CONCLUSIONS

1. The binding nature of arbitral awards rendered in investment treaty arbitration is usually contained within the BITs. In the specific case of ICSID awards, Article 53 of the Convention itself establishes the obligation of the parties to comply with the terms of the award. This commitment is an international obligation for the State. For this reason, the majority of investment treaty awards are honored voluntarily by the losing party and the enforcement process is not necessary.

However, in the event of refusal to comply, the current network of multilateral treaties, such as New York Convention or ICSID Convention, give to the winning party the possibility of seeking the enforcement in multiple jurisdictions. In this context, it is especially valuable that the ICSID award constitutes a decision in the territory of the Contracting States comparable to a final judgment of a local court, and therefore, not reviewable by local law, although remain subject to any restrictions that may exist in the enforcement of local judgments against a State.

2. The potential for enforcement in third States greatly increases the effectiveness of the awards; it allows the prevailing party to bring judicial pressure to bear in order to compel compensation. In practice, the vast majority of attempts to enforce ICSID awards have been carried out in the territory of States that have not previously been involved in arbitration. In the same way, the enforcement of non ICSID cases in multiple jurisdictions, such as those in *LIAMCO / Libya* or *Gold Reserve / Venezuela*, show the judicial pressure on the debtor and the value of the credibility for the State.

Moreover, this possibility for enforcement is also significant because if the prevailing party in the arbitration was the investor, he

doesn’t have to resort to the courts of the convicted host State, who has shown the intention to not honor the award arising out the arbitration. On the other hand, if the winner in the arbitration was the host State, it may pursue the property of the investor in another jurisdiction where the investor has enough assets. However, the practice has shown that the host State rarely appears as the complainant in ICSID arbitration. This has happend only in three cases so far, namely, Gabon, Peru, and Tanzania. In these three cases, an agreement was reached with the defendant investors. In other cases, in which the defendant host State has been acquitted of the investor's claims, the collection of the arbitration costs imposed on the plaintiff has been problematic, as demonstrated by the ICSID cases related with Turkey against Cementownia, Saba Fakes and Libananco. Notwithstanding, there is no information related with the possible enforcement procedures carried out by the State to recover the arbitration expenses incurred.

3. The application of the *lex fori* to the process of recognition and enforcement of awards also includes, *inter alia*, the rules on State immunity from execution, and this prerogative may be one of the main obstacles to the effectiveness of the award if the losing party in the arbitration has been a State that refuses to voluntarily comply with it. The *travaux préparatories* of the ICSID Convention prove that the issue of immunity was the core of the discussions on the execution of the awards.

4. It has been demonstrated that the possibility of a fast and effective execution of awards is directly proportional to the reliability of international arbitration as mechanism to settle investment protection disputes. Notwithstanding, presently the use of this mechanism is being increasingly questioned on grounds other than legal, but arbitration remains present in the vast majority of International Investment Agreements signed by States.

5. The analysis of comparative law has shown that most of the jurisdictions required to carry out the enforcement of awards have a clear pro-arbitration attitude. However, the judicial practice gener-

ated reflects that even in these forums, attempts to assert the effects of awards have faced important obstacles, both at the stage of recognition and the execution phase.

6. In the United States, the ICSID Convention is codified by the 22 USC §1650a, and unlike the United Kingdom, this implementation law does not refer to the specific procedure by which the party favored by an ICSID award may make it enforceable in a federal court, as required by the US system. Therefore, the problem has arisen to determine whether such a procedure must be contentious or merely an *ex parte* proceeding. Thus, the treatment of an ICSID award may vary depending on where its effects are sought to be enforce. In cases such as *LETCO / Liberia*, *Venezuela Holdings / Venezuela* and *Micula / Romania* filed before the Court of the Southern District of New York, it has been found that an *ex parte* application is sufficient to obtain the recognition of the award and convert it into an executable sentence, equal to State court judgment. However, the same *Micula / Romania* award was filed by one of the investors before the District Court of Columbia, and the court demanded a plenary action, under a contentious procedure that ended up being unfavorable to the investor.

