3VB/NUS Arbitration Lecture 2024

Double Waiver of Immunity and Ripple Effects

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Introduction

Thank you Tariq for that kind introduction. I have fond memories of our early work together as idealistic young lawyers and it's a pleasure to be brought together again by this event.

Thank you to 3VB and NUS – I am honoured to be this year's lecturer, and doubly honoured to have Lord Lloyd-Jones providing a response. I have admired your writings, judicial and extra-judicial, for many years. Sharing the floor with you is a career highlight.

I am grateful to Stavros, Chris and Cameron for their support. It is wonderful to see my family, friends, colleagues and former students in the audience.

I take this opportunity to pay tribute to two great mentors who are not here tonight, but who will receive the recording. Dame Rosalyn Higgins taught me (and many others) that law is a process of authoritative decision-making; an operational system for securing values that we all share. She also, by example, showed me that true leadership is underpinned by empathy. I owe a huge intellectual debt to Lady Hazel Fox. She showed me that the doctrine of State immunity is a valuable case study of the present nature of the international community, and that we must never stop questioning the status quo.

Tonight's topic arose from conversations with Hazel more than a decade ago. In our book *The Law of State Immunity*, we floated the idea of double waiver, saying:

> *English lawyers should consider more closely the French approach to enforcement of arbitration awards. This approach united the waiver given to immunity from adjudication as including waiver if immunity from enforcement, currently treated as a distinct regime,. …*[1]

We observed "*it may offer one means of bringing recalcitrant States closer to honouring their commercial commitments*."[2]

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[1] H Fox and P Webb, *The Law of State Immunity* (rev 3rd edn., OUP 2015), p. 619.

[2] Ibid.

We did not have the chance to develop the argument at the time. So, when 3VB and NUS invited me to discuss a "provocative idea in field of international dispute resolution", it gave me the excuse to revisit it.

Tonight, I contend that that the time is ripe to reconsider positively the concept of a 'double waiver' of immunity from the perspectives of principle, policy and practice. It is an argument that challenges assumptions about a cast-iron customary rule, that appeals to shared values, and imagines a better international legal order.

I will first outline the relevant terms and my argument before turning to principle, policy and practice.

1. Immunity from jurisdiction is the right of the State "not to be the subject of judicial proceedings in the courts of another State".[3] Immunity from enforcement can be a more ambiguous concept.[4] I will refer to immunity from recognition and enforcement as relating to the steps involving the conversion of an award into a judgment, which the claimant can then use as the basis for execution proceedings.[5] It is an exercise of adjudicative jurisdiction.[6] Immunity from enforcement measures (or immunity from execution) – the focus of my lecture - is immunity from power of the court to impose measures of constraint to execute a debt against State assets.[7]

2. As you know, the status quo rule (but not, in my view, necessarily the *customary* rule) is that immunity from jurisdiction and immunity from enforcement measures are distinct regimes and require separate waivers of immunity from the State. Courts including the ICJ,[8] the House of Lords[9] and the Privy Council[10] have held that consent to the exercise of

[3] *Jurisdictional Immunities (Germany v. Italy: Greece Intervening)* (Judgment) (2012) ICJ Rep 99, para. 113. Immunity from jurisdiction is a limit on the adjudicatory power of the court or tribunal – such power includes the court's inquiry into the claim and adjudication by means of a judgment or declaration of rights and obligations; it extends to interlocutory proceedings, appeal, and recognition (the grant of exequatur) of foreign judgments given against States. H Fox and P Webb, *The Law of State Immunity* (rev 3rd edn., OUP 2015), p. 23.
[4] B Juratowitch, 'Waiver of State Immunity and Enforcement of Arbitral Awards' (2016) 6 *Asian Journal of International Law* 119, p. 218.
[5] M Cottrell, 'State immunity and its implications when resolving disputes with – and enforcing outcomes against – states' in M Cottrell, *Construction Arbitration and Alternative Dispute Resolution* (Routledge, 1st ed 2021), §17.134.
[6] M Cottrell, 'State immunity and its implications when resolving disputes with – and enforcing outcomes against – states' in M Cottrell, *Construction Arbitration and Alternative Dispute Resolution* (Routledge, 1st ed 2021), §17.134, citing by analogy *AIC Limited v. The Federal Government of Nigeria & Anor*, [2003] EWHC 1357*,* para. 21.
[7] See Articles 18-19, United Nations Convention on Jurisdictional Immunities of States and their Property. See also Part IV, United Nations Convention on Jurisdictional Immunities of States and their Property ("State Immunity from Measures of Constraint in Connection with Proceedings before a Court"). See also H Fox and P Webb, H Fox and P Webb, *The Law of State Immunity* (rev 3rd edn., OUP 2015), p. 23: Enforcement jurisdiction relates to "the making and execution of mandatory orders or injunctions against the State in respect of, for example, restitution, damages, penalties, production of documents or witnesses and accounts"
[8] *Jurisdictional Immunities (Germany v. Italy: Greece Intervening)* (Judgment) (2012) ICJ Rep 99, para. 113.
[9] *Alcom v. Republic of Colombia* [1984] AC 580, p. 600.
[10] *Boru Hatlari Ile Petrol Tasima AS (also known as Botas Petroleum Pipeline Corp) v Tepe Insaat Sanayii AS* [2018] UKPC 31, para. 19.

jurisdiction does not imply consent to the taking of measures of constraint. This is also the approach in the UN Convention.[11]

3. My argument for double waiver is that once a State has *waived* its jurisdictional immunity (within the meaning of s. 2 State Immunity Act or its equivalent in another jurisdiction), this waiver extends to immunity from enforcement measures.

4. The waiver from jurisdiction may be contained in a prior written agreement - it may be an international convention or a contract or - or it may be waiver through the adoption of certain arbitral rules.[12]

5. The argument does not apply to other exceptions to jurisdictional immunity, such as the commercial activity or territorial tort exceptions.

6. When double waiver applies, the judgment debtor may enforce against State assets that are in use/intended for use for sovereign purposes as well as those for commercial purposes.[13] But property subject to a special regime (diplomatic, consular, cultural heritage, or military property) remains immune.[14]

7. The real practical value in double waiver is that it allows claimants to reach assets that are not exclusively earmarked for commercial use (e.g. funds in bank accounts). It also avoids the need for costly and lengthy litigation relating to use.

8. Under the double waiver approach, subsequent execution proceedings may be required; not to assess whether the State has waived immunity, but rather for the court to order the sale of assets or to affirm that the State owns the relevant shares.

