International Investment Law, the Law of State Immunity, and Human Rights: A Case Study in Cross-Regime Analysis as an Instrument of Defragmentation

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Abstract

The present paper analyzes the relationship between international investment law and the law of State immunity as a case study for how international investment law and general international law relate to each other. Comparing these two bodies of law is particularly interesting because it allows to shift the discussion about fragmentation in international investment law from a static to a dynamic and contextual perspective, that is, one that views the relationship between two bodies of international law and the interaction between them in an evolutionary perspective and by focusing on the interests protected by both bodies of law. Furthermore, the relationship between international investment law and the law of State immunity is a good example to illustrate how cross-regime analysis between international investment law and other international legal regimes, in particular human rights law, can be useful to generate insights about how international investment law should be interpreted and applied, and by means of which methods. Thus, the present article shows how proportionality analysis, which is used extensively by the European Court of Human Rights to balance human rights and State immunity, can also be used as a tool of defragmentation in international investment law and of inspiration to clarify the relationship between investment law and the law of State immunity.

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A. Introduction: Towards a Dynamic and Contextual Perspective

The relationship between international investment law and general international law becomes an increasingly important topic. For the general international lawyer, one of the main concerns in this context is the fragmentation of international law, that is, its loss of unity as a system of law which is capable of providing order for international relations.\(^1\) Given the proliferation of international investment treaties\(^2\) and the phenomenal growth of investment treaty arbitrations since the end of the Cold War,\(^3\) one core question becomes not only whether international investment law is itself a system of law,\(^4\) but whether it conforms to, or diverges from, the architecture, methods, notions, and concepts of general international law.\(^5\)

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4. For the argument that international investment law is a proper system of law see Stephan Schill, The Multilateralization of International Investment Law (2009); similarly Santiago Montt, State Liability in Investment Treaty Arbitration (2009) 86 (describing current international investment law as a «BIT system» and proposing to approach it with a new theory: «the BIT generation as a virtual network»).

5. On the relationship between international investment law and general international law see Campbell McLachlan, ‘Investment Treaties and General International Law’ (2008) 58 ICLQ 361; Jürgen Bering et al, General Public International Law and International Investment Law, The International Law Association German Branch, Sub-Committee on Investment Law (2009), at http://www.50yearsofbits.com/docs/0912211342_ILA_Working_Group_III_PIL.pdf. In addition, the relationship between international investment law and other specific areas of international law is of increasing concern. See, for example, Bruno Simma and Theodore Kill, ‘Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology’ in Christina Binder
Determining the relationship between two bodies of international law – one general, one specific – first requires a static snapshot of the present doctrinal interactions of two fields. Regarding the relation between international investment law and the law of State immunity such an approach is rather straightforward: from a doctrinal perspective both areas of international law interlock neatly, thus raising few, if any, concerns about fragmentation. Thus, immunity from jurisdiction, as the first element of State immunity,\(^6\) plays no role in investment arbitrations: just as in other international courts or tribunals, State immunity is not available as a defense to the jurisdiction of an investment treaty tribunal because the respondent State does not submit to the jurisdiction of the courts of another State.\(^7\) Immunity from enforcement, as the second element of State immunity,\(^8\) by contrast, is left unscathed: the legal framework governing investment treaty arbitrations, either explicitly or implicitly, allows States to invoke State immunity against enforcement of awards made by investment treaty tribunals.\(^9\) Under Article 55 of the ICSID Convention, States are expressly permitted to refuse enforcement of an ICSID award based on their respective domestic sovereign immunity doctrine.\(^10\) Similarly, the New York Convention allows States to resist enforcement of non-ICSID investment awards for reasons of sovereign immunity.\(^11\)

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\(^8\) Fox (supra note 6) 599-662. See also James Crawford, ‘Execution of Judgments and Foreign Sovereign Immunity’ (1981) 75 AJIL 820.


\(^10\) ICSID Convention, Art. 55 provides: «Nothing in Article 54 [ie the obligation to recognize and enforce ICSID awards] shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.» Notwithstanding, the respondent State is obliged under ICSID Convention, Art. 53(1) to comply with an ICSID award, even if State immunity is invoked as a bar to execution; see Christoph Schreuer *et al*, *The ICSID Convention – A Commentary* (2nd edn 2009) Art. 55, para. 7. As a consequence of non-compliance, the right of the investor’s home State to grant diplomatic protection revives; see ICSID Convention, Art. 27(1). In particular, the home State can institute proceedings in the International Court of Justice
A purely doctrinal perspective, however, is necessarily limited. Above all, it does not allow us to understand the relation between two areas of international as a dynamic process, in which both general and special bodies of international law interact and influence each other. Taking such a dynamic perspective allows us not only to determine to what extent international investment law is in conformity with, or opts out of, general international law. It also allows us to look at the reverse process by which international investment law has repercussions on the development of general international law. This perspective is dynamic in focusing on the mutual interaction between two bodies of law over time; it also is contextual in assessing how the interests protected by different bodies of international law develop in relation to each other. As regards the relations between international investment law and the law of State immunity, these interests are the protection of private economic rights, on the one hand, and State sovereignty, on the other.

A dynamic and contextual perspective helps to understand the development both international investment law and the law of State immunity have undergone during the past decades, and are still undergoing today. This development is characterized by the rapid growth of international investment treaties and investor-State arbitration, on the one hand, and the wide-spread transition from absolute towards more limited forms of State immunity, on the other. These developments are interrelated because, as will be argued in this paper, rigid forms of jurisdictional immunity were one factor precipitating the emergence of international investment law and investor-State arbitration. Notwithstanding, the common core of the development in international investment law and the law of State immunity is the increasing recognition of the importance of protecting private economic interests under international law in an increasingly globalized economy.

under ICSID Convention, Art. 64. This right is also not affected by the invocation of immunity in enforcement proceedings; Schreuer et al, ibid, Art. 64, para. 14.

Although not explicitly mentioned as grounds for refusing enforcement of an award against a State, enforcement immunity can form part of the public policy exception in Article V(2)(b) New York Convention or apply under Article III of the Convention as a rule of domestic procedure applicable to enforcement. See Andrea K Bjorklund, ‘State Immunity and the Enforcement of Investor-State Arbitral Awards’ in Binder et al (supra note 5) 302, 308-9; August Reinisch, ‘Enforcement of Investment Awards’ in Katia Yannaca-Small (ed), Arbitration under International Investment Agreements (2010) 671, 681-682 (referring to a case decided by the German Supreme Court, BGH, NJW-RR 2006, 198); van den Berg (supra note 7) 41, 56.

For a similar perspective as regards human rights and humanitarian law and their influence on general international law see Theodor Meron, The Humanization of International Law (2006).

For this dual perspective regarding international investment law and general international law see Bering et al (supra note 5) 7-8.

See supra notes 2 and 3.

On the development of the law of State immunity from absolute to restrictive forms see Schreuer (supra note 7) 1-9; Fox (supra note 6) 201-236; Chamlongrasdr (supra note 7) 65-77. A rich historic perspective is also offered by Ernest K. Bankas, The State Immunity Controversy in International Law (2005).

For the view that international investment law is an important building block for the global economy see Schill (supra note 4) 3-6. On the impact of globalization on international law more generally see, for example, Stephan Hobe, ‘Die Zukunft des Völkerrechts im Zeitalter der Globalisierung’ (2000) 37 Archiv für Völkerrecht, 253; David J. Bederman, Globalization and International Law (2008);
retreat of absolute forms of State immunity form part of the same trend away from the sovereignty-centered international law of Westphalian imprint, which was exclusively concerned with delineating different public spheres as a *ius inter gentes*, towards a rule of law-based international law that takes individuals and their protection seriously. In that regard, international investment law and the law of State immunity are but two sides of the same coin.

The continued recognition of enforcement immunity, by contrast, stresses that States and their international law do not accord unconditional primacy to the economic interests of foreign investors, but ensure the availability of procedural means to protect State interests against enforcement of investment treaty awards. This can serve the legitimate purpose of shielding assets from attachment and seizure that States need in order to act in the public interest, such as the protection of property used by diplomatic or consular missions as a precondition for States to cooperate with other States and to assist their own citizens abroad, or even help States fend off payment of damages in times of dire financial crisis. In that respect, the ability to prevent enforcement of investment treaty awards can be seen as a safety valve for States to protect legitimate public interests against the interests of foreign investors.

At the same time, the balance that the procedural framework on investor-State arbitrations strikes between private and public interests by leaving enforcement immunity untouched also allows States to refuse enforcement of investment treaty awards for purely opportunistic motives. This can effectively eviscerate claims by foreign investors for damages that have been validly determined in the arbitral process. In that regard, enforcement immunity is antagonistic to the objective of international investment law to promote and protect foreign investors. For that reason, it aptly has

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17 There is now a vast amount of literature on the rise of the individual in international law and the effects this development has on international law more generally. See comprehensively Meron (supra note 12).

18 Accordingly, under the prevalent practice assets are immune from enforcement in a foreign State if they serve a public purpose or pertain to the category of property specifically protected under international law, such as diplomatic property, military property, central bank property, and cultural heritage. See Chamlongrasdr (supra note 7) 259-315.

19 In this regard, enforcement immunity could be a means for debtor States to implement a defense against payment of debt based on necessity in economic crises. This defense has been accepted in a number of older cases before international courts and tribunals; it entitles States to suspend, but not to release it of, its payment obligations in severe economic crises. See August Reinisch, ‘Sachverständigengutachten zur Frage des Bestehens und der Wirkung des völkerrechtlichen Rechtfertigungsgrundes <Staatsnotstand>’ (2008) 68 ZaöRV 3, 10-16. Similarly, in modern investment treaty arbitration, arbitral tribunals have recognized that necessity can become operative in case of economic crises. See Stephan Schill, 'International Investment Law and the Host State’s Power to Handle Economic Crises’ (2007) 24 J Int Arb 265, 279-284. It is debated, however, whether a State can also invoke necessity under international law against claims by private parties. The German Constitutional Court, in particular, has declined in one of the Argentine bondholder cases that Argentina could rely on necessity under customary international law to suspend payment obligations under bonds issued in Germany. See German Constitutional, 2 BvM 1-5/03, 1-2/06, Decision, 8 May 2007, BVerfGE 118, 124.
been designated as the «Achilles’ heel in the body of investor-State dispute settlement.»

In spite of the limitations to effective investment protection in the procedural framework of investor-State arbitration, one needs to be mindful, however, of the substantive standards of investment protection. These standards, such as fair and equitable treatment and full protection and security, could increase the protection of foreign investors against State immunity if the invocation of sovereign immunity is contrary to such substantive investment treaty obligations. This could contribute to a more appropriate balance of private and public interests than the one struck under the procedural rules governing investor-State arbitration, in particular one that prevents States from relying on enforcement immunity for any, including purely opportunistic reasons.

