Alternative Approach to Address the Dilemma of State Immunity: A Functional Model of International Enforcement

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In the past decades, state immunity in collecting investment awards is left to municipal courts. This state-centrist approach is the outcome of obsolete international relations and enforcement theories. The rise of a host of new and powerful functional organizations challenges this approach. Community authority is a natural advantage of international organizations. An international organization with delegated authority can authorize enforcement, which could unify diverse legal techniques and dismiss political embarrassment. The centralized enforcement provides a new approach to solve state immunity in the collection of international investment awards.

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I. INTRODUCTION

> "Those who make no mistakes, it has been said will never make anything; and the judge who is afraid of committing himself may be called sound and safe in his own generation, but will have no mark on the law."[1]

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID) and Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) leave state immunity to municipal courts.[2] To balance the

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1. Sir Frederick Pollock, *Judicial Caution and Valour*, 45 L.Q. REV. 293, 297 (1929).

2. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 53-55, Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter ICSID Convention];

demands of protecting private business and respecting the host state's sovereignty, national courts create various legal techniques.[3] The universally accepted separation of adjudicative jurisdiction from executive jurisdiction makes enforcement nearly impossible.[4] Execution immunity becomes the last bastion of state immunity.[5] What is worse, the existing remedies for these awards require strict conditions but are inefficient.[6]

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 1-2, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]. In each of these mechanisms, enforcing an award entails three critical steps for the claimant: (1) the recognition of the award in a national court of a country party to one of the conventions; (2) the consent by the national court that the award is enforceable; and (3) the execution of the award by the national court against assets of the non-prevailing party located in the court's jurisdiction. *See* Renata Brazil-David, *International Commercial Arbitration Involving a State Party and the Defense of State Immunity,* 22 AM. REV. INT'L ARB. 241, 260 (2011).

3. XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 75-131 (2012).

4. Given the present state of law, it is generally accepted that immunity from adjudication is separate from immunity from execution. This separation comes from the practice of domestic courts. The reason behind this separation is enforcement against state property constitutes a greater interference with a state's freedom to manage its own affairs and to pursue its public purposes than does the pronouncement of an order by a national court of another. Nowadays, states increasingly maintain some of their national assets in the territory of other sovereign states. States eager to attract foreign capital are slow to permit execution against a state asset under its laws. Even when the measures of constraints can be legally taken in the forum state, the political consequences to the friendly relationships between the foreign state and the target state may discourage the forum state from taking any action. *See* HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 486 (3rd ed. 2015); J.W. Reid, *Is the Recent Disposition of the Doctrine of Sovereign Immunity in the United States Appropriate in the Light of Prevailing Governmental Policy?*, 1 GA. J. INT'L & COMP. L. 113 (1970); *State Owned Assets: Setting Out the Store,* THE ECONOMIST (Jan. 11, 2014), https://www.economist.com/briefing/2014/01/11/setting-out-the-store; Ian Sinclair, *Law of State Immunity: Recent Development*, 167 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE 113, 219-20 (1980) (Fr.); *see e.g.* Greek Emergency Law (1938: 15) art. 1(1) (Greece). The legislation stipulates the requirement of prior executive authorization for enforcement measures.

5. Jeremy Ostrander, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments*, 22 BERKELEY J. INT'L L. 542, 582 (2004).

6. Existing remedies for state immunity can be divided into two categories: political remedy and negotiation remedy. Political remedy refers to when the home state imposes economic and political pressures against the host state through various measures. Diplomatic protection, inducement, and countermeasures are political remedies. Unlike political remedy, negotiation remedy resorts to the personal bargaining power of the creditor himself. Waiver of immunity, comfort letter, post-award settlement, insurance, and assignment of awards to the third party are all closely connected with the negotiation power of the investor from all aspects. Remedies are good news for an aggrieved investor seeking to recover. Besides the bright and dark aspects of these remedies, it is noteworthy that from a policy perspective, these contributions lead to a re-politicization of collecting the value of the award. The disadvantages of politicized protection have been proved in history. For investors from powerful states, politicized protection could be a powerful weapon, particularly when a government makes fundamental changes to its policies towards foreign investment. In extreme cases, this could involve military intervention, whether in the form of "gunboat diplomacy" or even a full-fledged attack. Less powerful states, particularly Latin American countries, criticized the abuse of politicized protection by holding that foreign

Scholars throughout history have offered a variety of proposals for a systemic solution to the problem of state immunity in the collection of international investment awards.[7] Those proposals can be divided into three groups: (1) those pertaining to a change in the general international law on sovereign immunity; (2) solutions incorporated into the investment law regime; and (3) proposals related to more efficient use of the existing framework.[8] Scholars try to make the position of states similar by providing a unified set of rules.[9] Both the current approach and the proposals tacitly approve that sovereign states are the only subjects who have authority and effective power to enforce investment awards.[10] The obsolete state centrism influences this perception.[11] Although states value the transnational dispute settlement system, the primary focus is still on sovereign nations, when execution is the issue.[12]

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investors should not be entitled to such special privileges. Yet even powerful states would prove impossible to intervene on behalf of an investor in all non-compliance cases. States are interested in maintaining a friendly relationship with another state to further political considerations and military goals. Using politicized protection to assist an investor to settle a financial dispute might undermine other foreign policy goals. *See* JORGE VINUALES & DOLORES BENTOLILA, THE USE OF ALTERNATIVE (NON-JUDICIAL) MEANS TO ENFORCE INVESTMENT AWARDS AGAINST STATES 247 (2012); Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809, 821-25 (2005); Ibrahim F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID REV. 1, 1 n.1 (1992) (justifying French armed intervention into Mexico by alleged non-payment of debt Victorino J. Tejera Perez, *Diplomatic Protection Revival of Failure to Comply with Investment Arbitration Awards*, 3(2) J. INT'L DISP. SETTLEMENT 445 (2012). This observation underpins the critique of international investment protection threatens "the normative ideal of sovereignty as democratic self-determination."

7. Olga Gerlich, *State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?*, 26 AM. REV. INT'L ARB. 47, 87-89 (2015).

8. *Id*. at 82.

9. *Id.* at 88-89.

10. *State Immunity and the New UN Convention*, CHATHAM HOUSE (Oct. 5, 2005), https://www.chathamhouse.org/sites/default/files/public/Research/International%20Law/ilpstate immunity.pdf.

11. *See infra* Part II.

12. The international regime theory argues that power distribution is one of the major influences on the pattern of international relations. Stephen Krasner defines international regime as sets of express or implied principles, norms, rules, and decision-making procedures at which actors' expectations converge in a given area of international relations. Regimes can be articulated through formal conventions and treaties or in the form of institutional arrangements in practice. Regimes "are more specialized arrangements that pertain to well-defined activities, resources, or geographical areas and often involve only some sunset of the members of international society." This theory raises concerns on the need to break away from national systems due to the instance of cultural conflict or when the judiciary is not independent of the administrative department. *See* KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979). The key issue of neorealism is that it ignores other goals that the state may pursue and does not define survival. *See also* ROBERT KEOHANE & JOSEPH NYE, POWER AND INTERDEPENDENCE, 19 (1977); Stephen D. Krasner,

State immunity is a by-product that was technically and philosophically created by law, usage, and international political culture.[13] It is a useful device to reconcile the sovereign judicial power vested in the forum state and its inability to inspect activities of another foreign state.[14] No matter the decision made by the court or the government, state immunity issues inevitably affect international relations—the decision of the forum state is always exerted.[15] State-centrist enforcement inevitably puts the forum state in a dilemma.[16] The rise of a host of new and powerful functional organizations provides a new approach to solve these state immunity issues. Community authority is a natural advantage of international organizations.[17] An international organization with delegated authority can authorize enforcement, which could release the forum state from political embarrassment or even conflicts.[18]

II. Obsolete State-centrism

Both international relations and enforcement theories contribute to the state-centrist approach. The theories of international relations influence the importance of international organizations. Both neorealists and neoliberalists support state-centrism.[19] The proponents of neorealism

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Structural Causes and Regime Consequences: Regimes as Intervening Variables, 36 INT'L ORG. 185 (1982). He defines principles as beliefs of fact, causation and rectitude; norms as standards of behavior defined in terms of rights and obligations; rules are specific prescriptions for actions; and decision-making procedures are prevailing practices for making and implementing collective choice. ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATIONAL RESOURCES AND THE ENVIRONMENT 13 (1989).

13. State immunity relates to the complicated concept of sovereignty. The related principles, such as independence and equality, support the rationale for state immunity. According to these principles, each state has equal rights, but these rights must be seen as a general limitation geared towards the preservation of sovereign states' orderly conduct. *See* ERNEST K. BANKAS, THE STATE IMMUNITY CONTROVERSY IN INTERNATIONAL LAW 45 (2005).

14. Built on the premise that international law respects independence and equality of states, municipal courts showed much self-restraint in exercising jurisdiction over foreign states and their property thus echoing the Latin maxim, *par in parem non habet imperium*: Equals have no authority over one another. *See* Philip Marshall Brown, *The Theory of the Independence and Equality of States*, 9 AJIL 305, 329 (1915).

