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Jacob A. Kuipers
Boston College Law School, jacob.kuipers@bc.edu

TOO BIG TO NAIL: HOW INVESTOR-STATE ARBITRATION LACKS AN APPROPRIATE EXECUTION MECHANISM FOR THE LARGEST AWARDS

JACOB A. KUIPERS*

Abstract: Typically, when an international arbitration tribunal renders an award, it includes a specific date by which the defendants must pay the award. If the defendants refuse to pay the award by the mandated deadline and the defendants are not seeking that the award be set aside, then the claimants have the ability to seize assets of the defendants through national courts that could enforce the tribunal's judgment. Those courts may issue orders to seize a party's assets in their jurisdiction as a way to enforce all or part of the tribunal's award. This presents an uphill battle for the claimants, particularly if the defendant is a sovereign entity. States have sovereign-immunity laws that prevent their national courts from seizing most assets of another state, except for those assets largely used for a commercial purpose. Although seizing such assets is possible and has been done, it is a costly and time-consuming process. As the size of the award increases, the costs and time required to seize assets increase exponentially. And when awards become especially massive, it becomes particularly difficult for the claimant to seize assets that would be valued anywhere near the award amount. The degree of difficulty becomes so large that it might not even be worth attempting to seize the defendant's assets. Arbitration panels are likely to face more and more disputes involving higher and higher awards. Project-finance transactions and public-private partnerships, which have capital costs in the hundreds of billions of dollars, are becoming increasingly popular as investment mechanisms, particularly in developing countries. Nearly all these transactions use international arbitration in their contracts. Disputes that arise from these transactions could result in massive awards on a sizable scale. Barring adopting new investment treaties, states could be prevented from engaging in recalcitrant behavior by having the international community develop additional incentives to motivate states to comply with large awards rendered against them. This includes better involvement of multi-

* Jacob A. Kuipers is pursuing a Juris Doctor at Boston College Law School and a Master of Arts in Law and Diplomacy from the Fletcher School of Law and Diplomacy at Tufts University. He is the Executive Articles Editor for the *Boston College International & Comparative Law Review* and a Legal Editor for *The Fletcher Forum of Global Affairs*.

national organizations—to put additional pressure on the state—and the private sector—to determine the best entity to execute the award against the state.

INTRODUCTION

International arbitration has become a key dispute-resolution mechanism for cross-border transactions, particularly international investment.[1] In fact, for most investors, an investment-arbitration provision—found in bilateral investment treaties (BITs) between states, the national investment laws of states, or in specific investor-state agreements—is a requirement for any international investment operation.[2] These investment-arbitration provisions allow private parties that have invested in a host state to bring a claim directly against that state in an investment-arbitration tribunal.[3] Proponents of investment arbitration argue that it provides a relatively efficient, neutral forum; fosters flexibility in complex, multiparty disputes; and allows for confidential, non-public hearings and decisions.[4] States agree to these investor-friendly attributes to encourage investment in their countries, particularly those that might not otherwise be able to attract sufficient capital due to the inherent risks associated with establishing an investment in a foreign jurisdiction.[5] With the increased use of investment-arbitration provisions, disputes using investment arbitration as a resolution mechanism have soared, with more than 490 investment disputes registered with the International Centre for Settlement of Investment Disputes (ICSID) since 1990.[6]

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[1] *See* August Reinisch & Loretta Malintoppi, *Methods of Dispute Resolution*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 692, 692 (Peter Muchlinksi, Federico Ortino & Christoph Schreuer eds., 2008); Eric A. Schwartz, *The Role of International Arbitration in Economic Development*, 12 INT'L TRADE & BUS. L. REV. 127, 128 (2009).

[2] *See* ANDREA MARCO STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION 25, ¶ 2.54 (2012); Reinisch & Malintoppi, *supra* note 1, at 692.

[3] *See* Reinisch & Malintoppi, *supra* note 1, at 692. There are several arbitration tribunals that focus on investment disputes, including the International Centre for Settlement of Investment Disputes (ICSID), the International Chamber of Commerce International Court of Arbitration, the Stockholm Chamber of Commerce, and the Permanent Court of Arbitration. *See* Peter Muchlinski, *Policy Issues*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 1, at 4, 40–41.

[4] *See* SECTION OF DISPUTE RESOLUTION, AM. BAR ASS'N, BENEFITS OF ARBITRATION FOR COMMERCIAL DISPUTES 2, 4, 7 (2012), http://www.americanbar.org/content/dam/aba/events/dispute_resolution/committees/arbitration/arbitrationguide.authcheckdam.pdf [https://perma.cc/LCS5-QWH8]; Vladimír Balaš, *Review of Awards*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 1, at 1126, 1150.

[5] *See* Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147, 1149–50 (2014) (investing in foreign jurisdictions includes risks like transaction costs, currency manipulation, and liquidity barriers); Schwartz, *supra* note 1, at 129.

[6] *See* INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, WORLD BANK, THE ICSID CASELOAD STATISTICS 7 (2015), https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID Web Stats 2015-1 (English) (2)_Redacted.pdf [https://perma.cc/K4WJ-AEQW]; *see also* Gary Born, *A New*

As investment arbitration has proliferated and become mainstay for international investment agreements, commentators have taken a keen eye in analyzing its impact and pointing out its weaknesses.[7] These critiques include a potential bias given to foreign investors, opaque rulemaking, weak legal standards, and severely limited appellate review.[8] Some national governments party to investment-arbitration disputes have argued that these problems weaken state sovereignty by creating significant financial and legal burdens.[9] Concerns over these issues have prompted some states to limit their exposure to investment arbitration.[10] In some cases, states have waived investment-arbitration provisions or completely walked away from previously agreed investment treaties that include investment arbitration.[11]

Recent cases have exposed a significant and increasingly problematic shortcoming that gives investors further reason to question the effectiveness of investment arbitration: if a state refuses to pay an award rendered against it by an arbitral tribunal, the claimant faces an uphill battle of executing the award by seizing the state's assets.[12] Although a state has waived its jurisdictional immunity by agreeing to investment arbitration, courts have largely concluded that a state still retains immunity over its sovereign assets.[13] The treaties that govern investment arbitration and most national sovereign-immunity laws do not extend the waiver of jurisdictional immunity to the execution of awards.[14] For reasons that will be subsequently explained, this prevents claimants from seizing most assets that are owned and controlled by a state, leaving the claimant scrounging multiple jurisdictions for attachable assets.[15] These efforts re-

Generation of International Adjudication, 61 DUKE L.J. 775, 839–41 (2012) (citing statistics on other types of investment arbitration).

[7] *See* Born, *supra* note 6, at 842.

[8] *Id.* at 842–43.

[9] *See* S.I. Strong, *Contractual Waivers of Investment Arbitration: Wa(i)ve of the Future?*, 29 ICSID REV. 690, 690 (2014).

[10] *See* Born, *supra* note 6, at 844; Strong, *supra* note 9, at 690–91.

[11] *See* Strong, *supra* note 9, at 691; Tania Voon, Andrew Mitchell & James Munro, *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights*, 29 ICSID REV. 451, 451 (2014).

[12] *See* Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 302, 303 (Christina Binder et al. eds., 2009) [hereinafter Bjorklund, *State Immunity*].

[13] *See* Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 211 (2010) [hereinafter Bjorklund, *Re-Politicization of Investment Disputes*].

[14] *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54(1), Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention]; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 211.

[15] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 211.

quire additional legal and financial obligations by the claimant, which might be too costly and time consuming for a claimant to endure.[16] Consequently, the problems of executing an award directly call into question the overall effectiveness of investment arbitration, as a party to a dispute is not likely to engage in litigation if the defendant will eventually prevent the execution of the award.[17] After all, what good is an award that can never be collected?[18]

Fortunately for investors, the problems of execution immunity have only rarely surfaced because states by and large comply with awards rendered against them.[19] Although states are usually mandated by their investment agreements to abide by an award, they ultimately comply and pay the award because they fear that refusing to do so will hurt their future investment endeavors.[20] First, most states do not want to scare off future investment.[21] Refusing to comply with the award could significantly damage a state's reputation in the investment community, leaving foreign investors unwilling to move their capital into the country.[22] Second, states do not want to leave themselves indefinitely exposed to future litigation.[23] If a state ultimately decides not to comply with an award, it might be hesitant to locate any of its commercial assets abroad for fear that the claimant could attempt to seize such assets.[24] As a result, for the vast majority of cases, the incentives are greater for states to comply with an award than to refuse to pay.[25]

In certain situations, however, these incentives can be disrupted, interfering with a state's willingness to comply with an award and potentially destabilizing the investor-state dispute resolution regime.[26] One potential situation

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[16] *See id.*

[17] *See* Bjorklund, *State Immunity*, *supra* note 12, at 304; Joseph R. Profaizer, *Emerging Issues in the Enforcement of Foreign Arbitral Awards*, *in* INVESTING WITH CONFIDENCE: UNDERSTANDING POLITICAL RISK MANAGEMENT IN THE 21ST CENTURY 163, 164 (Kevin W. Lu et al. eds., 2009); Renata Brazil-David, *International Commercial Arbitration Involving a State Party and the Defense of State Immunity*, 22 AM. REV. INT'L ARB. 241, 260–61 (2011).

[18] *See* Bjorklund, *State Immunity*, *supra* note 12, at 304; Profaizer, *supra* note 17, at 164; Brazil-David, *supra* note 17, at 260–61.

[19] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 241; Profaizer, *supra* note 17, at 164; Charles B. Rosenberg, *The Intersection of International Trade and International Arbitration: The Use of Trade Benefits to Secure Compliance with Arbitral Awards*, 44 GEO. J. INT'L L. 503, 507 (2013).

[20] *See* CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 1106–07 (2d ed. 2009); Georges R. Delaume, *Sovereign Immunity and Transnational Arbitration*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 313, 322 (Julian D.M. Lew ed., 1986).

[21] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 233.

[22] *See* SCHREUER ET AL., *supra* note 20, at 1107; Delaume, *supra* note 20, at 322; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 233.

[23] *See* Rosenberg, *supra* note 19, at 507.

[24] *See* Profaizer, *supra* note 17, at 165; Rosenberg, *supra* note 19, at 507.

[25] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 241; Rosenberg, *supra* note 19, at 507.

[26] *See* Profaizer, *supra* note 17, at 170–71.

occurs when the size of the award rendered by a tribunal is especially large relative to the amount of inbound investment in the state.[27] As the size of the award increases, the problems of execution are compounded—costs and time required to seize assets sufficient to satisfy the award increase dramatically.[28] In fact, when awards become especially massive, like the one rendered by the Permanent Court of Arbitration for $50 billion against Russia, it becomes particularly difficult for the claimant to seize assets that would be valued anywhere near the award amount.[29] As the largest award ever rendered by an arbitral panel, this decision might seem like a unique situation.[30] Investment-arbitration panels, however, are likely to face more and more disputes involving higher and higher awards.[31] Mechanisms that allow foreign investors to finance, construct, and manage large, capital-intensive projects, like project

[27] *See* Randall Peerenboom, *Enforcement of Arbitral Awards*, *in* TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 285, 298, 303 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) [hereinafter Peerenboom, *Enforcement of Arbitral Awards*]. As the size of the award increases, enforcement of arbitral awards decreases. *See* Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 271 (2001) [hereinafter Peerenboom, *An Empirical Study*].