9. I am very aware that there is another immunity debate being hotly contested in courts in the UK,[15] Australia,[16] New Zealand[17] and Canada,[18] including by several people in this

[11] Article 20, UN Convention on Jurisdictional Immunities of States and their Property.
[12] Cf, eg., s. 2(2), UK State Immunity Act 1985; Article 17, Act on the Civil Jurisdiction of Japan with respect to Foreign States; *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l* [2023] HCA 11.
[13] See eg., *Creighton v. Qatar*, Case No 98-19068, (2000) 207 Bulletin civil I, 135, ILDC 772 (FR 2000), 6th July 2000, where the French Court de Cassation accepted double waiver, and attached money and assets belonging to the Qatari Ministry of Municipal Affairs and Agriculture deposited in French banks.
[14] Note that some Courts have gone further than this approach – for example, in *Société Commissions import export v. Republique du Congo* (2015) 13-17.751, translated in J Kudrna, 'Fall of State Immunity from Execution in France: let the states beware' [2016] IALR, the French Court de Cassation permitted seizure of bank accounts of the Congolese embassy and its delegation to UNESCO in Paris, to enforce an ICC award. Furthermore, in India, in *KLA Technologies v. Embassy of Afghanistan at New Delhi* (2021), the High Court of Delhi accepted double waiver and noted that the petitioners would be "at liberty to seek attachment of the assets of the respondents" (ie. the Embassy), if the Embassy did not provide assets to satisfy the award.
[15] *Infrastructure Services Luxembourg Sarl v Spain,* [2023] EWHC 1226 (Comm); *Border Timbers Ltd v. Republic of Zimbabwe* [2024] EWHC (Comm) [2024] EWHC 58 (Comm).
[16] *Spain v Infrastructure Services Luxembourg Sarl* [2023] HCA 11.
[17] *Sodexo Pass International SAS v Hungary* [2021] NZHC 371.
[18] *CC Devas (Mauritius) Ltd v. Republic of India* [2022] QCCS 4785.

room. I will therefore not touch on the question of whether certain terms of the ICSID Convention constitute an effective waiver of *jurisdictional* immunity.

(1) Principles engaged by double waiver

Turning to principle, there are 3 arguments in favour of double waiver:

1. Keeping one's word and upholding agreements
2. The State as a participant in the market
3. The State as a member of the international community

Keeping one's word is a manifestation of the principle of good faith, of *pacta sunt servanda*.[19] An agreement to arbitrate should waive immunity from enforcement measures as well as from jurisdiction. According to Brenninkmeijer and Gélinas, this is "*the reasonable consequence of the legal – and moral – obligation to respect the rule of law to which the sovereign itself defers*."[20]

International agreements such as New York Convention or ICSID Convention were intended to establish a system for the simple enforcement of awards.[21] Article III of the New York Convention provides that States parties will "*recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon*". Article 53 of the ICSID Convention imposes an obligation to comply and Article 54(1) contains the obligation to enforce awards.[22]

The practical effect of these provisions, where awards are rendered against States, may be limited by the law of State immunity. Article 54 of the ICSID Convention provides that: "*Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought*".[23] Article 55 says: "*Nothing*

[19] Article 26, Vienna Convention on the Law of Treaties 1969 1155 UNTS 331; *Nuclear Tests Case (Australia v. France),* Judgment [1974] ICJ Rep 253, para. 46.

[20] M Brenninkmeijer and F Gélinas, 'Execution Immunities and the Effect of the Arbitration Agreement' (2020) 37(5) *Journal of International Arbitration* 549, p. 552.

[21] The Preamble to the ICSID Convention, for example, provides that the Convention was drafted in recognition of the fact that "mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with". The New York Convention has also been described as "double" convention "which establishes a uniform regime for the enforcement of agreements to arbitrate as well as the enforcement of ensuing arbitral awards". While the New York Convention was designed primarily to permit the enforcement of arbitral awards in arbitrations between private parties, and although nothing in the Convention explicitly refers to States, there is no doubt that it permits enforcement through sovereign states. See A K Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes, 21 *American Review of International Arbitration* 211, pp. 216-220.

[22] Article 53(1) provides: "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

[23] The World Bank Executive Directors have also confirmed that the obligation to enforce ICSID awards does not extend to the execution of the awards, which continues to be governed by the domestic law of States parties: "The doctrine of sovereign immunity may prevent the forced execution in a State of judgments obtained against foreign States or against the State in which execution is sought. Article 54 requires Contracting States to equate an award rendered pursuant to the Convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the Convention in cases which final

in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

At the time of drafting the ICSID Convention, including a waiver of immunity from execution would have been technically possible. But, as the commentary explains, it was felt that the *"time was not ripe for such a drastic step. An attempt to include such a waiver would have run into the determined opposition of developing countries and would have jeopardised the wide ratification of the Convention*."[24]

But – crucially - Article 55 of ICSID does not freeze the law. It must be read as a reference to the law on immunity from enforcement measures as it evolves over time.[25] To the extent that the scope of the immunity undergoes changes, the possibilities for the execution of ICSID awards evolve as well.[26]

The *travaux préparatoires* confirm that the preservation of immunity from enforcement measures was based on the presumption that awards would readily be performed by States in good faith. The drafters believed that the "*problem*" of immunity "*should not be exaggerated*", because *there was no reason to believe that governments would not abide by [their] undertakings*."[27]

The UK State Immunity Act was also drafted in the belief that States keep their word. On delivery of the Bill to the House of Lords in 1978 the Lord Chancellor [Baron Elwyn Jones] noted that

> execution against the property of another State could create international tensions; … *States must rely on each other's compliance with legally established obligations. That broadly is the rule of the game, these days*; and it applies equally to countries like China and the Soviet Union…. Happily, we are not living in an international jungle in the commercial field. I have reasonable confidence that the procedures …[will] work reasonably satisfactorily….[28]

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judgments could not be executed." See ICSID, 'Convention on the Settlement of Investment Disputes Between States and Nationals of Other States - Documents Concerning the Origin and the Formulation of the Convention' (1970), p. 1083.

[24] S Schill, L Malintoppi, A Reinisch, C Schreuer, A Sinclair, *Schreuer's Commentary on the ICSID Convention* (OUP 2022), pp. 1520.

[25] C F Amerasinghe, 'The International Centre for Settlement of Investment Disputes and Development through the Multinational Corporation' (1976) 9 *Vanderbilt Journal of Transnational Law* 793, p. 814; A Broches, 'The Convention on the Settlement of Investment Disputes between States and Nationals of Other States' (1972) 136(II) *Recueil des Cours* 331, p. 404; A Broches, 'Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965, Explanatory Notes and Survey of its Application' (1993) 18 YCA 627, p. 704; M Hirsch, 'The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes' (1993).