The effect of substantive investment treaty obligations on issues of immunities is, however, far from settled: investment treaty tribunals deal with issues of sovereign immunity as seldom as domestic courts consider investment treaty obligations when applying domestic sovereign immunity law. Notwithstanding, substantive standards of international investment law arguably have a significant potential in affecting the sovereign immunity law applied by courts at the domestic level. This potential crystallizes when drawing parallels between investment treaty arbitration and human rights adjudication, in particular the jurisprudence of the European Court of Human Rights (ECtHR). Unlike investment tribunals, the ECtHR has had ample opportunities to pronounce on the tension between sovereign immunity and the right to property and access to justice protected under the European Convention on Human Rights and Fundamental Freedoms (ECHR) and its Protocols.

This jurisprudence, and the interpretative methods the ECtHR applies, above all proportionality analysis for resolving tensions between private and public interests, arguably could serve as a yardstick for conceptualizing the relationship between international investment law and the law of State immunity. This cross-fertilization could not only further the harmonious development of investment law and human rights law, but also push for the development of a legal framework that protects foreign investment more effectively, while leaving sufficient leeway for States to act in the public interests and protect the property necessary for that purpose.

Against this background, Part B of the present paper adopts a historic perspective and shows how the rise of international investment law and the erosion of absolute immunity of States concerning jurisdiction and enforcement are closely connected to the changing role of the State and of international law in an increasingly global economy. It argues that the development of both bodies of law centers around a recognition of the need for international law to protect private interests against undue State interference.

Part C focuses on the impact substantive investment treaty obligations can have on the law of sovereign immunity as it is applied in the domestic context. It suggests that

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20 Bjorklund (supra note 11) 321; see also Schreuer et al (supra note 10) Art. 55, para. 8.
concepts of sovereign immunity applied in domestic settings, both to decline jurisdiction and to refuse enforcement of judicial and arbitral decisions, can constitute a breach of the substantive principles of international investment law, if the application of immunity is overly broad and does not further a legitimate public interest in a proportionate manner. Part D then explores the potential of cross-fertilization between international investment law and human rights law by turning to proportionality analysis used in ECtHR jurisprudence to deal with the relation between sovereign immunity and rights granted under the ECHR. Part E concludes.

B. A Historical Perspective: International Investment Law, State Immunity, and the Recognition of the Individual in International Law

Both international investment law and the law of State immunity have undergone fundamental changes compared to their encapsulations in what was considered traditional international law, that is, the law governing the relations between States, and States only.21 These changes, as will be argued in this section, are a reaction to an evolution in the understanding of the role of the State in its relation to the economy, in particular the emerging global economy. In it, States not only act as regulators of private economic activity, but have themselves become important economic actors that engage in various transborder economic activities, including the procurement of goods, services, and capital on foreign markets, and cooperate with foreign traders and investors at home. The changes in the patterns of economic activities affected international investment law and the law of State immunity. Accordingly, this section first gives an overview of the evolution of international investment law and the law of State immunity (I.), before arguing that this development can be understood as driven by new economic realities, most importantly the emergence of a global economy (II.).

I. The Evolution of International Investment Law and the Law of State Immunity

International investment law has developed, accelerated by the end of the Cold War, through the proliferation of bilateral, regional, and sectoral investment treaties, and the rise of investor-State arbitration.22 At the core of its evolution is, on the one hand, the treatification of substantive standards for the protection of foreign investors and, on the other, the creation of a right of foreign investors to initiate arbitration directly

21 For this classical view of international law see Lassa Oppenheim, International Law (1905) Vol I, § 13, p. 19 («States solely and exclusively are the subjects of International Law.»); ibid, § 20, p. 26 («Municipal Law regulates relations between the individuals under the sway of the respective State and the relations between this State and the respective individuals. International Law, on the other hand, regulates relations between the member States of the Family of Nations.»); similarly Heinrich Triepel, Völkerrecht und Landesrecht (1899) 9, 11-26.

22 See supra notes 2 and 3.

against the host State, without having to rely on the mechanism of diplomatic protection. Foreign investors, in consequence, have seen an expansion of the legal protection they receive under international law, both substantively and procedurally. Host States, in turn, face increasingly effective means by which foreign investors can make them comply with their international obligations. The evolution of international investment law, therefore, marks the emancipation of foreign investors from mere objects of State regulation to actors who dispose of their own rights and remedies under international law and, on that basis, can cooperate with States more efficiently.

The law of State immunity also has seen major developments during the past decades: numerous common law countries have passed statutes codifying their domestic laws on foreign sovereign immunity, including the United States and the United Kingdom; and domestic courts, primarily in civil law countries, have rendered important decisions on issues of foreign sovereign immunity. Furthermore, relying on the Draft Articles prepared by the International Law Commission in 1991, the UN General Assembly adopted, on 2 December 2004, the United Nations Convention on Jurisdictional Immunities of States and Their Property. Preceded by international conventions with a more limited ambit, such as the 1972 European Convention on State Immunity, the UN Convention marks the first universal instrument to codify the international law of State immunity. Although it has not yet entered into force, but is expected to do so in the near future, domestic and international courts already have referred to the UN Convention as an expression of customary international law, including the ECtHR.

As regards substance, the central evolution of the law of State immunity, both at the domestic and the international level, is the erosion of doctrines of absolute immunity and the turn towards more restrictive forms of immunity. Thus, today the domestic courts of the large majority of States distinguish, in respect of jurisdictional immunity,
between public acts (*acta iure imperii*) of foreign States and commercial acts (*acta iure gestionis*), and regularly limit sovereign immunity to the former. In parallel, in respect of enforcement immunity, most States limit sovereign immunity to assets of a foreign State serving a public purpose and permit enforcement into commercially used assets. This increases the power of domestic courts to exercise jurisdiction over foreign States and to enforce judicial and arbitral decisions against them. It equally exposes States hosting foreign investors to increasingly effective means of implementing liability for breaches of their rights within domestic legal orders. In that regard, the development of international investment law and the law of State immunity displays important parallels.

II. New Economic Realities as the Driving Force for the Adaptation of International Investment Law and the Law of State Immunity

Both the rise of international investment law and the erosion of absolute doctrines of immunity can be seen as reactions to new patterns of economic activities, namely the increase in transborder trade and investment, and a changed role of the State in relation to the economy. These changes coincide with the general development of international law away from State-centered conceptions towards an international law that furnishes a legal framework for an international society and a truly global market economy. In particular, modern international law provides private economic actors with mechanisms allowing them to ensure that host States live up to commitments they made. Most importantly, these mechanisms encompass, compared to the reign of traditional international law, broader possibilities of third-party dispute settlement and enforcement of awards and judgments against States. This allows foreign investors to curtail arbitrary behavior of States and to reduce the political risk inherent in foreign investment activities more effectively.

This section therefore shows how international law more generally, as well as international investment law and the law of State immunity in particular, developed in reaction to changing economic patterns. After describing how the Westphalian model of international law and its underlying economic model construed international investment law and the law of State immunity (1.), this section points to the shortcomings of such a model for a global economy (2.). It is these shortcomings that precipitated changes to both international investment law and the law of State immunity as compared to Westphalian times. In that perspective, the rise of international investment law and the decline of absolute State immunity strengthen the position of private economic actors

32 See Fox (supra note 6) 502-530. See also UN Convention, Art. 10.
33 See Schreuer (supra note 7) 134-137; Reinisch (supra note 11) 683-688; comprehensively also Fox (supra note 6) 599-662; Chamlongrasdr (supra note 7) 259-298. See also UN Convention, Art. 19.
vis-à-vis abuses of public power and can be understood as part of the emergence of a rule of law framework for investor-State relations (3.).

1. The Westphalian System, its Concept of National Economies, and Classical International Law

International law, as it was initially conceived in the Westphalian system was insufficient to furnish the legal framework that was necessary for the efficient functioning of a global economic system. Most importantly, classical international law neither offered independent and effective third-party dispute settlement for disputes between investors and States, nor did it provide uniform rules necessary for a global market economy to function. Instead, conceived of as solely governing the relations between sovereign States, and focusing on the notion of sovereignty, the main function of international law under the Westphalian model was to protect States against interferences by other States and to delineate, in an exclusive inter-State system, spheres of sovereignty between them. Private economic actors, in contrast, were alien to this concept of international law: they were neither considered as subjects of international law with individual rights vis-à-vis foreign sovereigns, nor was the content of international law concerned with regulating, let alone sustaining or even promoting, cross-border economic activities.

Instead, the economic model underlying the Westphalian system of international law was one of national economies that were separated, both legally and economically, from other national economies. Accordingly, from the point of view of domestic law, cross-border trading and foreign investment often were not subject to the same legal regime as purely internal economic relations, but governed by a body of (domestic and international) law pertaining to external trade and foreign investment. Cross-border trade and foreign investment, in other words, were not conceived of as part of one global economic system transcending the economies of nation-States, but as an external, and incidental, aspect of domestic economies.

Whether this model actually represented the economic reality of the international economy in early modernity, is open to debate. What is crucial from a conceptual perspective, however, is that the rise of the nation-State and its claim to absolute internal and external sovereignty, resulted in a specific blueprint for domestic regulation

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35 Fox (supra note 6) 57-59.
36 After all, cross-border trading has been a significant aspect of merchant activities since the Middle Ages and was regulated by a body of rules designated as *lex mercatoria*. This body of rules had gained some independence from national laws based on the usages and customs of the merchant community itself and often was enforced outside the State court system by special commercial courts established in the major European maritime and land-trading centers. See Richard J. Howarth, *Lex Mercatoria: Can General Principles of Law Govern International Commercial Contracts?* (2004) 10 Canterbury LR 36, 40. See also Armin von Bogdandy and Sergio Dellavalle, *Die Lex mercatoria der Systemtheorie* in Graft-Peter Callies et al (eds), *Sociologische Jurisprudenz – Festschrift für Günther Teubner* (2009) 695 (putting the *lex mercatoria* into perspective as an ordering paradigm for the global economy).
of economic activities, which was based on the model that the economic space corresponded to politically divided spheres of sovereignty of different nation-States. The nation-States’ interaction with the economy, therefore, was one in which the question was not how to design rules that could enhance economic activity based on the needs of economic actors, but one in which economic activities had to conform to the State’s claim for absolute internal and external sovereignty.\(^{37}\) Essentially, the economic model underlying the Westphalian system of international law followed the political differentiation into separate sovereign entities and did not depart from a sociological understanding of the reality of (cross-border) economic exchange. The State and its public power, in other words, defined the economic space rather than were defined by it: economics followed politics, rather than vice versa. Or, as Carl Schmitt put it: *cujus regio ejus economia.*\(^{38}\)

This constructivist conception of the relation of States and their economies also founds its reflection in the law of State immunity and the traditional mechanism for resolving investor-State disputes. Thus, the law of State immunity was conceived of in absolute terms and found its justification in the principle that one sovereign could not exercise power over another sovereign: *par in parem non habet imperium.* The classical expression of the conceptual foundations of the principle of absolute State immunity can be found in the 1812 US Supreme Court decision in *The Schooner Exchange v. McFaddon:*

This full and absolute territorial jurisdiction being alike the attribute of every sovereign … would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.\(^{39}\)


Absolute sovereign immunity also applied in respect of enforcement of judicial decisions against foreign sovereigns. The House of Lords, for example, stated as follows in *Compania Naviera Vascongado v. SS Cristina*:

the courts of a country … will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial proposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both.40

Based on this understanding of absolute immunity, disputes with a foreign sovereign only could be entertained in the domestic courts of the foreign sovereign itself; and awards could only be enforced in its territory. The courts of any other State, including those of the home State of an individual negatively affected by acts of a foreign sovereign could not have jurisdiction as this would have interfered with the foreign State’s sovereignty. In consequence, the protection of private interests was relegated to the internal affairs of each State.

