

# ITA Workshop on Modern Enforcement of Arbitral Awards—Keynote Address

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The keynote speaker at this year's ITA Annual Workshop was the Honorable Bernardo Sepúlveda-Amor. Judge Sepúlveda-Amor is Vice President of the International Court of Justice and a professor of international law at El Colegio de México. He has previously served on the United Nations International Law Commission, as Mexico's Secretary of Foreign Affairs, and as its Ambassador to the United States and the United Kingdom.

Judge Sepúlveda-Amor shared his perspectives on the relationship between the enforcement of international arbitral awards and State responsibility under international treaties. Several tribunals, he explained, have held States responsible for failure to enforce arbitral awards, typically under the applicable bilateral investment treaty ("BIT") or similar treaty. There are a variety of mechanisms available to a State seeking to avoid responsibility. These may include defenses available under customary international law, defenses based on the language of the applicable treaty, annulment of the underlying award by a competent court, and sovereign immunity from either the underlying action or execution of the judgment. Results vary widely, he noted, even when based on the same operative facts.

Judge Sepúlveda-Amor began with a discussion of defenses that may be available to a State based on customary international law norms, particularly those set forth in the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Articles"). Chapter V of the ILC Articles set forth certain "circumstances precluding wrongfulness," which amount to defenses to State responsibility. Tribunals have applied these customary law defenses when a BIT or similar treaty is silent on the availability of a defense, or where the treaty refers to a defense but does not define it fully.

For example, Judge Sepúlveda-Amor noted, the ILC Articles provide that a State's act in violation of its international obligations towards another State are not wrongful where the act constitutes a legitimate countermeasure against the other State. Tribunals have generally agreed that this is an available defense to State responsibility under certain circumstances, but have differed on whether it is available against a non-State claimant. For example, in three NAFTA proceedings brought against Mexico based on its taxation of non-sugar sweeteners, Mexico asserted that its actions were legitimate countermeasures against US actions restricting the importation of Mexican cane sugar. In two of these proceedings, the tribunals concluded that countermeasures could be used only against another State, and could not be raised as a defense to an action brought by a non-State party. In the third, the tribunal concluded that Mexico could raise the defense against a non-State party, but that Mexico's actions did not qualify as permissible countermeasures under the ILC Articles.

Investment tribunals have also referred to customary norms in evaluating the defense of necessity, defined in ILC Article 25. In proceedings arising from Argentina's response to its economic crisis, tribunals have generally concluded that the customary law defense of necessity is available as a means of defeating State responsibility. However, tribunals have disagreed on whether Argentina has met its burden of showing necessity. In particular, tribunals have disagreed on whether the Argentinian economic crisis was a "grave and imminent peril" and whether Argentina's responses were "the only way for the State to safeguard an essential interest," both of which are required elements of the defense of necessity under Article 25.

Customary law defenses, Judge Sepúlveda-Amor explained, may be relevant in investor-state proceedings seeking to hold States responsible for failure to enforce arbitral awards. Parties have brought such actions on a number of theories. Often, the action is premised on an explicit or implicit treaty obligation to comply with and enforce arbitration awards. Parties have also asserted that lack of enforcement amounted to a denial of justice, or to an act of expropriation of contractual rights.

Results of such proceedings have been mixed, but under certain circumstances a refusal to comply with and enforce an arbitral award can create state responsibility. As Judge Sepúlveda-Amor explained, a key question is whether the arbitration award or the underlying economic activity constitutes an "investment" giving rise to jurisdiction under a BIT. In *Romak S.A. v. Republic of Uzbekistan*, for instance, the tribunal concluded that neither the underlying award nor the transaction between the parties was a qualifying investment under the BIT between Switzerland and Uzbekistan. Notably, the tribunal raised the concern that a broad reading of "investment" would effectively create a de facto "new instance of review of State court decisions concerning the enforcement of arbitral awards." Other tribunals have reached different results, concluding that either the Award itself or the underlying economic activity may be an "investment."

Turning to the issue of annulment, Judge Sepúlveda-Amor noted that courts may decline to enforce arbitral awards on the basis that the award has been annulled by a competent court of the arbitral forum. Under certain circumstances, however, courts may enforce awards even after they have been annulled. He observed, for instance, that in *Yukos Capital v. Rosneft*, Dutch courts enforced an award that had been set aside by the Russian courts on the grounds of possible bias.

Sovereign immunity is frequently at issue when a party seeks to hold a State responsible. Although a State that submits to arbitration waives its right to assert sovereign immunity as a bar to the proceedings, the State may still enjoy immunity from execution, depending on the law of the State where enforcement is sought. Some jurisdictions preclude execution on any property belonging to a foreign State. Other jurisdictions apply a more restrictive theory of immunity from execution, often depending on whether the property has a public purpose. Commentators have observed, however, that most of a State's foreign assets are likely to have a public purpose, which can make it very difficult to enforce an award against a foreign State even if it is determined to be responsible.

Judge Sepúlveda-Amor ended with a discussion of the role of the International Court of Justice in enforcing arbitral awards between States. The ICJ has generally declined to serve as a *de facto* appellate body for a merits review of State-to-State arbitrations. For example, in 1960 the ICJ considered a case brought by Honduras against Nicaragua seeking to give effect to a 1906 arbitral award rendered by the King of Spain that defined the border between the two countries. By a vote of 14 to 1, the ICJ held that the award was valid and binding, and it was promptly enforced.

Judge Sepúlveda-Amor has published a paper expanding on his keynote address, which will be available on the conference website.