15. Sinclair, *supra* note 4, at 219-20.

16. *Id.*

17. KAREN A. MINGST & IVAN M. ARREGUIN, ESSENTIALS OF INTERNATIONAL RELATIONS 213 (2017).

18. *Id.*

19. Although neorealists and neoliberalists do not consider international organizations are independent players in international relations, they still recognize the function of international organizations to some extent. Both of them have suggested that in a situation where states are unwilling to put up with gaps in gains from operations in favor of their partners, international institutions need not be irrelevant, but may, in fact, assume additional functions to mitigate

argue that international arbitration exists in a state of anarchy.[20] Consequently, individual nation states and their legal systems play an important supporting and supervisory role over arbitration.[21] The power of national courts is necessary for the recognition and enforcement of an arbitration award.[22] Neoliberalists acknowledge the state of anarchy, as do neorealists, but they diverge on the primary reason for state involvement in international regimes.[23] Neoliberalists also argue that states, as dominant actors in the international community, seek to maximize their own interests as opposed to the goal of survival or security.[24] Their concerns are interest-based, not power-based.[25] They do not rely on amassing power to compensate for non-cooperation of member states due to the presence of institutions with opportunities to monitor and penalize non-compliance.[26] They consider that power, manifested in formal regimes, intervenes to ensure stability and mediate between interests and

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members' relative gains concerns. *See* Andreas Hasenclever et al., *Integrating Theories of International Regimes*, 26 REV. INT'L STUD. 3, 14 (2000) ("Neoliberals have argued that regimes are created and maintained by states for the sake of certain functions they serve in mixed-motives situations. In particular, regimes help states to cooperate for mutual benefit by reducing uncertainty and informational asymmetries. Thus, regimes that include verification rules and procedures reduce states' fears of being cheated by their partners, permitting them to focus on the benefits from cooperation."); Joseph M. Grieco, *Realist Theory and the Problem of International Cooperation: Analysis with an Amended Prisoner's Dilemma*, 50 J. POL. 600, 602 (1988); Robert O. Keohane & Lisa L. Martin, *The Promise of Institutionalist Theory*, 20 INT'L SEC. 39, 42-43 (1995).

20. James N. Rosenau, *Governance, Order, and Change in World Politics*, *in* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 1-3 (Rosenau & Czempiel, eds. 1992).

21. Hong-lin Yu, *Total Separation of International Commercial Arbitration and National Court Regime*, 15 J. INT'L ARB. 145, 146 (1998). He argues that states are the most effective and direct controlling power over international commercial arbitration. *See also* MICHAEL W. REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 6, 10 (1992). He states that the international political environment has been favorable for the creation of bureaucratic controls over international commercial arbitration. This state of ever competing sovereignty has made arbitration adopt a unique approach to the issue of power, which the author defines as controls designed to work as techniques whose function is to ensure that an artifact works the way it was intended to work.

22. Matthew Kirtland et. al, *A Comparison of the Enforcement Regimes under the New York and Washington Conventions—A Tale of Two Cities*, *in* INTERNATIONAL ARBITRATION REPORT (Norton Rose Fulbright, May 2018), https://www.nortonrosefulbright.com/en-pg/knowledge/publications/04f14b2a/a-comparison-of-the-enforcement-regimes-under-the-new-york-and-washington-conventions.

23. CHARLES W. KEGLEY JR., CONTROVERSARIES IN INTERNATIONAL RELATIONS THEORY: NEOREALISM AND NEOLIBERAL CHALLENGE 4-5 (1995).

24. *Id.* at 6, 11.

25. *Id.* at 11, 13.

26. Stephen D. Krasner, *Global Communications and National Power—Life on the Pareto Frontier World Politics*, 43 CAMBRIDGE L.J. 336, 342 (1991).

outcomes.[27] There are some concepts shared by neorealists and neoliberalists:

> (1) the conception states as rational actors, who are atomistic in the sense that their identities, power, and fundamental interests are prior to international society (the society of state) and its institutions; (2) the basically static approach to the study of international relations, which is ill-equipped to account for learning (at the unit level) and history (at the system level); and (3) the positivist methodology that prevents students international institutions form from understanding central aspects of the workings of social norms (including norms at the inter-state level).[28]

Obsolete enforcement theories rise in response to neorealism and neoliberalism.[29] Traditional theories of international enforcement can be classified into three categories. The first category assumes that the major impetus behind compliance in international law is "conscience" or "compelling morality."[30] One commentator, Elihu Root, refers to conscience and sense of justice as the only factor in compliance.[31] He argues that the real condemnation and obloquy come from the moral isolation and disgrace, which follows conviction and punishment and not the actual physical effect of imprisonment or deprivation of property.[32] Another commentator, W. Paul Gormley, claims that, before enforcement, any morally defensible challenges or appeals must be resolved.[33] Clearly, the moral drive to rectitude—the ego's demand on itself for ethical behaviors—can be a force towards compliance.[34] However, moral or

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27. *Id.* at 337.

28. Andreas Hasenclever et al., *Integrating Theories of International Regimes*, 26 REV. INT'L STUD. 3, 5 (2000).

29. W. Paul Gormley, *The Status of the Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement*, 10 HOW. L.J. 40, 59 (1964); S.S. Wimbledon (U.K. v. Japan), 1923 P.C.I.J. (ser. A), No.1 (Aug.17); William T. Gossett, *The Law: Leader or Laggard in Our Society*, 51 ABAJ 1131, 1135 (1965).

30. Gormley, *supra* note 29, at 59.

31. Elihu Root denied the existence of the sheriff and the policeman in international law to guarantee the enforcement of the rules of international law. And because of the absence of sanction for the enforcement of the rules of international law, great authorities have no reason to abandon its own contention or yield against its own interest to the arguments of the other side. Therefore, he concluded that this led great authorities to deny that those not enforceable rules were entitled to be called law at all. *See* Elihu Root, *The Sanction of International Law*, 2 AM. J. INT'L 451, 453 (1908).

32. *Id.*

33. Gormley, *supra* note 29, at 43.

34. W. Michael Reisman, *The Enforcement of International Judgments and Awards*, 63 AM. J. INT'L L., 1, 2 n.5 (1969) ("Vattel rested the entire basis of international law upon an internal 'law of conscience[,]'" quoting W. FRIEDMANN, LEGAL THEORY 34 (2nd ed. 1949)). Friedmann construes this to be a denial of international law. Dr. Roscoe Pound suggests that since classical international law was directed personally to individual sovereigns, the idea of personal conscience was not the fictitious concept which the current 'state conscience' is. Even the concept of state

ethical drives are a result of a community-acting force.[35] This drive is one factor, but not the only factor in compliance, and it cannot work alone.[36] Only relying on morality or ethics is too idealized.[37] The reality has shown that states' financial crises and the levels of knowledge on the capability to disguise commercial assets as public have led to the increased number of recalcitrant states.[38]

The second category commonly applied by international judicial bodies is to presuppose that all states would comply with the enforcement of awards. In numerous statements, the Permanent Court and the ICJ have refused even to consider the possibility of non-compliance. In *S.S. Wimbledon*, the British, French, Italian, and Japanese governments petitioned the Permanent Court of International Justice (PCIJ) to find that Germany had wrongfully refused passage through the Kiel Canal to the *S.S. Wimbledon*.[39] The PCIJ held that Germany had acted wrongly and awarded the French government damages, but refused to consider contingent punitive interest for delay in payment.[40] The PCIJ held that it "does not award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance"[41] and "neither can nor should contemplate such contingency."[42] When a court anticipated that a state was likely to impugn a judgment, it frequently disseized itself of jurisdiction.[43] In other cases,

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conscience may be too broad for proper analysis. Since it is ultimately individuals who prescribe and apply international law, their personal ethics and internal demands for rectitude will clearly affect their decisions. Roscoe Pound, *Philosophic Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 71, 76 (1923).

35. Moral and ethical drives stem from collective social emotions, reflecting the subjective values of a society. These gut instincts determine the decision maker's choice. *See* sources cited *supra* note 34.

36. PERCY E. CORBETT, MORALS, LAW AND POWER IN INTERNATIONAL RELATIONS 11, 14, 15 (1956).

37. Potential conflicts of national systems become almost inevitable as soon as the process of international commercial arbitration comes into contact with national legislation and courts. *See* Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT'L 121, 122 (1996).

38. For instance, Argentina has financial crisis in 2007/8. And Greece has had a prolonged financial crisis with the climax in 2015. All these give rise to several actions and subsequent non-compliance on the basis of lack of funds. *See* James B. Stewart, *If Greece Defaults, Imagine Argentina, but Much Worse*, N.Y. TIMES (June 25, 2015), https://www.google.com/amp/s/www.nytimes.com/2015/06/26/business/an-echo-of-argentina-in-greek-debt-crisis.amp.html.

39. S.S. Wimbledon (U.K. v. Japan), 1923 P.C.I.J. (ser. A), No. 1 (Aug. 17).

40. *Id.*

41. *Id.*

42. *Id.*

43. The Anglo-Iranian Oil Co. Case (U.K. v. Iran), Judgment, 1952 I.C.J. Rep. 93 (July 22). The United Kingdom sought to bring Iran before the court on the basis of an Iranian declaration of adhesion under Article 36. It was apparent that Iran would not comply with any judgment which

issues were formulated restrictively,[44] or the final judgment was almost Delphic in ambiguity.[45] Enforceability was priorly assumed to be fine,[46] but the problem is that there is no remedy for non-execution.[47] Through denying adjudicative jurisdiction or giving ambiguous judgment, the courts found excuses to avoid dragging themselves into the wallow of non-compliance.[48]

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might have ensued. By extremely restrictive interpretation, the court found itself without jurisdiction. In a dissenting opinion, Judge Read observed that some twenty days before the court had upheld its jurisdiction under a similar adhesion in the Ambatielos Case (Greece v. U.K. ". . . notwithstanding that a restrictive construction of the jurisdictional clause would have led, inevitably, to an opposite result." Ambatielos Case (Greece v. U.K.), Preliminary Objections, 1952 I.C.J. Rep. 38 (July 1); *see also* ALAN H. SCHECHTER, INTERPRETATION of AMBIGUOUS DOCUMENTS by INTERNATIONAL ADMINISTRATIVE TRIBUNALS 130 (1964).

44. Case Concerning Right of Passage over Indian Territory (Port. v. India), Judgment, 1960 I.C.J. Rep. 6 (Apr. 12). The Court found that Portugal had a rite of passage in 1955; at the time of decision, Goa had already been annexed by India. The decision did little more than confirm the *status quo* at two points in time. *See* Northern Cameroons (Cameroon v. U.K.), Judgment, 1963 I.C.J. Rep. 38 (Dec. 2) (in which the court refused to take jurisdiction, saying: "The Court must discharge the duty to which it has already called attention—the duty to safeguard the judicial function").