This model equally informed customary international law concerning the protection of alien property. While providing some protection to foreign investment against uncompensated expropriations and other breaches of the international minimum standard of treatment,41 customary international law mediated foreign investors through an inter-State prism. It only allowed the investor’s home State to espouse the investor’s claim vis-à-vis the host State and take the dispute to the international level through the instrument of diplomatic protection.

The classical expression of this position can be found in the *Mavrommatis Palestine Concessions* case decided by the Permanent Court of International Justice (PCIJ) in 1924. In that case, the Greek Government brought a claim against the United Kingdom for breach of a concession granted to a Greek national for the construction and operation of an electric tramway and the supply of electric light, power, and drinking water in Jerusalem. With respect to the relationship between the Greek investor, the United Kingdom as the sovereign over the host State territory, and Greece as the investor’s home country, the PCIJ stated:

In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State – i.e. between M. Mavrommatis and Great Britain. Subsequently, the Greek Government took up the case. The dispute then entered upon on new phase; it entered the domain of international law, and became a dispute between two States. … It is an elementary principle of international law that

40 *Compania Naviera Vascongado v. SS Cristina* [1938] AC 485, 490.
a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.  

While allowing some protection of interests of individuals when harmed by a foreign State, customary international law and the instrument of diplomatic protection ensured that international law remained a governance mechanism for inter-State relations in line with the Westphalian model of international law and economics. Private interests as such found no place in that system.

Yet, entrusting dispute settlement between foreign investors and host States almost entirely to the domestic courts of the host State made the development of rules for a global economy virtually impossible, as the resolution of disputes between individuals and States at the domestic level enabled States to implement a primarily domestic vision of the regulation of national economies. A global economy that transcends national economies, by contrast, could hardly take shape given that dispute settlement in the domestic courts of various nation-States followed domestic rather than global rationales. International law, at the time, buttressed this vision and ensured that States could assert absolute sovereignty over their respective territories and shield themselves from interferences by foreign powers, both politically as well as economically. Both the law of State immunity and the customary law on the protection of aliens relegated the relations between economic and State interests primarily to the domestic level. Quite tragically, however, many domestic legal systems also exempted the State from liability towards private economic actors under domestic law. The doctrine that the «king can do no wrong», and therefore could not be held liable for damage caused to individuals, was a concept common to many common and civil law countries, often far into the 20th century.


43 See Fox (supra note 6) 42 («Immunity can be seen as a useful device to reconcile these two aspects, insulating the power to administer and to operate the public service of one State [free] from interference by another State and its courts. There can be little doubt that the early American and English decisions are based on the Westphalian model of the State, and of the international community as an inter-State society; they reflect the view of Bodin and Austin of the sovereign legislative power vested in the State and the consequent inability of another State to subject it to scrutiny.»).

44 See Irmgard Marboe, ‘State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests’ in Stephan Schill (ed), International Investment Law and Comparative Public Law (2010) 377 (showing how domestic legal system initially often exempted
2. The Insufficiencies of the Westphalian System for a Global Economy

From an economic perspective the primacy of politics over economics, and its ramifications in absolute immunity and diplomatic protection, could only inadequately protect the interests of foreign investors against interference by host States and, therefore, constituted significant obstacles in an increasingly globalized economy. While the Westphalian model may still have been adequate for economic systems in which cross-border trade and investment played but a marginal role, it proved insufficient to accommodate economic reality as soon as certain transborder economic activities that are specifically exposed to interference by foreign States became more wide-spread. At that point, absolute doctrines of State immunity could hardly accommodate the need of private parties for legal protection before courts other than the courts of the host State. This need arose when States appeared as borrowers from private parties on the international capital markets and purchasers of goods and services, but also with the increase of foreign investment and the exposure of foreign investors to the sovereign powers of host States. The courts of those States, however, were often considered as affording insufficient protection against the State because foreign traders and investors often have reservations regarding the neutrality of those courts vis-à-vis foreign parties, if not even their independence and impartiality in reviewing acts of their own governments.

Dispute settlement in the domestic courts of a third State was one possible reaction to these concerns. Consequently, the law of State immunity reacted to the need of economic investors for legal protection, by introducing the distinction between commercial acts (acta iure gestionis) and acts of a sovereign nature (acta iure imperii), and by allowing enforcement against assets serving a commercial purpose. Similarly, at the level of domestic law, immunity of the State from suit for regulatory activity increasingly gave way to accountability in many common and civil law countries.

Notwithstanding the evolution towards more restrictive forms of jurisdictional immunity, foreign sovereign immunity still constituted a considerable obstacle for foreign investors to seek redress against many of the host State’s acts outside that

the State from liability for harm caused to private interests but during the 19th and 20th centuries developed a State liability law); for a comparative analysis see also Duncan Fairgrieve, State Liability in Tort: A Comparative Law Study (2003).

45 On insufficiencies in settling disputes in the domestic courts of the State who has interfered with a private party’s interest in the setting of investment dispute see Schill (supra note 24) 33-34.

46 The institutional dependence of courts vis-à-vis the executive, both on the local as well as the national level, and the at times active interference of political interests in judicial proceedings compromise the ability of courts in a number of countries to settle investor-State disputes efficiently and impartially. This influence can stem from the power of a political party or from other government or political influence over the outcome of a specific dispute. The often insufficient financial support and lack of manpower in many developing countries further compromise efficient dispute settlement in the host State’s courts. Corruption in the courts of many countries add further complications. See Eduardo Buscaglia and Maria Dakolias, ‘An Analysis of the Causes of Corruption in the Judiciary’ (1999) 30 Law & Pol’y Int’l Bus 95; Maria Dakolias and Kimberley L. Thachuk, ‘The Problem of Eradicating Corruption from the Judiciary: Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform’ (2000) 18 Wis ILJ 353.

47 See references supra 44.
State’s domestic courts. Most importantly, regulatory acts of host States affecting foreign investors, including expropriations for a public purpose or administrative decisions rescinding an investment contract, constitute public acts (acta iure imperii), that consequently continue to benefit from sovereign immunity in third-country courts. Moreover, even if domestic courts outside the host State assume jurisdiction over foreign sovereigns, they often hesitate to review sovereign acts of foreign States. For example, domestic courts often apply doctrines of judicial restraint, such as the act of State-doctrine, when it comes to determining whether the acts of a foreign sovereign were in conformity with the international commitments made by that State. Under the act of State-doctrine, for example, the US Supreme Court in Banco Nacional de Cuba v. Sabbatino, refused to

[E]xamine the validity of a taking of property within its own territory by a foreign sovereign government … in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

The rationale behind the act of State-doctrine, and comparable doctrines applied by domestic courts outside the United States, is similar to that of the law of State immunity. On the one hand, it is a consequence of the principle of State sovereignty that required mutual respect among sovereigns and thus prevented one sovereign from judging the acts of another sovereign passed in the latter’s territory. On the other hand, it can also be explained by the domestic separation of powers. In Sabbatino, for example, the US Supreme Court specifically referred to the primacy of the executive branch in matters of diplomacy and foreign affairs as a reason for exercising judicial restraint, and considered that redress for violations of customary international law had to be sought primarily through traditional inter-State channels, given that domestic courts usually are not empowered to make foreign policy choices independently from the executive. In view of foreign sovereign immunity doctrines, the domestic courts of the investor’s home State, as well as the courts of any third State, therefore could not afford sufficient protection to foreign investors against sovereign acts of the host State.

At the same time, the increasing engagement of private individuals in investment activities on the territory of foreign States also cast the effectiveness of the system of diplomatic protection to afford protection to foreign investors into doubt. Diplomatic protection suffered from several shortcomings. First, diplomatic protection is a right of

51 Ibid 279-282 (discussing the rationale of the act of State-doctrine).
53 Ibid 423.
54 See ibid 427-433.
a State vis-à-vis another State to «ensure in the person of its nationals respect for the rules of international law» without a corresponding duty of the home States to grant diplomatic protection. Second, as a consequence of the distinction between domestic and international law, the home State is vested, under international law, with the exclusive control over the rights of their nationals on the international level and is entitled to settle, waive or modify the rights of their nationals by an international agreement with the host State. Third, in view of the distinction between the rights of the investor and the rights of its home State any compensation received by the home State did not have to be passed on, as a matter of international law, to the damaged investor. Finally, diplomatic protection required the exhaustion of local remedies by the foreign investor. This also constituted a limit to effective investment protection, in particular when the host State’s courts are not sufficiently impartial and independent in affording protection against actions of their own State.

The conclusion of international investment treaties and, in particular, access to investor-State arbitration can thus be seen as a reaction to the insufficiencies of both diplomatic protection and sovereign immunity law to afford private investors protection that is independent from the investor’s home State against sovereign acts by host States. The establishment of investor-State arbitration and the rise of investment treaty arbitration are therefore *inter alia* due to the obstacles posed by the law of State immunity to efficient investment protection in domestic courts outside the host State and the insufficiencies of investment protection under traditional customary international law.

55 See supra note 42.


58 Borchard (supra note 56), 356-359. 383-388; Hagelberg (supra note 57) 51.
3. Towards an International Rule of Law Framework for Investor-State Relations

Both the erosion of absolute immunity and the rise of international investment law and arbitration are a reaction to changes in the underlying economic realities brought about by increasing transborder economic activities of investors and States and the multiplied potential that State conduct can be a threat to private economic activity. Both the rise of international investment law and the erosion of absolute immunity have the purpose of protecting individuals and embedding States into a system that is based on the rule of law and that aims at protecting private parties by granting access to third-party dispute resolution. Although international investment law protects the private interests of foreign investors, and the law of State immunity serves to protect the State, the common concern underlying the developments in both fields was the insufficient structure traditional international law provided for the efficient functioning of transborder economic activity and, in particular, cooperation between States and private economic actors in a global economy.

In fact, both international investment law and the law of State immunity reflect a changed understanding of sovereignty and the role of the State in relation to the individual. Both have adapted to the need to strengthen the protection of private interests vis-à-vis public power. Instead of a rigid delimitation between public spheres in inter-State relations as under the Westphalian system, both bodies of law now recognize that public and private interests require adequate protection, and that the solution to enhancing global economic exchange cannot lie in giving unconditional primacy to the determination of public interests by States in purely inter-State relations. In this sense, the rise of international investment law, on the one hand, and the erosion of State immunity are not antagonist developments, but merely two sides of the same coin in adapting international law to the needs of a truly global economy.\(^{59}\) This coincides with a change of paradigm in international law from backing up sovereign equality towards more effective control of the use of public powers vis-à-vis private individuals and by embedding the exercise of that power into a framework based on the rule of law.

