Title: ENFORCING ARBITRAL AWARDS AGAINST SOVEREIGN STATES.
Subtitle: THE VALIDITY OF SOVEREIGN IMMUNITY DEFENCE IN INVESTOR-STATE ARBITRATION.

Author: Michael Junior Che Neba
Supervisor: Barrister Victoria Bui
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AUTHOR’S DECLARATION

I, Michael Junior Che Neba, declare that this thesis is my own work and that all sources that I have used or quoted have been indicated and or acknowledged by means of complete referencing.

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Michael Junior Che Neba

Date and signature

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DEDICATION

This thesis is dedicated to the research community at Uppsala University and to all those who strive in making Investor-state arbitration a better means of dispute resolution.
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<th>ACRONYMS</th>
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<td>ICSID-</td>
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<td>ICJ</td>
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BACKGROUND TO STUDY

This thesis seeks to illustrate the relationship that exists between international investment law and the public law notion of sovereign immunity with a keen interest on the enforcement and execution of foreign arbitral awards against states as sovereignties.

The development of sovereign immunity is highly influenced by the fact that international investment law is a hybrid of both public and private international laws, which influences rules on immunity from execution. The purpose of investment treaties is to protect investors against the sovereign acts of host states in a forum which is fair and impartial on such issues (sovereign immunity defence in investor state arbitration). The process of aiding foreign investors in overcoming such a claim made by host states, made possible through the development of international conventions and municipal laws on sovereign immunity. Therefore, once a state agrees to arbitrate its disputes with alien investors in which it owes international responsibility, a breach of such responsibility on the part of the host state should thus limit its (the state) chances of successfully relying on the notion of sovereign immunity to escape international wrongful acts. This will limit unjustified claims of sovereign immunity as a defence by host states from enforcing and executing arbitral awards.
PART ONE: INTRODUCTION

1.1 INTRODUCTION

There has been a rapid increase of Bilateral Investment Treaties (BITs) over the past decade¹, involving both developed and developing nations in commercial transactions with private individuals. This has increased the process of seeking neutral and impartial forums. Investor treaty-based dispute settlement (ISDS) cases have commenced arbitration before institutionalised tribunals such as the centre for settlement of investment disputes (ICSID), the Stockholm Chamber of Commerce (SCC) and ad hoc tribunals such as the United Nations Commission on International Trade Law (UNCITRAL).

The commencement of claims before ICSID tribunals helps to depoliticize investment disputes² and to limit the risk of diplomatic protection³ which is granted by a state to its nationals in investment disputes.

The purpose of investment protection agreements is to protect alien investors against uncompensated expropriation, breach of the fair and equitable standard as well as other substantive protections afforded in treaties. A state might have absolute authority over resources within its territory and can sometimes expropriate without compensating alien investors based on the “police power” doctrine. Indisputably, the state has the right under treaties to afford maximum protection to foreign investors and their investments⁵.

² Article 10 of the report of the World bank executive directors on ICSID Convention
⁴ R. Higgins, the taking of property by the State (1982) 167 Recueil des Cours 267.; See also M. Sornarajah, The International Law on Foreign Investment (CUP, UK 2010), pp. 363.; Rudolf Dolzer, Indirect expropriation: New development, NYU, 11 Environmental Law journal 64, pp.67
Failure by a state to obey treaty and contractual obligations entered with private persons, might be used as a claim basis by investors to seek enforcement of arbitral awards against the host states who often wish to deny enforcement or execution, based on the doctrine of sovereign immunity\(^6\). Consequently, state’s under international conventions such as the New York Convention on the enforcement and recognition of arbitral awards 1958 (NYC) and ICSID, are under obligation to enforce foreign arbitral awards. The non-compliance by a contracting party to the said conventions, will result in a breach of treaty obligations under public international law.

The two principles that govern proceedings of enforcement of arbitral awards are; the principle of good faith (\textit{pacta sunt servanda})\(^7\) and the doctrine of sovereign immunity (\textit{par in parem non habet jurisdictionem})\(^8\). The principle of good faith is developed from article 26 of the Vienna Convention on the law of treaties (VCLT) and interpretation of treaty clauses in good faith, which requires treaties to be interpreted in good faith. While the latter on sovereign immunity holds that a state as a sovereign, is not subjected to the jurisdiction of another state.

In the enforcement proceedings, domestic courts will apply the rules of \textit{Lex specialis and jus cogens,} to see which of the two above principles (good faith and sovereign immunity) have precedence over the other\(^9\).

A difficulty in enforcing arbitral awards comes from the discrepancy in a waiver of a state’s immunity from enforcement, execution and before national or municipal laws on sovereign immunity. This results in most states adopting a restrictive

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\(^9\) Hege Elisabeth kjos, Applicable law in investor-state arbitration. The interplay between national and international law (oxford university press) 18th September 2012. Pages 157-211
approach on immunity over the approach of absolute immunity\textsuperscript{10}. Even with the application of the theorem of restrictive immunity, a state can still raise the claim of sovereign immunity in the enforcement and execution stage and still be successful.

Consequently, investor state arbitration is hampered in the enforcement proceedings by not affording alien investors maximum protection.

The thesis focuses on the principle of proportionality, to deal with the widening gap between investors rights and public concerns in investment arbitration. This principle is however achieved via merging international and municipal law on sovereign immunity. This is because the enforcement of arbitral awards varies between jurisdictions based on the interpretation of sovereign immunity in municipal laws as well as the interpretation of arbitration clauses before a municipal court. Even though most arbitral awards are affected due to the defence of sovereign immunity raised by host states, little scholarly writing is being made annually to address the issue of sovereign immunity defence in the execution of investment arbitration awards.

The main research question of the thesis is: \textit{Should a defence of sovereign immunity be wholly made available to host states in investment arbitration, or should it be limited to national or municipal laws on sovereign immunity where enforcement of the arbitral award is sought?}. This poses a major problem in investment arbitration as to the degree to which a State may waive its immunities from jurisdiction, enforcement and execution of foreign arbitral awards, under the municipal laws of another state.

The thesis takes account of the decisions of international investment law, public international law, state practice and doctrines thereby attempting to answer the following questions.

\textsuperscript{10}Yasir Gokce, Trend toward the restrictive doctrine of state immunity: an evolution of this trend in respect of employment contracts. See, e.g., for the correlation between state approaches regarding individual rights or commercial concerns and restrictive state immunity; Pierre-Hugues Verdier, Erik Voeten, “How Does Customary International Law Change? The Case of State Immunity”, Social Science Research Network, APSA 2012 Annual Meeting Paper, January 24, 2013.
• Does international investment law and its related principles favour a fragmentation or harmonisation of international law?
• Are domestic rules on immunity, (municipal laws on sovereign immunity) superseded by the NYC and ICSID?
• How do we distinguish immunity from enforcement and execution? Does the agreement to arbitrate imply a waiver from immunity to execution by a host state?
• How can the principle of proportionality be used in investment arbitration disputes?

1.2 STRUCTURE

Attempting to provide answers of the above-mentioned questions will be divided into several chapters as seen below:

• Chapter one of this thesis highlights the introductory note and background of the study, structure, as well as the research methodology comprising of both doctrinal and comparative analyses.
• Chapter two views the doctrines established in international investment law and discusses whether it favours a harmonisation or fragmentation of public international law or not.
• Chapter three illustrates the evolution of sovereign immunity, the effects of states trading, engaging in international agreements to arbitrate claims and the doctrines involved in disputes concerning sovereign immunity limiting it from absolute to restrictive immunity. Furthermore, it distinguishes immunity from jurisdiction and immunity from enforcement and execution of arbitral awards
• Chapter four is the core of the thesis and deals with the enforcement of court judgements and arbitral awards before municipal or state courts, distinguishing ICSID and non-ICSID (awards governed by the 1958 New York Convention.
• Chapter five explores the limitations or setbacks of enforcing arbitral awards
• Chapter six, of the thesis provides a way forward in overcoming the
defence of sovereign immunity and analyses the role of the principle of
proportionality in future disputes.

1.3. RESEARCH METHODOLOGY.

The methodology of this research will first consider the “Black-letter-law”\textsuperscript{11} approach, which is applied in the analysis of socio-economic and political
discrepancies in different jurisdictions. Thereby comparing the common law
jurisdictions such as the United Kingdom and United states, civil law jurisdictions
such as Sweden and Argentina, as well as socialist jurisdictions such as the Peoples
republic of China and Russia. In this light, it therefore views the relationship
between international investment law and sovereign immunity. The methodology
ends with an analysis of legal principles (doctrines), legislative and judicial
decisions on sovereign immunity, both in the national and international levels.