45. Asylum (Colombia v. Peru), Judgment, 1950 I.C.J. Rep. 266 (Nov. 20). The court was asked to determine whether asylum granted to Sr. Haya de la Torre by the Colombian Embassy in Lima, Peru was in accordance with the Havana Convention on Asylum to which both litigants were parties, and, if so, whether Peru was bound to accord safe passage to Haya out of the country. The court held that Colombia was not qualified to make a unilateral and definitive characterization of Haya's alleged offenses as falling within the purview of the Convention, and that the grant of asylum had been prolonged beyond the period sanctioned in Art. 2(2) of the Convention. On the day on which this judgment was handed down, Colombia, invoking Art. 60 of the Statute of the Court, asked for an interpretation of the judgment: specifically, did the judgment mean that Colombia was obligated to surrender Haya to the government of Peru? In its judgment on this matter, the court refused to interpret, holding that the fact that the decision was obscure to one party, but perfectly clear to the other, did not make a dispute. The court held that Colombia must terminate the asylum, but that Colombia was under no obligation to surrender Haya to Peru. *See* Asylum (Colombia v. Peru), Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case, 1950 I.C.J. Rep. 395 (Nov. 27); *see also* Reisman, *supra* note 34, at 2.

46. Joan E. Donoghue, *The Effective of the International Court of Justice*, 108 ASIL PROCEEDINGS 114, 114 (2014).

47. According to Article 94(2) of the UN Charter, the Security Council deals with non-compliance. In the entire history of the UN, the Security Council has never employed its Article 94 powers even on occasions of clear non-compliance. *See* Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 847 (2007).

48. Aerial Incident of July 27th 1955 (Isr. v. Bulg.), Judgment, 1959 I.C.J. Rep. 127 (May 26). Israel sought to bring Bulgaria before the court for downing an Israeli civilian carrier which strayed into Bulgarian airspace, the court disseized itself of jurisdiction, refusing to construe the Bulgarian declaration of adhesion of 1921 to the P.C.I.J. as operative vis-à-vis the I.C.J., under Art. 36(5) of the Statute. The declaration of 1921 had been made when Bulgaria was a kingdom. Subsequently, Bulgaria became communist. It was highly improbable that she would have complied with a judgment. In a joint dissent, four judges, among them Sir Hersch Lauterpacht, argued that the court's construction would cut away a good deal of its jurisdiction.

They did not solve the issue but instead covered it up.[49] By doing so, the courts immensely damaged the meaning of the existence of these impartial judicial organs.[50] The courts try to avoid non-compliance to keep their dignity, but they put the cart before the horse.[51] In fact, this theory does not concern enforcement itself, it just provides an excuse to neglect enforcement.

The third category is called a counsel of despair due to issues of non-execution. Scholars in this category assume enforcement is impossible.[52] Some of them assume that enforcement, as a type of social change, should be at the same tempo of social change.[53] William T. Gossett, a nationally-renowned lawyer, argues that law should reflect the values of our society and respond to true changes in those values.[54] It is not the function of the law either to promote or to prevent change, but to keep the world civilly organized as it moves along.[55] Professor Jan F. Triska also involves social reality in the enforcement stage by referring to a pre-consensual situation.[56] He argues that the parties involved in an agreement would have gotten a consensus to some extent in accordance with the social reality.[57] When social changes happen, the original consensus on the content may have fallen out of favor; when the consensus is lower than the minimum standard, the instrument loses its force.[58] It can be inferred that Professor

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49. Case of the Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K. and U.S.), Judgment, 1954 I.C.J. Rep. 19 (June 15). The court applied an extremely restrictive and not logically exhaustive construction of the Washington Agreement in order to defeat the attachment strategy of the Three Powers.

50. The function of an international court of justice is to declare and administer law in disputes as the nations may in their wisdom or enlightened self-interest bind themselves to submit to a determination of this agency of justice. *See* Hon. James Brown Scott, *Aim and Purpose of an International Court of Justice*, 96 AM. ACAD. POL. SOC. SCI. 100, 100 (1921).

51. Avoiding unenforceability through denying jurisdictional is against the function of an international court of justice. "The Court's role is to settlement, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies." *See The Court*, INT'L CT. OF JUST., https://www.icj-cij.org/en/court (last visited Sept. 21, 2020).

52. *See e.g.* William T. Gossett, *The Law: Leader or Laggard in Our Society*, 51 ABAJ 1131, 1134 (1965).

53. *Id.*

54. *Id.*

55. *Id.*

56. Jan F. Triska, Different Perceptions of Agreements and Disagreements, 58 AM. SOC'Y INT'L L. PROC. 61, 65 (1964). Jan F. Triska, JUDr., J.S.D., Ph.D., Professor of Political Science and International Relations at Stanford University since 1960, died February 20, 2003.

57. *Id.*

58. "The strength of a given consensual instrument may be assessed by calculating the probability that parties will respond as stipulated in the instrument. When the probabilities drop too low, the instrument loses its force." *Id.* at 65.

Triska's proposition is law should be in conformity with social reality, not the opposite.[59] And only when law conforms with social reality is it binding.[60] Undoubtedly, the distance between social reality and legal norms do and always will exist.[61] However, this should not be taken to deny that decisions moving towards realization can also be made.[62] The above opinion "tended to regard statutory laws as mere end-products, mere expressions of the forces that mold human behavior, and not as independent contributory factors."[63] It overly isolates social reality and legal norms.[64] Legal norms, as an instrument, derive from social reality, and, if they are effective, they also direct human behaviors.[65] Decisions can be conforming or in conformation with the social reality.[66] To assume all decisions are in conformation with social reality is arbitrary; it is inaccurate to assume that there is no possibility of enforcement.[67]

Professor Roger D. Fisher provides another reason to claim enforcement is impossible.[68] He assumes that enforcement is impossible because awards are subject to a *de jure* veto.[69] He provides that if the sovereign state was unsatisfied with the award, it has a right to veto. In the present author's opinion, *de jure* veto may lead to non-enforcement. If the state could prove that the award itself is not binding, such as because the judicial body did not have jurisdiction, the award would be

59. "Compliance with law depends on many things . . . and cardinally, in my opinion, on the perceived distance between social reality and the respective legal norm which is designed to order that social reality. The greater the distance or gap between the social reality and the corresponding law as perceived by the parties, the individual human beings or the groups, the less 'compliance' with the law, i.e., the less the desire of the parties to comply. Conversely, the shorter the perceived distance and the smaller the gap, the greater the desire to comply with the law . . . This is why I would submit that it is not enough to ask how to cause compliance of social reality with law, but also how to cause compliance of law with social reality." *Id.* at 61.

60. *Id.*

61. Arnold M. Rose, *Sociological Factors in the Effectiveness of Projected Legislative Remedies*, 11 J. LEGAL EDUC. 470, 470-71 (1959).

62. *Id.*

63. *Id.* at 471.

64. *Id.*

65. Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603 (2000).

66. David Dittfurth, *Judicial Reasoning and Social Change*, 50 IND. L.J. 258, 263-64 (1975).

67. *Id.*

68. Roger Fisher, *The Veto as a Means of Making Third-Party Settlement Acceptable*, 58 AM. SOC'Y INT'L L. PROC. 123, 123-24 (1964). Roger D. Fisher was the Samuel Williston Professor of Law at Harvard Law School and Director of Law at the Harvard Negotiation Project.

69. *Id.*

unenforceable.[70] A *de jure* veto is a unilateral action to ensure that the state would have a backup solution in extreme cases.[71] It is not a general solution to every case.[72] It is a situation that may or may not occur during the enforcement proceedings.[73] One cannot assume that a veto would occur in every enforcement proceeding and thus make every enforcement impossible.[74] Also, in the international community, third-party awards binds states and states assume state liabilities to enforce those awards.[75] Unilateral veto is illegal and may lead to compulsory enforcement against that reluctant state.[76]

The defects of these three obsolete theories are apparent. They build on an adjudication-enforcement dichotomy. They presuppose that adjudication and enforcement are totally isolated and when the judgment is made, the function of law has been realized.[77] This assumption ignores the importance of enforcement and exaggerates the isolation of courts and lawyers from post-adjudicative processes.[78] If the words written on the paper cannot be fulfilled, then they are just authoritative wastepaper.[79] In the short term, no remedy for non-compliance would damage the interests of winning parties.[80] In the long term, it would detract from the authority of the law and court.[81] Besides the short and long terms effects, these

70. Steven C. Bennett, *Non-Binding Arbitration: An Introduction*, DISP. RESOL. J., May-July, 2006, at 25.

71. Richard W. Edwards Jr., *Reservations to Treaties*, 10 MICH. J. INT'L L. 362, 362-364 (1989).

72. Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. INT'L & POL. 175, 206-07 (1995-1996).

73. *Id*.

74. *Id*.

75. For example, Article 54(1) of the ICSID Convention requires Contracting State to recognize an award rendered pursuant to the Convention as binding and to enforce the pecuniary obligations imposed by the award as if it were a final judgment of the State's courts. *See* ICSID Convention, art. 54.

76. Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, ¶ 41 (Nov. 30, 2004).

77. Eberhard P. Deutsch, *Problems of Enforcement of Decrees of International Tribunals*, 50 ABAJ 1134, 1135 (1964).

78. *Id*.

79. C. C. Engering & N. A. Liborang, *Judgments of European Court of Human Rights Against the Netherlands and their Effects: An Overview 1960-1997*, *in* THE EXECUTION OF STRASBOURG AND GENEVA HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER 57 (Thomas Barkhuysen et al., eds. 1999).

80. *Id.* Without measures of constraint against the reluctant party, the winning party has no measures to obtain compensation.

