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ARTICLE

Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement

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Abstract—This article explores two themes. The first one addresses the legal nature of arbitral awards and an attempt is made to offer a legal definition also by looking at the legal nature of arbitration and related theories. The conclusion is that awards are *de facto* and *de jure* functional equivalents of court judgments. In this regards the article also looks at the 'value' of arbitral awards. The second theme is whether the interference of judicial or other State authorities with the enforcement of a foreign arbitral award may be the trigger for investment protection (for treatment short of fair and equitable treatment or even expropriation) in investment treaty arbitration; this may be on the basis of a bilateral investment treaty and/or the Convention on the Settlement of Investment Disputes between States and National of Other States ('ICSID Convention'). It is well established that States party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention') have a public international law obligation to enforce a foreign arbitral award unless they find that one of the limited grounds to resist enforcement exists. A number of recent cases rely on investment treaties to establish jurisdiction against States which aggressively and arbitrarily or negligently and willfully refuse to enforce an award with a foreign party beneficiary. While a trend emerges there are also cases which reject such applications for lack of jurisdiction under investment treaties. The article provides guidance as to which State conduct in relation to enforcement of arbitral awards may warrant investment arbitration.

I. INTRODUCTION

International commercial arbitration is now well established in most parts of the world as the preferred method of resolution of international commercial disputes,[2]

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[2] Various surveys conducted by academic institutions, arbitration institutions, industry organizations and law firms confirm the popularity of arbitration as a dispute settlement mechanism. See eg Loukas Mistelis, 'International Arbitration: Corporate Attitudes and Practices' (2004) 15 Am Rev Intl Arb 525, published in June 2006; Loukas Mistelis, 'Arbitral Seats—Choices and Competition' in S Kröll et al (eds), *Liber Amicorum Eric Bergsten. International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer 2011) 363; and Loukas Mistelis and Crina Baltag, 'Trends and Challenges in International Arbitration: Two Surveys of Inhouse Counsel of Major Corporations' (2008) 5 WAMR 83.

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and with a substantial increase in the number of cases in various emerging markets and developing countries.[3] Perhaps the prime features of arbitration are the choices[4] that are available to the arbitrating parties. They may choose a neutral venue to have their dispute resolved, avoid submitting to the other party's national courts and can select (often specialist) experienced arbitrators with whom the parties feel comfortable that the dispute will be fairly heard and decided. However, the main advantage of arbitration for many users of this process is the enforceability of awards. Indeed for more than half a century, since its signing in June 1958, the New York Convention has created a largely uniform legal regime for the enforcement of foreign arbitral awards and a *de facto* and *de jure* system for the free movement of awards.[5,6] The mobility and enforceability of arbitral awards is unprecedented and unparalleled; recognition and enforcement of foreign judgments is typically more onerous and subject to various controls at the incoming court level absent a treaty facilitating and harmonizing these processes. The New York Convention is 'recognized as a foundation of international commercial arbitration and imposing on courts of contracting States a public international law obligation . . . to recognize and enforce awards made in other States, subject to specific limited exceptions . . . and creates a uniform legal regime on the grounds on which enforcement of an award may be resisted'.[7]

It is important that the arbitral award be acknowledged as an instrument capable of recognition and enforcement. For the arbitrating parties and the tribunal, the award is nothing but an 'instrument recording the tribunal's decision provisionally or finally determining claims of the parties'.[8] It may deal with 'legal or factual differences between the parties, may involve interpretation of contract terms or determining the respective rights and obligations of the parties under the contract'.[9] Ultimately, it is the enforceability and indeed the

[3] Indeed, there is a significant increase in cases in countries such as, or involving parties from, Brazil, China, India and Russia. For example, it is often pointed out that Russian parties use London Court of International Arbitration (LCIA) arbitration services more than any other nationality and Brazilian parties feature very highly in ICC statistics. India is also one of the fastest growing arbitration jurisdictions.

[4] See <http://www.arbitrationonline.org/docs/2010_InternationalArbitrationSurveyReport.pdf> accessed 7 January 2013 and/or <http://choices.whitecase.com> accessed 7 January 2013 with various data relating to choices corporate parties make in the context of arbitration and the jurisdictions parties set.

[5] It is currently in force in 146 countries, making it one of the most successful international treaties. See also <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html> accessed 7 January 2013 and <http://www.newyorkconvention1958.org> accessed 7 January 2013 and <http://www.newyorkconvention.org> accessed 7 January 2013 for further information, full texts of the treaty and data on its application and current practice.

[6] See on the New York Convention: Marc Blessing (ed), *The New York Convention of 1958: A Collection of Reports and Materials delivered at the ASA Conference held in Zurich on 2 February 1996* (ASA 1996); Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards—The New York Convention of 1958* (Cameron May 2001); Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards. The New York Convention in Practice* (Cameron May 2008); Giorgio Gaja (ed), *New York Convention* (Juriana 1978–96); *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (2011); Herbert Kronke and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010); Loukas Mistelis and Stavros Brekoulakis (eds), *Arbitrability—International and Comparative Perspectives* (Kluwer 2009); Loukas Mistelis and Domenico Di Pietro, '1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' in Mistelis (ed), *Concise Arbitration* (Kluwer 2010) 1; United Nations (eds), *Enforcing Arbitral Awards under the New York Convention—Experience and Prospects* (1999); Albert Jan van den Berg, *The New York Arbitration Convention of 1958—Towards a Uniform Judicial Interpretation* (Kluwer 1981); Albert Jan van den Berg, *Consolidated Commentary on New York Convention*, part of ICCA Yearbook but also available on <www.kluwerarbitration.com>, from 1976.

[7] Mistelis and Di Pietro (n 6) 1.

[8] Julian DM Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) para 24-1.

[9] ibid.

enforcement of the award that gives credence to the entire arbitration process and justifies the cost and time that the parties to a dispute have invested in the resolution process.

It is against this background that in recent years there have been a number of cases considering the non-enforcement of awards or actions and inactions aiming at technically making such enforcement obsolete that considered such State conduct as a breach of bilateral investment treaties (BITs). The purpose of this article is to discuss and explore the legal nature of arbitral awards briefly in Section II, to look at specific investment arbitration cases[10] that have dealt with the BIT consequences of non-enforcement of an arbitral award in Section III, and to offer some concluding remarks in Section IV. The article will not deal with enforcement of investment arbitration[11] awards or the consequences of non-enforcement of investment arbitration awards.[12]

II. WHAT IS AN ARBITRAL AWARD?

There are very few definitions offered of arbitral awards. It is worth pointing out that there is no distinction to be made between commercial awards and investment awards for definition purposes. Both instruments have the same function as they bring an end to a dispute with a decision rendered by an independent and impartial tribunal and are capable of being enforced. However, it is essential to ascertain the essential characteristics and legal nature of arbitral awards in order to appreciate their legal or economic value and consider the consequences of their enforcement. Accordingly, in this part we explore definitions and the legal nature of awards in Section IIA before looking at the issue of the 'value' of awards in Section IIB and the consequences of enforcement and non-enforcement in Section IIC.

[10] See eg *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/07, Award (30 June 2009); not entirely in the same thematic because of the prevalence of a fork-in-the-road issue: *Pantechniki SA Contractors & Engineers v Republic of Albania*, ICSID Case No ARB/07/21, Award (30 July 2009); *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan*, ICSID Case No ARB/08/2, Award (18 May 2010); *GEA Group Aktiengesellschaft v Ukraine*, ICSID Case No ARB/08/16, Award (31 March 2011); and *White Industries Australia Limited v The Republic of India*, UNCITRAL, Award (30 November 2011).

[11] This is a substantial topic which requires separate attention and for which some literature already exists. For the distinction between investment and commercial arbitration see Nigel Blackaby, 'Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)' in Loukas Mistelis and Julian Lew (eds), *Pervasive Problems in International Arbitration* (Kluwer 2006) 217.

[12] See eg Alan Alexandroff and Ian Laird, 'Compliance and Enforcement' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *Oxford Handbook of International Investment Law* (Oxford University Press 2008) 1170; Crina Baltag, 'Enforcement of Arbitral Awards against States' (2008) 19 Am Rev Intl Arb 391; R Doak Bishop (ed), *Enforcement of Arbitral Awards Against Sovereigns* (Juris 2009) with contributions from Bishop (ibid 3), Reed and Martinez (ibid 13), and other papers in the same collection; Anoosha Boralessa, 'Enforcement in the United States and United Kingdom of Awards against the Republic of Argentina (2004) NY Intl L Rev 53; August Reinisch, 'Enforcement of Investment Awards' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (Oxford University Press 2010) 671; Christoph Schreuer with Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary* (2nd edn, Cambridge 2009) Arts 48–55, 805–1185 (or just Art 48, 805–39); Christopher Dugan et al, *Investor–State Arbitration* (Oxford University Press 2008) 675–700; R Doak Bishop, James Crawford and William Michael Reisman, *Foreign Investment Disputes: Cases, Materials, and Commentary* (Kluwer Law International 2005) 515ff; M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International 2000) 279ff.