1.3.1. LEGAL (DOCTRINAL) PRINCIPLES

The most vital legal principles or doctrines in the enforcement of investment
arbitral awards are: The principle of good faith (\textit{pacta sunt servanda}) derived from
the treaty obligations and interpretation, and the principle of sovereign immunity
\textit{(par in parem non habet jurisdictionem)}. The application of these two principles
simultaneously is lax in the sense that no one has precedence over the other and
an international unified means in applying both principles simultaneously does not
exist. So, it is difficult to establish which principle has precedence over the other.

This thesis is partly based on a doctrinal research methodology. So, doctrinal or
legal principles will be used to solve the above problem. The question here is: in
applying the principle of good faith and sovereign immunity, which principle
should have precedence over the other?. This is achieved by distinguishing \textit{acta
jure imperii} or claims derived from sovereign acts and \textit{acta jure gestionis} or claims

\textsuperscript{11} M. McConville and W.H. Chui, Research Methods for Law, (Edinburgh University Press, Edinburgh
2010) pp.4
derived from a commercial activity. Both legal norms analysed in a restrictive approach on sovereign immunity. By relying on the said approach, a state cannot rely on the claim of sovereign immunity as a defence with respect to a claim concerning a commercial act of the state. At the execution level, there is need for recognising commercial acts or assets of the state. This thesis will do so in chapter five.

The principle of good faith and treaty obligations contained in articles 31-33 in the VCLT, specifies rules on interpretation, thereby requiring the doctrine of sovereign immunity to be interpreted according to the VCLT. The doctrine of sovereign immunity has become a principle in international law and has often bowed to treaty provisions in the interpretation process. Article 31(3)(c) of the VCLT provides that where there is a major conflict of laws between international and national laws, “any relevant rules of international law should be applied between the disputing parties”. The treaty therefore looks at international law as a disintegration or integration with respect to international investment law and sovereign immunity.

1.3.2. STATE PRACTICE BEFORE NATIONAL COURTS

There are two conventions which govern the enforcement and execution of foreign arbitral awards before national courts. These are the 1958 New York Convention and the Washington or ICSID convention. While awards rendered under ICSID convention are perceived as a final judgement of the domestic court, awards under the NYC, are viewed as foreign awards, subject to review before domestic courts. Here, treaty interpretation plays a role in the determination of conflict of laws such as a country’s public policy, legislation in domestic law and international law.

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The ICSID convention was created by the world bank, to depoliticise investment arbitration\textsuperscript{13}. The notion of sovereign immunity under ICSID, leaves immunity from execution to the law of the forum state where execution is sought and is governed in articles 54(3) and 55. The NYC, was created by the United Nations (UN) and makes no mention of sovereign immunity in executing arbitral awards. Therefore, national courts have interpreted sovereign immunity based on the 1958 Convention awards differently, creating variations in state practice and interpretation.

So much so that, jurisdictions such as Argentina and Mexico are copying state practice and interpretation of sovereign immunity from other jurisdictions such as the U.S and U.K (legal transplants) creating a harmonisation of international law. Even with this harmonisation, differences may still be observed in the way various national jurisdictions apply the notion of sovereign immunity. The thesis in this section will use the comparative analysis technic. i.e., between national laws as well as between international treaties themselves such as the 1972 European Convention on Sate Immunity and the United Nations Convention on Jurisdictional Immunities of States and Their property.

1.4. ARBITRAL AWARDS AND COURT JUDGEMENTS

The absentia of a multi-lateral treaty governing the principle of sovereign immunity has made most states to move to a more restrictive approach on sovereign immunity enshrined in their domestic laws. This is problematic as the principle, will then be interpreted differently across various jurisdictions. The thesis looks at common law jurisdictions on sovereign immunity such as the United States of America that has a parliamentary law on sovereign immunity, while civil law jurisdictions such as Sweden and Argentina have relied on case law, public

international law as well as judicial law developed in their national courts.\textsuperscript{14} Also, socialist countries such as China still maintain the notion of absolute immunity.

Common law jurisdictions such as the UK and US have created case laws on immunity which are a binding precedent to their municipal courts. The restrictive approach that these two jurisdictions have adopted on sovereign immunity and case law is rooted in their traditional national laws on sovereign immunity. Arbitral awards rendered in these nations have become precedents to other countries. Such cases include the UK case of Alcom \textit{v} the republic of Colombia\textsuperscript{15}, and the US case of LETCO \textit{v} Liberia\textsuperscript{16}

Civil law countries refer to international laws on sovereign immunity developed via case laws in their municipal laws. The practice of Swedish courts is not far from that of common law jurisdictions of the U.S.A and the U.K, which allows for the enforcement and execution of alien arbitral awards against property that is used for commercial purposes. A good example is the case of Sedelmayer \textit{v} Russian Federation.\textsuperscript{17} The financial crisis in Argentina saw the state receive a lot of arbitral awards against it and it has thus adopted a restrictive approach on sovereign immunity.

China is an example of a socialist country that has signed the UN Convention, which advocates for a restrictive approach, but still practice the notion of absolute immunity. The FG Hemisphere Associates LLC \textit{v} DRC\textsuperscript{18}, final appeal in Hongkong with a common law jurisdiction saw that Hongkong cannot adhere to a doctrine on sovereign immunity which is different to that practiced in mainland china that prescribes for absolute immunity.

\textsuperscript{14} Karl M. Meessen, ‘State immunity in the arbitral process’ in Norbert Horn (eds) Arbitrating foreign investment disputes (Kluwer law international 2004), pp. 388.
\textsuperscript{15} Alcom Ltd. \textit{v} The Republic of Colombia, House of Lords (Court of Appeal) AC 580 (1984).
\textsuperscript{16} LETCO \textit{v} Liberia, United States District Court, the District of Columbia, Judgment, 16 April 1987, 2 ICSID Reports 390
\textsuperscript{17} Sedelmayer \textit{v} Russian Federation, Stockholm Chamber of Commerce, Decision on Jurisdiction and Final Award, July 7, 1998
\textsuperscript{18} FG Hemisphere Associates LLC \textit{v} Democratic Republic of the Congo, FACV 5-7/2010 (Court of Final Appeal
1.5. CONCLUSION

As seen above, the practice of enforcing arbitral awards is inconsistent and varies from jurisdiction to jurisdiction as there are three stages in enforcing arbitral awards being: jurisdiction (agreement to arbitrate), recognition (conversion of the arbitral award into a court judgement and execution (conversion of the judgement into a property or money). All these are left to wimps and caprices in the jurisdiction of the municipal law where enforcement is sought.

CHAPTER TWO

DOCTRINES ESTABLISHED IN INVESTMENT LAW AS AN AGENT OF PUBLIC INTERNATIONAL LAW

2.1 INTRODUCTION.

The growing number of investor-state cases before arbitral tribunals has raised concerns on the relationship between international investment law and international law. This is because investment disputes, are hybrids of public (sovereign) and private (commercial) nature of disputes, which aims to bring a balance between investor protection and regulatory powers of host states19, making investment state arbitration as a structure of global governance. It is then important to investigate if international investment law is a harmonisation or disintegration of public international law.

The chapter also aims to view the balance between international investment law and sovereign immunity law, with respect to alien investor protection and the sovereignty of a state. This provides a background to the doctrines of treaty interpretation and state responsibility to resolve the balance.

2.2 INTERNATIONAL INVESTMENT LAW AS PART OF PUBLIC INTERNATIONAL LAW.

19 Investor-State Arbitration as Governance (n 1), pp.1.
The increase of investment treaties and regional integration leading to entities such as the European Union (EU), have provided theoretical and conceptual framework dealing with the interpretation of treaties to the enforcement of arbitral awards to the final stage (execution). This has had an impact on public international law, even though there is unpredictability and uncertainty in enforcing arbitral awards. This is due to the conflicts of interest in the protections afforded to alien investors in treaties, and the right of states to regulate and control the investment purposes via the so-called police power doctrine20.

Another means by which investor state arbitration contributes to public international law, is via diplomatic protection. By relying on diplomatic protection, a national of a home state relies on its state to commence an inter-state claim. This is viewed in the Barcelona traction case21. The existence of diplomatic protection in investor state arbitration is termed as “arbitration without privity”22 which makes the mechanism different from other forms of dispute resolution. Traditional diplomatic protection is only possible if the investor exhaust local remedies in the host state. The existence of “gunboat diplomacy”23 makes it possible that once a state has given its (state) consent, it has much less control over the dispute, than traditional means of diplomatic protection. This makes a treaty-based system a precedent and superior alternative to investor protections, vis-a-vis reliance on diplomatic protection which is uncertain and politically motivated24.

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20 M. Sornarajah, The International Law on Foreign Investment (CUP, UK 2010), pp. 224-225; See Omar E. Garcia-Bolivar, ‘Sovereignty v. Investment Protection: Back to Calvo?’,
Also, the system of investment arbitration combines the applicable law of public law and private dispute resolution with procedural rules of private procedural law and those used in commercial arbitration, such as those contained in the Stockholm Chamber of Commerce (SCC) to affect international law.

