schreuer and others (n 16) 1135.
\item[120] See Georges R Delaume, ‘Arbitration with Governments: Domestic v International Awards’ (1983) 17 The International Lawyer 687, 695–96; Delaume (n 18) 799; Van den Berg (n 18) 11 ff.
\item[121] See Schreuer and others (n 16) 1136 (referring to Broches (n 19) 318, 320–21).
\item[122] See eg Bjorklund (n 82) 216. See also Inna Uchkunova and Oleg Temnikov, ‘Enforcement of Awards Under the ICSID Convention – What Solutions to the Problem of State Immunity?’ (2014) 29 ICSID Rev – FILJ 187.
\item[123] For a discussion of the definitions, see Olga Gerlich, ‘State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles’ Heel of the Investor-State Arbitration System?’ (2015) 26 Am Rev Intl Arb 47, 54–60; Reed, Paulsson and Blackaby (n 20).
\item[124] See Schreuer and others (n 16) 1134–36. See also J Martin Hunter and Javier García Olmedo, “Enforcement/Execution” of ICSID Awards Against Recalcitrant States’ (2011) 12 JWIT 307; Abby Cohen Smutny, Anne D Smith and McCoy Pitt, ‘Enforcement of ICSID Convention Arbitral Awards in US Courts’ (2016) 43 Pepp L Rev 649.
\item[125] Broches (n 19) 318. In support see Ioannis Kardassopoulos and Ron Fuchs v Georgia, ICSID Case Nos ARB/05/18 and ARB/07/15, Decision of the \textit{ad hoc} Committee on the Stay of Enforcement of the Award (12 November 2010) para 30 (‘The simplified and automatic enforcement system of Article 54(1) of the ICSID Convention should not be conflated with the measures of execution that follow the order granted by the court or authority designated in accordance with Article 54(2) for enforcement of the award and which are referred to in Article 54(3) ...’). See further Toope (n 9) 245–47; Juratowitch (n 15).
\end{enumerate}
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commentators have since followed this position and separate enforcement from execution. As such, ‘[t]he two terms – recognition and enforcement – tend to be used in a single phrase that broadly refers to all steps leading up to, but stopping short of, actual execution of an award’.

To a similar effect, many court decisions have found a distinction between the enforcement and the execution of ICSID-awards. In *Benvenuti and Bonfant*, for example, the investor turned to the French courts in an attempt to have a favourable award enforced and executed against the recalcitrant State party. At first instance, the *Tribunal de grande instance* of Paris granted an order of *exequatur*, which contained the following restriction: ‘No measure of execution, or even a conservatory measure, shall be taken pursuant to the said award, on any assets located in France, without the prior authorization of this Court’. Claimants thereupon seized the Court of Appeal, which reformed the earlier decision by deleting the above-quoted limiting language. On appeal, the Court held that an order granting recognition is not in itself an act of execution, and that the lower court had thus exceeded its authority by dealing – at that stage of the proceedings – with matters of immunity from execution. More specifically, after quoting Article 54, the Court held that the restriction made in the order should be deleted since it was directly contrary to the simplified proceedings laid down under this provision of the ICSID Convention. Later, French courts would reach the same result in a different case.

126 Reed, Paulsson and Blackaby (n 20) 180.
127 See most recently *Eiser Infrastructure Ltd v Kingdom of Spain* [2020] FCA 157 (in which Stewart J extensively sets out the discussion on the enforcement/execution of ICSID awards). See also the decisions in *Micula and Others v Romania* [2020] UKSC 5; *Micula v Romania* [2018] EWCA Civ 1801.
128 *Benvenuti and Bonfant v Congo*, TGI Paris (13 January 1981) 108 JDI 365. See also Schreuer and others (n 16) 1130 (‘An order of 13 January 1981 by the same Court confirmed the prior decision and refused to remove the limiting condition on the ground that it was impossible at that stage to distinguish funds or assets that were to be used for sovereign activities from those originating from commercial activity of a private law character.’). The prior decision of 23 December 1980 is unpublished. The quoted passage is from Rosemary Rayfuse (ed), *ICSID Reports*, vol 1 (CUP 1993) 372.
129 *Benvenuti and Bonfant* (n 44).
130 For a more detailed account of the proceedings, see Delaume (n 18) 796–800.
131 In its exact words, the Court of Appeal said: ‘The judge at first instance, acting on a request pursuant to Article 54 of the Convention of Washington, could not therefore, without exceeding his competence, become involved in the second stage, that of execution, to which the question of the immunity from execution of foreign States relates’.
132 In *SOABI v Senegal*, CA Paris (5 December 1989) [1990] 17 JDI 141, the Court held that a foreign State by submitting to arbitration accepts that the award may receive an order of *exequatur*, and that such an *exequatur* does not in itself constitute an act of execution.
Courts in the United States, too, have been presented with the issue of rec-
ognition and enforcement of ICSID awards.133 In the case of LETCO v Liberia,
the Liberian Government moved to vacate the judgment entered by the
Federal District Court for the Southern District of New York or, in the alterna-
tive, vacate the order of execution permitting LETCO to begin enforcing that
judgment.134 The Court, however, denied the motion to vacate. First, it rea-
soned that Article 54 of the Convention obliges the United States – as it obliges
any other contracting State – ‘to recognize and enforce the pecuniary obliga-
tion of the award’.135 Second, the Court held that ‘Liberia, as a Convention
signatory, waived its sovereign immunity with respect to recognition of any
arbitration award entered pursuant to the Convention’, because, third, hav-
ing regard to Article 54, ‘Liberia clearly contemplated the involvement of the
courts of any of the Contracting States, including the United States as a signa-
tory to the Convention, in enforcing the pecuniary obligations of the award’.136