[28] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 211 (articulating that successfully executing awards can be difficult for claimants due to the resources needed to locate and seize attachable assets); Peerenboom, *An Empirical Study*, *supra* note 27, at 271 (providing evidence that as the size of arbitral awards increases, the likelihood that the award will be successfully enforced decreases). For large awards, it becomes increasingly harder for claimants to find and seize assets that would satisfy the award. *See, e.g.*, Megan Davies et al., *Court Orders Russia to Pay $50 Billion for Seizing Yukos Assets*, REUTERS (July 28, 2014), http://www.reuters.com/article/2014/07/28/us-russia-yukos-idUSKBN0FW0TP20140728 [https://perma.cc/B6YJ-GRU5]; Henry Meyer & Stephen Bierman, *Yukos Hunting Rosneft Assets from Venezuela to Vietnam*, BLOOMBERG BUSINESSWEEK (July 31, 2014), http://www.businessweek.com/news/2014-07-30/yukos-hunting-rosneft-gazprom-assets-from-venezuela-to-vietnam [https://perma.cc/E655-BN22].

[29] *See* Shona Simkin, *The* Yukos *Settlement: An Insider's View into the Largest Arbitration Award in History*, HARV. L. TODAY (Mar. 10, 2015), http://today.law.harvard.edu/the-yukos-settlement-an-insiders-view-into-the-largest-arbitration-award-in-history [https://perma.cc/NZZ7-4N28]. Emmanuel Gaillard, lead attorney for the claimants in the *Yukos* case, in referring to the likelihood of actually seizing assets valued near the awarded amount, said, "The clients are open to negotiation and [possible] settlement. [Enforcement] is typically very hard. Against a private party you [can] freeze their bank accounts; states have all sorts of immunities and it takes time." *See id.*

[30] *See* Neil Buckley & Kathrin Hille, *Former Yukos Shareholders Awarded $50bn in Damages Against Russia*, FIN. TIMES (July 28, 2014), http://www.ft.com/intl/cms/s/0/f5824afa-1623-11e4-8210-00144feabdc0.html?siteedition=intl#axzz3Bu38bl8h [https://perma.cc/5WJ9-CV77]. The largest arbitration award up until this point was $2.473 billion, which was awarded to Dow Chemical Company against Kuwaiti Petrochemical Industries Company over a failed joint venture in 2013. *See* Jan Wolfe, *Decision in $114 Billion* Yukos *Case to Be Announced Monday*, AM. LAW. (July 23, 2014), http://www.americanlawyer.com/id=1202664334343/Decision-in-114-Billion-Yukos-Case-to-Be-Announced-Monday?slreturn=20140919120551 [https://perma.cc/YG69-DJPM].

[31] *See* Mark Bezant et al., *Trends in International Arbitration in the New World Order*, *in* THE EUROPEAN, MIDDLE EASTERN AND AFRICAN ARBITRATION REVIEW Section 2, #4, 2015 (Global Arbitration Review ed., 2015).

finance and public-private partnerships (P3s), are becoming more popular.[32] For example, project-finance transactions, which primarily include investment-arbitration provisions and can have capital costs in the hundreds of billions of dollars, have ballooned in prevalence as investment mechanisms.[33] Disputes that arise from these transactions have the potential to result in massive awards on a scale similar to the award rendered against Russia.[34]

This Note explores the degree to which large awards impact a state's willingness to comply with an arbitral decision and how, ultimately, investment arbitration falls short in providing an adequate execution mechanism for these especially large awards. Part I of this Note comprehensively examines the instability of the execution mechanism of arbitral awards rendered against recalcitrant states. Part II details the hallmark case in which it took a claimant more than a decade to execute a relatively small award against a sovereign. Part III explores how large awards have the potential to incentivize states to not comply with arbitral decisions and how this risks destabilizing the entire investor-state dispute resolution system. In addition, this section suggests several potential solutions and their likelihood of success. The Note concludes by arguing that, although there are currently sufficient incentives in place to keep the problems of execution in check, the investment environment continues to evolve in a way that increases the likelihood that states will refuse to pay an arbitral award. This could potentially undermine the investor-state dispute resolution regime.

I. Background

When an investment-arbitration tribunal renders an award, it typically mandates that the non-prevailing party pay the award by a specific deadline.[35] If the non-prevailing party refuses to pay the award, then the claimant can seek to enforce the award against the respondent's assets by seizing them.[36] Because arbitration tribunals do not have the authority to enforce awards, the claimant must make an enforcement claim in the national courts of countries that have agreed to enforce the awards of arbitration tribunals.[37]

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[32] *See* Dan Tallis & Muhabbat Mahmudova, *Global Project Finance Infrastructure Review Full Year 2013*, INFRASTRUCTURE J. 1, 5 (2014); Elizabeth Woodman, *The Market for Financing of Infrastructure Projects Through Public-Private Partnerships: Canadian Developments*, 5 FIN. SYS. REV. 35, 37 (2006).

[33] *See* Tallis & Mahmudova, *supra* note 32, at 5.

[34] *See* Bezant et al., *supra* note 31, at Section 2, #4.

[35] *See* MICHAEL MCILWRATH & JOHN SAVAGE, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE 343 (2010); Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 213 (providing examples of several states that have refused to comply with investment arbitration tribunal awards).

[36] *See* Brazil-David, *supra* note 17, at 260.

[37] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 215.

The two most popular agreements that provide vehicles for enforcement of arbitration awards in national courts are the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[38] In each of these mechanisms, enforcing an award entails three crucial 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.[39]

Although each step in this process is equally essential for a successful claimant, executing the award—when the claimant actually obtains the award or assets that can be used to recover the award—can be the most decisive for the claimant when strategizing where to bring its claim.[40] When deciding where to bring a claim, the claimant will search for assets of the respondent non-prevailing party in jurisdictions that belong to one of the conventions.[41] The best jurisdictions for a claimant to bring an enforcement claim against a noncompliant respondent will belong to either the ICSID or the New York Conventions and be home to substantial assets of the respondent.[42] After all, in order for a court's execution of an award to be worthwhile for a claimant, the non-prevailing party should have assets within the court's jurisdiction that can be seized.[43] In addition, it would be most beneficial for the claimant if these assets were valued relatively close to the awarded amount so the claimant would not have to seek enforcement of the award in multiple jurisdictions.[44]

When the noncompliant respondent is a state, which can occur in investor-state arbitration, executing an award can pose additional legal challenges not typical in other forms of arbitration.[45] In fact, 81% of claimants that experienced difficulties enforcing an investment-arbitration award against a state indicated that their problems occurred in the execution stage of enforcement, rather than in the recognition and consent stages.[46]

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[38] *See id.* at 212.

[39] *See* Brazil-David, *supra* note 17, at 260.

[40] *See id.* at 266.

[41] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 215; Brazil-David, *supra* note 17, at 266.

[42] *See* Inna Uchkunova & Oleg Temnikov, *Enforcement of Awards Under the ICSID Convention—What Solutions to the Problem of State Immunity?*, 29 ICSID REV. 187, 187–88 (2014).

[43] *See id.*

[44] *See id.*

[45] *See* Brazil-David, *supra* note 17, at 244, 260.

[46] *See* Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes Towards Recognition and Enforcement of International Arbitral Awards: Enforcement of Arbitral Awards Against States*, 19 AM. REV. INT'L ARB. 391, 405 (2008).

The general challenge that claimants face here is overcoming protections provided by sovereign immunity.[47] Most jurisdictions have some form of sovereign-immunity law—either through customary international law, domestic law, or treaty law—that protects sovereign entities from prosecution.[48] Although states at one point experienced absolute immunity from prosecution, states today typically adhere to a restrictive or relative principle of immunity in which a state enjoys sovereign immunity from jurisdictions only when the dispute arises out of acts that are governmental in nature.[49] In fact, most sovereign-immunity laws codify this principle, declaring that a state's sovereign immunity does not apply when the dispute arises out of state action that is commercial in nature.[50]

Another basis for abrogating sovereign immunity occurs when a state explicitly waives its jurisdictional sovereign immunity—typically through an arbitration clause in an international investment agreement or a treaty like a BIT—which allows the investor to bring a claim directly against the state in an arbitration tribunal.[51] Although states have typically extended this waiver of immunity to the enforcement of the award, which allows a national court to recognize and certify an award rendered against a state, most states have stopped short of explicitly including a waiver of execution immunity.[52] This means that, although the waiver of sovereign immunity allows a petitioner to litigate directly against a state in a national court or tribunal, sovereign immunity still protects a state's assets from the reach of a national court.[53]

The distinction between jurisdictional and execution immunity is apparent in the conventions that provide for the enforcement of arbitral awards.[54] The ICSID Convention includes mechanisms for the execution of awards that are rendered by ICSID tribunals.[55] Article 54 of the ICSID Convention stipulates that an ICSID award must be enforced by any contracting state "as if it were a final judgment of a court in that State."[56] This means that all states party to the ICSID Convention are obligated to enforce any ICSID award.[57] Article 55, however, specifies that Article 54 does not "derogat[e] from the law in force in any Contracting State relating to immunity of that State or of any foreign State

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[47] *See id.*; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 212; Brazil-David, *supra* note 17, at 261.

[48] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 220.

[49] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 327–28 (7th ed. 2008).

[50] *See id.*

[51] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 215.

[52] *See* GEORGIOS PETROCHILOS, PROCEDURAL LAW IN INTERNATIONAL ARBITRATION 291–92 (2004); Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 221–22.

[53] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 221–22.

[54] *See id.* at 215.

[55] *See id.*

[56] ICSID Convention, *supra* note 14.

[57] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 216.

from execution."[58] In other words, a claimant of an award rendered by an ICSID tribunal may only be able to execute an award through a state party to the ICSID Convention to the extent that that state's sovereign-immunity laws are not violated.[59] Moreover, national courts have rarely found that their respective national law infers consent to arbitration as an effective waiver of immunity from execution.[60] Although the ICSID Convention requires the recognition and enforcement of ICSID awards through state-party courts, effectively waiving sovereign jurisdictional immunity, the ICSID Convention only extends that waiver to the execution of the award if it does not violate the state's sovereign-immunity laws.[61]

Awards that are rendered by a non-ICSID tribunal (for example, the International Chamber of Commerce, the Arbitration Institute of the Stockholm Chamber of Commerce, or the Permanent Court of Arbitration) can typically be enforced through the New York Convention.[62] Like the ICSID Convention, the New York Convention provides for the enforcement of arbitral awards through the national courts of states party to the Convention.[63] Article III of the New York Convention stipulates that contracting states must "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."[64] In addition, most national courts agree that a state implicitly waives its immunity in the enforcement of awards when a state agrees to investment arbitration in a jurisdiction party to the New York Convention.[65] Despite the mandate to enforce arbitral awards, Article V of the New York Convention gives substantial leeway to national courts enforcing an arbitral award, essentially allowing them to follow the procedural laws of the state, including any sovereign-immunity laws that include the protection of state assets.[66] In fact, national courts typically utilize

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[58] ICSID Convention, *supra* note 14, art. 55.

[59] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 217.

[60] *See* SCHREUER ET AL., *supra* note 20, at 1100–01; Hazel Fox, *State Immunity and the New York Convention*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 829, 829–32 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008); Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 219; Georges R. Delaume, *ICSID Arbitration and the Courts*, 77 AM. J. INT'L L. 784, 800 (1983); Albert Jan van den Berg, *Some Recent Problems in the Practice of Enforcement Under the New York and ICSID Conventions*, 2 ICSID REV. FOREIGN INV. L.J. 439, 450 (1987).