Conclusively, international investment law is a form of public international law because in investment arbitration, a party is usually the state, which wields public law powers, such as expropriation for public purpose, and sometimes it is elevated to an inter-state battle.

2.3 THE HARMONISATION OR FRAGMENTATION OF INTERNATIONAL LAW

As noted in the previous chapter, international investment law is a typology of public international law. It concerns the restriction of state authority (police powers doctrine) to regulate alien investors with the scope of public interest provided by legislative and judiciary conducts.25

Public international law is not the only law applicable in investment arbitration. Customary international law contained in the Vienna Convention on the law of treaties (VCLT)26 dealing with treaty interpretation, and state responsibility contained in the International Law Commission (ILC)27, are vital areas of customary international law that international investment arbitration heavily relies on.

This thesis views international law in two ways:

(1) By analysing international investment law thereby attaching it to specific doctrines in public international law.
(2) How public international law is affected by international investment law.

27 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful acts.
Undoubtedly, there is no doctrine of precedent (stare decisis) in investment treaty arbitration. The way arbitral decisions are made in investment arbitration is inconsistent and unpredictable. It is this inconsistency and non-predictability that leads to the fragmentation of international law.

Another inconsistency derived from international investment law, is the law governing the merits of the dispute. Some treaties contain a choice of law clause, in case the disputing parties have failed to achieve an agreement between them. For example, article 42(1) of the ICSID convention refers to the law of the host state and international law in the absence of such an agreement.

Conflict of laws may arise during enforcement proceedings of arbitral awards, as an obligation of a state towards a foreign investor. Enforcing states are obliged to enforce pursuant to the New York Convention (NYC) and ICSID Convention. This obligation is called treaty obligation. Non-compliance to enforce arbitral awards as such, by a party would be a breach of treaty obligations leading to political and economic consequences.

Therefore, the law governing investment disputes is far from uniform. Investment law needs to be interpreted in accordance with other areas of international law, such as diplomatic immunity law and state immunity law. This can be achieved via good faith interpretation, which might see international

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30 The Relevance of Public International Law (n 54), pp. 9.


32 The Relevance of Public International Law (n 54), pp. 9.

investment law in line with other areas of international law. Investment arbitration is more complicated by having a broader wording contained in procedural as well as substantive law. Investment arbitration is more complicated by having a broader wording contained in procedural as well as substantive law.\textsuperscript{34}

\textbf{2.4 PRINCIPLES IN THE SETTLEMENT OF INVESTMENT DISPUTES}

\textbf{2.4.1. TREATY INTERPRETATION.}

As noted above, there is need for a consistent interpretation of international investment law with other areas of international law. There is always conflict of laws between the two principles of enforcing arbitral awards. These principles are, treaty obligations under international investment law (\textit{pacta sunt servenda})\textsuperscript{35} and the principle of sovereign immunity (\textit{par in parem non habet jurisdictionem}). The principle of \textit{pacta sunt Servanda} is the core of article 26 (b) of the Vienna Convention on the Law of Treaties (VCLT), which permits that \textquoteleft every treaty in force is binding upon the parties and must be performed in good faith\textquoteright\textsuperscript{36}, while the principle of sovereign immunity is the basis of the principle of absolute immunity. The principle of absolute immunity provides that \textquoteleft one sovereign state is not subjected to the jurisdiction of another\textquoteright. Due to the conflict of laws on which of the above-named principles apply, tribunals are faced with the task of which principle takes precedence over the other, and how to interpret both principles simultaneously.

Tribunals in an attempt to resolve the above issue, will often refer to article 31 and 32 of the VCLT. For instance, article 31 (3) (c) of the VCLT prescribes a rule of interpretation to \textquoteleft any rules of international law applicable in relation between the disputing parties.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{34} ibid
\item \textsuperscript{35} H. Lauterpacht, \textquoteleft The problem of jurisdictional immunities of foreign states\textquoteright, 28 Brit.Y.B. Int\textquoteright L. 220 (1951); J. Crawford, \textquoteleft International law and foreign sovereigns: Distinguishing immune transactions\textquoteright 54 Brit.Y.B. Int\textquoteright L.75 (1983)
\item \textsuperscript{36} Art. 26 of VCLT, May 23, 1969, 1155 U.N.T.S. 331. \textsuperscript{36} (b) leads to a result which is manifestly absurd or unreasonable.\textquoteright 80 Art. 31 of VCLT, reads: \textquoteleft 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes;
The travaux préparatoires of the VCLT, as seen in its article 31(3)(c) requires a systematic integration\textsuperscript{38} of all sources of international law to be included. This is often viewed in situations where the interpretation of the treaty obligations touches on human rights, or environmental law which has acquired a status of customary international law.

Anne Van Aaken stated that “\textit{a distinction must be made conceptually between the application of other (general) norms of international investment disputes on the one hand, and the interpretation of investment norms by considering non-investment laws, indirectly mainly via article 31(3)(c) of the VCLT, on the other hand}\textsuperscript{39}.”

Tribunals can influence national courts and other tribunals in the interpretation of investment norms and non-investment norms at a procedural level when enforcing arbitral awards. The application of article 42 of the ICSID convention requires the tribunal to select the most appropriate law to the substantive merits of a dispute\textsuperscript{40}. This may create a conflict towards the obligations that a host state owes to alien investors and obligations in national and international laws in the areas of human rights, criminal and environmental law.

More so, article 53 of the VCLT states that “\textit{a treaty is void if at the time of conclusion, it conflicts with a peremptory norm of general international law}\textsuperscript{41}, paving the way for article 64 of the VCLT that “if a new peremptory norm of

\begin{itemize}
\item[(a)] any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
\item[(b)] any instrument which was made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
\end{itemize}

3. There shall be considered, together with the context;
\begin{itemize}
\item[(a)] any subsequent agreement between the parties regarding the interpretation of the treaty of the application of its provisions;
\item[(b)] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
\item[(c)] any relevant rules of international law applicable in the relations between the parties.
\end{itemize}

4. A special meaning shall be given to a term if it is established that the parties so intended.”

\textsuperscript{38}C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, 54(2) ICLQ 279 (2005)

\textsuperscript{39}Fragmentation on International Law (n 74), pp.9.

\textsuperscript{40}C. Schreuer, The ICSID Convention: A commentary, (CUP, UK 2009) pp. 550

\textsuperscript{41}Art. 53 of VCLT.
general international law emerges, any existing treaty which conflicts with that norm becomes void\textsuperscript{42}. The application of \textit{jus cogens}, is also contained in article 103 of the United Nations (UN) Charter\textsuperscript{43} which protect human right obligations.

However, applying \textit{jus cogens} to other international norms is limited as it cannot be applied in areas of such as human rights but can be used in other areas such as sovereign immunity alongside a proportionality analysis. (\textit{proportionality analysis} will be discussed at the end conclusion of the thesis). Apart from \textit{jus cogens}, the \textit{lex specialis rule} might be used in other investment treaty obligations in investment law. This is possible in international law rules such as those in human rights treaties, which \textit{jus Cogen} cannot interpret.

Therefore, interpretation by reference to article 31(3)(c) is widely accepted than other techniques because “\textit{the application of a technique of interpretation that permits reference to other rules of international law offers a broad prospect of averting conflict of norms by promoting and enabling the harmonisation of rules rather than the application of one norm to the exclusion of the other}”\textsuperscript{44}

\textbf{2.4.2. STATE RESPONSIBILITY.}

The principle of state immunity is developed pursuant to the historic concerns for diplomatic protection to nationals and injuries to foreigners. The doctrine reflects ancient legal systems between states as sovereigns and where states are accountable for their international obligations and diplomatic status\textsuperscript{45}.

Diplomatic protection has long been an established principle in international law for the protection of alien investments in the form of state responsibility. Investor-state arbitration was introduced to replace diplomatic protection, when there is

\textsuperscript{42} Art. 64 of VCLT
\textsuperscript{43} Art. 103 of UN Charter, it reads “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”
\textsuperscript{44} C. McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’, ICLQ 54 (2005), 286
not a compliance by a state provided under the ILC’s articles on diplomatic protection 2006\(^\text{46}\).

