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Doctoral (PhD) Dissertation

**Enforcement of Commercial Judgments against Foreign Sovereign
Assets in International Law**

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Abbreviation

ECOWAS: Economic Community of West African States

ECtHR: The European Court of Human Rights

ECSI: European Convention on State Immunity (1972)

EU: European Union

FOB: Free on Board

FSIA: The Foreign Sovereign Immunity Act of 1976 (the US)

FSIA (1985): The Foreign Sovereign Immunity Act of 1985 (Australia)

GDP: Gross Domestic Product

ICJ: International Court of Justice

ICSID: International Centre for Settlement of Investment Disputes

ILC: International Law Commission

ILA: International Lawyers Association

IMF: International Monetary Fund

ISDS: Investor-State Dispute Settlement

MoA: Margin of Appreciation

MoC: Measure of Constraint

NYC: The Convention on Recognition and Enforcement of Foreign Arbitral Award of 1958, New York (the NYC)

PPP: Public-Private Partnership

SIA: The State Immunity Act of 1978 (the UK)

SIA (1985): The State Immunity Act of 1985 (Canada)

SOEs: State-owned Enterprises

UN: The United Nations

UNESCO: The United Nations Education, Scientific and Cultural Organization

UNCITRAL: The United Nations Commission for International Trade Law

UNCLOS: The United Nations Convention on the Law of the Sea of 1982

UNGA: The United Nations General Assembly

USSC: The United States Supreme Court.

VCCR: The Vienna Convention on Consular Relations (1963)

VCDR: The Vienna Convention on Diplomatic Relations (1961).

VCLT: The Vienna Convention on Law of Treaties (1969)

WB: The World Bank.

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Figure 1: Types of foreign sovereign immunity

Figure 2: Types of measures of constraint (MoCs)

Figure 3: Non-immune assets

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International Law**

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Abstract

Questions of foreign sovereign immunity play a vital role in interstate affairs as well as the State's relation with its commercial counterparts. Absolute immunity is no longer granted to a State for its commercial activities; instead following the restrictive immunity principle, the State is deemed as a private person. The United Nations Convention on Jurisdictional Immunities of State and Their Property (2004) [yet to be effective] (the UN Convention) and the European Convention on State Immunity (1972) (the ECSI) and the national legislations from dominant jurisdictions follow the same principle.

Nevertheless, the immunity of sovereign assets from the measures of constraint (MoCs) is yet to be settled. The ECSI (1972) grants immunity to the foreign sovereign assets when it comes to enforcement of a judgment against the defendant State except with the State's consent thereto [article 23]. The UN Convention (2004) permits enforcement only either with consent or earmarked assets or assets used in other than governmental, non-commercial purposes [article 19]. Due to the absence of effective international law, the national legislation and the case laws have filled up the vacuum. The law on foreign sovereign immunity from MoCs develops based on the national practices also because the judgment creditor brings the enforcement litigations before the forum States where the defendant State has some assets available for MoCs. Precedents in the forum States also vary in terms of granting absolute or restrictive immunity to foreign sovereign assets for enforcement of commercial debts. For

instance, China follows absolute immunity from MoCs whereas the US, the UK allow MoCs against foreign sovereign assets if used for commercial purposes. On the other hand, the Basic Law of Germany requires its courts to follow prevalent international law. However, the UN convention (2004) has not come into force, and deriving customary international law from State practices is a challenge. Therefore, the law on the immunity of foreign sovereign assets is being developed with the case laws from the national jurisdictions. Precedents from different forum States are referred to in other cases with persuasive value [even not binding]. This results in inconsistent, uncertain, and unpredictable interpretations of sovereign assets for the question of immunity from MoCs affecting the judgment creditor, the defendant State, its subjects, and the forum State as well. With a view to mitigating the adverse effects, this dissertation focused on four corner issues in enforcement of a commercial judgment against foreign sovereign asset, namely the legal framework, the substantive and procedural challenges in enforcement litigations, the interpretation of various sovereign assets for immunity in cases, and finally, application of different interpretative tools borrowed from other canons of laws.

The embedded analysis of the international conventions, national legislations, and the forum State's executives' role in the enforcement litigations against another State show the scattered status of the laws on the immunity of sovereign assets from MoCs. Such as, where the Brussels Convention (1926) allows enforcement against State-owned ships in case of their commercial uses, the Paris Convention (1919) and the Chicago Convention (1944) state that the State-owned aircrafts are not immune unless they are used in public services, the ECSI (1972) grants MoCs only with State's consent. Besides, where the UN Convention and several national legislations declare the assets with commercial use/purpose as non-immune, the interpretation of the same is left at the discretion of the deciding court. In some cases, concerned executive branches of forum States send *amicus* briefs to the courts suspending or stopping the MoCs against the foreign sovereign assets despite the respective national legislations allowing MoCs. These justify the further study on the substantive and procedural challenges for a comprehensive view of the enforcement litigations against foreign sovereign assets.

In enforcement litigations, two substantive questions regarding the targeted asset are ownership and attribution of the asset. The challenge arises when the defendant State

is not the owner of the asset but a mere holder; or the State-owned asset is held by a separate legal entity pursuant to some contractual arrangement *e.g.*, concession contract, agency, bailment contract, lease, or assignment contract, *etc.* Assets of State-owned enterprises (SOEs) are another example of a similar challenge. For attribution, different courts follow different tests either suggested by the respective legislation or in absence of any suggestion from the legislation, at the discretion of the deciding court *e.g.*, nature test, commercial activity test, purpose test, *etc.* Challenges from procedural matters are the undermined burden of proof, the standard of evidence, and the pre-judgment attachment. Such as, should the court accept the certificate from the head of a diplomatic mission as to the purpose of the targeted asset as conclusive or should it investigate further? Should such investigation be construed as an interference to the sovereign functions of the defendant State? Moreover, the dilemma among the courts in granting pre-judgment attachment entices the defendant State to remove the asset from the territory of the forum State which leaves the judgment creditor with a mere paper judgment of enforcement.

This dissertation takes a closer scrutinization of different types of sovereign assets either listed as immune or non-immune in international conventions and also the commonly targeted assets for enforcement such as State's immovable assets in the territory of the forum State, sovereign wealth funds, receivables from the third party, State-owned ship and aircraft, *etc.* The finding shows inconsistent interpretations of a similar type of asset even in the same jurisdiction. It emphasizes the entangled different areas of laws in the enforcement litigation. For example, the fiscal law of the forum State plays a significant role in the enforcement case against immovable asset as it is deemed as non-immune for the debt accrued from the asset itself. Targeting the funds in the bank account in the name of the defendant State brings the question the banking laws in action. Courts consider the corporate law principles when assessing the assets of SOEs for the enforcement of commercial debt of the defendant State.

The application of the law of foreign sovereign immunity in enforcement litigations comes with intertwined status with other relevant laws. Therefore, this dissertation attempts to borrow some interpretative tools from different areas of laws in construing the purpose of sovereign assets in enforcement litigations to bring consistency and predictability, such as margin of appreciation, the doctrine of proportionality, application of international public purpose instead of the national one, interpretive

safeguards from the Vienna Convention on the Law of the Treaties (1969), international rule of law, *etc.* All of them bring some benefits but none of them is found without challenges. It also ponders into the current global initiatives to bring consistency with legitimacy. However, after seeing the struggle of the UN Convention for effectiveness, the finalization of these initiatives and coming into effect is a long shot. Therefore, this dissertation concludes with the proposal of developing a model law with interpretative guidelines and a few suggestions for the same.

Chapter 1: Introduction

1.1. Background of the research

1.1.1. Problem statement

The world is now witnessing Russia's invasion to Ukraine. The economic sanctions imposed upon Russia are the most strict and costly sanctions since the Cold War,¹ in order to reduce its access to finance its warfare. Nevertheless, Russia is using these economic sanctions as shield to defend its default on its commercial debt and justify its interference to its foreign investors right to repatriate their incomes.² Besides the other negative impacts on the global financial markets,³ these defaults might cause many future commercial disputes [litigations or arbitrations] and enforcement litigations for the eventual judgments and arbitral awards. Sovereign immunity from jurisdiction and execution become the core questions for these dispute settlements and consequential enforcement litigations. Russia has not waived its immunity either from jurisdiction or execution for its commercial contracts, such as the Russian Eurobonds.⁴ Therefore, the question comes whether these commercial counterparts of Russia are left with no remedy for Russia's default.

Law of foreign sovereign immunity have shifted its principle of absolute sovereign immunity to restrictive sovereign immunity. Now, the courts of forum States may still accept the jurisdiction over Russia due to the commercial nature of the transaction and also grant measures of constraint (MoCs) depending on the commercial purpose of the targeted assets. This shift is justified with the increase of global economic development and extension of State functions from its public acts (*jure imperii*) to its private or commercial acts (*jure gestionis*). Public acts are defined as the activities derived from the sovereign authority of a State such as collecting taxes,

¹ Richard Berner, Stephen Cecchetti, Kim Schoenholtz, 'Russian sanctions: Some questions and answers' VoxEU Column Politics and Economics (21 March 2022).

² BBC, 'What are the sanctions on Russia and are they hurting its economy?' (30 September 2022). "*It (Russia) is blocking interest payments to foreign holders of government bonds and banning Russian firms from paying overseas shareholders. And it has stopped foreign investors who hold billions of dollars-worth of Russian investments from selling them.*"

³ Nicholas Mulder, 'The Sanctions weapons: Economic sanctions deliver bigger shocks than ever before and are easier to evade.' (June 2022) Finance & Development International Monetary. Energy price hike, limited export of many commodities, higher commodity price and transaction costs, increased inflation, disrupted supply-chain, trade losses,

⁴ Quinn Emanuel Urquhart and Sullivan LLP, 'A Russian sovereign debt default? No longer improbable' (21 March 2022) < <https://www.quinnemanuel.com/the-firm/publications/client-alert-a-russian-sovereign-debt-default-no-longer-improbable/>> accessed 12 October 2022.

administration of justice, maintenance of diplomatic relations. On the other hand, the commercial or private acts include those that can be performed by any non-sovereign entities which are pre-dominantly commercial in nature. For instance, availing debt, issuing bond, executing commercial contracts, *etc.*⁵ The State involvement in private acts makes it subjected to commercial disputes with private entities. The question of sovereign immunity arises if the commercial counterparts unequivocally bring the dispute before foreign courts.

Earlier, relying on the theory of equality of sovereignty, a State was immune from jurisdiction, known as immunity from jurisdiction and its assets were protected from any measures of constraint (MoCs)⁶ granted by any foreign courts, known as immunity from execution. Such unfettered immunity is known as absolute sovereign immunity. However, with the pace of time and increasing complexities in State acts, laws on foreign sovereign immunity have shifted from absolute foreign sovereign immunity to restrictive sovereign immunity.⁷ Regardless of their sources for validity, both the international and the national laws of dominant jurisdictions nowadays accept restrictive sovereign immunity for the commercial acts of State. Thus, with restrictive immunity from jurisdiction, the private entity can receive a judgment or award against a State as its commercial counterparts. The judgment creditor or the award winner starts the enforcement litigations for levying the judgment debt against the sovereign assets of the defendant State. Sovereign assets used in commercial purposes again fall within the ambit of restrictive sovereign immunity, thereby not protected from any MoCs. Therefore, the distinction between commercial and public acts of a State or purposes of its assets demand both theoretical and practice argumentations for consistent and predictable results in enforcement litigations.

The enforcement attempts are not always smooth and quick, rather than full of legal challenges and sometimes a prolonged legal battle. The *Yukos case* (2014) is the perfect example of challenges for a judgment creditor while pursuing enforcement litigations against a foreign sovereign. After ten year long arbitration proceeding, [2005-2014], the private party received the award of fifty billion USD against the

⁵ Hazel Fox, *The Law of State Immunity* (Oxford University Press 2002).

⁶ The measures of constraint are the forms of execution of judgments against the judgment debtor. It includes attachment, garnishment, injunction, *etc.* Discussed in detail in chapter 3.6 of this Dissertation.

⁷ Ferdous Rahman, 'Questioning Chinese Government's Stand for Sovereign Immunity' (2017) 9(1) *Transnational Corporations Review* 41.

Russian Federation. The judgment creditor attempted to enforce the award in several jurisdictions including India, Germany, Belgium, France, Sweden, the UK, the US, etc.⁸ Nevertheless, after the annulment of the arbitral award by the Hague district court (dated 20 April 2016) [subsequently confirmed by the Dutch Supreme Court on 5 November 2021],⁹ majority of the forum States where the enforcement was sought, denied the recognition and enforcement.¹⁰ Nevertheless, since article V (1) of (e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (known as the New York Convention) is not binding on forum States to refuse recognition and enforcement of foreign arbitral award even after its annulment by the State of origin [*i.e.*, the seat of arbitration], the US district court continued its recognition and enforcement proceedings.¹¹ However, it also denied to grant prejudgment MoC of deposit of security against Russia as moot.¹²

Laws of foreign sovereign immunity influence a State from several perspectives. The question of immunity from execution has a great impact on the business of the defendant State located beyond its territory. Further, the reciprocity principle may apply here as the national court of the defendant State may also entertain similar kinds of enforcement litigations against other foreign States pursuant to the proceeding brought by any private judgment creditors. The reciprocity makes the question of immunity a matter of foreign affairs from the perspective of international relations.¹³ Consistent and predictable enforcement of commercial debts against sovereign assets prevents multiplicity of proceedings, decreases transaction cost, and reduces undesired fiscal burden on the taxpayers of the defendant State. It also increases

⁸ The Yukos case, Court actions: Attempted asset seizures, <https://www.yukoscase.com/court-actions/attempted-asset-seizures/> accessed 12 October 2022.

⁹ The Yukos case, ‘Dutch Supreme Court quashes the Yukos Case judgment of the Hague Court of Appeal’ (5th November 2021) <https://www.yukoscase.com/news/press-release/dutch-supreme-court-quashes-yukos-case-judgments-hague-court-appeal/> accessed 12 October 2022.

¹⁰ *Yukos v. the Russian Federation and others* [2018] Brussels Court of Appeal Brussels, (20 February 2018); [2021] High Court of Justice of England and Wales, EWHC 894; *Quasar de Valores (Spain) et al v Russian Federation* [2016] The Supreme Court, Sweden (15 December 2016); *RosInvestCo UK Ltd (UK) v Russian Federation* (2013) Svea Court of Appeals, Sweden (September 2013).

¹¹ *Hulley Enterprises Ltd et al v. the Russian Federation* [2022] District Court for the District of Columbia (13 April 2013) Civil Action no. 14-1996 (BAH).

¹² *Ibid.* ‘Denied as moot’ means that the order is denied as the order becomes irrelevant due to the continuance of the proceeding.

¹³ *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* [2011] HKEC 747 (CFA); Chien-Huei Wu, ‘One Country, Two state immunity doctrines: A pluralistic depiction of the Congo case’ (2014) 9 National Taiwan University Law Review 197.

confidence in the relations among State and its commercial counterparts, State and its subjects and the defendant State and the forum State.

Notwithstanding the development of the law of foreign sovereign immunity through national legislations and interpretation from domestic courts, Ruizfabri warned courts to be more cautious as to making or effecting political choices to prevent inconsistent results.¹⁴ The experts suggested the cautious use of the judicial discretion. Such as in the case before the House of Lords [the UK], Lord Millett refused to accept the judicial discretion to grant or abandon sovereign immunity in the case of *Holland v. Lampen-Wolfe* (2000). He emphasized the basis of immunity rooted in international law not in respective national legislation.¹⁵ The case before Lord Millett was related to torture to foreign official against the sovereign employer, therefore, his stand for international law indicated to public international law. In broader classification, the multiple scholars such as Fox and Bankas put the question of sovereign immunity in public international law.¹⁶ Nevertheless, the disputes regarding the private acts of the States with any private entity fall under the scope of private international law.¹⁷ Similarly, the sovereign asset with commercial purposes falls within private international law. On the other hand, the foreign sovereign asset with public purposes stands within the scope of public international law, it is immune and not otherwise. Hence, Mills opined the ‘tolerance of differences’ in international law as the foundation of private international law.¹⁸

The international law on foreign sovereign immunity is yet to achieve its effectiveness, despite international initiatives. Therefore, the national legislations come in to fill up the vacuum. The major jurisdictions for enforcement litigations against foreign States are the US and the UK followed by some other European States

¹⁴ Helene Ruiz Fabri, ‘Regulating Trade, Investment and Money’ in James Crawford, and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 352-372.

¹⁵ *Holland v. Lampen-Wolfe* [2000] UKHL 40.

¹⁶ Fox (n 5); Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* (Springer 2005).

¹⁷ Ferenc Madl and Lajos Vekes, *The Law of Conflicts and of International Economic Relations* (Mihaly Kocsis tr, Academic K 1998).

¹⁸ Alix Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the international constitutional ordering of Private Law*, (Cambridge University Press 2009) 226.

such as, Belgium, Germany, France, *etc.*¹⁹ Each of them has their own national laws regulating the law of foreign sovereign immunity in question including both immunity from jurisdiction and immunity from execution. This research concentrates on the immunity of sovereign assets from execution. Notwithstanding, the (yet to be effective) international instrument and the existing international customary laws, different States have adopted different parameters for sovereign assets' immunity. For instance, the Foreign Sovereign Immunity Act (FSIA) of 1976 of the US section 1610 takes the commercial use of the assets in order to determine its immunity. On the other hand, the State Immunity Act (SIA) of 1978 of the UK section 13 (4) relies on the commercial purpose of the assets. Apart from the distinctions between the national laws of different jurisdictions, the judicial interpretations in the same jurisdiction and even with similar assets vary. Such lack of coherence opens the scope of further research to focus on the interpretation of sovereign ownership of any asset and its commercial use and/or purpose both in judicial and academic literature.

1.1.2. Literature review

Most of the literature discusses the sovereign immunity question from the perspective of Statehood and/or the enforcement challenges for the judgment creditors. Limited works are found on sovereign immunity from execution.²⁰ The existing literature faces several challenges accrued out of international relations between the forum State and the defendant State from the question of sovereign immunity, the uncertain enforcement of judgment debt for the judgment creditors because of the ambiguous distinctions of immune and non-immune assets.

While interpreting the question of immunity for sovereign assets from execution, the court decides the cases from three issues: (a) express or implied waiver of immunity

¹⁹ Julian Schumacher, Christoph Trebesch, and Henrik Enderlein, 'Sovereign Defaults in Court' (European Central Bank Working Paper Series No 2135/February 2018).

²⁰ Sir Ian Sinclair, 'The European Convention on State Immunity' (1973) 22 *International and Comparative Law Quarterly* 254; James Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (October 1981) 75 (4) *American Journal of International Law* 820; Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic view* (Springer, 1984); Christoph H. Schreuer, *State Immunity: Some Recent Developments* (Grotius Publications Limited, 1988); Fox (n 5); Bankas (n 16); Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press, 2012); Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd Edn, Oxford University Press 2013); Olga Gerlich, 'State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?' (June 1, 2015) 26 (1) *American Review of International Arbitration*, 47.

from execution (b) the immune or non-immune assets and (c) determining the nature and/or purpose of the assets in questions and (d) the question of nexus.

Lim researched on the first question raised before the court *i.e.*, waiver from the defendant State.²¹ He identified three types of waivers required to prevent the State from claiming immunity: from proceeding, the pending trial attachment, and the final execution order. He discussed the illustrations of waiver from immunity in different contractual forms and the judicial approach to their interpretation. The English judge Mr. Saville held in *A Company Ltd v. Republic X* (1990),²² that the contractual language needed to be clear enough to exclude the sovereign immunity from execution. With the span of time, the courts have also started interpreting the contractual provisions regarding waiver liberally. Such liberal approach is common in multiple jurisdictions including Singapore,²³ the US,²⁴ the UK,²⁵ *etc.* where the courts refuse to grant sovereign immunity relying on the implied provision in the contract. Understandably the contradictory decision may come from other jurisdictions following distinct philosophy of Statehood and diplomatic agenda.²⁶ Concern arises when the dissenting interpretation is held in subsequent judgment from the forum State requiring express waiver.²⁷

Reinisch had similar findings after reviewing the practices in European courts. He illustrated the judicial practices of different European States regarding immunity from execution including the prior approval from executives, express or implied waiver, the earmarked assets and commercial use of the sovereign assets and identified the unresolved and inconsistent interpretation of the international law on sovereign

²¹ CL Lim, 'Worldwide Litigation over Foreign Sovereign Assets' (2016) 10 *Dispute Resolution International* 145.

²² *A Company Ltd v. Republic X* [1990] the Queen's Bench Division (the UK) 2 *Lloyd's Rep.* 520.

²³ For illustration, in the case of *Maldives Airport Co. Ltd. v. GMR Male International Airport Pte Ltd.* [2013] SLR 449, before Singapore court, the contractual clause in question stated, "to the extent that any of the Parties may in any jurisdiction claim for itself [...] immunity from service of process, suit, jurisdiction, arbitration [...] or other legal or judicial process or other remedy [...] such Party hereby irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws such jurisdiction."