[61] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 217.

[62] *See* Muchlinski, *supra* note 3, at 40–41.

[63] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 218.

[64] New York Convention, *supra* note 14.

[65] *See* PETROCHILOS, *supra* note 52, at 221–22. In fact, some states have codified this principle in their national laws: for example, in the United States, the Foreign Sovereign Immunities Act explicitly directs the United States to enforce awards rendered by arbitration tribunals party to the New York Convention. *See* 28 U.S.C. § 1605(a)(6) (2012).

[66] *See* New York Convention, *supra* note 14, art. V; Baltag, *supra* note 46, at 396–98; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 219.

the public policy exception in Article V when recognizing sovereign immunity with a state respondent.[67] In these cases, the award can only be executed if it does not violate the state's sovereign-immunity laws.[68]

When a claimant attempts to execute an award in a national court, both the ICSID Convention and the New York Convention can point to the sovereign-immunity laws of the national court's jurisdiction.[69] Therefore, a claimant's success in executing an award under either convention depends on the claimant's ability to navigate domestic sovereign-immunity laws.[70] Sovereign-immunity laws can vary significantly across states, leaving claimants with the legal complexities of overcoming sovereign-immunity defenses of varying degrees of stringency.[71] Despite this variation, almost every domestic sovereign-immunity law provides for execution immunity, protecting all sovereign assets that are governmental in nature from being seized by claimants.[72]

To overcome execution immunity, a claimant can generally pursue two main avenues: (1) obtain a waiver of execution immunity in the agreement or BIT; or (2) seek state-owned, commercial assets.[73] The first route, however, is unlikely to be successful for the claimant.[74] The claimant would have to obtain execution immunity either explicitly or implicitly through an international investment agreement or the ICSID or New York Conventions.[75] Execution immunity is absent from both conventions as well as nearly all investment agreements.[76] Although some national courts in France and Switzerland have occasionally extended the implied waiver of jurisdictional immunity to execution immunity, these are largely exceptions to the standard acceptance that a waiver of execution immunity does not exist.[77]

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[67] *See* STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION 140–41 (1990).

[68] *See id.*

[69] *See* ICSID Convention, *supra* note 14, art. 55; New York Convention, *supra* note 14, art. V; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 220.

[70] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 220.

[71] *See, e.g.*, European Convention on State Immunity, May 16, 1972, E.T.S. No. 74; *see* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 221. *See generally* DHISADEE CHAMLONGRASDR, FOREIGN STATE IMMUNITY AND ARBITRATION (2007) (articulating examples of sovereign immunity throughout Europe and other developed countries); August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, 17 EUR. J. INT'L L. 803 (2006) (providing additional examples of sovereign immunity).

[72] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 222. *See generally* CHAMLONGRASDR, *supra* note 71.

[73] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 223.

[74] *See id.* at 225.

[75] *See id.* at 223–24.

[76] *See id.*

[77] *See* Sarah François-Poncet et al., *Enforcement of Foreign Arbitral Awards Against Sovereign States or State Entities—France*, *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 355, 369–71 (R. Doak Bishop ed., 2009); Michael E. Schneider & Joachim Knoll, *Enforcement of Foreign Arbitral Awards Against Sovereigns—Switzerland*, *in* ENFORCEMENT OF ARBITRAL AWARDS

The second route—to seek state-owned, commercial assets—is more likely to be successful for claimants, although it is still a difficult task.[78] As described earlier, most states adhere to the restrictive principle of sovereign immunity, which provides immunity for all acts that are governmental in nature.[79] Although not uniformly adopted, states have increasingly extended this principle to execution immunity, shunning the argument that a state has implicitly waived its execution immunity as part of investment arbitration.[80] In terms of executing awards, the restrictive principle acknowledges sovereign immunity over all state assets that are not commercial in nature.[81] This means that state assets used mainly for commercial purposes are not protected under execution immunity.[82] Executing an award against these assets first requires the claimant to search and find state-owned assets that may be used for commercial purposes, and second, to prevail in a national court on the argument that the discovered assets are not protected under execution immunity.[83]

Both of these steps can be challenging for any claimant.[84] First, locating state assets that are outside of the state's territory can be a complex and frustrating endeavor.[85] For a variety of reasons, states do not publicly disclose where their assets are located.[86] In fact, states may own assets but have them operated, managed, or controlled by a third party, further obscuring the ownership of the asset.[87] Discovering state assets beyond the territory of the sovereign can be so difficult that claimants may even attempt to seize debt owed to the sovereign by a third party.[88] This strategy, however, has not proven to be effective.[89]

Second, even if the claimant is able to locate assets owned by the sovereign, the claimant must still overcome the protection of execution immunity by proving that the asset is strictly of a commercial nature.[90] It is generally pre-

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AGAINST SOVEREIGNS, *supra*, at 311, 343–45; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 224–25.

[78] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225.

[79] *See* BROWNLIE, *supra* note 49, at 342–43.

[80] *See id.*

[81] *See id.*

[82] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225.

[83] *See id.*

[84] *See* Bjorklund, *State Immunity*, *supra* note 12, at 314–16.

[85] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225–26.

[86] *See* George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 666 (2008).

[87] *See id.* at 681.

[88] *See id.*

[89] *See, e.g.*, Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 226 (detailing an example of a claimant who attempted to seize a payment owed to the Russian Federation by an airline for using Russian airspace for a portion of its flights).

[90] *See id.*

sumed that the assets are governmental in nature, and therefore, the burden is on the claimant to prove that the assets are commercial.[91] Even more discouraging for the claimant, in some jurisdictions, any evidence that the claimant provides showing that the funds are commercial can be refuted by the state simply through a certificate from the state's diplomatic mission verifying that the funds are not for a commercial purpose.[92] In addition, most jurisdictions have determined that several specific assets—like diplomatic or military-related property and financial instruments held by a state's central bank—are always governmental in nature and off-limits to targeting claimants.[93]

A legal gray area exists, however, where the asset is not unquestionably of either a governmental or commercial nature; in these instances, national courts have grappled with how to categorize the asset.[94] To determine whether the asset is governmental or commercial in nature, many jurisdictions will categorize an asset as commercial if the sovereign has engaged with the asset in a way a private entity could have been able to engage with it.[95] Approaching assets this way allows the court to examine the nature of the act.[96] For example, if a state sold an asset to a private entity in exchange for cash, that cash might be considered a commercial asset because the state engaged in a commercial transaction in the same way a private entity could have.[97] In fact, under the UK State Immunity Act, all transactions for the sale of goods and services are commercial.[98] In the United States, courts have also focused on the nature of the asset and have found that the following sovereign transactions constitute commercial activity:

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[91] *See* Reinisch, *supra* note 71, at 829, 832 n.196, 833 n.197 (noting several jurisdictions that provide the sovereign respondent with the presumption that its assets are governmental in nature); *see, e.g.*, Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) ("[T]he plaintiff has the burden of going forward with evidence showing that, under exceptions to the [Foreign Sovereign Immunities Act], immunity should not be granted . . . although the ultimate burden of persuasion remains with the alleged foreign sovereign.").

[92] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 228–29; *see, e.g.*, Alcom Ltd. v. Republic of Colombia, 23 I.L.M. 719, 725 (Apr. 12, 1984) ("[T]he head of the [diplomatic] mission's certificate that property is not in use or intended for use by or on behalf of the state for commercial purposes is sufficient evidence of that fact unless the contrary is proved.").

[93] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 226; Reinisch, *supra* note 71, at 823–34.

[94] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 226–28; Reinisch, *supra* note 71, at 823–34 (citing several examples where European jurisdictions struggled to determine if an asset owned by a sovereign was commercial or governmental in nature).

[95] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 226–27.

[96] *See id.* at 226.

[97] *See id.* at 227. In *Orascom Telecom Holding S.A.E. v. Republic of Chad*, the UK court declared that oil revenues from Chad, which were held in a London bank account, were not protected by sovereign immunity and were attachable to satisfy an arbitral award. *See id.*

[98] *See* State Immunity Act 1978, c. 33, § 3(3)(a) (U.K.); Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 227.

> [A] State's issuance of bonds to U.S. investors, a national space agency's obtaining and assertion of U.S. patents, a national airline's sale of tickets to U.S. passengers, a defense ministry's purchase of military supplies, a State art gallery's publication of books and advertising of exhibitions in the United States, a State commission's entry into a contract with a U.S. company for the sale of an aircraft, and a State instrumentality's sale of spices to, and purchase of supplies from, U.S. companies.[99]

Although it might appear that there is a variety of assets claimants could attach to satisfy an award, the body of law that attempts to define a commercial and governmental asset is very insecure and can be divergent across jurisdictions.[100]

II. DISCUSSION

As described in the previous Part, states relinquish jurisdictional immunity by allowing investment arbitration to take place outside the state's judicial system.[101] If an award is rendered against a state by an investment tribunal, however, most states still maintain execution immunity.[102] As a result, enforcement of investment-arbitration awards with recalcitrant state respondents requires the prevailing party to seek assets of the state that are not protected by this immunity.[103] This process, as *Sedelmayer v. Russian Federation* will show, is not an easy task.[104] Claimants must first comb ICSID Convention or New York Convention countries, depending on the tribunal, for potential state-owned, commercial assets, and second, claimants must navigate multiple jurisdictions with varying forms of sovereign immunity, overcoming any claims the state may make in asserting execution immunity.[105] As a result, enforcing even relatively small awards requires a persistent, well-financed claimant.[106] It is

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[99] Foster, *supra* note 86, at 674–75. Even though military equipment is typically protected under sovereign immunity, a U.S. circuit court specified that the contract of sale of such equipment is not immune, as the contract itself is commercial in nature. *See* Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 385 F.3d 1206, 1219–20 (9th Cir. 2004), *rev'd on other grounds*, 546 U.S. 450 (2006); *see also* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 226; Foster, *supra* note 86, at 674.

[100] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 227–28.

[101] *See id.* at 211.

[102] *See id.* at 211, 215.

[103] *See id.* at 225.

[104] *See Mr. Franz Sedelmayer v. The Russian Federation*, 2 STOCKHOLM INT'L ARB. REV. 1, 1–2 (1998) [hereinafter *Mr. Franz Sedelmayer*]; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225.

[105] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225.

