ON SOME ASPECTS OF RECOGNITION AND ENFORCEMENT OF ICSID AWARDS IN THE REPUBLIC OF AZERBAIJAN

The current paper analyzes recognition and enforcement procedure of ICSID Awards, namely matters of immunity from jurisdiction and immunity from recognition under legal framework established by the ICSID Convention. As such, Article 55 of the ICSID Convention regards national laws on state immunity which results in implications in enforcement of ICSID Awards. To be more precise, based on, inter alia, this provision the states have developed national rules governing application of state immunity which in absence of unified rules and practice may result in inability of winning investor to enforce the ICSID Award due to nature of property located in a state where investment is sought. Accordingly, there has been attempts to mitigate this risk by developing contractual tools for waiving sovereign immunity in case of enforcement of arbitrary award. With that said, the current paper highlights existing problems in enforcement of ICSID Awards deriving from doctrine of sovereign immunity and proceeds with analysis of the abovementioned tools as well as applicable national legislation of the Republic of Azerbaijan in order to identify provisions governing recognition and enforcement of ICSID Awards as well as those addressing the matter of sovereign immunity.

Key words: foreign investment, international law, ICSID Convention, arbitration, recognition, enforcement, bilateral investment treaties, the Republic of Azerbaijan, civil procedure, state immunity

Рамазанзаде М. В. О некоторых аспектах признания и исполнения решений Международного центра по решению инвестиционных споров (ICSID) в Республике Азербайджан

Эта статья посвящена анализу процедуры признания и исполнения решений ICSID, а именно: вопросам иммунитета от юрисдикции и иммунитета от признания в соответствии с нормативной базой, установленной Конвенцией ICSID.

Ключевые слова: иностранные инвестиции, международное право, Конвенция ICSID, арбитраж, признание, принудительное исполнение, двусторонние инвестиционные договоры, Азербайджанская Республика, гражданский процесс, государственный иммунитет.

Formulation of the problem. Section 6 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ‘ICSID Convention’) establishes rules governing recognition and enforcement of awards of ICSID Tribunal. By developing
these rules, the ICSID Convention seeks to achieve its goal in establishment of an independent and effective recognition and enforcement system. Indeed, apart from the ICSID Convention recognition and enforcement system is established by other legislative acts, such as United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the ‘New York Convention’) or other legislation. However in development of the ICSID Convention establishment of self-sufficient recognition and enforcement system was observed as a goal, which is also stressed in available case materials, therefore it is understandable that the ICSID Convention does not rely on other recognition and enforcement systems. For instance, in Vivendi v Argentina it was noted that ‘drafters of ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention’ [1, p. 35]. Accordingly, by establishing independent recognition and enforcement system the ICSID Convention aims to offer more comprehensive protection to investors concerned.

It goes without saying that international arbitration may only be effective if matters concerning enforcement of arbitrary awards are addressed and respective safeguards are offered to the parties. From this perspective, Article 53 of the ICSID Convention sets that the awards of the tribunal are binding for the parties concerned and may not be subject to appeal or any other remedy except for those envisaged by the ICSID Convention. Alongside with it, under Article 54 of the ICSID Convention an award rendered pursuant to the ICSID Convention is required to be recognized by contracting states as if it was a final judgement of a court in contracting state where enforcement is sought. Despite this requirement, further analysis shows that investors encounter certain problems at the stage of enforcement of ICSID awards. Namely, doctrine of state immunity complicates enforcement of awards rendered pursuant to the ICSID Convention. To be more precise, it is observed that national courts are reluctant to enforcement of ICSID awards based on state immunity. The reason for this lies in Article 55 of the ICSID Convention which sets ground for application of national laws governing matters of state immunity. State immunity being a bar in enforcement of arbitrary awards has accordingly led to development of national legislation and court practice from one side and contractual methods of waiving state immunity from the other. With that said, the current paper seeks to analyze problem of state immunity in enforcement of the ICSID awards and national legislation of the Republic of Azerbaijan governing matters of state immunity as well as enforcement of ICSID awards. As it will be further elaborated, development of investment climate is one of priorities for the Republic of Azerbaijan and accordingly analysis of these rules is also of high importance for development of effective and comprehensive legislation.

Analysis of recent research and publications. In preparation of this article scientific materials in the field of international law and international investment law in particular written by reputable scientists, including Christoph Schreuer, Hazel Fox, Andrea Bjorklund, Aron Broches etc. were analyzed.