²⁴ *Behring Int'l v. Imperial Iranian Air Force* [1979] 475 F Supp. 383 (DC NJ)

²⁵ *Sabah Shipyard (Pakistan) Ltd. V. Islamic Republic of Pakistan* [2003] 2 *Lloyd's Rep.* 571 (CA)

²⁶ Lim (n 21), opined, "only the consent of the foreign sovereign to submit itself to legal process after a dispute has arisen as an act of grace, would suffice." while analyzing the judgment of Hong Kong Court in the case of *FG Hemisphere Associates LLC v. Democratic Republic of the Congo* [2010] 2 *HKLRD* 66, granting absolute sovereign immunity to Congo, regardless of existence of all pre-requisites of restrictive sovereign immunity.

²⁷ *Libra Bank Ltd v. Banco Nacional de Costa Rica* [1982] 676 F 2d 47 (2nd Cir).

immunity.²⁸ He opined that acceptance of litigation against State discarding the immunity from jurisdiction did not automatically result at denial of immunity from execution.²⁹ Therefore, the standard of waiver clause was required to be stricter for immunity from execution than immunity from jurisdiction.

The second question before the court as well as relevant for this dissertation is the categorization of immune or non-immune assets. Fox took an elaborative approach as to various types to assets and the courts' interpretation of those assets for attachability.³⁰ Fox divided the sovereign assets into three categories: the immune assets, the non-immune assets, and the assets of State agency.³¹ She further questioned should the presumption of public use of sovereign assets be removed to determine which categories of the assets in question belong to. For instance, the public purpose of diplomatic assets, military assets, warships, government-owned ships and aircraft, tax revenues of the State, assets of the central bank, *etc.* She opined that reduction of immunity for the sovereign assets other than these categories might result in the deviation from the previous rule of immunity from execution. She advised for a separate list of sovereign assets with immunity so that evidence would be redundant for them. Following the similar approach of Fox, Reinisch categorized various sovereign assets such as, central bank's deposits, military assets, warships, international office cultural centers, embassy premises and accounts, *etc.* and with the support from case-laws, attempted to answer their question of attachability.³² Among the various categories of sovereign assets, the assets of State-owned enterprises (SOEs) hold a significant value because of the question of their separate entity in law. Byers examined the execution immunity from the perspective of shifting the liability, questioning whether the assets of one SOE could be subjected to execution for the liability of another.³³ He opined the variance in judicial philosophy as the reason of diversified approach. For instance, in *First National City Bank v. Cuba* (1983), the US

²⁸ August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', (2006) 17(4) the European journal of International Law 803, 829.

²⁹ *ibid* 829.

³⁰ Fox (n 5) 390-393.

³¹ *ibid* 401.

³² Reinisch (n 28) 829.

³³ Michael Byers, 'State Immunity article 18 of the International Law Commission Draft', (1995) 44(4) International and Comparative Law Quarterly, 882.

court emphasized on the protection of private creditors in commercial law more than the public international law of sovereign immunity.³⁴

For the third issue on the test for determining the question of immunity for sovereign assets, restrictive immunity principle applies for commercial acts only (*jure gestionis*). Different jurisdictions apply different tests. The US courts apply the purpose (or use) test for immunity from execution.³⁵ The UK courts interpret the ‘purpose’ of the assets to grant or reject immunity from attachment and execution. This issue inquires if the asset is used or intended to be used for commercial purpose.³⁶ Besides the purpose or use test for assets, certain assets receive automatic immunity under the international instruments such as the diplomatic assets under the Vienna Convention on Diplomatic Relations (the VCDR) 1961 and the Vienna Convention on Consular Relations (the VCCR) 1963. There are some other assets commonly recognized as immune in national laws, for instance, the assets of the central banks, the military forces, the diplomatic embassy of a State are immune from both pre and post judgment attachment order.³⁷

Shaw addressed the difficulties in determining the purpose test for the sovereign assets, as it depends on various factors, such as the present and past use, one-time use or use of longer period, the origin of assets, *etc.*³⁸ Similarly, Yang examined the application of purpose test for as a catalyst for determining the question of immunity from enforcement.³⁹ Along with this, he also mentioned the purpose test for the assets’ nature like the other scholars.⁴⁰ He divided the legal instruments on foreign sovereign immunity containing the ‘purpose’ test into two types: the explicit requirement of ‘purpose’ and the implicit use of ‘purpose’ in the legal instruments.⁴¹

³⁴ Ibid 888; *First National City Bank v. Cuba* [1983] US Supreme Court 462 US 611; 103 S Ct 2591; 77 L.Ed.2d 46.

³⁵ *FG Hemisphere Associates LLC* (n 26).

³⁶ Lim (n 21) 153.

³⁷ Foreign Sovereign Immunity Act (FSIA) 1976 (the US) s 1611; the State Immunity Act (SIA) 1978 (the UK) s 16 (2); Fox and Webb (n 21) 373.

³⁸ Malcom N. Shaw, *International Law*, (6th Edn, Cambridge University Press, 2008) 747.

³⁹ Yang (n 20) 363.

⁴⁰ Ibid 343.

⁴¹ The European Convention on State Immunity [1972] ETS 74- State Immunity 16.V.1972 (the ECSI) art 26, implicitly states that a judgment may be enforced against the assets of the State, when the assets are “*exclusively in connection with such an activity*”, here the term activity indicates to “*an industrial or commercial activity*”. On the other hand, the UN Convention on Immunity of Foreign State, and their Properties 2004 (the UN Convention) art 19 (c) mentioned that “*the property is specifically in use*

He acknowledged the role of public purpose of the assets as the determinative criterion for its attachability and also identified the inconsistent interpretation of public purposes of the assets even in the same forum State. For instance, in the US case of *the City of Englewood v. Socialist People's Libyan* (1985),⁴² the Third Circuit court refused to consider the previous use of the assets in deciding its purpose whereas in another US case of *Af-Cap Inc. v. Republic of Congo*,⁴³ the Fifth Circuit court relied on the one-time past commercial use of the tax as sufficient to reject the public purpose of tax income of the defendant State. However, his work did not make any comments on how the courts of the forum States should decide the public purposes of the assets of the defendant States.

For the fourth issue regarding the nexus with the forum State, Yang specifically identified the territorial connection as one of the determining factors in the law on State immunity from execution.⁴⁴ He termed this part of the law on foreign sovereign immunity as the most sensitive one, capable of causing serious foreign relation problems.⁴⁵ Comments are available both in support and against the nexus requirement. Singer opined, "*A territorial approach certainly eliminates the difficulty of having to differentiate between commercial and sovereign acts.*"⁴⁶ Fox also supported the requirement of nexus between the assets and the claim in disputes as this link ensured the jurisdiction of the forum and limited the execution to non-immune transactions.⁴⁷ The requirement of connection reduces the interest of the forum State to entertain a case against a foreign sovereign. Rather it lets the court to concentrate more on protecting the interest in comity and good diplomatic relations with the defendant sovereign.⁴⁸ On the other hand, such requirement of nexus limits the execution options for the judgment creditor.⁴⁹ Necessity of nexus restricts the

or intended for use by the State for other than government non-commercial purposes..." are available for enforcement

⁴² [1985] 3d Cir 773 F.2d 31.

⁴³ [2004] 5th Cir Court 383 F.3d 361.

⁴⁴ Yang (n 20) 343.

⁴⁵ *ibid* 344.

⁴⁶ Michael Singer, 'Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe' (Winter 1985) 26 (1) *Harvard International Law Journal* 1, 2.

⁴⁷ Fox (n 5) 403.

⁴⁸ Richard Garnett, 'State Immunity in Employment Matters' (January 1997) 46 (1) *The International and Comparative Law Quarterly* 81, 84.

⁴⁹ W. Mark C. Weidemaier, 'Sovereign Immunity and Sovereign Debt' [2014] *University of Illinois Law Review* 67, 92.

possible MoC against the sovereign assets. Therefore, some jurisdictions do not accept nexus as a pre-requisite for enforcement litigation.

1.1.3. Contribution to the literature

The legal framework of law of foreign sovereign immunity is not comprehensive. The only comprehensive international instrument *i.e.*, the United Nations Convention on Jurisdictional Immunities of States and Their Properties (2004) (the UN Convention) has not achieved the required number of ratifications to be effective. Therefore, the national legislation comes forward to fill up the vacuum. State practices in formulating their national legislations on foreign sovereign immunity are also diverse. Besides, the executive organs of forum States keep sending the *amicus brief* to the deciding courts from time to time due to impact of the enforcement litigations on diplomatic relations and international affairs. This dissertation contributes to the literature on law of foreign sovereign immunity from the perspective of bringing these fragmented pieces into a comprehensive view for the laws on foreign sovereign immunity and their role in the enforcement litigations.

This dissertation poses substantive and procedural questions regarding the sovereign assets targeted by the private judgment creditors in an enforcement litigation. and the judicial approach toward the immune or non-immune assets of the defendant State. Here, it stands unique from the existing literature from its focus point. The existing literature brought the questions of coherence between international and national laws, political dilemma between the forum State and the defendant State or the enforcement challenges from the end of judgment creditors. These issues are inevitable for this dissertation as well. Nevertheless, the spotlight of the discussion in this dissertation continuously stays on the targeted sovereign assets and the judicial approach toward them in deciding their immunity from execution in an enforcement litigation.

This dissertation scrutinizes the interpretation of purposes of sovereign assets in the enforcement litigations: based on the types of targeted assets. The comprehensive mapping of legal framework [discussed in the second chapter] results at identifying the list of the immune assets and characteristics of non-immune assets. The investigation into the substantive and procedural questions [discussed in the third chapter] spots the commonly targeted sovereign assets in enforcement litigations. This dissertation demonstrates the inconsistencies in interpreting the purpose of sovereign

asset which is the core determining issue to decide its immunity. It explores the convergence of laws of foreign sovereign immunity and the other related laws to the particular asset in question to bring consistency, coherence, and predictability [discussed in the fourth chapter].

Literature proposes different interpretative techniques such as margin of appreciation, international public purpose, doctrine of proportionality, *etc.* This dissertation tests various suggested interpretative tools borrowed from other areas of laws in order to recommend a comprehensive one which will bring not only consistency, coherence and predictability but also comes with legitimacy.

1.2. Research design

1.2.2. Research questions

Determination of the immunity of foreign sovereign assets does not solely depend on the sovereign ownership or their public nature (or purpose). There are assets having mixed purposes and use of public and commercial nature. Having regard to the above discussion on the statement of problem, and the literature gap, the research questions of this dissertation are:

When do the foreign sovereign assets enjoy immunity from execution in the existing national and international legal framework?

The question of immunity of sovereign assets from execution in enforcement litigations is examined under the international conventions and the national legislations of different forum States. The findings of this research question give conceptual clarity regarding State responsibility, foreign sovereign immunity and various related principles. They also determine the paradigm of the international conventions and the statutory provisions of the dominant forum States for the law on foreign sovereign immunity. This research question leads to the next research question for deeper understanding of enforcement litigations from the perspective of sovereign assets.

How are the substantive and procedural issues (related to sovereign assets) dealt with in enforcement litigations?

After examining the provisions of legal framework of sovereign asset's immunity from execution, the related substantive and procedural questions are analyzed to

grasp the comprehensive view of an enforcement litigation. The findings of this research question show the open-ended issues of challenges in determining sovereign ownership, unsettled nexus requirement and application of various tests for scrutinizing the purpose of sovereign assets in different jurisdictions without any consistent rule of thumb.

How do the deciding courts interpret the purposes of various sovereign assets for the question of their immunity from execution? To what extent are the interpretations of the purposes of various sovereign assets consistent and coherent?

This research question narrows down its scope from sovereign assets in general to certain types of sovereign assets. The sovereign assets are selected based on their categorization as immune or non-immune in the international conventions and the national legislations, such as diplomatic assets, military assets, assets of central bank, *etc.* Sovereign assets commonly targeted for execution are also scrutinized such as immovable assets, receivables from third party, balance in bank account, ships, and aircraft, *etc.* The objective is to find a consistent interpretive way for the purposes.

To what extent the interpretive tools from other areas of laws can contribute to achieve more consistency, coherence, and predictability in interpreting the purposes of sovereign assets?

With a view to proposing a comprehensive solution to inconsistent interpretation of purposes of sovereign assets, this research question attempts to borrow various interpretive tools from other areas of laws. For instance, doctrine of proportionality, margin of appreciation, international public purpose, rule of law, *etc.* Nevertheless, none of these tools come without challenges. Thereby this dissertation ends with its own proposals of model law provisions for global initiative to bring consistency and predictability.

1.2.3. Objectives of the research

The inconsistent judgments lead to weaker legal framework and legal uncertainty. The laws of foreign sovereign immunity suffer the same challenges such as absence of effective international conventions, application of national laws on sovereign

immunity and dominance of domestic courts in deciding the attachability of the sovereign assets. This research and the resulting dissertation aim at scrutinizing the paradigm of sovereign assets subjected to attachment, in enforcement of commercial judgments and arbitral awards against the sovereign judgment debtor. The functional objective of this research is to explore the coherence in judicial approach toward sovereign assets deciding their availability for execution. This dissertation starts with the scrutinization of existing legal framework of foreign sovereign immunity in relation to execution, and how foreign sovereign assets are governed in the existing laws. Secondly, it analyses the interpretations of foreign sovereign assets in the enforcement litigations for commercial judgments. It gives the practical applications of the laws of foreign sovereign immunity. Depending on these substantive and procedural frameworks, the dissertation aims at examining the factors considered by the courts in deciding the execution cases against any sovereign and their significance in order to map the judicial interpretation of attachability of sovereign assets in light of *inter alia* the jurisdiction, the defendant State, the nature of assets, its ownership and attribution. Finally, various interpretative tools borrowed from other areas of laws involving sovereign authorities are examined to check their viability in solving the inconsistent interpretation of purpose of sovereign assets.

1.2.4. Rationale of the research

This dissertation entitled with “*Enforcement of commercial judgments against foreign sovereign assets in international law.*” is supported from both academic and pragmatic perspectives. Due to lack of any uniform practices in international law regarding sovereign immunity, inconsistencies accrue in the courts’ judgments as well as the academic literature and the precedents.⁵⁰ The enforcement litigations need to be analyzed to identify the inconsistencies and the underlying reasons behind such inconsistency. The literature gap identified above justifies the academic rationale. Most of the academic works concentrates on sovereign immunity from jurisdictions before foreign courts and application of restrictive sovereign immunity for *jure gestionis*. Therefore, academic research on sovereign assets from an enforcement point of view is a pressing need.

⁵⁰ Jerry L Mashaw, ‘Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy Fairness and Timeliness in the Adjudication of Social Welfare Claims’, (1974) 59 Cornell Law Review 772, 816.

Simultaneously, ambiguity in the enforcement of commercial judgment against sovereign assets may lead to two diverse situations: either stubborn defendant States may intend to avoid its liability in honoring its judgment debt; or the vulture litigants may target more and more sovereign assets in different jurisdictions making the highly indebted poor States more economically vulnerable.⁵¹ Desired certainty, consistency, and predictability as to the attachability of sovereign assets reduce the cost and time of enforcement litigations. The targeted mapping of sovereign assets based on judicial interpretation in this dissertation formulates the common principles followed by the courts in deciding the enforceability of judgment against any particular asset of the State. It assists not only the litigants and the defendant in their argumentation but also the courts for their reasoning in future. Such coherence not only benefits in avoiding inconsistent judgments from the same forum but also assists the parties to the enforcement litigations to prepare for their respective cases and predict the outcome of the judgments beforehand. It reduces the transaction cost as well as making the proceedings both cost and time efficient. It also prevents the private judgment creditors from applying extra legal means to extract judgment value from the defendant state.

In addition to these immediate impacts, the dissertation also contains long-term impact. The long-term impact will be on the sovereign, its citizens (taxpayers), the creditors and the global market connecting the sovereign and the private. The pattern of judicial interpretation toward sovereign assets and the strategic argumentation protects the citizens of the defendant State from getting over-burdened from lengthy and multiple legal proceedings. Inappropriate litigations (including execution ones) also violate the right to development of the citizens thereof. As the literature and published cases show, the judgment holder or awardee files several enforcement

⁵¹ When the judgment creditor sells the judgment debt in the secondary market at a discounted price, there are certain hedge funds purchasing the debt. These funds chase the defendant State in different jurisdictions for enforcement at full price. Because of their rigorous and extra-legal initiatives to recover the judgment debt going beyond the legal means, these funds are known as vulture funds. See for more, David Bosco, 'The Debt Frenzy' (June 11, 2007) *Foreign Policy*, 2; OECD, 'Investor-State Dispute Settlement' (Public Consultation, 16 May-9 July 2012), 67; Mallory Barr, 'The Litigation Tango of La Casa Rosada and the Vultures: The Political Realities of Sovereign Debt, Vulture Funds and the Foreign Sovereign Immunities Act' (2016) 7(2) *Santa Clara Journal of International Law* 567; Jill E. Fisch, and Caroline M. Gentile, 'Vultures or Vanguard? The Role of Litigation in Sovereign Debt Restructuring' [2004] *Faculty Scholarship. Paper 1051*, 34; Anzette Were, 'Debt Trap? Chinese Loans and Africa's Development Options' [August 2018] *South African Institute of International Affairs, Policy Insights* 66, 1.

litigations in different jurisdictions for attachment of sovereign assets to pressurize the sovereign to come forward for an out-of-court settlement. Study of the common judicial practice in interpreting sovereign assets may stop such multiplicity of proceeding and achieve efficiency in enforcement proceeding.

1.2.5. *Significance of the research*

With economic advancement, commercial involvement of the State with private entities increases and hence opens the possibility of disputes and eventual litigation and arbitration followed by attempts of execution. For instance, the state court of Texas (the US) duly recognized the scope of advancement in the arena of law stating that there are minimum case laws setting the criteria for determination of the nature of assets for the question of immunity.⁵² Following the same line of argument, this dissertation aims to scrutinize the sovereign assets attempted for execution of commercial judgments against the sovereign judgment debtor. The findings contribute to the literature on sovereign liability and its engagement to commercial activities. Its functional value resides together with its academic value. Study on sovereign assets from the perspective judicial and socio-economic interpretation expands its pragmatic significance.

The research intends to examine the popular interpretive tools in determining the question of immunity for sovereign assets *inter alia* margin of appreciation (MoA), doctrine of proportionality, application of international public purpose, application of international law-based rule of law, *etc.* In the long-term, this research can have on the efficiency in enforcement litigations and bringing coherence, consistency and predictability in international law regulating the immunity of sovereign assets from execution.

1.2.6. *Scope of the research*

As the background of the study shows, States usually enjoy sovereign immunity from jurisdiction as well as from execution in international law. Nevertheless, this dissertation is limited to the sovereign immunity from execution. Thus, the dispute settlement cases against the State and the questions of restrictive sovereign immunity from jurisdiction are out of the scope of this work. As a matter of practice of forum

⁵² *AF-CAP INC. v. the Republic of Congo, and others*, [2004] 5th Cir 383 F3d 361.

States, international organizations also enjoy limited immunity similar to foreign sovereigns. This research excludes the questions of immunity for international organizations from jurisdiction and enforcement. Moreover, the question of immunity of *inter se* provinces [or states] in federal States is also out of its scope.

Furthermore, the State faces private suits on several occasions including foreign investment disputes, default on debt contract, breach of commercial contract. With the introduction of exception of terrorism in the FSIA (1976) of the US, the courts' doors are also open for cases against State, filed by private persons for compensation or damages as the case may be for terrorism and also violation of human rights.⁵³ Nevertheless, this dissertation is fully concentrated only on the sovereign assets attempted for execution of judgments obtained by the commercial counterparts of the State brought before a foreign court for attachment of allegedly non-immune sovereign assets. Therefore, enforcement of judgments obtained from terrorism exceptions, cyber security violations, criminal proceedings, are not considered for this dissertation.

1.2.7. Limitations of the research

Given the defined scope, this dissertation is also subjected to certain limitations. This area of study suffers from definitional crisis. The relation between the sovereign [deemed as private in commercial cases] and the private entities remained outside the arena of current literature. Hence, this research adopted a working definition of private judgment creditors relying on the dictionary meaning of 'judgment creditors' and applying the law-in-context method of defining 'private' for the purpose of clear understanding. The research also faces challenges because of lack of literature on sovereign assets targeted for enforcement. The current literature extensively focuses on the questions of sovereign immunity whereas this research holds its core focus on sovereign assets available for execution. Availability of relevant literature would have been a great support to the research.

Moreover, because of the nature of the research question and the applied methodologies, this research extensively relies on the judgments of domestic courts of

⁵³ Ferdous Rahman, 'Elasticity of the Laws on Foreign Sovereign Immunity: Role of the Dominant Jurisdictions in Determining of Cause of Actions against the Foreign Sovereign', [2021] (1) *Studia Iurisprudentiae Doctorandorum Miskolciensium* 71.

forum States in order to distinguish or assimilate the judicial approaches to the sovereign assets in question of execution. Nevertheless, the judgments from many forum States remain beyond the reach of this study. This limitation is mitigated to a certain extent as the majority of the private judgment creditors file the execution cases pre-dominantly in the US and the UK courts.⁵⁴ Hence, the major jurisdictions are brought into consideration. Since these two jurisdictions follow common law system (highly reliant on their case laws), the legal concepts from these major jurisdictions play a pre-dominant role in analyzing the legal questions and formulating the final recommendations. Finally, the confidentiality maintained by the debtor State and the judgment creditors as to the compliance of the decree of the court makes the data on follow up questions after the judgment publicly unavailable. Data on non-compliance of the State from extra-legal sources are available but not the compliant ones. On the other hand, the court not only relies on the legal sources but also the non-legal materials for their *ratio decidendi*. The interpretation in light of these non-legal materials demands the application of socio-legal methodology and the law in context analysis to grasp the full view of the pattern.

