Immunities: A Forgotten Variable in intra-EU Investment Claims?

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Whenever litigating against states or sovereign entities – or international organisations for that matter – outside of their home jurisdiction there is a roadblock to consider: immunities. On closer inspection, immunities turn out as two roadblocks: immunity from jurisdiction and immunity from enforcement. Whereas the general assumption is that an agreement to arbitrate waives immunity from jurisdiction, immunity from enforcement is a common obstacle to cashing in on an award (as demonstrated by the struggles many investors faced trying to enforce awards in the Argentinian cases or the lengthy collection battle in *Walter Bau v. Thailand*).

The issue is rarely if ever mentioned in the recent discussions on investor-state dispute settlement reform, let alone in the intra-EU BIT debate. In a nutshell, the European Commission's position on intra-EU BITs assumes that its Member States consist of advanced legal systems, free from bias towards foreign litigants from other member states. This does not take into account the difficulties associated with challenging exercises of governmental authority such as legislation within the host state, particularly for foreigners. But what if that state suddenly decides to change its legislation on remedies all together (a concern already voiced by the IBA in its 2015 fact-correcting statement on ISDS)? In an integrated European legal system, could the disappointed investor take the case to court in the safety of her

own home state?

Immunity from Jurisdiction

The rationale behind immunities is the sovereign equality of states: no sovereign shall come before the courts of another (exemplified by the Latin phrase *par in parem non habet imperium* that equals cannot exercise power over one another). Following the doctrine of absolute immunity – as some states, *e.g.* China, still seem to do – immunity means exactly that. However, the majority view has shifted towards relative immunity when it comes to immunity from jurisdiction, meaning that commercial acts (*acta iure gestionis*) are, as a general rule, not covered, as opposed to acts through which states exercise governmental authority (*acta iure imperii*). But this only transposes the issue to the determination of what constitutes commercial activity. With exceptions (for a compilation of practice see here), domestic courts tend to make this call based on the nature of an act, as opposed to its purpose (contrary to immunity from enforcement, see below).

The 2004 United Nations Convention on Jurisdictional Immunities of States and their Property could provide greater clarity at the international level, including a tort exception, but is not in force. The 1972 European Convention on State Immunity is only in force in eight states: Austria, Belgium, Cyprus, Germany, Luxembourg, The Netherlands, Switzerland, and the United Kingdom. This includes six EU Member States to which the potpourri of exceptions to immunity from jurisdiction applies in claims relating to each other. In all other instances, customary international law applies.

Additional Hurdles: Service of Process

Irrespective of these larger questions, the issue of litigating a foreign state starts with the service of process upon it. This usually involves diplomatic channels, including both the home and the host state's foreign ministry. This can prove time-consuming and formalistic, often requiring a strict order of hierarchical steps and translations of multiple documents. The gut instinct to attempt service on a foreign state's embassy might easily backfire (as exemplified by the US Supreme Court case *Republic of Sudan v. Harrison et al*). For 76 states, the 1965 Hague Service

Convention may provide guidance for the service of process from one contracting state to another. It requires the designation of Central Authorities for that purpose. However, under Article 13 a state "*may refuse to comply* [...] *if it deems that compliance would infringe its sovereignty or security*".

Additional Hurdles: Recognition

Once a decision is to be enforced in a foreign state, it must, as a general rule, be recognized and declared enforceable by the domestic courts of that state prior to actual enforcement measures such as attachment of assets. If no specific framework allowing for privileged recognition and enforcement exists, asset gathering might already fail simply because the relevant decision is not recognised or is not declared enforceable in the target state.

The issue of recognition and enforceability is, of course, less problematic with respect to court decisions subject to the Brussels 1a Regulation (or similar international treaties), as it would be for arbitral awards rendered under the ICSID framework or commercial awards subject to the New York Convention (or the European Convention): Pursuant to Article 53 of the ICSID Convention an ICSID award is binding on the parties and its monetary obligations are enforceable from the moment the award is rendered. Furthermore, pursuant to Article 54(1) of the ICSID Convention, each contracting state must recognize and enforce an ICSID award as if it were a final judgment of its own courts. Article 54(2) then provides that the party seeking recognition and enforcement furnish a certified copy of the award to the court or other authority designated by the relevant contracting state. For states which have acceded to the New York Convention the procedure of recognition and enforcement is governed by said convention.

Immunity from Enforcement

Yet even if the decision is recognized and accepted as an enforcement title, assets owned by foreign states (and sometimes also state-owned enterprises) can be exempt by the second roadblock that is immunity from enforcement: Whether this is the case will typically depend on the purpose for which the asset is used. Generally, those serving "governmental" activities are excluded (*e.g.*, real estate

used for diplomatic or consular purposes, including private residences, or such vehicles). Assets which are used for purely commercial activities are not immune from enforcement. Some jurisdictions require a sufficiently close connection between the claim and the forum state and immunity can also extend to "mixed use assets". The Austrian Supreme Court held, for example, that the account of a foreign embassy with an Austrian bank that is also used for payments in relation to the performance of governmental activities is immune from enforcement measures in Austria. Article 19 of the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property requires that the assets be within the forum state. Article 23 of the 1972 European Convention on State Immunity only allows enforcement in case of an express waiver in writing. Irrespective of applicability of this treaty, some jurisdictions require that such a waiver also be specific (as discussed on this blog and as Argentina had prominently argued in the *ARA Libertad* case, para 41).

If the investor is not able to conduct enforcement proceedings against the host state in another state due to immunities, the only path left is diplomatic protection, which is not a subjective right (although domestic legal systems may include provisions to that extent) and puts the proceedings out of the hand of the investor entirely (with payments awarded to the state, even if they should eventually end up in the pockets of the injured person, as the ICJ suggested in its 2012 *Diallo* decision, para 57). Investors would be subject to the good will of their home states. It is not clear how this result should be beneficial to an international rules-based order.

Towards an Honest ISDS Reform Debate

Immunities in the broader sense have been considered by the Secretariat of UNCITRAL Working Group III with regard to the status of a possible standing mechanism and its members (here, para 55, here, para 65, and here, para 83) or of an advisory centre on international investment law (here, para 65). The Report of the Working Group of its 38th session resumed in January 2020 flags the issue of immunity from enforcement, holding that 'attention should be given to the assets of a State that would be subject to enforcement as well as issues relating to State immunity' and that 'reference was made to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (which applied to the

immunity of a State and its property from the jurisdiction of the courts of another State) and article 55 of the ICSID Convention' (see here, para 66). At the beginning of the session, the Chair pointed to the view that enforceability was 'one of the most significant benefits' of the current ISDS system (see the audio recording of the meeting on 20 January 2020 at 23.51) and a number of delegations addressed the issue of immunities in this regard (see the audio recording of the meeting on 22 January 2020). Morocco proceeded to reiterate in a written submission that enforcement should follow the 2004 United Nations Convention.

Apart from these considerations, the issue of immunity in its entire scope has not been prioritised in the discussion, nor have any of the additional hurdles. An honest ISDS reform debate must also consider the issue of immunities, an issue that equally persists within the Union. By excluding a separate legal remedy for intra-EU investments, the investor will most probably end up before the courts of the host or home state. A layer of international dispute settlement would be shed to reveal more sovereignty. While immunities are an unlikely danger for the autonomy of the EU legal order, as was the concern of the Court of Justice of the European Union in its *Achmea* decision, they will not promote an "ever closer Union". If intra-EU BITs are unnecessary in a single market, why are immunities?