The purpose of the article. Identify problems posed to enforcement of ICSID awards by doctrine of state immunity, their respective solution and rules governing matters relating to the state immunity in national legislation of the Republic of Azerbaijan.

The main results of the study. To start with, for analysis of legal framework governing state immunity from recognition and state immunity from jurisdiction it is required to observe the subject matter from perspective of the ICSDI Convention. It should be noted that the New York Convention is the main convention in the field of recognition and enforcement of
arbitrary awards. In the meantime, as noted above, recognition and enforcement system of the ICSID Convention was intended to be distinguished from the one established by the New York Convention. However, Azerbaijan has been involved in only 4 proceedings under ICSID Convention while court practice on enforcement of awards under New York Convention is more widely spread. With that said, for the purposes of current paper comparison of recognition and enforcement systems established by the ICSID and New York Conventions may be also required.

At this point it should be noted that while the New York Convention establishes system which is closely linked to national legislation governing arbitration, the ICSID Convention opts for establishing its own self-sufficient system which does not contemplate involvement of national arbitration rules [2, p. 439]. However, the system established by the ICSID Convention still bears certain implications when it comes to enforcement and recognition of arbitrary awards. Precisely, involvement in an investment dispute does not deprive the state from sovereign immunity and its own jurisdiction. That is, legislation of the state concerned may potentially tackle enforcement of arbitrary awards should there be provisions limiting enforcement of arbitrary awards concluded in relation to the state assets. In the meantime, enforcement of arbitrary awards in other state than the one concerned may be also complicated since in practice the courts uphold the principle of state immunity [3, p. 302]. Such obstacles impair effectiveness of enforcement and recognition system and trust of investors to investment arbitration. However, it should be also added that enforcement of arbitrary awards is a matter of state interest as otherwise it loses attractiveness for foreign investors.

With that said, prior to proceeding to analysis of recognition and enforcement provisions envisaged by the ICSID Convention matters relating to state immunity should be observed. As such, under Article 54 of the ICSID Convention arbitrary awards granted pursuant to the ICSID Convention are recognized and enforced by the states in the same manner as final judgements of national courts. Further on, Article 55 of the ICSID Convention highlights that the state immunity laws cannot be derogated from the law of the state where arbitrary award is to be enforced. This means that when it comes to state immunity enforcement of arbitrary awards granted under regime of the ICSID Convention are subject to the same enforcement rules as decisions of national courts. Accordingly, such linkage creates obstacles in enforcement of arbitrary awards.

It should be clarified that enforcement, recognition and execution are different concepts. As such, recognition, as noted by Christoph Schreuer, is ‘formal confirmation that the award is authentic and that it has legal consequences provided by the law’ [4, p. 1128]. This procedure is also referred to as _exequatur_. In connection with this Article 54 of the ICSID Convention sets that the states are obligated to recognize an award. This provision is very important for arbitration under ICSID Convention, as ICSID awards are aimed to be exempted from any national provisions concerning recognition of awards, including review of such awards by authorized courts. In other words, the ICSID Convention limits functions of national authorities to mere verification of authentity. In addition, Article 54 of the ICSID Convention implies that the states are not immune from recognition due to the fact that have expressed their consent on arbitration. Such view is also supported by available case law [5]. Meanwhile, execution involves transfer of assets of losing party to wining party for the sake of satisfaction of an award and follows recognition of an award. It should be noted that English text of the ICSID Convention uses both “enforcement” and “execution”. As noted by Christoph Schreuer such difference suggests that these words stand for different concepts [4, p. 1134]. As he further concludes words execution and enforcement used in the ICSID Convention have identical meaning, a view that is argued by

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Ramazanzade Malik V. On some aspects of recognition and enforcement of icsid awards in the republic of Azerbaijan
Aron Broches stating that enforcement is a matter of the ICSID Convention while execution is a matter of national law [6, p. 294]. Following approach of Schreuer, it should be outlined that the term enforcement used in current paper entails execution procedure.

With that said, Article 54 denies state immunity at the stage of recognition or jurisdiction, while enforcement of arbitrary award is still subject to state immunity. This may be explained by the fact that the states do have assets that require protection from enforcement, such as military property. In the meantime, as noted by Alexis Blane ‘sovereign immunity is based upon the fundamental reluctance of one sovereign’s court to judge the actions of another sovereign’ [7, p. 492].