[26] S Schill, L Malintoppi, A Reinisch, C Schreuer, and A Sinclair, *Schreuer's Commentary on the ICSID Convention* (OUP 2022), p. 1521.

[27] A Broches, 'Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution' [1987] *ICSID Review: Foreign Investment Law Journal,* 287, pp. 299-300 (emphasis added). It has been noted that, Article 54 was initially intended to give recourse against a defaulting investor, as it was felt unlikely that the Contracting States would not abide by enforcement of ICSID awards and would be too concerned for their reputation to do so. See S Schill, L Malintoppi, A Reinisch, C Schreuer, A Sinclair, *Schreuer's Commentary on the ICSID Convention* (OUP 2022), p. 1474. See also AK Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes, 21 *American Review of International Arbitration* 211, p. 217

[28] HL Deb 17 Jan 1978, Vol 388, col 75 (emphasis added).

But history has shown that when a State refuses to comply with an arbitral award and invokes its immunity from enforcement in ensuing litigation, a private party is left with no means of enforcing the award. Recent empirical work on compliance in 260 ISDS cases where states were in breach of their treaty obligations found that 31% of awards remain unresolved.[29]

English judges have recognised the injustice of allowing States to escape their undertakings. In a case prior to the 1978 Act - *Duff Development*, an order giving leave to enforce an award was set aside, upon the application of the Government of Kelantan in Malaysia. Lord Carson, in dissent, noted the "*palpable injustice*" involved in allowing a State to enforce an arbitral award if it wins the arbitration, but allowing it to prevent enforcement on grounds of immunity when it does not.[30]

Words matter. Consent to arbitration is a faithful commitment to upholding the award, even if it goes against the State. In my view, it does not lessen the dignity of the State for it to abide by its agreements; it enhances it.

The second important principle is that when the State chooses to participate in the market, it should be accountable for its conduct. This choice – and the reduction in legal protection that accompanies it – is an attribute of sovereignty.

A century ago, the Permanent Court of International Justice stated in the *Wimbledon* case:

> *The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform … a particular act an abandonment of its sovereignty..*[31]

An important backdrop to this argument is there is cause to doubt the legal canon that jurisdictional immunity developed in the 19th and 20th centuries in a linear fashion from an absolute doctrine to a restrictive doctrine permitting exceptions for commercial AND private law acts. Lord Sumption in *Benkharbouche*, relying on the work of Sir Hersch Lauterpacht,[32] concluded that

> *…the common assumption that the majority of states were wedded to the doctrine of absolute state immunity was inaccurate. On the contrary, in the great majority of states in which there is an articulate practice on the subject, courts have declined to follow the principle of absolute immunity*.[33]

In other words, the State has never been fully protected from scrutiny and accountability, especially when it enters the marketplace.[34]

It is true that commercial carve-outs from immunity have less relevance to investment arbitration since most, if not all, investment treaty claims are based on sovereign acts.

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[29] N Strain et al, 'Compliance politics and international investment disputes: a new dataset' (2024) 27 *Journal of International Economic Law* 70, p. 83 (analysing ISDS cases up to 31 December 2020).
[30] *Duff Development v Kelantan* [1924] AC 797, p. 835.
[31] *S.S. "Wimbledon"* (*UK v Japan*) (1923) (Judgment) PCIJ (Series A, No. 1) 16, p. 25 (emphasis added).
[32] H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 28 BYIL 220.
[33] *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, para. 50.
[34] Ibid., para. 52.

But the State's role in the market is complex, as Hazel Fox has pointed out.[35] It is not as simple as the two extreme positions: "once a trader, always a trader"[36] at one end, and the state as an "untouchable entity" at the other.

When a State makes a plea for immunity in proceedings for the enforcement of arbitral awards, it does not act as a monolithic entity, but in different capacities.

- It acts as the "sovereign guardian of public assets".[37] Its undertaking to comply with the award is premised on making those assets available, if needed.
- It is a party to the specific arbitration agreement, with an interest in making the international system more effective for all participants.[38]
- It is a contracting party to the international agreements on awards, which are the product of consent between the parties.[39]
- And the State may also be setting an example by acting as a regulator.

The third principle engaged by double waiver is the State's role and responsibility as a member of the international community. As Hazel Fox and I have observed, State immunity is in many ways a microcosm of broader trends and forces in public international law. We said in our book:

> *Ultimately the extent to which international law requires, and national legislations and courts afford, immunity to a foreign State … depends on the underlying structure of the international community …. In order to understand the structure of international law, theory must be tested against reality, and the significance of trends and patterns must be discerned. A study of State immunity directs attention to the central issues of the international legal system.*[40]

A significant trend is the growing involvement of States in the *protection of common and collective interests*, which is often facilitated by civil society. We need only look at the docket of the International Court of Justice. In less than two years, the number of cases has doubled. It now stands at 24 cases.

Three features of these cases are worth noting.

First, States are instituting litigation on the alleged violations of rights owed to the international community as a whole**.** The Gambia has brought Myanmar to the Court alleging "genocidal acts … intended to destroy the Rohingya as a group."[41] Canada and The Netherlands have jointly instituted proceedings against Syria, calling for accountability for "countless violations

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[35] H Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property' (1996) 12(1) *Arbitration International* 89.
[36] Cf R Sinha, '"Once a Trader, always a State": The Federal Constitutional Court classifies Greek debt restructuring measures as *acta iure imperii*' (GPIL, 2020).
[37] H Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property' (1996) 12(1) *Arbitration International* 89, p. 91.
[38] M Brenninkmeijer and F Gélinas, 'Execution Immunities and the Effect of the Arbitration Agreement' (2020) 37(5) *Journal of International Arbitration* 549, p. 584-5; 581-3.
[39] H Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution Against State Property' (1996) 12(1) *Arbitration International* 89, p. 93.
[40] H Fox and P Webb, *The Law of State Immunity* (rev 3rd edn., OUP 2015), p. 7 (emphasis added).
[41] ICJ, 'The Republic of Gambia institutes proceedings against the Republic of the Union of Myanmar and asks the Court to indicate provisional measures', ICJ Press Release No. 2019/47 (2019).

of international law", focusing on torture."[42] And South Africa has a case against Israel for alleged violations of the Genocide Convention in relation to Palestinians in Gaza.[43]

Second, two-thirds of UN Member States are participating in proceedings before the Court as applicants, respondents, intervenors and participants in advisory proceedings, including an unprecedented 91 written statements in the pending proceedings on *Obligations of States in respect of Climate Change.*[44]

Third, and relatedly, on the greatest collective challenge of our time – climate change – the ICJ is one of several international courts being asked to define States' legal obligations.[45] The International Tribunal for the Law of the Sea will issue an advisory opinion on the matter in one week.[46] Over 50 states and organizations participated in the hearings. A request on "the climate emergency and human rights" is pending before the Inter-American Court.[47] And 100 civil society groups are working on a request to the African Court of Human and Peoples' Rights.[48]

This interest in - and use of - international dispute settlement is not just notable for the number of States participating, but also for the diversity of representation. States from every region are involved; civil society groups, from Pacific Island youth to senior Swiss women, are triggering historic cases.[49]

How does a strict conception of State immunity fit into this changing view of State responsibility and collective interests? The "*underlying structure of the international community*" may be shifting from a bilateral model to a community interest model.[50] Double waiver based on consent to dispute settlement in international agreements is more compatible with the community interest model.