The 1958 Convention requires contracting states, under states obligations to recognise and enforce arbitral awards rendered in foreign jurisdictions but does not explain a state’s responsibility for a breach of the said obligation. Article 27(1) of the ICSID Convention forbids the use of diplomatic protection investment arbitration. The use of diplomatic protection under the convention is only possible when a state has refused to enforce the ICSID award. The investors home state may initiate a claim on behalf of the investor against the host state before the International Court of Justice (ICJ). This is in confirmation of Article 64 of the ICSID convention which permits for the settlement of unresolved disputes to the ICJ. However, the home state of an investor may bring claims on behalf of its nationals against a host state, but the home state will sometimes be reluctant to exercise the use of diplomatic protection because of political reasons. This might result in re-politicisation of the investment dispute, in which a more powerful state could involve in the arbitration process just to apply pressure in the dispute settlement against a less powerful host state. This will mean that state responsibility will be a last resort to enforcing arbitral awards derived from treaty obligations within the bounds of investor-state arbitration.

State responsibility is also contained in the 2001 International Law Commission’s articles on State Responsibility for International Wrongful Acts (ILC articles)\(^\text{47}\), so as to preserve mutual and amicable international relations between states. The main concept of state responsibility is whether a state and its organs including agencies of the state, can be held liable for violating treaty obligations and other international law obligations towards an investor.\(^\text{48}\) The theory of state

\(^{46}\) Art. 1 of the International Law Commission, Draft Articles on Diplomatic Protection, 2006, UN Doc. A/CN.4/L.684, it reads


responsibility is also considered part of public international law and also accepted as forming part of customary international law.\textsuperscript{49}

Article 1 and 2 of the ILC, reads thus:

“Every internationally wrongful act of a state entails the international responsibility of the state.”

“There is an internationally wrongful act of a state when conduct consisting of an action or omission:

(a) Is attributable to the State under international law; and

(b) Constitutes a breach of international obligation of that State.”\textsuperscript{50}

The phenomenon of state responsibility, has to do with the state or its representative, as seen under articles 4-11 of the 2001 ILC articles which is based on sovereign acts (\textit{acta jure imperii}) or commercial acts (\textit{acta jure gestionis}). Hence, when an organ or representative of the state, conducts a sovereign act, which breaches an international obligation, the state will be held responsible for attribution. As seen in article 25 of the ICSID Convention, an organ of a state may bring claims against a host state thereby allowing a state entity to become a party to the proceedings.

When a state acts in non-compliance to an arbitral award, the injured state could take measures against the state liable for the international wrongful act such as proportionality of counter measures. In the domain of customary international law, state responsibility exists in the sense of compensation for expropriation of alien property. This is viewed in the \textit{Hull formula} used in the \textit{Chorzow factory} case which requires “\textit{prompt, adequate and effective payment}” is widely accepted today as a benchmark.

\textbf{2.5. Conclusion.}

\textsuperscript{50} Art. 1-2 of ILC’s Articles
The interpretation of investment law with other principles of international law will lead to the development of law. Hence, balancing the interest of investor disputes via the relationship between international investment law and other areas of law, will develop based on harmonisation of public international law. This is seen in the way in which tribunals have always resorted to the EUROPEAN COURT OF HUMAN RIGHTS as well adopting a proportionality approach, to balance investor and host states interests from substantive provisions in investment treaties.51

CHAPTER THREE

3.1. THE NOTION OF SOVEREIGN IMMUNITY IN INVESTMENT ARBITRATION.

3.2. DOCTRINE OF SOVEREIGN IMMUNITY

The notion of sovereign immunity is always available to a state to invoke against the enforcement of arbitral awards but not in treaty arbitration before tribunals52. This notion is established under international law but requires an application in accordance with the municipal law were enforcement of the arbitral award is sought. It is a point of intersection between international law, and municipal procedural law and is often viewed as a procedural bar to domestic courts53.

The multilateral conventions governing sovereign immunity include: the European Convention on State Immunity 1972 (THE EUROPEAN CONVENTION), the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004(The UN Convention), Brussels Convention relating to immunity of State Owned Vessels. The UN Convention seems to be the most vital in an attempt for a universal codification of sovereign immunity on state practice and at the

51 UNCTAD, Selected recent development in IIA Arbitration and Human Rights, UNCTAD/WEB/DIAE/IA/2009/7, 5.
international level. Even so, the UN Convention is not viewed as part of customary international law due to a limited number of signatories who have ratified it, and hence cannot be part of a custom of state practice to bind non-parties to the treaty. The UN convention favours a restrictive approach on sovereign immunity, but the approach is not universally recognised. Also, some provisions in the UN Convention are contrary to some state practice on sovereign immunity, which leaves the usefulness of the UN Convention doubtful in resolving the claim of sovereign immunity as a defence in enforcing proceedings.

More so, article 38(1) of the International Court of Justice (ICJ)\textsuperscript{55} prescribes that apart from the use of international conventions by states, the enforcement of arbitral awards can be effective with the aid of municipal court and national legal systems.

Hence, the increasing participation of states in commercial transactions has resulted in international conventions and national laws on sovereign immunity to move towards a restrictive approach.

\subsection*{3.3. STATE TRADING AND EFFECT OF AN INTERNATIONALISED AGREEMENT BY A STATE TO ARBITRATE ITS DISPUTES.}

The doctrine of sovereign immunity is not limited to the jurisdictional immunity of a state, which says a sovereign state is not bound before a foreign municipal court of another state but extends to situations where a private party is prevented from impleading a state in a domestic court. In such instances, the principle of absolute immunity prevents a suit against a sovereign state commenced by a private party or another state, irrespective of whether the act performed by the state was in a private or public capacity.

A socialist state such as China, believes that all economic and political acts, performed by the state are within the realm of sovereign immunity and only

limited to acts of a sovereign nature (*acta jure imperii*) and could not extend to acts of a commercial nature (*acta jure gestionis*)\(^{56}\).

The west, especially common law countries such as the UK and US, has adopted a restrictive notion on sovereign immunity. While civil law countries such as Sweden, have adopted a restrictive approach on sovereign immunity, via implementation of municipal law, parliament and case law. The restrictive approach on sovereign immunity distinguishes between sovereign acts and commercial acts\(^ {57}\). In this respect, a state loses sovereign immunity when it engages in a commercial act with a private entity\(^ {58}\). In this light, the doctrine views the legal protections afforded to alien investors to provide a fair dispute settlement process before municipal courts of another state.

Apart from engaging in a commercial activity, most international conventions on sovereign immunity, contain an agreement to arbitrate as a condition to a waiver of immunity by the state. So, this thesis is in favour of the position that, an agreement to arbitrate by the parties does not only constitute a waiver of immunity from jurisdiction, but also contains an implied waiver of immunity from enforcement and execution of arbitral awards before municipal courts brought under the New York and ICSID Conventions. Arguably, a foreign state can consent or waive its immunity from jurisdiction by submitting a dispute to arbitration\(^ {59}\), but it is unclear if such a waiver constitutes a waiver from execution. The conflict of these two approaches, regarding the interpretation of a state’s agreement to arbitrate will have uncertain effects in enforcing arbitral awards.

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\(^{59}\) Section 9(1) of the UK SIA; Section 1605(a) of the US FSIA; Section 17(1) of the Australian FSIA; Article 12 of the European Convention; Article 17 of the UN Convention.
3.4. COMMERCIAL ACTIVITY EXCEPTION IN INVESTMENT ARBITRATION

States of today are increasingly commencing commercial transactions with private individuals, and investment treaty arbitration which is a public-private dispute resolution mechanism is often contained in a dispute resolution clause between the parties. The issue of sovereign immunity can be raised by the state party, at any level or stage of the arbitration proceedings. If such a claim raised by the state party as a defence, is successfully allowed, then the private party will be left without any remedy or compensation.\(^{60}\) The commercial activity exception, when viewed under the restrictive approach, applies to immunity from jurisdiction and immunity from execution and enforcement of the arbitral award. Hence, when a state engages in a commercial transaction, it cannot raise the defence of sovereign immunity.

3.5. IMMUNITY FROM JURISDICTION.

Only when a foreign municipal court has jurisdiction over a matter involving a state as a party, will it be necessary to talk of immunity or exemption from it. This is also termed territorial jurisdiction which limits the role of municipal courts in a forum state exercising jurisdiction over a foreign state, contained in the doctrines of independence, equality and the dignity of states under the maxim “par in parem non habet jurisdictionem”\(^{61}\). This principle extends to state agencies and private individuals acting as representatives functioning in state capacity based on the principle of extraterritoriality. This requirement has been codified in the UN Convention of sovereign immunity relating to investment treaty disputes.

A state cannot raise the defence of sovereign immunity, not just because of the notion on restrictive immunity limiting immunity only to sovereign acts, but because of its treaty obligations of good faith or pacta sunt servanda, when it agrees to arbitrate its disputes with a private individual.

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\(^{60}\) D. Chamlongrasdr, Foreign State Immunity and Arbitration (Cameron May, London 2007), pp. 79

\(^{61}\) H. Lauterpacht, ‘The problem of jurisdictional immunities of foreign states’ (1951) 28 BYIL 220, 221
The question of distinguishing sovereign activity from a commercial activity is weary to differentiate as it varies amongst municipal laws. However, a broad interpretation of a commercial activity has been adopted in most western countries such as Sweden and the UN Convention\textsuperscript{62}. But it still leaves the task to municipal courts to make a final pronouncement of the issue\textsuperscript{63}.