1.3. Research methodology

The research questions of this dissertation demand application of multiple methodologies including the doctrinal, the functional, and analytical comparative, and the law-in-context methods.

1.3.2. *The doctrinal methodology*

The doctrinal methodology is applied to find a normative position for a study which starts with the understanding of current legal framework and continues with its development process and interrelationship with the origin, source of validity and implementing authority⁵⁵ It relies on the philosophy behind the law, the theories of

⁵⁴ Julian Schumacher, Christoph Trebesch, and Henrik Enderlein, 'What Explains Sovereign Debt Litigation', (CESifo Working Paper no 5319, April 2015); Schumacher, Trebesch and Enderlein (n 19); The number of litigations increased from 10% to 40% from 1978 to 2010; the results found 16% of all cases were filed in more than one jurisdiction and 32% cases pending before the UK court and 11% cases in the US courts was also continued in the US and UK courts respectively.

⁵⁵ Adilah Abd Razak, 'Understanding Legal Research' (2009) <https://docuri.com/download/19-24-adilahpdf_59bf3a41f581716e46c48ff8_pdf> accessed on 18 December 2019.

legal interpretation and reasoning thereof.⁵⁶ Fox enumerated the law of foreign sovereign immunity in her books as the application of doctrines of international law in accordance with the municipal law in domestic courts.⁵⁷ The primary objective of this dissertation requires a clear view of current legal framework of State immunity and recognition of sovereign assets for the purpose of protection from execution. The doctrinal methodology is applied to identify the sources of sovereign immunity at national and international level, their legal reasoning and legal theories supporting the current stand. This discussion assists to grab the understanding of the shift of paradigm from absolute immunity to restrictive immunity and the gradual increase of the scope of State's private acts shrinking its public acts. Such a study helps to analyze the sovereign ownership of assets, the concession granted thereover, the use and the purpose of the assets. The current legal framework and the applicable theories as to the concept of State, the equality of sovereignty, the distinction of private and public acts, defining the interpretive tools are considered.

1.3.3. Functional and analytical comparative methodology

Comprehensive research demands the application of various types of comparative methodologies. There are six popular types of comparative methods namely: functional, structural, analytical, law in context, historical and common core methods.⁵⁸ The functional, analytical, and law in context methods are applied here. The functional approach starts with common legal problems and finds solutions in compared legal systems. Given the absence of effective international convention, the national laws of the major jurisdictions are the primary source of law for State immunity. These legal instruments need to be compared to find a global picture applying a bottom-up approach. The meaning of the legal concept used in the statutes carries significant value while applying the same in real cases. Thus, the findings from functional comparison lack the efficient outcome unless the analytical comparison is given. Hoecke articulated analytical comparison as discovery of the same legal concept, adopted in different legal systems in various meaning. Applying

⁵⁶ Thomas F. Gordon, 'Artificial Intelligence and Legal Theory at Law School', (2006) <<https://pdfs.semanticscholar.org/7328/d3b3796b17cc1d6ea6fdd811a653de303535.pdf>> accessed on 18 December 2019.

⁵⁷ Fox (n 5) 1.

⁵⁸ Mark Van Hoecke, *Methodology of Comparative Legal Research*, (2015), DOI: 10.5553/REM/000010

this methodology, this dissertation aims at exploring the relevant concepts *inter alia* the private and public act of the State, its ownership of assets, the use and the purpose, the question of commercial nature in different jurisdictions. The academic literature and the judicial interpretations of the concerned statutes are the consulted sources.

1.3.4. The law in context method

As the State's private acts are the conjuncture of economic and legal in nature, the proper interpretation of the relevant laws needs some interdisciplinary approaches. This analysis gets even intense in the cases of execution. Moreover, the doctrinal and the comparative methodologies leave some room for assistance from other branches of literature. For instance, the property rights of a State are not only a subject matter of property law, but its economic attribution also plays a significant role therein. Another instance can be the cost efficiency of the proceeding where the concept of transaction cost is inevitable. Besides the economic analysis of property rights and the study of political economy in order to assess the impact of inconsistent interpretations of assets are other prerequisites for this dissertation. Several academic scholars found the US judgment against Argentina inconsistent with the existing international comity⁵⁹ which again justifies the application of law in context method. The negative impact of inconsistent interpretation of sovereign assets is analyzed by using this law-in context method. These negative impacts justify the attempt to apply various interpretative tools from different areas of laws with a view to bringing coherence and predictability.

1.4. Teleological and working definitions

This research demands the explanation of certain terms severally used herein, especially the private judgment creditors. Besides, the defendant State, private litigation and the forum State also ask for some explanations.

1.4.2. Recognition and execution or enforcement

⁵⁹ International comity is a common law concept where the courts are required to honor the public policies forwarded by the executive of its own State and a foreign State in order to balance conflicting public and private interests. Joel R. Paul, 'The Transformation of International Comity' (2008) 71 Law & Contemporary Problems 19 [19]. Barr (n 51); Tomas M Arya, 'A Decade of Sovereign Debt Litigation: Lessons from the NML vs Argentina Case and the Road Ahead', (May 2016) 17(2) Business Law International 83.

After receiving a judgment from a court or an award from an arbitration tribunal, the judgment debtor may honor the claim voluntarily. Otherwise, the judgment creditor needs to pursue the means to force the compliance which brings the question of recognition, enforcement, execution, and attachment. This proceeding has two stages: recognition or confirmation of the foreign judgment or the arbitral award, followed by the execution attempts. Recognition is the process of getting certification from the courts to declare the judgment or the award as binding in its territorial jurisdiction.⁶⁰ At the first stage after the pronouncement of award or judgment, the judgment creditor files a claim before the national court of a third State, *i.e.*, the forum State, where it wants to execute a judgment or award for recognition of the award or judgment.⁶¹ At the second stage, the judgment creditor files application to the forum State's court for execution of the said award or judgment against the defendant State's assets.

The Black's Law Dictionary defined 'execution' as "*judicial enforcement of a money judgment usually by seizing and selling the judgment debtor's property*"⁶² and 'enforcement' as "*the act or process of compelling compliance with a law, mandate, command, decree or agreement.*"⁶³ In this stage, the judgment creditor applies to the court for granting MoC in the forms of including but not limited to attachment, seizure, garnishment, injunction or other coercive measures against specific assets of the sovereign judgment debtor.⁶⁴ This process in some jurisdictions is also known as *exequatur*.⁶⁵

The court's decision as to the recognition of foreign judgment or the arbitral award and following execution is governed by the domestic laws of the forum State and to certain extent the international laws, such as for the recognition of arbitral award is predominantly regulated by the New York Convention (1958).⁶⁶ Article 54 of the ICSID Convention (1966) uses the terms "*recognition, enforcement and execution*"

⁶⁰ Jan Paulsson, Nigel Rawding and Lucy Reed, *Guide to ICSID Arbitration*, (Kluwer International, 2010) 179.

⁶¹ Carolyn B. Lamm and Eckhard R. Hellbeck, 'The Enforcement of Awards', in Chiara Giorgetti (ed) *Litigating International Investment Disputes* (Brill: Nijhoff, 2014) 462.

⁶² Black's Law Dictionary (8th Edn, West Thomson Reuters 2004) 'Execution'.

⁶³ *ibid*, 'Enforcement'.

⁶⁴ Christoph H. Schreuer and others, *The ICSID Convention: A Commentary*, (2nd ed Cambridge University Press, 2009) 1128.

⁶⁵ Marta Requejo Isidro, 'Exequatur', *Max Planck Encyclopedias of International Law*, (Oxford Public International Law, May 2019).

⁶⁶ Lamm and Hellbeck (n 61) 463.

and the New York Convention (1958) used the recognition and enforcement. Regardless of the origin of the verdict from a court or an arbitration tribunal, the judgment creditors take it to the court where compliance is expected for recognition. The recognition of arbitral award is comparatively smoother because of the New York Convention (1958), whereas the procedure is more cumbersome for foreign judgment because of the States' reliance on principle of reciprocity. For enforcement and execution, the ICSID Convention (1966) used both terms in English whereas the French and Spanish version used one synonym for both. Thus, Schreuer advised to take enforcement and execution in ICSID Convention (1966) interchangeably.⁶⁷ Similarly, the FSIA (1976) of the US section 1610 uses the immunity from execution. On the other hand, the SIA (1978) of the UK, section 13 (2) (b) uses enforcement instead.

1.4.3. *Private litigation and private judgment creditors*

In literatures the legal contractual relationship of States with other non-State parties is described as legal relationship between State and 'individual'.⁶⁸ State itself is considered as private entity for its commercial activities despite the absence of any clear distinction.⁶⁹ The term 'private' distinguishes from 'public' for adjudication. In a litigation where the State is sued either by a private party or another State for its sovereign action, such litigation is called public such as acquisition of private assets by State and the private owner sues the State for unlawful acquisition, interference to the fundamental rights with constitutional guarantee, *etc.* Similarly, State may be sued by a private party for any commercial act of the State. The catalyst of this kind of litigation is whether the act in question could have been done by another private entity such as issuance of bond [known as sovereign bond when issued by a State], breach of commercial contracts, *etc.* Such adjudication is private in nature.

Duhaime's Law Dictionary defined '*judgment creditors*' as a person including a foreign or domestic corporation, whether as plaintiff or defendant, who has received a judgment against another person and entitled to enforce the judgment.⁷⁰ Therefore, the

⁶⁷ Schreuer (n 64) 1135.

⁶⁸ Gus Van Harten, 'The Private-Public Distinction in the International Arbitration of Individual Claims against the State' (April 2007) 56(2) *The International and Comparative Law Quarterly* 371, 372.

⁶⁹ *Ibid.*

⁷⁰ Duhaime, Lloyd, Legal Definition of Judgment Creditor, <<http://www.duhaime.org/LegalDictionary.aspx>> accessed 29 April 2021.

judgment creditor of the private adjudication can be called as private judgment creditors. The Commentary on the ILC Drafts (1991) also described the litigants as ‘private’, thereby the judgment creditors pursuant to these litigations, can justifiably be addressed as ‘private judgment creditors’ in this dissertation.⁷¹ Yet, such distinction is not in black and white.

1.4.4. Defendant State or debtor State

Nowadays the private parties drag the sovereign entities to court or before any arbitral tribunal for its acts private in nature. Pursuant to such proceedings, the private entities may also win some judgment or award against the sovereign and begin a new proceeding of recognition and enforcement of the judgment or award in court. The State against whom the judgment or award is pronounced is the defendant State or judgment debtor State, interchangeably called sovereign judgment debtor or debtor State in this dissertation.

1.4.5. Efficiency in enforcement cases

Efficiency in the enforcement proceeding is the expected outcome for both the disputing parties as well as the forum states. The multiple enforcement litigations targeting various assets of the respondent States, located in several jurisdictions, increase the enforcement cost of the parties. The proceeding’s efficiency is measured primarily in terms of cost and time. The cost of litigation should not exceed the expected benefit or outcome of the proceeding of both the parties.⁷² Efficiency of a proceeding can be scrutinized into two categories: (a) regulatory means of promoting efficiency and sanction in case of breach (b) discretion of judges in conducting the proceeding.⁷³

1.4.6. Attribution

⁷¹ International Law Commission, ‘Draft articles on Jurisdictional Immunities of States and their Property with commentary 1991’ (Yearbook of the International Law Commission 1991 II (2)) Part IV paragraph 1 <https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf> accessed 3 April 2021 (the ILC Draft 1991).

⁷² Adam Gearey, Wayne Morrison and Robbert Jago, *The Politics of the Common Law: Perspectives, Rights, Process Institutions* (Routledge-Cavendish, 2009) 311.

⁷³ Fabricio Fortese and Lotta Hemmi, ‘Procedural Fairness and Efficiency in International Arbitration’ (2015) 3(1) Groningen Journal of International Law 110, 119.

James Crawford introduced attribution as an international law doctrine.⁷⁴ This principle is vastly applied in the determination of States' responsibility for wrongful acts,⁷⁵ in interpretation of international treaties.⁷⁶ Given the absence of any stringent definition in international law, the literatures applied its customized definition based on the purpose of the study.⁷⁷ As the rule of attribution is used inherently in normative means, Csaba Kovacs provided the normative definition of attribution is as "*the convent [...] bridges the gap between the two conflicting realities.*"⁷⁸ For the purpose of this dissertation, the term 'attribution' is used as a standard to bridge the convergence between the public and the commercial nature of sovereign assets and merge both the purpose and use of sovereign assets [discussed in details in the third chapter of this dissertation].

1.4.7. *The Forum States*

After litigation or arbitration proceedings, the judgment or the award is enforceable in any State only where the sovereign debtor has assets. Since the domestic court of the debtor State is unlikely to grant any MoC against its own State, the judgment creditor or the beneficiary of an arbitral award has no option but to enforce the same in any third-party country where the defendant State has some assets.⁷⁹ By virtue of extensive adherence to the New York Convention (1958), the awardee has more chances to get the award recognized to begin the enforcement proceeding. However, the situation is comparatively challenging for foreign judgment since the practice is based on the principles of reciprocity.⁸⁰ The court where the private judgment creditor brings the action for execution of any judgment either given by the same judiciary or any other foreign court and/or any arbitration award is the forum State for the purpose

⁷⁴ James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review 127, 134.

⁷⁵ For example, the draft provisions in the United Nations Convention on Responsibility of States for Internationally Wrongful Acts 2001, chapter II titled with 'Attribution of Conduct to a State'. The United Nations General Assembly, 'Responsibility of States for Internationally Wrongful Acts 2001' (Resolution 56/83 of 12 December 2001. A/56/49(Vol. I)/Corr.4).

⁷⁶ The Vienna Convention on Law of the Treaties 1969 (the VCLT) art 7-8, 46-47 and 50-51.

⁷⁷ Peter Tomka, 'Are States Liable for the Conduct of their Instrumentalities? Introductory Remarks' in E. Gailard, J. Younan (eds), *State Entities in International Arbitration, IAI Series on International Arbitration*, (11(4), Juris Publishing 2008); Csaba Kovacs, *Attribution in International Investment Law* (Kluwer Law International, 2018) 25, fn 133.

⁷⁸ *Ibid* 26.

⁷⁹ ABA Working Group, 'Reforming the Foreign Sovereign Immunities Act', (2002) 40 Columbia Journal of Transnational Law 489, 584.

⁸⁰ Nadia de Araujo, Marcelo De Nardi, Inez Lopes and Fabricio Polido, 'Private International Law Chronicles', (2019) 16 Brazil Journal of International Law 19.

of this dissertation. This jurisdiction is also called territorial State as the asset attempted for execution is located within the territory of this State and the execution suit is also initiated there. The term ‘forum State’ is used in this dissertation to maintain consistency.

1.5. Research structure

1.5.2. Chapter 2

The next chapter of this dissertation starts with the legal analysis of sovereign immunity from execution. The conceptual and legal analysis are sourced from both international and national legal frameworks. The objective of this chapter is to explore the first research question of this dissertation *i.e.*, immunity of sovereign assets from execution in national and international legal framework. It starts with the historical development of foreign sovereign immunity from absolute immunity to restrictive immunity. The scrutinization shows how the international conventions still hold up the absolute immunity for sovereign assets whereas the national legislations are inclined to restrictive immunity. It further examines the role of executives in determining the immunity of sovereign assets as diplomatic relations are involved.

1.5.3. Chapter 3

After the scrutinization of legal framework of sovereign assets’ immunity from execution in the foregoing chapter, the third chapter focuses on the second research question of this dissertation *i.e.*, the substantive and procedural matters related to sovereign assets in an enforcement proceeding. The substantive questions involve the questions of ownership and the attribution of the assets. On the other hand, the procedural matters consist of burden of proof, standard of proof, MoCs, *etc.*

This chapter starts with the literature on property rights defining ownership and attribution. An asset can be subjected to MoC when its owner is liable as judgment debtor. Hence, sovereign ownership prevents the court from making order interfering with the property rights of any third person other than judgment debtor. Hence, the assessment of ownership of sovereign asset comes forward as the first question in an enforcement litigation. Ownership is defined based on exclusivity and enforceability from the perspective of the holders’ rights. On the other hand, the attribution of the sovereign assets determines its immunity. The strict divorce of ownership and attribution of sovereign assets is neither possible nor desirable. Thus, this chapter

scrutinizes firstly, the sovereign assets in terms of their enforceability considering the ownership *vis-à-vis* the holding. Secondly, the attribution for the purpose of execution is examined from both legal and economic perspective.

The second part of the chapter illuminates the procedural issues including applicable law, the burden of proof, standard of proof, presumption of use, diversity of MoC, *etc.* The attachability of a sovereign asset largely depends on the complexity of the procedural matters. The diplomatic account having mixed purposes of both commercial and public is a burning issue in many cases. The procedural issue of standard of proof also results on different interpretations of waiver clauses. The findings of this chapter act as the foundation for the next chapter where specific sovereign assets targeted for execution are scrutinized.

1.5.4. Chapter 4

Judgment creditors seeking enforcement, target one or more sovereign assets. This chapter is focused on the third research question of this dissertation *i.e.*, how sovereign assets are interpreted in an execution proceeding. For the purpose of comprehensive view, sovereign assets are scrutinized under three heads: the immune assets, the non-immune assets, and the commonly targeted assets for enforcement. The lists of immune and non-immune assets are taken from international conventions and national legislations. The third and final part of this chapter focuses on the various types of cross-border sovereign assets, usually targeted by the judgment creditors for enforcement. Such as sovereign wealth funds, receivable from third party, funds in bank accounts, royalties from intellectual properties, State-owned ships, airplanes, and cargo therein. The purpose of this chapter is to discover the judicial approach in applying the laws relating to foreign sovereign immunity from execution.

This chapter looks for the coherent understanding of these targeted assets based on their legal definitions. After the legal definition of usually targeted assets in enforcement litigations, this part of the dissertation concentrates on the practical nature of the issues concerning immunity of sovereign assets. It examines the sovereign assets' purposes interpreted by the courts of various jurisdictions. The findings of this chapter demonstrate the inconsistent interpretations of sovereign assets and MoCs granted against the assets despite being listed as immune in laws.

The chapter concludes with proposals for interpreting specific sovereign assets in light of the laws on foreign sovereign immunity from execution vis-à-vis the laws related to that asset in question. Such as, corporate law for assets of SOEs; banking law for balance in bank accounts, financial law for sovereign wealth funds. Despite the fragmented approach for each category of assets, this dissertation aims at bringing a comprehensive solution for interpreting the purpose of sovereign assets. Therefore, the next chapter focuses on the possible alternative approaches borrowed from other areas of laws related to State acts.

1.5.5. Chapter 5

The fifth chapter poses the final research question of this dissertation *i.e.*, the scrutinization of interpretative tools from other areas of laws. This chapter examines the efficiency of various interpretive tools applied in other areas of law in balancing conflicting interests and the possible way forwards to resolve the inconsistencies in the laws on foreign sovereign immunity from execution. This dissertation critically analyses various interpretative tools borrowed from other areas of law: the MoA from the judgments of the European Court of Human Rights (the ECtHR); the doctrine of proportionality from the administrative law; the international public purpose from the literature on refusal to recognize foreign arbitral awards under the New York Convention (1958) to bring consistency, coherence, and predictability in interpretation of attribution of the sovereign assets by the courts in forum States. The findings illustrate the challenges in applying different interpretative tools. Hence, the concluding chapter of this dissertation attempted to formulate certain recommendations to mitigate the challenges considering the reviewed cases in previous chapters and the interpretative tools in this chapter.

1.5.6. Chapter 6

The international law in foreign sovereign immunity demands consistency, coherence, and predictability to ensure time and cost efficiency in enforcement of commercial judgments. Such consistency also urges for legitimacy from the States which stand at the core of this mechanism. This chapter concludes the dissertation with its stand on interpreting the sovereign assets for the question of immunity from MoCs. This chapter re-analyses the findings from the cases discussed in the previous chapters to identify the factors leading the courts to decide the cases. The analysis is based on

several issues, *inter alia* the jurisdictions, the defendant State, the assets in question, the underlying legal and non-legal considerations of the courts. Finally, it proposes the key points on interpreting sovereign assets [distinct from asset specific suggestions given in the fourth chapter] for future development of laws on foreign sovereign immunity from execution.