A. *Definition and Legal Nature of Arbitral Awards*

A meaningful definition and delimitation of the legal nature of arbitral awards may be well aligned with discussions about the juridical nature and philosophical foundations of arbitration.

A US legal dictionary defines an arbitral (or arbitration) award as:

> . . . a decision made by an arbitration tribunal in an arbitration proceeding. An arbitral award is analogous to a judgment in a court of law. An arbitral award can be of a non-monetary nature where the entire claimant's claims fail and no money needs to be paid by either party.
>
> An arbitration award can be made for payment of a sum of money, declaration upon any matter to be determined in the arbitration proceedings, injunctive relief, specific performance of a contract and for rectification, setting aside or cancellation of a deed or other document.[13]

What is pertinent in this definition is that an award is considered analogous to a court judgment, and hence it is vested with the same functionality and powers. This definition aims to establish that arbitration has a powerful outcome and is not a poor alternative to court litigation. This is undisputedly a true statement, courtesy of the New York Convention. Craig makes the point that the 'Convention was designed to give international currency to arbitral awards'.[14] He also expresses the concern that since the mechanics for enforcement are left to domestic court and national court procedures, the New York Convention has its weaknesses.[15] Efficiency of the enforcement mechanism is often intertwined with judicial efficiency, as well as judicial attitudes towards the arbitral process.[16]

Arbitration conventions, laws and rules do not offer concrete definitions of arbitral awards,[17] leading many authors to attempt to capture the main features of an award in lieu of a full legal definition. For example, Lew, Mistelis and Kröll focus on the essential characteristics of the award. They stress that an award:

- concludes the dispute as to the specific issue determined in the award so that it has res judicata effect between the parties; if it is a final award, it terminates the tribunal's jurisdiction;
- disposes of parties' respective claims;
- may be confirmed by recognition and enforcement;
- may be challenged in the courts of the place of arbitration.[18]

[13] 'Arbitral Award Law & Legal Definition' in *US Legal Definitions* <http://definitions.uslegal.com/a/arbitral-award/> accessed 10 December 2012.

[14] See W Laurence Craig, 'Some Trends and Developments in the Laws and Practice of International Commercial Arbitration' (1995) 30 Texas Intl LJ 1, 11.

[15] ibid; see also, more recently, a similar critical and constructive perspective by Stavros Brekoulakis, 'Enforcement of Foreign Arbitral Awards: Observations on the Efficiency of the Current System and the Gradual Development of Alternative Means of Enforcement' (2008) 19 Am Rev Intl Arb 415.

[16] See the empirical data and analysis in Loukas Mistelis and Crina Baltag, 'Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration in Practice: Corporate Attitudes and Practices' (2008) 19 Am Rev Intl Arb 319.

[17] See Domenico Di Pietro, 'Arbitral Awards Under the New York Convention: What Are and What May Be' <http://blogs.law.nyu.edu/transnational/2011/11/arbitral-awards-under-the-new-york-convention-what-are-and-what-may-be/> accessed 18 August 2012; Domenico Di Pietro, 'What Constitutes an Arbitral Award Under the New York Convention?' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention in Practice* (Cameron May 2008) 139. See also Gerold Herrmann, 'Does the World Need Additional Uniform Legislation on Arbitration?' (1999) 15 Arb Intl 211, also Julian Lew and Loukas Mistelis (eds), *Arbitration Insights* (Kluwer 2007) 223–55, 249–50.

[18] Lew et al (n 8) para 24-13.

These four main functions (conclusion of dispute, determination of parties' rights and obligations and disposition of claims, recognition and enforceability, and potential for review or challenge) provide for context and appreciation of the award.

The fact that the award can be challenged or its enforcement resisted adds a dimension or a point of consideration: What is the legal nature of an award? Craig asks:

> Should any document having the form of an award be as easily recognized and enforced as a promise to pay, in the form of a bill of exchange or other negotiable instrument? Or should the recognition and enforcement court view the award as if it were a judgment of an inferior, albeit exceptional, tribunal, and satisfy itself at least as to the procedures followed by the tribunal in reaching the award?[19]

In answering these questions, and legally qualifying an arbitration award, one should first look at the various theories relating to the nature of arbitration. Arguably this is the missing piece needed to provide a comprehensive all-around legal definition of arbitral awards. The discussion of the legal nature of arbitral awards is connected to the debate about the legal or juridical nature of arbitration. Although at first glance it appears to be a theoretical debate, it does have practical consequences.

There is consensus as to the four main theories about the juridical nature of arbitration with associated conclusions as to the legal nature of arbitral awards:[20]

(i) The *contractual theory* focuses on the origin of arbitration in the agreement of the parties to refer their dispute to arbitration and the consensual nature of arbitration. Since the arbitration agreement is enforceable, the outcome of the arbitration, the award, must also be enforceable. The arbitral award is the outcome of the agreement to arbitrate. For many writers this is the result of agent theory: the award is a contract made by the arbitrators acting as agent of the parties.

(ii) The *jurisdictional theory* focuses on the endorsement of arbitration by national legal systems and the status of the arbitrator, which is equated to the judicial function of the judge. The caveat, of course, is that judges and arbitrators are in the same business: the judge on the public side while the arbitrator on the private side.[21] It is the premise of this theory that arbitration and the national courts and national law interact[22] and that the law of the seat of arbitration is critical in determining the level of interaction. The arbitrators perform a judicial function and the result of this work, the arbitral award, is treated as, and is given the effect of, a judgment of a national court.[23]

[19] Craig (n 14) 9.

[20] For an early discussion on the four main theories, see Julian DM Lew, *Applicable Law in International Commercial Arbitration* (Oceana 1978) 51–66. See also, Lew et al (n 8) paras 5.02–5.33; Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law* (Schulthess 1989); Ashjan Faisal Shukri Daoud, *The Legal Nature of Arbitration Award, Its Effects and Appeal Mechanisms—A Comparative Study* (2008) <http://scholar.najah.edu/print/5638> accessed 27 December 2012. For an update and further references, see Hong-Lin Yu, 'A Theoretical Overview of the Foundations of International Commercial Arbitration (2008) 3 Contemp Asia Arb J 255. See also Sylvain Bollée, *Les méthodes du droit international privé à l'épreuve des sentences arbitrales* (Economica 2004) paras 70ff and 78ff.

[21] Donaldson J in *Bremer Schiffbau v South India Shipping Corp Ltd* [1981] AC 909, 921.

[22] Francis A Mann, 'Lex Facit Arbitrum' (1983) 2 Arb Intl 245. See also Yu (n 20) 258ff.

[23] For a historical perspective on that, see Yu (n 20) 262–3.

(iii) The *hybrid (*or *eclectic* or *sui generis) theory*[24] attempts to strike a balance between the contractual and the jurisdictional theory by accepting that arbitration has evolved to encompass characteristics of both a contractual and jurisdictional nature. As such, the hybrid theory is considered to be more comprehensive.[25] The origin and basis of arbitration is a contract but the outcome, the award, is akin to a judgment of a national court.

(iv) The *autonomous theory*[26] sees arbitration as a self-sufficient system founded on party autonomy and at least tolerated or endorsed by national laws. In the pure form of this theory, 'the award is not a judgment and the arbitral agreement is not a contract like any other'.[27] It is something different supported by a global arbitration institution. The autonomy of arbitration is indeed an ideal, possibly unattainable but possibly feasible via the increasing harmonization of arbitration law and practice.[28] In a 'moderate' sense, the New York Convention provides the backbone for an international (if not global) system for the enforcement of awards, which may contribute to this end.

Emmanuel Gaillard provides an alternative and appealing classification.[29] There are three different 'representations' of international arbitration to consider which do not, however, offer a conclusion on the legal nature of awards, unlike the classical discussion immediately above:

- The first is the *mono-local account* which 'assimilates the arbitrator to a national judge exercising his or her function within a single national legal order'.[30] Each arbitration is anchored to a single legal order, namely, the legal order of the seat.
- The second is the *Westphalian* or *multi-local account* which focuses on the place of enforcement of the award. Under this representation, the arbitration is not anchored to any one legal order, but rather to all legal orders (including the seat) willing to 'recognize the effectiveness of the award'.[31]
- The third is the *transnational* or *autonomous account* which looks to the 'arbitral legal order' itself rather than one of any particular sovereign, whether it is the seat or the place(s) where enforcement is sought. This representation is based on the self-perception of international arbitrators that they administer justice on behalf of the international community rather than any given State.[32]

Indeed, these theories focus more on the justification and legitimacy of arbitration as a dispute settlement system and assess the same on the basis of enforceability of awards in a single place, multiple places, or the community of nations operating under the same principles.[33]

[24] Developed by Professor Sauser-Hall, see Lew (n 20) 57 with further references.
[25] Pieter Sanders, 'Trends in the Field of International Commercial Arbitration' (1975) 145 Recueil des Cours 205, 233–34.
[26] See Lew (n 20) 59–61; Samuel (n 20) 67. The founder of this theory is Rubellin-Devichi.
[27] See Lew (n 20) 17 quoting and translating Rubellin-Devichi and Samuel (n 20) 68.
[28] Julian DM Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22 Arb Intl 179.
[29] See Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff/Brill 2010); and Emmanuel Gaillard, 'Representations of International Arbitration' (2010) 1 J Intl Disp Settlement 271.
[30] Gaillard, *Legal Theory* (n 29) 15.
[31] ibid 24.
[32] ibid 35.
[33] Gaillard, 'Representations' (n 29) 276–8.