(2) Policies engaged by double waiver

I now turn to briefly policy-based arguments for the double waiver approach. I use 'policy' in a broad sense.[51] As the English courts have recognised, public policy must "*move with the times*".[52] Customary international law develops in response to the needs of the international community, and those needs are often expressed as matters of public policy.

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[42] ICJ, 'Canada and the Kingdom of the Netherlands jointly institute proceedings against the Syrian Arab Republic and request the Court to indicate provisional measures' ICJ Press Release No. 2023/28 (2023).
[43] ICJ, '*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*: The Court indicates additional provisional measures', ICJ Press Release No. 2024/26 (2024).
[44] ICJ, '*Obligations of States in respect of Climate Change* (Request for Advisory Opinion) Filing of written statements' ICJ Press Release No. 2024/31 (2024); Pacific Islands Students Fighting Climate Change website.
[45] ICJ, 'The General Assembly of the United Nations requests an advisory opinion from the Court on the obligations of States in respect of climate change' ICJ Press Release No. 2023/20 (2024).
[46] ITLOS, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Advisory Opinion)*, Case No. 31 (2024).
[47] IACtHR, 'Request for an advisory opinion on the Climate Emergency and Human Rights submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile' (2023)
[48] I Kaminski, 'The unique character of African climate litigation' (Wave, 2024).
[49] ECtHR, *KlimaSeniorinnen v. Switzerland* (Application No. 53600/20) (2020).
[50] B Simma, 'From Bilateralism to Community Interest in International Law' (1994) *Recueil des cours de l'Académie de La Haye en ligne,* vol. 250.
[51] M Land, 'Reflections on the New Haven School' (2013) 272 *Faculty Articles and Papers* 919.
[52] *Belhaj v. Straw* [2014] EWCA Civ 1349, para. 91.

I raise two main policy concerns in favour of double waiver:

1. The integrity of the international investment regime;
2. The relationship between domestic courts and arbitral tribunals.

The policy of protecting the integrity of the international investment regime calls for recognising and addressing the asymmetry at the heart of a system that pits individuals and companies against States. As Cottrell has observed:

> *The prohibition on the granting of measures of constraint in the absence of consent is a privilege only afforded to states and one which places them at a significant advantage to their non-state counterparties. ..."[t]o the reasonable international business person, an undertaking to "execute" or to "carry out" an award ... could not possibly be consistent with a claim of immunity from execution, since such a claim is tantamount to a refusal to honour the award".*[53]

A second policy argument in favour of double waiver is that it would facilitate the growing complementary role between domestic courts and the international arbitration network.[54]

As Lord Mustill put it: *"[i]deally, the handling of arbitral disputes shall resemble a relay race". The baton passes from the court to the tribunal once the tribunal is constituted, and then remains with the tribunal until it has issued an award and passed back to the court if needed for enforcement.*[55] In ICSID, the baton passes from ICSID to the tribunal to the court.

Tribunals sit within a 'system' of law, needing to work in tandem with domestic courts, which in turn strengthens the role of tribunals as elements of a cohesive justice system.[56]

The orthodox approach to waiver would seem to encourage tension rather than cooperation; a competitive race rather than a relay.

(3) Practice on Double Waiver[57]

I now turn to my arguments based on practice. I have examined the practice of 19 States from the Americas, Asia, Europe, and Oceania. I am grateful to the many national law experts who exchanged with me.[58]

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[53] M Cottrell, 'State immunity and its implications when resolving disputes with – and enforcing outcomes against – states' in M Cottrell, *Construction Arbitration and Alternative Dispute Resolution* (1st ed., Routledge 2021), §17.127, citing R Kennell and A Rooney, 'The State Immunity Act 1978 and article 28(6) of the ICC Rules: a missed opportunity: Orascom v Chad Arbitration' (2010) 76(1) *Arbitration* 181, p. 185.

[54] Sixth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur (1984) A/CN.4/376 and Add.1 and 2, para. 234.

[55] See A Ambast, 'Panellist Discussion: Courts and Pre-Award Supervision' (21st ITA-ASIL Conference, Washington D.C., 3 April 2024).

[56] C De Stefano, 'Arbitration Agreements as Waivers to Sovereign Immunity' (2014) 30 Intnl Arbitraion 59, pp. 65-66.

[57] In 2015, Lady Fox and I considered the practice on double waiver in France, the United States and Switzerland. In 2020, Brenninkmeijer and Gélinas surveyed the same States, with the addition of the UK.[57] Juratowitch, writing in 2016, looked at Hong Kong, France, the United Kingdom, Australia, the United States, Canada and Germany.

[58] Australia, Austria, Canada, China, Ecuador, France, Germany, India, Italy, Japan, Luxembourg, New Zealand, Singapore, Sweden, Switzerland, The Netherlands, Ukraine, United Kingdom, United States.

This survey reveals that the status quo remains in place, but there is more practice on double waiver than previous studies have identified.

Of the 19 States

- 6 accept the double waiver approach. There are nuances and variations among them.[59]
- A further 5 States have mixed practice that indicate an openness to double waiver.[60]
- 11 States follow the status quo.

My article examines the practice in depth, but the headline point is that the status quo is not "*settled practice*",[61] which opens the way for developing law in this area.

And as Lord Denning observed in *Trendtex:* "*…someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood*".[62]

a. State practice in favour of double waiver

Turning double waiver State practice: Switzerland, France, Ukraine, Sweden, India and Ecuador have practice in favour of double waiver.

In **Switzerland**, the highest court has repeatedly confirmed double waiver. But a jurisdictional nexus requirement narrows the situations in which it may apply. The Swiss courts have also recognised a tension between double waiver and the ICSID Convention.