1.6. Conclusion

With the advancement of economic development, State functions are getting complex resulting in the blurred distinction between its public and private acts. Such overlapping State acts increase the possibility of litigation against the sovereign filed by private parties. Adoption of restrictive sovereign immunity for private acts opens the forum States' jurisdiction to the judgment creditors. The emerging popularity of arbitration shifts some disputes from courts to arbitral tribunal whereas even with the arbitral awards, the private judgment creditors need to knock the courts' door of the forum States for enforcement against a non-compliant sovereign judgment debtor. Because the awards and judgments remain as a mere paper judgment unless duly enforced. Thus, sovereign immunity from execution deserves more attention in academic research to construct the foundation for uniform judicial interpretations. Even less attention has been paid to the sovereign assets particularly. Thus, sovereign assets play a vital role in enforcement litigation against foreign State where the defendant State is no longer treated as sovereign rather deemed as a private entity for the purpose of its commercial activity. This research proposes an application of doctrinal and comparative approaches with a view to mapping judicial thinking as to the sovereign assets for enforcement.

Chapter 2: Sources and practice in law of foreign sovereign immunity

2.1 Conceptual development of foreign sovereign immunity

2.1.1. Sovereignty and State responsibility

The current principles of sovereign immunity originate from the English maxim saying, “*King can do no wrong.*”⁸¹ At that time, sovereign functions were limited to the public acts only. Only the king [representing the State] could do those functions. States as sovereign authorities were considered so supreme that they were not accountable for their actions to any temporal body.⁸² Sovereign equality was defined in international law as sovereignty and equality as recognizing the characteristics of States because of their sovereign powers and the equality among them.⁸³ Some authors defined sovereignty as the supreme power.⁸⁴ However, now-a-days such strict definition seems incompatible with international law, therefore it can be corrected as ‘relatively supreme authority’ instead of an absolute one.⁸⁵ States enjoy rights conferred thereon under international law and are also bound to comply with the duties imposed by international law. Sovereign immunity is one of such privileges adhered thereto by States under international law.

As a principle of foreign sovereign immunity, a State enjoys immunity in the territory of another State. The underlying support for this immunity derives from the concept of sovereign equality. “*Par in parem imperium non habet*” ensures that one sovereign State [here, the forum State] has no power over another sovereign State.⁸⁶ While explaining the constitutional backing of State immunity, Justice Kennedy in an US case stated:

“The state’s immunity from suit is fundamental aspect of the sovereign which the state enjoyed before the ratification of the constitution and which they

⁸¹ Erwin Chemerinsky, ‘Against Sovereign Immunity’, (May 2001) 53 Stanford Law Review 1201.

⁸² James Crawford, *State Responsibility: The General Part*, (Cambridge University Press 2013) 3.

⁸³ Hans Kelsen, ‘The Principle of Sovereign Equality of State as a Basis for International Organization’ (March 1944) 52(2) The Yale Law Journal 207, 207.

⁸⁴ John Austin, *The Province of Jurisprudence* (John Murray, 1832) 226.

⁸⁵ Kelsen (n 83) 208.

⁸⁶ The ILC Draft 1991 (n 71) commentary on art 18, para 2.

*retain today (either literally or by virtue of their admission into the union) upon an equal footing with other states.”*⁸⁷

Hence, the law on foreign sovereign immunity significantly relies on the principle of sovereign equality and inviolability of sovereignty. Sovereign equality is a well-accepted principle in international relations.⁸⁸ The reason behind accepting this principle is to ensure the uninterrupted exercise of sovereign power by the foreign State through its officials without undue impairment.⁸⁹

On the other hand, States sign and ratify the international agreements undertaking duties and obligations. Violation of those obligations makes States liable to the counterparts.⁹⁰ At the same time, international law grants the immunities and privileges to States. There is the question of State responsibility for the violation of a commitment.⁹¹ The Permanent Court of International Justice (PCIJ) defined State responsibility as a general principle of international law making the State pay for its violation of commitment.⁹² The ILC attempted to codify the international law on State responsibility.⁹³ The rules causing State responsibility are dominantly derived from the violation of international law⁹⁴ and its breach of its commercial commitments as well.

With the increase of economic development, the State functions are no longer limited to its public acts (*jure imperii*) but also extended to private acts (*jure gestionis*). The public acts are defined as the actions derived from its sovereignty including collecting taxes, administration of justice, maintenance of diplomatic relations, whereas the private acts and/or the commercial acts are those which can also be performed by any non-sovereign entities. For instance, commercial activities of availing debt, issuing bonds, executing commercial contracts, *etc.* The State involvement in private acts

⁸⁷ *Alden v. Maine*, [1999] the US Supreme Court 527 US 706 [713].

⁸⁸ The United Nations Charter 1945 art 2.

⁸⁹ Sevrine Knuchel, ‘State Immunity and the Promise of Jus Cogen’ (Spring 2011) 9(2) Northwestern University Journal of International Human Rights 149, 150.

⁹⁰ The UN Convention (Draft) 2001 (n 75).

⁹¹ Danwood Mzikenge Chirwa, ‘the Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights’ (2004) 5 Melbourne Journal of International Law 1, 4.

⁹² *Chorzow Factory (Germany v. Poland)* (Claim for Indemnity) [1927] PCIJ (ser A) No. 8, 21.

⁹³ The United Nations, ‘Concept note on the (draft) Convention on the Responsibility of States for Internationally Wrongful Acts’ (2015), <https://www.un.org/en/ga/sixth/70/docs/concept_note_state_responsibility_4_nov_2015.pdf> accessed 2 May 2020.

⁹⁴ The UN Convention (Draft) 2001 (n 75).

makes it subjected to commercial disputes with private entities, litigated before foreign courts in case of any dispute where the question of sovereign immunity arises.

In the era of globalization, the distinction between the public acts (*jure imperii*) and the private acts (*jure gestionis*) are getting blurred. With this blur distinction, as the States are getting involved in private functions, States are also entrusting more and more private entities with their public activities. Such as the concession agreements for extraction of mineral resources, managing airports, Public-Private Partnership (PPP) projects, *etc.* Such delegation cannot be referred to as vertical or horizontal instantly. Hence, the function in question is investigated from two perspectives: the nature of the actors and the process of discharging the responsibility thereby leading to the issue of immunity.⁹⁵ The authors argued, “...immunity to a foreign state depends on the underlying structure of the international community.”⁹⁶ Hence, in view of increasing participation of private entities in public functions, the immunity to them regardless of their separate entity from the government, is required to be extended. The international regulations also adhered to the application of rules of private international laws in these cases.⁹⁷ Law on foreign sovereign immunity comes into play when the defendant State is brought before the court of forum State for its violation or breach and [in some cases] for the violation by its [delegated] private agents.

2.1.2. Principles of foreign sovereign immunity

Two principles dominate the international law on foreign sovereign immunity, namely: absolute sovereign immunity and restrictive sovereign immunity. These two principles are visible in existing [*albeit* not effective] international convention, draft instruments provided by international organizations and the national legislations. The application of these two principles broadly depends on the nature of the underlying transaction in question *i.e.*, the public or private nature of the State acts and of the sovereign assets in question. The following figure shows the types of foreign sovereign immunity and its subjects.

⁹⁵ Ibid 8.

⁹⁶ Ibid 13.

⁹⁷ The ECSI 1972 (n 41) art 20 (3) (b); the UN Convention 2004 (n 41) art 10.

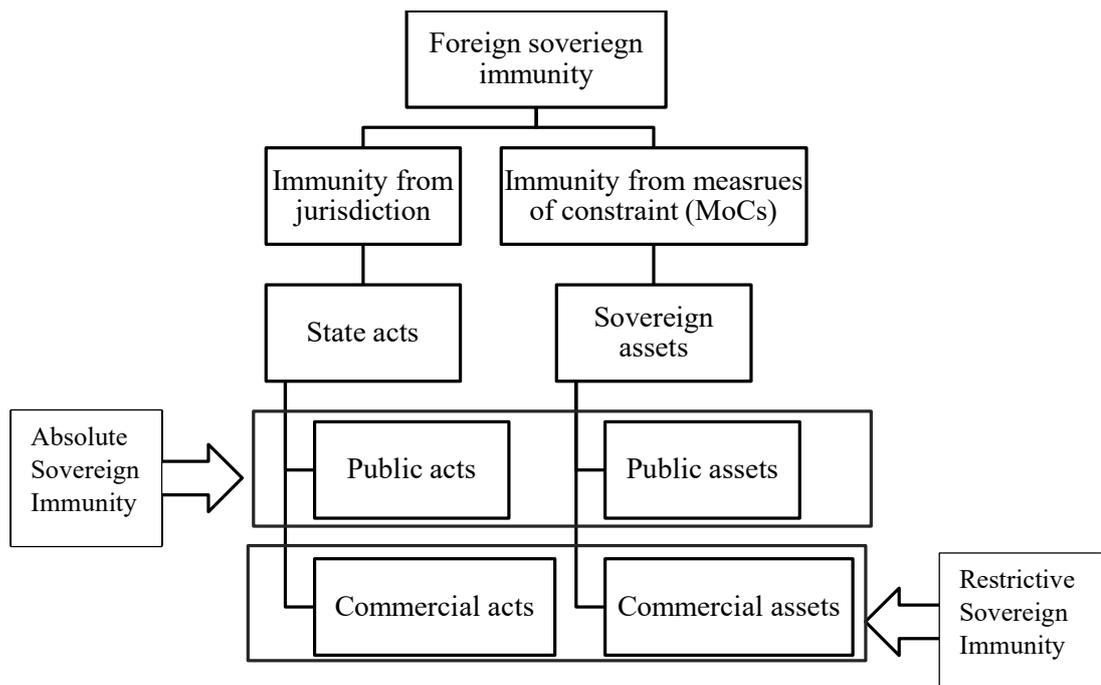


Figure 1: Types of foreign sovereign immunity under the UN Convention (2004).

2.1.2.1. Absolute sovereign immunity

The Latin maxim, “*Par in parem non habet jurisdictionem*” meaning “*equals have no jurisdiction over each other*” act as the basis of the absolute sovereign immunity from jurisdiction.⁹⁸ Earlier the State enjoyed absolute immunity from judicial proceedings and immunity from execution or MoCs. Under the principle of absolute sovereign immunity, no courts of another State have jurisdiction over the foreign State or over the assets of the foreign State for any judicial proceedings without its consent.⁹⁹ The leading case of absolute sovereign immunity was against the French Government before the US Supreme Court in 1812 regarding the repossession of a ship by the French Navy.¹⁰⁰ In this case, the US plaintiff attempted enforcement of his claim against the French Naval ship. In another case before the French Court of Cassation in 1849, absolute immunity was invoked where the real property of Spain was in question.¹⁰¹

⁹⁸ Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, (Oxford University Press 2011).

⁹⁹ Rahman (n 7) 41.

¹⁰⁰ *The Schooner Exchange v. McFaddon*, [1812] the US Supreme Court 11 US (7 Cranch) 116; This case has been discussed in detail in 4.4.2 of this Dissertation.

¹⁰¹ *French case, Lambège et Pujol* [1849] (French Court of Cassation) Sirey I, 81.

Nevertheless, the absolute sovereign immunity was still not a conclusive matter as the court might deny absolute immunity in case of express or implied waiver from immunity.¹⁰² Lord Atkin in *the Cristina* (1938) observed two principles of State immunity in their domestic laws: firstly, the foreign State could not be a party to any proceeding without its consent and secondly, no MoCs could be taken against its assets. He also made the second one subjected to the purpose of the asset whether it was commercial or sovereign. He opined the immunity rule to be applied to both.¹⁰³ Such observation of Lord Atkin infers the application of absolute sovereign immunity for both jurisdiction and execution. Absolute immunity was a well-accepted defense in litigation involving foreign sovereign before the domestic courts during the nineteenth century.¹⁰⁴ At that time, State activities at the time were significantly limited to its public acts such as diplomatic relations, military missions, *etc.*¹⁰⁵ Absolute immunity was granted for the sovereign activities only until the controversy started as to the claim of the same immunity for commercial activities of the State.¹⁰⁶ With the expansion of the State activities and its involvement in international trade and commerce, the immunity rule started taking its shift from absolute to restrictive one. As a matter of fact, absolute immunity increases the risk of injustice in private individuals' commercial relations with foreign States. Because of this immunity, the [private] commercial counterpart of the State may be left without any remedy for the breach of commercial commitment. Hence, the historical journey to restrictive sovereign immunity is intricately connected with the redefinition of the State and its sovereign activities.¹⁰⁷

2.1.2.2. Restrictive sovereign immunity

With the span of State's involvement in non-sovereign actions, absolute immunity [discussed above] is reduced and restricted to *jure imperii* only such as internal administration, legislative acts, acts concerning armed forces or diplomatic activity, *etc.*¹⁰⁸ On the contrary, for the actions falling under the category of *jure gestionis*, such as commercial contracts, availing debts, *etc.*, States are started being considered

¹⁰² Yang (n 20) 11.

¹⁰³ *The Cristina* [1938] I All E.R. 719, para 720.

¹⁰⁴ Yang (n 20) 7.

¹⁰⁵ *Ibid* 8.

¹⁰⁶ *Ibid*, 7.

¹⁰⁷ *Ibid*.

¹⁰⁸ *Victory Transport v. Comisaria General* [1964] 2nd Cir court 336 F.2d 354.

as the same of a private party¹⁰⁹ and thereby, are subjected to restrictive sovereign immunity.

The relevant literature recognizes the gradual alignment toward restrictive immunity for both jurisdiction and execution *albeit* not to the same extent.¹¹⁰ Following the restrictive sovereign immunity principle, sovereign debtors do not enjoy immunity from jurisdiction before the court of the forum State in any commercial litigations including sovereign debt litigations, breach of contract, employment disputes, tortious liability, *etc.*¹¹¹ Pursuant to the principle of restrictive immunity from jurisdiction for commercial disputes, the court may pronounce judgment against the defendant State requiring it to pay the judgment creditors.¹¹² However, the enforcement of the judgment is still under doubt because of the immunity from execution. The principle of restrictive sovereign immunity from execution is not broadly accepted as for immunity from jurisdiction. Limited application of restrictive sovereign immunity from execution is found for the assets used or intended to be used for commercial purpose.¹¹³ The question of proving the commercial nature depends on two issues: whether the activity or transaction is *jure gestionis* and whether the purpose of the asset is not to accomplish any public function [alternatively whether the asset is use for commercial purpose].¹¹⁴ The court presumes the public nature of the sovereign assets in some cases.¹¹⁵ The onus of rebuttal of this presumption lies on the judgment creditor.¹¹⁶

Development of foreign sovereign immunity principles significantly relies on the laws and practices of the dominant jurisdictions such as the US, the UK. These dominant jurisdictions formulated national laws in the last century introducing restrictive sovereign immunity. Restrictive immunity is granted to the defendant State in any

¹⁰⁹ Shaw (n 38) 495.

¹¹⁰ Crawford (n 20) 851.

¹¹¹ Rahman (n 53).

¹¹² Lee Buchheit, *Sovereign debt restructuring: the legal context*, (BIS paper no. 72, July 2013).

¹¹³ *The Philippines Embassy Bank Account Case* [1977] the German Constitutional Court, 65 ILR 146, [150]. Observed that “*forced execution of judgment by the state of the forum under a writ of execution against a foreign state which has been issued in respect of non-sovereign acts [...] of the state, or property of that state which is present or situated in the territory of the state of the forum is inadmissible without the consent of the foreign state if [...] such property serves sovereign purposes of the foreign state.*”

¹¹⁴ *Candor and Filvem vs Minister of Justice (Governmental body)* [1992] the Italian Court of Cassation 101 ILR 394, [401]- [2].

¹¹⁵ Discussed in 3.5.3 of this Dissertation.

¹¹⁶ Shaw (n 38) 520; discussed in 3.5.4 of this Dissertation.

private commercial dispute despite its sovereign nature. Though restrictive sovereign immunity is applied for judicial proceedings, the State still enjoys a higher level of immunity for execution issues. Because as the scholars observed, the MoCs against sovereign assets even in the forum State's jurisdiction may cause diplomatic tension between the States.¹¹⁷

2.1.3. *Types of foreign sovereign immunity*

Peters duly commented "*Immunities are a messy affair*"¹¹⁸ Fox defined immunity as a defense "*to the adjudicative and enforcement jurisdiction of national courts which bars the municipal courts of one state from adjudicating the disputes of another state*".¹¹⁹ Three types of sovereign immunities are: immunity from application of foreign law, immunity from jurisdiction, and immunity from execution. Immunity from application of foreign law ensures that the foreign State is not subjected to the laws of the other State in full force. Nevertheless, this dissertation follows the classification stated in the UN Convention (2004) and the ECSI (1972) which are immunity from the jurisdiction of a foreign State [when a State is a defendant in a civil action pending in another State], and immunity from execution.¹²⁰ This dissertation deals only with the latter one with the immunity from execution.

2.1.3.1. Immunity from the jurisdiction of the forum State

Although, this dissertation deals with the immunity from execution only, the question of immunity from execution comes after the determination of the question of immunity from jurisdiction. The commentary to article 18 of the International Law Commission (ILC) Draft (1991) duly stated, "*Whatever the theories [are applied] [...] the question of immunity of execution does not arise until after the question of jurisdictional immunity has been decided in the negative.*"¹²¹

States enjoy immunity from the jurisdiction of another State's court on the ground of non-justiciability and State act. International law grants such immunity based on the

¹¹⁷ Sir Ian Sinclair, *the Law of Sovereign Immunity: Recent Development* (Hague Recueil, 1980), 218-220; Ian Brownlie, *Principles of Public International Law*, (4th edn Oxford University Press 1990), 338.

¹¹⁸ Anne Peters, 'Immune against Constitutionalization?' in A. Peters, E. Lagrange, S. Oeter and C. Tomuschat, (eds) *Immunities in the Age of Global Constitutionalism*, (Maritnus Nijhoff, 2014) 1.

¹¹⁹ Fox (n 5) 1.

¹²⁰ The UN Convention 2004 (n 41) a 5 and a 18; the ECSI 1972 (n 41) a 1 and 23.

¹²¹ The ILC Draft 1991 (n 71) commentary on art 18, para 2.

principle that a sovereign State should not be brought before a court against its own will.¹²² However, immunity from jurisdiction does not mean exemption from domestic legal proceeding. The immunity from jurisdiction prevents the sovereign from the jurisdiction of another State [*i.e.*, the forum State] as a matter of international law, whereas the exemption from jurisdiction protects the State from its domestic legal proceeding under its national constitutional safeguards.¹²³ The jurisdictional immunity has two exceptions: sovereign's immunity waiver and the commercial activity of the sovereign.

The restrictive sovereign immunity¹²⁴ from jurisdiction in case of the commercial act has been accepted as a rule of international law.¹²⁵ While comparing the commercial contract exception between the FSIA (1976) of US and the ILC draft (1991) Lowe opined that ILC took a rigid approach in granting immunity to the States whereas it adopted liberal definition of commercial contract. The given definition of commercial contract in ILC covered all situations as mentioned in the FSIA (1976) of the US, but it did not require any direct effect on the forum State. The FSIA (1976) of the US applies restrictive immunity to the commercial contract when such contract has some direct link with the US.¹²⁶ However, the ILC draft (1991),¹²⁷ as well as the UN Convention (2004),¹²⁸ have made the commercial contract exception for the immunity from jurisdiction as a subject matter of private international law, thus subjected it to the law of the forum State.

In commercial contract exception, the US courts distinguish between the activity and the purpose. A contract or an act is deemed as commercial regardless of its

¹²² *The Schooner Exchange* (n 100), [144].

¹²³ *International Association of Machinists & Aerospace Workers vs OPEC* [1981] 9th Cir Court 649 F.2d 1354, [1359].

¹²⁴ Discussed in 2.1.2.2 of this dissertation.

¹²⁵ Singer (n 46).

¹²⁶ L. Weatherly Lowe, 'the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property, the Commercial Contract Exception' (1989) 27 *Columbia Journal of Transnational Law* 657.

¹²⁷ The ILC Draft 1991 (n 71) art 10. It states, "*article 10 (1): Commercial transaction. If a State engages in a commercial transaction with a foreign natural or juridical person and by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot involve immunity from that jurisdiction in a proceeding arising out of that commercial transaction.*"

¹²⁸ The UN Convention 2004 (n 41) art 10.

governmental purpose when its core aim is to earn profit.¹²⁹ The US court relied on ‘commercial activity’ test to decide the claims of immunity for contracts *albeit* the public purpose of the contract such as procurement contract for military equipment, and/or construction contract for government building.¹³⁰ In the case of *MOL Inc. v. Bangladesh* (1984),¹³¹ the termination of contract of licensing to capture and export money was held as sovereign act because this termination was made in exercise of the regulatory power of the State under its sovereign prerogatives. In another dispute under an employment contract where the claimant was a US citizen and appointed by the army of the defendant State for his services, the US court refused to consider the contract as commercial activity exception because only the State could recruit the army.¹³² However, in a similar contract for service of rural development, the US court rejected immunity stating the essence of the contract was to receive advice in the exchange of money.¹³³ In order to determine the connection with the activity, the court observed whether the act in question has a link with the chain of transaction.¹³⁴ The line between nature and purpose is often blurry and their boundaries cannot be marked with certainty.¹³⁵

In a debate between nature and purpose test for commercial contract exception, some commentators emphasized the purpose test, stating that the governmental purpose of a commercial contract needs to be immune such as relief during famine, emergency health services. The ILC report (1984) proposed a compromise between the nature test and the purpose test. It suggested the nature test at the first, and if the nature test went in favor of the commercial contract, the State could still claim the purpose test.¹³⁶ Nevertheless, the challenge remains as under the principle of private

¹²⁹ *De Sanchez v. Banco Central de Nicaragua* [1985] 5th Cir court 770 F2d 1385. In this case, sale of foreign currency reserve by the Nicaraguan Central Bank was questioned whether commercial or governmental.