The position assumed in this thesis is that the request to file a plenary action is not appropriate for the enforcement of ICSID awards. This would greatly delay the execution of the award and give the counterparty the opportunity to establish a new defense in accordance with the federal rules of civil procedure. The process of issuance of an Order and Judgment recognizing the executive effects of the ICSID award, under an *ex parte* application, this is the most appropriate according to the objective of the ICSID Convention.

In addition, the equivalence, made by the implementing regulation 22 USC §1650a, of the ICSID awards with a State court judgment could generate a review of the arbitration decision by the Federal District Courts even applying the full faith and credit principle. This review also could be contrary to the purpose of the

Convention, among other things, because it can allow the annulment of the award.

7. In Spain, it has been established, through the practice, that ICSID awards are directly executable by *Tribunales de primera instancia*. However, according to Article 54 (2) of the Convention, the Kingdom of Spain should formally notify the ICSID Secretary of this designation. Spain is the only Contracting State in its environment that has not complied with this obligation. Regarding the non-ICSID awards, it has been observed that although the High Court of Madrid has developed an expansive interpretation of the public policy for review of the awards through annulment action, this position does not exist in the field of enforcement of foreign arbitral awards, which are generally enforced in a short period of time according to the requirements of the New York Convention. This is a trend observed in the rest of the High Courts of the Autonomous Communities.

8. It can be concluded that the position of Argentine Republic position, telling claimants and ICSID *ad hoc* committees that injured investors must resort to Argentina's domestic courts to enforce the awards under Article 54, is not in accordance with the international obligation of compliance assumed by that country in Article 53 of the ICSID Convention. Only when a State has failed to comply with this obligation of Article 53 and remains non-compliant, the investor would have to use the enforcement mechanism provided for in Articles 54 and 55 of the Convention. The obligation under Article 53 to abide by and comply with an award is independent of the enforcement mechanisms provided for in Article 54. For this reason, in most awards rendered under the ICSID Convention, it is not necessary to carry out the enforcement procedure. In addition, an analysis of the negotiating history of Convention shows that the provisions of article 54 were devised as a State's tool against reluctant investors. It was considered that States were already sufficiently bound by the international obligation of compliance provided for in Article 53 of the Convention.

An interpretation of Articles 53 and 54 of the Convention as Argentina proposed imply that awards would only be binding accord-

ing to the domestic legal system of the convicted State, who would have no independent international obligation to comply with. Therefore, it would be sufficient to modify its local procedural rules on enforcement and in this way limiting its liability.

However, it has been proved throughout this investigation that the position of Argentina has undergone a significant change, having signed various agreements with the ICSID awards creditors and hedge funds that had invested in its debt. These agreements demonstrate, on the one hand, the States sovereign bargaining power due to prerogatives such as sovereign immunity and, on the other hand, the value of maintaining its international prestige.

9. As a general rule, it has been demostrated that, except the mistakes committed in the early attempts to recognize the ICSID awards *Benvenuti&Bonfant/Congo* and *SOABI/Senegal* at the French courts, the allegations concerning the immunity from execution of States are not relevant at the stage of recognition and enforcement.

10. The attitude shown by the European Commission in the *Micula / Romania* case would make it likely that attempts to enforce such award in the territory of a Member States could face important obstacles related to public policy. However, beyond the arguments that support a hierarchical supremacy of EU law, the fact is that, the doctrine of imputability allows ruling out the existence of illegal state aid, and it would be hard to argue that Romania's compliance with the ICSID award could be contrary to European public policy and to deny on this basis the effects of the Convention on the territory of a Contracting State. Especially, when the international instrument of ICSID does not establish this ground. It would be a different case if Romania were to reinstate such aid at present and to seek to comply with the award, where a rule of European primary law expressly prevents it.

In any case, these allegations of breach of the EU's public order are irrelevant when the requested State for recognition is not a member of the Union and its main international commitment to the

award is respect for the ICSID Convention, which allows the enforcement in any Contracting State.

11. Although these approaches are firmly accepted with respect to the necessary recognition and enforcement of the ICSID awards, things are different at the execution stage, where ICSID awards are subject to the same restrictions as may exist in the forum related to the enforcement of judgments against a State. In this regard, it has been established that the main procedural obstacles to the adoption of coercive measures against the debtor's assets, are the States immunity from execution and the allegations of separate legal personality.