These court decisions draw a clear distinction between the recognition and
enforcement of awards, on the one hand, and their actual execution, on the
other. To that extent, there is no State immunity with respect to the recognition
or enforcement of an ICSID award, and issues of immunity from execution can
only arise under Article 55 when actual execution measures are taken.137 As a
matter of great practical significance, and regardless of the exact definitions
given to the different enforcement stages, the combination of Articles 54 and
55 means two things: first, a recognized ICSID award becomes a valid title on
whose basis measures of execution can be taken, provided, second, that where
such measures are directed at State property, execution is possible under the
law of the contracting State in which execution is sought.138 A distinction
that is intimately linked – if not the same in this context – is the distinction
between jurisdictional immunity and immunity from execution.139 In so far
as one accepts the predominant tendency in domestic and international
practice that a waiver of execution immunity is required to be express, ‘it
becomes self-evident that a waiver of the immunity from jurisdiction, whether
express or implicit, does not in itself mean that the State has also waived its

133 See eg Sophie Davin, ‘Enforcement of ICSID Awards in the United States: Should the
ICSID Convention Be Read as Allowing a “Second Bite of the Apple”’ (2016) 48 NYU
J Intl L and Pol 1255.
134 LETCO v Liberia (n 55). The approach in LETCO has more recently been followed in Blue
Ridge Investment LLC v Republic of Argentina, 2nd Cir, 735 F 3d 72 (2013). This was then
affirmed in Mobil Cerro (n 69).
135 ibid 190.
136 ibid 190–91.
137 See Schreuer and others (n 16) 1132.
138 See Delaume (n 18) 800.
139 In this respect, see the references at supra n 13.
immunity from execution'.\textsuperscript{140} It becomes clear, in other words, that when a State enters into an ICSID arbitration agreement, it waives any jurisdictional immunity with respect to the enforcement of the resulting award, but keeps its immunity from any measures of execution.

Although these distinct regimes explain the reluctance of domestic courts to follow the interpretation of an implied waiver, it does not make the question of its possibility less relevant.\textsuperscript{141} If anything, the preceding sections have highlighted a renewed emphasis in scholarship and in case law on the question of State immunity in international arbitration. While it is beyond the scope of this article to examine in more detail why the possibility of an implied waiver has not led to a broader acceptance thereof, a few remarks are in order. First, most analyses of execution immunity focus on the nature of a foreign State's assets along the lines of the restrictive doctrine, and much less attention is paid to the nature of the forum State's exercise of such execution jurisdiction.\textsuperscript{142} This, however, is slowly changing. For example, though the concept of jurisdiction was traditionally considered purely a question of the rights and powers of States, it has been suggested that it requires reconceptualization.\textsuperscript{143} Moreover, in light of international arbitration more specifically, this reconceptualization continues to be subject to two contrasting and incompatible readings – the first reflecting arbitration as a form of alternative dispute resolution backed up by domestic courts but lacking any normative power of its own; the second implying an international and separate form of ordering, alongside and competing with domestic courts.\textsuperscript{144} Finally, and closely related to this reconceptualization, the broader developments in State immunity law and international adjudication

\textsuperscript{140} Dopagne (n 70) 395 (referring in support to Jurisdictional Immunities (n 72); O'Keefe and Tams (n 72); and UNCSI (n 71) art 20).