[106] *See id.* at 211.

not clear that all claimants would be able to stomach the additional time and cost required.[107]

The *Sedelmayer* case exemplifies the difficulties that claimants face in enforcing awards against sovereign entities.[108] In 1990, Franz Sedelmayer, a German citizen, set up a law enforcement supply and training company called the Sedelmayer Group of Companies in St. Petersburg, Russia.[109] The company engaged in multiple agreements with the city's police department, *Glavnoje Upravlenije Vnutrenich Del* (GUVD), to provide services that would update its equipment and modernize its policing procedures.[110] As part of these agreements, Sedelmayer invested more than $2 million to establish a proper training facility, which included leasing and renovating a villa formerly used by the Soviet government.[111] In August 1991, the company and GUVD signed an agreement establishing a joint stock company, *Kammenij Ostrov* (KOC).[112] Later in 1991, GUVD and KOC signed an Act of Transfer, which placed ownership of the property in KOC.[113] In 1992, the Russian government established a Federal Property Fund to handle all Russian State property, including assets that governmental agencies had contributed to joint ventures.[114] Subsequently, the Property Fund ordered all of GUVD's shares in KOC to be transferred to the Property Fund.[115] Soon thereafter, the Property Committee of the City of St. Petersburg (or *Komitet po Upravlenijo Gorodskim Imusjestvom Merii St. Peterburga* (KUGI)) acquired the duties of the Property Fund.[116] KUGI then ordered GUVD to transfer its share in KOC to KUGI, but GUVD refused.[117]

Multiple forms of litigation in Russian state commercial courts ensued in 1992 and 1993.[118] The result was that KOC's state registration was declared

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[107] *See id.*

[108] *See* Bjorklund, *State Immunity*, *supra* note 12, at 314. It took a German citizen more than seventeen years and 140 separate claims to eventually attach Russian assets that could be used to satisfy the entirety of a claim originally valued at $2.35 million. *See* David Crawford, *Businessman vs. Kremlin: War of Attrition*, WALL ST. J. (Mar. 6, 2006), http://www.wsj.com/articles/SB114161519002090116 [https://perma.cc/T744-XHDT] [hereinafter Crawford, *Businessman vs. Kremlin*]; Andrew Higgins, *Beating Russia at Its Own Long Game*, N.Y. TIMES (Feb. 9, 2015), http://www.nytimes.com/2015/02/10/world/europe/once-friendly-with-putin-german-goes-to-court-over-seized-assets.html?_r=0 [https://perma.cc/Z2W6-UWZR].

[109] *See Mr. Franz Sedelmayer*, *supra* note 104, at 1–2.

[110] *See id.* at 2.

[111] *See* Alan S. Alexandroff & Ian A. Laird, *Compliance and Enforcement*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 1, at 1172, 1182; Bjorklund, *State Immunity*, *supra* note 12, at 314; Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[112] *See Mr. Franz Sedelmayer*, *supra* note 104, at 2.

[113] *See id.* at 5.

[114] *See id.*

[115] *Id.*

[116] *Id.*

[117] *Id.* at 6.

[118] *See id.*

null and void, and KOC was liquidated.[119] In addition, on December 4, 1994, a presidential decree transferred all of KOC's assets to the government as a part of a presidential residence to receive foreign delegations.[120] Sedelmayer tried to fight the decree, but on September 20, 1995, the Judicial Collegium for Civil Cases ordered that the buildings be sealed.[121] In January 1996, the Russian government seized the premises.[122] That same month, Sedelmayer initiated a claim of illegal expropriation in the Arbitration Institute of the Stockholm Chamber of Commerce in Sweden under the German-Soviet BIT, which was signed in June 1989.[123] In his claim, Sedelmayer sought compensation for all his investments in KOC, including maintenance and improvements made to the facilities and premises.[124] As a component of its defense, Russia claimed that it was protected by sovereign immunity, and, as a result, the arbitral tribunal did not have jurisdiction to hear the case.[125]

The tribunal found, however, that Russia waived its immunity when it submitted to arbitration through the German-Soviet BIT.[126] In July 1998, the tribunal ordered the Russian government to pay Sedelmayer $2.35 million, including interest at 10%, as compensation for his investments under the treaty.[127] Despite the relatively small size of the award, Russia refused to pay.[128]

Sedelmayer sought enforcement of the award in Germany through the New York Convention.[129] To successfully do this, Sedelmayer had to first convince a German court to recognize the award and to consent that the award was enforceable.[130] Germany adheres to the restrictive principle of sovereign immunity (immunity is only granted when the dispute arises out of acts of a governmental nature), which has been developed through the country's courts but has not been codified in law.[131] The *Kammergericht* in Berlin—Germany's highest court of general jurisdiction—ruled, however, that Russia's waiver of jurisdictional immunity through its investment treaty with Germany extended to enforcement immunity.[132] In addition, the court pointed to Article 10 of the German-Soviet BIT, which stated that any award rendered by an arbitral tribu-

[119] *See id.*
[120] *See id.*
[121] *See id.* at 7.
[122] *See id.*
[123] *See id.*
[124] *Id.* at 11.
[125] *See id.* at 35.
[126] *See id.* at 54, 83–84.
[127] *See id.* at 118.
[128] *See* Bjorklund, *State Immunity*, *supra* note 12, at 314.
[129] *See id.*
[130] *See id.* at 314–15.
[131] *See id.*
[132] *See* Alexandroff & Laird, *supra* note 111, at 1183; Bjorklund, *State Immunity*, *supra* note 12, at 315.

nal in deciding a dispute arising out of the treaty should be enforceable under the New York Convention.[133] As a result, Russia could not be protected by sovereign immunity in Sedelmayer's enforcement of the award in Germany.[134] The German court quickly recognized and certified the award as enforceable under the New York Convention.[135]

With this victory, Sedelmayer moved on to executing the award, which proved much more difficult.[136] Here, the German court did not extend the waiver of sovereign immunity to the execution of the award against state assets.[137] Although the court examined whether there was an implied waiver of immunity when it came to the execution of the award, the court relied on German case law that distinguishes between the enforcement and execution of the award when it comes to sovereign immunity.[138] Accordingly, only assets that were deemed commercial in nature would not be subject to immunity.[139] The German court determined, after all, that executing against assets that are governmental in nature is not necessary to encourage foreign investment in each country—the central goal of any BIT.[140] To be successful in seizing such assets, Sedelmayer had to first locate Russian assets in Germany and then prove that they were commercial in nature.[141] After several years of failing to locate physical Russian assets in Germany, Sedelmayer brought several cases in the municipal court of Cologne against Russian financial assets in the form of payments owed to Russia.[142] Sedelmayer was momentarily successful with one of these attempts in which he tried to seize payments from Lufthansa Airlines to the Russian government for use of Russian airspace during its flights.[143] These payments, however, were ultimately deemed immune from execution because they were of a public character.[144] First, the payments only came about because Russia was exercising its territorial sovereignty.[145] Second, the payments were going to be used for monitoring Russian airspace—a typical sover-

[133] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315.
[134] *See id.*
[135] *See* Alexandroff & Laird, *supra* note 111, at 1183.
[136] *See id.*; Uchkunova & Temnikov, *supra* note 42, at 188.
[137] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315.
[138] *See id.*
[139] *See id.*
[140] *See* Alexandroff & Laird, *supra* note 111, at 1184.
[141] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315.
[142] *See id.*
[143] *See* Alexandroff & Laird, *supra* note 111, at 1183; Bjorklund, *State Immunity*, *supra* note 12, at 315.
[144] *See* Alexandroff & Laird, *supra* note 111, at 1183–84; Bjorklund, *State Immunity*, *supra* note 12, at 315.
[145] *See* Alexandroff & Laird, *supra* note 111, at 1184.

eign action.[146] Consequently, the court found that sovereign immunity protected the assets from German courts.[147]

Frustrated by nearly seven years of failed attempts, in 2005 Sedelmayer brought a case against Germany in the European Court of Human Rights (ECtHR) for failure to enforce the award.[148] The ECtHR agreed with the German courts' determinations, stating that Germany had not enforced the award only because the assets chosen by Sedelmayer to be seized were protected by Russia's sovereign immunity.[149]

Undeterred by these setbacks, Sedelmayer did not give up and continued to try a variety of tactics.[150] He went after Russian refunds of European taxes, Russian trade-show merchandise and equipment, and even a Russian airliner.[151] By 2005, Sedelmayer had brought more than thirty separate execution cases against Russia in Germany and several more in other jurisdictions.[152] In nearly all the cases, he was thwarted by the protections of execution immunity over Russia's state assets.[153] To make matters worse, Sedelmayer claimed that he often faced intimidation and veiled threats from Russian authorities.[154]

Then, in February 2006, Sedelmayer finally received the victory he had been awaiting for almost eight years.[155] A German municipal court awarded Sedelmayer a Russian-owned apartment complex in Cologne, which had previously been used as a compound for the KGB (the former Soviet intelligence agency) and a Soviet trade mission.[156] With an initial value of $40 million, this asset would fetch more than enough to fulfill Sedelmayer's award.[157] Tracking down this property turned out to be the most difficult aspect of seizing the asset.[158] Sedelmayer only came across the property after being tipped of its exist-

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[146] *See id.*

[147] *See id.*; Bjorklund, *State Immunity*, *supra* note 12, at 315.

[148] *See* Alexandroff & Laird, *supra* note 111, at 1183 n.34; Bjorklund, *State Immunity*, *supra* note 12, at 315.

[149] *See* Leonila Guglya, *International Review of Decisions Concerning Recognition and Enforcement of Foreign Arbitral Awards: A Threat to the Sovereignty of the States or an Overestimated Hazard (So Far)?*, *in* CZECH YEARBOOK OF INTERNATIONAL LAW 93, 97 (Alexander J. Bělohlávek & Naděžda Rozehnalová eds., 2011).

[150] *See* Alexandroff & Laird, *supra* note 111, at 1184.

[151] *See* Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[152] *See* Alexandroff & Laird, *supra* note 111, at 1183; Cody Olson, *Enforcement of International Investment Arbitration Awards Against the Russian Federation*, 22 AM. REV. INT'L ARB. 711, 741 (2011).

[153] *See* Alexandroff & Laird, *supra* note 111, at 1184.

[154] *See* Higgins, *supra* note 108.

[155] *See* Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[156] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[157] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[158] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Crawford, *Businessman vs. Kremlin*, *supra* note 108.

ence by friends who used to work for the KGB.[159] After discovering the property, Sedelmayer brought his execution claim to the German municipal court in an attempt to overcome any sovereign-immunity protection.[160] This time, the court agreed with Sedelmayer, declaring that the complex, currently being rented to Russian refugees, was being used for commercial purposes.[161] This ruling gave Sedelmayer control over the property, whereby he could immediately begin to collect the rent payments of building tenants—about $29,000 a month—before selling the property.[162]

It was not until late 2008 and early 2009 that Sedelmayer was able to begin selling the acquired property.[163] Despite recovering about $6.8 million from such sales, by early 2015 Sedelmayer had still not fully recovered his award, which had increased over time to more than $17 million.[164] In fact, Sedelmayer today continues to investigate additional means to seize Russian assets, all while being dogged by Russian countersuits over tax evasion and money laundering.[165] After seventeen years of legal battles including more than 140 different cases in multiple jurisdictions, Sedelmayer shows no sign of relenting: "You cannot give in . . . Russia only respects the language of strength. Nothing else works," he told *The New York Times* in February 2015.[166] Despite several banks, creditors, and other businesses fighting to enforce awards totaling several billion dollars against Russia, Sedelmayer remains the only private claimant to successfully execute an award not voluntarily paid by Russia.[167]

The *Sedelmayer* case clearly illustrates the substantial difficulties a claimant faces when attempting to execute an investment-arbitration award against a recalcitrant state.[168] First, Sedelmayer had to track down state-owned, com-

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[159] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[160] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315–16.

[161] *See id.* at 316; Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[162] *See* Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[163] *See* Bjorklund, *State Immunity*, *supra* note 12, at 316; David Crawford, *Moscow Pays a Debt—at Last*, WALL ST. J. (Dec. 18, 2008), http://www.wsj.com/articles/SB122955279471915687 [https://perma.cc/6J77-9EDR] [hereinafter Crawford, *Moscow Pays a Debt*].