When the defenses raised by the respondent State make the execution of the ICSID award in the forum procedurally impossible, as would be the case with an internal final local judgment, that circumstance could not be considered as a breach by the requested Contracting State. The ICSID Convention does not establish that Contracting State must execute the award when, under the same circumstances, a final national judgment would not be enforceable either.

12. At the execution phase, it has been demonstrated that State immunity from execution is still the main obstacle to the effectiveness of the award in the event that the losing party in the arbitration is a State and refuses to honor the award. Numerous remedies have been proposed to circumvent the State's immunity. Notwithstanding, customary international law, conventional texts, various national legislation and the reiterated case law of the national courts make clear that the sovereign immunity of States cannot be ignored deliberately.

13. In the particular case of Spain, there is a deep concern related to the efficacy of the awards due to the recent practice that has led to the intervention of the Ministry of Foreign Affairs (MAEC) in those proceedings in which a foreign State has been sued. The cases analyzed have revealed that the content of the MAEC’s reports often

reveala position close to the doctrine of absolute immunity, leading to a greater review of the award by the court, in order to refute MAEC's positions. We recommend that the MAEC take a more respectful stance with the relative conception of State immunity, or, if necessary, that the report requirement be eliminated, in order to achieve a better balance between the international courtesy by the State and the investors right to an effective judicial protection.

14. Several solutions proposed by the doctrine have been taken into consideration: the establishment of a model law on the execution of awards, the inclusion in the Investment Agreements of a waiver of immunity clause, or to hiring insurance. However, the implementation by the States of such model law is highly unlikely in view of the rejection of multilateral agreements on trade and investment. The waiver of immunity via BIT would also be rejected by of the host State. Additionaly, it has also been shown that the local courts don't take into consideration this waiver in reference to assets iure imperii, and therefore such waiver becomes ineffective. At the same time contracting insurance represents a very important additional cost for the investors making it unfesible for small and medium size companies, finally, it is also very difficult to obtain coverage for investment treaty awards, and political risk insurance only covers the book value of the investment, less than its market value. Consequently, none of the proposed solutions are truly effective with regard to State immunity.

The success of the award execution will depend on the forum chosen to carry it out and the treatment of the immunity in this forum, where in any case there should be sufficient debtor assets. The investor should be particulary careful about the appointment of the most suitable assets for the adoption of coercive measures and, once this has been done, to prove that these assets have a iure gestionis purpose. There are certain companies specialized in this task.

French jurisprudence, after the ruling by the Court of Cassation in the *Creigthon / Qatar* case, seems to change its traditional position on the legal autonomy of state- owned companies. The Paris Court of Appeals allowed, in cases where the company was closely

controlled by the debtor State, coercive measures against their property iure gestionis to satisfy the recognized right of the creditors against the State. This is done in accordance with the principle of sovereign immunity, the fulfillment of the agreements and pursuant to the good faith principle.

15. Taking into account that Article 53 of the ICSID Convention and most of BIT provide for compliance with the award as an international obligation for the State, non-compliance with this arbitral decision - whether on the basis of immunity or any other procedural defense - would place the recalcitrant State in a compromised legal position. The success of the State claiming its immunity from execution or, where appropriate, a different legal personality, to breach the award, leads to a significant loss of prestige. In addition, it would entail its international liability for a wrongful act resulting in harm to a foreigner. In this area, the debtor State does not enjoy any type of immunity and in addition, will remain non complaint.

16. In addition to this general regime, the BIT commonly establishes the binding nature of the award and enables the exercise of diplomatic protection in case of non compliance; the same is reinforce by the Article 53 of the ICSID Convention in accordance with Article 27 of the ICSID Convention. Thus, the investor’s State of nationality in the exercise of his diplomatic protection may take measures to persuade the recalcitrant State to comply with the award, involving economic pressures and the possibility of requesting its suspension under the provisions of Article 60.1 of the Vienna Convention on the Law of Treaties of 1969 in case of breach of an international Treaty.