81. Hornsby v. Greece (No. 25701/94), 1997-II Eur. Ct. H.R. 495, 510. The Court asserted that a right of access to a court "would be illusory of a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6§1 should implementation of judicial decision. . . . Execution

theories are also removed from the political-legal distinction, the core of which is central to international law.[82] They exclude the issue of enforcement from the scope of legal issues; therefore, they refuse to provide legal remedies for non-execution.[83] For domestic cases, enforcement is a logical consequence of judgment; thus, it makes no sense to challenge enforcement jurisdiction.[84] As compared to the international plane, these issues are much more complicated. In international law, what the organized community can do is legal, what it cannot do is political.[85] As Manley O. Hudson maintains, enforcement is strictly an executive, not a judicial, function.[86] Accordingly, he stated: "The function of enforcing a decision of an international tribunal is an executive function, and as such it should be confined—to a body which is invested with executive powers. It becomes, in this event, a political as distinguished from a judicial matter."[87] In accordance with tradition, what the international community can do is "legal," what it cannot do is "political."[88]

Massive changes have occurred in the international plane, rendering the theories discussed above anachronistic. Enormous scientific, social, and economic changes have had a profound influence across the world.[89] Unstoppable globalization has its impact on every corner of the world.[90] A continuous succession of scientific developments and the greatest revolution in communications has transformed global society.[91] The increased and intensified cross-border economic exchanges, such as trade and investment, are a great consequence of this deep social change,[92] which has led to a growing trend of increased multilateral cooperation that

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of a judgment given by any court must therefore be regarded as an integral party of the 'trial' for the purposes of Article 6."

82. *See* Ralph Cavanagh & Austin Sarat, *Thinking about Courts: Towards and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 373 (1980).

83. *Id.*

84. *Id.*

85. *See* Deutsch, *supra* note 77.

86. MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 128 (1944). Manley Ottmer Hudson was a U.S. lawyer, specializing in public international law. He was a judge at the PCIJ, a member of the International Law Commission, and a mediator in international conflicts.

87. *Id.*

88. HERBERT BRIGGS, THE LAW OF NATIONS 1043 (1952) ("Any conflict between States as well as between private persons is economic or political in character; but that does not exclude the possibility of treating the dispute as a legal one").

89. Rob van Leen, *Why the World Needs to Embrace Science*, WORLD ECON. F. (Dec. 16, 2015), https://www.weforum.org/agenda/2015/12/why-the-world-needs-to-embrace-science/.

90. *Id.*

91. *Id.*

92. Joel Mokyr, *Building Taller Ladders*, FIN. & DEV., June 2018, at 32-35.

takes place in international organizations, when there is a deviation from the delegated authority and which leads, most importantly, to their increasing legitimacy as creators of global norms.[93]

Corresponding with this development, a new theory of international relations emerges—cognitivism.[94] Cognitivists value international institutions more.[95] They consider that states are as much shaped by international institutions as international institutions shape them.[96] Cognitivists are knowledge-based thinkers who reject the concept of states as rational actors.[97] They identify states as more of role-players than utility maximizers.[98] They focus on "logic of appropriateness" rather than "logic of consequentiality."[99] They consider norms and rules to not only restrict their behavior but also drive their decisions.[100]

This theory challenges state-centrism and provides a new approach to enforcement. All obsolete theories that exclude enforcement from the scope of legal systems beg the question of international enforcement.[101] It should be noted that these obsolete enforcement theories were forged when the interaction between nations was relatively low and transnational commercial transactions were rare.[102] Since direct enforcement required

93. Isabella Lowenthal-Isaacs, *Can International Organizations Becomes "Autonomous Sites of Authority"?*, E-INTERNATIONAL RELS. STUDENTS (Feb. 18, 2019), https://www.e-ir.info/2019/02/18/can-ios-become-autonomous-sites-of-authority-barnett-and-finnemore-1999/.

94. Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 384 (1994).

95. "The neorealists and neoliberalists debate about the possibilities for collective action in international relations has been based on a shared commitment to Mancur Olson's rationalist definition of X the problem as one of getting exogenously given egoists to cooperate . . . The causes of state egoism do not justify always treating it as given. Insights from critical international relations and integration theories suggest how collective identity among states could emerge endogenously at the systemic level. Such a process would generate cooperation that neither neorealists nor neoliberals expect and help transform systemic anarchy into an 'international state'—a transnational structure of political authority that might undermine territorial democracy." *Id.* at 384.

96. Alexander Wendt & Raymond Duvall, *Institutions and International Order in* GLOBAL CHANGES AND THEORETICAL CHALLENGES: APPROACHES TO WORLD POLITICS FOR THE 1990S 51 (1989).

97. *Id.*

98. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 237, 244, 253 (1977).

99. Andreas Hasenclever et al., *Integrating Theories of International Regimes*, 26 REV. INT'L STUD. 3, 32-33 (2000).

100. JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: The ORGANIZATIONAL BASIS of POLITICS 23 (1989).

101. Deutsch, *supra* note 77.

102. Besides the second approach, which is not concerned about the ontology of enforcement, all other approaches are mainly developed at the era of the Cold War. At that period, the international community were split into two opposing camp which made it impossible to have a supreme international law. However, this situation has changed associated with Soviet

physical interventions and in that era, assets of any one state were usually found only within its own territory,[103] there was no impetus to consider international enforcement.[104] The rise of a host of new and powerful functional organizations challenges the traditional approach.[105] In 1960s, Professor W. Michael Reisman proposed a centralized enforcement theory.[106] This theory emphasized the function of international organization, which provided guidance to solve sovereign immunity issues through international organizations.[107] Massive changes in the international context have provided a new approach that incorporates the hitherto neglected functions of international organizations to solve enforcement issues.[108] In the next part, the present author proposes a centralized enforcement remedy guided by Professor Reisman's theory to solve state immunity issues.

III. FUNCTIONAL INTERNATIONAL ORGANIZATION

Professor Reisman proposed the establishment of centralized enforcement and its methodology in the article "The Enforcement of International Judgments."[109] The system is based on the political-legal elements at play in an enforcement process: community authority and effective power.[110]

The present author agrees with the possibility of substituting international community force for the action of the individual state. Although states and political circles continue to be venerated as the hoary totems of sovereignty, the social and economic systems of our modern industrial and science-based civilization are thoroughly and inextricably

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dissolution. Nowadays, the scope and degree of international law has intensified. Each sovereign state must, to some extent, bind by the international law. *See* KAZIMIERZ GRZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES AND DIPLOMATIC PRACTICE 62-64, 236 (1970).

103. Reisman, *supra* note 34, at 7.

104. *Id*.

105. *Id*.

106. *Id*. at 8. W. Michael Reisman is the Myres S. McDougal Professor of International Law at Yale Law School, where he has been on the Faculty since 1965.

107. The current issues about state immunity include 1) fragmentation and non-uniform of legal techniques, 2) political embarrassment of the forum state, and 3) re-politicization of the remedies. All these issues connect with state centrism. *See* HAZEL FOX, THE LAW OF STATE IMMUNITY 486 (2nd ed., 2013).

108. Wendt, *supra* note 94.

109. Reisman, *supra* note 34.

110. It focuses on the controlling reality and an expectation of centralized enforcement. The proposal is deriving from a belief that cross-boundary cooperation has comprise modern international law, not options but imperatives. Enforcement as the final stage could be organized at the international level and need the help of international arrangements. *Id.* at 8.

integrated into many different types of transnational arrangements.[111] As a result, political and legal programs in any so-called national unit must take account of policies and conditions in other units.[112] National programs require active and ongoing collaboration with coordinate parts of other governments.[113] Nowadays, international organizations cover a wide range of centralized activities.[114] They disseminate information and reduce bargaining and transaction cost.[115] Although most organizations have decentralized enforcement arrangements, few specific international enforcement institutions exist. One such institution is the Security Council, which enforces international peace and security,[116] and the International Criminal Tribunal for the Former Yugoslavia, which has been given the power to enforce international humanitarian and human rights law.[117]

There are less favorable opinions. Professor Mary Ellen O'Connell argues that international actors generally comply with international law, but enforcement sits on the margins of international law.[118] Without an international legal system becoming the law of a world government, the best approach to enforcing international law is through domestic courts.[119] Professor Oran R. Young indicates monitoring and reporting are better techniques in a decentralized system since reputation assumes greater importance.[120] Besides, the degree of concrete, detailed, and wide-reaching rules of international law is relevant to international enforcement.[121] The idea of international enforcement is a more recent

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111. W. MICHAEL REISMAN, NEW SCENARIOS OF THREATS TO INTERNATIONAL PEACE AND SECURITY: DEVELOPING LEGAL CAPACITIES FOR ADEQUATE RESPONSES 15 (1999).

112. *Id.*

113. *Id.*

114. Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 761 (2001).

115. Wang Min, *The Contribution of the UN Information Dissemination Mechanism to the Awareness of Global Issues*, 8 INT'L J. ASIAN SOC. SCI. 167, 167-72 (2018).

116. U.N. Charter, ch. VII.

117. *The International Criminal Tribunal for the Former Yugoslavia: Making a Difference or Making Excuses?*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, THE HAUGE (May 1999), available from https://www.icty.org/en/press/international-criminal-tribunal-former-yugoslavia-making-difference-or-making-excuses.

118. Mary Ellen O'Connell, *Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 47, 57 (1995-1996). Mary Ellen O'Connell is the Robert and Marion Short Chair in Law and research professor of international dispute resolution at the University of Notre Dame's Kroc Institute for International Peace Studies.

119. *Id.*

120. *See* ORAN R. YOUNG, COMPLIANCE AND PUBLIC AUTHORITY ch. 3 (2010). Oran R. Young is professor emeritus and co-director of the Program on Governance for Sustainable Development at the Bren School of Environmental Science & Management at the University of California (Santa Barbara).

121. *Id.*

concept.[122] The present author agrees that in the existing international context, international enforcement is still too forward.[123] However, centralized enforcement does provide a new approach to the unsolved issues during international enforcement, such as state immunity relative to collecting investment awards.[124] In the following, the present author proposes to apply the functional system to state immunity issues.