[164] *See* Higgins, *supra* note 108. In 2009, the award was valued at €7 million or, at a dollar-Euro exchange rate of 0.748, about $9.36 million, which included interest and legal costs. *See* Crawford, *Moscow Pays a Debt*, *supra* note 163; *2009 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] (last visited Mar. 29, 2016). Applying a 10% interest rate compounded monthly, the award is valued in 2015 at about $17.01 million (author's calculations). *See* Crawford, *Moscow Pays a Debt*, *supra* note 163.

[165] *See* Higgins, *supra* note 108.

[166] *See id.*

[167] *See id.*

[168] *See* Bjorklund, *State Immunity*, *supra* note 12, at 313.

mercial assets.[169] This can be particularly time-consuming, especially because respondents are unlikely to be forthcoming with this information and may even attempt to conceal their assets.[170] In addition, states may not be as public or open about their assets compared with non-sovereign entities, which are typically required to disclose at least the value of their assets.[171] In fact, Sedelmayer was only able to find the asset that led to partial fulfillment of his award by happenstance, and it took him five years to discover it.[172] Second, any asset Sedelmayer found had to fall outside the protection of execution immunity.[173] As described earlier, proving that a state asset is strictly commercial can be difficult, especially because the burden lies with the claimant.[174] The *Sedelmayer* case shows that executing an award against an uncooperative sovereign respondent can be time-consuming, costly, and politically intimidating to the point where it might not make sense to pursue execution proceedings.[175] In fact, Sedelmayer attempted to execute his award against hundreds of Russian assets before he found one of significant value that was attachable.[176]

Sedelmayer's experience confronting an uncooperative state respondent provides a clear warning for claimants confronting a similar enforcement predicament.[177] Even when the award is relatively small and execution proceedings are conducted in a jurisdiction with a stable and transparent legal system, like in *Sedelmayer*, overcoming the hurdles of execution immunity can make for a protracted, frustrating, and energy-intensive process that can last for decades.[178] Given that Sedelmayer is the only successful private claimant to come close to executing an award rendered against Russia, he is clearly a unique claimant in terms of persistence and willingness to devote time and resources to executing his award.[179] If a typical claimant would not have engaged as fiercely as Sedelmayer, then claimants that face more difficult circumstances—

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[169] *See id.* at 315.

[170] *See* Foster, *supra* note 86, at 681.

[171] *See id.*

[172] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Crawford, *Businessman vs. Kremlin*, *supra* note 108.

[173] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315.

[174] *See* Reinisch, *supra* note 71, at 832 n.196, 833 n.197.

[175] *See* Alexandroff & Laird, *supra* note 111, at 1183; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 211–12.

[176] *See* Higgins, *supra* note 108.

[177] *See* Alexandroff & Laird, *supra* note 111, at 1184–85.

[178] *See* Giorgio Bernini & Albert Jan van den Berg, *The Enforcement of Arbitral Awards Against a State: The Problem of Immunity from Execution*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 359, 359, 373 (Julian D.M. Lew ed., 1986); Bjorklund, *State Immunity*, *supra* note 12, at 316. Germany has the eighth-strongest rule of law in the world according to The World Justice Project, which includes factors that measure stability, transparency, and order and security. *See* WORLD JUST. PROJECT, RULE OF LAW INDEX 2015, at 20, 160–64 (2014), http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf [https://perma.cc/9TGR-KCK3].

[179] *See* Alexandroff & Laird, *supra* note 111, at 1183; Higgins, *supra* note 108.

such as enforcing an award in a state with a weak rule of law—are even more likely to be unsuccessful.[180]

III. Analysis

The *Sedelmayer* case exemplifies why executing an award against an uncooperative state respondent has been referred to as the "Achilles' heel" in the body of investor-state dispute settlement.[181] Current legal infrastructure in investment arbitration provides investors with mechanisms to bring claims directly against states.[182] Neither BITs nor the two major arbitration enforcement conventions, however, sufficiently provide an efficient system for executing an award against a sovereign unwilling to pay such an award.[183]

These problems of execution are compounded as the size of the award increases, especially for the largest awards.[184] First, finding sufficient assets that are valued as highly as these awards further increases the time and investigative resources required for successful claimants.[185] Second, even if the claimant were able to locate assets of value at or near the awarded amount, asserting that such assets are not protected by sovereign immunity becomes more difficult because the sovereign can argue that the large value of the asset itself should be protected under the principle of economic necessity, found in many international investment agreements.[186]

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[180] *See* Steven L. Smith, *Enforcement of International Arbitral Awards under the New York Convention*, *in* PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION 283, 351 (Richard Chernick et al. eds., 3d ed. 2012); Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 211–12; Higgins, *supra* note 108.

[181] *See* Bjorklund, *State Immunity*, *supra* note 12, at 321. The problems of execution immunity were popularly termed the Achilles' heel of the ICSID Convention by Christoph Schreuer in his commentary on the ICSID Convention. *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 236; Tomoko Ishikawa, *Extraterritorial Discovery in Aid of Execution and State Immunity: Case Comment on Republic of Argentina v. NML Capital, Ltd.*, 4 J. ACCT. ECON. & L. 1, 15 (2014); Uchkunova & Temnikov, *supra* note 42, at 199.

[182] *See* PAUL D. FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS 173 n.326 (2d ed. 2007); Reinisch & Malintoppi, *supra* note 1, at 692; Brazil-David, *supra* note 17, at 261.

[183] *See* Alexandroff & Laird, *supra* note 111, at 1185; Bjorklund, *State Immunity*, *supra* note 12, at 321.

[184] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225–26; *see, e.g.*, Davies, *supra* note 28; Meyer & Bierman, *supra* note 28.

[185] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225–26 (arguing that claimants must first locate assets and then successfully classify them as commercial in nature in order to attach sovereign assets to their claims). The *Yukos* case, with a $50 billion award, has triggered numerous arguments that the claimants will be hard pressed to fully execute their award due to the immense size of the award. *See* Davies, *supra* note 27; Meyer & Bierman, *supra* note 28; Simkin, *supra* note 29.

[186] *See* FRIEDLAND, *supra* note 182, at 174; ORG. FOR ECON. COOPERATION & DEV., OECD INVESTMENT POLICY REVIEWS: RUSSIAN FEDERATION: ENHANCING POLICY TRANSPARENCY 72 (2006), http://www.oecd.org/investment/investmentfordevelopment/oecdinvestmentpolicyreviews

The problem with executing large awards against recalcitrant states is increasingly troubling because these large awards have the potential to become more prevalent as international investment in capital-intensive projects continues to increase.[187] For example, over the last twenty years, large-scale investments through project-finance transactions and P3s, which together represent over $250 billion annually, have ballooned in both size and popularity.[188] As a result, if a dispute arises out of these transactions, the claimant will likely seek a relatively large award.[189]

If larger and larger awards are more likely to be granted, issues of execution have the potential to become more prevalent.[190] Without an effective execution mechanism for investment disputes, a state could be motivated not to comply with an award because it understands that a claimant will have tremendous difficultly executing an award rendered against it.[191] This incentive will increase as the size of the award increases because the state obviously has less of a desire to pay a large award than a small award.[192] As described earlier, other incentives that push a state to comply with awards are currently stronger.[193] But as larger awards become more prevalent, these incentives could change.[194] If more states begin refusing to pay an award, then investors may question their strategy of resolving international investment disputes through

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russianfederation2006.htm [https://perma.cc/4BEY-Z3EG]; Alan O. Sykes, *Economic "Necessity" in International Law*, 109 AM. J. INT'L L. 296, 297 (2015). BITs increasingly include a provision in which a balance of payments crisis would permit a state to restrict the flow of capital in and out of the country. *See* Sykes, *supra*, at 306–08. If complying with an especially large award would trigger a balance of payments crisis, then the party would be limited in performing under the BIT. *See id.* Therefore, large-value assets can be protected under sovereign immunity. *See id.*; *The* Yukos *Ruling: An Expensive Lesson*, ECONOMIST: SCHUMPETER BLOG (July 29, 2014), http://www.economist.com/blogs/schumpeter/2014/07/yukos-ruling [https://perma.cc/R97Y-8K5P].

[187] *See* Bezant et al., *supra* note 31, at Section 2, #4.

[188] *See* Tallis & Mahmudova, *supra* note 32, at 5; Woodman, *supra* note 32, at 37.

[189] *See* Bezant et al., *supra* note 31, at Section 2, #4 (listing 165 investment-treaty arbitrations with disputed amounts exceeding $100 million and 109 investment-treaty arbitrations with disputed amounts more than $500 million); Born, *supra* note 6, at 830 n.213.

[190] *See* Bezant et al., *supra* note 31, at Section 2, #4 (showing that the value of awards is increasing); *see, e.g.*, Davies, *supra* note 28; Meyer & Bierman, *supra* note 28 (explaining that it becomes harder for claimants to execute an award as the size of the award becomes larger).

[191] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 243 (hypothesizing that states might upend conventional practice and begin refusing to pay arbitral awards in increasing numbers, especially because states that do not pay arbitral awards have yet to be firmly sanctioned); Vincent O. Nmehielle, *Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 ANN. SURV. INT'L & COMP. L. 21, 47 (2001) (suggesting that states could take advantage of a situation in which they know that awards rendered against them might be un-executable).

[192] *See* Peerenboom, *Enforcement of Arbitral Awards*, *supra* note 27, at 303; Peerenboom, *An Empirical Study*, *supra* note 27, at 271.

[193] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 241; Profaizer, *supra* note 17, at 164; Rosenberg, *supra* note 19, at 507.

[194] *See* Nmehielle, *supra* note 191, at 35.

investment arbitration.[195] After all, if an award will not be paid and there is not a proper mechanism to execute the award against a state, then there is little reason for an investor to engage in arbitration.[196] Obtaining the award is the main reason a claimant would spend the time and money to pursue a dispute against a state.[197] Although several potential solutions have been suggested to combat the problems involved in execution immunity, none seem likely to sufficiently equip the claimant with adequate recourse when the size of the award becomes large.[198]

A. Successfully Locating and Classifying Sovereign Commercial Assets When Executing Large Awards

In order for a claimant to successfully execute an award against a recalcitrant state respondent, it must locate the sovereign's assets and establish that they are commercial in nature.[199] In the *Sedelmayer* case, it took the claimant over seventeen years to recover a majority of his $2.3 million award.[200] Applying this time scale to bigger awards shows a troubling situation; for example, in the *Yukos* case, where the claimant was granted $50 billion against Russia, it would take the claimant 6750 years to recover the entirety of the award.[201] This is obviously a substantial time commitment that few claimants would be capable of pursuing.[202] Although this example assumes that one claimant would recover at the same rate as another claimant, it effectively illustrates the simple fact that the size of the award complicates the execution of the award

[195] *See* Bjorklund, *State Immunity*, *supra* note 12, at 304; Profaizer, *supra* note 17, at 164; Rowland Akande, *Enforcement and Practicability of Sovereign Immunity Doctrine in International Commercial Arbitration*, 7 J. POL. & L. 143, 143 (2014); Brazil-David, *supra* note 17, at 260–61.

[196] *See* Bjorklund, *State Immunity*, *supra* note 12, at 304; Profaizer, *supra* note 17, at 164; Akande, *supra* note 195, at 143; Brazil-David, *supra* note 17, at 260–61.

[197] *See* Brazil-David, *supra* note 17, at 260–61.