Accordingly, this leads to a conclusion that the state immunity in the given matter may be observed from two perspectives: immunity from jurisdiction (recognition) and immunity from enforcement. As it was noted the state immunity from jurisdiction is denied by the ICSID Convention. Therefore, distinction between these two immunities is required. Furthermore, absence of such distinction would eventually require authorized courts to review the decision subject to enforcement which would delay or even deny enforcement on that decision and consequently negate all efforts of ICSID Convention on establishment of effective recognition framework. One of positions on the matter contemplates that the states automatically waive their immunity from enforcement by giving consent on arbitration. However, as noted by Albert Jan van den Berg most states continue to apply absolute immunity when it comes to enforcement [2, p. 449]. It may be also argued that the waiver in question is not given explicitly and thus may not be relied upon. Furthermore, the United Nations Convention on Jurisdictional Immunities of States and Their Property also provides for expressed consent of a state as a precondition for post-judgement measures. Accordingly, such diversity of thoughts on state immunity has led to establishment of different approaches in states. As such, prior to enforcement of arbitrary awards courts of certain states tend to determine whether the state assets subject to enforcement are protected by the state immunity [2, p. 450]. Namely, if assets of the state which are subject to enforcement for commercial purposes they may be subject to enforcement, while enforcement in relation to those serving for governmental purposes is restricted. However, these rules are not uniform and in practice largely depend on approach upheld in a given state. For instance, the Swiss courts require the dispute in question and legal relations in respect of which these proceeding were instituted to be connected with Switzerland in order to enforce arbitrary award against given state in Switzerland [4, p. 1159]. In my view, absence of unified rules on enforcement and freedom of competent courts of the states give rise to forum-shopping and does not serve for the purposes of the ICSID Convention. In addition, an investor who was granted an arbitrary award should have freedom to decide where exactly this award should be enforced.

Based on the above, it may be concluded that the state immunity is not viewed as absolute in the context of protection of foreign investment. It rather bears relative character particularly due to available restrictions and waivers of state immunity. In the meantime, it is also clear that the ICSID Convention does not provide comprehensive solution of the problem of state immunity. With that said, winning investor does not have to many options for enforcement of arbitrary award. Namely, the state receiving investment should expressly waive its immunity from enforcement in bilateral investment or any other treaty or enforce an arbitrary award on commercial property of that state. In latter case, however, absence of unified rules may result in additional burdensome requirements for winning investor.
As noted, Article 55 of the ICSID Convention leaves room for application of state immunity. This view is also supported by available case materials. For instance, in *MTD v Chile* it was noted that Article 55 leaves issue of immunity to be dealt with under applicable national law [8]. ICSID however being aware of this problem attempts to resolve it by available measures. As such, waiver of immunity which has proven itself effective in relation to immunity from jurisdiction is also used in relation to immunity from enforcement. It would be also appropriate to note that such waiver is the most effective tool for resolving of the issue that may be offered nowadays. Waivers of immunity are frequently contained in bilateral investment treaties (“BIT”) which are concluded for the sake of facilitation and governance of investments and also include provisions relating to resolution of potential (or even existing) disputes. As such, BITs entitle investors to institute proceedings outside of the host state which serves as additional safeguard for protection of their investments. Historically, BITs were concluded between Western capital-exporting states and developing capital-importing states. With that said, arbitration clauses were required to secure nationals of capital-exporting states from political and other risks they may encounter if they proceedings against a host state is instituted in that state. Further on, immunity waiver may be also included in BIT. It should also be added that the ICSID has also developed model clauses which also include waiver of immunity. In the meantime, it is noted that waivers in BITs are not likely to succeed for some reasons, including their reciprocal character and the fact that capital-exporting states are reluctant to denying their immunity [7, p. 497].

It should be also added that BIT is not the only document that may envisage waiver, in the opposite such waiver may be enacted to any contract that an investor concludes with the state or its subsidiary. However, if BIT is concluded by a state in its sovereign capacity, conclusion of agreement between investor and subsidiary of a state would raise issues of competence which should be also addressed in order to make waiver effective and prevent potential problems with enforcement of awards. Nonetheless, there is also tendency to include waiver of immunity to agreements concluded between investors and states or their bodies. Such option also seems effective since the recipient state would likely provide single investor with more beneficial terms rather than generally expose its assets to every possible investor. As noted above, reciprocal character of waivers complicates their inclusion in BITs. In contrast to this, immunity waiver contained in an investor-state agreement does not contemplate reciprocity and therefore its inclusion to agreement is not accompanied by difficulties. However, as noted by Christoph Schreuer, ‘in many situation investors will never have the chance to negotiate a waiver of immunity’ for the very least due to absence of direct investor-state agreement or the fact that investors acts under national legislation of host state or BIT [4, p. 1173].