However, these theories have a major impact on how we legally delimit and define arbitral awards. If an award was the outcome of a purely contractual approach, its enforcement would be entirely in the hands of the parties. However, we know that courts can enforce awards. If an award was solely the outcome of a jurisdictional theory, then it could be fully controlled by the courts in whose territory the award was made. Nonetheless, we do know that an award may be enforced even if it has been set aside at the court of the place where it was made. Indeed, when an award is annulled or vacated, is not enforceable in the country in which it was made. It will usually be unenforceable in other countries although it may be enforceable in some countries.[34] The French Cour de Cassation in the much discussed *Putrabali* case stated:

> An international award, which is not connected to any legal system, is an international judicial decision, whose legality is examined with regards to the applicable laws in the country where its recognition and enforcement are sought.[35]

It also follows that the award is not always controlled by the laws of the place where it was made. The laws of the place of arbitration may well have a bearing on the legality, validity and effectiveness of the award. However, the international and transnational law, such as the New York Convention, will also have a say that is often not consistent with the law of the place of arbitration. It has a transnational effect and may not be controlled by a single legal system which could occasionally rely on idiosyncratic grounds to have an award set aside locally.

In conclusion, what we should be adding to the definitions of the arbitral awards suggested above is that an award is *de facto* and *de jure* a judgment with transnational effect. This is also supported by the New York Convention[36] and the ICSID Convention,[37] which clearly impose a public international obligation on their respective Contracting States to recognize and treat an award as if it were a decision of a local court. Irrespective of where one stands on the academic debate regarding the legal nature of the arbitration as a system, it is undisputed that the functionality of an award is that of a court judgment. Furthermore, it is a judgment of arbitral justice which has a wider enforceability than a judgment of State justice.

[34] See eg in the United States: *Chromalloy Gas Turbine Corp v Arab Republic of Egypt*, 939 F Supp 907 (D DC 1996); *TermoRio SA ESP v Electranta SP*, 487 F3d 928 (DC Cir 2007), Year Book Commercial Arbitration (200[illegible] France: Cour de cassation, 10 June 1997, *Omnium de Traitement et de Valorisation v Hilmarton*, XXII YBCA [illegible] (1997); Cour de cassation, 23 March 1994, *Omnium de Traitement et de Valorisation v Hilmarton*, XX YBCA 663 (1995); Cour de cassation, 9 October 1984, *Pabalk Ticaret Ltd Sirketi (Turkey) v Norsolor SA (France)*, XI YBCA 484 (1986); *Direction Générale de l'Aviation Civile de l'Emirat de Dubaï v Internationale Bechtel*, Paris Court of Appeals, 29 September 2005; in Austria: Oberster Gerichtshof, 20 October 1993/23 February 1998, *Kajo-Erzeugnisse Essenzen GmbH v DO Zdravilisce Radenska*, 105 Österreichische Juristen-Zeitung 513, XXIVa YBCA 919 (1999), Rev Arb 419 (1998), XX YBCA 1051 (1995); in the Netherlands: Supreme Court, *Yukos Capital v Rosneft*, 25 June 2010 (LJN: BM1679). See [illegible] Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)' (1998) 9 ICC [illegible] Ct Arb Bull.

[35] Cour de Cassation, *Société PT Putrabali Adyamulia v Société Rena Holding*, 29 June 2007. For more information, see eg Bernard Audit, 'French Court Decisions on Arbitration 2007–2008' (2008) 19 ICC Intl Ct Arb Bull para 31.

[36] In particular, Arts 3–6.

[37] In particular, Arts 53–55.

B. *'Value' of Arbitral Awards and the Consequences of Enforcement and Non-Enforcement of Arbitral Awards*

Having ascertained the legal quality of arbitral awards, it is now essential to assess their 'value' either in the economic sense or in terms of enforcement, as well as the consequences of non-enforcement. In other words, what is the true currency of arbitral awards?

In 2008, an empirical survey conducted by the School of International Arbitration[38] regarding compliance and enforcement of arbitral awards found compelling results. The study found that awards were typically voluntarily complied with, and only in a very small number of cases enforcement proceedings had been initiated to ensure enforcement:

> 84% of respondents indicated that the opposing party had honoured the award in full in more than 76% of the cases. Only 3% reported that an award debtor had failed to comply with the award. During the interviews, corporate counsel often mentioned that more than 90%, typically 99% of the awards had been honoured by the non-prevailing party.[39]

According to the same survey, in only 11 per cent of cases did participants need to proceed to courts or other enforcement agencies to enforce an award. Even in such cases, the majority of the corporations reported that they had not encountered major difficulties in doing so. These findings refute the predominately anecdotal evidence that corporations encounter major difficulties when resorting to recognition and enforcement of arbitral awards: only a very small proportion of the corporations faced such problems. Out of the 11 per cent of cases proceeding to courts or other enforcement agencies, only 19 per cent of the corporations had encountered difficulties when seeking to recognize and enforce foreign arbitral awards.[40] This number is quite small and encouraging as far as enforcement of awards is concerned.

As part of the same survey, in-house lawyers reported that the 'difficulties in enforcing an award often arose because of the circumstances of the award-debtor rather than deficiencies in the arbitral or court proceedings'.[41] The survey indicated that 70 per cent of the problems related to the lack of assets or the inability to identify the debtor's assets. Against this background, it is not surprising that asset-tracking or asset-tracing has become a profession nowadays. However, it is very encouraging that:

> only 6% of the respondents encountered difficulties because the country of enforcement was not a signatory to the New York Convention. The small percentage in this last case is translated in the large number of countries parties to the New York Convention 1958. 17% of the corporate counsel indicated the hostility of the place of enforcement, which is understood as comprising, among others, an unstable and bureaucratic political and legal system with all consequences deriving from this, intimidation and threats or corruption.[42]

[38] See <http://www.arbitrationonline.org/research/Corpattitempirical/2008.html> accessed 7 January 2013.
[39] Mistelis and Baltag (n 16) 343.
[40] ibid 345.
[41] ibid 346.
[42] ibid.

There are, however, also concerns about the effectiveness and efficiency of the New York Convention,[43] and it is often pointed out that settlement may present a better option than an attempt to enforce an award through national courts. In the 2008 survey the empirical evidence showed that 56 per cent of corporations which had experienced difficulties at the place of enforcement identified as a major issue the local enforcement or the execution proceedings. Similarly, the majority of counsel linked the enforcement problems with the attitude of local bureaucrats and courts, while 10 per cent of respondents cited difficulties arising from corruption at local courts.[44]

According to our empirical survey, 44 per cent of the participating corporations responded that they usually recovered 100 per cent of the amount awarded in the award when using recognition, enforcement and execution proceedings, while 40 per cent recovered over 76 per cent of the amount awarded. In other words, at least 84 per cent of the participants reported that they have recovered 76 to 100 per cent of the awarded sum. Corporate counsel also indicated that the lack of assets of the non-prevailing party was the main reason for the failure to recover the full amount of an award.[45] The fact that parties prevailing in arbitration are prepared to settle and satisfy their claim for a sum less than 100 per cent of that awarded by the tribunal should not be read as a defect of the arbitration system or an indication of the diminished value of an award. To the contrary, most awards are complied with or provide the basis for enforcement for a very substantial percentage.

It is also worth mentioning that the award debt was typically collected in a rather short period of time (ie often less than six months or, more commonly, less than one year), but with some cases (about 5 per cent) going for more than two years.[46]

As alternatives to voluntary compliance or enforcement via the national courts, other options have been developed, such as post-award settlements. Use of such alternatives to traditional enforcement seems to be gathering pace.[47] Similarly, it has been reported[48] that one Award (*CMS v Argentine Republic*)[49] was assigned to a fund, Blue Ridge Investments LLC, which exercised significant diplomatic pressure in order to ensure enforcement. It was anecdotally reported that CMS received from Blue Ridge a sum they felt fully compensated them, but lower than the sum awarded as the result of the arbitration proceedings. Similarly, in a recent decision of the Thai Supreme Court, Judgment No 9691/2554, it was confirmed that awards are transferable and may be enforced for the benefit of the transferee and ultimate recipient of the transferred award.[50]

[43] See eg Brekoulakis (n 15).

[44] See Mistelis and Baltag, 348–9, where there are also indications of countries which are perceived as hostile in terms of enforcement of foreign arbitral awards.

[45] ibid 351–2.

[46] ibid 351.

[47] See eg Loukas Mistelis, 'The Settlement-Enforcement Dynamic in International Arbitration' (2008) 19 Am Rev Intl Arb 377, 379ff and most pertinently 383–7.