[198] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 229–38; Nmehielle, *supra* note 191, at 39–41; Uchkunova & Temnikov, *supra* note 42, at 202–09.

[199] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225.

[200] *See* Higgins, *supra* note 108.

[201] $2.3 million / 17 years * $50 billion ≈ 6750 years (author's calculations for how long it would take the claimants in the *Yukos* case to claim their award, if the rate at which they were able to recover equaled the rate Sedelmayer produced). *See Mr. Franz Sedelmayer*, *supra* note 104, at 118 (declaring that Sedelmayer was awarded $2.3 million); Higgins, *supra* note 108 (showing that it has taken Sedelmayer more than seventeen years to enforce and execute his award against Russia); *see also* Yukos Universal Ltd. (Isle of Man v. Russ. Fed'n), PCA Case No. AA 227, Final Award ¶ 1827 (Perm. Ct. Arb. 2014), http://pcacases.com/web/sendAttach/420 [https://perma.cc/K8BW-RELP] (declaring that the claimants in the *Yukos* case were awarded $50 billion against Russia).

[202] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 211 (describing how claimants that face challenges executing an award might not be able to overcome them).

for the claimant because it makes it that much harder for the claimant to find assets of value that add up to the awarded amount.[203]

One of the initial steps for a claimant seeking to enforce an award is to locate sovereign assets outside the sovereign's territory.[204] In fact, the location of a sovereign's foreign assets can be a crucial factor in deciding which jurisdiction the claimant chooses to enforce an award.[205] As described earlier and illustrated in the *Sedelmayer* case, this is a challenging feat, even for relatively small awards.[206] When an award is particularly large, the obvious sovereign-owned targets of significant value are real estate, military hardware, or foreign reserves held in accounts abroad.[207] These assets are not only likely to be worth a large amount, but they also are assets that can easily be identified and located.[208] The very assets that claimants of large awards could easily target, however, are protected under execution immunity by most jurisdictions.[209] As a result, claimants are left to scour jurisdictions, investigating potential assets that may or may not be owned by the sovereign, which requires additional time and resources.[210] The bigger the award, the more time and resources required to find potential assets.[211]

If the claimant is able to successfully locate any assets, it must then argue that the asset does not fall under execution immunity by demonstrating that the asset is of a commercial nature.[212] With exceptionally large awards, however, this creates an additional potential problem for the claimant.[213] When the award is relatively large, the claimant has the incentive to seek assets that are valued as close to the award as possible: the fewer assets needed for recovery, the fewer number of times the claimant has to overcome execution immuni-

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[203] *See* Peerenboom, *Enforcement of Arbitral Awards*, *supra* note 27, at 303; Peerenboom, *An Empirical Study*, *supra* note 27, at 271; *see, e.g.*, Simkin, *supra* note 29.

[204] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225.

[205] *See* Foster, *supra* note 86, at 671, 678.

[206] *See* Bjorklund, *State Immunity*, *supra* note 12, at 314–16; Crawford, *Businessman vs. Kremlin*, *supra* note 108; Higgins, *supra* note 108.

[207] *See* Foster, *supra* note 86, at 678–79; Reinisch, *supra* note 71, at 823–34.

[208] *See* Reinisch, *supra* note 71, at 823–34 (describing specific case law asserting that obvious state-owned assets that are likely to be located outside the sovereign's territory, such as military equipment, embassies, and central bank funds, are protected by sovereign immunity).

[209] *See* Foster, *supra* note 86, at 678–79; Reinisch, *supra* note 71, at 823–34.

[210] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 211, 225–26; *see, e.g.*, Davies, *supra* note 28; Meyer & Bierman, *supra* note 28.

[211] *See* Peerenboom, *Enforcement of Arbitral Awards*, *supra* note 27, at 303; Peerenboom, *An Empirical Study*, *supra* note 27, at 271; *see, e.g.*, Simkin, *supra* note 29.

[212] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225; Uchkunova & Temnikov, *supra* note 42, at 202–09.

[213] *See* FRIEDLAND, *supra* note 182, at 174; ORG. FOR ECON. COOPERATION & DEV., *supra* note 186, at 72; *The* Yukos *Ruling: An Expensive Lesson*, *supra* note 186.

ty.[214] In the face of such a high-value award, however, the sovereign would likely raise the defense that even if the asset is commercial in nature, the simple fact that the value of the asset is so high protects it under the principle of economic necessity.[215] Part of the reason why diplomatic real estate, military assets, and central bank funds are off limits to claimants is that if claimants were able to seize any of these assets, it would severely limit the sovereign's ability to carry out essential government functions.[216] Seizing an asset of substantial value could impact typical functions of a sovereign and justify economic necessity, particularly if it threatened a fiscal or currency crisis, added tremendous risk to national security, or brought about political upheaval.[217] Consequently, not only will finding assets valued high enough to satisfy a large award be difficult for the claimant, but also, even if the claimant is able to locate the assets, they might be protected due to their sheer size.[218]

B. An Environment Ripe for Large Awards

The difficulties that exist when executing large awards against uncooperative states are increasingly concerning because they have the potential of occurring more frequently.[219] International investors make massive individual investments through a variety of cross-border transactions.[220] Two of the most popular financing mechanisms for large-scale investments are project-finance transactions and P3s, which together represent over $250 billion annually.[221] In fact, each year several investments reach into the hundreds of millions of dollars and several even exceed $1 billion.[222] As the incidence of large investments increases so too does the number of disputes arising out of such invest-

[214] *See* Peerenboom, *Enforcement of Arbitral Awards*, *supra* note 27, at 303; Peerenboom, *An Empirical Study*, *supra* note 27, at 271; *see, e.g.*, Simkin, *supra* note 29.

[215] *See, e.g.*, ORG. FOR ECON. COOPERATION & DEV., *supra* note 186, at 72; *The Yukos Ruling: An Expensive Lesson*, *supra* note 186.

[216] *See* Foster, *supra* note 86, at 678–79 (explaining that diplomatic real estate allows a state to interact with other states, military assets allow a state to protect itself, and central bank funds ensure currency liquidity).

[217] *See* Foster, *supra* note 86, at 678–79; Sykes, *supra* note 186, at 323; Uchkunova & Temnikov, *supra* note 42, at 202.

[218] *See, e.g.*, ORG. FOR ECON. COOPERATION & DEV., *supra* note 186, at 72; *The Yukos Ruling: An Expensive Lesson*, *supra* note 186.

[219] *See* Bezant et al., *supra* note 31, at Section 2, #4.

[220] *See* Tallis & Mahmudova, *supra* note 32, at 5; Woodman, *supra* note 32, at 37.

[221] *See* PRISCILLA ANITA AHMED & XINGHAI FANG, INT'L FIN. CORP., PROJECT FINANCE IN DEVELOPING COUNTRIES 5–7 (1999); Tallis & Mahmudova, *supra* note 32, at 5; Woodman, *supra* note 32, at 37.

[222] *See* Tallis & Mahmudova, *supra* note 32, at 9, 11, 13, 15 (providing examples of some of the largest infrastructure investments for 2013: the Ichthys liquefied natural gas (LNG) project, which is valued at over $38 billion; the Sadara Complex Loan Financing deal, which is valued at over $34 billion; and the Sabine Pass LNG Train project, which is valued at over $22 billion).

ments, which will likely involve comparatively large awards.[223] Despite these new financing mechanisms that provide for such capital-intensive transactions, the same dispute resolution mechanism—international arbitration—and the problems of execution immunity that go with it remain.[224]

One of the main mechanisms for financing large investments is international project finance.[225] In project finance, revenue used to repay the debt borrowed to finance the project is limited to the cash flows generated by the project itself.[226] A project-finance transaction is typically made up of sponsors (equity investors), lenders (commercial banks that finance the project), contracting parties (construction and project management firms), and can include sovereign entities as equity investors, project regulators, or insurance issuers.[227] Project finance is most popular in capital-intensive industries like utilities (for example, power plants and transmission lines), transportation infrastructure (for example, bridges, highways, and airports), and natural resources (for example, oil or gas extraction and copper or gold mines).[228]

Since emerging in the latter-half of the twentieth century, project finance has become a more common financial mechanism for funding large public works projects throughout the world.[229] Rather than exclusively using public funding, governments have included private investment to relieve the financial pressures associated with raising capital for such projects.[230] In addition, there are a number of advantages associated with using project finance.[231] First, liability to the sponsors is limited to the project's assets, in which the lender's

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[223] *See* Bezant et al., *supra* note 31.

[224] *See* Christopher Dugué, *Dispute Resolution in International Project Finance Transactions*, 24 FORDHAM INT'L L.J. 1064, 1065–66, 1074 (2001).

[225] *See* AHMED & FANG, *supra* note 221, at 5–7.

[226] *See* E.R. YESCOMBE, PRINCIPLES OF PROJECT FINANCE 1 (2d ed. 2014) [hereinafter, YESCOMBE, PROJECT FINANCE]; Nagla Nassar, *Project Finance, Public Utilities and Public Concerns: A Practitioner's Perspective*, 23 FORDHAM INT'L L.J. 60, 62 (2000).

[227] *See* YESCOMBE, PROJECT FINANCE, *supra* note 226, at 1, 7, 13, 30; Nassar, *supra* note 226, at 62–64.

[228] *See* Darrin Grimsey & Mervyn K. Lewis, *Evaluating the Risks of Public Private Partnerships for Infrastructure Projects*, 20(2) INT'L J. PROJECT MGMT. 107, 108 (2002).

[229] *See* AHMED & FANG, *supra* note 221, at 4; Dinesh D. Banani, Note, *International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction*, 26 B.C. INT'L & COMP. L. REV. 355, 358 (2003).

[230] *See* YESCOMBE, PROJECT FINANCE, *supra* note 226, at 1; Nassar, *supra* note 226 at 60–61; *see, e.g.*, Deloitte Touche Tohmatsu, *Sustainable Power Sector Reform in Emerging Markets: Financial Issues and Options* 10 (Joint World Bank/USAID Policy Paper, 2004), http://pdf.usaid.gov/pdf_docs/Pnadb309.pdf [https://perma.cc/63SP-92P7] ("Assuming that 40% to 50% of power sector investment in emerging markets . . . comes from self-financing, this still leaves an additional investment need of about US $50 billion to $70 billion per year, which policymakers would seek to attract from the private sector.").

[231] *See* EDWARD OCHIENG ET AL., MANAGEMENT OF GLOBAL CONSTRUCTION PROJECTS 217–18 (2013); Christopher J. Sozzi, *Project Finance and Facilitating Telecommunication Infrastructure Development in Newly-Industrializing Industries*, 12 COMPUTER & HIGH TECH L.J. 435, 447 (1996).

only recourse is the collateral.[232] Second, the sponsor can keep the project's debt off its own balance sheet, as the project is an independent entity.[233] Third, because lenders are repaid through the cash flows generated by the project, the project can include highly leveraged debt with limited equity necessary.[234] Fourth, the sponsor can sometimes get better interest rates on the loan by using a project-finance loan structure because the risk of the loan is associated with the creditworthiness of the project itself and not the sponsor.[235]

These benefits have helped ease investor concerns by spreading the risks of investment to various participating parties, which has encouraged more and more foreign investors to make larger and larger investments.[236] Although the number of project-finance transactions dipped during the global economic recession, the number of deals is still up more than 56% since 2005.[237] In addition, project finance has become a popular vehicle for large infrastructure projects, which are inherently capital-intensive and can have multibillion-dollar price tags: for example, the Kashagan oil field project in Kazakhstan is estimated to bring in more than $100 billion in investment.[238] Although this project is very unique in size and scale, the average project-finance deal worldwide was more than $510 million in 2013, with several deals valued at over $20 billion.[239] In 2005, the average project-finance deal was just under $480 million, with only a handful of deals valued over $10 billion.[240] Not only has the number of project-finance transactions continued to grow, but also the average size of each deal has increased.[241]

Some project-finance transactions can directly include a sovereign entity as a stakeholder, such as a P3.[242] Although not all P3s involve project finance, P3s have become another popular mechanism for large, capital-intensive fi-

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[232] *See* OCHIENG ET AL., *supra* note 231, at 217–18.

