Chapter Twelve

The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards against States

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I. Introduction

As a rule States comply with investment awards. Yet, in some cases, the enforcement of such awards has proved to be difficult. This contribution focuses on the interaction between judicial and non-judicial means of enforcing investment awards. Specifically, it analyses a variety of ‘alternative’ or ‘non-judicial’ means that can be used either as a supplement to the judicial framework for enforcement or on a stand-alone basis, when judicial enforcement has been pursued unsuccessfully.

The broad context of the topic is given by the legal framework governing the enforcement of investment awards. Under the Convention on the Settlement of Investment Disputes between States and Nationals of other States (‘ICSID Convention’) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (‘New York Convention’) investment awards can be enforced before domestic courts through a rather simple mechanism leaving little or no room for review. Yet, when the loosing party is a State, an additional layer of complexity is added to the enforcement


2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159; 4 ILM 532 (1965).

process. Certain assets of the State that are used for a public purpose are covered by the State’s immunity of execution. Some other assets that are not used for a public purpose may also be out of reach if they belong to a separate entity organized by the State for the pursuance of certain economic activities. At a more practical level, the enforcement procedure before the domestic courts of a State may be organized in a way that allows for political interference.

These and other difficulties in enforcing investment awards against States have fostered the development of mechanisms that go beyond the conventional *exequatur*. The analysis of a number of investment cases where enforcement was particularly difficult or (so far) unsuccessful suggests that investors, debt-collection funds, home States, third States, international organizations (IOs) and arbitral institutions have been increasingly engaging in efforts to achieve compliance through the use of alternative, non-judicial means. Such means range from the simple negotiation of a post-award settlement to some of the most intrusive forms of economic or political coercion on the host State to comply or settle. The use of some of these means has been assessed empirically. Others, instead, have received little or no attention. After a brief overview of the basic enforcement framework of investment awards (II), this chapter analyses the potential of several non-judicial means either as a supplement to judicial enforcement or as a full alternative to it (III).

II. Enforcement before Domestic Courts

A. The Basic Legal Framework

There are two distinct regimes governing the enforcement of investment awards. The first regime applies to awards rendered under the aegis of the ICSID Convention, i.e. when both the host State and the investor’s home State are a party to this treaty. All the other cases, including cases governed by the ICSID Additional Facility Rules, are governed by the regime applicable to international commercial arbitration awards. We first discuss the latter regime (a) and then move to the specific regime laid out by the ICSID Convention (b).

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