[48] JE Viñuales and D Bentolila, 'The Use of Alternative (Non-judicial) Means to Enforce Investment Awards' in L Boisson de Chazournes, M Kohen and JE Viñuales (eds), *Diplomatic and Judicial Means of Dispute Settlement: Assessing their Interactions* (Brill forthcoming), also in SSRN: SSRN-id2125051, at 13.

[49] *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Award (12 May 2005).

[50] Information provided by Professor Thawatchai Suvanpanich. The case allegedly related to an enforcement of an LCIA Award in Thailand where the enforcement proceedings were initiated by the transferee and beneficiary of the original Award claim. The Award creditor appears to have been a British Virgin Islands company which transferred the Award to a Thai company.

It is reasonable to conclude that the 'value' of an arbitral award lies not only in the fact that the legal framework for the recognition and enforcement of (foreign) arbitral awards is supportive of enforcement internationally (courtesy of the New York and ICSID Conventions), giving 'teeth' and true economic currency to the outcome of arbitrations, but also in the fact that awards maintain economic value irrespective of whether the award is enforced or not. Awards may be used as a basis for renegotiation of contracts or for the exercise of pressure to achieve legitimate commercial objectives. For example, press releases may be issued and/or published on the financial or daily political press; awards may be assigned to collecting agencies, funds or banks; or an award may be used after it has been rendered to safeguard future business relationships. This may appear too rosy a picture but the fact remains that awards, whether enforced or not, do embody real economic and/or commercial value.

III. AWARD AS AN INVESTMENT

In this section, we look at the various cases where investment tribunals have examined whether the non-enforcement of arbitral awards and/or active State interference with proceedings to enforce awards may amount to breaches of bilateral investment treaties. In some cases, judicial interference may be seen as expropriation or may otherwise trigger a level of State responsibility: it may be seen as abuse of rights by a State or as an expression of a denial of justice and hence as unfair and inequitable treatment. In other words, the pertinent question is 'whether an arbitration agreement or an arbitral award is an investment and therefore enjoys protection'[51] under the relevant BIT and possibly also the ICSID Convention. If the answer to the first question is negative, then the likelihood is that an investment tribunal will decline jurisdiction to hear this matter. In most cases, it will be important to examine both the BIT and Article 25 of the ICSID Convention. It seems that the jurisprudence so far is inconsistent[52] and hence worthy of further discussion. In particular, we discuss below *Saipem v Bangladesh* in Section III.A, *ATA v Jordan* in Section III.B, *GEA v Ukraine* in Section III.C and *White Industries v India* in Section III.D, with some additional references to other cases.

A. *Saipem SpA v People's Republic of Bangladesh*

The first known investment arbitration decision that considered the issue of State responsibility for the non-enforcement of an arbitral award is the Decision on Jurisdiction in *Saipem v Bangladesh*.[53] In this case, the Claimant

[51] Charles Claypoole, 'Recent Developments in the Jurisprudence of Investment Arbitration Tribunals' (2012) Eur Middle Eastern Arb Rev available online at <http://www.globalarbitrationreview.com/reviews/40/sections/140/chapters/1433/recent-developments-jurisprudence-investment-arbitration-tribunals>.

[52] ibid.

[53] *Saipem SpA v People's Republic of Bangladesh*, ICSID Case No ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures (21 March 2007). See also discussions in Andrew Newcombe, 'When is Court Interference in Arbitration Proceedings Expropriatory' *Kluwer Arbitration Blog*, 7 July 2009; Cameron Kay and Luke Eric Perterson, 'Bangladesh Courts Overstepping Supervisory Role in ICC Arbitration Amounts to Unlawful Exporporiation at ICSID, 12 September 2009 <www.iareporter.com/articles/20090912_2/print> accessed 7 January 2013; and Ruth Teitelbaum, *Case Report on Saipem v Bangladesh* (2010) 26 Arb Intl 313; Promod Nair, 'State Responsibility for Non-enforcement of Arbitral Awards: Revisiting Saipem Two Years On' *Kluwer Arbitration Blog*, 25 July 2011.

commenced ICSID arbitration proceedings against the Government of Bangladesh on the basis of an alleged breach of the expropriation clause in Article 5 of the Italy–Bangladesh BIT.[54] The underlying dispute arose out of a gas pipeline construction contract between Saipem, an Italian company, and Petrobangla (Bangladesh Oil Gas and Mineral Corporation), a Bangladeshi State entity. The contract provided for dispute settlement in the form of ICC arbitration with the seat in Dhaka. After the project was completed, a dispute arose over payment and Saipem filed a request for arbitration. During the ICC proceedings, Petrobangla filed an action with the local courts seeking revocation of the Tribunal's authority. It alleged that the Tribunal had breached the parties' procedural rights by rejecting several of Petrobangla's procedural requests. The local courts found in favour of Petrobangla's interests; however, this did not deter the ICC Tribunal which eventually rendered an Award in favour of Saipem. Petrobangla then filed an application before the High Court Division of the Supreme Court of Bangladesh to set aside the ICC Award. Although denying the application, the High Court Division ultimately found in favour of Petrobangla by refusing to acknowledge the existence of the ICC Award 'in the eye of the law'. It held that a 'non-existent award can neither be set aside nor can it be enforced'.

Saipem instituted ICSID proceedings against the Government of Bangladesh alleging that the:

> local courts colluded with the State entity to sabotage the ICC Arbitration and deny the foreign investor's right to arbitrate under the [construction] contract and obtain satisfaction of its claims.[55]

In essence, Saipem argued that the actions of Bangladesh (through Petrobangla and the local courts) deprived Saipem of sums awarded to it by the ICC Award and thus amounted to an expropriation in breach of Article 5 of the BIT. Petrobangla contested jurisdiction under Article 25 of the ICSID Convention and, if found, under the BIT. In both cases the ICSID Tribunal considered the existence of an 'investment'.

Applying the *Salini*[56] test, the Tribunal found that Saipem had made an investment within the meaning of Article 25. In its reasoning, the Tribunal emphasized that it would consider the 'entire operation' when determining the existence of an 'investment', and in this case, that included the initial construction contract, the construction itself, warranties, retention money and 'the related ICC Arbitration'.[57] The Tribunal further elaborated on the point when considering

[54] Agreement between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments (signed 20 March 1990, entered into force 20 September 1994) Art 5:

> (1) The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgments or orders issued by Courts or Tribunals having jurisdiction.
> (2) Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.

[55] *Saipem SpA v People's Republic of Bangladesh* (n 53) para 61.

[56] *Salini Construttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001).

[57] ibid para 110.

whether the dispute arose *directly* out of an investment under Article 25(1). It noted that the ICC Award could not be viewed in isolation for this purpose. Rather, it held that the 'rights arising out of the ICC Award arise only *indirectly* from the investment'. The Tribunal suggested that a finding otherwise would mean that the Award itself constituted an investment under Article 25(1).[58] This, in the words of the Tribunal, was a finding that it was 'not prepared to accept'.[59] When considered with the other elements (the construction contract, the construction itself, etc), however, the dispute could be found to arise directly out of the overall investment. In other words, the Award was just one piece of the puzzle.

The Tribunal also found jurisdiction under the BIT. In particular, it accepted Saipem's argument that the construction contract was an investment under Article 1(1) of the BIT[60] and that the 'rights accruing from the ICC Award fall squarely within the notion of "credit for sums of money . . . connected with investments" set out in Article 1(1)(c)'.[61] Taking their ordinary meaning, the Tribunal held that the words 'credit for sums of money' also include 'rights under an award ordering a party to pay an amount of money'.[62] However, unwilling to consider whether the Award itself constituted an 'investment', the Tribunal added the following caveat:

> This said, the rights embodied in the ICC Award were not created by the Award, but arose out of the Contract. The ICC Award crystallized the parties' rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.[63]

This is a seminal case in many respects. While the Decision of the Tribunal did not state that (i) the Award may constitute an 'investment' and/or (ii) its non-enforcement or the interference with its enforcement may be seen as an unlawful interference with an 'investment', it did functionally apply investment law (both ICSID and the relevant BIT) to assess State liability in the given fact pattern and assume jurisdiction. This functional equivalence is more than sufficient to trigger both State liability and investment protection and, if the factual circumstances are appropriate, provide significant additional support for arbitral awards. It would have been more instructive to have an indication of the specific breach of the investment protection treaty to which the conduct of the courts amounted.

[58] ibid para 113.
[59] ibid.
[60] Art 1(1):

> The term 'investment' shall be construed to mean any kind of property invested before or after the entry into force of this Agreement by a natural or legal person being a national of one Contracting Party in the territory of the other in conformity with the laws and regulations of the latter.
> Without limiting the generality of the foregoing, the term 'investment' comprises:
>
> a) movable and immovable property, and any other rights in rem including, insofar as they may be used for investment purposes, real guarantees on other property;
> b) shares, debentures, equity holdings and any other negotiable instrument or document of credit, as well as Government and public securities in general;
> c) credit for sums of money or any right for pledges or services having an economic value connected with investments, as well as reinvested income as defined in paragraph 5 hereafter; . . .
> e) any right of a financial nature accruing by law or by contract and any licence, concession or franchise issued in accordance with current provisions governing the exercise of business activities, including prospecting for, cultivating, extracting and exploiting natural resources.