C. Looking at State Immunity from the Perspective of International Investment Law

Despite a common trajectory in the development of international investment law and the law of State immunity towards embedding States into a rule of law-framework for investor-State cooperation, international investment law still falls short of providing

\(^{59}\) For a similar argument that both State immunity and investor-State arbitration share the common thrust to move the law concerning international trade and investment from a power-based to a rules-based system of international relations with a stronger focus on the doctrinal structures of investor-State arbitration and State immunity under the US Foreign Sovereign Immunities Act, Charles H. Brower, *Mitsubishi, Investor-State Arbitration, and the Law of State Immunity* (2005) 20 Am U ILR 907 (2005).
efficient investment protection in one important aspect: the enforcement of arbitral awards. Indeed, while investor-State arbitration provides a mechanism to determine whether the conduct of host States was in conformity with the commitments made to foreign investors in investment treaties or investor-State contracts, the enforcement of the decisions of investment treaty tribunals themselves is severely limited.

Although non-compliance with an ICSID award constitutes breach of Art. 53(1) of the ICSID Convention, such breach is unenforceable for the foreign investor, as Art. 55 ICSID Convention, as well as the New York Convention, completely defer to domestic law regarding enforcement immunity. Although investor-State arbitration provides a mechanism to determine whether the conduct of host States was in conformity with the commitments made to foreign investors in investment treaties or investor-State contracts, the enforcement of the decisions of investment treaty tribunals themselves is severely limited. An investor thus remains dependent on its home State to exercise diplomatic protection in case the host State does not comply with an investment treaty award. Although enforcement in third States is possible, it is equally limited because States often only maintain assets abroad that serve a public purpose, such as property belonging to diplomatic or consular missions, which is exempt from execution under State immunity doctrines.

Thus, enforcement immunity as «the last bastion of State immunity» creates a loophole in the efficient protection of foreign investors. Although most States voluntarily comply with arbitral rulings against them, that loophole is amply illustrated by cases of investors struggling for years to enforce an award against assets not protected by enforcement immunity. A prominent example of this struggle is the «Sedelmayer saga», involving a German investor who, after having obtained an award against the Russian Federation for breach of the German-Russian BIT in 1998, has made numerous, partly successful, partly unsuccessful, attempts at enforcement of the award. In this endeavor, he was refused satisfaction on several occasions based on foreign sovereign immunity accorded to assets he had tried to attach. This illustrates

60 Schreuer et al (supra note 10) Art. 55, para. 13. The only way enforcement immunity under domestic law can be overcome is through a waiver of immunity by the respondent State. See Schreuer et al (supra note 10) Art. 55, paras. 72 et seq. Participation in the ICSID Convention and consent to ICSID arbitration per se, without more, can, however, not be construed as a waiver of enforcement immunity. Cf Schreuer et al (supra note 10) Art. 55, paras. 75. See also UN Convention, Arts. 19 and 20 (requiring express consent to measures of constraint in addition to consent to jurisdiction). Some domestic courts, by contrast, have treated consent to arbitration by States as an implicit waiver of enforcement immunity. See, for example, in the context of consent to ICC arbitration the decision by the French Cour de cassation, 1e civ., 6 July 2000, Creighton v. Ministère des Finances de l’Etat du Qatar, 127 JDI 1054, 1055 (2000).

61 See supra note 9.


63 It is widely assumed that voluntary compliance with investment treaty awards is the rule. See Blane (supra note 9) 464-465 (with further references).

64 Bjorkland (supra note 11) 314-316.

65 For the various attempts at enforcement in the Sedelmayer case see Reinisch (supra note 11) 681, 685-688. The Sedelmayer case, however, is not a singular case: according to a 2008 survey conducted by the School of International Arbitration at Queen Mary University of London out of the 19% of participants in the survey – all major corporations – who had to go through enforcement of an award against a State, 46% experienced difficulties; in 13% of these cases sovereign immunity was the reason for difficulties. See Loukas Mistelis and Crina Baltag, ‘Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices’ (2009) 19 Am Rev Int’l Arb 319, 354–61; see also Crina Baltag, ‘Enforcement of Arbitral Awards against States’ (2009) 19 Am Rev Int’l Arb 391. On problems of enforcement of ICSID awards
how significant enforcement immunity can vitiate the aspiration of international investment law to protect foreign investors efficiently.66

There are several reactions to difficulties with the law of State immunity concerning efficient investor-State dispute settlement and enforcement.67 Investors could simply change their expectation that successful dispute settlement does not necessarily allow them to enforce a favorable award; or conversely States may agree to waive sovereign immunity in investment treaties or investor-State contracts. The first view is rather cynical, the second at most a project for future investment treaty negotiations. The more immediate, and more practical avenue might be that domestic sovereign immunity doctrines are reinterpreted so as to meet the need for more effective investment protection. While economic incentives can pressure States to reduce the scope of their sovereign immunity doctrines applied at the domestic level, the question also arises whether substantive investment treaty obligations may have a legal impact on the law of foreign sovereign immunity applied in domestic courts.

This Part therefore analyzes whether the application of sovereign immunity to protect a State’s interest at the domestic level can result in breach of substantive investment treaty obligations (I.). It concludes by suggesting that the relationship between investment protection and State immunity can be conceptualized within a framework of proportionality reasoning that is increasingly used by investment treaty tribunals (II.).

I. Application of State Immunity as Breach of Investment Treaty Obligations

Four substantive standards of international investment law could affect sovereign immunity doctrines applied in domestic courts: (1) the obligation to treat foreign investors fairly and equitably, which includes the prohibition of denial of justice;68 (2) the obligation to provide full protection and security, which is increasingly often

66 For the same conclusion regarding litigation in domestic courts against foreign sovereigns see Schreuer (supra note 7) 125 («Enforcement is an important corollary to jurisdiction. The assumption of jurisdiction by domestic courts over foreign States without any prospect of having the resulting decisions made effective would not only be rather half-hearted but would also largely nullify the progress made in the protection of the private claimant. In fact, allowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution may put them into the doubly frustrating position of having been lured into expensive and seemingly successful lawsuits only to be left with an unenforceable judgment plus legal costs. Voluntary compliance with foreign court decisions can be expected no more than voluntary compliance with obligations in the face of immunity from jurisdiction.»).

67 See Blane (supra note 9) 495-505.

interpreted as requiring host States to provide, beyond physical safety, a legal infrastructure for the effective protection of foreign investment;\(^{69}\) (3) the prohibition of expropriations without compensation, which can be affected if rights are rendered worthless, even if the property title remains intact;\(^{70}\) and (4) provisions in investment treaties, such as Article 10(12) of the Energy Charter Treaty (ECT), that expressly requires that «[e]ach Contracting Party shall ensure that its domestic law provides effective means for the assertion of claims and the enforcement of rights with respect to investments, investment agreements, and investment authorizations.»\(^{71}\)

The precise scope of many of these investor’s rights, however, is still unsettled, given that investment treaties and investor-State arbitration are a relatively novel phenomenon. In particular, the issue of whether the grant of foreign sovereign immunity constitutes breach of an investment treaty has not been raised or decided in an investment treaty arbitration or in domestic court proceedings.\(^{72}\) Nevertheless, there is arbitral jurisprudence dealing with questions of access to domestic courts and enforcement of commercial arbitration awards that may give an indication of how substantive investment law can affect questions of foreign sovereign immunity. This arbitral jurisprudence will be examined in this section, starting with questions relating to jurisdictional immunity (1.), and turning to enforcement immunity thereafter (2.).

It is, however, important to realize the limitations of the direct impact investment treaty obligations can have on the application of State immunity at the domestic level. First, awards for damages rendered on the basis that State immunity doctrines are in breach of investment treaty obligations face itself the enforcement limitations under the

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71 A similar provision is contained in Article II(7) of the Treaty between the United States of America and the Republic of Ecuador concerning the Encouragement and Reciprocal Protection of Investment, signed 27 August 1993, entered into force 11 May 1997 («Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.»).

72 Problems that have arisen in the enforcement of investment treaty awards so far have not concerned the question of how investment treaty obligations may influence enforcement, but have only concerned the interrelations between the procedural framework, namely the ICSID Convention, and enforcement. In all, only four cases have arisen in domestic courts so far concerning enforcement of ICSID awards. See Edward Baldwin et al., ‘Limits to Enforcement of ICSID Awards’ (2006) 23 J Int Arb 1, 5-9.
ICSID or the New York Convention. Second, and more importantly, the impact of substantive investment treaty obligations will regularly be limited to the application of immunity from jurisdiction and enforcement in host States themselves. The reason for this is that the application of State immunity by third States regularly would not come under the scope of application of an investment treaty as no investment has been made in that third State.

Nevertheless, investment treaty obligations requiring the reduction in scope of immunity doctrines with respect to the host State itself could nevertheless pressure States more generally to bring their domestic legal orders in line with investment treaty obligations as all States are potential respondents in investment treaty arbitrations. Furthermore, investment treaty obligations may also indirectly impact the law of foreign sovereign immunity as applied by domestic courts because in many States foreign sovereign immunity doctrines and domestic sovereign immunity doctrines align.

1. Jurisdictional Immunities in Investment Treaty Arbitration

Jurisdictional immunities played a role in the NAFTA arbitration in *Mondev v. United States*. The tribunal was faced with the question of whether a statutory immunity granted under Massachusetts law to certain public bodies for various intentional torts was in breach of the obligation to grant full protection and security contained in Art. 1105(1) of NAFTA. It observed:

In the Tribunal’s opinion, circumstances can be envisaged where the conferral of a general immunity from suit for conduct of a public authority affecting a NAFTA investment could amount to a breach of Article 1105(1) of NAFTA. Indeed the United States implicitly accepted as much. It did not argue that public authorities could, for example, be given immunity in contract vis-à-vis NAFTA investors and investments.

The tribunal therefore accepted that full protection and security was affected when States applied sovereign immunity doctrines to prevent access to its domestic courts. It also observed, however, that

[R]easons can well be imagined why a legislature might decide to immunize a regulatory authority, mandated to deal with commercial redevelopment plans, from potential liability for tortious interference. Such an authority will necessarily have both detailed knowledge of the relevant contractual relations and the power to interfere in those relations by granting or not granting permissions. If sued, it will be able to plead that it was acting in good faith and in the exercise of a legitimate

73 See Fox (supra note 6) 59-61.
74 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, 11 October 2002, paras. 139-156.
75 Ibid para. 151.
mandate – but such a claim may well not justify summary dismissal and will thus be a triable issue, with consequent distraction to the work of the Authority.\textsuperscript{76}

The tribunal therefore accepted that considerations relating to the effectiveness of governmental regulation and administration could justify restricting access to domestic courts in specific cases. While holding that the grant of sovereign immunity in the case at hand did not breach Art. 1105(1) of NAFTA, the tribunal also stressed that the statutory immunity in question would not apply in NAFTA arbitration and could not shield the host State from investor-State arbitration.\textsuperscript{77} This reasoning suggests that the fact that the investor had a remedy available in investor-State arbitration, and therefore could enforce its rights in a forum outside domestic courts, had a positive impact on the assessment of the statutory immunity under the obligation to grant full protection and security to foreign investors.