[233] *See id.*

[234] *See id.*

[235] *See id.*

[236] *See* ESTEBAN C. BULJEVICH & YOON S. PARK, PROJECT FINANCING AND THE INTERNATIONAL FINANCIAL MARKETS 182–83 (1999); *see, e.g.*, Tallis & Mahmudova, *supra* note 32, at 5.

[237] *See* Tallis & Mahmudova, *supra* note 32, at 7. There were 351 and 548 international project finance deals in 2005 and 2013, respectively, which represents a 56% increase (author's calculations: 548 – 351 / 351 = 0.56). *See id.*

[238] Benjamin C. Esty & Florian Bitsch, *The Kashagan Production Sharing Agreement (PSA)*, (Harv. Bus. Sch. Case No. 9-213-082, Sept. 2013).

[239] *See* Tallis & Mahmudova, *supra* note 32, at 4. In 2013, there were 548 international project finance deals worth a total $280 billion, making the average deal more than $510 million (author's calculations: $280 billion / 548 = $510.95 million). *See id.*

[240] *See id.* at 7. In 2005, there were 351 international project-finance deals worth a total of $168 billion, making the average deal roughly $480 million (author's calculations: $168 billion / 351 = $478.63 million). *See id.*

[241] *See id.* at 4–7.

[242] *See* E. R. YESCOMBE, PUBLIC-PRIVATE PARTNERSHIPS: PRINCIPLES OF POLICY AND FINANCE 3, 113 (2007) [hereinafter YESCOMBE, PUBLIC-PRIVATE PARTNERSHIPS].

nancing.[243] In a P3, sovereigns engage directly with private investors as equity holders in the project.[244] Since the 1990s, states have looked for alternative revenue streams to finance public infrastructure projects, rather than solely relying on governmental revenues.[245] In a P3, a private-sector firm can finance, build, and manage public facilities like roads, seaports, and power plants.[246] Common among nearly all infrastructure P3s is the large amount of capital required to finance such projects.[247] In fact, around $50 billion flows into the P3 infrastructure market each year.[248]

C. The Potential to Destabilize the Investor-State Arbitration Regime

Due to the growth of both project finance and P3 transactions over the last twenty years, there are more opportunities for disputes to arise between investors and states that could result in relatively large awards.[249] For such awards, there are two main incentives that influence states to largely comply with awards rendered against them: (1) states do not want to risk their international investment reputation; and (2) states do not want to leave themselves indefinitely exposed to future litigation.[250] For the vast majority of cases, the incentives are greater for states to comply with an award than to refuse to pay.[251] When the award amount becomes increasingly large, however, these incentives might be disrupted.[252] Because executing an award of such substantial size against a recalcitrant state is so challenging for the claimant, the incentive for a state not to cooperate and to refuse to pay the award could increase.[253] This incentive has the potential to increase as the size of the award increases because the state will have less of a desire to pay a large award than a

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[243] *See id.* at xv; Woodman, *supra* note 32, at 37.

[244] *See* YESCOMBE, PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 242, at 16; Grimsey & Lewis, *supra* note 228, at 107.

[245] *See* Grimsey & Lewis, *supra* note 228, at 107.

[246] *See id.* at 108.

[247] *See id.*; Woodman, *supra* note 32, at 37.

[248] *See* Muhabbat Mahmudova, *Global PPP Market Review*, PROJECT FIN. & INFRASTRUCTURE J., June 20, 2014, at 20.

[249] *See* Bezant et al., *supra* note 31, at Section 2, #4.

[250] *See* Profaizer, *supra* note 17, at 165; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 233; Rosenberg, *supra* note 19, at 507.

[251] *See* Baltag, *supra* note 46, at 404; Antonio R. Parra, *The Enforcement of ICSID Arbitral Awards* 10 (Paper Presented at 24th Joint Colloquium on International Arbitration, Paris, Nov. 16, 2007) http://www.arbitration-icca.org/media/0/12144885278400/enforcement_of_icsid_awards.pdf [https://perma.cc/9A8Z-HPFZ] (last visited Mar. 29, 2016).

[252] *See, e.g.*, Davies, *supra* note 28; Meyer & Bierman, *supra* note 28.

[253] *See* Peerenboom, *Enforcement of Arbitral Awards*, *supra* note 27, at 303; Peerenboom, *An Empirical Study*, *supra* note 27, at 271; *see, e.g.*, Davies, *supra* note 28; Meyer & Bierman, *supra* note 28; Simkin, *supra* note 29.

small award.[254] At this stage, the threat that international investments might flee and that the state would fall out of favor with the international investment community might be relatively small compared to this incentive.[255] If awards cannot be executed and enforced against a state, then there is little reason for an investor to engage in arbitration.[256] After all, executing the award is the main reason a claimant would spend the time and money to pursue a dispute against a state.[257] Consequently, the problems of execution immunity in enforcing large awards have the potential to destabilize the investor-state arbitration regime.[258]

To illustrate how the incentives of the sovereign will change as the size of the award increases relative to the amount of foreign investment in the state, decision trees are used below to predict the behavior of the sovereign as well as the claimant. First, a decision tree will be used to show how the situation is likely to play out when the sovereign has more of an incentive to pay the award than not. Then, a second decision tree will be used to show how the situation changes when the sovereign has the incentive to not pay the award. This comparison will show that when the state has a higher incentive to not pay the award, the claimant no longer wants to engage in arbitration.

When the sovereign has the incentive to pay the award, the claimant will want to seek arbitration. The first step in developing a decision tree is to allocate potential payoffs for each of the parties' outcomes. In this situation, where the outcomes have been drastically simplified, there are four outcomes: (1) the claimant does not litigate; (2) the claimant litigates but loses; (3) the claimant litigates, wins, and the sovereign respondent pays; or (4) the claimant litigates, wins, and the sovereign respondent does not pay. For this decision tree, I assume that the claimant has more than a 50% chance of winning any claim brought against the sovereign. For the claimant, the best outcome is to litigate, win, and the sovereign pays, as the claimant receives compensation for the sovereign's actions. The worst outcome for the claimant is to litigate, win, and the sovereign does not pay, because the claimant would have spent the time and resources to litigate only to not get an award. The second-worst outcome for the claimant is to litigate and not win, because at least at this stage the claimant has not spent as much time and as many resources attempting to execute an award. The second-best outcome for the claimant is to not litigate be-

[254] *See* Peerenboom, *Enforcement of Arbitral Awards*, *supra* note 27, at 303; Peerenboom, *An Empirical Study*, *supra* note 27, at 271.

[255] *See* Peerenboom, *Enforcement of Arbitral Awards*, *supra* note 27, at 303; Nmehielle, *supra* note 191, at 35; Peerenboom, *An Empirical Study*, *supra* note 27, at 271.

[256] *See* Bjorklund, *State Immunity*, *supra* note 12, at 304; Profaizer, *supra* note 17, at 164; Akande, *supra* note 195, at 143; Brazil-David, *supra* note 17, at 260–61.

[257] *See* Brazil-David, *supra* note 17, at 260–61.

[258] *See* Bjorklund, *State Immunity*, *supra* note 12, at 304; Profaizer, *supra* note 17, at 164; Akande, *supra* note 195, at 143; Brazil-David, *supra* note 17, at 260–61.

cause here the claimant has not spent any time or money pursuing arbitration but ends with the same result of no payment.

For the sovereign respondent, the best outcome is for the claimant not to litigate, followed by the claimant litigating and then not winning. The second-worst outcome for the sovereign respondent is for the claimant to litigate, win, and then pay the award, which is better than the worst outcome of not paying the award. In this situation, the incentive to pay the award is greater than not paying the award for the state. The main reason for this is that the state is fearful that if it does not pay the award, the international investment community will not be willing to bring its capital to the state and current investors might flee.[259] With these payoffs, the sovereign will pay the award if it loses, and as long as the claimant has more than a 50% chance of winning in arbitration, the claimant will bring a case against the sovereign.

With incentives for the sovereign not to pay the award, the claimant no longer is willing to seek arbitration. The potential outcomes in this situation are the same as in the previous scenario. In addition, the payoffs for the claimant are the same, as its incentives have not changed. The payoffs for the sovereign respondent, however, have changed as it is more incentivized to not pay an award rendered against it. As a result, the worst outcome for the sovereign is to have an award rendered against it and then pay the award. The second-worst outcome is to have an award rendered against it and then not pay the award. Given that the sovereign will choose not to pay an award rendered against it, the claimant will choose not to litigate, as this gives the claimant a better payoff than litigating and losing or litigating, winning, and the sovereign not paying the award. This means that even if the claimant has a 100% chance of winning the arbitration, the claimant would still not choose to litigate.

These scenarios illustrate the potential impact that a weak execution mechanism could have on the investor-state arbitration regime. As described earlier, claimants face several challenges when executing an award against an uncooperative sovereign respondent, and these challenges are compounded as the size of the award increases.[260] Instances of large awards being rendered against states are likely to increase as states engage directly with investors in large infrastructure projects.[261] If these challenges become so large that states realize that claimants will rarely be able to recover their award if they refuse to pay and the threat of damaging their reputation among foreign investors is not sufficiently motivating to comply, then sovereign respondents might choose

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[259] *See* Profaizer, *supra* note 17, at 165; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 233; Rosenberg, *supra* note 19, at 507.

[260] *See* Bjorklund, *State Immunity*, *supra* note 12, at 315; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 225–26; *see, e.g.*, Davies, *supra* note 28; Meyer & Bierman, *supra* note 28.

[261] *See* Bezant et al., *supra* note 31, at Section 2, #4.

not to pay awards rendered against them in increasing numbers.[262] If this occurs, then claimants will likely choose not to even engage in investor-state arbitration, as they would not be able to recover an award even if they won their case.[263] Investors and states would be left to find an alternative dispute resolution mechanism, as investor-state arbitration would fall out of favor with investors.[264]

D. Unclear Solutions

Several solutions have been proposed to address the problems of execution immunity.[265] These include changes in international law, changes to domestic sovereign-immunity laws, or negotiated amendments to international investment agreements that would waive execution immunity.[266] Such solutions, however, are unlikely to occur because they all require a great degree of political will, which is lacking in the international community with regards to sovereign immunity.[267] In addition, these solutions are inherently investor-friendly, and during a time when states are increasingly skeptical of giving investors direct access to dispute resolution, it is unlikely that states would adopt such reforms.[268] Instead, solutions that use market mechanisms—like insurance and assignment—or well-established international law—like diplomatic protection—might provide more realistic outcomes.[269]

One possible solution that has been suggested is to enhance political risk and BIT-award insurance.[270] Through both of these mechanisms, an investor who has been rendered an award against a state can recoup part of or the entire award from the insurance provider if the state does not pay.[271] There are several problems with this solution, however, when the award is large.[272] First, insurance providers typically cap their exposure in one particular country to $1

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[262] *See* Bjorklund, *State Immunity*, *supra* note 12, at 304; Profaizer, *supra* note 17, at 164; Akande, *supra* note 195, at 143; Brazil-David, *supra* note 17, at 260–61.