¹³⁰ *Environmental Tectonics v. W.S. Kirkpatrick Inc.* [1988] 3rd Cir 847 F2d 1052 [1059].

¹³¹ [1984] 9th Cir 736 F.2d 1326.

¹³² *Friedar v. Government of Israel*, [1985] SDNY 614 F. Supp. 395.

¹³³ *Practical Concept Inc. v. Republic of Bolivia* [1987] DC Cir 811 F2d 1543.

¹³⁴ Dan T Carter, ‘NLRB Jurisdiction over Foreign Government’ (Summer 1978) 11(3) *Vanderbilt Journal of Transnational Law* 483.

¹³⁵ Lowe (n 126) 674-675.

¹³⁶ The United Nations, ‘Jurisdictional Immunities of States and their Property’ (1984) Yearbook of International Law Commission (Document A/CN.4/376 and Add 1 and 2) 5, 8 fn 10. The proposed article 3 (paragraph 2) stated, “*In determining whether a contract for sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken in to account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.*”

international law of the forum State as the courts of the forum State decide which test is to be applied. Although the immunity from jurisdiction is outside the scope of this dissertation, these tests applied for the immunity from jurisdiction play vital role while determining the nature or purpose of the sovereign assets for immunity from execution [discussed in next chapter of this dissertation].¹³⁷

2.1.3.2. Immunity from execution

Fox acknowledged the limited success of execution against sovereign assets. She commented, “*Actual seizure of state assets without consent remains a rarity.*”¹³⁸ The execution for the purpose of immunity rule means any forcible action to ensure the compliance with the judgment or discharge of judgment debt. The international conventions defined the immunity from execution as immunity from applying MoCs against the sovereign assets.¹³⁹ The MoCs against any private entities include the specific performance, attachment of assets, garnishment, injunction order, and penalty for non-compliance with any of these enforcement measures. The ILC Draft (1991) included attachment, arrest and execution against the assets as MoCs.¹⁴⁰ However, the commentary thereon elaborated the scope as inclusive of any prejudgment conservatory measures and hence, made the list of measures as inclusive and non-exhaustive.¹⁴¹ The International Law Association (ILA) Draft also recognized similar kinds of MoCs to be applied against the defaulting State [defaulted in paying the judgment debt voluntarily] similar to any private judgment debtor, except punitive measures.¹⁴² It advised the punitive measures to be replaced with compensatory damages.

There are two forms of MoCs: the pre-judgment and the post-judgment MoCs.¹⁴³ The common forms of pre-judgment MoCs against a foreign sovereign are the temporary injunction over the sovereign assets pending the execution suit (also known as the

¹³⁷ Discussed in 3.4.1 of this dissertation.

¹³⁸ Fox (n 5) 6.

¹³⁹ The UN Convention 2004 (n 41); the ECSI 1972 (n 41).

¹⁴⁰ The ILC Draft 1991 (n 71) art 18 (1).

¹⁴¹ Ibid. commentary on the ILC Draft 1991 art 18 (1) para 4.

¹⁴² The International Law Association, Conference at Montreal (ILA/2/38, 1982) (the ILA Draft 1982); see also International Law Association, ‘Draft Articles for a Convention on State Immunity’ (March 1983) 22 (2) International Legal Materials 287, art V (A).

¹⁴³ Discussed in 3.6.1 and 3.6.2 of this Dissertation.

Mareva order in common law jurisdictions),¹⁴⁴ conservatory order (*saisie-conservatoire*),¹⁴⁵ *saisie-arret*,¹⁴⁶ etc. Each of them is issued based on the necessity of the case. Such as, the conservatory order is issued for settlement of title of the asset, whereas the temporary injunction order is issued for prevention of transfer of assets from the territory of the forum State.¹⁴⁷ The post-judgment MoCs are attachment and garnishment.¹⁴⁸ Attachment orders are given to recover the judgment value from the sale or any other forms of transfer of the asset. Besides, garnishment order is granted against the third party who owes money to the defendant State and the court orders the third party to pay the judgment creditor instead of the defendant State.

Nevertheless, these MoCs are not possible against a foreign sovereign without putting the diplomatic relationship at risk. For this reason, the court requires a higher level of proof to grant these MoCs. In a case against Egypt where the petitioner asked for the temporary preventive injunction, Donaldson MR, an US judge required “*solid evidence that a major friendly foreign state with funds in this country (the forum state) was intending to remove them simply to avoid paying an arbitration award, albeit one for quite a large amount.*”¹⁴⁹ Thus, the foreign State used to enjoy more immunity for execution than from jurisdiction.

Besides, following the similar trend of jurisdictional immunity, restrictive sovereign immunity is practiced for the assets in limited cases, especially for the assets used or intended to be used for commercial purpose.¹⁵⁰ This exception acts as motivation to the private parties to enter commercial ventures with the sovereign. Assets of a foreign State can be subjected to MoCs if used for commercial activity or used for commercial purposes in the forum State. Here, the purpose and/or the activity of the

¹⁴⁴ Mareva order, also known as a freezing order or asset protection order, is a special type of interlocutory injunction which restrains a defendant from dealing with the whole or part of their assets pending the outcome of legal proceedings.

¹⁴⁵ The *Saisie conservatoire* or the conservatory order is granted as an interim measure to preserve the assets involved in the dispute. This measure of constrain is limited to the assets that have nexus with the dispute itself.

¹⁴⁶ The *saisie-arret* means the attachment order against the assets held by third party for the benefit of the claimant.

¹⁴⁷ Fox (n 5) 372.

¹⁴⁸ Discussed in 3.6.2. of this Dissertation.

¹⁴⁹ *SPP (Middle East) Ltd. v. the Arab Republic of Egypt* [1994] CA, transcript 122, 19 March 1994.

¹⁵⁰ *The Philippine Embassy Account Case*, (n 113) [150], the German Constitutional Court observed that “*forced execution of judgment by the state of the forum under a writ of execution against a foreign state which has been issued in respect of non-sovereign acts [...] of the state, or property of that state which is present or situated in the territory of the state of the forum is inadmissible without the consent of the foreign state if [...] such property serves sovereign purposes of the foreign state.*”

asset should be the core of the judgment to be enforced. The major challenge for the judgment creditors is to find the non-immune assets of the debtor State. Usually, when the debtor is a private entity unlike a State, the creditors are aware of the debtor's assets, whereas in case of a sovereign judgment debtor, the creditors may not know where the sovereign's assets are located. Hence, the enforcement becomes a challenging one.¹⁵¹ In terms of the legal framework on immunity from execution, the ECSI (1972) permits MoCs against foreign assets only with prior consents and the UN Convention (2004) takes comparatively liberal approach [than the ECSI] toward immunity for execution.¹⁵²

2.2. Historical development of laws on foreign sovereign immunity

Historical development of laws on foreign sovereign immunity can be discussed from the perspectives of international regulations and national legislations. The question of foreign sovereign immunity attracted the global attention in 1812 when the US court granted immunity to France based on comity and grace for a military vessel.¹⁵³ The first attempt in codification of international law on sovereign immunity was initiated by the Institute de Droit International in 1891.¹⁵⁴ The gradual development of the codification process described the entrance of restrictive sovereign immunity to the regime of absolute sovereign immunity.

The Hamburg Resolution was proposed by the Institute de Droit International in 1891. It recognized the absolute sovereign immunity to the State for its acts and brought the idea of restrictive sovereign immunity for its non-sovereign act in a limited manner *albeit* the foreign State still enjoyed absolute sovereign immunity from execution unless waived its immunity. The first restrictive sovereign immunity for execution was adopted for the State-owned ships used for commercial voyage in 1926 by the Brussels Convention. Although this was the first legally effective international instrument granting restrictive immunity to the foreign State from execution, it did not receive many ratifications.¹⁵⁵ Subsequently, the Harvard Project in International Law

¹⁵¹ Barr (n 51).

¹⁵² The ECSI 1972 (n 41) art. 23; the UN Convention 2004 (n 41) art. 19. Discussed in details in 2.4.1 and 2.4.2 of this dissertation.

¹⁵³ *The Schooner Exchange* (n 100) [116]-[147].

¹⁵⁴ Gerhard Hafner, 'Historical Background to the Convention', in ed. Roger O'Keefe, Christian J. Tams, and Antonios Tzanakopoulos, *the United Nations Convention on Jurisdictional Immunities of State and their Properties* (Oxford University Press, March 21, 2013), 1-12.

¹⁵⁵ Fox (n 5) 396.

(1932) brought forward the concept of restrictive sovereign immunity from execution for certain sovereign assets.¹⁵⁶ The next draft came in 1954, named as the Aix-en-Provence Resolution, published by the Institute de Droit International. Its contribution to the development of law on foreign sovereign immunity was that it permitted MoCs to be taken against the foreign sovereign assets used for other than a governmental purposes.¹⁵⁷ The first codified international convention on sovereign immunity is the European Convention of State Immunity, which came into force in 1972. It granted restrictive sovereign immunity from jurisdiction for the commercial activities of the foreign State whereas the absolute sovereign immunity was adopted for execution unless the foreign State consented to it.¹⁵⁸

Subsequently, for the purpose of a globally acceptable international convention, the ILC prepared its drafts and submitted them to the United Nations General Assembly (UNGA) several times such as in 1986, 1991 and finally 1999. In response to those drafts, the ILA also published the drafts in 1982 and 1994. Meanwhile, the Institute de Droit International also presented the drafts in 1991 and 2001 where the draft of 1991 was for the foreign State immunity and the other one of 2001 dealt with the immunity of head of the State and of the government. All these drafts opened the question of restrictive immunity from execution and made the sovereign assets used for commercial purposes subjected to MoCs. The major contribution of these drafts was the incorporation of a list of immune assets and the features of non-immune assets of the foreign State.¹⁵⁹ Finally, in 2004, the UN Convention on State Immunity from Jurisdiction and their Properties was adopted and opened for ratification which is yet to receive its required number of ratifications for coming into force.¹⁶⁰

On the other hand, in the absence of any effective and well accepted international regulation in this regard, States attempted to fill up the gap with national legislations and hence, the national laws played a vital role in developing the current legal

¹⁵⁶ PC Jessup, 'Competence Courts in Regard to Foreign States' (1932) 26 American Journal of International Law (Supplement Research in International Law) 451, 527.

¹⁵⁷ The Immunity from Jurisdiction and Enforcement from Foreign State (Aix-en-Provence Resolution 1954) art 5.

¹⁵⁸ The ECSI 1972 (n 41) a 23.

¹⁵⁹ Discussed in 4.2 and 4.3 of this dissertation.

¹⁶⁰ United Nations Treaty Collection, 'United Nations Convention on Jurisdictional Immunities of States and Their Property' (New York, 2 December 2004) <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en> accessed 05 October 2022.

framework of laws on foreign sovereign immunity. In 1950, the Supreme Court of Austria put light on the commercial activities of the defendant State and concluded to limit the application of absolute sovereign immunity in cases of non-sovereign activities of the State party.¹⁶¹ Following the same trend, the *Tate Letter* was issued by the United States Department of State law in 1952. Justifying this stand, the State Department of US announced, “widespread and increasing practice on the part of governments of engaging in commercial activities” made it “necessary” to “enable persons doing business with them to have their rights determined in the courts.”¹⁶² Madl and Vekas reasoned such shift from absolute immunity to restrictive one because of the emerging number of disputes between the private parties and foreign States.¹⁶³ the forum States like the US adopted restrictive sovereign immunity because the absence of restrictive immunity would have affected the interest of their private traders having business with other foreign States and also negatively impacted the popularity of its jurisdiction before the private judgment creditors of the foreign states.

In 1956 [when Hong Kong was a British colony], the Hong Kong court applied the restrictive sovereign immunity principle against the Bank of Communications of Shanghai as one of the State instrumentalities of China on the ground of lack of evidence of public use.¹⁶⁴ The Philippines Privy Council recognized the same rule in an in-rem action against the defendant State.¹⁶⁵ Subsequently the FSIA (1976) of the US and the SIA (1978) of the UK were adopted. Other States enacted their own national laws in this regard, such as Australia,¹⁶⁶ Canada,¹⁶⁷ Pakistan,¹⁶⁸ Singapore,¹⁶⁹ etc. Now, even though the rule of restrictive sovereign immunity from execution has not reached the level of customary international law, many States follow this principle based on reciprocity.¹⁷⁰

¹⁶¹ *Dralle vs Republic of Czechoslovakia* [1950] 17 ILR 155.

¹⁶² Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-985 (1952).

¹⁶³ Madl and Vekas (n 17) 143.

¹⁶⁴ *Midland Inv. Co. v. Bank of Commc 'ns* [1956] 40 HKLR 42, [49].

¹⁶⁵ *The Philippines Admiral Case* [1977] AC 373, [376].

¹⁶⁶ The Foreign Sovereign Immunity Act 1985 (Australia) (the FSIA).

¹⁶⁷ The State Immunity Act (SIA) 1982 (Canada).

¹⁶⁸ The State Immunity Ordinance 1981 (Pakistan).

¹⁶⁹ The State Immunity Act 1979 (Singapore).

¹⁷⁰ Fox (n 5) 395.

2.3. Legal framework of foreign sovereign immunity

Law on foreign sovereign immunity receives validity from international law. A state is entitled to sovereign immunity under customary international law. The customary international law still relies on the absolute sovereign immunity for suing a foreign State or granting MoCs against its assets without its consent.¹⁷¹ The customary international law regarding the foreign sovereign immunity is vividly found in State practices “by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States [...]”¹⁷² Nevertheless, international law has gone through changes in its subject matters, from core inter States relation to global governance where the private parties are engaged in cross-frontier functions. This new inclusive approach to international law towards non-State actors challenged the existing State-made framework consisting of treaties and customs. Oddenino and Bonetto argued that because of the development of cross-border trade, investment and environmental issues, confrontation of the non-State actors in framing international law made the international law softer than before.¹⁷³ While determining the legal framework of the newly shaped international law, two ways are presented: firstly, effect theory where the norms should be determine based on their effect on the actors such as international environmental law and secondly the norms should be the one that the actors accept and make for themselves such as *lex mercatoria*, the procedural law of the international commercial arbitration, *etc.* Such an inclusive approach causes horizontal extension of international law as it expands its lawmakers from pure sovereign authority to non-State actors.

The legal framework of law on foreign sovereign immunity starts with international conventions. Due to the absence of any effective and comprehensive international

¹⁷¹ Edward Chukwemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, 2018) 41-42; Jorg Polakiewicz, ‘the Contribution of Europe to State Immunity through its Conventions and the Case Law of the European Court of Human Rights, State Immunity under International Law, and Current Challenges’ (CAHDI Proceedings 2017). The authors commented that the ECSI (1972) codified the customary international law [as existed at the time of its drafting]. Therefore, it can be commented that the customary international law still follows absolute sovereign immunity from execution unless prior consent of the defendant State to execution. Similar stand in favor of absolute international law is found in the ICJ Judgment (2012) in *The Jurisdictional Immunities of the State* (cited in n 172).

¹⁷² *The Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening) [2012] ICJ Report, 99, [56].

¹⁷³ Alberto Oddenino and Diego Bonetto, ‘the Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law’ [February 25, 2020] AperTO- Archivio Istituzionale Open Access dell’Universeta di Torino, 3-4.

convention, the national legislation fills up the vacuum in the legal framework. Given the convergence of diplomatic relations and international affairs with the application of law on foreign sovereign immunity, the executive body of the forum State plays a vital role in the enforcement litigation by sending executive brief to the deciding court from time to time.

2.4 International conventions on foreign sovereign immunity

The UN Convention (2004) and the ECSI (1972) are the two well-known international conventions on State immunity, *albeit* the UN convention (2004) is yet to be in force. There are some effective international conventions which are not directly related to foreign sovereign immunity but their subject matter deals with certain aspects of sovereign immunity. Such as the Vienna Conventions on diplomatic and consular relations (1961 and 1963). Moreover, some international organizations published their drafts from time to time.

2.4.1. The UN Convention on Jurisdictional Immunities and Their Property (2004)

Despite the non-effective status, the UN convention (2004) holds persuasive value to both national and international courts regarding the immunity issues.¹⁷⁴ It deals with both the jurisdictional immunity and the immunity from execution. It has a distinctive feature for pre-judgment and post-judgment enforcement. For instance, the pre-judgment attachment against sovereign assets is permitted only with prior written consent of the defendant State and/or allocation of asset for satisfaction of the claim in question (called as ‘earmarked’ asset).¹⁷⁵ The post-judgment measure can be taken against a sovereign asset when the asset in question is used for non-governmental or commercial purpose, located in the forum State and has a direct connection with the ‘sovereign entity’ involved in the proceeding.¹⁷⁶ Qualifying the interpretation of the direct relation with the ‘sovereign entity’, the UN convention (2004) defines the State including any organ of the government, constitute units of federal States or political subdivision, instrumentalities or other entities or representative of the state, exercising the sovereign authority.¹⁷⁷ This Convention lacks the definition of ‘non-

¹⁷⁴ Martin Smolek, ‘The International Legal Framework on State Immunity, State Immunity under International Law and Current Challenges’ (CAHDI Proceedings 2017).

¹⁷⁵ The UN Convention 2004 (n 41) art 18.

¹⁷⁶ Ibid art 19.

¹⁷⁷ Ibid art 2 (1) (b).

governmental' use of assets in questions which leaves the interpretative discretion at the hand of the court. In addition, the UN convention (2004) has more mature provisions than the ECSI (1972), such as it includes a specific article for the protection of certain sovereign assets. Notwithstanding the non-governmental use, the assets of military character, diplomatic mission, central bank, cultural heritage having the purpose of exhibition of scientific, cultural, or historical interest are immune.¹⁷⁸

2.4.2. *The European Convention on State Immunity (1972)*

The ECSI (1972) is the only effective multilateral instrument exclusively regarding sovereign immunity, adopted in 1972. Being the first codified law exclusively on the matter of foreign sovereign immunity, this convention is regarded as a source of customary international law.¹⁷⁹ It has more restrictive approach in immunity from execution than from jurisdiction. Article 23 clearly restricts any execution and preventive measures against sovereign assets to be taken in the territory of other States with the exception of prior consent to such action.¹⁸⁰ The ECSI (1972) leaves the execution challenges unresolved relying on the voluntary compliance from the defendant State. However, the explanatory report mentions multiple times that the drafters' focus was to protect the judgment creditors.¹⁸¹ The scope of article 23 is narrowed down with two exceptions *i.e.*, express waiver of immunity by the State and the execution of arbitral award.

It also gives restrictive interpretation to the 'preventive measures' limiting with the actions 'taken with a view to eventual execution' thereby excluding the immunity for pre-judgment attachment orders or the 'conservatory measures'.¹⁸² Although the literal interpretation of the ECSI (1972) does not permit execution against the sovereign asset except State's consent and enforcement of arbitral award, the explanatory report to the convention gives a liberal interpretation to article 14 mentioning that it provides a limited scope of execution against sovereign assets in the case of judicial administration of assets regardless of the sovereign interest

¹⁷⁸ Ibid art 21.

¹⁷⁹ Polakiewicz (n 171).

¹⁸⁰ The ECSI 1972 (n 41) a 23.

¹⁸¹ The Explanatory Report to the European Convention on State Immunity (Basel, 16.V.1972), European Treaty Series No. 74, para 76, 92. (the Explanatory Report to the ECSI).

¹⁸² Ibid para 106; The ECSI 1972 (n 41) art 26.

therein.¹⁸³ Similarly, the explanatory report puts the broader construction to article 26 permitting the execution against the foreign sovereign assets used exclusively for industrial or commercial activities.¹⁸⁴ While defining its relationship with the prior conventions, in this matter, the explanatory report claims overriding effect on them relying on the principle of *lex specialis derogate generali*.¹⁸⁵

2.4.3. *Asset specific conventions*

Due to the lack of any comprehensive international conventions on foreign sovereign immunity, there are certain international instruments dealing with specific kinds of sovereign assets: such as, the International Convention for Unification of Certain Rules Concerning the Immunity of State-owned Ships (1926), known as the Brussels Convention denying immunity to State-owned ships used in commercial purposes, the Hague Convention on for the Protection of Cultural Property in the Event of Armed Conflict (1954) protecting the cultural assets, the Vienna Convention on Diplomatic Relations (1961) (VCDR) and the Vienna Convention on Consular Relations (1963) (VCCR) granting immunity to the diplomatic and consular assets, *etc.*

2.4.3.1. The International Convention for Unification of Certain Rules Concerning the Immunity of State-owned Ships (1926)

The Brussels Convention (1926) deals with the State-owned ships and the cargo therein.¹⁸⁶ The convention puts the State-owned ships, irrespective of their charter status and the cargo therein to the same rights and liabilities as applicable to the privately-owned ships, cargo, and equipment.¹⁸⁷ The exception to this rule is the “*ships of war, state-owned yacht, petrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels used for governmental and non-commercial purposes.*”¹⁸⁸ The ships that are immune under this Convention, can still be subjected to execution pursuant to proceeding brought by private parties, in case of collision, accident of navigation, claim of salvage, general average, claim for repairs, supplies

¹⁸³ Ibid para 55.