The tribunal’s reasoning therefore suggests that the obligation to provide full protection and security requires States to grant access to justice to foreign investors, be it at the domestic or the international level.\textsuperscript{78} This right is affected when States apply sovereign immunity doctrines to prevent access to their courts. The tribunal’s reasoning, however, also shows that access to domestic courts is not unconditional; instead, host States can limit access to their courts to pursue legitimate public policy grounds. Although the case related to domestic sovereign immunity, there is no reason not to apply the same conceptual framework also to foreign sovereign immunity cases. However, just as in domestic immunity cases, the question would need to be asked if granting foreign sovereign immunity pursues a legitimate aim in the case at hand.

2. Obstacles to Enforcement as a Breach of Investment Treaty Obligations

Not only immunity from jurisdiction can breach investment treaty obligations, but also the application of immunity as a defense against the enforcement of arbitral awards. Thus, in \textit{Desert Line v. Yemen}, the tribunal found a violation of a provision of the Yemen-Oman BIT containing the obligation to provide fair and equitable treatment and the prohibition of discriminatory and legally unjustified measures because the

\begin{footnotes}
\item[76] Ibid para. 153.
\item[77] Ibid para. 154 (stating that «such an immunity could not protect a NAFTA State Party from a claim for conduct which was substantively in breach of NAFTA standards – but for this NAFTA provides its own remedy, since it gives an investor the right to go directly to international arbitration in respect of conduct occurring after NAFTA’s entry into force. In a Chapter 11 arbitration, no local statutory immunity would apply.»).
\item[78] This reasoning is also in line with customary international law on denial of justice. A prohibition of suits against the treasury, for example, was held to constitute a denial of justice under customary international law \textit{Case of Ruden & Co (US v. Peru)}, Decision, 18 January 1870 (1898) 2 Moore Int’l Arb 1653, 1655; \textit{Case of R.T. Johnson (US v. Peru)} (1898) 2 Moore Int’l Arb 1656, 1657. The same obligation, that is to grant access to domestic courts, also derives from the fair and equitable treatment standard. This standard, inter alia, can be violated «if Claimants were denied access to [domestic] courts . . . or if the Claimants were treated unfairly in those courts (denial of procedural justice) or if the judgment of those courts were substantively unfair (denial of substantive justice).» See \textit{Compañía de Aguas del Aconquija SA & Compagnie Générale des Eaux v Argentine Republic ICSID Case No. ARB/97/3}, Award, 21 November 2000, para. 80.
\end{footnotes}
Respondent had pressured the Claimant to accept lesser payment in satisfaction of the sums due under an arbitral award, which the Claimant had obtained against the respondent State. In consequence, in the tribunal’s reasoning, the obligation to provide fair and equitable treatment and not to subject investors to discriminatory and legally unjustified measures required the host State to comply with and enforce the arbitral award in question. While the award in question was an award rendered in the context of a commercial arbitration, the same would seem to apply, mutatis mutandis, to the enforcement of an investment treaty award.

Similarly, in Saipem v. Bangladesh, the issue arose whether conduct of the domestic courts of the host State that interfered with an ICC arbitration between a foreign investor and an entity owned by the respondent State, and which ultimately compromised the enforcement of the arbitral award, constituted breach of the prohibition of expropriation without compensation in the Italy-Bangladesh BIT. In the case at hand, Bangladeshi courts had issued not only an injunction restraining Claimant from continuing the arbitration, but also revoked the authority of the arbitral tribunal to entertain the case. When the arbitral tribunal proceeded with issuing a final award in favor of claimant for approx. US$ 6 million, stating that the authority to challenge and replace arbitrators fell into the exclusive jurisdiction of the ICC, the Bangladeshi court declared the award to be a nullity and unenforceable.

The ICSID tribunal seized of the matter found that the measures of the Bangladeshi courts constituted an expropriation because the investor was prevented from enforcing the award against assets of the Respondent located in Bangladesh. The tribunal found this to constitute an expropriation «[b]ecause, by the Respondent’s own admission, the ICC Award could not be enforced outside Bangladesh.» Even though the issue at hand

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79 Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, 5 February 2008, para. 193 (stating that «the conduct of the Respondent, by inadmissibly pressuring the Claimant to accept and execute the Settlement Agreement instead of the final and binding Yemeni Arbitral Award, amounted to a breach of Art. 3 of the BIT»). Similarly, the Claimant in Romak v. Uzbekistan argued that the non-enforcement by Ukrainian courts of a commercial arbitration award entered into against a State-owned company constituted breach of the provisions of the Swiss-Uzbek BIT, notably the prohibition of expropriation without compensation, fair and equitable treatment and the treaty’s umbrella clause; see Romak S.A. v. The Republic of Uzbekistan, PCA Case No. AA280, UNCITRAL, Award, 26 November 2009, paras. 12-70, 133-138). The tribunal, however, declined jurisdiction ratione materiae because it considered that Claimant in the case at hand had not made an investment in Ukraine. Non-execution of domestic court judgments was also considered as a denial of justice in Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 454.

80 Also under customary international law the concept of denial of justice included the obligation of State authorities not to refuse execution of judgments or to postpone execution indefinitely Montano Case (Peru v. US), Opinion, 27 May 1855 (1898) 2 Moore Int’l Arb 1630, 1635; Fabiani case (France v. Venezuela), Award, 30 December 1896 (1898) 5 Moore Int’l Arb 4878, 4893-4897.

81 For the facts of the case see Saipem S.p.A. v. The People’s Republic of Bangladesh, ICSID Case No. ARB/05/7, Award, 30 June 2009, paras. 6-51. The issue was framed in terms of expropriation because the dispute settlement clause in the Italian-Bangladesh BIT was restricted to «disputes arising between a Contracting Party and the investors of the other, relating to compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments.» See ibid para. 97.

82 Ibid para. 130.
did not concern a decision of domestic courts refusing enforcement of an enforceable award as such, its effects were comparable. The tribunal’s reasoning, in principle, therefore would equally apply when a domestic court refuses enforcement of an enforceable arbitral award based on sovereign immunity.

Finally, applying enforcement immunity at the domestic level could also contravene provisions, such as Article II(7) of the United States-Ecuador BIT, or Article 10(12) ECT, that requires «[e]ach Party [to] provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorizations.» While one tribunal considered that such provisions only impose systemic obligations on States to «provide an effective framework or system for the enforcement of rights, but does not offer guarantees in individual cases,» other tribunals faced with interpreting similar provisions considered that such an obligation required that remedies in domestic courts were available to foreign investors and that rights could be effectively enforced in every individual case. The tribunal in *Chevron v. Ecuador*, for example, considered that such a provision «applie[d] to a variety of State conduct that has an effect on the ability of an investor to assert claims or enforce rights.» Similarly, in *Petrobart v. Kyrgyz Republic*, the tribunal found a breach of Article 10(12) ECT because a domestic court in the respondent State had stayed the execution of a domestic judgment following an *ex parte* communication from the Vice Prime Minister asking for a stay of enforcement of a court decision against a State-owned company in order to allow debt restructuring. A comparable reasoning, in principle, would also apply when sovereign immunity is applied to avoid enforcement of an arbitral award. At the same time, however, a tribunal would need to consider whether a legitimate public interest was pursued in refusing enforcement of an arbitral award based on sovereign immunity.

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83 *Limited Liability Company Amto v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, para. 88 (continuing that «[i]ndividual failures might be evidence of systematic inadequacies, but are not themselves a breach of Article 10(12) [ECT]»).


85 *Chevron v. Ecuador* (supra note 84), para. 248.

86 *Petrobart v. Kyrgyz Republic* (supra note 84) 77 (for the facts of the case see ibid 4-8). Even if provisions like Art. 10(12) ECT are only viewed as requiring States to provide a legislative framework for the effective protection of rights of foreign investors, such a reading would equally affect how States fashion their sovereign immunity doctrines, as these doctrines are of general application in the whole of the domestic court system. To the extent that sovereign immunity doctrines applied at the domestic level constitute a systemic deficiency in the enforcement of rights, provisions such as Art. 10(12) ECT would require a State to «take[e] the appropriate steps to identify and address deficiencies in its legislation» and to «moderniz[e] and adapt[1] [its legislation] from time to time.» See *Amto v. Ukraine* (supra note 83), p. 88.
II. Proportionality Analysis as an Overarching Framework for Balancing Private and Public Interests in International Investment Law

The above mentioned decisions of investment treaty tribunals illustrate that the application of enforcement immunity and immunity from jurisdiction at the domestic level may touch upon various investment treaty standards. Although, none of the decisions concerned the application of foreign sovereign immunity doctrines, they deal with situations in which the attempt of an investor to access domestic courts or to have a judicial or arbitral decision enforced was effectively eviscerated by various executive, legislative, or judicial measures. From an economic perspective such conduct is equivalent in its effects to the application of foreign sovereign immunity doctrines as a bar to jurisdiction and enforcement. As regards the rights granted under investment treaties, sovereign immunity, in principle, should be treated no differently from other instruments resulting in a denial of access to courts or other obstacles to enforcement.

Yet, treating sovereign immunity and other bars to jurisdiction and enforcement prima facie alike, does not mean that sovereign immunity doctrines could not be viewed as justified departures from investors’ rights laid down in investment treaties and, in consequence, would not trigger the State’s liability for breach of an investment treaty. Arguably, the same conceptual framework would apply to a State invoking immunity as would to a State invoking any other public interest to defend against a claim for damages. Reliance by a State on immunity, in other words, should be analyzed according to the same legal framework as that used by arbitral tribunals to determine a State’s liability under investment treaties for any other measure that interferes with a foreign investment.

In that context, it bears noting that most of the standard rights granted under investment treaties, in particular fair and equitable treatment, full protection and security, or the prohibition of expropriations without compensation, are not understood by arbitral tribunals as absolute guarantees. Rather, most investment-treaty tribunals recognize that, in interpreting investment treaty standards, a balance needs to be struck between the private interests of foreign investors and the public interests of host States, for example by applying proportionality analysis. In doing so, they recognize that interferences with interests of foreign investors based on legitimate public policy grounds, which are applied in a non-discriminatory manner and are proportional to the impact on the foreign investors, in principle, do not entitle the investor to damages.

The underlying idea of balancing private and public interests arguably could also be used in order to resolve the tension between international investment law and the effective protection of foreign investments, on the one hand, and the law of State

immunity and the protection of interests of States, on the other. Proportionality analysis arguably helps to curtail abuses of State powers in invoking State immunity, while allowing to defend the public interest against claims for protection of private interests. Under a proportionality framework, the relation between international investment law and the law of State immunity becomes less a question of how two bodies of international law relate to each other, but how the interests protected by the respective bodies of law relate to each other. Proportionality analysis thus also becomes a tool of defragmentation of international law.

In order to further develop this argument and to illustrate how precisely proportionality analysis can be applied as an interpretative tool to balance the interests of foreign investors and States in the context of sovereign immunity, this paper now turns to analyzing the jurisprudence of the ECtHR on how rights granted under the ECHR interact with public interests protected by sovereign immunity, including foreign sovereign immunity in a number of cases.