3.6. IMMUNITY FROM ENFORCEMENT.

The enforcement stage is comprised of three steps: recognition, enforcement and execution of the award. The notion of sovereign immunity can be raised at any step of enforcement of the arbitral award. The likeliest problem occurs when the private party tries to execute the arbitral award against sovereign state assets\textsuperscript{64}. Even though it is widely accepted that immunity from execution is no longer absolute but rather a restrictive one, the restrictive notion of immunity has less effects on immunity from enforcement and recognition than immunity from jurisdiction. This is because immunity from execution against state property, has many challenges when compared to immunity from jurisdiction. With regards to the immunity from execution, it can be denied if the waiver of immunity to execution is with respect to specific state property, that is used for sovereign purpose\textsuperscript{65}.

More to it, most national laws follow the same restrictive approach on sovereign immunity from execution, but each municipal law might vary in the degree of defining a commercial activity when allowing execution against a foreign state’s

\textsuperscript{62}Art. 2(1)(c) of the UN Convention, reads: “A “commercial transaction” means: (i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.”


\textsuperscript{65}Swedish court of appeal, Sedelmayer v Russia.
commercial property\textsuperscript{66}. Therefore, three types of foreign properties are noticed while filing for execution of the arbitral award: property used for commercial activity or intended for use for commercial activity and property used for sovereign acts.

Some municipal laws add a jurisdictional nexus between the property subjected to jurisdiction and the underlying claim with a commercial activity exception. This makes it more difficult for investors to locate a specific property which satisfies the requirement of execution.

In trying to execute an arbitral award against a host state, the investor must demonstrate that, the property is used or intended to be used for a commercial purpose. While the commercial activity exception is only against property in use or intended to be used for a commercial activity, Article 21 of the UN Convention, limits this to certain types of properties such as diplomatic missions, military property, central bank property, cultural heritage property and exhibition of objects of science, cultural interests. All these properties as seen under article 19, are not classified as commercial properties, but sovereign properties of the host state.

\textbf{3.7. CONCLUSION.}

In balancing the interests between states and private parties, with regards to the commercial activity development in the sovereign immunity doctrine, the practice of immunity has shifted from an absolute immunity to a restrictive immunity before municipal courts\textsuperscript{67}. Hence, the restrictive approach permits immunity only in public acts of the state \textit{(acta jure imperii)} and refusing immunity under private acts \textit{(acta jure gestionis)}, thus making this approach the hallmark in interpreting the defence of sovereign immunity.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{66} P. Trooboff, Foreign state immunity: Emerging consensus on principles, 200 Recueil Des Cours V 235 (1986) pp. 364
\end{itemize}
\end{footnotesize}
CHAPTER FOUR

4.1. ENFORCEMENT OF COURT JUDGEMENTS AND ARBITRAL AWARDS AGAINST SOVEREIGN STATES.

The enforcement of arbitral awards before municipal courts is governed by two conventions. The ICSID Convention and the New York Convention. These conventions are made available via the protections afforded to foreign investors in BITs and MITs. Therefore, a state which is a party to either conventions is under treaty obligations (*pacta sunt servanda*) to enforce arbitral awards rendered in foreign jurisdictions that are also parties to the said conventions\(^{68}\). A non-compliance by a contracting state will mean breach of treaty obligations\(^{69}\).

Indisputably, the authority of domestic courts to enforce arbitral awards is not just subjected to these conventions, but also to sovereign immunity principle, which is varied under municipal law\(^{70}\). Therefore, the purpose of this chapter is to see if the ICSID and New York Conventions will override the notion of sovereign immunity before municipal courts by favouring enforceability.

4.2. ARBITRAL AWARDS.

4.2.1 ICSID AWARDS

The International Centre for Settlement of Investment Disputes (ICSID) was formulated by the World Bank. The preamble of this convention states “promote private investment by improving the investment climate for investors and host states alike”\(^{71}\).

The obligation of parties to comply with the arbitral award is contained in the concept of *res judicata* and the principle of *pacta sunt servanda*, under customary international law. Consent by a sub-agency of a host state to arbitration, does not automatically amount to consent by host state itself. Article 53 provides that the

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\(^{69}\) ibid 1077


\(^{71}\) A. Broches, ‘The Convention on the Settlement of Investment Disputes between States and Nationals of Other States’, 136 Recueil des Cours 331, 348 (1972-II).
binding force of an award against the sub agency of a state, would not be binding on the host state, but only obliges the entity to be a party to that proceedings.\textsuperscript{72} But, a host state would be responsible for such entities by principle of attribution under the rule found in the International Law Commission on State Responsibility\textsuperscript{73} as seen in chapter two. Article 54 affirms the finality in domestic courts via enforcement while article 54(3) refers to execution. The distinction between the two is somewhat slim in various jurisdictions. Article 54(3) deals with execution with the possibility of contracting states reviewing the award using municipal law. Such an award can be reviewed by the ICSID Convention only on procedural grounds but not on the merits of the award. ICSID awards have an advantage over other types of awards in that failure by a state to recognise and enforce an award will be a treaty breach leading to state responsibility, including diplomatic protection.

The last provision of article 55 reads “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 any foreign state from execution”. The meaning of this provision is to confirm article 54. An arbitral award is subjected to the domestic law of the enforcing state and is treated as a final judgement of the enforcing jurisdiction. The domestic law here includes the law of sovereign immunity. Article 55 of this Convention prevents execution against property that is not used for commercial purposes or those termed as public assets. Article 55 does no more than accept state practice on sovereign immunity\textsuperscript{74}.

\textbf{4.2.2 NON-ICSID AWARDS REGULATED BY THE NEW YORK CONVENTION OF 1958}

There are a limited number of reasons why arbitral awards governed the 1958 Convention might not be enforced before municipal courts. These exceptions are

contained in article V of the New York Convention. This convention applies to foreign arbitral awards with written arbitration agreements made in a jurisdiction other than the enforcing state.\footnote{Art. I(1) of the New York Convention. It says: “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”}

Awards rendered under this Convention are not deemed a domestic award under the state of enforcement, but rather as foreign awards. Contracting states of this convention are obliged to enforce awards in accordance with their procedural rules, as seen in article 3 which states “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles”. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.\footnote{Art. III of the New York Convention} The main reasons for refusing enforcement under the New York Convention, are contained in article V (1). These grounds are sub-divided into those proven by the host state being the respondent and those refused for public policy reasons.

More so, article V (2) provides additional grounds of public policy, which could be raised by the enforcing court to refuse enforcement. This convention thus contains substantial and procedural grounds for refusing to enforce arbitral awards against sovereign states such as those contained in the applicable law. This is often based on the arbitration clause and party autonomy as well as the courts and tribunals other than lex fori which is applicable to investment treaties and contracts.\footnote{M. Sornarajah, The international law on foreign investment (CUP, UK 2010) pp. 284-305} In solving the public-private interest in international arbitration under the New York Convention, public policy is a vital element to determine the outcome of the award. The rules of applicable law under the New York Convention, are differentiated from those contained in the ICSID Convention. While the conflict of
laws under the ICSID Convention is governed by article 25 and 44, the latter in the absence of party autonomy is governed by host institutions such as the Stockholm Chamber of Commerce (SCC) and/or municipal courts.

4.3 ROLE OF NATIONAL COURTS

The finality of investment arbitration is the execution of the arbitral award before national courts. However, finality of the arbitral award is one of the biggest problem in investment arbitration\(^78\). National courts have the powers to review, enforce and not to enforce arbitral awards. However, how national courts interpret the finality of arbitral awards rendered under the international conventions dealing with the enforcement and execution of arbitral awards is questionable.

Article 53 of the ICSID convention illustrates the *Suo moto* and exhaustive nature of review of the ICSID Convention, which is not subjected to a national courts procedure when reviewing arbitral awards. ICSID review of post-awards is limited only to the centre: being interpretation, revision and annulment. ICSID awards are on the same footing with any domestic court judgement creating obligations to the enforcing jurisdiction to view the award as its final judgement not subjected to review. The review of ICSID awards is possible if conducted by its internal appeal mechanism and not via municipal courts at the seat of arbitration\(^79\). This means that ICSID awards are not affected by the laws of the seat and not subjected to review before municipal courts. With regards to ICSID awards, national courts have only one function being either to accept or refuse enforcement of the award.