[263] *See* Profaizer, *supra* note 17, at 164; Bjorklund, *State Immunity*, *supra* note 12, at 304; Akande, *supra* note 195, at 143; Brazil-David, *supra* note 17, at 260–61.

[264] *See* Alexandroff & Laird, *supra* note 111, at 1184–85; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 241; Rosenberg, *supra* note 19, at 507.

[265] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 229–38; Nmehielle, *supra* note 191, at 39–41; Uchkunova & Temnikov, *supra* note 42, at 202–09.

[266] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 229–38; Nmehielle, *supra* note 191, at 39–41; Uchkunova & Temnikov, *supra* note 42, at 202–09.

[267] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 240.

[268] *See id.* at 241.

[269] *See id.* at 229; Uchkunova & Temnikov, *supra* note 42, at 206.

[270] *See* YESCOMBE, PUBLIC-PRIVATE PARTNERSHIPS, *supra* note 242, at xv; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 234; Uchkunova & Temnikov, *supra* note 42, at 206.

[271] *See* Baltag, *supra* note 46, at 404; Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 234–35.

[272] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 234–35.

billion to $1.5 billion.[273] With large investments, a single insured investor could easily exceed that market capacity cap, and some investors would not even be able to get insured up to the total value of their investment.[274] In addition, this type of insurance is already quite expensive for investors, and if states begin to refuse to pay awards in increasing numbers, premiums for this insurance will likely increase, potentially to a prohibitive level.[275]

Another possible market-based solution is to enhance the marketplace for the assignment of awards.[276] Here, the successful claimant effectively sells his or her rendered award to a third party, which buys the authority to seek the entirety of the award from the respondent.[277] There are several high-profile awards rendered by investor-state tribunals that have successfully been assigned to third parties.[278] This solution has the potential to help ease the problems of execution immunity because a third party may be more willing, especially when the price is right, to spend decades going after sovereign assets that are not subject to execution immunity.[279] Thus far, however, this solution remains untested for large awards.[280]

Alternatively, claimants could attempt to rely on mechanisms of international law, like diplomatic protection, to attempt to influence the recalcitrant respondent to pay the award.[281] In this situation, the claimant would attempt to have a state espouse its claim against the uncooperative respondent.[282] The home state has complete discretion over whether to take up the claim on behalf of the claimant or not.[283] When a state espouses the claim, it can then submit

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[273] *See id.*

[274] *See id.*; Tallis & Mahmudova, *supra* note 32, at 9, 11, 13, 15.

[275] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 234–35.

[276] *See* Uchkunova & Temnikov, *supra* note 42, at 207–08.

[277] *See id.*

[278] *See id.* In several ICSID cases against Argentina, the awards were assigned to third parties, who then sought enforcement of those awards in national courts. *See id.* In another ICSID case between a claimant and the government of Indonesia, the claimant assigned its award to a party that was not a nationality of an ICSID-contracting state, and as a result, the ICSID tribunal lacked jurisdiction. *See* Stephen Jagusch & Anthony Sinclair, *The Impact of Third Parties on International Arbitration—Issues of Assignment*, *in* PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION 291, 296 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

[279] *See* Dirk Otto, *Article IV*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 145, 197–98 (Herbert Kronke et al. eds., 2010); Uchkunova & Temnikov, *supra* note 42, at 207–08.

[280] *See* Uchkunova & Temnikov, *supra* note 42, at 207–08.

[281] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 239 (specifying that this action would revert to a system of dispute resolution that was prevalent before the creation of direct, investor-state arbitration); Uchkunova & Temnikov, *supra* note 42, at 206 (pointing out various issues with the process of espousing claims against a sovereign).

[282] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 239; Uchkunova & Temnikov, *supra* note 42, at 206.

[283] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 239; Uchkunova & Temnikov, *supra* note 42, at 206.

the claim directly against the respondent state in the International Court of Justice or another state-to-state dispute resolution body.[284] Using diplomatic protection, however, is not a desirable strategy to execute an award.[285] Although diplomatic protection enables a home state to apply legal pressure against a respondent state, it inserts political hurdles and complexities into the process.[286] These hurdles include both domestic and international considerations.[287] The home state is confronted with domestic political issues of espousing an investor's claim: essentially, to what extent will espousing this investor's claim impact the political environment of the home state?[288] In addition, the home state will have to consider how espousing the investor's claim will impact its relationship with the respondent state as well as other states in similar situations.[289] These concerns are complex and potentially risky for the home state.[290] In fact, such concerns were largely the motivation for creating a direct investor-state dispute resolution mechanism in the first place.[291] It is doubtful that either investors or states would want to revert back to a system where political considerations play a key role in determining the status of a dispute.[292] Using diplomatic protection to espouse claims of large awards is even less likely because the larger the award, the greater the political considerations.[293]

To limit such political complexities in the dispute resolution process, another potential solution could be to use the multilateral pressure of large intergovernmental organizations to influence uncooperative state respondents to pay their awards.[294] Organizations like the International Monetary Fund and the World Bank wield significant weight as lending authorities.[295] These and

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[284] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 239–40; Uchkunova & Temnikov, *supra* note 42, at 206; Voon et al., *supra* note 11, at 451.

[285] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 239–40.

[286] *See id.* at 240; Voon et al., *supra* note 11, at 460 (specifying that these political hurdles and complexities are the very obstacles investment arbitration attempted to avoid when it was created).

[287] *See* Voon et al., *supra* note 11, at 460.

[288] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 240; Uchkunova & Temnikov, *supra* note 42, at 206.

[289] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 240; Uchkunova & Temnikov, *supra* note 42, at 206.

[290] *See* Rosenberg, *supra* note 19, at 518. The author argues that the political risk encompasses a two-level system: (1) between and among states; and (2) between the state's government and its constituents. *See id.*

[291] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 240.

[292] *See id.*

[293] *See* Peerenboom, *Enforcement of Arbitral Awards*, *supra* note 27, at 303 (providing evidence that when the size of the award increases, the political stakes are higher); Rosenberg, *supra* note 19, at 518 (specifying that political considerations are a determinative factor when a state decides whether to espouse an investor's claim).

[294] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 238; Uchkunova & Temnikov, *supra* note 42, at 207.

[295] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 238.

similar organizations could include a membership requirement that all states must have paid or be in the process of paying all awards rendered against them by any investor-state arbitral tribunal.[296] States, however, may be in financial distress and seeking the assistance of these organizations because of their obligation to pay an award.[297] In those instances, these organizations would essentially be providing loans so that countries could pay back claimants.[298] When the award rendered is particularly large, the recalcitrant state might look to multinational development banks to help develop a viable financial solution.[299] This solution deserves further research as it allows a multilateral third party to enter the execution process and help the state with its award obligations.[300]

There is clearly no magic bullet, as these proposed solutions do not provide an infallible answer to the problems of execution immunity.[301] Enhanced political risk and BIT-award insurance would not provide an adequate safety net, especially for large awards, and reverting back to diplomatic protection to resolve investor-state disputes would include political considerations that states and investors would be unlikely to support.[302] Expanding the market for the assignment of awards could provide a solution, but it is not clear how viable this market would be when the award is particularly large and if states begin refusing to pay awards in larger numbers.[303] Involving multilateral organizations to put informal or formal pressure on states to pay awards provides the most viable solution and should be further explored.[304]

CONCLUSION

The international community has created a stable and predictable investor-state arbitration regime: An investor can bring a claim directly against a state in a neutral forum and the parties can expect an efficient, confidential, and rules-based process. If the claimant prevails, more than 140 jurisdictions around the world have pledged to recognize and enforce the award. At the very end of this widely accepted process, however, the system has the potential to

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[296] *See id.*

[297] *See id.*; Joseph M. Cardosi, Note, *Precluding the Treasure Hunt: How the World Bank Group Can Help Investors Circumnavigate Sovereign Immunity Obstacles to ICSID Award Execution*, 41 PEPP. L. REV. 117, 151 (2013).

[298] *See* Cardosi, *supra* note 297, at 151–52.

[299] *See* Rosenberg, *supra* note 19, at 517–19.

[300] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 238.

[301] *See id.* at 241.

[302] *See id.* at 229–38; Nmehielle, *supra* note 191, at 39–41; Uchkunova & Temnikov, *supra* note 42, at 202–09.

[303] *See* Otto, *supra* note 279, at 178–79 (assigning an award is not always possible when there is not a viable buyer willing to take over the award, which is more likely to happen when the award becomes so large); Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 229–38; Nmehielle, *supra* note 191, at 39–41; Uchkunova & Temnikov, *supra* note 42, at 202–09.

[304] *See* Bjorklund, *Re-Politicization of Investment Disputes*, *supra* note 13, at 238.

be completely undermined. If the state refuses to pay an award rendered against it, the claimant is forced to overcome the difficulties of executing the award against sovereign assets. Not only is it difficult for a claimant to locate sovereign assets outside the sovereign's territory, but it is also challenging to prove such assets do not serve a governmental purpose. After all, sovereign immunity protects from seizure state assets that are governmental in nature.

Today, a state's refusal to pay an award is still very much the exception to the rule, as states largely comply with investment-arbitration awards. When the size of the award becomes particularly large, however, the problems of execution are compounded and have the potential to disrupt the incentives currently motivating states to comply with awards. Locating assets that are proportionately valued with these awards also requires dramatically more time and investigative resources. In addition, once assets are found, asserting that such assets are not protected by sovereign immunity becomes more difficult because the sovereign can argue that the large value of the asset itself protects it under sovereign immunity. As a result, it is highly unlikely that a claimant can successfully satisfy a large award against a recalcitrant state. It would take a very unique claimant with substantial resources and time to overcome these difficulties. Unfortunately, with the intense growth of P3s and project finance, issues of execution immunity against these large awards have the potential to become more prevalent.

If states begin refusing to pay large awards rendered against them in greater numbers, then claimants might reconsider engaging in investment arbitration altogether. When a claimant believes that a state will not pay an arbitration award and that there is little opportunity to force that state to comply, then the claimant would prefer not to spend the time and resources pursuing a claim against that state. After all, a claimant has little incentive to seek an award that can never be obtained. At this point, the legitimacy of investment arbitration would be undermined and investors could potentially stop utilizing the investor-state arbitration regime in greater numbers.

To prevent states from engaging in recalcitrant behavior, the international community should develop additional incentives to motivate states to comply with large awards rendered against them. Involving multinational organizations, like the World Bank, to put pressure on states through financial incentives provides the most practical solution. Also, expanding the market for the assignment of the award so that awards can be distributed and allocated to the creditor best positioned to execute the award might put further pressure on states to comply with awards.

If the problems of execution against large awards are not addressed, then investment arbitration risks losing its reputation as a credible and reliable form of dispute resolution. At the same time, investment arbitration cannot be abandoned. Without a clear alternative, it is crucial to maintain the stability and strength of investment arbitration. As a central pillar to any investment decision, a sufficient dispute resolution mechanism is key to future development projects around the world.