[61] *Saipem* (n 53) para 125.
[62] ibid para 126.
[63] ibid para 127.

B. *ATA Construction, Industrial and Trading Company v Hashemite Kingdom of Jordan*

ATA v Jordan[64] concerned whether the Jordanian courts' annulment of an Award rendered in favour of the Claimant, a Turkish construction company, and the extinguishment of the arbitration agreement upon which the Award was based amounted to a breach of the Jordan–Turkey BIT.[65] The underlying dispute involved the collapse of a dike at a site on the Dead Sea constructed by the Claimant for the Arab Potash Company (APC) pursuant to a FIDIC form contract entered into on 2 May 1998. When the dike collapsed, APC—an entity based in Jordan and at the time controlled by the Government of Jordan—commenced FIDIC arbitration proceedings against ATA, which brought a counterclaim in respect of sums owed under the contract on 6 September 2000. Three years later, on 30 September 2003, the FIDIC Tribunal found in favour of ATA, exonerating it of any liability for the collapse and awarding compensation in relation to the counterclaim.

Shortly thereafter, on 29 October 2003, APC applied to the Amman Court of Appeal to have the FIDIC Award annulled pursuant to the Jordanian Arbitration Law 2001. The Court of Appeal issued its Judgment on 24 January 2006 (incidentally, 1 day after the Jordan–Turkey BIT came into force), annulling the FIDIC Award on the basis that the Tribunal erred in applying Jordanian law. The Court of Appeal also referred to Article 51 of the Jordanian Arbitration Law 2001 and extinguished the arbitration agreement between ATA and APC.[66] The Claimant later appealed to the Jordanian Court of Cassation, which upheld the Court of Appeal's Judgment on 16 January 2007. Following this Decision, APC commenced proceedings against ATA before the Jordanian Court of First Instance in relation to its original claims regarding the collapse of the dike.

Against this background, ATA initiated ICSID proceedings against Jordan for alleged violations of the Jordan–Turkey BIT. In particular, ATA argued that Jordan had unlawfully expropriated its claims to money and rights to legitimate performance under the construction contract and FIDIC Award, and that it had failed to accord fair and equitable treatment to ATA's investment by way of serious and repeated denials of justice by the Jordanian courts. Jordan, the Respondent, contested jurisdiction on the grounds that the BIT did not apply as the dispute predated its entry into force and that, in any event, there was no 'investment existing' at the time of the BIT's entry into force or 'made or acquired thereafter'.

The ICSID Tribunal considered its jurisdiction in relation to two of the Court of Cassation's findings:

(i) the annulment of the FIDIC Award, and
(ii) the extinguishing of the arbitration agreement in the contract between ATA and APC.

[64] *ATA* (n 10).
[65] Agreement between the Hashemite Kingdom of Jordan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments (signed 2 August 1993, entered into force 23 January 2006).
[66] Jordanian Arbitration Law 2001, Art 51:

> If the competent court approves the arbitral award, it must decide its execution and such decision is final. If, otherwise, the court decides the nullity of the award, its decision is subject to challenge before the Court of Cassation within thirty days following the date of notifying that decision. The final decision nullifying the award results in extinguishing the arbitration agreement.

With respect to the former, the ICSID Tribunal found that the dispute that gave rise to ATA's claims, which crystallized when the Court of Cassation confirmed the annulment of the Award on 16 January 2007, was 'legally equivalent' to and 'really indistinguishable' from the original dispute initiated when the FIDIC arbitration proceedings were commenced on 6 September 2000.[67] Since the original dispute arose prior to the entry into force of the Jordan–Turkey BIT (23 January 2006), the Tribunal found that all claims in connection with the annulment of the Award, including claims of denial of justice, were *per se* inadmissible because of a lack of jurisdiction *ratione temporis*.[68]

In relation to the annulment Decision, the Tribunal also considered, albeit *obiter dicta*, whether 'an international commercial arbitral award constitute[s] an investment that could be, as it were, expropriated by an otherwise lawful annulment by a national court'.[69] Noting that Article 25(1) of the ICSID Convention left the term 'investment' open to the parties to define, the Tribunal looked to Article I(2)(a) of the Jordan–Turkey BIT which provided that a 'claim to money' was a discrete investment, separate from the investment which gave rise to it.[70] The question remained as to whether 'an arbitral award in itself qualifies as a claim to money'. Like *Saipem v Bangladesh*, the *ATA* Tribunal refrained from deciding this question directly and instead noted that—if the *ratione temporis* could be defeated—the FIDIC award would be part of an 'entire operation' that qualifies as an investment.[71] In this respect, the *ATA* Tribunal aligned itself with the *Saipem v Bangladesh* Tribunal.

Next, the Tribunal considered the Respondent's jurisdictional objections in relation to the extinguishment of the arbitration agreement. Namely, the Tribunal considered whether there was an investment and whether it was barred *ratione temporis*. With regard to the first question, the Tribunal observed that the extinguishment of the arbitration agreement amounted to the extinguishment of the 'right to arbitrate'. This was because, after the annulment of the FIDIC Award, ATA would have been entitled to initiate another arbitration both under the New York Convention (to which both Jordan and Turkey were parties) and under the old Jordanian Law, which was in force when the original contract was concluded in 1998.[72] The Tribunal determined that the 'right to arbitrate' was a distinct 'investment' pursuant to the BIT as it fell clearly within the Article I(2)(a)(ii) definition: ie 'claims to money or any other rights to legitimate performance having financial value related to an investment'.[73]

With regard to the second question, the Tribunal noted that the right to arbitrate was extinguished by the Court of Cassation on 16 January 2007 and not through the enactment of the Jordanian Arbitration Law 2001.[74] Here, the Tribunal focused on the discretion of the Jordanian courts. In particular, it held that:

> [t]he Court of Cassation could have exempted the Claimant from the operation of this new law. As a result, this part of the decision of the Court of Cassation, occurring, as it

[67] *ATA* (n 10) paras 95, 103.
[68] ibid.
[69] ibid para 110.
[70] ibid para 111.
[71] ibid paras 113ff.
[72] ibid para 116.
[73] ibid para 117.
[74] ibid.

> does, after the entry into force of the BIT and distinct from the underlying investment, is not barred *ratione temporis* and falls within the Tribunal's jurisdiction because the right to arbitrate was never in contention until the annulment whereupon the Court of Cassation extinguished that right.[75]

Having so established its jurisdiction insofar as the extinguishment of arbitral clause claims, the Tribunal moved on to the merits. It found that the retroactive application of the Jordanian Arbitration Law 2001 to extinguish a valid right 'deprived an investor such as the Claimant of a valuable asset in violation of the Treaty's investment protections'.[76] More specifically, the Tribunal had a problem with the Jordanian courts' retroactivity and found that it contravened Jordan's BIT obligation to accord ATA's investment fair and equitable treatment.[77] Having found the extinguishment to be unlawful, the Tribunal turned to the question of reparation. It found that the single remedy which would offer adequate and effective relief was to restore ATA's right to arbitrate.[78] Thus, it ordered the immediate and unconditional termination of the proceedings at the Jordanian Court of First Instance and restoration of the Claimant's right to arbitrate under the original 1998 agreement.[79]

The *ATA v Jordan* Decision reinforces the Decision of the *Saipem* Tribunal as to the liability of States which interfere with arbitral rights and lawfully obtained arbitral awards. Such liability would normally entitle an award creditor to initiate ICSID or other investment treaty arbitration. It is also worth noting that both the *Saipem* and the *ATA* Tribunals consider an award 'as an aspect of the 'entire operation' for purposes of deciding whether there had been an investment for the purposes of'[80] the relevant treaty. In addition, the *ATA* Tribunal made clear that the right to arbitrate (ie the non-statutory extinction of the right to arbitration) was a 'distinct' investment in that it had financial value related to an investment.[81]

C. *GEA Group Aktiengesellschaft v Ukraine*

GEA Group v Ukraine[82] took a slightly different approach when considering whether a commercial arbitration award qualifies as an investment in the sense of investment arbitration (and treaties). The dispute in this case stemmed from a settlement agreement and repayment agreement whereby Oriana, a Ukrainian

[75] ibid para 118.
[76] ibid para 126.
[77] This obligation was derived from the preamble of the BIT which provided 'that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources'. The Tribunal also noted that 'by virtue of Article II(2) of the Treaty (the "MFN" clause), the Respondent has assumed the obligation to accord to the Claimant's investment fair and equitable treatment (see the UK–Jordan BIT) and treatment no less favourable than that required by international law (see the Spain–Jordan BIT).'
[78] ibid paras 129–31.
[79] ibid para 132.
[80] Claypoole (n 51).
[81] *ATA* (n 10) para 117.
[82] *GEA Group* (n 10). See also comments and story coverage by Luke Eric Peters[illegible] 'German Firm Sues Ukraine under BIT: Claimant Complains or Failure to Enforce ICC Arbitral Award and O[illegible]reaches' <www.iareporter.com/articles/20090929_33/print>; Luke Eric Peterson, 'Analysis: Tribunal Ruling in *GEA v Ukraine* Offers Contrast to Earlier ICSID Arbitration Where Non-Enforcement of Arbitral Award Was [illegible]ue' <www.iareporter.com/articles/20110414_1/print>; Claypole (n 51). See also Leonila Guglya, 'Internati[illegible]Review of Decisions Concerning Recognition and Enforcement of Foreign Arbitral Award: A Threat to the Sovereignty of the States or an Overestimated Hazard (so far)? (With Emphasis on the Developments within the International Investment Arbitration Setting) (April 1, 2011)' (2011) 2 Czech Ybk Intl L 93 <http://ssrn.com/abstract=1795607> accessed 7 January 2013.

kombinat (a State-owned oil refinery) agreed to compensate KCH, a German chemical company, for its non-performance under a fuel conversion contract.[83] The 1995 contract provided for the supply of naphtha fuel to Oriana for processing, with Oriana receiving a tolling fee. The supply and logistics were organized by the German party, KCH. It was alleged that after an incident in 1998 in which a German inspector was shot in the kneecap, a substantial amount of naphtha in the region of 125,000 tons was missing. The parties following such events negotiated a settlement agreement followed by a repayment agreement according to which Oriana agreed to provide just over US$ 27 million in compensation. Both agreements contained an ICC arbitration clause, with the seat of the arbitration in Vienna.