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\(^79\) 9 A. Boralessa, ‘Enforcement in the United States and United Kingdom of ICSID awards against the republic of Argentina: Obstacles that transnational corporations may face’, 17 N.Y. Int’l L. Rev 53 (2004) pp. 57 (Enforcement in the United States and United Kingdom); Sovereign immunity as a bar (n 8), pp. 458.
and nothing more. Article 52(1), lists the grounds of annulment to be determined by ICSID ad hoc committee.\textsuperscript{80}

The review of awards under the New York Convention is left completely to the autonomy of municipal courts of the seat of arbitration. Article V of the New York Convention permits a party to challenge a municipal court to review an arbitral award based on due process and accuracy of the award. Hence, both substantive and procedural challenges contained in the New York Convention, can be raised before municipal courts or under the arbitration law at the place or jurisdiction where enforcement of the arbitral award is sought.\textsuperscript{81}

Non-pecuniary measures such as injunctions or specific performance which are ICSID awards might be possible to enforce under the New York Convention if the ICSID arbitral tribunal is not limited to grant remedies only to pecuniary obligations such as stipulated in article 54 of the ICSID Convention. There are two types of remedies which different legal systems and tribunals offer. These are: pecuniary remedies which are very common in investment arbitration, such as monetary compensation, interest and cost, while the 2\textsuperscript{nd} type is non-pecuniary remedies such as judicial review, injunctions, annulling a government measure, declaration of the party's rights.\textsuperscript{82} Hence, it is possible to enforce ICSID non-pecuniary awards under the New York Convention, and these awards might be subjected to domestic law.

The most controversial ground in enforcing arbitral awards is the claim of public policy. This issue is very uncertain as it varies amongst jurisdictions where enforcement is sought. The issue of public policy is glaring obvious under the New

\textsuperscript{80} Article 52(1) of the ICSID Convention provides five specific grounds for the annulment: “(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

\textsuperscript{81} Sovereign immunity as a bar (n 8), pp. 458; See N. Rubin's, ‘Judicial Review of Investment Arbitration Awards’ in T. Weiler (eds), NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Prospects (Transnational Publisher, USA 2004) pp.359

York Convention while the ICSID Convention offers no grounds in which, a municipal court can refuse recognition and enforcement on public policy. Public policy could be used as a bar to enforce arbitral awards, and the notion can be divided into two levels. National public policy, and international public policy. Hence, international public policy is not the same as domestic or national public policy.

Article 52 of ICSID Convention provides grounds for annulment which might be deemed as international public policy such as corruption on the part of the tribunal and serious departure from a fundamental rule of procedure.

The applicability of the New York Convention to ICSID awards, is possible in exceptional situations where the forum state of enforcement is not a party to the ICSID Convention but is a party to the New York Convention.

4.4 CONCLUSION

Awards rendered under the New York Convention, can be differentiated from those rendered under the ICSID convention. This is because both conventions provide distinct grounds and procedures for annulments. While New York Convention awards are generally subjected to review before national courts, the latter awards are not, except only in limited situations such as those on non-pecuniary measures. While the ICSID convention indirectly mentions sovereign immunity defence, the latter convention is silent on it.

CHAPTER FIVE

LIMITATIONS AND CHALLENGES IN ENFORCING (EXECUTING) ARBITRAL AWARDS AGAINST SOVEREIGN STATES

5.1 INTRODUCTION:

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83 Enforcement in the United States and United Kingdom (n 107), pp. 57.
Municipal laws sometimes require an express or implied waiver of immunity from certain state property, which might be used for sovereign purpose. While it is possible to waive immunity from execution, it might be extremely difficult to carry-out execution against certain types of property which are protected, despite a waiver of immunity from execution. In order to tackle this problem, it is important to distinguish between property that is predominantly used for sovereign and commercial activities.

As seen in the previous chapter above, the test for immunity from jurisdiction, focuses on the nature of the activity by the host state, while immunity from execution focuses on the purpose of the property. The law of sovereign immunity can be found both in domestic laws (section 1610-16611 of US sovereign immunity act) and in the international level (Article 19 and 20 of the UN Convention).

However, it is difficult in adopting a purpose test against a property which is used for a mixed purpose such as a bank account. Sometimes, the execution of foreign sovereign property, belonging to a foreign state, would be affected by international relations between states such as the US Cases of Birch Shipping Co v The United Republic of Tanzania.

In addition, most municipal laws on sovereign immunity require a jurisdictional nexus or link between the underlying claim or subject matter and the state where enforcement is sought, combined with a nexus requirement between the underlying claim (subject matter) and property to be executed. While a states immunity from jurisdiction is defeated by the commercial activity as seen in major codification on sovereign immunity, some codifications add a nexus or specific link requirement for execution against a state’s foreign commercial property.

There are certain properties which are used for mixed purposes. In situations where the state has expressly waived its sovereign immunity from execution, such

87 D. Chamlongrasdr, Foreign state immunity and arbitration (Cameron May, London 2007) pp. 260
88 Birch Shipping Co v Embassy of The United Republic of Tanzania, D.C.C., 18 November 1980, 63 ILR 524 (1982).
89 Section. 1610(1)(2) of the US FSIA
properties become a burden to be categorised as the lanes of distinction become blur. Such properties include:

5.2. BANK ACCOUNTS HELD BY DIPLOMATIC MISSIONS IN THE COUNTRY WHERE EXECUTION IS SOUGHT.

Bank accounts are often a popular object and a target by investors for the execution of arbitral awards, as they are often not intended for specific purposes and may be used for mixed sovereign and commercial activities\(^90\). It is therefore difficult to ascertain what is the intended use of such property. Hence, a bank account held by a foreign state in the state of execution and not necessarily used or exclusively used for a sovereign purpose, could be exempted from an execution\(^91\). However, if such a bank account has been allocated by a foreign state for a purpose of execution under a dispute, it would be easier for an alien investor attack the bank account, and as well easier for municipal courts treat such an account as non-immune\(^92\).

Hence, where a bank account is used for a mixed purpose, it will be very difficult for execution against it because municipal laws only allow execution against commercial properties of a state in the absence of a waiver. For instance, section 1610(a)(b) of the US FSIA says that property of a foreign state in the USA “used for a commercial activity in the United Sates” is not immune from a sovereign immunity from execution, upon a confirmation of a judgement of arbitral award\(^93\). This act only limits execution against commercial properties and does not allow execution against a sovereign property even in the case of a waiver. To determine if a specific bank account is used for commercial or sovereign purpose is problematic. That is why Schreuer suggests two contrasting means to determine the purpose:

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\(^92\) Section 1610 (a)(6) of the US FSIA
"One possible answer is to see bank accounts and other money credits as inherently commercial assets which cannot be regarded as directly serving sovereign purpose... The opposite argument sees the mere possibility of a future public use of financial assets as sufficient reason always to regard bank accounts belonging to foreign States as immune as a general precaution."

The suggestions provided by Schreuer, cannot absolutely differentiate the purpose of property and hence, the origin of the property might be used in determining the nature of the property, as seen in art 2(2) of the United Nations Convention, which adopts both a nature and purpose test. Since a bank account can be used for mixed purposes, the focus will then be to consider whether the money is designated for a specific public function and or whether the main bulk of money in the bank account is used for a commercial or sovereign activity. But, it is chaotic to try to find the real intent for the use of money in an account as well as the future purpose the money.

The privileges and immunities of diplomats and their properties are protected by customary international under the Vienna Convention of 1961. Moreover, such privileges and immunities are not affected by municipal laws on sovereign immunity before a municipal court at the execution stage. Most municipal laws in Europe and the European convention, have a saving clause regarding the preservation of diplomatic immunities, their furnishings and other properties,

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95 1604, 1609 and 1611 of the US FSIA; Art. 32 and 33 of the European Convention; Art. 21 and 26 of the UN Convention
means of transportation, achieves and documents of the mission, diplomatic bags and especially diplomatic agents and their properties.

Sovereign immunity law should not be confused with diplomatic law, as the former governs states, by protecting their jurisdictional immunities and their property, while the latter governs the protection of diplomats and their premises.

Still on bank accounts, but those of a diplomatic mission, the Vienna Convention is not clear on it, as one can link it via articles 29 and 30(2) plus the immunity attached to the premises of the mission as sees in articles 22 and 24 of the Vienna Convention on Diplomatic Relations 1961 (VCDR).

5.3. CENTRAL BANK FUNDS

It is generally accepted that central bank accounts are immune from execution. This immunity flows to central bank accounts used for commercial transactions of a foreign state or its entity. Thus, central bank accounts have privilege status, which is clearly differently from that of an embassy bank account with a mixed purpose. Such accounts have funds abroad with a bank of another country for official purposes, especially bank reserves.

Earlier cases on central bank accounts before the establishment of municipal laws on sovereign immunity shows that some municipal courts did not treat central bank accounts differently from ordinary bank accounts. This is viewed in the case

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97 Art. 21 (1) of the Vienna Convention, it reads: “1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.”