**D. Taking a Human Rights Perspective on State Immunity: Proportionality Analysis in the Jurisprudence of the ECtHR**

So far investment treaty arbitration has not directly dealt with the law of State immunity, and domestic courts have not looked towards international investment law when applying sovereign immunity at the domestic level as a bar either to jurisdiction or to enforcement of judicial and arbitral decisions. In other international legal regimes, by contrast, in particular under the ECtHR, the tension between sovereign immunity and the protection of individual rights has been dealt with in more detail. This section, therefore, analyzes the jurisprudence of the ECtHR on matters of immunity as potential guidance for how the relationship between sovereign immunity and international investment law could be conceptualized and concretized and whether, and under what circumstances, the application of sovereign immunity at the domestic level results in a breach of investment treaty standards.

Such a cross-regime analysis between international investment law and human rights relies on the conviction that both bodies of law are functionally comparable: they are both public law disciplines that aim at limiting governmental power in light of rights granted to private actors and that are implemented by means of international dispute settlement to which affected individuals have direct access.88 Both international

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88 See on the understanding of international investment law as a public law discipline and on investor-State arbitration as a mechanism similar to administrative or constitutional review Stephan Schill, 'International Investment Law and Comparative Public Law – An Introduction' in Schill (supra note 44) 3, 10-17. On this conceptualization of international investment law and the appropriateness of drawing inspiration from human rights law see also International Thunderbird Gaming Corp v. United Mexican States, UNCITRAL/NAFTA, Arbitral Award, 26 January 2006, Separate Opinion by Thomas Wälde, para. 13 («... more appropriate for investor-state arbitration are analogies with judicial review relating to governmental conduct—be it international judicial review (as carried out by the WTO dispute panels and Appellate Body, by the European- or Inter-American Human Rights Courts or the European Court of Justice) or national administrative courts judging the disputes of
investment law and human rights therefore share the common aim of holding governments to rule of law standards and of sanctioning the abuse of public powers. In light of these commonalities, the potential for mutual learning between both bodies of international law is considerable.\(^89\) A cross-regime analysis also appears useful, because, as will be shown in this Part, there are undeniable parallels between the principles of international investment law and the rights granted under the ECHR concerning access to justice in domestic courts and enforcement of arbitral decisions.

Against this background, this Part first analyzes the jurisprudence of the ECtHR concerning issues of State immunity (I.), and then focuses on the Court’s proportionality reasoning as a framework for harmonizing human rights and State immunity (II.). This cross-regime analysis suggests that international investment law can draw inspiration from the interpretative methods and concepts used by the ECtHR, whose jurisprudence in many fields is further advanced and more mature than the arbitral jurisprudence in the rather young field of investment treaty arbitration. Certainly, human rights jurisprudence can only directly be relevant for the interpretation of investment treaties to the extent it is applicable law between the parties to the proceedings. Yet, even independent of the applicability of human rights law in investor-State arbitrations, human rights law can provide «guidance by analogy»\(^90\) as to possible interpretations of rights granted under investment treaties, including fair and equitable treatment or full protection and security, as regards State immunity law.

I. Immunity as a Breach of Rights Granted under the Convention

Issues, including the application of State immunity, that international investment law deals with under the headings of fair and equitable treatment, full protection and security, the prohibition of expropriation without compensation, and special clauses requiring effective means for enforcing rights, are dealt with under the ECHR Convention as matters affecting the right to property in Art. 1 of Protocol 1 and the fair individual citizens’ [sic] over alleged abuse by public bodies of their governmental powers. In all those situations, at issue is the abuse of governmental power towards a private party that did and could legitimately trust in governmental assurances it received; in commercial arbitration on the other hand it is rather a good-faith interpretation of contractual provisions that is at stake. Abuse of governmental powers is not an issue in commercial arbitration, but it is at the core of the good-governance standards embodied in investment protection treaties. The issue is to keep a government from abusing its role as sovereign and regulator after having made commitments.»).\(^89\)

\(^89\) For this reason cross-regime analyses of international investment law and human rights law are on the rise. Their aim is mostly to concretize the understanding of the often vague concepts of international investment law, or even reform international investment law so that it can deal more adequately with the conflicts between private and public interests. See, for example, Ursula Kriebaum, *Eigentumsschutz im Völkerrecht* (2008) 549-573; Freya Baetens, ‘Discrimination on the Basis of Nationality: Determining Likeness in Human Rights and Investment Law’ in Schill (supra note 44) 279; Ehsassi (supra note 68); William Burke-White and Andreas von Staden, ‘The Need for Public Law Standards of Review in Investor-State Arbitrations’ in Schill (supra note 44) 689; see also the contributions in Dupuy (supra note 5).

\(^90\) *Mondev v. United States* (supra note 74), para. 144.
trial-principle in Art. 6(1) ECHR. Both of these rights have also been applied by the ECtHR to deal with matters of immunity.

In order to draw parallels between international investment law and human rights law, this section first discusses the substantive standards in the ECHR that are affected when jurisdictional or enforcement immunities are applied (1.). It then turns to the ECtHR’s jurisprudence on jurisdictional immunities (2.), before discussing the Court’s specific case law concerning sovereign immunity and its relations to the rights granted under the ECHR (3.). The Court’s jurisprudence is particularly instructive as regards the methodology applied by the Court.

1. Access to Justice and Protection of Property in ECtHR Jurisprudence

Since its landmark decision in Golder v. United Kingdom the ECtHR consistently interprets Art. 6(1) ECHR as guaranteeing individuals access to a domestic court, even though that right does not appear expressly in the text of the Convention. Yet, the Court argued, a guarantee to access to courts was necessarily implied as otherwise the procedural guarantees laid down in Art. 6(1) ECHR concerning fairness, publicity, and promptness in the decision-making of courts would be meaningless. Similarly, the ECtHR considers that Art. 6(1) ECHR grants a right to individuals to have judicial decisions enforced, as otherwise the right to access to a court «would be illusory if a Contracting State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party.» In consequence, a State is required under Art. 6(1) ECHR «to make use of all available legal means at its disposal in order to enforce a final court decision … and that the overall enforcement system is effective both in law and in practice.» Likewise, the ECtHR held that the non-execution of judgments constituted breach of Art. 1 of Protocol 1.

Art. 6(1) ECHR also has been applied in relation to arbitration. Thus, the ECtHR considers that access to arbitration satisfies the obligations of Member States to grant

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91 ECHR, Art. 6(1) provides:
In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

92 Golder v. United Kingdom, Judgment, 21 February 1975, ECHR Series A No. 18, paras. 28-36; most recently confirmed in Cudak v. Lithuania (supra note 30) para. 54.


95 Immobiliare Saffi v. Italy (supra note 93) paras. 49-59.
individuals access to justice.\textsuperscript{96} Likewise, the Court has held that a State that declares an arbitral award void by subsequent legislation and thereby changes the effects of an arbitral award rendered against it breached Art. 6(1) ECHR.\textsuperscript{97} Finally, in \textit{Regent v. Ukraine}, the ECtHR considered that continued non-enforcement of an arbitration award against a Ukrainian company, which was 99.9\%-owned by the State, constituted breach of Art. 6(1) ECHR.\textsuperscript{98} In \textit{Regent v. Ukraine}, the Court also found that non-enforcement of a commercial arbitration award constituted breach of Art. 1 of Protocol 1.\textsuperscript{99} In consequence, a Member State of the ECHR is required, not only as regards judicial decisions, but also in relation to arbitral awards, to «make use of all available legal means at its disposal in order to enforce a binding arbitration award providing it contains a sufficiently established claim amounting to a possession [and] must make sure that … the overall system [for enforcement] is effective both in law and in practice.»\textsuperscript{100} The parallels to the investment treaty decisions in \textit{Desert Line v. Yemen},\textsuperscript{101} \textit{Saipem v. Bangladesh},\textsuperscript{102} or \textit{Mondev v. United States}\textsuperscript{103} regarding access to justice and enforcement of awards are undeniable.

2. Immunity from Jurisdiction in ECtHR Jurisprudence

The ECtHR has also had a chance to consider whether the grant of immunity from jurisdiction in domestic courts breached Art. 6(1) ECHR. In \textit{Fayed v. United Kingdom},\textsuperscript{104} the applicants were barred in the United Kingdom from bringing libel actions against inspectors appointed under the Companies Act 1985 who had delivered a report on the takeover of a major group of department stores. The inspectors’ report contained statements that the applicants considered as damaging to their reputation.\textsuperscript{105} They did not, however, dispose of a judicial remedy under English law, because domestic courts could only review the report for illegality, irrationality, and procedural impropriety, but, in principle, not for mistake of facts.\textsuperscript{106} Libel actions against the inspectors, in turn, were entirely excluded because of an immunity granted under English law.\textsuperscript{107}

\textsuperscript{96} Lithgow and Others v. United Kingdom, Judgment, 8 July 1986, ECHR Series A No. 102, para. 201; reiterated in \textit{Regent v. Ukraine}, Judgment, 3 April 2008, para. 54.
\textsuperscript{97} Stran Greek Refineries and Stratis Andreadis v. Greece, Judgment, 9 December 1994, ECHR Series A No. 301-B, paras. 46-50.
\textsuperscript{98} \textit{Regent v. Ukraine} (supra note 96) paras. 59-60.
\textsuperscript{99} Ibid para. 61.
\textsuperscript{100} \textit{Kin-Stib and Majkić v. Serbia}, Judgment, 20 April 2010, para. 83.
\textsuperscript{101} See supra notes 79-80.
\textsuperscript{102} See supra notes 81-82.
\textsuperscript{103} See supra notes 74-77.
\textsuperscript{104} \textit{Fayed v. United Kingdom}, Judgment, 21 September 1990, ECHR Series A No. 294-B.
\textsuperscript{105} Ibid para. 64.
\textsuperscript{106} Ibid paras. 44-45.
\textsuperscript{107} Ibid para. 42. The Court regularly also stresses that jurisdictional immunity needs to be distinguished from the lack of a cause of action under the domestic law of the respondent State. Only proper immunities touch upon Art. 6(1) ECHR, while the lack of a cause of action does not. \textit{Z and Others v. United Kingdom}, Judgment, 10 May 2001, paras. 94-100; \textit{Roche v. United Kingdom}, Judgment, 10
In determining the conformity of this immunity, the ECtHR observed that

[I]t would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 para. 1 (art. 6-1) … if … a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.\[108\]

At the same time, however, the Court emphasized that the rights granted under Art. 6(1) ECHR were not absolute, but left room for States to impose restrictions that reflect a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.\[109\]

For the Court, this balance referred to the proportionality of an interference with the applicants’ right to access to court in light of the purpose of the interference pursued; at the same time, the ECtHR granted a margin of appreciation to the Contracting State. Thus, in Fayed, the Court observed that

[T]he Contracting States enjoy a certain margin of appreciation, but the final decision as to observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired.

Furthermore, a limitation will not be compatible with Article 6 para. 1 (art. 6-1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.\[110\]

In applying this proportionality analysis to the case at hand, the Court found that protecting inspectors, whose mandate under the Companies Act aimed at «ensuring the overall soundness and credibility of the country’s company law structures,» from libel actions was justified by an «overriding interest of social importance.»\[111\] The Court also considered that the rights and reputational interests of companies subject to inspection, and of their shareholders, were sufficiently protected because the investigations under the Companies Act had to conform to a strict legal framework, which also included procedural safeguards during the inspection proceedings.\[112\]

Furthermore, the Court stressed the margin of appreciation accorded to the State:

October 2005, para. 124. Under Art. 6(1) ECHR the Court therefore may not create a substantive right which has no legal basis in the State concerned. See Roche v. United Kingdom, ibid, paras. 116-117; Markovic and Others v. Italy, Judgment, 14 December 2006, para. 93.