¹⁸⁴ Ibid, para 104.

¹⁸⁵ Ibid para 108; The ECSI 1972 (n 41) a 33.

¹⁸⁶ The International Convention for Unification of Certain Rules Concerning the Immunity of State-Owned Ships 1926 (the Brussels Convention).

¹⁸⁷ Ibid art 1.

¹⁸⁸ Ibid art 3.

or other contract relating to ship.¹⁸⁹ However, this Convention did not receive wide acceptance until the 1970s when the restrictive immunity was getting accepted for jurisdictional immunity.¹⁹⁰

2.4.3.2. The Vienna Conventions on Diplomatic Relations (1961)

The Vienna Convention on Diplomatic Relations (1961) (the VCDR) states the immunity of diplomatic missions and their agents. It declares the premises of diplomatic missions, their furnishings, and other assets as immune from search, requisition, attachment and execution.¹⁹¹ The assets of diplomatic agents are also immune from civil, criminal and administrative enforcement except for their personal assets in the receiving State or any act relating to professional or commercial in nature outside the official functions.¹⁹² Its broader protective approach is more visible while comparing with the Vienna Convention on Consular Relations (1963) (the VCCR).

2.4.3.3. The Vienna Convention on Consular Relations (1963)

The VCCR recognizes the immunity of the consular officers from jurisdiction of the host State.¹⁹³ It declares the inviolability to the premises of the consular office,¹⁹⁴ and prevents the receiving State from taking any actions causing interference to the functioning and dignity of the consular office.¹⁹⁵ It also grants immunity from any MoC to the premises, furnishings, assets and its means of transport from any requisition for national defense or public utilities.¹⁹⁶ The sending State may waive the immunity granted under this Convention. However, the waiver of immunity from jurisdiction does not act as an automatic waiver from execution. The court requires a separate waiver for immunity from execution.¹⁹⁷

2.4.3.4. The Hague Convention on for the Protection of Cultural Property in the Event of Armed Conflict (1954)

¹⁸⁹ Ibid.

¹⁹⁰ Fox (n 5) 396.

¹⁹¹ The Vienna Convention on Diplomatic Relations 1961, the United Nations (the VCDR) art 22 (3).

¹⁹² Ibid art 31.

¹⁹³ The Vienna Convention on Consular Relations 1963, the United Nations (the VCCR) a 43 (1).

¹⁹⁴ Ibid art 31 (1).

¹⁹⁵ Ibid art 31 (3).

¹⁹⁶ Ibid art 31 (4).

¹⁹⁷ Ibid art 45 (4).

The Hague Convention (1954) declares the immunity of the cultural assets of the defendant State subject to some exceptions such as use of the asset or its surroundings for military purpose.¹⁹⁸ The Convention defines the cultural assets as the moveable or immovable assets having cultural, historical, or archaeological values.¹⁹⁹ The Convention prevents the cultural assets from being subjected to any form of seizure, capture or prize, except the right to visit and search.²⁰⁰ The immunity continues even during the transportation of assets from one contracting State to another.²⁰¹ However, the State party may withdraw the immunity of any of its protected cultural assets by informing the Commissioner-General for cultural assets [an office created under this Convention].²⁰²

2.5. Drafts by non-governmental international organizations

The sovereign assets with public purposes receive absolute immunity under the above discussed international conventions. Different drafts by non-governmental organizations illustrated various restrictions as to immunity from execution. Such as, the Institute de Droit International's draft allowed execution of only earmarked assets whereas the Harvard drafts made the immovable assets non-immune except the diplomatic assets and the assets in connection with the conduct of business enterprises having the connection with the disputes.²⁰³ Hence, these drafts imply the development of law on sovereign immunity till date.

2.5.1. The Harvard draft

The Harvard Law School developed a draft on foreign sovereign immunity in 1932 (the Harvard Draft 1932).²⁰⁴ The arguments of independence and sovereign equality justified the entitlement of sovereign immunity. On the other hand, the persisting commercial activities and assets with commercial purpose acted as exceptions to the

¹⁹⁸ The Hague Convention on for the Protection of Cultural Property in the Event of Armed Conflict 1954 art 9.

¹⁹⁹ Ibid art 1. The cultural property has been discussed in detail in 4.2.4. of this Dissertation.

²⁰⁰ Ibid art 14.

²⁰¹ Ibid art 12, 13.

²⁰² Ibid art 11.

²⁰³ Fox (n 5) 395.

²⁰⁴ Harvard Law School, 'Competence Courts in Regard to Foreign States: Part I Use of Terms' (1932) 26 (1) *the American Journal of International Law* (Supplement: Research in International Law) 455, 527 (the Harvard Draft 1932).

general rule of absolute immunity.²⁰⁵ The draft granted absolute immunity to the foreign State from jurisdiction except waiver of immunity with express consent, dispute regarding immovable assets located in the forum State,²⁰⁶ and engagement in any industrial, commercial, financial, or other business activities like any private person except public debt,²⁰⁷ dispute regarding any ownership of shares in companies for profits in the forum State.²⁰⁸ On the other hand, enforcement of judgment was also limited to immovable assets of the foreign State within the territory of forum State and the assets used in connection with the above-mentioned purposes.²⁰⁹ The defendant State had the option of avoiding the execution proceeding even against these assets by providing security for the discharge of the judgment to the satisfaction of the court.²¹⁰ The Harvard Drafts also granted immunity to diplomatic and consular functions and public acts of the defendant State.²¹¹

2.5.2. *The ILA drafts*²¹²

The ILA drafted a convention on foreign sovereign immunity with the objective of harmonizing State practices in this regard and submitted the draft to the UNGA as a recommendation to the ILC in Montreal conference (1982).²¹³ This draft recognized absolute immunity from adjudication for *jure imperii* with the exceptions of commercial activity and express waiver.²¹⁴ The language for immunity from execution was clear as it declared immunity from attachment, arrest, and execution.²¹⁵ Simultaneously, it declared the immunity to the assets of diplomatic and consular purpose, military activity, central bank and any other State monetary authority.²¹⁶ The exceptions to the immunity from execution were the waiver of immunity, against the

²⁰⁵ Jessup (n 156).

²⁰⁶ The Harvard Draft 1932 (n 204) comment on art 7-9.

²⁰⁷ Ibid art 11.

²⁰⁸ Ibid art 12.

²⁰⁹ Ibid art 22 and 23.

²¹⁰ Ibid art 24.

²¹¹ PC Jessup 'Diplomatic Privileges and Immunities' Harvard Law School, (1932) 26 the American Journal of International Law (Supplement Research in International Law) 15, 99.

²¹² The ILA Draft 1982 (n 142).

²¹³ Ibid.

²¹⁴ Ibid art II and III.

²¹⁵ Ibid art VII.

²¹⁶ Ibid art VIII (C).

assets used in commercial activity, and the assets taken in violation of international law.²¹⁷

The unique features of this draft were that it accepted implied waiver as sufficient to deny the immunity defense to the State.²¹⁸ Moreover, it added the new provisions of assets obtained or exchanged in violation of international law.²¹⁹ It had also made the assets with mixed-use of commercial activity and governmental one, subjected to attachment to the extent of severability of the mixed-use.²²⁰ Unlike other drafts and international regulations, it permitted the prejudgment attachment in form of interim measures in case of apprehension of removal of assets from the territory of the forum State and thereby frustration of the execution proceeding.²²¹ The ILA adopted the final report on its draft convention on sovereign immunity at the Buenos Aires conference in 1994 where it focused on the questions of determination of sovereign act and commercial act and the issues of execution.²²²

2.5.3. The ILC drafts and the ILC report

With the recognition of the overriding effects of the VCDR (1961), the VCCR (1963) and existing international law,²²³ the ILC's draft convention on sovereign immunity granted the immunity in clear terms with a list of incidents as exceptions to the general rule of absolute immunity.²²⁴ It published the first draft in 1986 and the final one in 1991. The ILC draft (1991) did not make the immunity subject to international law in fear of open interpretation by the forum States and resulting inconsistent judgments.²²⁵ Sovereign assets were further protected in the enforcement litigations where foreign State was not a party. In these litigations, the affecting State was deemed to be a party to the proceeding and thereby the court had to respect the immunity under article 5.²²⁶ The commentary took an inclusive approach to this

²¹⁷ Ibid art VIII.

²¹⁸ Ibid art VIII (A) (1).

²¹⁹ Ibid art VIII (A) (3).

²²⁰ Ibid art VIII (B).

²²¹ The ILA Draft 1982 (n 142) art VIII (D).

²²² Hafner (n 154) 2.

²²³ The ILC Draft 1991 (n 71) art 3.

²²⁴ Ibid art 5.

²²⁵ Ibid commentary on art 5, para 3.

²²⁶ Ibid art 6 (2) (b).

provision covering the assets owned by the State agencies and also for pre-judgment attachments.²²⁷

More express provisions were available at Part IV of the ILC Draft which stated the cases where the immunity from execution could not be invoked.²²⁸ The common ones were the express waiver of immunity from execution by consent, earmarked assets for the discharge of debt and the assets used for “*other than governmental non-commercial purposes*”.²²⁹ For the latter exception, the nexus between the asset and the claim, or the asset and the judgment debtor of the substantive proceeding was stated as a prerequisite.²³⁰ This draft categorically protected certain assets from the threat of attachment by listing them as immune such as the assets of diplomatic mission, military agency, central bank, cultural heritage, scientific, cultural and historical objects for exhibition, not intended for sale.²³¹

In 1999, the ILC published its report with the explanation and the challenges on the clauses in its previous drafts. The report illustrated the necessity of distinguishing the prejudgment and post judgment MoCs. The prejudgment MoC was discussed to be allowed for consensual attachment, earmarked assets and assets available under international law.²³² The assets of State instrumentalities having separate legal entities were available for prejudgment attachment for their own debt.²³³ With reference to the post-judgment attachment, the commission explored the alternatives of giving a grace period to the defendant States for voluntary compliance before any forcible measure to be taken and leaving the proceedings at national legislations.²³⁴ Regarding the assets to be enforced against, the report mentioned two imminent issues to be addressed which were the nature of the assets and the purpose of the assets.²³⁵

2.5.4. *Institute de Droit International drafts*

²²⁷ Ibid commentary on art 6 (2) (b), para 11.

²²⁸ Ibid art 18.

²²⁹ Ibid.

²³⁰ Ibid art 18 (1) (c), commentary on the ILC Draft 1991, art 18, para 7.

²³¹ Ibid art 19.

²³² The United Nations, ‘International Law Commission Report 1999’ (Yearbook of the International Law Commission 1999 A/CN.4/SER.A/1999, I) (the ILC Report I 1999), para 80.

²³³ Ibid.

²³⁴ Ibid, para 82; The United Nations, Report to the Working Group on Jurisdictional Immunities of States and their Property (the Yearbook of the International Law Commission, United Nations, II 2 1999) A/CN.4/SER.A/1999/Add.1 (the ILC Report 1999 II), para 128.

²³⁵ Ibid, para 120; discussed in 3.4.1 of this dissertation.

The Institute de Droit International published several non-binding drafts on different aspects of sovereign immunity including the Hamburg Resolution on the Jurisdictions of Courts in proceeding against foreign State, sovereign and head of States (1891), the Aix-en Provence Resolution on the Immunity of Foreign State from Jurisdiction and Measures of Execution (1954) and the Basel Resolution on Contemporary Problems Concerning Immunities of States in Relation to Question of Jurisdiction and Enforcement (1991) and the Vancouver Resolution on Immunity from Jurisdiction and Execution of Head of States and of Government in International Law (2001),²³⁶ In addition, it also had drafts on immunity in specific cases such as for international crimes, the Resolution on the immunity from the jurisdiction of States and of persons who act on behalf of the State in case of international crimes (2010). Among the available drafts, the drafts of 1954, 1991 and 2001 hold significance for the purpose of this dissertation. These drafts (although named as resolutions) are not any binding instruments. These were attempts of the Institute de Droit International to codify the State practices in foreign sovereign immunity trending from time to time.²³⁷

The first attempt at codification of the laws on sovereign immunity was the Hamburg Resolution (1891) giving a hint to the future of restrictive sovereign immunity. It accepted restrictive sovereign immunity from jurisdiction in case of non-sovereign acts of the State. This resolution required a territorial nexus between the action in dispute and the forum State. For the execution against sovereign assets, absolute sovereign immunity was granted except for the assets earmarked for the satisfaction of the debt.²³⁸ The Aix-en Provence Resolution (1954) followed the similar approach to the question of immunity from jurisdiction and execution with an additional exception thereto. It allowed execution in case of waiver of immunity either expressly

²³⁶ Institute de Droit International 74 Sessions (2010), Archiv des Volkerrechts, 48. Bd. No. 2 (June 2010) 266-270.

²³⁷ Institute de Droit International Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement (14th Session Basel 1991) (the Basel Resolution), the preamble states, “*whereas significant trends have appeared both in practice of States and in doctrine and jurisprudence since the Resolution on the immunity of foreign States adopted at the Aix-en-Provence Session of the Institute 1954; Whereas it is helpful to propose formulations pertinent to the application within the various national legal systems of the rules relating to the jurisprudential immunity of States with a view to limiting the immunity, while maintaining the protection of essential States interests.*”

²³⁸ The Resolution on the Jurisdictions of Courts in proceeding against Foreign State, Sovereign and Head of States (Hamburg session, 11 September 1891), Institute de Droit International.

or impliedly,²³⁹ and the exercise of authority other than public ones *i.e.*, commercial or non-sovereign authority.²⁴⁰ The forcible measures were permitted for the assets other than used in exercise of governmental activity, “*which does not relate to any economic exploitation*”.²⁴¹ The significance of this resolution was the answer to the procedural questions of whether the act in question was public or not.²⁴²

Another international attempt at codification of law on sovereign immunity was the Basel Resolution of the Institute de Droit International in which it listed the assets as immune and non-immune. It categorically declared the assets allocated for diplomatic and consular missions, armed forces, owned by central bank, cultural heritages of the State which were not available for sale as immune.²⁴³ On the other hand, It also announced the assets allocated for discharge of the liability in question and the assets ‘*in use or intended in use for commercial purpose*’ as non-immune.²⁴⁴ For the assets owned or held by the State agencies or their instrumentalities having separate legal entity were deemed as non-immune for their own liability and also subjected to both pre and post-judgment measures.²⁴⁵ Besides, the court might deny the immunity defense in case of explicit waiver of the immunity.²⁴⁶

The latest resolution of the Institute de Droit International on the immunity of the head of the State and the government from jurisdiction and execution was the Vancouver Resolution published in 2001. It granted immunity to the personal assets of the head of the State and the head of the government from pre-judgment attachment but declared them non-immune for the execution of final judgment pronounced against them.²⁴⁷ The significance of the Vancouver Resolution was that it recognized the power of the forum State to enquire into the origin, lawfulness and the appropriation of the assets including funds in the name of the head(s) of the defendant

²³⁹ The Aix-en Provence Resolution 1954 (n 157) art 1-2.

²⁴⁰ Ibid art 3.

²⁴¹ Ibid art 5.

²⁴² Ibid art 3.

²⁴³ The Basel Resolution 1991 (n 237) art 4 (2).

²⁴⁴ Ibid art 4 (3).

²⁴⁵ Ibid art 4 (4).

²⁴⁶ Ibid art 5.

²⁴⁷ The Immunities from Jurisdiction and Execution of Head of State and of Government in International Law, Session of Vancouver 2001, (13th Commission Vancouver) (The Vancouver Resolution) art (4) (1).

State.²⁴⁸ It also empowered the court to order preventive measures against the assets in question and combat illegal practices.²⁴⁹

2.6. Regulations of foreign sovereign immunity in national legislations

In absence of an effective international framework, State practices vary in respect of foreign sovereign immunities. The national practices are not uniform except for certain deciding factors. States have either codified the rule on foreign sovereign immunity such as the US, the UK, France, Belgium, Russia or left it with judicial determination guided by international law such as Germany, Netherlands, Switzerland.²⁵⁰ Another practice is to rely on the notes from the executive branch of the forum State guiding the court in determining immunity of the foreign sovereign assets, such as China. All the jurisdictions consider the legal personality of the State actor and the nature of the power exercised by them.

The US has its FSIA (1976), and the UK courts apply the SIA of 1978 which are the two dominant jurisdictions for the execution cases against sovereign.²⁵¹ These jurisdictions are popular among the judgment creditors because of their creditor-friendly laws and the availability of assets of many foreign States. Fox commented that the common law jurisdictions deem to give consent to attachment of sovereign assets for discharge of judgment debt by agreeing to the process of execution suits.²⁵² She opined the gradual acceptance of restrictive immunity from jurisdiction made the State follow restrictive immunity from execution relying on the practices of the US and the UK.

In terms of execution immunity, the US has incorporated restrictive sovereign immunity from execution in the FSIA.²⁵³ Under the FSIA (1976) of the US, assets of the sovereign debtors can be attached when firstly, these assets are in the US

²⁴⁸ Ibid art 4 (2)-(3).

²⁴⁹ Ibid art 4 (3).

²⁵⁰ Daniel J. Michalchuk, 'Filling a Legal Vacuum: The Form and Content of Russia's Future State Immunity Law Suggestions for Legislative Reform' (Spring 2001) 32 *Law and Policy in International Business* 487, 488.

²⁵¹ Schumacher, Trebesch and Enderlein (n 19).

²⁵² Fox (n 5) 396.

²⁵³ Jonathan I Blackman and Rahul Mukhi, 'The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos and Other Legal Fauna' (Fall 2010) 73(4) *Law and Contemporary Problems (A Modern Legal History of Sovereign Debt)* 47.

jurisdiction and secondly, these are used for commercial activity.²⁵⁴ The FSIA (1976) of the US section 1602 states that “*their commercial property may be levied upon the satisfaction of judgment rendered against them in connection with their commercial activities.*”²⁵⁵ The additional requirement of the FSIA (1976) of the US under section 1610 (2) is that the asset is located in US and used for the activity upon which the claim was based on. The US court requires the express waiver of sovereign immunity from attachment to issue a pre-judgment attachment order against a sovereign debtor. In a case against the Republic of Panama,²⁵⁶ the plaintiff obtained not only judgment in its favor pursuant to the application of restrictive sovereign immunity, but also an attachment order against the assets of Panama’s national telecommunication company located in the US territory, in contrary to the absolute immunity from attachment and execution.

The SIA (1978) of the UK section 13 (4) states the availability of assets used in commercial purpose for attachment. The term commercial purpose is defined in section 3 (3) as transaction in relation to the sale of goods, supply of services, transaction for provision of finance or commercial, industrial, professional activity. The SIA (1978) of the UK does not require the assets to be in connection with the dispute and the provision also does not apply for pre-judgment attachment. For the pre-judgment MoCs, the UK court grants the *Mareva* injunction [temporary injunction] against the sovereign based on “good and arguable case” of the other party.²⁵⁷

On the other hand, the FSIA (1985) of Australia recognizes the absolute immunity from execution,²⁵⁸ except the waiver in relation to asset in question,²⁵⁹ and execution against commercial assets²⁶⁰ or immovable properties located in the territory of Australia.²⁶¹ It makes a compromise between liberal presumption in favor of

²⁵⁴ The FSIA 1976 (n 37) s 1610.

²⁵⁵ Ibid.

²⁵⁶ *Elliot Associate v. Republic of Panama* [1977] 975 F Supp 332 (SDNY).

²⁵⁷ *McLean Watson vs Department of Trade and Industry* [1988] 3 WLR 1033 [1103].

²⁵⁸ The FSIA 1985 (n 166) sect 30.

²⁵⁹ Ibid sec 31. It states the defendant State may waive its immunity from execution in relation to property except the diplomatic and military properties unless the waiver specifically mentions these properties for the waiver.

²⁶⁰ Ibid sec 32.

²⁶¹ Ibid sec 33.

sovereign purpose or negative presumption of commercial purpose.²⁶² The FSIA (1985) of Australia also adopts a list of immune and non-immune assets. The immune assets list includes the diplomatic and the military assets and the non-immune asset list includes the cargo and the ship when either of them is commercial.²⁶³

In 2016, France enacted its national legislation for foreign sovereign immunity. Before 2016, the immunity from execution was dealt in accordance with the case laws.²⁶⁴ The French court held the absolute immunity from execution till 1984. In the leading case of *the Clerget*, the French court of appeal observed the immunity from execution as separate and distinct from immunity from jurisdiction.²⁶⁵ Subsequently, when this case went before the French Court of Cassation, the Court affirmed the ruling but added the requirements of origin and destination of the asset to be proved for different outcome *i.e.*, non-immune.²⁶⁶ The French court gradually opened in applying restrictive immunity from execution. In 1984, the court attached two conditions for permitting attachments against foreign sovereign asset.²⁶⁷ These conditions were the asset to be attached was used for commercial purpose and the debt to be discharged out of this asset was also arisen from ‘*non-immune commercial transaction*’.