These instruments are by far the best solution of immunity problem. However, it is noted in the literature that investors still encounter obstacles in enforcement despite having required waiver in place. From one perspective Article 55 of the ICSID Convention gives ground to assess compliance of a waiver with national legislation. Accordingly, a state where enforcement is sought may apply its own rules and eventually end up with conclusion on invalidity of such waiver. Furthermore, apart from developing court practice on the matter, several states have adopted legislative acts governing matters of state immunity. With that said, enforcement, whether with or without waiver, is often reviewed in terms of its compliance with the mentioned acts (such as, for instance, Foreign Sovereign Immunities Act in the USA). In addition, waiver of immunity also does not lift other burdens from winning investors, such as proving that state
assets subject to enforcement are indeed of commercial character. This leads to the conclusion that waivers of immunity still do not offer desirable level of protection for investors.

For the sake of completeness, it should be added that the New York Convention may be also applicable to an award rendered in connection with a dispute between the state and foreign investor, as such disputes are not excluded from its scope. Yet, for application of the ICSID Convention clear reference to its jurisdiction is required and accordingly these two legal frameworks are not in contradiction with each other. It should be added that further to Albert Jan van den Berg, ‘no sensible claimant would rely on the New York Convention, since an award rendered pursuant to the ICSID Convention is enforceable within the Contracting States with no resistance to the enforcement possible’ [2, p. 441]. While the inability of states to resist to the enforcement is rather questionable, especially in light of the abovementioned aspects, it is still clear that the ICSID Convention provides more effective framework for enforcement of arbitrary awards than the New York Convention.

Recognition and enforcement of ICSID Awards in Azerbaijan

Recognition and enforcement of foreign arbitrary awards is governed by Chapter 47 of the Civil Procedure Code of the Republic of Azerbaijan approved by the Law No. 780-IQ dated 28 December 1999 (“Civil Procedure Code”). As a general rule, foreign arbitrary awards may be recognized and enforced in Azerbaijan if they are not contrary to legislation and legal order of Azerbaijan and where the reciprocity is provided.[9] It should be noted that pursuant to decision of the Constitutional Court of the Republic of Azerbaijan dated 15 April 2019 reciprocity is clarified as conclusion of bilateral or multilateral agreement envisaging legal assistance in the field of recognition and enforcement [10]. However, these provisions of the Civil Procedure Code are rather general and not tailored for recognition and enforcement procedure envisaged by the ICSID Convention. Furthermore, general criteria enabling recognition and enforcement of arbitrary awards contemplate their compliance with legislation and legal order of the Republic of Azerbaijan. These criteria may be further construed as the ability to review the arbitrary award in question which may further complicate recognition and enforcement of arbitrary award rendered pursuant to the ICSID Convention.

Coming to the matter of immunity it should be noted that the Civil Procedure Code does not anyhow address the matter of state immunity. Additionally, the Law No. 57 dated 15 January 1992 “On protection of foreign investment” also does not contain provisions governing matters relating to state immunity. Neither are any specific provisions envisaged in other legislative acts (including the Law No. 243-IIQ dated 27 December 2001 “On execution”). It should be also highlighted that the process of unification of court practice has recently started and it may be anticipated that eventually approach to the matter of state immunity will be clarified as a result of this process. On a separate note, it should be added that the Republic of Azerbaijan has not joined the United Nations Convention on Jurisdictional Immunities of States and Their Property or the European Convention on State Immunity.

Further to the above discussion, it should be reviewed whether state immunity waivers have been included to BITs or other agreements concluded by the Republic of Azerbaijan. As such, Article 8 (5) of the BIT with Switzerland denies the right of contracting state which is party to a dispute with investor to assert as a defence its immunity during the procedures [11]. However, this wording is not precise enough to conclude that state immunity is indeed waived by this provision. Furthermore, section 7 of the same Article 8 stipulates binding character of arbitral
award and its execution in accordance with national law. With that said, it may be concluded that matters of state immunity are not clearly stipulated in given BIT.