108 Fayed v. United Kingdom (supra note 104) para. 65 (internal citation omitted); similarly, Markovic and Others v. Italy (supra note 107) para. 97; Cudak v. Lithuania (supra note 30) para. 58.

109 Fayed v. United Kingdom (supra note 104) para. 65.

110 Ibid (quoting Lithgow and Others v. United Kingdom (supra note 96) para. 194). The Court already had set out proportionality analysis combined with the margin of appreciation doctrine in Ashingdane v. United Kingdom, Judgment, 28 May 1985, para. 57.

111 Fayed v. United Kingdom (supra note 104) para. 69.

112 Ibid para. 70.

113 Ibid para. 78.
It is not, however, for the Court to substitute its own view for that of the national legislature as to what would be the most appropriate policy in this regard. The risk of some uncompensated damage to reputation is inevitable if independent investigators in circumstances such as those of the present case are to have the necessary freedom to report without fear, not only to the authorities but also in the final resort to the public. It is in the first place for the national authorities to determine the extent to which the individual’s interest in full protection of his or her reputation should yield to the requirements of the community’s interest in independent investigation of the affairs of large public companies.\(^{114}\)

Proportionality analysis also figured prominently in other cases before the Court relating to immunities. Thus, the Court in several other cases found that immunity for members of parliament from suit by persons who considered they had been wronged by the words or deeds of such members, in principle, constituted a proportional restriction of the right to access to court that «pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.»\(^ {115}\) Such an immunity, however, could not encompass cases where no clear link existed between the parliamentarian’s conduct and a parliamentary activity, as this would result in a disproportionate restriction of the right to access to courts.\(^ {116}\)

There are also other instances in which the Court found that domestic immunity from jurisdiction breached Art. 6(1) ECHR because it was overly broad and did not allow for a differentiated application to the circumstances of each individual case. Thus, in Osman v. United Kingdom the Court found a general immunity of the police from suit for negligence in connection with the investigation and suppression of crime to be disproportional because the immunity did not permit to take into account the circumstances of each individual case.\(^ {117}\) Similarly, the Court found that Art. 6(1) ECHR was breached in case a government could block individuals from accessing courts simply by issuing national security certificates. In the Court’s view «[t]he right guaranteed to an applicant under Article 6 § 1 of the Convention to submit a dispute to a court or tribunal in order to have a determination of questions of both fact and law cannot be displaced by the ipse dixit of the executive.»\(^ {118}\)

Overall, the cases dealing with various forms of domestic immunities as a bar to access to courts illustrate that proportionality analysis can be a way to reach balanced decisions, allowing States to protect public interests and to accord them primacy over

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\(^{114}\) Ibid para. 81.

\(^{115}\) A v. United Kingdom, Judgment, 17 December 2002, ECHR 2002-X 294-B, paras. 75-87 (quote at para. 77). See most recently also Kart v. Turkey, Judgment, 3 December 2009, paras. 49-114.

\(^{116}\) In consequence, the Court found breach of Art. 6(1) ECHR in a number of cases despite because of parliamentary immunity under domestic law. See Cordova v. Italy (No. 1), Judgment, 30 January 2003, ECHR 2003-I, paras. 48-66; Cordova v. Italy (No. 2), Judgment, 30 January 2003, ECHR 2003-I, paras. 58-67; Tsalkitzis v. Greece, Judgment, 16 November 2006, paras. 45-51; C.G.I.L. and Cofferati v. Italy, Judgment, 24 February 2009, paras. 62-80.

\(^{117}\) Osman v. United Kingdom, Judgment, 28 October 1998, para. 151.

the rights of individuals, while limiting such interferences to measures that pursue a legitimate aim and do not restrict individual rights more than necessary.

3. Foreign Sovereign Immunity in ECtHR Jurisprudence

Unlike investment treaty tribunals, the ECtHR has entertained several cases in which the applicants invoked that the application of foreign sovereign immunity to bar jurisdiction and enforcement of judicial decisions breached Art. 6(1) ECHR and Art. 1 of Protocol 1. Like in the domestic immunity cases discussed above, the ECtHR applied a proportionality test to balance the right of the individual to access to justice with the interest protected by the law of State immunity, asking whether the immunity served a legitimate purpose and was proportional in the case at hand. Unlike in domestic immunity cases, the Court, however, supplemented its analysis on foreign sovereign immunity with a reference to the international law aspects of sovereign immunity. In case of foreign sovereign immunity the Court thus added that

[t]he Convention, including Article 6, cannot be interpreted in a vacuum. The Court must be mindful of the Convention’s special character as a human rights treaty, and it must also take the relevant rules of international law into account. The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity.119

In doing so, the Court considered that granting foreign sovereign immunity as a bar to jurisdiction or enforcement, in principle, pursued the legitimate aim of complying with international law and of promoting comity and good relations between States.

Thus, in a first set of cases, the Court accepted that the grant of immunity from jurisdiction in domestic courts to an international organization in Germany was not a breach of Art. 6(1) ECHR. Applying the proportionality framework developed under Art. 6(1) ECHR in the context of domestic immunity cases, the Court considered that «the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments.»120 Such grant, however, also needed to be proportional in the circumstances of the particular case.121 The Court thus stressed that by attributing competences to an international organization, the Contracting States were not absolved from their responsibility to ensure the fundamental rights granted by

121 Waite and Kennedy (supra note 120) para. 64.
the ECHR. In the context of Art. 6(1) ECHR, however, this did not necessarily mean that applicants had to have access to domestic courts when affected by measures of that international organization. Instead, in the Court’s view it was sufficient if applicants disposed of reasonable alternative means to protect their Convention rights, such as access to dispute settlement mechanisms established under the framework of the international organization itself.

In a second set of cases, the Court extended these considerations to the relations between States. Thus, in McElhinney v. Ireland, the Court accepted that Ireland’s grant of jurisdictional immunity to the United Kingdom for a tort committed by a UK border guard on Irish territory did not breach Art. 6 ECHR. It reasoned that such grant constituted a proportional restriction on the applicant’s right to have access to an Irish court which served to protect the diplomatic relations between the two States. In particular, the Court pointed out that despite a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission of a foreign State within the forum State, Ireland was not «alone in holding that immunity attaches to suits in respect of such torts committed by acta jure imperii or that, in affording this immunity, Ireland falls outside any currently accepted international standards.» Moreover, the Court observed that there was no reason why suit could not have been brought in the United Kingdom.

Quite similarly, in Fogarty v. United Kingdom, the Court accepted that the United Kingdom’s grant of jurisdictional immunity to the United States in an action in UK courts against the US embassy for alleged discrimination in the embassy’s recruitment process was not «outside any currently accepted international standards.»

Both McElhinney and Fogarty concerned situations where, in the view of the parties, international law did not require the forum State to grant immunity to a foreign State, but where immunity was extended as a discretionary act in order to protect the diplomatic relations of the forum State and the third State. While the Court accepted that the underlying policy constituted a sufficient public interest to limit the applicants’ right to access to court, the Court did not view this discretion as granting a carte blanche to the States in question. Instead, the Court controlled the decision of the respondent States under a proportionality test that weighed the interests of the applicants against the interests of the State to protect its diplomatic relations.

By referring to currently accepted international standards, however, the Court indicated that the standards were subject to change. Furthermore, it determined whether granting sovereign immunity was acceptable internationally based on the subject matter of the claim pending in domestic courts. This is an indication that absolute immunities attaching to the status of the respondent in domestic proceedings as a foreign sovereign

122 Ibid para. 67.
123 Ibid paras. 68-69.
124 McElhinney v. Ireland (supra note 119) paras. 33-40.
125 Ibid para. 38.
126 Ibid para. 39.
127 Fogarty v. United Kingdom (supra note 119) para. 37.
as such would not be a sufficient justification to prevent individuals from bringing suit against a foreign State in the domestic courts of another State. Finally, one important factor militating for the proportionality of the restriction to access to courts, at least in *McElhinney*, was the availability for the applicant of remedies in the courts of the third State that enjoyed immunity in the forum State.\(^{128}\)

Whereas *Fogarty* and *McElhinney* concerned cases, in which granting foreign sovereign immunity was presented to the Court as a discretionary decision of the forum State, in *Al-Adsani v. United Kingdom*, the respondent State argued that international law required it to confer sovereign immunity to the third State.\(^{129}\) The case concerned a claim in UK courts against the State of Kuwait for damages resulting from personal injury that the applicant allegedly had suffered when tortured by Kuwaiti police guards in Kuwait. In this case the Court, like in *Fogarty* and *McElhinney*, denied that the application of foreign sovereign immunity by UK courts was in breach of Art. 6(1) ECHR. Responding to the argument by the United Kingdom that it was required to accord immunity to Kuwait, the Court stressed the need for a harmonious interpretation of the Convention in light of general international law relating to State immunity. It observed

> [t]hat measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1. Just as the right of access to a court is an inherent part of the fair trial guarantee in that Article, so some restrictions on access must likewise be regarded as inherent, an example being those limitations generally accepted by the community of nations as part of the doctrine of State immunity.\(^{130}\)

After declining the applicant’s argument, that the United Kingdom was under an obligation under international law not to grant immunity for alleged acts of torture in view of the *ius cogens* nature of the prohibition of torture,\(^{131}\) the Court found that the grant of foreign sovereign immunity in the case at hand did not breach Art. 6(1) ECHR.

The ECtHR, however, did not only accept that foreign sovereign immunity could be invoked as a restriction to access to a court, but equally in respect of the enforcement of a domestic judgment against a foreign State. In *Kalogeropoulou and others v. Germany and Greece*, the Court accepted that Greece had not breached Art. 6(1) ECHR, nor Art. 1 of Protocol 1, when refusing to enforce a Greek judgment against Germany for damages for crimes committed by the German army during World War II in Greece.\(^{132}\) The Court reasoned that Art. 6(1) ECHR was not violated because Greece, by refusing enforcement, granted foreign sovereign immunity to Germany within the scope commonly accepted by the community of States. Likewise, the Court considered that


\(^{129}\) *Al-Adsani v. United Kingdom* (supra note 119) para. 44.

\(^{130}\) Ibid para. 56.

\(^{131}\) Ibid paras. 57-66.

\(^{132}\) *Kalogeropoulou and others v. Greece and Germany*, Decision, 12 December 2002, ECHR 2002-X.
refusing enforcement was a proportional restriction on the right to property because it could not be expected from Greece to violate commonly expected principles of the law of State immunity in order to protect good international relations with another State.