In 2016, France enacted the *Sapin II* law with provisions dealing with the execution measures against foreign sovereign assets.²⁶⁸ The *Sapin II* law permits MoCs with the express consent of the defendant State, in relation to the earmarked assets, assets with non-governmental or commercial purposes and the assets having nexus with the claim.²⁶⁹ The distinction of the French practice from the FSIA (1976) of the US is that

²⁶² Ibid sec 32 (1). It clearly excludes the submissions made by the plaintiff to convince the court for assumption of jurisdiction under section 10, for the purpose of defining commercial properties. Therefore, the properties involved in the commercial transaction are not held as commercial property for the purpose of execution.

²⁶³ Ibid sec 32 (2)-(3).

²⁶⁴ Clement Dupoirier, Andrew Cannon and Laurence Frac-Menget, ‘A law on immunity from enforcement in France’, 1 December 2016, Herbert Smith Freehills, <<https://hsfnotes.com/publicinternationalaw/2016/12/01/a-law-on-immunity-from-enforcement-in-france/>> accessed 19 July 2022.

²⁶⁵ *Clerget v. Banque commerciale Pour l'Europe de Nord*, [7 June 1969] Court of Appeal, Paris 52 ILR 310 [315].

²⁶⁶ [1971] Court of Cassation, [2 November 1971] 65 ILR 54 [56].

²⁶⁷ *Islamic Republic of Iran v. Eurodif* [1982] Court of Appeal of Paris [21 April 1982] 65 ILR 93.

²⁶⁸ The Law on Transparency, Anti-corruption Measures and the Modernization of the Economy (known as the Sapin II law a 59), approved by the French National Assembly on 8 November 2016.

²⁶⁹ The Code of Civil Enforcement Procedures 1889 (France), a L.111-1-1, 2-3. “*Article L.111-1-1. Provisional or enforcement measures cannot be applied to the property of a foreign State unless there*

the French court requires the assets to be in use for the same commercial activity from which the claim has arisen.²⁷⁰

Belgium's Judicial Code has a similar provision like in France. It allows seizure of foreign sovereign assets located in Belgium territory provided that the defendant State has either consented thereto, or waived its immunity from execution or earmarked the asset for the claim in question.²⁷¹ The provision is also subjected to the "Supranational imperative provisions and international" which gives the precedence to the customary international law.²⁷² Belgium ordered attachment of funds in a bank account, maintained in the name of Greece, for payment of judgment debt.²⁷³

Russia has its statutory provisions on foreign sovereign immunity allowing execution against the foreign sovereign assets subject to prior waiver or commercial use of the asset in question.²⁷⁴ Restrictive immunity may be applied when permitted under any bilateral agreements between the States and under comprehensive waiver of State immunity by the foreign State.²⁷⁵ Precedents also exist as to the application of restrictive sovereign immunity in the Russian courts.²⁷⁶ For the question of immunity from execution, the Russian legislation permits MoCs against sovereign assets when the immunity has been waived. It also lists certain assets as immune, including diplomatic, and military assets, assets of the central bank of the defendant State, objects with cultural values, *etc.* On the other hand, Russia as defendant State may consent to the execution of a valid debt against its assets which are not required for

is prior authorization by a judge in an order issued upon request. Article L.111-1-2. Provisional or enforcement measures concerning a property belonging to a foreign State cannot be authorized by a judge unless one of the following conditions is satisfied: 1. The State concerned has expressly consented to the application of such measure; 2. The State concerned has reserved or affected this property to the satisfaction of the claim which is the purpose of the proceedings; 3. When a judgment or an arbitral award has been rendered against the State concerned and the property at issue is specifically in use or intended to be used by the State concerned for other than government non-commercial purposes and is linked to the entity against which the proceedings are initiated."

²⁷⁰ Fox (n 5) 399.

²⁷¹ The Judicial Code 1967 (modified in 2016) (Belgium) art 1412 *quinquies*.

²⁷² Jonathan Toro, 'Article 1412 *quinquies* of the Judicial Code: Immunity from Seizure of the Property of the Foreign State and of the International Organization' 31 October 2021 <<https://s-team.law/insights/article-1412quinquies-of-the-judicial-code-immunity-from-seizure-of-the-property-of-the-foreign-state-and-of-the-international-organization/>> accessed 20 July 2022; for details, see 2.3 of this dissertation.

²⁷³ *Socobelge v. the Hellenic State* [1951] 15 ILR 3.

²⁷⁴ The Federal Law on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State (2015), (The Federal Law No. 297-FZ) (Russia)

²⁷⁵ Michalchuk (n 250), 498.

²⁷⁶ Anthony Cioni, 'the First Pancake Always Has Lumps: Alberta Petroleum Companies, Arbitration and Arbitral Award Enforcement in the Russian Federation' (1997) 35 Alberta Law Review 726, 752.

the exercise of its political and diplomatic rights in conformity with international law.²⁷⁷

Another kind of State practice regarding foreign sovereign immunity from execution is that there are States having no codified law on sovereign immunity. These States follow the international laws as prevailing from time to time such as, the ECSI (1972) [if ratified], the UN Convention (2004) [even though it is not effective yet]. Germany follows the general principles of public international law regarding the question of foreign sovereign immunity unless the ECSI (1972) applies.²⁷⁸ The Basic Law of Germany (1949) states in its article 25, “*the general rules of international law shall form part of federal law.*” This provision acts as the foundation of the sovereign immunity law in Germany. As it does not define the content of the general principles, the system enjoys the flexibility to accommodate the change in immunity principles from time to time. For the German practice, two cases hold the higher persuasive precedential value. These are *the Empire of Iran* case (1964)²⁷⁹ and *Non-Resident Petitioner v. Central Bank of Nigeria* (1977).²⁸⁰ The German Constitutional court observed:

The general rules of international law imposed non-outright prohibition on execution by the state of forum against a foreign sovereign but they do impose certain limits [...] there is an established general custom among states backed by legal consensus whereby the state of the forum is prohibited from levying execution under judicial writs against a foreign state on the property of foreign state which is situated or present in the state of the forum and is used for sovereign purposes except with the letter’s consent.²⁸¹

The Dutch legal framework of foreign sovereign immunity follows the same practice as in Germany. The legal basis of Dutch law on foreign sovereign immunity is based

²⁷⁷ Fox (n 5) 395.

²⁷⁸ The Basic Law 1949 (Germany) art 25. It accepts the general principles of international law as a part of its legal system.

²⁷⁹ Federal Republic of Germany, Federal Constitutional Court, 1963, 16 BVerfGE 27 (1964), 45 ILR 57, 73–75 (1972)

²⁸⁰ *Non-resident Petitioner v. Central Bank of Nigeria* [1976] Dist. Ct. Frankfurt Neue Juristische Wochenschrift [N.J.W.] 1004, 16 ILM 501 (1977); See also, the United Nations Documents on the Development and Codification of International Law: (October 1947) 47(4) *Supplement to American Journal of International Law* 292

<https://legal.un.org/ilc/documentation/english/ASIL_1947_study.pdf> accessed 31 March 2021.

²⁸¹ *The Philippines Embassy Bank Account Case* (n 113); Fox (n 5) 398.

on the General Provisions Act (1829) instructing the deciding court to be guided by international law.²⁸² The detail legal precedents have been developed based on its case laws.²⁸³ Netherlands ratified the ECSI (1972) but not the UN Convention (2004). Nevertheless, its case laws are found in alignment with the UN Convention provisions. Dutch courts have precedents of granting valid attachment orders against the foreign sovereigns. The Dutch court granted attachment against SOE which had separate legal entity.²⁸⁴ The Dutch Supreme Court denied granting attachment order for both conservatory and final judgment unless the judgment creditors could prove the non-sovereign purpose of the assets.²⁸⁵ Italy has no specific statutory law regarding sovereign immunity, instead requires its courts to follow the international law.²⁸⁶ Similar to Germany and Netherlands, Switzerland does not have any specific law on State immunity rather it follows the ECSI (1972) as binding and the UN Convention as the guiding principles.²⁸⁷ It ratified the UN Convention (2004) in 2010. The case laws from the Swiss court stand on single regime for both jurisdiction and execution against assets. The Swiss court allowed MoCs against assets that were not allocated for any specific purpose. The past or future use for sovereign purpose was irrelevant.²⁸⁸

China has its distinctive practice regarding foreign sovereign immunity. It does not have any comprehensive statutory law thereon. In 2005, China enacted a law recognizing immunity of assets of central bank.²⁸⁹ This law grants immunity to the

²⁸² The General Provisions Act (1829), Netherlands, article 13a. It states, “*the jurisdiction of judge and the enforceability of judicial decisions authentic instruments are limited by the exceptions recognized in international law.*” [unofficial translation].

²⁸³ Sebastiaan Barten and Marc Krestin, ‘State Immunity from Enforcement in the Netherlands: Will Creditors be Left Empty Handed?’ (Wolters Kluwer, 25 April 2017).

²⁸⁴ *NV Cabolent v. National Iranian Oil Company* [1968] the Hague Court of Appeal 28 November 1968, 47 ILR 138, Hague, UN Legal Materials 344.

²⁸⁵ *Morning Star International Corporation v. Republic of Gabor and others* [2016] 16/01153 ECLI: NL: HR: 2016: 2236

²⁸⁶ The Constitution of the Italian Republic (1948), art 10. It states, “*the Italian juridical order conforms to the generally recognized norms of international law.*”

²⁸⁷ Switzerland, Federal Department of Foreign Affairs, FDFA, State immunity, <<https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/privileges-and-immunities/state-immunity.html>> accessed 20 July 2022.

²⁸⁸ *United Arab Republic v. Mrs. X, Switzerland* [1960] Switzerland Federal Tribunal 65 ILR 385 [391].

²⁸⁹ The State Council, Law of The People’s Republic of China on Immunity of the Property of Foreign Central Bank from Compulsory Judicial Measures, adopted at the 18th session of the Standing Committee of the Tenth National People’s Congress of the People’s Republic of China (25 October 2005)

<http://english.www.gov.cn/services/investment/202102/24/content_WS6035ab7bc6d0719374af960d.html> accessed 05 October 2022.

central bank's assets of any defendant State unless the defendant State waives its immunity or has earmarked the asset for the debt.²⁹⁰ Nevertheless, this law also keeps the principle of reciprocity in action when it comes to the question of immunity to the assets of China's central bank before the courts of the defendant State.²⁹¹ For the other areas of law on foreign sovereign immunity, the Chinese courts rely on the executive notes provided by the central government from time to time when any case involving this issue comes before the court.²⁹² It has reportedly followed the absolute sovereign immunity with exception of either explicit consent of the foreign State to jurisdiction or waiver of immunity.²⁹³ Although not as exclusively as China, the executive organs of other States send notes or brief to the deciding courts from time to time regardless of having specific national legislation. Therefore, the role of the executives in relation to foreign sovereign immunity demands further analysis.

2.7. Role of forum States' executive bodies

The immunity from execution comprises the concerns about the political standing of the forum State and the possible chaos to be caused by the foreclosure of the sovereign assets of the defendant State pursuant to execution.²⁹⁴ Though restrictive sovereign immunity is applied for immunity from jurisdiction, the defendant State still enjoys a higher level of immunity from execution because execution orders involve seizure of sovereign assets in the forum State's territory and may cause diplomatic tension between the States.²⁹⁵ The question of execution not only holds an impact on the litigation proceeding but also the business and trade of the defendant State in the forum State and eventually, plays a vital role in international relations between them.

The MoCs from the courts of the forum States are regarded as an interference to the exercise of sovereign power of the defendant State.²⁹⁶ The interference from the forum State raises the apprehension in the mind of the States as to the protection of their assets in foreign territory. There are incidents where the States hesitate to send

²⁹⁰ Ibid., art 1.

²⁹¹ Ibid., art 3.

²⁹² Guan Feng, Do state-owned enterprises enjoy sovereign immunity? King & Wood Mallesons, September 27, 2018,

²⁹³ Jin Huaang and Jingsheng Ma, 'Immunities of States and their property: Practice of the People's Republic of China' (1988) 1 Hague Yearbook of International Law 163, 165.

²⁹⁴ *Connecticut Bank of Commerce v. Republic of Congo* [2002] 5th Cir court 309 F 3d 240 [256] .

²⁹⁵ Sinclair (n 117); Brownlie (n 117) 338.

²⁹⁶ Fox (n 5).

their cultural objects even on loan to other States due to poor immunity protection to the assets in their territory, such as Austria,²⁹⁷ Taiwan,²⁹⁸ etc. States' lack of confidence on the interpretation of public purpose of their assets by the judges in the forum States deteriorates the inter-State relationships and act as an impediment to the mobility of sovereign assets. Besides, the forum State also fears its future receipt of foreign reserve from other States.²⁹⁹ Such loss of business to other jurisdictions affects the forum State's relationship with the interested parties. This apprehension is not necessarily limited to the monetary reserve but also the exchange of assets with cultural, historical, and/or scientific values, brought to the forum State for exhibition for the purpose of educational and cultural exchange. These negative effects bring the executive body of the forum State to guide the deciding court by sending notes in the cases involving foreign sovereign immunity.

In the case of *Prefecture of Voiotia v. Federal Republic of Germany* (2000),³⁰⁰ before the Greek court, the petitioner attempted to execute a monetary judgment against the cultural institutions of the defendant State located in the forum State, for a war crime committed during the Second World War by the army of the defendant State. The Greek Supreme Court confirmed the decision for enforcement which was subsequently stopped upon the refusal of the Greek Minister of Justice.³⁰¹ The same judgment failed to be enforced before the ECtHR,³⁰² and in Germany.³⁰³ Finally, the execution suit was brought before Italy which permitted the enforcement against the *Vila Vigoni*, the German State-owned cultural exchange center in Italy where the Italian court ordered the mortgaged upon the *Vila Vigony* for reimbursement of the

²⁹⁷ *Altmann v. Republic of Austria*, [2001] US District Court for the Central District of California 142 F Supp 2d. In 1998 when its two paintings of Austria got confiscated for prejudgment attachment in New York due to refusal of the New York Court in granting immunity to the cultural objects of Austria.

²⁹⁸ Linda Chang, 'Paris to Exhibit Chinese Art Treasures' (Taiwan Aujourd' hui., 12 June 1998); After the denial of immunity to the cultural objects of Austria in New York pursuant to the *Altman case* (2001), Taiwan refused to lend their cultural objects in France and also in Germany in fear of litigations from China for confiscation of these objects in the territory of borrowing State. It had less or no confidence in the domestic jurisdictions of the borrowing States in interpreting the public purpose of these cultural objects and thereby losing the immunity.

²⁹⁹ Bernd Krauskopf and Christine Steven, 'Immunity of Foreign Central Banks under German Law' (2000) 2(4) Journal of International Financial Markets 138, 141.

³⁰⁰ *Prefecture of Voiotia v. Federal Republic of Germany* [4 May 2000] reported in (2001) 95 American Journal of International Law 198.

³⁰¹ Andre Gattini, 'The Dispute on jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 Leiden Journal of International Law 173, 176.

³⁰² *Kalogeropoulou and others v. Greece and Germany* [2002] Application no. 59021/00 sec 1 ECHR, (12 December 2002) 417.

³⁰³ *Greek Citizens v. Federal Republic of Germany* [2005] 129 ILR 556.

judgment debt.³⁰⁴ This execution by way of mortgage was also suspended afterward pursuant to an executive order pending the litigation filed by Germany before the ICJ.³⁰⁵ Here, the intervention from the executives in determining the question of immunity against a foreign State may prevent such consequences. Hence, the governmental practice in form of the role of its executives is another valid source in the evolution of international law on State immunity.³⁰⁶

Sucharitkul focused on the effect of the executive orders, “*the views of the executive appear to be final if not decisive on the question...*”³⁰⁷ He identified the role of executives in two ways for the development and practice regarding State immunity. Firstly, consultation with the legislators while formulating national statutes on State immunity confirming the foreign policy and international political standing of the State; Secondly, advising the judicial authorities in form of note, certifications, or amicus brief on the existence of the defendant State such as whether the forum State recognizes the Statehood of the defendant State, or the contemporary relevant international law and the footing of the forum State in this regard. Such practice can further be either at the request of the court or *suo motto* submission by the executives. In the former instance, pursuant to the request of the Hong Kong court under the Basic Law of Hong Kong, the Chinese government issued interpretative order to the court informing about its stands in favor of absolute sovereign immunity,³⁰⁸ *albeit* the shift was globally visible. On the other hand, despite having the statutory law on State immunity, the US executives continuously sent amicus brief to the court in the NML Capital case (2011) against Argentina while interpreting the law.³⁰⁹

Some States consider the order of the executives as conclusive on judicial authority in deciding the issue of foreign State immunity. For instance, the executive orders given by the Chinese government in relation to the act of State for defense of State immunity are conclusive and binding on the Hong Kong court.³¹⁰ Argentina also

³⁰⁴ *The Distomo Case*, [2008] 133 *Foro italiano* I, 1308.

³⁰⁵ *The Jurisdictional Immunities of the State* (n 172).

³⁰⁶ Mr. Sompong Sucharitkul, ‘Preliminary Report on Jurisdictional Immunities of State and their Properties, United Nations’ (18 June 1979) II (1) *Yearbook of the International Law Commission*, Agenda 10, Document A/CN.4/323, 234; Knuchel (n 89) 149, 150.

³⁰⁷ *Ibid* para 34.

³⁰⁸ The Basic Law of Hong Kong 1990 art 13. It confers the power of the government of China to determine the foreign affairs of Hong Kong.

³⁰⁹ Arya (n 59).

³¹⁰ The Basic Law 1990 (n 308) art 19.

relies on its executive branch before accepting jurisdiction over a foreign State in order to investigate the reciprocity. In absence of reciprocal grant of immunity, the foreign State is subjected to the Argentine jurisdiction.³¹¹ In Italy and Greece, attachment of commercial assets is granted with the prior approval of the concerned minister of the government to such forcible measures against a foreign State. They maintain the executive control over the political economy of the cases.³¹² Fox expressed her concern as to the risks of engaging the executives in the matter of determining State immunity. She commented, “*Execution may be misused by the private parties to settle old political scores*”³¹³

There is no comity confirming the binding value of the executive notes to the court. Precedents are available where the US court refused to accept the roles of executives in justifying the application of immunity rules based on their foreign policy interest with the defendant State.³¹⁴ The court opined on the scope of executive power as to either intervene to satisfy the judgment debt or procure guarantee from the defendant State to satisfy the claim.³¹⁵ Chief Justice Stone opined, “*it is not the court to deny an immunity which our government has seen fit to allow or to allow an immunity on new grounds which the government has not seen fit to recognize.*”³¹⁶ Such interventions from the executive body and the binding nature thereto, are considered as a violation of the separation of power principle and the independence of judiciary.

Notwithstanding the reverse precedents in following executive orders, their role is still visible in the exercise of jurisdiction and execution against the State as the administrative functions as to the execution of the judgment including the seizure and attachment of the assets are completed by the executive officials.³¹⁷ As the gap in the exercise of judicial functions and the executive orders intervenes the States’ interest and leads to political embarrassment, the coordination and harmonization are expected.

³¹¹ The National Code of Civil and Criminal Procedure 1977 art 24 (Argentina).

³¹² *Romania Court v. Trutta*, Italy [14 February 1926]; L. Condorelli and L. Sbolci, ‘Measures of Execution against the Property of Foreign Sovereign: the Law and Practice in Italy’ (1979) 10 *Netherlands Yearbook of International Law* 197.

³¹³ Fox (n 5) 412

³¹⁴ *Condor* (n 114).

³¹⁵ *Ibid.*

³¹⁶ *Mexico v. Hoffman* [1945] (324 Washington DC, US Government Printing Office 1946) [35].

³¹⁷ Sucharitkul (n 306) affirmed “*the exercise or non-exercise of such administrative power is tantamount to the recognition or explicit allowance of various types of immunity [...] to the denial or refusal of such immunity.*”

2.8. Conclusion

The State practices on the law of foreign sovereign immunity from execution by the legislative, judicial, and executive bodies are diverse. Fox summarized the law on State immunity from execution in three principles *i.e.*, assets in use of public purposes are immune, and assets in commercial use are non-immune and finally, assets of the State agencies having separate legal entity are subjected to the same provisions as the private persons.³¹⁸ There have been international attempts to uniform the laws relating to sovereign immunity, which are yet to achieve the desired success. Thus, the legal framework on laws on foreign sovereign immunity consists of national laws as well as international legal instruments. Such as, the UK and the US have their national legislations on foreign sovereign immunity; Germany, Netherlands, Switzerland require their courts to apply the international law in this regard.³¹⁹

Despite the absence of any effective international instrument, the drafts and the non-effective international conventions carry persuasive value in the legal framework on laws of foreign sovereign immunity from execution. In relation to the two major international instruments on State immunity, the UN Convention (2004) has taken a comparatively liberal approach in immunity from execution than the ECSI (1972). The reason is the year of their acceptance. The ECSI was formulated in 1972 granting absolute immunity from execution [unless the State consents otherwise] whereas by the time the UN convention was opened for ratification in 2004, the restrictive sovereign immunity has already made its place in international law. The UN Convention (2004) is still restrictive in the question of execution than the provisions regarding jurisdiction. It contains a negative list for jurisdictional immunity meaning, jurisdictional immunity cannot be claimed in usual cases unless the claim falls in the negative list. On the other hand, it expressly grants immunity from execution with limited exceptions to it where immunity from execution can be denied.