\textsuperscript{141} Contra ibid 395–96 (‘Another immediate consequence of the express waiver requirement is that the – heavily debated – question whether an arbitration clause in a contract may in itself be construed as implying consent to the taking of measures of constraint against immune property, whether or not the clause includes or refers to a commitment to execute the award such as the commitment in question in Creighton, largely becomes, as such, a moot question’).

\textsuperscript{142} See eg Satya Talwar Mouland, ‘Enforcing International Arbitral Authority in National Courts’ (2020) 86 Arbitration: The International Journal of Arbitration, Mediation and Dispute Management 39. Compare with Angelet (n 14) in relation to jurisdictional immunities.

\textsuperscript{143} See Alex Mills, ‘Rethinking Jurisdiction’ (2014) 84 British YB Intl L 187.

\textsuperscript{144} ibid 234 (referring in support of the second reading to Thomas Schultz, Transnational Legality: Stateless Law and International Arbitration (OUP 2014); Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (CUP 2012); Gaillard (n 3): However, ‘[w]hether this is indeed taking place remains one of the great contested issues of the international legal order’ (ibid 235)).
indicate a willingness of domestic courts to prioritize the autonomy of arbitration over the immunity claims brought before them. Together with other second-generation adjudicatory mechanisms, ICSID arbitration has contributed significantly to the development of the field of modern State immunity laws. Yet, as mentioned above, remarkably little attention has been devoted to the rules governing the execution stage of the arbitral process as distinct from the execution stage of the judicial process. It remains to be seen whether or not a growing practice in relation to execution jurisdiction will suggest, as a separate matter from the execution of courts’ judgments, a natural extension of a domestic court’s power to enforce an arbitral award.

6 Conclusion

Interpreting consent to arbitration as an implied waiver of immunity from execution should be seen as the reasonable consequence of legal obligations which the State voluntarily undertakes. Yet, while the system of mixed arbitration ultimately depends on domestic courts for the enforceability of awards, these courts are caught in a past where deference to immunity claims thwarts the objectives of the system. Such is the weight of history on the law of State immunity. No matter how justified such deference may seem in the short run, it comes at a heavy cost: ‘[i]t acts to increase moral hazard and to create disincentives for further transboundary investments, thus undermining one of the major political and economic goals of the international system’. The problem of immunity from execution, therefore, can no longer be ignored. Though the drafters of the Convention may not have been able to foresee it, the many accounts of issues arising out of the doctrine clearly indicate its current practical relevance. Notably, several domestic courts have taken a praiseworthy first step in holding that consent to non-ICSID arbitration implies a waiver of immunity from execution. A similar judicial development could also take place in the specific context of ICSID arbitration. Notwithstanding the well-rehearsed objections, the relevant provisions do not make an implied waiver incompatible with the Convention. Rather, the possibility of the implication relies on three principles: the impracticability of

145 For an extensive analysis of second-generation adjudicatory bodies, see Gary Born, ‘A New Generation of International Adjudication’ (2012) 61 Duke L J 775.
146 Mouland (n 142) 48.
147 Michael W Reisman, ‘International Arbitration and Sovereignty’ (2002) 18 Arb Intl 231, 238.
both the absolute and the restrictive doctrines of State immunity; the primacy of arbitration’s consensual nature; and the origin, purpose, and obligations imposed by the Convention read as a whole.

Though the implied waiver of execution immunities remains rare in this as in other contexts, and though it may take time for this interpretation to gain enough traction, the necessary room for change is clearly there. The approach that has prevailed up to now is grounded in political and economic considerations and is increasingly fragmented. As such, its preservation weakens the international rule of law and the effectiveness of arbitral awards. That is why the nature of the execution stage and the waiver mechanism more specifically needs further exploration. The Convention has intentionally left the execution of awards outside its scope, assuming that States, given their dignity and legal obligations, would comply as a matter of course. More importantly, nothing in the Convention prevents the laws of State immunity from evolving over time. If domestic courts want to prevent a return to the situation that ICSID was intended to overcome, the weight of arbitration’s autonomy should incite them to interpret consent as an implied waiver of the immunity from execution.

Biographical Note

Mees Brenninkmeijer is an associate with the Private Justice and the Rule of Law Research Group. He has obtained his LL.B. from the University of Amsterdam, where he currently pursues an LL.M. in public international law.

Professor Fabien Gélinas, Ad. E., is Sir William C. Macdonald Professor of Law at McGill University. Formerly General Counsel of the ICC International Court of Arbitration, he is a member of the Quebec Bar and acts as arbitrator, expert and consultant on dispute resolution and legal reform.