The Court’s jurisprudence in *McElhinney*, *Fogarty*, and *Al-Adsani* have been criticized as unnecessarily deferential, given that the Court did not engage in an in-depth inquiry into the proportionality of the immunities in the cases at hand. Yet, in the recent judgment in *Cudak v. Lithuania* the Court showed that its proportionality approach did not only play out in favor of States. In the case in question, the Court found that the grant of foreign sovereign immunity by Lithuanian courts concerning an employment-related dispute involving the dismissal by the Polish embassy in Vilnius of a locally hired employee was in breach of Art. 6(1) ECHR. The Court noted that the grant of immunity in the specific case was essentially equivalent to applying an absolute form of sovereign immunity, which, as the Court noted, «has, for many years, clearly been eroded.» Instead, the Court applied a provision of the UN Convention dealing with employment contracts with a State, as an expression of customary international law, and determined that that provision would not have entitled Poland to immunity in Lithuanian courts. In consequence, the Court found that by upholding in the present case an objection based on State immunity and by declining jurisdiction to hear the applicant’s claim, the Lithuanian courts, in failing to preserve a reasonable relationship of proportionality, overstepped their margin of appreciation and thus impaired the very essence of the applicant’s right of access to a court.

This case shows that the Court’s proportionality analysis does not only work in one direction to protect interests of State, but can equally afford protection to the rights of individuals. The decision is further noteworthy as the Court applied the UN Convention as an expression of customary international law and made allusion to the fact that absolute immunity doctrines were problematic in view of the blanket restrictions they impose on the right of private individuals to access to courts under Art. 6(1) ECHR. This case therefore can be viewed as an example of the ECtHR actively using human rights law to influence and reduce the scope of State immunity, much like substantive investment treaty obligations could be used to reduce the scope of domestic State immunity doctrines.

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133 Reinisch (supra note 26) 816.
134 *Cudak v. Lithuania* (supra note 30) paras. 60-75. For discussion of this case see Lijana Štarienė ‘Cudak v. Lithuania and the European Court of Human Rights Approach to the State Immunity Doctrine’ (2010) 2 Jurisprudencija/Jurisprudence 159.
135 Ibid para. 64.
136 Ibid paras. 64-67.
137 Ibid para. 74.
II. Proportionality Analysis as a Means of Harmonizing Human Rights and State Immunity

The core of the ECtHR’s approach to conceptualizing the relationship between the right to access to courts and the right to property, on the one hand, and (foreign) sovereign immunity, on the other, is proportionality reasoning combined with the granting of a certain margin of appreciation to the respondent State. In the Court’s interpretative framework, restrictions on the right to access to courts and on enforcement of judicial and arbitral decisions must serve a legitimate purpose and constitute a proportional restriction to the rights granted to individuals under the Convention. Despite granting a margin of appreciation to the State, the question of whether a host State has struck a proportional balance, ultimately, is to be determined by the Court itself. Granting a margin of appreciation, however, is justified because the Court is not well-placed, in terms of expertise and mandate, to replace its own judgment for that of the State.

Overall, the Court’s approach allows it to balance the private rights protected by the ECHR and the measures pursued by the respondent State to protect a certain public interest. This avoids granting unconditional primacy to either private or public interests, which would either prevent governments from effectively regulating in the public interest, if primacy was granted to private rights, or giving governments carte blanche to interfere with private rights, if granting immunity would go unscrutinized by the Court.

In applying its conceptual framework, the Court considers that grants of jurisdictional and enforcement immunities can be permissible. However, they cannot be an end in themselves, but only the means of protecting an underlying public interest. It is noteworthy in this context that the Court appears to draw no principled distinction based on whether immunity was granted to a domestic public body or to a foreign State. In both cases, proportionality analysis is the preferred method of analysis. The Court only compliments its analysis, when dealing with foreign sovereign immunity, by making reference to Art. 31(3)(c) of the Vienna Convention to stress that the ECHR needs to be interpreted in light of general public international law.

The Court, thus, does not perceive of general public international law as an independent framework that is dissolved from the ECHR but as one that needs to fit harmoniously with the obligations States undertook by acceding to the Convention. Hence, in the Court’s view, living up to other obligations under international law, safeguarding diplomatic relations with other States, and exercising comity vis-à-vis acts of those States are all legitimate reasons for granting immunity. Yet, these considerations do not absolve States from taking into account the rights of individuals to access to courts and to enforcement of judicial and arbitral decisions. Instead, proportionality analysis becomes a method for harmonizing the relationship between special and general international law through interpretation.138

Such an idea of balancing is not only familiar from human rights law. It is also inherent to the law of State immunity itself. As Judges Higgins, Kooijmans and Buergenthal noted in a Separate Opinion in the *Arrest Warrant* case when discussing the evolution of international law on the relation between immunity of high State officials and peremptory norms of international criminal law:

These trends reflect a balancing of interests. On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance must therefore be struck between the two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity. Moreover, a trend is discernible that in a world which increasingly rejects impunity for the most repugnant offences, the attribution of responsibility and accountability is becoming firmer, the possibility for the assertion of jurisdiction wider and the availability of immunity as a shield more limited. The law of privileges and immunities, however, retains its importance since immunities are granted to high State officials to guarantee the proper functioning of the network of mutual inter-State relations, which is of paramount importance for a well-ordered and harmonious international system.139

As arbitral tribunals in investment treaty arbitration increasingly also have recourse to proportionality-type reasoning to balance investor rights and the host State’s interest to take action in the public interest,140 they could follow the example of the ECtHR and apply the same type of reasoning in dealing with the tension between investment protection and domestic and foreign sovereign immunity.

In applying proportionality reasoning, investment treaty tribunals would need, first, to determine whether immunity from jurisdiction and enforcement in a given case protect a legitimate public interest; and, second, to restrict a State’s interference with the interest of foreign investors to what is necessary to protect the public interest at stake. Finally, the measure in question would also need to be proportional in the strict sense, meaning that there is a reasonable relationship between what is protected by the immunity in question and the degree of interference with what is at stake for the investor. A respondent State, in turn, would need to show that the immunity granted serves a legitimate public policy purpose and that the rights of the person affected nevertheless are sufficiently protected by other substantive, procedural, and institutional means.

This framework makes justifying absolute forms of sovereign immunity difficult because they do not allow domestic courts to react to the individual circumstances of

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140 See supra note 87.
each case and prevent them from scrutinizing whether an appropriate balance was struck between public and private interests. That is why absolute forms of immunity are adverse to the very concept of the rule of law as public interests are given unconditional primacy in relation to the private interests affected. Applying proportionality analysis in this context constitutes a change in paradigm from permitting States to exercise largely uncontrolled discretion as to what type of sovereign immunity doctrine to follow at the domestic level towards requiring them to choose a more restrictive one that allows the protection of legitimate public interests, while affording the best possible protection to foreign investors.

Thus, not only the emergence of a global economy, but also considerations of human rights, the rule of law, and court supervision of State behavior, pressure States to reduce the scope of State immunity they grant to foreign States. International investment law, therefore, would be no exception in pushing for a further restriction of jurisdictional and enforcement immunities at the domestic level. Instead, applying proportionality analysis to determining the impact substantive investment treaty obligations have on jurisdictional and enforcement immunity would be the logical continuation in respect of the developments in international investment law and the law of State immunity towards a rule of law-based framework for investor-State relations. In this sense, international investment law, human rights law, and the law of State immunity can co-exist peacefully in their common search for a more balanced relation between private and public interests.

E. Conclusion

This paper has suggested that the rise of international investment law and the retreat of State immunity are part of the larger evolution of international law away from an exclusive inter-State system towards one that takes individuals and their protection seriously. Both the evolution in international investment law and in the law of State immunity, it was argued, can be explained by the increasing need in a global economy to provide effective protection under international law to interests of individuals against the abuse of public power. This also meant taking leave from an international law that governed the relation between States only and welcoming one in which individuals are recognized as subjects of international law.

The recognition of individuals as part of international law, however, does not mean that private interests trump public interests. Instead, States and the power they exercise remain crucial for providing a legal infrastructure and necessary ordering mechanisms for the global society in general and the global economy in particular. Apart from increasing the accountability of States vis-à-vis private individuals, including foreign investors, international law also needs to ensure that States can remain functional in using their powers to serve the public good and, in times of globalization, bring about public institutions for a global social system that do not only work in the interest of some States, or some groups of society, but that enhance welfare globally. States, in other words, remain central in providing global ordering structures, not only for non-
economic interests that cannot be protected through market mechanisms, but also for the functioning of global markets themselves.

Thus, while international investment law can contribute to strengthening the protection of private interests against the abuse of governmental powers, it also needs to provide sufficient leeway for States to act in the public interest. It needs to ensure above all that States remain in a position to effectively cooperate internationally in order to establish institutions that can govern globalized processes effectively. Foreign sovereign immunities can have an important function in the protection of such interests, for example by protecting assets of States that are necessary to enable inter-State communication and cooperation. At the same time, it is important to ensure that State immunities are not misused to frustrate the legitimate expectation of foreign investors that States live up to the obligations they have entered into in international investment agreements and in the context of international arbitration.

While the law of State immunity has reacted to those demands by departing from absolute immunity and adopting more restrictive versions, it still struggles for the appropriate balance between public and private interests. As Hazel Fox observes, the contours of the post-modern law of State immunity, as she calls it,

are not fully discoverable, but certain conflicting trends can be perceived. In one direction, the enhanced status of the individual presses for the lifting of immunity from all claims arising from conduct of the State; in another direction, the pooling of national powers in non-State entities calls for their protection to enable their proper development in the public interest.  

Both international investment law and the law of State immunity need to share the concern for finding an appropriate balance between the protection of private economic interests and the obligation and responsibility of States to act in the public interest. While that balance has been found in opening access to investor-State arbitration, where jurisdictional immunity does not apply, enforcement immunity still leaves ample opportunities for States to avoid compliance with their obligations vis-à-vis foreign investors. Thus, while united with international investment law in its development towards ensuring more accountability of States, the law of State immunity still displays antagonistic traits to the objective of international investment law, above all as regards the enforcement of arbitral awards.

This antagonism, however, could be overcome by adopting the conceptual foundations laid down by the ECtHR in its jurisprudence on the relation between rights granted to individuals under the ECHR and State immunity: balancing the interest of individuals and States by proportionality analysis. Investment treaty tribunals, when dealing with whether the grant of immunity from jurisdiction and enforcement breaches investment treaty obligations, and domestic courts, when making decisions about the enforcement of investment treaty awards against States, should draw on the solutions and the conceptual framework used by the ECtHR. This allows enhancing investor-

141 Fox (supra note 6) 5.
State cooperation by protecting reliance of foreign investors on commitments by States, while safeguarding sufficient leeway for States to regulate and to cooperate efficiently with other States to further the public interest.

Such a proportionality analysis suggests that absolute forms of immunity would need to be abandoned as they violate investment treaty provisions, such as full protection and security, fair and equitable treatment, the prohibition of uncompensated compensations, and the obligation to provide effective remedies and means of enforcement. Limited forms of enforcement immunity that protect, for example, assets and bank accounts of foreign missions against enforcement, by contrast, are acceptable as they protect assets States require to serve the public interest, namely to cooperate with other States at the international level. In that sense international investment law may serve as a body of law that further pushes for the reduction in scope of foreign sovereign immunity doctrines without questioning the principle that certain public interests need to be protected by sovereign immunities. In that perspective, both international investment law and the law of State immunity serve the protection of important interests that need to converge, and are in the process of convergence, in a framework that aims at balancing and optimizing private and public interests.