A. Community Authority and Effective Power

The functional system is based on two political-legal elements at play in a decision-making process: community authority and effective power.[125] The relevant social context should be scrutinized and a combination of authority and effective power arranged.[126]

The international community respects the principle of state sovereignty[127] and precludes any international or foreign intervention without consent.[128] This has been affirmed under the Charter of the United Nations.[129] International organizations have deviated from the delegated authority.[130] Without an international organization with internal authority to extend its own jurisdiction, the authority of the centralized enforcer could only come from the agreement of sovereign states.[131] There is no international law prohibiting sovereign states from establishing centralized enforcement.[132] If the international community is willing to undertake the function of enforcement, centralized enforcement can be realized.[133]

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122. *See* Reisman, *supra* note 34.
123. *Id.*
124. *See* the following discussion.
125. Myres S. Mcdougal, *International Law, Power, and Policy: A Contemporary Conception, in* 82 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1953).
126. *Id.*
127. U.N. Charter, art. 2, ¶ 1. "The Organization is based on the principle of the sovereign equality of all its Members."
128. U.N. Charter, art. 2, ¶ 4. "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
129. *See generally* U.N. Charter.
130. Lowenthal-Isaacs, *supra* note 93.
131. Some IGOs, such as WTO, develop procedures to make rules, settle disputes, and punish those who fail to follow the rules. *See* AUTAR KRISHEN KOUL, GUIDE TO THE WTO AND GATT 41 (2018).
132. Reisman, *supra* note 34.
133. *Id.*

The final goal of the functional model is to build up an effectively functioning, centralized enforcement.[134] Theoretically the subject of the enforcement should have community authority and effective power.[135] Potential centralized enforcers include international organizations, regional organizations, and functional agencies.[136] These entities represent the desire to improve cooperation relationships and global economic governance.[137] Of course, not all of these entities have direct control over the assets of the member states.[138] This explains why sovereign states are treated as the best subject for international enforcement.[139]

Community authority is a natural advantage of international organizations.[140] An international organization with delegated authority could authorize a controlling state to enforce the award.[141] This strategy is a great way to relieve the pressure of the forum state.[142] The forum state may find it inexpedient to transfer the assets of the losing state to the winning party because the losing state would interpret the act as hostile and might retaliate.[143] But with an authority from an international organization, the forum state is just assuming its own international obligation towards the community; it permits the forum state to execute the award without bearing primary responsibility.[144]

This is a strategy to defeat the bastion of state immunity.[145] The practice of state immunity is highly fragmented.[146] One is persuaded to argue that large markets in industrialized centers, where finance capital is

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134. *Id.*
135. *Id.*
136. *Id.*
137. *See* Maria Gabriela Sterian, *The Role of International Organizations in the Global Economic Government—An Assessment*, SPECIAL ISSUE ROMANIAN ECON. BUS. REV. 308, 309 (2013).
138. For example, WTO does not have direct control over the assets of its member states. *See* KOUL, *supra* note 131.
139. *State Owned Assets: Setting Out the Store,* THE ECONOMIST (Jan. 11, 2014), https://www.economist.com/briefing/2014/01/11/setting-out-the-store.
140. Lowenthal-Isaacs, *supra* note 93.
141. *See Intergovernmental Organizations, Nongovernmental Organizations, And International Law*, *in* ESSENTIALS OF INTERNATIONAL RELATIONS (2017), available from https://wwnorton.com/college/polisci/essentials-of-international-relations5/ch/07/summary.aspx.
142. YANG, *supra* note 3, at 361.
143. *Id.*
144. Andrea Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPHER SCHREUER 307 (2009).
145. Ostrander, *supra* note 5, at 582.
146. Richard Garnett, *Should Foreign State Immunity be Abolished?* 20 AUST. Y.B. INT'L L. 175, 190 (1999).

well-established, regard trading activities of nations as *acta jure gestionis,* and subscribe to the tenets of restrictive immunity.[147] On the contrary, developing countries insist on absolute immunity because of their collective self-interest and lack of capital and technological advancement.[148] Besides, the practices among western countries are also inconsistent.[149] These diversities contribute to a disunity of rules in the international plane from both principal and legal techniques.[150] The inconsistency is connected to political concerns.[151] National courts have discretion on the cases and they will make decisions that protect their states from political embarrassment.[152] A centralized enforcer is a great approach to relieve the forum state from potential political conflicts.[153] A centralized enforcer is an institution who has centralized power and decision-making autonomy and carries out actions that enjoy legitimacy and affect the legitimacy of the state activity.[154] It outlines the political context of interactions between states.[155] It maintains neutrality, impartiality, and independence.[156] Neutrality enables the centralized enforcer to act as mediator between states and to implement their decisions; impartiality resides on the fact that neither part is favored; and independence resides on the fact that the enforcer can take decision for itself.[157] This kind of centralized enforcement could give a sovereign state an "excuse" to take measures of constraint.[158]

Besides relieving the burden from the forum state, a centralized enforcement organ helps depoliticize the existing enforcement remedies.[159] Those winning parties whose legal rights cannot be protected

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147. U.N. General Assembly, *Jurisdictional Immunities of States and Their Property—Information and Materials Submitted by Government*, U.N. Doc. A/CN.4/343 (Apr. 14, 1981).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. Greece and Croatia are great examples to expose political concerns of the forum state because both states require executive authorization for enforcement measures against the property of foreign nations.

153. MINGST & ARREGUIN, *supra* note 17.

154. Sterian, *supra* note 137, at 311-12.

155. André Broome et al., *Bad Science: International Organizations and the Indirect Power of Global Benchmarking*, 24 EJIR 514, 519 (2018).

156. J. F. Lalive, *International Organization and Neutrality*, BRIT. Y.B. INT'L L. 1947, at 72, 75, 80.

157. *Id.*

158. Bjorklund, *supra* note 144.

159. Zixin Meng, State Immunity and International Investment Law (Jan. 22, 2021) (unpublished S.J.D. dissertation, Tulane University) (on file with Tulane University Law Library). https://library.law.tulane.edu/record=b936103.

by a judicial organ would be referred to other alternatives to recover loss.[160] Those alternatives regress to political bargaining.[161] Investors' home states, who possess strong power, may use their influence to protect their investors.[162] This shows a lack of loyalty to the values that underlie neutral and depoliticized international investment arbitration.[163] To reincorporate this last stage of proceedings of the legal system, a centralized enforcer gives winning parties an opportunity to argue executive immunity in an environment governed by rules and procedures.[164] Although the effectiveness of a centralized enforcer is dependent on the combination of structure and operation, at least it provides an opportunity to solve the issue from a legal aspect.[165]

Another element is effective power. Effective power refers to direct control.[166] The felicitous conjunction of authority and effective power is rarely found in one entity in international law.[167] Ideally, enforcement is a combination of both authority and effective power.[168] An organization that has a conventional combination consisting of authority and effective power will have the capacity to enforce judgments.[169] If an organization only possesses one of these capabilities, it will be defective in its capacity.[170] If it only has authority, it risks the judgment being a hollow victory; if it only has effective power, it faces the challenge of the legitimacy of its action.[171] In the international investment community, it is impossible to establish that an organization has full capacity and effective power.[172] Giving authority to a centralized enforcement and still leaving

160. *Id.*

161. *Id.*

162. *Id.*

163. SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 32 (2008).

164. *See State Immunity and International Investment Law*, *supra* note 159.

165. Michael Faure & Wanli Ma, *Investor-State Arbitration: Economic and Empirical Perspectives*, 41 MICH. J. INT'L L. 1, 49-58 (2020).

166. "Effective power is expressed in military and economic. A community authorizes its sheriff to implement pronouncements and vests in him enough effective power for the task." Reisman, *supra* note 34, at 10.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. There is no indication shows that sovereign states are willing to give any international organization direct control over their state assets. *See* OECD, *The Contribution of International Organisations to a Rule-Based International System* (Apr. 10, 2019), https://www.oecd.org/gov/regulatory-policy/IO-Rule-Based%20System.pdf.

effective power to sovereign states is a compromise solution.[173] Since this centralized enforcement is clearly defective and the degree of difficulty to establish a new international organization is high, the best measure is to let the existing organization assume the function of a centralized enforcement. After scrutiny of the existing international investment organizations, the present author considers that the ICSID is the best choice to assume the function of centralized enforcement.

The ICSID system promotes much-needed international investment by offering a neutral dispute resolution forum both to investors who are (rightly or wrongly) wary of nationalistic decisions by local courts and to host states that are (rightly or wrongly) wary of self-interested actions by foreign investors.[174] As explained by Ibrahim Shihata, who served as the Secretary-General of ICSID from 1983 to 2000, the goal of the ICSID Convention is "to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to depoliticize the settlement of investment disputes."[175] After decades of development, ICSID now has been privileged to host the majority of state-investor arbitrations and to play a leadership role in the field.[176] The ICSID Convention provides for rigorous finality.[177] It accepts no grounds whatsoever for national courts to refuse recognition and enforcement of ICSID awards.[178] The only defect the ICSID has regards state immunity.[179] If it can revise this provision of the Convention to incorporate the issue of state immunity, it could serve as centralized enforcement with the lowest-cost to reform, as opposed to the higher cost of reforming other international organizations to be such a centralized enforcer.[180]

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173. *Id.*
174. LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 4-5 (2011).
175. Shihata, *supra* note 6.
176. MEG KINNEAR, GUIDE TO ICSID ARBITRATION ix (2011).
177. ICSID Convention, art. 54.
178. *Id.*
179. *Id.* at art. 55
180. The authority of the ICSID derives from the ICSID Convention. The ICSID Convention may be amended following provisions outlined in Chapter IX. Ratification, acceptance, or approval by all contracting states is required for an amendment to become active. *See* ICSID Convention, ch. IX, *Draft Protocol for the Enforcement of ICSID Awards*: "The undersigned States parties to this proposal, in the interests of ensuring enforcement of ICSID awards, agreed that ICSID has the jurisdiction to issues related to state immunity during the enforcement."

