CHAPTER 11

The Role of the State after an Award is Rendered in Investor-State Arbitration

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11.1 Introduction

A principal State actor in investor-State arbitration is undoubtedly the host State that is a party to the arbitration. Paradoxical though it may sound, this contribution focuses not on the role of the host State in investor-State arbitration, but that of a State other than the host State (a third State). The role of a third State comes to the fore after an arbitral award is rendered. It is axiomatic that an arbitral award is binding on the parties and they are obligated to comply with the award. However, the binding force of an arbitral award does not always secure compliance. Investor-State arbitration is no exception in this regard. As discussed in this chapter, although the vast majority of investment arbitral awards have been complied with,¹ there are some exceptional cases in which the host State does not comply with the award. Neither the investor, nor the arbitral tribunal has the power to enforce the award against the recalcitrant host State. It is a third State that may have such power or may provide some assistance in securing compliance.

Specifically, a third State may have an obligation under a treaty to enforce the arbitral award or may be entitled to seek compliance with the award through an inter-State procedure. The purpose of this contribution is to examine the role of the State as a unilateral enforcer of investment arbitral awards under international law. Problems concerning the principle of foreign State immunity, which may prevent, and has prevented, the effective performance of this role, are examined. The article finally analyzes the role of the State in

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the implementation of investment arbitral awards through an inter-State procedure.

11.2 The State as a Unilateral Enforcer of Investment Arbitral Awards

In a case in which the host State has not voluntarily complied with an arbitral award, the investor may seek to enforce it in a third State. For the purposes of this chapter, it would be useful to analyze separately the enforcement of arbitral awards under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”) and other investment arbitral awards. Article 54 of the ICSID Convention provides for recognition and enforcement of ICSID awards by the courts of a Contracting State, and this provision is considered to be “a distinctive feature of the ICSID Convention.”

11.2.1 ICSID Arbitral Awards

Under Article 53, paragraph 1, of the ICSID Convention:

[t]he award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.4

If any of the parties – generally the host State – does not comply with the award despite its binding force, the other party – generally the investor – may seek enforcement of the award in a Contracting State of the ICSID Convention. Article 54 is then relevant:

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State [...].

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2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 UNTS 159.
4 The relevant provisions are those concerning interpretation, revision and annulment of the award (Articles 50 to 52).