98 Art. 24 of the Vienna Convention, it reads: “The archives and documents of the mission shall be inviolable at any time and wherever they may be.”

99 Art. 27 (3) of the Vienna Convention, it reads: “3. The diplomatic bag shall not be opened or detained.”

100 Art. 29 of the Vienna Convention, it reads: “The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity.”

101 Art. 21 (1) of the Vienna Convention, it reads: “1. The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.”


of Hispano American Mercantil S.A v Central Bank of Nigeria, in which sovereign immunity was refused to the central bank of Nigeria on such grounds\textsuperscript{104}.

Recent codifications of municipal laws on sovereign immunity with regards to central banks accounts has given such accounts a privileged immune status. For instance, section 14(4) of the UK SIA provides thus “property of a State’s central bank or other monetary authority shall be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes”\textsuperscript{105}. While execution against a commercial property of a foreign state is possible under section 13(4) UK SIA, central banks properties are not subjected to this provision. Section 14 (3)(4) of the UK SIA makes it clear that full immunity is reserved for all properties that belong to a central bank.

More so, section 1611(b) (1) of the US FSIA makes it clear that only accounts held by its own account name of a foreign central bank, which is used for central bank accounts purposes, enjoy immunity from execution\textsuperscript{106}. The US court in the case of Weston stated, “property used for commercial activity and the property of a central bank held for its own account, aren’t mutually exclusive categories\textsuperscript{107}”. Hence, such a central bank account with a commercial activity, cannot be regarded as a commercial activity, in which it isn’t immune from execution\textsuperscript{108}. This means that, a central bank account held for mixed purpose would not invalidate the entire account from immunity from execution\textsuperscript{109}.

It is important to distinguish between a central banks own accounts as a US court will only permit execution against funds or property of a central bank account used for a commercial purpose, while the rest of funds or property, used for the function of a central bank account will remain immune from jurisdiction.

\textsuperscript{104} Hispano Americana Mercantile S.A. v Central Bank of Nigeria, United Kingdom, Court of Appeal, Civil Division, 25 April 1979; 64 ILR 221.
\textsuperscript{105} Sec. 14(4) of the UK SIA.
\textsuperscript{106} Weston Compagnie de Finance et d’Investissement, S.A v La Republica del Ecuador, 823 F. Supp 1106 (SDNY 1993) at. 1112.
\textsuperscript{107} ibid
\textsuperscript{108} ibid 1113
\textsuperscript{109} D. Chamlongrasdr, Foreign state immunity and arbitration (Cameron May, London 2007) pp. 304.
5.4. **SPECIALLY PROTECTED PROPERTY.**

The effects of waiver from execution, on specifically protected property such as central bank property is not debatable. On central bank accounts, the US FSIA in section 1611(b)(1) demands the central bank or its authority or home government to expressly waive its immunity from execution of central bank property\(^\text{110}\). The UK SIA does not expressly mention a waiver from immunity from central bank property but referring to section 13(3)\(^\text{111}\) requires a written consent of a state to apply it to a property in question, including those properties of central banks, as clarified in section 14(4)\(^\text{112}\).

A pre-judgement attachment or a provisional measure of constraint, is needed to secure the property before a final judgement for a post-judgement execution. This is necessary to evade the intentions of a losing party (host state) not to try to frustrate an execution\(^\text{113}\). Therefore, it is necessary to differentiate pre-judgement attachment post judgement attachment, in which the former requires a written consent or express waiver by a party.

A foreign central bank can expressly waive its sovereign immunity from execution for its property in its own account only for a post-judgement attachment\(^\text{114}\). A pre-judgement attachment is contained in section 13(3) of the UK SIA and article 18 of


\(^{111}\) 13(3) of the UK SIA, it reads:

“(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

\(^{112}\) Section 14 (4) of the UK SIA, reads:

“Property of a State’s central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsection (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.


the United Nations Convention\textsuperscript{115}, but limited to it by express consent\textsuperscript{116}. A pre-judgement measure of a commercial property of a foreign state is easily affected, not a central bank or sovereign property, which touches on issues of international relations between states\textsuperscript{117}.

5.5. CONCLUSION

Execution against central bank and specially protected property, are not deemed as commercial property falling within the arena of commercial activity exception. Execution against such property, however remains possible with use of an express provision with consent. It becomes opaquer in areas that touch on diplomatic and military properties, which are governed by municipal law and sovereign law. Properties with the nature of diplomatic and military purposes, sometimes require specific waiver provisions with the properties in question.

CHAPTER SIX

6.1. PROPOSALS TO THE LIMITATIONS

As seen from the previous chapter, there exists huge difficulty in executing arbitral awards, when the claim of sovereign immunity is raised as a defence. Hence, solutions are required to overcome this problem. These solutions could be derived in international conventions, guaranteeing an effective mechanism in reforming municipal laws, the adoption of a restrictive theory on sovereign immunity, to the provision of moving into a unified future. These solutions will also help clarify the approach towards immunity from execution.

The unique nature of investor-state arbitration as a public-private mechanism is aimed at providing maximum protection to the economic interests of alien investors derived from international investment law and state sovereignty derived from the law of sovereign immunity. This is a tricky situation at the courts where execution is sought as they have to balance the interests of the parties as such.


\textsuperscript{116}\textsuperscript{13}(2)(a) and 13(3) of the UK SIA

Most international conventions on enforcing arbitral awards do not deal with both sovereign law from execution and a consideration of municipal law. A state’s breach of treaty or contractual obligations, which affects alien investors will be handled by a municipal court and municipal laws on sovereign immunity.

International Conventions such as the New York Convention and ICSID Convention, do not contain any specific provision when dealing with conflict of laws when the issue of sovereign immunity is raised. Apart from the traditional use of diplomatic protection by the investor’s home state, the above-mentioned conventions are silent on a post-award remedy in the event where a host state does not comply with the award. This almost leaves the alien investor frustrated with no remedy to execute the award by themselves.

The proportionality analysis can be an effective tool to deal with theoretical legal concepts. This analysis is an interpretation method to resolve conflicts comprised of public and private interests as seen by the European Court of Human Rights. Such a method of interpretation can protect both private-public interests simultaneously diminish the sovereign immunity defence when raised unjustifiably and at the same time defend public interest in a claim for the protection of a private interest. The following proposals below are attempts to overcome the uncertainty of sovereign immunity defence in investor-state arbitration.

6.2. AMENDING INVESTMENT TREATIES AND INTERNATIONAL CONVENTIONS AN EXPRESS WAIVER PROVISION OF SOVEREIGN IMMUNITY FROM EXECUTION.

International conventions such as ICSID and New York Conventions, should be amended in ways which favour the enforceability of arbitral awards. Such amendments should ensure and guarantee alien investors that dispute resolution will be protected.

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118 International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 25-26
With regards to the ICSID Convention, there should be a provision which stipulates sovereign waiver from execution. Article 55 of this Convention has no effect on the law of sovereign immunity\textsuperscript{120}. However, a broad interpretation in good faith could view a waiver of sovereign immunity in the execution stage, by an agreement to arbitrate. This same provision leaves the issue of sovereign immunity to be determined by municipal laws where execution of the award is sought. \textit{The French case of NGOA}, before the Paris Court of Appeal shows that an explicit waiver of Immunity by the Russian Federation, did not explicitly mean a general waiver of its diplomatic immunity from execution derived from customary International law and the Vienna Convention\textsuperscript{121}. Due to the absence of precedence on sovereign immunity contained under the ICSID convention, which comes from the permission contained in article 55 of the ICSID Convention to rely on municipal laws on sovereign immunity during execution, investors become aware of the high risk of non-enforceability of arbitral awards. Consequently, forum shopping for the most preferred municipal court is sought, thereby undermining the reliability of ICSID.

The ICSID convention should be amended in such a fashion as to make clear that, when a state waives immunity from execution, it has also waived immunity from execution such as article 34(2) of UNCITRAL Arbitration rules.

The ICSID Convention was meant to depoliticise investment disputes. Relying on municipal laws on sovereign immunity and diplomatic protection, undermines what the drafters intended. Hence, the amendments of ICSID, should be

\footnotesize{\textsuperscript{120}C. Schreuer, The ICSID Convention : A commentary, (CUP UK 2009), pp. 1154, Citing on A. Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 136 Recueil des Cours 331, 403 (1972-II

\footnotesize{\textsuperscript{121}Embassy of the Russian Federation et.al v. Compagnie NOGA d’importation et d’exportation (NOGA), Paris Court of Appeal (10 August 2000), reported in (2001) XXVI Yearbook of Commercial Arbitration}
completely depoliticised. Such a move will greatly limit the uncertainties of diplomatic protection contained in article 27.\textsuperscript{122}

6.3. **A COMPLETE MOVE FROM ABSOLUTE IMMUNITY NOTION TO A RESTRICTIVE NOTION BY MUNICIPAL LAWS AND NATIONAL COURTS**

Most states are have moved from absolute to restrictive immunity. Socialist countries are however a notable ex captione. This does not in any way solve any problem as municipal practice on a restrictive approach on sovereign immunity differs amongst various jurisdictions. Due to the absence of an international convention on sovereign immunity, the UN Convention should be a bench mark for states practice on sovereign immunity laws. Here, a state can adopt a Model law into its municipal laws on sovereign immunity, which has *Lex specialis* status within the bounds of international investment law. State’s should take the initiative to amend their municipal laws on sovereign immunity. In seeking a perfect execution of arbitral awards, states should apply international conventions alongside their municipal norms which favours a restrictive approach on sovereign immunity.