B. A Centralized Enforcer

The willingness to establish a centralized enforcer will be evaluated through four aspects: the target state, which has lost the judgment; the enforcers; the power bases of enforcers applicable to the enforcement problem at hand; and the strategies to be employed.[181]

1. The Target, the Creditor State, or the Third-Party

Firstly, do states tend to identify themselves with the target state, the creditor state, or a third-party?[182] States that possess different identifications have different predispositions, demands for values, and expectations about the organizations.[183] In state immunity cases, whether sovereign states identify themselves as the target state or the forum state makes little difference. The present author's opinion is that no matter the identification, a centralized enforcer is better than a nation-state-based solution.

For the target state, their best choice is the plea of sovereign immunity to prevent enforcement of investment awards.[184] In the existing enforcement proceedings, the interpretation of state immunity is at the

181. "Within the limits of this article, only a truncated version of the model can be presented. A comprehensive system of functional enforcement would comprise (1) Enforcer and Targets; (2) Their Perspectives; (3) Potential Enforcement Arenas; (4) Bases of Power of both Enforcers and Targets; (5) Strategies of Modalities of Enforcement; (6) Enforcement Outcomes; (7) Post-Outcome Effects, i.e., trends toward or away from the institutionalization and centralization of international enforcement. The four phases which are not discussed expressly in the text have been assimilated to the other three." *See* Reisman, *supra* note 34, at 9 n.27.

182. Professor Reisman claimed that the subjectivities of the elites in potential enforcing polities are of significant significance. The original version of the question is, do elites tend to identify themselves with the target or the creditor state? *See* Reisman, *supra* note 34, at 9 n.27.

183. *Id.*

184. The Sedelmayer saga clearly illustrates the many issues, some yet remaining unresolved, concerning the nature and scope of state immunity. By early 2015, Mr. Sedelmayer took 17 years of legal battles, including over 140 cases in multiple jurisdictions, to secure some partial payment. During this time, in many of the cases against it, Russia successfully relied on the sovereign nature of target assets to frustrate Mr. Sedelmayer's unrelenting claims against it. *See* Jacob A. Kuipers, *Too Big to Nail: How Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards*, 39 B.C. INT'L & COMP. L. REV. 417, 434 (2016); Andrew Higgins, *Beating Russia at Its Own Long Game*, N.Y. TIMES (Feb. 9, 2015), http://www.nytimes.https://www.nytimes.com/2015/02/10/world/europe/once-friendly-with-putin-german-goes-to-court-over-seized-assets.html. In 2009, the award was valued about $9.36 million, which included interest and legal costs. *See also* David Crawford, *Moscow Pays a Debt-at Last,* WALL ST. J. (Dec. 18, 2008), http://www.wsj.com/articles/SB122955279471915687; *U.S. Dollar-Euro Exchange Rate Information,* EMBASSY OF THE U.S. IN FR., http://france.usembassy.gov/irs-euro.html [https://perma.cc/P48P-2MS5].

discretion of the forum state.[185] National courts can unilaterally decide whether enforcement immunity should be denied.[186] The proposition of the target state is not binding to the forum state.[187] Out of political considerations, the forum state is always cautious when securitizing enforcement immunity.[188] But most sovereign states insisting on absolute immunity are developing states who lack capital and technological advancement.[189] The result is that their political influence is slight.[190] On the contrary, most forum states who move to restrictive immunity are developed states with well-established legal systems and mature legal techniques.[191] It is impossible for the host state to persuade the forum state to change its own legislation to respect absolute immunity.[192] For the target state, the suboptimal choice is that the restrictive immunity rules could be unified and exclude the more state assets from enforcement the better.[193] Centralized enforcement is quite helpful for this approach. The existing enforcers are nation-states who have diverse criteria and standards.[194] A target state, who wants to refer to state immunity to defeat enforcement, needs to know the statute and the court practice of different forum states, which increases the burden of the target state.[195] Compared to that, a centralized enforcer means only one set of rules, which is more economically friendly and predictable, to the target state.[196] A centralized enforcer could not guarantee its criteria and standards will completely

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185. *See* August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 EUR. J. INT'L L. 803, 826 (2006).

186. *Id*.

187. *Id*.

188. YANG, *supra* note 3, at 361.

189. *See* Peider Konz, *Legal Development in Developing Countries*, 63 PERSP. INT'L LEGAL DEV. 91, 92-93, 100 (1969).

190. *Id.*

191. Most cases referred to state immunity in ILR are adjudicated in developed countries. *See* Victoria Rigby Delmon, *Sovereign Immunity: Summary and Sample Wording*, PPIAF (Apr. 2008), available from https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/sovereignimmunity.pdf

192. Reinisch, *supra* note 185, at 807.

193. If some of the state assets have to be executed, clear and unified rules are better than fragmented rules. Limited state assets are subject to enforcement is better than all state assets are enforceable. *See* Ian Hargreaves et al., *Enforcing Against Foreign State Parties: Some Lessons from Abroad*, KING & WOOD MALLESONS (Sep. 15, 2016), available from https://www.kwm.com/en/hk/knowledge/insights/enforcing-parties-lessons-from-abroad-20160915.

194. Reinisch, *supra* note 185, at 807-08.

195. *Id*.

196. *The Contribution of International Organisations to a Rule-Based International System*, *supra* note 172.

satisfy the expectation of the potential target state, but it does provide an opportunity to participate in the rulemaking process.[197]

For the forum state, a centralized enforcer relieves itself from political embarrassment.[198] The existing domestic rules may be changed.[199] However, even without centralized enforcement, the international community is trying to unify the law of sovereign immunity.[200] United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI) indicates a tendency to unify the practice of state immunity.[201] During the economic integration development process, the position of the forum state and target state are changeable.[202] To both sides, a more effective and predictable interpretation of sovereign immunity is better than the existing situation.[203]

One may doubt whether ideological differences play a role in state immunity cases. The cases of the Soviet Union and China reveal that, although issues related to sovereignty can never be irrelevant to ideology, states now prefer legal technical grounds rather than ideology to defend immunity.[204] *Von Dardel*, a case about the alleged unlawful arrest, subsequent imprisonment, and possible death of Raoul Wallenberg, a Swedish diplomat, was submitted to the District Court for the District of Columbia.[205] The Soviet Union first defaulted[206] and then entered a special appearance to contest jurisdiction and, invoking U.S. procedural rules, moved for relief from default judgment and dismissal for lack of subject matter jurisdiction.[207] In *Jackson*, an action against China for defaulted

197. *Id*.

198. The potential political embarrassment behind the plea of state immunity can never be neglected. *See* New York and Cuba Mail Steam Ship Company v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).

199. OECD, *supra* note 196.

200. Esra Yildiz Ustun, *Waiver of Immunity from Execution*, JUS MUNDI (July 8th, 2020), https://jusmundi.com/en/document/wiki/en-waiver-of-immunity-from-execution.

201. *Id.*

202. Since 1990, developed countries and developing countries compete to attract foreign investment inflows. Nowadays, both developed and developing countries are the potential target states. *See* Samina Sabir, *Institutions and FDI: Evidence from Developed and Developing Countries*, 5 FIN. INNOVATION 1, 2 (2019).

203. *Id.*

204. *See e.g.*, Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985); Jackson v. China, 794 F. 2d 1490 (11th Cir. 1986).

205. Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985).

206. A default judgment was entered against the USSR. *Id*.

207. Von Dardel v. Union of Soviet Socialist Republics, 736 F. Supp. 1, at 3 (D.D.C. 1990). For reasoning couched in terms of international law, *see The Memorandum Presented by Mr. Nikolai A. Uskakov*, YEARBOOK OF THE INT'L L. CONV., VOL. II, PART 1, U.N. Doc. A/CN.4/371 (May 11, 1983). The USSR's defense in terms of international law was the same even under the

payment of bearer bonds issued by the Imperial Chinese Government in 1911 was brought to the Court of Appeals for the Eleventh Circuit.[208] China defended itself by stating:

> Thus, according to China, restrictive sovereign immunity is applicable only within the group of nations that have adopted it and is not applicable to China, which continues to adhere to the principle of absolute sovereign immunity. Finally, China contended that even if sovereign immunity can be changed by the Unites States, to apply the change retroactively would violate international law.[209]

Because of intervention by the U.S. government, the default judgment was set aside and later dismissed on the ground that the U.S. FSIA did not apply retroactively to bonds issued in 1911 and maturing in 1951, well before the U.S. government announced its shift from absolute to restrictive immunity in the Tate Letter in 1952.[210]

In *Morris*, a U.S. citizen brought a similar action against China.[211] This time, China moved from arguing blanket absolute immunity to technical grounds that (1) none of the exceptions under the FSIA were applicable and (2) the statute of limitations had long since expired.[212]

Nowadays, no matter how diversiform the states' legal and political systems and philosophies that inform such systems are, states have found a common language.[213] This feature has also run through the debates within the International Law Commission, which is designed to represent and reflect diversity.[214] It has drafted an international convention on state

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rule of Stalin. *See* Union of Soviet Socialist Republics v. Association, Cour de cassation (Cass.) [supreme court for judicial matters], Feb. 19, 1929, 56 Clunet 1042 (Fr.).

208. Jackson v. China, 794 F. 2d 1490 (11th Cir. 1986); 84 ILR 132.

209. Jackson v. China, 794 F. 2d 1490 (11th Cir. 1986); 84 ILR 132, at 152.

210. Jackson v. China, 794 F. 2d 1490 (11th Cir. 1986); 84 ILR 132, at 155-56; affirming *Jackson v. China*, 596 F. Supp. 386 (N.D. Ala. 1984); 84 ILR 132, at 147-48. For earlier stages of the case, *see Jackson v. China*, 550 F. Supp. 869 (N.D. Ala. 1982); 84 ILR 132, at 138-39; Jackson v. China, 23 ILM 402 (N.D. Ala. 1984); 84 ILR 132, at 143-44. For criticism of the case *see* Jill A. Sgro, *China's Stance on Sovereign Immunity*, 22 COLUM. J. TRANSNAT'L L. 101, 102-03 (1983).