In 1960, in *United Arab Republic v. Mrs X*, the Swiss Federal Court held that "*the power of execution flows from the power of jurisdiction*".[63] Nearly two decades later, the Swiss Federal Tribunal in *Egypt v. CINETEL* confirmed that the waiver of jurisdictional immunity constituted an implied waiver of immunity from execution. The court was not dealing with sovereign assets, however.

In *Libya v. LIAMCO*, the claimant obtained the attachment of Libyan State property held in Swiss banks. The Federal Court annulled the attachment orders due to an insufficient legal link

[59] Switzerland, France, Ukraine, Sweden, India and Ecuador.

[60] Germany, United States, Luxembourg, Italy and Canada.

[61] ILC Draft conclusions on identification of customary international law, with commentaries (2018) *Yearbook of the International Law Commission,* vol. II(2), Conclusion 2; *Jurisdictional Immunities (Germany v. Italy: Greece Intervening)* (Judgment) (2012) ICJ Rep 99, pp. 122-123; *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (1985) (Judgment) ICJ Rep 13, pp. 29-30, para. 27; *North Sea Continental Shelf (Germany/Netherlands)* (1969) (Judgment) ICJ Rep 3, p. 44, para. 77.

[62] Lord Denning in *Trendtex Trading Corporation v. Central Bank of Nigeria* [I977] QB 529, p. 556.

[63] Tribunal Federal, February 10, 1960, 88 J Droit Intl (Clunet) 458 (1961). In this case, the defendant (a resident of Zurich) leased her villa in Vienna, Austria, to the Egyptian Minister to Austria, who acted on behalf of the diplomatic representation of the Kingdom of Egypt in Austria. The house was to be used for diplomatic purposes and for the residence of the minister. In 1957, the defendant terminated the lease on the ground that the tenant did not comply with his obligations, and claimed an amount of over 187,000 Austrian shillings. To secure these funds she obtained an attachment in Geneva of funds of the Republic of Egypt located in a Geneva bank. The Embassy of Switzerland in Cairo attempted to serve the attachment order, together with the order of payment, on the Egyptian Foreign Office. The Egyptian Foreign Office, however, refused to accept or forward the papers on the basis that the attachment and execution violated the immunities of the Egyptian State.

between the expropriation dispute and Switzerland. The mere fact that the seat of the arbitration was Geneva was not sufficient.[64]

France has long been emblematic double waiver jurisdiction. Two factors create uncertainty: the fluctuating requirement of specific identification of assets to be seized and France's ratification of the UN Convention (which codifies the orthodox approach).

In the well-known 2000 case of *Creighton v. Qatar*,[65] the Cour de Cassation held that an arbitration agreement providing for arbitration under ICC Rules constituted a double waiver. The relevant ICC rule read: "*the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be mad*e."[66]

In the *renvoi* proceedings, the Paris Cour d'Appel decided "*in light of the principle of good faith*", that "*the acceptance of the binding nature of the award that results from the… arbitration agreement … [there is] a waiver of immunity from enforcement*".[67] The Cour d'Appel did not limit its finding to the effect of the ICC Rules.[68]

But in *NML v Argentina*, the Cour de Cassation said that immunity from enforcement measures "*can only be waived [by] mentioning assets or categories of assets for which the waiver is granted."* [69]

In 2016, France enacted the Sapin II law, which provides that enforcement measures cannot be applied to State property unless there is prior authorisation by a judge.[70] This adds a new obstacle to enforcement measures based on ICSID and non-ICSID awards in France.[71]

In **Ukraine,** courts appear to be in favour of the double waiver. This is despite the fact that under Ukrainian law, foreign States in enjoy absolute immunity.

In 2018 in *Everest Estate*, the Supreme Court of Ukraine ruled that Article 9 of the Russia—Ukraine BIT (which provides that "*Each Contracting Party shall undertake to execute such an award in conformity with its respective legislation*"), constituted a double waiver and

[64] *Lybie v. LIAMCO*, Tribunal fédéral Suisse, 19 June 1980, ATF 106 Ia 142, 62 ILR 228. In light of this finding, the Court found that it was unnecessary to determine whether Libya had waived its immunity from execution by the arbitration clause.
[65] Case No 98-19068, (2000) 207 Bulletin civil I, 135, ILDC 772 (FR 2000), 6th July 2000.
[66] Rule 35(6) (previously Rule 24), 2021 International Chamber of Commerce Arbitration Rules.
[67] Paris Court of Appeal, *Creighton v. Qatar*, 1st ch. G, December 12, 2001, Rev. arb.2003.417.
[68] N Mayer Fabre, 'Immunité d'execution et arbitrage' (2003) 1(XXXVII) *Revue Internationale de Droit Économique* 47.
[69] Cour de Cassation, *NML Capital v. Argentina* (2013) 11-13.323. Translated in J Kudrna, 'Fall of State Immunity from Execution in France: let the states beware' [2016] IALR. See also CA Paris, *Noga c. Banque centrale de la Fédération de Russie*, 17 September 2009, R.G. n° 08/05950, et CA Versailles, *Noga c. Banque centrale de la Fédération de Russie*, 7 January 2010.
[70] French Transparency, Anti-corruption and Economic Modernisation (Sapin II) Law (2017).
[71] J G Olmedo, 'Chapter 21: Sovereign Immunity as a Ground to Refuse Compliance with Investor-State Awards: Past Experience and Future Developments' in K Gomez and A M Lopez-Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019), pp. 351-368, pp. 354-6, pp. 363-5.

confirmed the attachments of shares in the 3 Russian banks.[72] This case appears to remain in good standing.

In **Sweden**, a high point on waiver was the decision of Svea Court of Appeal in 1982. But later jurisprudence has endorsed the status quo approach. The 1982 decision, however, has not been overruled.

In *LIAMCO v. Libya*, the Svea Court of Appeal held that a double waiver applied. It expressly departed from earlier domestic cases, with reference to developments in international law.[73] Judge Tillinger observed that if there is an arbitration agreement "*it is shocking … that one of the contracting parties later refuses to …respect a duly rendered award*.".[74] Libya appealed to the Supreme Court, but LIAMCO withdrew its case. As a result, the Supreme Court dismissed the case.

Subsequent judicial practice, in cases like *Sedelmayer v. Russia,* have adopted the status quo approach, but without expressly overruling the Svea Court. And the *LIAMCO* reasoning has been invoked in other cases, including the principled point that international arbitration would be rendered futile if there was no reasonable prospect of enforcement.[75]

In **India**, after initially rejecting the double waiver argument, lower courts have adopted the approach, at least in cases involving arbitration clauses in contracts.