6.4. **AMENDING NATIONAL LAWS ON THE INTERPRETATION OF MUNICIPAL LAW ON SOVEREIGN IMMUNITY.**

The uncertainties of forum shopping due to difficulties in amending arbitral awards can be halted by a unanimous and harmoniously good faith interpretation. Before most municipal courts, the investor has the burden or onus of proof to demonstrate that the property in question which execution is sought against, should be used for a commercial purpose. For instance, the UK SIA, permits the head of a diplomatic mission to issue a certificate that a property is not used and not intended to be used for commercial activity, unless the investor can proof otherwise\textsuperscript{123}. It is an even more complex task for an investor to try and challenge such a certificate from the head of a diplomatic mission. This is contrary to the

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\textsuperscript{123} Section 13(5) of the UK SIA
wordings of article 31 (2) of the Vienna Convention which forbids a diplomatic agent from giving evidence as a witness. For the Investor to challenge such a document during cross-examinations will be almost impossible due to the absentee of diplomatic agents during Cross-examination. Hence, the burden or onus of proof should shift from the investors to the state. This helps in clarifying what the property is intended or used for. The saying goes in the law of evidence, “he who alleges should prove”.

More to it, the list of specially protected property contained in the UN Convention, found especially in article 21 of this Convention, states its position on properties such as diplomatic, central bank and military property. There should be also list of properties which are not intended or used for commercial immune property, which is not subject to execution. The UN convention does not make any note on properties that are used for mixed purposes.

In addition, states should adopt a waiver of jurisdiction as to encompass a waiver of execution. The interpretation of waiver of jurisdiction to encompass a waiver of immunity should be viewed thus “consent to arbitration excludes all other remedies”.

6.5. THE USE OF THE PRINCIPLE OF PROPOTIONALITY.

Tribunals have always relied on the rules of state responsibility, contained in the 2001 ILC articles on the international wrongful acts, which demands for awarding damages as compensation. When a state raises the claim of sovereign immunity as a defence at the enforcement of the arbitral award, it constitutes a procedural bar to execution which has no effect on the binding nature of the arbitral award.

Investor-state arbitration being a private-public dispute mechanism, governs arbitration as such, by rules in a form of global administrative law. It therefore raises the question of whether the rules on state responsibility are sufficient enough to deal with the relationships between states and alien investors. Hence,

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125 Enforcement in the United States and United Kingdom (n 16), pp. 109-110.
failure to comply with an arbitral award is an abuse of the agreement to arbitrate and states responsibility derived from treaty obligations\textsuperscript{126}. States are therefore obliged by law to obey arbitral awards under treaty obligations contained in the New York Convention\textsuperscript{127} or ICSID\textsuperscript{128}, where the state is a contracting party\textsuperscript{129}.

The main interest of investor-state arbitration is to protect the economic interest of alien investors derived from treaty obligations on the one hand, and the sovereignty of states, contained in sovereign immunity law on the other\textsuperscript{130}.

Since investor-state arbitration is a hybrid of both public and private law, which is evolving as a sphere of global governance, where neither private transnational dispute resolution nor public international law can separately apply in the system.

It craves the need in balancing the public and private interests as \textit{Schill stated}:

\textit{“the balance that the procedural framework on investor-state arbitrations strikes between private and public interests by leaving enforcement immunity untouched also allows States to refuse enforcement of investment treaty awards for purely opportunistic motives… In that regard, enforcement immunity is antagonistic to the objective of international investment law to promote and protect foreign investors\textsuperscript{131}.”}

Following this, whenever a state raises sovereign immunity defence, the law of sovereign immunity should not be considered as a specific rule in international law as it favours a fragmentation of international law on sovereign immunity. It should however, be noted that, the general trend on the law of sovereign immunity has moved towards a restrictive approach.

\textsuperscript{127} Art. III of the New York Convention
\textsuperscript{128} Art 53 of the ICSID Convention
\textsuperscript{130} International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 4
\textsuperscript{131} International Investment Law, the Law of State Immunity, and Human Rights (n 1), pp. 5
A proportional analysis is a method of legal interpretation and decision-making in situations of conflict of various principles and legitimate public policy objective\textsuperscript{132}. This principle is important because, municipal courts when dealing with sovereign immunity law, do not usually refer to the investment law standard, as a jurisdictional bar in enforcing arbitral awards. The proportional analysis has been used in cases such as \textit{Mondev v USA}\textsuperscript{133} and \textit{Saipem v Bangladesh}\textsuperscript{134}. Here, both tribunals acknowledged the fact that in the presence of a treaty violation by a state, the enforcement of an arbitral award against it is undeniable.

Apart from a breach of substantive protections contained in BITs, tribunals have also found a violation of article II of the New York Convention, regarding the recognition of an agreement to arbitrate. Fore instance, in the \textit{Bangladesh-case}, the state of Bangladesh contested that it had not adopted the New York Convention into its national legislation, and hence the said convention should be in applicable, since a violation of the said convention cannot lead to Bangladesh’s international responsibility as seen in art 27 of the Vienna Convention on the law of Treaties. However, the Vienna Convention stipulates that a “party may not invoke its national laws as a justification for failure to perform a treaty”\textsuperscript{135}. Furthermore, Article 3 of the international Law Commission on state responsibility for their international wrongful acts reaffirms that, “the characterisation of an act of State as an international wrongful act is governed by international law. Such a characterisation is not affected by the characterisation of the same act as by internal law\textsuperscript{136}.

\textsuperscript{132} B. Kingsbury and S. Schill, ‘Public Law Concepts to Balance Investor’s Rights with State Regulatory Actions in the Public Interest- The Concept of Proportionality’ in S. Schill (eds), International Investment Law and Comparative Public Law (OUP, New York 2010) pp. 79. 86
\textsuperscript{133} Mondev International Ltd. v United States of America, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 139-156.
\textsuperscript{134} Saipem S.p.A. v The People’s Republic of Bangladesh, ICSID Case No. ARB(05)/7, Award, 30 June 2009, paras 6-51
\textsuperscript{135} Article 27 of the VCLT, quoted in Saipem S.p.A. v. The People’s Republic of Bangladesh, ICSID Case No. ARB(05)/7, Award, 30 June 2009, para 165.
\textsuperscript{136} Art. 3 of the International Law Commission’s Articles on State Responsibility for Internationally Wrongful Acts quoted in Saipem S.p.A. v. The People’s Republic of Bangladesh, ICSID Case No. ARB(05)/7, Award, 30 June 2009, para 165.
Therefore, in interpreting the defence of sovereign immunity by a state before an arbitral tribunal or municipal court, the legitimate conduct of the state should be weighed against the sovereign immunity defence. Hence, a State is totally responsible for a breach of treaty obligations, if such a conduct cannot be equated to the state acting in good faith.

Thus, the proportionality analysis can be used as guidance in dealing with international investment law and the law of sovereign immunity, as it will ensure that sovereign immunity defence is not abusively used to frustrate the legitimate expectations of alien investors. Hence, this analysis has sought to de-politicise investment arbitration by harmonising as well as balancing public-private interest in treaty arbitration.

6.6. CONCLUSION

The balancing of investor economic rights and states responsibility could be effective in promoting investments in both capital exporting and importing countries opening up ways for a neutral and impartial forum. Balancing such rights will lead to the development of international law. This development favours a harmonisation rather than a de-fragmentation of international law. Answering the research question of this thesis which states: Should a defence of sovereign immunity be wholly made available to host states in investment arbitration, or should it be limited to national or municipal laws on sovereign immunity where enforcement of the arbitral award is sought? The thesis favours the notion that the defence of sovereign immunity in investment arbitration should be limited to acts that are not commercial in nature but rather dominantly sovereign. Hence, an act of the state which is predominantly commercial should not be affected by the notion of sovereign immunity. So much more, this thesis shows that, investors can successfully overcome such a defence alleged by sovereign States by targeting execution against properties of the sovereign states that are predominantly used or intended to be used for commercial purposes.
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