211. Morris v. China, 478 F. Supp.2d 561, 563 (S.D.N.Y. 2007).

212. *Id*. "The PRC moves to dismiss Morris's complaint on the grounds that: (1) it is entitled to sovereign immunity and none of the exceptions enumerated in the Foreign Sovereign Immunities Act (''FSIA'') are applicable; (2) the action is barred by the comprehensive settlement of existing claims of United States nationals against the PRC under the International Claims Settlement Act 1 and a 1979 treaty between the two nations 2; and (3) the statute of limitations has long since expired."

213. Dino Kritsiotis, *The Power of International Law as Language*, 34 CAL. W. L. REV. 397, 402-03 (1998).

214. Yejoon Rim, *Reflections on the Role of the International Law Commission in Consideration of the Final Form of Its Work*, 19 ASIAN J. INT'L L. 23, 35, 37 (2020).

immunity.[215] Seen in this light, the law of state immunity is a subject on which states can agree to disagree.[216]

2. States Favor Peaceful Resolution of Disputes

Secondly, do states commit themselves to an international program that favors peaceful dispute resolution?[217] Concerning investments, the answer is positive.

The success of ICSID is a clear example that international arbitration has become a key dispute-resolution mechanism for international investment.[218] An investment-arbitration provision can be found in numerous bilateral investment treaties (BITs) between states.[219] There are 163 signatory and contracting states to the ICSID Convention, representing 80% of the world.[220] States agree to provide a relatively efficient, neutral forum to foster flexibility in complex, multiparty disputes.[221] Within the past two decades, there has been a significant increase in the number of international investment agreements providing for arbitration through ICSID.[222] The first investment treaty case, *Asian Agricultural Products Ltd. v. Sri Lanka*, was registered in 1987.[223] Henceforward, the flow of investment treaty cases has increased remarkably. Since 1990, more than 700 investment disputes have been registered with ICSID.[224] ICSID has been privileged to host the majority

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215. U.N. General Assembly, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, U.N. Doc. A/RES/59/38 (Dec. 2, 2004).

216. YANG, *supra* note 3, at 25.

217. Professor Reisman claimed that the subjectivities of the elites in potential enforcing polities are of significant significance. The original version of the question is, Do elites tend to identify themselves with the target or the creditor state? *See* Reisman, *supra* note 34.

218. William W. Burke-White et al., *Private Litigation in a Public Law Sphere: The Standard Review in Investor-State Arbitration*, 35 YALE J. INT'L L. 283, 284 (2010).

219. *Id.*

220. *Database of ICSID Member States*, ICSID, https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (last visited Jan. 19, 2021).

221. Stephen E. Blythe, *The Advantages of Investor-State Arbitration as a Dispute Resolution Mechanism in Bilateral Investment Treaties,* 47 INT'L LAW. 273, 276-277 (2013).

222. Elizabeth Moul, *The International Centre for the Settlement of Investment Disputes and the Developing World: Creating a Mutual Confidence in the International Investment Regime,* 55 SANTA CLARA L. REV. 881, 882 (2015). For a description of the Centre and the investor-state dispute process, *see Background Information on the International Centre for Settlement of Investment Disputes*, ICSID (Jan. 20, 2013), https://icsid.worldbank.org/apps/ICSIDWEB/about/Documents/ICSID%20Fact%20Sheet%20-%20ENGLISH.pdf.

223. Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (June 27, 1990), 6 ICSID REV. – FOREIGN INV. L.J. 526, 527, 533 (1991).

224. *2019 Annual Report*, ICSID 2019, https://icsid.worldbank.org/en/Documents/ICSID_AR19_EN.pdf (last visited Jan. 19, 2021).

of these arbitrations and play a lead role in this field.[225] In 2019, 52 new ICSID cases were registered.[226] A record 59 proceedings concluded in 2019—a significant gain over the 46 concluded proceedings in 2018.[227] The Centre administered a record 306 ICSID cases in 2019.[228] In addition, ICSID has seen significant growth in the number of investment cases administered under non-ICSID sets of rules, in particular those of the United Nations Commission on International Trade Law (UNCITRAL).[229] In total, ICSID provided a range of services for 17 cases governed by non-ICSID rules in 2019, compared with eight administered in the previous fiscal year.[230] In the majority of these cases, ICSID provided full administrative services.[231] In the other cases, ICSID served as appointing authority and/or assisted with hearings.[232] The prosperity of ICSID demonstrates the goal of ICSID, which is "to provide a forum for conflict resolution in a framework which carefully balances the interests and requirements of all the parties involved, and attempts in particular to depoliticize the settlement of investment disputes," is widely recognized by the international community.[233] States prefer a neutral international organization to settle the dispute impartially and apolitically.[234]

When it comes to the specific issue of state immunity, utilizing United Nations Convention on Jurisdictional Immunities of States and Their Property as a codification provides a solid basis for states to adopt a uniform norm of international law in this area.[235] It is not yet in force.[236] Currently, twenty-eight states have signed the Convention, and twenty-two among them have ratified it.[237] China, India, and the Russian Federation signed the Convention, but have not ratified it.[238] This is a

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225. REED, *supra* note 174.
226. *2019 Annual Report*, *supra* note 224.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. Shihata, *supra* note 6, at 4.
234. Richard B. Bilder, *International Third Party Dispute Settlement*, 17 DENV. J. INT'L L. & POL. 471, 477-79 (2020).
235. U.N. General Assembly, *Convention on Jurisdictional Immunities of States and Their Property: Report of the Secretary-General*, U.N. Doc. A/56/291 (Aug. 14, 2001).
236. *Privileges and Immunities, Diplomatic and Consular Relations, etc.,* Ch. III, U.N. TREATY COLLECTION, available from https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=iii-13&chapter=3&clang=_en.
237. *Id.*
238. *Id.*

signal that some developing states are considering moving from absolute immunity to restrictive immunity.[239] UNCSI constitutes a significant stage in the harmonization and articulation of the international law of state immunity.[240] Regarding measures of constraint, UNSCI recognizes the clear distinction between procedural immunity and immunity from measures of constraint.[241] Part IV of the Convention refers to the attachment and seizure in execution as follows: Article 18—state immunity from pre-judgment measures of constraint; Article 19—state immunity from post-judgment measures of constraint; Article 20—effect of consent to jurisdiction to measures of constraint; and Article 21—specific categories of property.[242] Overall, UNSCI achieves a compromise between western industrialized countries and the developing state players.[243]

Furthermore, the legislative history of UNSCI reveals that the international community urged adoption of a convention to unify rules on state immunity.[244] In 1977, the UN General Assembly decided to include the topic of the jurisdictional immunities of states and their property in the work program of the International Law Commission (ILC).[245] Between 1979 and 1986, Special Rapporteur Professor Sompong Sucharitkul produced eight reports and proposals of state immunity issues.[246] On June 29, 1986, a first draft was adopted.[247] This draft was accused of placing too much reliance on the practice of a limited number of western countries and ignoring the continued observance of absolute immunity in the USSR and countries in Asia, Africa, and South America.[248] In 1988, Professor Motoo Ogiso succeeded as Special Rapporteur.[249] During his tenure, he proposed three reports to present a framework offering a fair compromise

239. Lijiang Zhu, *State Immunity from Measures of Constraint for the Property of Foreign Central Banks: The Chinese Perspective*, 16 CHINESE J. INT'L L. 67, 79 (2007).

240. Ustun, *supra* note 200.

241. *See Convention on Jurisdictional Immunities of States and Their Property: Report of the Secretary-General*, *supra* note 235.

242. *Id.*

243. *Jurisdictional Immunities of States and Their Property*, INT'L L. COMM'N, https://legal.un.org/ilc/summaries/4_1.shtml (last visited Jan. 19, 2021).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Sompong Sucharitkul, *Jurisdictional Immunities of States and Their Property*, [1983] 2 Y.B. Int'l L. Comm'n 25, U.N. Doc. A/CN.4/SER.A/1983/Add.1.

249. Hazel Fox, *The Merits and Defects of the 2004 UN Convention on State Immunity: Gerhard Hafner's Contribution to its Adoption by the United Nations*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION 413 (2008).

between countries favoring a restrictive theory and those which favored absolute theory.[250] Finally, in 1991, the revised second draft of the Jurisdictional Immunities of States and Their Property was submitted to the UN General Assembly.[251] In the Sixth Committee of the General Assembly, governments were given an opportunity to comment on the draft before July 1, 1992.[252] Nineteen states responded, and their critical views were referred to an open-ended Working Group set by the Sixth Committee.[253] In 1999, the topic was referred again to the ILC.[254] In 2000, the General Assembly urged states that had not provided comments on the current proposals to do so.[255] In 2002, the Working Group published a revised text with proposed alternatives for the unsolved issues.[256] In 2003, the Working Group finalized the text. On October 25, 2004, the UN Sixth Committee met and recommended that the General Assembly adopt the final text as a convention.[257] UNCSI is an instrument designed to unify a much-disputed area.[258] It is "a threshold of consensus and confronts states in a significant way"[259] producing a universally applicable legal regime on "a matter which is certainly of growing importance."[260] UNCSI is a considerable achievement—"the culmination of 27 years of sometimes difficult work of the Commission, the Sixth Committee and the Ad Hoc Committee . . . The Convention may have its deficiencies."[261]

3. Public Policies

Thirdly, do the judgments in question offend their own public policies?[262] Public policy is a potential loophole in binding international

250. *Id.*

251. *Report of the International Law Commission on the Work of Its Forty-third Session*, [191] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/SER.A/1991/Add.1.