It should be noted that most of investor-state agreements are usually not available to the public. However, considering development of oil and gas industry there are certain specific agreements that are made publicly available. With that said, Host Government Agreement dated February 2002 concluded between the Republic of Azerbaijan and consortium of oil companies contains commitment of contracting parties to the ICSID Convention and ICSID Arbitration Rules. In the meantime, Section 17.11 of the Host Government Agreement waives *inter alia* immunity from execution of final award. It is also notable that the discussed waiver explicitly excludes specific categories of property, such as military, diplomatic etc. from the scope of waiver [12].

**Conclusion.** Firstly, it may be outlined that absence of rules governing (or even restricting) state immunity in matters of enforcement of the ICSID awards, as well as unified practice on this poses a number of problems which impair effectiveness of recognition and enforcement system established by the ICSID Convention. Furthermore, tools developed for addressing the matter of state immunity also do not guarantee that national court of the state where investment is sought will take such tools (*i.e.* waivers) into consideration, which is another factor complicating enforcement of ICSID awards. Accordingly, it may be concluded that lack of regulation threatens effectiveness of recognition and enforcement system established by the ICSID Convention. Secondly, as noted above, establishment of beneficial investment climate has been one of the priorities of the Republic of Azerbaijan ever since its foundation. Based on this priority a number of amendments has been made to national legislation. Considering recent tendencies, it may be outlined that development of national legislation relating to recognition and enforcement of ICSID Awards would also be a huge step towards increasing attractiveness of the Republic of Azerbaijan for foreign investors.

**REFERENCES**

1. Companıa de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/97/3
5. SOABI v Senegal, Cour de cassation, Decision (11 June 1991) 2 ICSID Rep 341.
8. MTD Equity Sdn Bhd & MTD Chile SA v Republic of Chile, ICSID Case No ARB/01/7.


Ця стаття присвячена аналізу процедури визнання та виконання рішень ICSID, а саме: питанням імунітету від юрисдикції та імунітету від визнання відповідно до нормативної бази, встановленої Конвенцією ICSID. Ст. 55 Конвенції ICSID стосується національного законодавства про державний імунітет, що призводить до наслідків у застосуванні рішень ICSID. На основі цього положення держави розробили національні правила, що регулюють застосування державного імунітету, що за відсутності уніфікованих правил та практики може призвести до неможливості інвестора-переможця забезпечити виконання рішень ICSID через характер майна, що знаходиться у державі, де їх увиникають інвестиції. Відповідно, були зроблені спроби пом'якшити цей ризик шляхом розробки договірних інструментів позбавлення суверенного імунітету у разі примусу довільного рішення. З огляду на це, у статті висвітлюються існуючі проблеми у застосуванні рішень ICSID, що випливають з доктрини суверенного імунітету, і продовжується аналіз вищезазначених інструментів, а також чинного національного законодавства Азербайджанської Республіки з метою визначення положень, що регулюють визнання та виконання рішень ICSID, а також рішення, що стосуються питання суверенного імунітету. У висновку автор констатує, що, по-перше, відсутність норм, що регулюють (або навіть обмежують) державний імунітет у питаннях примусового виконання рішень ICSID, а також уніфікована практика щодо цього створює ряд проблем, які погіршують ефективність системи визнання та примусового виконання встановленої Конвенцією ICSID. Крім того, інструменти, зроблені для вирішення питання державного імунітету, також не гарантують, що національний суд держави, де вимагається інвестування, братиме до уваги такі інструменти (тобто відмову), що є ще одним фактором, який ускладнює виконання рішення ICSID. Відповідно, можна зробити висновок, що відсутність регулювання загрожує ефективності системи визнання та забезпечення виконання, встановленої Конвенцією ICSID. По-друге, як зазначалося вище, створення сприятливого інвестиційного клімату було одним із
пріоритетів Азербайджанської Республіки з моменту її заснування. На підставі цього
приоритету було внесено ряд поправок до національного законодавства. Беручи до уваги
останні тенденції, можна зазначити, що розробка національного законодавства, що
стосується визнання та виконання рішень ICSID, також буде величезним кроком на
шляху підвищення привабливості Азербайджанської Республіки для іноземних інвесторів.

Ключові слова: іноземні інвестиції, міжнародне право, Конвенція ICSID, арбітраж,
визнання, примусове виконання, двосторонні інвестиційні договори, Азербайджанська
Республіка, цивільний процес, державний імунітет.

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