In 2021, in *KLA v. The Embassy of Afghanistan*,[76] the High Court of Delhi, permitted an action for enforcement against Afghanistan, holding that:

> *it cannot be contended by a Foreign State that its consent must be sought once again at the stage of enforcement of an arbitral award against it, while ignoring the fact that the arbitral award is the culmination of the very process of arbitration which the Foreign State has admittedly consented to*.[77]

Finally, in **Ecuador**, double waiver applies to contract-based arbitration. And the Constitutional Court has recently held that the immunity of Central Bank assets does *not* justify non-compliance with awards. A double waiver therefore exists in respect of those (usually highly-protected) State assets.[78]

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[72] *Everest Estate LLC et al v. the Russian Federation* (2018). See also O Maslov, 'Ukraine's Supreme Court Takes an Unexpected Approach on Sovereign Immunities' (Kluwer Arbitration Blog, 2019); M Soldatenko, 'Ongoing Territorial Challenges in Crimea Cases: Putting Everest v. Russia in Context' (Kluwer Arbitration Blog, 2018).
[73] P Wrange, 'Swedish breakthrough – state immunity in two High Court decisions' (2012) 23(4) *Juridisk Tidskrift* 800-824, fn 42.
[74] *Libyan American Oil Company v. Socialist People's Arab Republic of Libya* (1982) 62 ILR 227.
[75] NJA 2021 p. 850. These arguments were made in order to lower the bar on the required link between sovereign use and the assets in question and to encourage the Court to retain its line of protecting restrictive immunity from execution and apply this to property that was connected with central banking. These arguments were successful.
[76] Decided along with *Matrix Global Pvt. Ltd. v. Ministry of Education, Federal Democratic of Ethiopia* [OMP (EFA) (COMM)) 11/2016].
[77] *KLA Technologies v. Embassy of Afghanistan at New Delhi* (2021), [49].
[78] Corte Constitucional del Ecuador, Caso 32-18-IN (8 February 2024). The ruling clarified that the prohibition of non-seizure of Central Bank's assets and of the treasury single account does not justify the non-compliance of judicial decisions, which would include arbitral awards duly recognized under the rules of COGEP. The Court underlined that Article 170 of the Ecuadorian Monetary and Financial Code establishes the essential duty of assuring the integral compliance of res judicata judicial decisions by public entities, which would include foreign judgements and arbitral awards (para. 53).

b. State practice with a mixed approach to double waiver

Germany, the United States, Luxembourg, Italy and Canada take a mixed approach to double waiver. It is "*mixed*" due to divergent case law and *obiter* statements.

In **Germany,** the highest court has rejected the double waiver approach[79] whereas lower courts have conflated immunity from jurisdiction and enforcement measures.[80] But the highest court has also recently held that the Germany-Thailand BIT, which provides for enforcement of awards in accordance with domestic law, constitutes a double waiver.[81]

In the **United States**, the FSIA requires separate waivers, but allows a waiver to be 'implied'. The District Court has confirmed double waiver under a contractual arbitration agreement, but this was only applied to commercial assets.[82] Appellate courts have held that the ICC Rules constitute an express waiver of immunity from enforcement measures.[83] Recent jurisprudence, however, has found the opposite with regard to an arbitration clause in a contract.[84]

The key case on double waiver is from 2004: *Walker International v Congo,* which – like *Creighton* in France, involved an arbitration under the ICC Rules. The production-sharing contract stated "[*t]he Congo hereby irrevocably renounces to claim any immunity during any procedure relating to any arbitration decision …*"[85] The US Court could have relied on that wording but it also cited the ICC Rules as an additional basis for waiver, finding that the Congo had waived its immunity from execution by accepting those rules.[86]

On one view, the reasoning of *Walker* is limited to awards rendered under the ICC Rules.[87] However, both *Walker* and the *Creighton* in France at the very least serve as authority for the proposition that a waiver of a State's immunity from execution *can* be implied from a State's agreement to arbitrate.[88]

In **Luxembourg,** the status quo prevails, but it does accept implied waivers of enforcement measures. The District Court has held that a waiver of immunity from enforcement measures

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[79] *Sedelmayer v. Russian Federation*, BGH SchiedsVZ 2013, 110 at 111, para. 20. From extracts translated into English in (2006) 31 YCA 707.
[80] *Philippine Embassy Bank Account Case* (1984) 64 ILR 146.
[81] R Kläger, 'Werner Schneider (liquidator of Walter Bau AG) v Kingdom of Thailand: *Sovereign Immunity in Recognition and Enforcement Proceedings under German Law*' (2014) 29(1) *ICSID Review – Foreign Investment Law Journal* 142.
[82] *Birch Shipping Corp v. Embassy of the United Republic of Tanzania* (1980) 507 F. Supp. 311. For a discussion of this case, see P McGowan, 'Arbitration Clauses as Waivers of Immunity From Jurisdiction and Execution Under the Foreign Sovereign Immunities Act of 1976' (1984) 5(2) *NYLS Journal of International and Comparative Law* 409, p. 412, pp. 434-5.
[83] *Walker International Holdings v Republic of Congo* (2004) 395 F.3d 229.
[84] *Preble-Rish Haiti S.A. v. Republic of Haiti,* Fifth Circuit Case No. 22-20021 (2022), p. 9. See also DL Alonso Massa, 'US Court of Appeal vacates writ of prejudgment attachment of Haitian Agency BMPAD on grounds of sovereign immunity' (Iarbnews, 2022).
[85] *Walker International Holdings v Republic of Congo* (2004) 395 F.3d 229, p. 234.
[86] C De Stefano, 'Arbitration Agreements as Waivers to Sovereign Immunity' (2014) 30 *International Arbitration* 59, pp. 81-2.
[87] B Juratowitch, 'Waiver of State Immunity and Enforcement of Arbitral Awards' (2016) 6 *Asian Journal of International Law* 119, p. 226.
[88] C De Stefano, 'Arbitration Agreements as Waivers to Sovereign Immunity' (2014) 30 *International Arbitration* 59, pp. 81-2.

may be implied in an agreement as long as the *clear and unequivocal* will of the State can be identified.[89]

The Constitutional Court of **Italy** has confirmed the orthodox approach,[90] but some decisions of lower courts have conflated immunities from jurisdiction and enforcement measures. These lower court decisions have been implicitly rejected, but not formally overruled.[91] Having said that, just last year, the Constitutional Court held that "*State immunity from enforcement … is not a mere extension of immunity from jurisdiction*".[92] The Supreme Court of Cassation appears to have adopted this status quo view,[93] and it has also been endorsed by Italian scholarship.[94]