252. FOX, *supra* note 4, at 286.

253. *Id.*

254. *Jurisdictional Immunities of States and Their Property*, [1999] 2 Y.B. INT'L L. COMM'N 127, U.N. Doc. A/CN.4/SER.A/1999/Add.1.

255. G.A. Res. 55/150 (Jan. 12, 2001).

256. G.A. Res. 57/22 (Feb. 4-15, 2002).

257. *Completion of Draft Text on Jurisdictional Immunities Welcomed by Legal Committee; Climax of Effort Begun in 1977*, U.N. MEETINGS COVERAGE AND PRESS RELEASES (Oct. 25, 2004), https://www.un.org/press/en/2004/gal3259.doc.htm.

258. IAN BROWNLIE, PRINCIPLES OF PUBLIC INERNATIONAL LAW 344 (7th ed., 2008).

259. *Id.*

260. *State Immunity and the New UN Convention*, *supra* note 10.

261. FOX, *supra* note 4, at 330.

262. Reisman, *supra* note 34, at 10.

investment arbitration.[263] This misgiving is based on the forum state's insistence on sovereign control over arbitral awards that conflict with the public policy of the forum.[264] Here, Professor Reisman asked if this is more a concern about the willingness of a state to enforce a judgment. If the judgment is inconsistent with the public policy of the state, the state will deny enforcement.[265] The more that cases involve public-policy defense, the less possibility there is that a centralized enforcer would be established.[266] Compared to balancing the interests and policies of the seat of the arbitration and those of enforcing courts, a centralized enforcement of international investment awards is more about application and interpretation of public-policy defense of the forum state.[267] The ICSID Convention has no public policy exception to the obligation of contracting states under Article 54 to enforce an award.[268] Five grounds specified in Article 52(1) for requesting the annulment of an award also do not contain the term public policy.[269] It is a reasonable inference that the public-policy defense was intentionally deleted from the ICSID Convention.[270] On the contrary, Article V(1)(b) of the New York Convention specifies public-policy defense.[271] Concerning the practice of this provision, a distinction is generally drawn by many jurisdictions between domestic public policy and international public policy.[272] International public policy, as an excuse to refuse enforcement, refers to rules that would violate the forum state's

263. Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas, Civ. Action No. 16-140, Mem. Op. ¶ 20-28 (D.D.C. June 7, 2018).

264. *See* Farshad Ghodoosi, *The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 686-87 (2016).

265. DEVI STOOKUN, STOP VULTURE FUND LAWSUITS: A HANDBOOK 35 (2010).

266. Many cases involve public policy defense indicate that different jurisdictions have different public policies. The intense diversity makes it harder to reach a consensus on a centralized enforcer. *See* Fabio Landini & Franco Malerba, *Public Policy and Catching up by Developing Countries in Global Industries: A Simulation Model*, 41 CAMBRIDGE J. ECON. 927, 928 (2017).

267. Tiffany Chan & Adam Lee, *A Tale of Two Cases: Public Policy Defence to Award Enforcement in Hong Kong*, KLUWER ARBITRATION BLOG (June 3, 2020), http://arbitrationblog.kluwerarbitration.com/2020/06/03/a-tale-of-two-cases-public-policy-defence-to-award-enforcement-in-hong-kong/?doing_wp_cron=1596086234.9071619510650634765625.

268. ICSID Convention, art. 54.

269. ICSID Convention, art. 52(1).

270. J. Christopher Thomas & Harpreet Kaur Dhillon, *The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards*, 32 ICSID REV. 459, 499 (2017).

271. New York Convention, art. 5(1)(b).

272. UNCITRAL: 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 160 (U.N. 2013).

most basic notions of morality and justice.[273] It should be noted that the position of the New York Convention is pro-enforcement.[274] It gives rise to a substantive rule of non-discrimination which precludes the enforcement of an award because of a national rule that discriminates against international arbitration, or is not applied neutrally, or fails to acknowledge an international recognized defense such as duress or mistake.[275] Such an approach decides that what falls within the ground of international public policy must be given a narrow meaning.[276] The report of the International Law Association's 2002 New Delhi Conference endorsed the narrowing of the public policy exception and the application of a test of international public policy which would be narrower than the test of public policy.[277] The existing practice of the international community shows that domestic courts are cautious on the interpretation and application of international public policies.[278] Therefore, as a general consensus has been achieved, the present author does not deem public policies to be an impediment to the creation of a centralized international enforcer.

C. Strategies

The last element of the functional model of enforcement is strategies. Strategies refer to legal techniques used to directly control assets.[279] The world community has diverse techniques: attachment, garnishment, liens, freezing assets, restrictive licensing, dumping, and the termination of aid.[280] At this stage, the effective power is still governed by sovereign states.[281] And it is crystal-clear that these procedural issues, according to

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273. Joel R. Junker, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, 7 CAL. W. INT'L L.J. 228, 230 (1977).

274. Fifi Junita, *'Pro Enforcement Bias' Under Article V of the New York Convention in International Commercial Arbitration: Comparative Overview*, 5 INDONESIA L. REV. 141, 141 (2015).

275. Ledee v. Ragno, 684 F. 2d 184, 187 (1st Cir. 1982).

276. Junker, *supra* note 273.

277. *See generally* Lord Neuberger, *Arbitration and the Rule of Law*, 17 ASIAN DISP. REV. 180 (2015).

278. Inae Yang, International Interpretations and Applications of Public Policy Under the New York Convention (2013) (unpublished Ph.D. dissertation, Tulane University), https://digitallibrary.tulane.edu/islandora/object/tulane%3A27624.

279. Reisman, *supra* note 34.

280. *Id.*

281. *See The Contribution of International Organisations to a Rule-Based International System*, *supra* note 172.

the principles of private international law, are subservient to *lex fori*.[282] Since in the context the focus is on the possibility of establishing a specific centralized enforcement for the enforcement of international investment awards, not how to enforce the awards, the present author will not go deeper on the strategy issue.

Professor Reisman explained the functional model excludes the consideration of the doctrines of sovereign immunity to greatest extent.[283] That is because state immunity, as a lawful form of self-help, breaks the process of enforcement.[284] If state immunity is upheld, there is no enforcement.[285] However, with the development of restrictive immunity, sovereign immunity is no longer an enforcement breaker.[286] Rather, there is an issue within the enforcement.[287] Restrictive immunity contains

282. Pier Terblanche, *Lex Fori or Lex Delicti? The Problem of Choice of Law in International Delicts*, 30 COMP. INT'L L.J. S. AFR. 243, 245, 249 (1997).

283. Reisman, *supra* note 34, at 10 n.33. Only the briefest reference can be made to the vexed problem of sovereign immunity in this Article. Sovereign immunity generally refers to the self-imposed bar of a domestic court to impleading a foreign state before it. Hence, the judicial doctrines developed regarding sovereign immunity do not apply to most of the instances which are discussed in this Article. Not only is there no authority against executive attachments, but state practice clearly demonstrates that they are held to be a lawful form of self-help in international law. In regard to the bar as applied in courts, it may be noted that it refers to impleading but not to enforcing. Enforcement may be taken against immovable property and commercial property if it is not used for diplomatic or consular purposes. See *Competence of Courts in Regard to Foreign States*, 26 AM. J. INT'L L. Sup 451, 655, 707 (1932). This is essentially the *jus gestionis—jus imperii* test, applied with varying degrees of conformity in most national jurisdictions.

284. Hulley Enterprises Limited v. Russian Federation, PCA Case No. AA 226, Award (July 18, 2014); Yukos Universal Limited v. Russia Federation, PCA Case No. AA 227, Award (July 18, 2014); Veteran Petroleum Limited v. Russian Federation, PCA Case No. AA 228, Award (July 18, 2014). Russia failed to pay as ordered and Yukos commenced enforcement proceedings against Russia's overseas assets in a number of countries including France, Belgium, and the United States. French courts did not uphold the awards because of state immunity invoked by Russia. The Paris tribunal upheld the plea of state immunity and stopped the enforcement proceedings. *See* Ben Knowles et al., *The US $50 Billion Yukos Award Overturned—Enforcement Becomes A Game of Russian Roulette*, KLUWER ARB. BLOG (May 13, 2016), http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/.

285. Ben Juratowitch, *Waiver of State Immunity and Enforcement of Arbitral Awards*, 6 ASIAN J. INT'L L. 199, 230-31 (2016).

286. All countries that adhere to restrictive immunity recognize a commercial or private law exception although its application varies from state to state. The purpose underlying restrictive immunity is plain: a state engaging in business transactions with private parties should be subject to the jurisdiction where the transaction is conducted. "Growing concern for individual rights and public morality, coupled with the increasing entry of governments into what has previously been regarded as private pursuits, has led a substantial number of nations to abandon the absolute theory of sovereign immunity in favor of a restrictive theory." *See* Victory Transport Inc v. Comisaria General, 336 F. 2d 354, 357 (2nd Cir. 1964); 35 ILR 110.

287. Reinisch, *supra* note 185, at 807.

criteria and standards and legal techniques that need to be unified.[288] A centralized international investment enforcement provides a new approach to overcome the existing inconsistency.[289]

IV. CONCLUSION

Simply put, the present author deems that centralized enforcement is the most appropriate choice to conquer the bastion of state immunity rather than assimilation of domestic application of executive immunity. It is predictably stable to both the target and creditor states, and it complies with the high degree of centralized international law in the investment area. The ICSID and New York Convention not only provide for binding and finality of investment awards, but are also a precedent to control enforcement issues in international law. They leave sovereign immunity as the biggest issue. UNCSI provides a template of state immunity, although it is not detailed enough. ICSID is a potential institution to assume the function of centralized enforcement. It seems like all cornerstones are ready for the creation of a centralized international investment enforcer. Therefore, why not give it a try?

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288. *Id.*
289. *Id.*