The Claimant's predecessor, Solvadis, obtained an ICC Award in 2002. The ICC Tribunal found in favour of Solvadis (formerly KCH) and awarded over USD $30 million in primary compensation. On 11 March 2003, Solvadis sought recognition and enforcement of the ICC Award in the Appellate Court of the Ivano-Frankivsk Region of the Ukraine, but its application was rejected by the Court, which found the repayment agreement to have been concluded by unauthorized persons and thus invalid. Solvadis then filed a complaint with the Supreme Court of Ukraine, but to no avail. Alongside the enforcement proceedings, Solvadis also attempted to claim under the ICC Award in bankruptcy proceedings brought by a third party against Oriana. Here too, after a number of appeals, Solvadis was unsuccessful. This led GEA Group, the ultimate beneficiary of the ICC Award,[84] to commence ICSID proceedings under the Germany–Ukraine BIT[85] for alleged expropriation, breaches of full protection and security, fair and equitable treatment, arbitrary and discriminatory measures, national treatment and most-favoured nation treatment obligations.

After ruling on GEA's standing,[86] the ICSID Tribunal considered whether GEA made an 'investment' in Ukraine within the meaning and scope of the BIT and the ICSID Convention. The Tribunal considered this question in relation to (i) the conversion contract, together with the property rights and products delivered under that contract; (ii) the settlement agreement, together with the repayment agreement; and (iii) the ICC Award, on its own.[87] It found that neither (ii) the settlement agreement nor (iii) the ICC Award could, in and of themselves, constitute 'investments'.[88]

With respect to the ICC Award, the Tribunal did not find the reasoning of the *Saipem* Tribunal persuasive, noting that 'the Tribunal made statements that are

[83] The Tribunal described this 'complex' contractual relationship as entailing 'a contribution in kind, in the form of over one million metric tons of diesel and naphtha, catalysts and other materials, delivered to Ukraine as part of a broad economic operation, as well as the contribution of the Claimant's know-how on logistics, marketing, and the mobilisation of repairs and other services'.

[84] On 28 June 2004 (after Solvadis's cassation complaint was rejected in the enforcement proceedings, but before its final appeal was rejected in the bankruptcy proceedings), Solvadis assigned all of its rights deriving from the business with Oriana to GEA (then known as MG Technologies AG).

[85] Agreement between the Federal Republic of Germany and Ukraine on the Promotion and Mutual Protection of Investments (signed 15 February 1993).

[86] *GEA Group* (n 10) paras 94–125.

[87] ibid para 145. The Tribunal noted that these three 'categories' of investment could be identified from the Claimant's description of its investment, ie the 'contractual and property rights under the Conversion Contract, "formalised in the settlement agreement and the repayment agreement with respect to the amounts that are at dispute, and ultimately ... crystallised in the ICC award"' (ibid para 144).

[88] ibid paras 157, 161.

difficult to reconcile'.[89] It held that the ICC Award was nothing more than 'a legal instrument, which provides for the disposition of rights and obligations arising out of the Settlement Agreement and Repayment Agreement (neither of which was itself an "investment")'.[90] It further maintained that even if the settlement and repayment agreements could be characterized as investments or the Award itself could be characterized as directly arising out of the conversion contract or the products (which the Tribunal did consider an investment within the meaning of the BIT),[91] GEA's claims with regard to the Award were bound to fail. The Tribunal observed that:

> the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal's view, the two remain analytically distinct, and the Award itself involves no contribution to, or relevant economic activity within, Ukraine such as to fall—*itself*—within the scope of Article 1(1) of the BIT or (if needed) Article 25 of the ICSID Convention.[92]

As mentioned above, the Tribunal acknowledged that the Claimant made at least some 'investment' in Ukraine (ie the conversion contract, together with the property rights and products delivered under that contract) and thus considered the merits of GEA's claims. Although in the end the Tribunal was unable to find any liability on the part of the Respondent, for the sake of completeness it did offer some analysis in relation to GEA's claims relating to the ICC Award.[93]

In relation to the Claimant's assertion that the Ukrainian courts' refusal to recognize the ICC Award is tantamount to an expropriation, the Tribunal found that this claim must fail. The Tribunal noted that while it may have been able to prove expropriation in *Saipem*, a similar finding was not appropriate in this case.[94] In particular, the Tribunal found that:

> [e]ven assuming (contrary to its earlier finding) that the ICC Award could somehow qualify as an 'investment', the Claimant has provided the Tribunal with no reason to believe that the courts of Ukraine were 'applying a discriminatory law', only that the Ukrainian courts came to a conclusion different to that which GEA had hoped. Moreover, contrary to *Saipem*, the Tribunal has been presented with no evidence that the actions taken by the Ukrainian courts were 'egregious' in any way; that they amounted to anything other than the application of Ukrainian law; or that they were somehow deliberately taken to thwart GEA's ability to recover on the ICC Award.[95]

Similarly, the Tribunal was unable to find sympathy with GEA's denial of justice claim that the Ukrainian courts refused enforcement of the Award without taking the Claimant's arguments into account. It held that GEA did not produce sufficient evidence to this effect and that it instead 'appears from the record that the courts took the Claimant's arguments into account and simply rejected

[89] ibid para 163.
[90] ibid para 161.
[91] ibid paras 146–53.
[92] ibid para 162.
[93] ibid para 206.
[94] ibid para 234.
[95] ibid para 236.

them'.[96] Referring to the *Mondev* test,[97] the Tribunal concluded that by having regard to 'generally accepted standards of the administration of justice', it did not have any 'justified concerns as to the judicial propriety of the outcome' with respect to the Ukrainian courts' decisions, and as there was nothing 'clearly improper and discreditable' with these decisions, it rejected the GEA's claims.[98]

With *GEA Group v Ukraine*, we record a different side of the argument, a slightly narrower definition of 'investment' (in that the economic development element of the definition is deemed an essential element) and a refusal to allow investment arbitration proceedings for failure to enforce and possibly local law and courts' interference with enforcement proceedings. The approach of the Tribunal was labelled as a 'belts and suspenders' one, in that the Tribunal analysed certain merits claims despite finding it lacked jurisdiction over them.[99] The Award is a useful counter-balance to the *Saipem* and *ATA* cases.

D. *White Industries Australia Limited v The Republic of India*

Our final case dealing with investment treaty implications of the non-enforcement of an arbitral award is *White Industries v India*.[100] In this case, the Claimant, an Australian mining company, initiated UNCITRAL arbitration proceedings under the Australia–India BIT[101] in relation to delays by the Indian courts in the enforcement of an ICC Award. The original ICC Award arose out a contract entered into by White with Coal India, an Indian State-owned and controlled company, for the supply of equipment to and development of a coalmine in Piparwar, India. The commercial relationship broke down and White filed a request for arbitration in 1999. In May 2002, the ICC Tribunal seated in Paris rendered an Award in favour of White.

In September 2002, Coal India applied to the Calcutta High Court to have the Award set aside while White applied to the Delhi High Court for enforcement. After receiving notice of the setting aside proceedings, White petitioned the Supreme Court of India to transfer Coal India's application to the Delhi High Court. Proceedings in Calcutta were stayed and the transfer petition was heard in January 2003. The transfer petition was eventually withdrawn and proceedings continued in the lower courts. In Delhi, after what can be described as a 'less than ideal' procedural history,[102] Coal India successfully petitioned in March 2003 for a stay of

[96] ibid para 318.

[97] *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, paras 126–7ff (11 October 2002). The *Mondev* Tribunal presented an extended discussion on denial of justice as related to domestic judicial attitudes and presented a denial of justice test in paras 126ff.

[98] *GEA Group* (n 10) para 319.