State immunity legislation in **Canada** codifies the status quo. However, recent *obiter* comments indicate that Canada may be open to double waiver. In *CC/Devas Ltd et al v. India*, the Québec Superior Court reasoned that:

> *states agreeing to international arbitration under bilateral investment treaties necessarily consent to have orders made against them and necessarily waive claims to state immunity….*[95]

The Court noted that India attempted to "*sidestep*" the effect of the awards by claiming immunity from enforcement measures.[96] The Court stated that India's position "*interferes with the good functioning of the international arbitration system which allows parties to have reasonable expectations that an … award may be rendered and enforced*".[97]

c. State practice in favour of the status quo of the distinct regime, separate waivers

The remaining eight States endorse the status quo approach: the UK, Japan, Singapore, Austria, Australia, New Zealand, The Netherlands, and China. Only two of them (Japan and Austria) have ratified the UN Convention. I will focus on the UK, Singapore and Australia.

In the **United Kingdom**, the 1978 Act specifies that submitting to the jurisdiction of the court for the purposes of adjudication will not simultaneously waive immunity from enforcement measures.[98] Double waiver would therefore require legislative amendment.[99]

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[89] District Court, 7 June 2019, No 142988, p 9.
[90] See eg Italian Supreme Court decision dated 10/12/2020, n. 28180.
[91] Italian Constitutional Court, Judgment 159/2003.
[92] Italian Constitutional Court decision dated 21/07/2023, n. 159.
[93] Italian Supreme Court decision dated 30/01/1991, n. 902; Italian Supreme Court decision dated 08/02/1991, n. 1303, Italian Supreme Court decision dated 12/02/1999, n. 53; Italian Supreme Court decision dated 21/01/2010, n. 972; Italian Supreme Court decision dated 04/04/1986, n. 2316; Italian Supreme Court decision dated 04/06/1986, n. 3733; Italian Supreme Court decision dated 03/09/2019, n. 21996.
[94] R Giuffrida, 'L'immunità dei beni degli Stati dalla giurisdizione esecutiva e cautelare nel diritto internazionale e italiano' [2015] *Ordine internazionale e diritti umani* 273.
[95] *CC/Devas Ltd et al v. India* [2022] QCCS 4785, [156] (emphasis added); Ben Juratowich, 'Waiver of State Immunity and Enforcement of Arbitral Awards' (2016) 6 *Asian Journal of International Law* 119, pp. 227-8.
[96] *CC/Devas Ltd et al v. India* [2022] QCCS 4785, [170].
[97] *CC/Devas Ltd et al v. India* [2022] QCCS 4785, [173].
[98] UKSIA, Section 13(3); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (Merits) [2012] ICJ Rep 99, para 113.
[99] State Immunity Act 1978 (Remedial) Order 2022.

Cases such as *Svenska* and *NML Capital v. Argentina*, held that while a State consenting to arbitration effectively waives its immunity from proceedings "relating to" the arbitration, it does not waive its immunity from enforcement measures. In *Orascom Telecom v. Chad*, Mr Justice Burton considered the French and US double waiver practice but was "*reluctant to conclude*" that it should be "*imported into*" the UK.[100]

Singapore's case law has not yet directly engaged with the question,[101] the indications are that the status quo prevails[102] (including in the wording of the domestic legislation).[103]

Recently the High Court of **Australia** appeared to confirm the status quo approach in the context of ICSID proceedings in *Kingdom of Spain v. Infrastructure Services*. And in *SSDM Holdings v. India*, the Federal Court made a similar finding in relation to the New York Convention.[104] Interestingly, the Australian Foreign States Immunities Act, based on the work of James Crawford while he was on the Law Commission, contains an provision in s 32(3)(b) that "*property that is apparently vacant or apparently not in use*" is deemed to be in use for commercial purposes[105] – this could be seen as a "one-and-half waiver" (though the foreign state's ambassador can certify the property is for sovereign purposes).

Ripple Effects

I've focused on the arguments in favour of double waiver, but I realise that the adoption of a double waiver approach in the English courts or other 'status quo' jurisdictions would create waves. There are at least 3 'ripple effects' to consider: fragmentation, reciprocity and disengagement.

First, the double waiver approach requires *necessary implication* – the waiver of immunity from enforcement measures flows from the State's waiver of jurisdictional immunity. If the double waiver approach is limited, as I argue it should be, to proceedings related to the enforcement of judgment debts, then it will diverge from other areas of immunity law that require specific, express waivers. In cases involving State officials, submission to jurisdiction must be express and unequivocally communicated by the official's State.[106] The Vienna Convention on Diplomatic Relations provides that waiver of diplomatic immunity "*always must be express*".[107] But this apparent fragmentation may be mitigated through precision on the circumstances in which a waiver applies.[108]

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[100] *Orascom Telecom Holding SAE v Chad* [2008] EWHC 1841, paras 49-50. It was not necessary to resolve the issue as he had already determined that the bank account in question was in use for commercial purposes

[101] See N Goh, J Lim and P Tan, *The Singapore International Arbitration Act: A Commentary* (OUP 2023); S Menon, F Xavier, C Yee Leong, and L Reed, *Arbitration in Singapore: A Practical Guide* (2nd edn, Sweet & Maxwell 2018).

[102] *Josias van Zyl and others v. Kingdom of Lesotho* [2017] SGHC 104.

[103] Singapore State Immunity Act 1979.

[104] From what I understand the investors weren't actually seeking execution in Australia. As the Full Court noted: "the fact that 'execution' includes 'enforcement' is of no assistance to Spain in a proceeding which seeks recognition. Because recognition is necessarily distinct from enforcement or execution, the distinction between execution and enforcement is irrelevant in the present litigation. That is to say, perhaps there is scope for a future case, which seeks all recognition, enforcement and execution at once, which could reach the "double waiver" bar.

[105] Australian Law Reform Commission, *Foreign State Immunity* (Report No. 24, 1984).

[106] *Surkis v Poroshenko* [2021] EWHC 2512, para. 89.

[107] Article 32(3), Vienna Convention on Diplomatic Relations; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)* (Preliminary Objections) (1980) ICJ Rep. 3, para. 45.

[108] See, eg, *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3)* (1999) 2 All E.R. 97 and the implied waiver of immunity of a former head of State under the Torture Convention.