In the event of non-compliance by a State with an ICSID award, the Convention specifically provides for the activation of the mechanisms established in Article 27, relating to the diplomatic protection and in Article 64, with reference to the International Court of Justice, through which the controversy will move to an interstate plane. However, these assumptions imply that the investor loses control of his claim, and should accept the indemnification

agreements that may be concluded by the State of his nationality and the State convicted in the arbitration, which in most cases does not correspond to the reality of the damages suffered. The ICSID membership of the World Bank Group could place the debtor State in a position of difficult access to loans and credits granted by international organizations, which, in addition to economic pressure, could also affect the State's reputation. This is seen as a more effective method of obtaining payments, than the retaliatory measures taken individually by economicaly powerful States. These measures, in addition to affecting the sovereignty of the State against which they are exercised, have in practice demonstrated their ineffectiveness in reaching an agreement by affecting mainly the civilian population of the host State and not its circles of power.

17. Finally, the mechanism for the recognition and execution of ICSID awards, which was devised for use by States against recalcitrant investors, is to be susceptible to improvements that adapt it to the circumstances of the practice it has generated. On one hand, should be established a term during which the award can not be enforced in the Contracting States; and on the other hand, by expanding or improving the system expressly stating that the State has failed to comply with its obligations under the Treaty due to its non-complaint with the award.

Although modifications to the system of recognition and enforcement of awards, which result in its transnational effectiveness and increased voluntary compliance, these do not appear to be a major concern of ICSID, as the issue was ignored in the reforms carried out in 2006. Notwithstanding the current regulation of the Convention has allowed situations in which, one day after notification of the award, the winning investor filed the enforcement proceeding, with the particularity that the award was partially annulled greatly reducing the amount of damages. The establishment of a reasonable waiting period is provided by a lot of procedural legislation, and during the *travaux préparatories* of the Convention, it was a constant concern of the delegates. The establishment of such term is necessary if it is taken into account that in those cases in

which the State is the losing party, it will have to make the relevant treasury or budgetary adjustments, wich per se doesn't imply an intention not to honor the award.

18. While maintaining the obligation to comply with the award once issued (unless execution is suspended), the proposed reform is logical and takes into consideration the singularities of the State entities. This aspect becomes important when it is considered that the mechanism of recognition and enforceability of the award provided for in Article 54.2 of the Convention was devised as a tool to be used against foreign investors, not against States. A mandatory waiting period is what other international instruments are providing for the resolution of investor-state disputes, such as NAFTA or, more recently, CETA, signed between the EU and Canada.

Such a provision should be established in the ICSID system, particulary in the Rules of Arbitration governing the proceedings before the Center. In this legal body, the 2006 reforms were incorporated. In any case, although not with the same degree of uniformity, these provisions establishing a reasonable period of compliance could be incorporated in all those BIT in which the dispute resolution referred to ICSID, and in that contex these international texts should be renegotiated by States.

19. On the other hand, to incorporate such a reform, which would certainly benefit the States, implies a necessary balancing and improvement of the remedies available in the event of State non-compliance with the award. One option could be to make the mechanism by which the State can be declared in breach (with the award and its international obligations) more flexible and streamline. The Convention has provisions in this regard, such as Article 64, which provides for the discretion of the State of the investor nationality to initiate a proceeding before the ICJ against the reluctant State. However, to date, despite numerous cases of States that have not complied with ICSID awards, the process before the ICJ has never been opened.

Other instruments such as the aforementioned NAFTA establish that in the case of refusal of State's refusal to comply with the award, the State of the investor's nationality must request a procedure in which a panel will be constituted to declare the existence of such a breach. Consequently, a more flexible and efficient mechanism in which the State of investor's nationality applies either to the ICJ or, to an *ad hoc* committee, to declare the State non-compliance would greatly improve honoring of the awards, without resorting to other coercive measure.

20. The ICSID has to adapt to the new circumstances and thus update the enforcement mechanism designed to be used by States against reluctant foreign investors. However, to date, the opposite has been true. The establishment of a grace period and the flexibilization of the non-compliance mechanism would constitute an important step (respecting the balance of the parties and the international courtesy), in the improvement of the voluntary compliance of the ICSID's arbitration awards and where appropriate, of its transnational effectiveness, taking into account the value of the States reputation in the international community.