[99] Petersen (n 3)

[100] *White Indus* n 10). See also Rishab Gupta and Luke Eric Peterson, 'India Sued by Foreign Investor for Investment Treaty Breach; Complaint s from Willingness of Indian Courts to Consider Set-Aside of an Earlier Commercial Arbitration Ruling' w.iareporter.com/articles/20110707_2/print>; Jasmine Joseph and Badrinath Srinivasan, Comments on the A in White Industries Investment Arbitration Against India *Practical Academic* blog, 17 February 2012 <http://practicalacademic.blogspot.co.uk/2012/02/comments-on-award-in-white-industries.html>; Joanne Greenaway, 'Does Investment Arbitration Pro or a Second Bite at the Cherry?' *Kluwer Arbitration Blog*, 28 March 2012 <www.kluwerarbitrationblog.com>; bhash Ranjan, 'The White Industries Arbitration: Implications for India's Investment Treaty Program' *Investment Treaty News*, 13 April 2012 <www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/> accessed 7 January 2013.

[101] Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments (signed 26 February 1999, entered into force 4 May 2000).

[102] *White Industries* (n 10) para 7.4.1.

the enforcement proceedings pending disposal of the setting aside proceedings in Calcutta. In Calcutta, White sought to have Coal India's setting aside application struck out on the basis that the Indian courts lacked the jurisdiction to take on such applications in respect of foreign awards. White's application was rejected by the Calcutta High Court, which was subsequently upheld by the Appellate Division in May 2004. White then appealed to the Supreme Court of India.

By 2010, neither the appeal nor the enforcement proceedings had been heard, which prompted White to initiate UNCITRAL arbitration proceedings against India. In particular, White contested that India had effectively expropriated its investment under Article 7 of the BIT, failed to afford fair and equitable treatment to its investment pursuant to Article 3(2), failed to encourage and promote favourable conditions for investors from Australia under Article 3(1) and failed to provide effective means of asserting claims and enforcing rights with respect to its investment.

The UNCITRAL Tribunal began by considering whether White had an 'investment' pursuant to Article 1 of the BIT. It acknowledged that a 'double-check' (ie establishment of an 'investment' under both the ICSID Convention and the BIT) was not necessary in this case, but found that the *Salini* test[103] was satisfied in any event. After finding that the definition of 'investment' in the BIT would 'clearly include White's rights under the Contract',[104] the Tribunal considered White's rights under the ICC Award. Agreeing with the *Saipem* Tribunal, the Tribunal concluded that:

> rights under the Award constitute part of White's original investment (i.e., being a crystallisation of its rights under the Contract) and, as such, are subject to such protection as is afforded to investments by the BIT.[105]

In doing so, the Tribunal considered the recent Decision in *GEA Group v Ukraine* cited by India in support of its argument that rights pursuant to the Award are not a covered investment for the purposes of the BIT. The Tribunal found that:

> the conclusion expressed by the *GEA* Tribunal represents an incorrect departure from the developing jurisprudence on the treatment of arbitral awards to the effect that awards made by tribunals arising out of disputes concerning 'investments' made by 'investors' under BITs represent a continuation or transformation of the original investment.[106]

It noted that such a finding was also in line with the reasoning employed by tribunals in other cases, such as *Mondev International Ltd v United States of America*,[107] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v Republic of Ecuador*[108] and *Frontier Petroleum Services v The Czech Republic*[109] which

[103] See *Salini* (n 56) para 52
[104] See *White Industries* (n 16) paras 7.4.1ff.
[105] ibid para 7.6.10.
[106] ibid para 7.6.8.
[107] *Mondev International Ltd v United States of America*, ICSID Case No ARB(AF)/99/2, Award, (11 October 2002).
[108] *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v Republic of Ecuador*, UNCITRAL, PCA Case No 34877, Interim Award, para 185 (1 December 2008).
[109] *Frontier Petroleum Services Ltd v The Czech Republic*, UNCITRAL, Final Award (12 November 2010). In this less known case, the Claimant (Frontier), a Canadian company, had obtained interim and final Awards in Swedish arbitration proceedings against a Czech company (MA). Before the Awards were made, MA had been declared bankrupt. Frontier sought to enforce the Awards in the Czech Republic. However, the Czech courts refused to recognize or enforce the Awards, relying on the public policy exception in Art V(2)(b) of the New York Convention. Frontier claimed that the Czech courts' failure to recognize and enforce the Awards meant that the Czech Republic was in breach of its obligations under the BIT to provide fair and equitable treatment and full protection and security

characterized awards as 'providing protection to the subsisting interests that [the investor] continued to hold in the original investment' rather than an 'investment' in itself.[110]

With respect to the substantive claims, the Tribunal only found force in one of White's arguments, namely, that India failed to provide effective means of asserting claims. Although the Australia–India BIT lacked an effective means provision, the Tribunal found that the obligation (which did exist under the Kuwait–India BIT)[111] could, nevertheless, be incorporated into the BIT through a 'most favoured nation' clause. Applying the effective means standard, the Tribunal first considered the enforcement proceedings in the Delhi High Court. Here, it was held that although White's application for enforcement remained unresolved for more than nine years, it could not be demonstrated that White had taken all available measures to prevent the delay. In particular, the Tribunal was unsatisfied with White's decision not to appeal the Delhi High Court's stay Order. The Tribunal was, however, more sympathetic to White's jurisdictional claims in the setting aside proceedings. The Tribunal concluded that:

> In these circumstances, and even though we have decided that the nine years of proceedings in the set aside application do not amount to a denial of justice, the Tribunal has no difficulty in concluding the Indian judicial system's inability to deal with White's jurisdictional claim in over nine years, and the Supreme Court's inability to deal with White's jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India's voluntarily assumed obligation of providing White with 'effective means' of asserting claims and enforcing rights.[112]

On that basis, the Tribunal considered whether the ICC Award was enforceable under the laws of India, and after it found this to be the case, awarded White full compensation for the loss it suffered as a consequence of India's breach of the BIT. This included not only the amount payable under the ICC Award ($4,085,180) but also interest at a rate of 8 per cent per annum from 24 March 1998, a sum that exceeded the amount of the Award itself.

White Industries v India is the most recent case in what appears to be an emerging trend of foreign investors using remedies under BITs to recover sums owed to them on the basis of international arbitral awards. The process is not a

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to Frontier's investment. It commenced arbitration under the UNCITRAL Rules 1976. The Tribunal dismissed Frontier's claims. It found that the alleged inaction of the Czech courts in relation to the Interim Award did not constitute a failure to properly give effect to that Award. In relation to the Final Award, the Tribunal's role was to determine whether the Czech courts' refusal to recognize and enforce the Final Award in full violated the BIT. Specifically, was the Czech courts' refusal made in an arbitrary or discriminatory manner or did it otherwise amount to a breach of the fair and equitable treatment principles? The Tribunal found that equality of creditors in bankruptcy proceedings and equitable distribution of assets were well-established public policy principles sufficient to refuse enforcement of awards under the New York Convention. Furthermore, there was no evidence that the Czech courts had acted arbitrarily, discriminatorily or in bad faith. It would be against public policy to afford special status and preferentially satisfy Frontier's claim to the detriment of other creditors.

[110] *White Industries* (n 10) para 7.6.8, fn 41 with reference to *Chevron* (n 108), para 185; *Mondev* (n 107) para 81.

[111] Agreement between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investments (signed 27 November 2001). In particular, Art 4(5) provides:

> Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide *effective means of asserting claims and enforcing rights* with respect to investments... (emphasis added).

[112] *White Industries* (n 10) para 11.4.19.

quick or an inexpensive one but in this case the Claimant was motivated by the fact that nine years had lapsed trying to enforce the ICC Award so that a denial of justice in breach of the fair and equitable treatment principle was quite convincing. This was compounded by what the UNCITRAL Tribunal saw as a failure to comply with the international legal obligation to enforce an arbitral award stemming from the New York Convention. It is aptly commented that the *White Industries* decision is:

> something of a double edged sword. On the one hand it provides a remedy of last resort to investors . . . in countries . . . where judicial interference in the enforcement of arbitral awards is commonplace. . . . It builds on the decisions in the cases of Saipem . . . and more recently . . . Chevron Corporation (USA) and Texaco Petroleum Company (USA) v Republic of. . . . However, it is unlikely to open floodgates for claims relating to delays in enforcement.[113]

IV. CONCLUDING REMARKS

The continuing importance and resonance of arbitration relies heavily, if not exclusively, on the enforceability of arbitral awards. A 'victory' in arbitration will be pyrrhic if its outcome cannot be enforced or voluntarily complied with. As we have seen, the vast majority of cases, typically in the region of ninety percent, see voluntary compliance with awards. To a large extent this justifies arbitration as a self-standing jurisdiction, or even an alternative juridical system.

In those instances where awards are not voluntarily complied with, more often than not the assistance of national courts will be sought and judicial enforcement is a second best alternative. Judicial assistance for enforcement purposes is generally a well-established and mostly well-functioning system thanks to the New York Convention. However, on occasion, the system may by tedious, long and subject to national or local law and court peculiarities, leaving a frustrating aftertaste. The New York Convention does not harmonize national court procedures and hence its application may occasionally be affected or even become hostage to domestic court practices and relevance of local procedural laws.