Second, international investment and commercial relations are premised to a large extent on reciprocal behaviour. Adoption of the double waiver may lead to retaliation or at least protest.[109] → But in jurisdictions that have adopted a form of double waiver, we have not seen retaliation, and most protest has come from commentators not other States.[110] Ripple effects could be smoothed out by the adoption of, for example, an UNICTRAL model law.[111]

Third, States taking the orthodox approach may be unwilling to join new arbitration agreements or apply certain institutional rules if they believe that this will lead to a double waiver. There is already a backlash against investment arbitration resulting from certain States perceiving the ISDS system to be unfair, one-sided or intruding into the policy space.[112] States may also disengage by hiding their assets in separate entities.

But maintaining the status quo is *not* a neutral position. It can also have ripple effects, especially given the non-fulfilment of awards by recalcitrant States. Immunity from enforcement measures has been described as the "Achilles heel" of the ICSID regime.[113] This is part of the bigger picture of discontent with the status quo: In a 2020 survey, 80% of investors said there was scope for reforms to improve ISDS.[114]

Inability to enforce awards against States may also have ripple effects.

- Private parties may shift their investments away from States perceived as 'risky' due to their orthodox approach, or try to negotiate a higher return to compensate for risks.[115]
- Private parties may take steps to secure enforcement of an award prior to the onset of a dispute through an express waiver in the investment agreement.[116]
- It is of course highly unlikely that States will agree to waive immunity from enforcement measures in advance for any claims related to a contract. We may instead see an uptick in political risk insurance or BIT coverage.[117]

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[109] *Process & Industrial Developments Ltd v. Republic of Nigeria, 27 F.4th at 775 (D.C. Cir. 2022).* The amicus brief of the United States in pending cases concerning the waiver of jurisdictional immunity explains that taking a different approach to waiver based on the ICSID or New York Conventions "may have implications for the treatment of the United States in foreign courts and for [the United States'] relations with foreign states." See *Nextera Energy Holdings v. Kingdom of Spain; 9Ren Holdings v. Spain; Blasket Renewable Investments LLC v. Kingdom of Spain* (Brief for the United States as Amicus Curiae) (2024).

[110] On the survey of State practice, I have only identified one protest after the High Court of Delhi's judgment in *KLA Technologies v. Embassy of Afghanistan at New Delhi* (2021), when Afghanistan complained to the Supreme Court but subsequently withdrew its petition.

[111] 80 States have adopted legislation based on the UNCITRAL Model Law on International Commercial Arbitration. See 'The Model Law' (Linklaters).

[112] U Anastasiya and S Vanina, 'Backlash in Investment Arbitration' (Jus Mundi, 2023).

[113] S Schill, L Malintoppi, A Reinisch, C Schreuer, A Sinclair, *Schreuer's Commentary on the ICSID Convention* (OUP 2022), p. 1520.

[114] *2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS* (May 2020), p. 5.

[115] A 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 Intl Arb 211, pp. 233. One of the cables released by "Wikileaks" describes the favourable deal that Italian oil company ENI was able to negotiate with Venezuela due to the reluctance of most oil companies to do business with President Chavez and state-owned PDVSA in the aftermath of widespread nationalization of broad portions of the oil industry.

[116] A K Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes, 21 *American Review of International Arbitration* 211, p. 233.

[117] Ibid., pp. 234-5.

- Private parties may look for alternatives to arbitration for their disputes. If a party believes it will have difficulty securing payment of an award, it may look to local litigation or other tools at its disposal.[118] Having an investor's State of nationality exercise diplomatic protection, perhaps even ending up in the ICJ, is another option, but one that is time-consuming, legally complex and unlikely to lead to significant payments.[119]

Conclusion

In conclusion, as my former Dean, the much-missed David Caron, observed: "*If the realist tends to see only the constraints of the present, then the idealist tends to see only the possibilities of tomorrow. Both strains of thought … can often be found in the law*".[120]

Double waiver leans towards idealism, but I believe we have a grounding in the law. It is ultimately about trust in a State's consent to resolve its disputes through arbitration. The drafters of the key conventions and national immunity laws assumed that we could rely on States' good faith implementation of decisions by international tribunals. That assumption has proven to be misplaced in many cases.

Within and beyond the world of arbitration, the "*rules-based international legal order*"[121] is both being invoked more than ever and being violated with impunity. 118 states are participating before the ICJ in cases involving climate change, self-determination of peoples and the prohibition on genocide.[122] At the same time, we are witnessing in Ukraine the bloodiest conflict in Europe since the Second World War;[123] we have the longest running conflict in Eurasia between Armenia and Azerbaijan;[124] and the conflict in Israel and Palestine with the more deaths per day than any other major conflict this century.[125]

From this perspective, the question of double waiver is a narrow and technical one, but it is also at its core about *what kind of international legal order* we want to create and live within.

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[118] Ibid., p. 236, 239, discussing how, in the past, in the absence of investor-state dispute settlement, a foreign investor could seek relief in local courts or administrative tribunals of the host-state. Such investors often ran into problems such as state immunity or a non-independent judiciary that could be influenced by the prospect of negative repercussions should a judge decide in favour of the foreign investor.

[119] *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)* (Compensation) (2012) ICJ Rep. 324. Mr Diallo was awarded the total (small) amount of USD$95,000.

[120] D D Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94(1) AJIL 4, p. 29.

[121] UK Parliament Select Committee on International Relations, *UK Foreign Policy in a Shifting World Order*, Chapter 1, Box 1.

[122] ICJ, '*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*: Canada, Denmark, France, Germany, the Netherlands, the United Kingdom (jointly) and the Maldives file declarations of intervention in the proceedings under Article 63 of the Statute' ICJ Press Release No. 2023/68 (2023); *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine v. Russian Federation*); ICJ, '*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Request for Advisory Opinion): Conclusion of the public hearings held from 19 to 26 February 2024' ICJ Press Release No. 2024/17 (2024); ICJ, '*Obligations of States in respect of Climate Change* (Request for Advisory Opinion) Filing of written statements' ICJ Press Release No. 2024/31 (2024).

[123] 'What has Russia achieved during two years of war in Ukraine?' (Aljazeera, February 2024).

[124] 'The Nagorno-Karabakh Conflict: A Visual Explainer' (International Crisis Group, September 2023).

[125] Oxfam, 'Daily death rate in Gaza higher than any other major 21st Century conflict' (2024); Al Jazeera, 'Gaza daily deaths exceed all other major conflicts in the 21st century' (2024).

And as with intractable conflict, "*achieving fundamental change and a more viable solution*"[126] requires moving past the status quo.

[126] R Mansour, 'Will the war in Gaza become a breaking point for the rules-based international order?' (Chatham House, 2024)