When international arbitration interacts with national courts there is potentially an increased (and sadly in some rare instances immeasurable) legal risk that things may not develop exactly the way in which the prevailing party in arbitration (and award creditor) had expected. Consequently, certain alternatives have been developed, such as a post-arbitration settlement, transfer (or assignment) of the arbitral award of sale of the award. Arbitral awards offer tangible economic (even if not monetary) value, as they can embody real value and function as an asset in the context of business negotiations and between the parties or parties and funders.

An emerging and legally potent alternative to enforcement via national courts (or alternatives to judicial enforcement), especially when national courts are not particularly arbitration friendly or supportive of actions brought by foreign parties, is the substantiation of a claim on the basis of the ICSID Convention or BITs. In such cases, a serious or at least reasonable attempt must first be made to have the award (typically a commercial arbitration award) enforced via the national courts. What

[113] Greenaway (n 100).

remains then (as a guidance question) is to appreciate when non-enforcement may be seen as triggering investment protection under investment treaties.

In order to resort to investment protection it is essential to establish (i) whether an arbitral award (which functionally is equated to a local court judgment, irrespective of where it was made) is an investment, and if not, to explore (ii) whether the undue and possibly unlawful judicial inaction or interference may qualify as expropriation or denial of justice consistent with the fair and equitable standard entrenched in most BITs and in customary international law where relevant. In this regard there is a peculiar, and possibly unintended, interaction of commercial arbitration and investment treaty arbitration.

The case law stemming from investment treaty tribunals is reviewed above and shows that the practice is inconsistent but with a trend creeping, if not emerging. Four cases, *Saipem v Bangladesh*, *ATA v Jordan*, *White Industries v India* and *Chevron and Texaco v Ecuador*[114] go in one direction, while two cases, *GEA v Ukraine* and to a large extent *Frontier Petroleum Services v Czech Republic*[115] go in a different direction. Of course, the specific fact patterns and relevant treaties as well as State practices are always relevant, so details and nuances are critical. However, certain principles can be established by looking at the cases.

The key question is whether an arbitration agreement and/or an arbitral award can be deemed an investment capable of protection in accordance with a BIT. States, in their defence to investment treaty claims, argue that an award cannot be seen as an 'investment' in the context of Article 25 of the ICSID Convention, and arguably most BITs.

The *Saipem* Tribunal emphasized that in order to establish whether an 'investment' exists pursuant to the *Salini* test,[116] one has to take into account the whole operation of the foreign company rather than the Award or the arbitration agreement. It found that the entire operation also met the requirements of the broad definition of the relevant BIT. In relation to the BIT definition, the Tribunal confirmed that any kind or property can qualify as investment and the award functions or may function as property, as an asset. The *ATA* Tribunal took a similar approach, looking at the Award as a part and parcel of the entire operation in the host State and confirmed that it can be considered in order to establish jurisdiction under the relevant BIT and the ICSID Convention.

[114] This already almost iconic case deserv[illegible]alysis in a separate article as it has several facets and many instances in arbitration and various national courts. See <http://italaw.com/cases/257> accessed 7 January 2013, for many but not all instan[illegible]

[115] See n 11[illegible]

[116] According to the *Salini* Tribunal, for an investment to qualify under Art 25 of the ICSID Convention, the investment must: (i) be a substantial commitment, (ii) associated with risk, (iii) have certain (longer) duration, (iv) bring with it a regularity of profit and return and (v) contribute to the economic development of the host State. See substantial writings on the topic, including, eg Crina M Baltag, 'Precedent on Notion of Investment: ICSID Award in *MHS v Malaysia*' (2007) 4 TDM 2; Walid Ben Hamida, 'Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control' (2007) 24 J Intl Arb 287, 289; Christoper F Dugan et al, *Investor–State Arbitration* (Oxford University Press 2008) 257ff; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press 2008) 69; Martin Endicott, 'The Definition of Investment in ICSID Arbitration: Development Lessons for the WTO?' in Markus Gehring and Marie-Claire Segger (eds), *Sustainable Development in World Trade Law* (Kluwer Law International 2005) 379; Emm[illegible] Gaillard, 'Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice' in [illegible]inder et al (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 403; Devashish Krishan, 'A Notion of ICSID Investment' in Todd Weiler (ed), *Investment Treaty Arbitration and International Law* (JurisNet 2008) 61; Sébastien Manciaux, 'The Notion of Investment: New Controversies' (2008) 9 J World Investment & Trade 1.

The *GEA v Ukraine* Tribunal took a different approach. Although it did accept that the conversion contract could qualify as an investment, the settlement and repayment agreements did not constitute investments under the relevant BIT or the ICSID Convention. The Tribunal further found that the ICC Award could not itself qualify as investment: it is a 'legal instrument which provides for the disposition of rights and obligations'.[117] It also added that the Award could not be an investment because it is the outcome (or offspring) of the settlement and repayment agreements which it found are not investments. The Tribunal went further to point out that it could not reconcile the approach adopted by the *Saipem* and *ATA* Tribunals.

The *Frontier Petroleum Services* Tribunal adopted a mixed (or nuanced) approach. As it was an UNCITRAL Tribunal, it did not have to examine jurisdiction under Article 25 of the ICSID Convention; it only considered the relevant BIT. It found that the Award did constitute an investment for purposes of the BIT, pointing out that the original investment was 'transformed into an entitlement to a first secured charge in the Final Award'.[118]

All of these cases, as well as *White Industries*, clearly indicate that wrongful judicial inaction or a potentially unlawful judicial interference with the arbitral process may trigger investment protection under BITs and the ICSID Convention. It seems that the most typical case will be denial of justice consistent with the fair and equitable treatment standard. Of course, expropriation may also be argued but it will not always be easy to prove. In most cases, however, non-enforcement of an award based on grounds provided for in the New York Convention where an additional denial of justice claim cannot be substantiated will not be sufficient to trigger investment treaty protection. As an exception, the *Frontier Petroleum Services* Tribunal looked at the issue of the New York Convention and, instead of denial of justice, fair and equitable treatment and expropriation, examined the question of full protection and security. The Tribunal in examining all these issues also assessed the lawfulness or unlawfulness of the actions and conduct of the State.

A mere dissatisfaction of the party seeking protection with the decision of national courts will not suffice for investment treaty arbitration. If the decision of the national court is tenable (or simply arguable) and there is no evidence of discriminatory treatment, arbitrariness, abuse of rights or bad faith, then there is no scope for introduction of investment treaty protection. In some cases the conduct of the State will amount to abuse of rights. These assessments as to abuse of rights or denial of justice will be done on the basis of international law.

Despite the inconsistencies[119] of the Awards discussed above, there seems to be a clear trend supporting the proposition that investment treaty arbitration provides an additional forum or an *ultimum refugium* remedy to investors where there has been judicial interference with the arbitral process and/or the arbitral award. It appears that invariably five conditions will need to be fulfilled:

(i) The jurisdiction of investment arbitration tribunals will have to be based on relevant BITs and/or the ICSID Convention which in the case of the BITs

[117] *GEA* (n 10) para 161.
[118] *Frontier Petroleum* (n 109) para 231.
[119] See also the discussion in Claypoole (n 51) passim.

will have to include sufficiently broad language to accommodate such claims.

(ii) The investment arbitration tribunal will have to establish that the State interference with the award will be subsumed in the relevant definition of 'investment' in the BIT.

(iii) Judicial interference may include unlawful, systemic judicial inaction which may violate legitimate expectations of award creditors.

(iv) In all cases the judicial attitude should not be tenable, even if arguable and should typically be abusive, discriminatory, arbitrary or in bad faith.

(v) The assessment of State conduct, be it expropriation or denial of justice or full protection and security, will have to satisfy the standards prevalent in the relevant treaty and/or customary international law.

It is worth noting that all these cases have been considered in the last few years with a slight increasing trend. Linking the destiny of commercial arbitration outcomes with foreign investment protection and investment treaty arbitration is an intriguing proposition with consequences which are not yet easy to ascertain fully. So far, investment tribunals have shown reason and restraint and have treaded very carefully.

What it is clear so far (and an undisputed conclusion to draw) is that the mere non-enforcement of commercial arbitration awards would not automatically pull the trigger of investment protection. For investment treaty protection to be activated it is important that claimants link the non-enforcement with unlawful conduct of the State (judicial or other authorities) and are able to prove that such conduct would amount either to denial of justice (and treatment which is unfair and inequitable) and in some cases indicative of absence of full protection and security or even expropriation. Investment treaty tribunals will examine their jurisdiction in the usual way and, in the case of ICSID arbitration, they will also have to satisfy themselves that the conditions of Article 25 of the ICSID Convention are also met. In other words, investment treaty arbitration will not normally provide for an additional 'instance' in the enforcement process of commercial awards, but may well provide a remedy in case a State judicial authority either refuses to enforce or otherwise fails to take any action to enforce an arbitral award in a way that is arbitrary, discriminatory, in bad faith and possibly amounting to an abuse of right. It is a high threshold which is necessary in order to enhance protection under BITs and the ICSID Convention.