The international conventions are expected to provide a set of minimum standards for 'common commercial justice'.³²⁰ From the plain reading of these instruments mentioned above, the common understanding is that the immunity is granted to the sovereign assets for their governmental or non-commercial use. In other words, the

³¹⁸ Fox (n 5) 399.

³¹⁹ Discussed in 2.6 of this dissertation.

³²⁰ Lim (n 21).

non-governmental or commercial use puts the sovereign assets at the same standard as applied for private persons. This stand may vary in pre-judgment and post-judgment measures such as the UN convention (2004) takes a restricted approach for pre-judgment attachment with the exception of earmarked assets and/or, express consent to the MoCs,³²¹ whereas the ECSI (1972) prohibits pre-judgment MoCs unless State has expressly consented thereto.³²² The common features of these conventions on State immunity from execution infer that upon the express waiver of the sovereign immunity from execution, the court may order the post-judgment attachment of any sovereign assets, used or set to be used for any commercial purpose. However, none of the conventions mention the determination of commercial purpose leaving room for case laws from national jurisdictions.

The findings of this chapter imply that notwithstanding the terminological similarity, the judicial interpretative consistency is still struggling which demands further research. Interpretations of commercial purpose of the asset and their nexus with the forum State, the claim and the defendant State entity are left open-ended. Hence, their coherence significantly depends on the jurisdiction where the cases are brought before. In order to find a uniformity among the international conventions, further discussion is followed in the next chapters on the analysis of the substantive and procedural aspects of the execution suits.

³²¹ The UN Convention 2004 (n 41) art 18.

³²² The ECSI 1972 (n 41) art 23.

Chapter 3: Sovereign assets in enforcement litigations

3.1. Enforcement litigations

Legal analysis of immunity from execution in an enforcement litigation demands a comprehensive study on both substantive and procedural issues related to sovereign assets. In the enforcement litigation against sovereign assets, the substantive issues are the determination of ownership of the asset and its attribution to be entitled to immunity. The procedural questions clarify the required evidence to prove the substantive questions of ownership and attribution. These are applicable laws, judicial presumptions, standard of proof, burden of proof, *etc.* The success for the defendant State is determined by the grant of immunity to its asset. The judgment creditor is deemed to be successful if MoC is granted against the sovereign asset. Thus, this chapter starts with the substantive questions of ownership and attribution of sovereign assets. The next part discusses the procedural matters for the enforcement cases such as burden of proof, standard of proof, MoCs related to the sovereign asset targeted for execution.

3.2. Sovereign assets

The definition of sovereign asset poses a significant question for this dissertation. The Black's Law Dictionary defined asset as "*an item owned and has value*"³²³ and defined 'property' as "*the right to possess, use and enjoy a determinate thing.*"³²⁴ From the combined effect of these two definitions, sovereign asset can be defined, for the purpose of this dissertation, as a tangible or intangible item owned by States which has a monetary value.

Etymologically, the term "property" is derived from the Latin term "*proprietas*" meaning own or proper.³²⁵ The rights associated with asset are known as proprietary rights or property rights.³²⁶ Scholars defined proprietary rights as a bundle of rights,³²⁷

³²³ Black's Law Dictionary (n 62) 'Asset'.

³²⁴ Ibid, 'Property'.

³²⁵ O. Lee Reed, 'What is Property' (Summer 2004) 41(4) American Business Law Journal 459, 468.

³²⁶ Wex definitions Cornell Law School 'Proprietary rights' (July 2021) <https://www.law.cornell.edu/wex/proprietary_rights#:~:text=Proprietary%20rights%2C%20also%20termed%20property,or%20in%20respect%20of%20property.> accessed 23 August 2022.

which are *in rem* in nature,³²⁸ including right to possession, uninterrupted enjoyment, right to assign or transfer the rights, *etc.* Sovereign assets can be defined as assets or property owned by the State. Chechi defined, “*the term public property also refers to the state-owned assets and originates from the virtually unlimited and exclusive state’s power to legislate on the distribution and management of resources that are situation on the national territory.*”³²⁹ The ILC Report (1985) described the concept of ‘State property’ as ‘*property in which a State has interest.*’³³⁰ While explaining the term ‘interest’ in the definition, it broadened the scope of State interest in an asset even without the ownership to it. Therefore, the interest in an asset as beneficiary or holder thereof is also included in the definition of sovereign asset although there is no such concept of beneficial interest in the civil law legal systems.³³¹

On the other hand, the term ‘asset’ denotes to tangible, or intangible things³³² having a monetary value for the rights associated with the things. Thus, the asset is more suitable and well defined from the perspective of the rights associated thereto, instead of the object or material itself. Therefore, the term ‘asset’ instead of ‘property’ is used in this dissertation. Sovereign asset means the asset of which State is entitled to the proprietary rights. Like private entities, State owns assets of various kinds. Such as, industrial, intellectual,³³³ moveable, immoveable, *etc.*³³⁴

Proprietary rights and their scope cannot be explained by mere ownership. Ownership of an asset consists of a bundle of rights. Given the complex structure of a sovereign entity and its activities, a sovereign asset may be held by private parties on contractual relationship, or State may be in possession of a private asset pursuant to some legal or contractual arrangements. Such as contract, agency, trust, or bailment, *etc.* Hence, the legal framework of sovereign ownership is a complex combination of property law

³²⁷ AM Honore, ‘Ownership’, in AG Guest (Ed) *Oxford Essays in Jurisprudence*, (OUP 1961) 107-47; WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916-1917) 26 *Yale Law Journal* 710, stated, property rights as “multilateral rights”; HE Smith, ‘Property as the Law of Things’ (2012) 125 *Harvard Law Review* 1691, 1691, stated property rights as “*modules connected by interfaces*”.

³²⁸ Reed (n 325) 462.

³²⁹ Alessandro Chechi, ‘State Immunity, Property Rights and Cultural Objects on Loan’ (2015) 22 (2/3) *International Journal of Cultural Property* 279, 281.

³³⁰ United Nations, ‘Jurisdictional Immunities of States and their Property’ (1985) II (2) *Yearbook of International Law Commission* 51, 55 para 231 (the ILC Report 1985).

³³¹ Discussed in 3.3.2 and 3.3.4. and n. 370 of this dissertation.

³³² Eveline Ramekers, ‘What is Property Law?’ (2017) 37(3) *Oxford Journal of Legal Studies* 588, 591.

³³³ The ILC Draft 1991 (n 71) art 14.

³³⁴ *Ibid* art 13.

and the other related areas of laws, *inter alia* contract law, company law, laws on foreign sovereign immunity, law of obligation, *etc.* The contract law is relevant as it determines the agreement between the State as owner and the other party as user, licensee, or assignee of the same;³³⁵ the scope of the contract also plays a vital role in determining the attribution of the asset in question. Company law makes the distinction between the sovereign asset and the corporate asset of SOEs. Bailment, agency, or trusts are also related when the asset in question is held by any other entity other than the legal owner. The diverse connotations of ownership and attribution of sovereign assets have been discussed in this chapter.

The US Supreme Court commented, “*Property ownership is not an inherently sovereign function.*”³³⁶ An asset does not enjoy immunity automatically merely based on its sovereign ownership. Whenever any private party applies to the court for enforcement of the judgment against sovereign asset, the issues of ownership and attribution of the sovereign asset come before the court. Sovereign ownership makes the asset entitled to immunity. After the determination of ownership, commercial use or attribution of the asset seizes its right to immunity from execution. Thus, the deciding court examines sovereign ownership and its distinction from the public asset for the question of immunity. For instance, in the case of *Sedelmayer v. Russia* (1998),³³⁷ the US company owned by the German citizen brought a case before the court in Cologne, Germany to confiscate the payment of Lufthansa to be made to Russia for its flights over the Russian airspace. In this case, the court had to decide whether the payment made by the Lufthansa to Russia for using airspace was the public asset of Russia as the sovereign. If the asset was owned by Russia, only then it could be eligible for the next question as to its attribution. Thus, deciding ownership and attribution bears significant impact on the enforcement litigation and cost and time of the litigating parties.

3.3.Ownership of sovereign assets

³³⁵ Ramekers (n 332) 590.

³³⁶ *Permanent Mission of India v. City of New York*, [2007] Supreme Court of the US, 46 ILM 737.

³³⁷ *Sedelmayer v. Russia* [1998] SCC Case No 106/1998, IIC 106.

State owns assets by way of succession, gift, administration, insolvency, purchase, etc.³³⁸ While determining the question of immunity, the ownership of the sovereign asset carries vast significance. It is equally important as the use or purpose of the asset. The Latin maxim says, “*nemo dat quod non habet*” meaning one cannot give what s/he does not have. Hence, the asset owned by the defendant State can only be held available for the discharge of its judgment debt. Unlike private ownership, the enforceability of sovereign asset and its cost efficiency are complex and unique. The determination of ownership for the State is cumbersome in some cases based on the nature of the asset in question. The owner may not be in direct control of the asset. For example, the *de jure* ownership is in the name of SOE whereas the *de facto* control is at the hand of the sovereign authorities or vice versa. Therefore, the relationship between the holder and the owner plays a major role here. In some cases, the lawfulness of the ownership can also be at issue, such as for the attachment of cultural or historical objects.³³⁹

Laws related to proprietary rights are closely connected with the economic aspects of the assets. While analyzing the ownership, the court considers the bundle of rights coming under the umbrella of ownership. It also scrutinizes the economic analysis of ownership and proprietary rights for efficient enforcement. The cost efficiency of the proprietary rights closely depends on the institutions and their force applied to define and enforce the rights of the owner. The economic value of proprietary rights attracts the judgment creditor to bring the execution suits against the asset. Again, a sovereign asset can be subjected to MoCs only when it is used for commercial purposes. Strict separation of legal and economic aspects of assets is neither possible nor desirable. The literature on economic analysis of sovereign assets define ownership based on exclusivity and enforceability from the perspective of the holders’ rights.

3.3.1. *Literatures on proprietary rights*

³³⁸ The Council of Europe (2005) Pilot Project of the Council of Europe on State Practice Regarding State Immunities-Analytical Report, Committee of Legal Advisers on Public International Law, 30th Meeting, Strasbourg 04/08/05, prepared by the Directorate General of Legal Affairs, 19-20 September 2005.

³³⁹ Discussed in 4.2.4 of this Dissertation.

There are two significant approaches in defining ownership of assets.³⁴⁰ The older approach defines ownership from the question of who owns the assets whereas the new approach questions why ownership matters meaning the rights coming under the scope of ownership.³⁴¹ From the aspect of ‘bundle rights’, Demsetz emphasized exclusivity and alienability as two core rights in the bundle of property rights.³⁴² Umbeck defined ownership to property rights as the exclusively enforceable through legal and non-legal institutions.³⁴³ Coase examined the economic implication of allocation of liability rights as a part of property rights along with the other external factors having implication on the value of the asset.³⁴⁴ He defined asset not as physical object, but as a bundle of rights. By private ownership, he meant the entitlement to exercise these rights including the right to make profit from the asset, right to enjoyment, right to assignment subject to the legal restrictions and ability of the owner to exclude others. The challenge in this theorem was the assumption of zero transaction cost. Coase relaxed the assumption on transaction cost to see the correlation of allocation of use rights, although the extent of such relaxation was left in vacuum.³⁴⁵

On the other hand, the new approach to ownership interprets the ownership under two aspects: the specific right to control obtained through contractual arrangement and the residual right to control as achieved by legal ownership.³⁴⁶ This approach focuses on the rights coming under the umbrella of ownership instead of person on whom the ownership bestowed upon. Therefore, under the new approach, there can be several owners of an asset who are entitled to various proprietary rights of the asset. This notion of ownership includes both the contractually and legally derived rights as subject matter of ownership. This approach is taken into account in this dissertation.

³⁴⁰ Eric Brosseau and M’Hand Fares, ‘Incomplete Contract and Governance Structures: Are Incomplete Contract theory and New-Institutional Economics Substitutes or Complements?’ in Menard C (ed) *Institutions, Contracts, Organizations, Perspectives from New Institutional Economics* (Edward Elgar Publication, 2000); Kirsten Foss, and Nicolai Foss, ‘Theoretical Isolation of Contract Economics’ (2000) 7 *Journal of Economic Methodology* 313.

³⁴¹ Ibid.

³⁴² Harnold Demsetz, *Toward a Theory of Property Rights, Ownership, Control and Firm* (Basil Blackwell 1988).

³⁴³ John Umbeck, ‘Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights’ [1981] *Economic Inquiry* 38.

³⁴⁴ Ronald Coase, *The Problem of Social Cost*, (October 1960) 3 *the Journal of Law and Economics* 1.

³⁴⁵ Kirsten Foss and Nicolai Foss, ‘Assets, Attributes and Ownership (2001) 8 (1) *International Journal of the Economics of Business* 19.

³⁴⁶ Oliver Hart, ‘An Economist’s View of Authority’ (1996) 8(4) *Rationality and Society* 371, 371.

A private entity may qualify as owner of the asset to the extent of its exclusive enjoyment of any proprietary right over the asset. Therefore, the dynamics between the owner and the holder of sovereign assets are relevant.

3.3.2. *Typology of owner and holder of the assets*

Ownership of a foreign State to an asset is the first question before the court while determining the question of immunity. The primary proof of legal ownership for an asset is the documentary title to it. The usual proof of documentary title is the registration of the asset in the name of the owner. Such as, the merchant ships are registered in the national register of ships.³⁴⁷ Similarly, shares and stocks in any incorporated company are also registered in the office of national register of company matters.³⁴⁸ Hence, registration with concerned public offices acts as the primary proof of the asset's ownership. Alternatively, absence of registration in some cases proves the sovereign title to the asset. For example, the warships and/or State-owned ships are exempted from the requirement of registration.³⁴⁹

The question of ownership of sovereign assets does not solely depend on legal registration. Such as, a registered merchant ship can be subjected to mortgage or lien, like any other assets. In such cases, the dynamics between the holder and the owner play a significant role. The matter gets complicated for the merchant ship when it is operated under a 'bareboat' charter.³⁵⁰ The sovereign merchant ship can be leased out for bareboat charterparty contract where the charterer becomes the holder of the ship whereas the ship yet remains registered in the name of the State. The German Constitutional Court used an analogy of 'no name' bank account while discussing the similar situation with the bank account of the defendant State. The entity in whose name the account was maintained with the bank was the creditor of the bank. Nevertheless, the bank also acknowledged a third party as the beneficiary of the account in certain cases (such as trusteeship).³⁵¹ This beneficiary could be argued as

³⁴⁷ For example, the Merchant Shipping (Registration of Indian Ships) Rules 1960 (India).

³⁴⁸ For example, the Companies Act 2006 (the UK), sec. 113.

³⁴⁹ Rainer Lagoni, 'Merchant Ships' *Max Planck Encyclopedias of International Law*, (Oxford Public International Law 2011) para 9.

³⁵⁰ The 'bareboat' charter is the contract between the charter or the ship owner where the ship owner gives the full control of ship and complete responsibilities of its operation to the charterer for the contracted period of time.

³⁵¹ Decision of the Second Division [of the Federal Constitutional Court] of April 12, 1983, Docket nos. 2 BvR 678-683/81., para. 1293.

the actual or *de facto* owner of the account. Forum States' practices vary in term of dealing with the question of MoCs against such bareboat chartered ships or 'no name' accounts.³⁵²

The typology of owner and holder is also relevant for granting MoCs. Such as, the garnishment order is granted against a third party who is not the owner but the holder for the time being. The third-party holder is contractually bound to provide the funds to the beneficiary [*i.e.*, the defendant State] but pursuant to the court order of garnishment, is being bound to give the funds to the judgment debtor. Therefore, in the execution cases, the determination of holder and owner is significant.

3.3.3. *Control test*

The convergence between the holder and the owner is tested based on the right to control the asset. The legal presumption acts in favor of ownership proved by the documentary title. For certain assets, mere registration in the name of the State may not be enough. Such as, merchant ship under bareboat contract, 'no name' bank accounts, sovereign wealth funds managed by SOEs. The asset in question may be held by the State agency/instrumentality but enjoyed by the State organ or vice versa. The owner and the holder typology are determined by the control test or beneficiary interest test. The control rights are relevant for both cases to a certain extent. An entity is known as State instrumentality when it holds the asset in question exercising sovereign power or on behalf of other sovereign authority. In question of sovereign asset for execution of its liability, the first issue comes before the court is whether the entity holding the asset is sovereign or not. This question is closely connected with the nature of the entity holding the asset. If the entity holding the asset is sovereign, the asset is immediately considered as sovereign. On the other hand, if the holder is not sovereign in nature, the court brings the second question as to the control of the assets.

The ILC Report (1985) emphasized on the physical control over the asset to identify the sovereign ownership especially when the ownership was claimed by *de facto* or a

³⁵² Lagoni (n 349) para 20. "No name" accounts designate those accounts where the account holder is not the actual owner of the account rather hold the account in benefits of someone else who does not hold the documentary title.

de jure owner.³⁵³ Nevertheless, the new approach to ownership emphasizes on the rights to control over the asset, especially the specific right of control and the residual rights of control.³⁵⁴ The specific right of control denotes the physical control over the asset whereas the residual rights of control consist of the rights to make decisions as to the use of the assets.³⁵⁵

The specific right of control is allocated by contractual arrangement whereas the residual rights of control derive from the legal ownership.³⁵⁶ State may obtain control over an asset by way of contractual arrangement. Such a contract would make the asset entitled to jurisdictional immunity provided that the purpose of the asset had been public in nature. Similarly, a State may own an asset but put it at the control of an entity distinct from its sovereign authority. Here, the control test determines the owner of the asset. The German constitutional court in the *National Iranian Oil Company* case (1983) observed, “*it is true, a duty to grant immunity in rem may be applicable as regards objects in the possession of a private business enterprise that are property of a foreign state and serve sovereign purposes.*”³⁵⁷ For immunity from execution, the residual rights of control are examined. Because the use of the asset decides its entitlement of immunity from execution. If the State decides the asset to be used for public purposes even at the hand of non-sovereign entity, the State remains the owner and the asset is entitled to immunity.

The same ‘control’ test is applied to determine whether the assets should be treated as sovereign for the purpose of immunity. The control over the asset and authority to decide its use make the holder its owner. In the case of *Dole v. Patrickson*, (2003)³⁵⁸ even though the assets were in the control of the institution, but the governance of the institution was in control of the State, thus, the US court held assets as sovereign. However, there are some dissenting opinions from the same forum where governance was not considered as triggering point while deciding the ownership. For illustrations,

³⁵³ The ILC Report 1985 (n 330), 55 para 231.

³⁵⁴ Foss and Foss (n 345) 25.

³⁵⁵ Kirsten Foss and Nicolai J Foss, ‘Understanding Ownership: Residual Rights of Control and Appropriate Control Rights,’ Danish Research Unit for Industrial Dynamics (DRUID Working paper no. 99-4, March 1999).

³⁵⁶ Hart (n 346) 371.

³⁵⁷ *The National Iranian Oil Company* Federal Republic of Germany: Federal Constitutional Court Decision (Decision of the second division of the Federal Constitutional Court, 12 April 1983) 2 BvR 678/81, [1983] 64 BVerfGE 1 [1283].

³⁵⁸ [2003] 538 US 468.

in *Bank of China vs. Chan* (1992),³⁵⁹ the US court rejected the argument of claiming immunity for the asset of Bank of China because of the separate legal entity of the bank. In *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co. Ltd.* (2001)³⁶⁰, *Re China Oil and Gas Pipeline Bureau* (2002)³⁶¹, and *BP Chemicals Ltd. v. Jiangsu Sopo Corp.* (2002)³⁶² the entities were held by the US courts as separate from the sovereign and entitled to hold their assets distinct from sovereign entity disregarding the State's control over the governance.

In the case of *Republic of Mexico v. Hoffman*, (1945)³⁶³ the ship was owned by the Mexican government whereas it was operated and controlled by a private corporation. The US Supreme Court considered the control of the ship at the hands of private corporation, thereby was denied immunity to the ship. Hence, the control of the asset played a significant role in this case while identifying its sovereign nature. In terms of the asset targeted by the judgment creditors, the control of the defendant State draws the attention of court before granting any MoC.³⁶⁴ The anticipated control can be administrative, technical, or social.³⁶⁵ The control can be determined based on the nature of the officers. For example, the definition of warship, given in the United Nations Convention on Law of the Sea (1982) (the UNCLOS) clarifies the distinction between a warship and a merchant ship, based on the nature of the officers who control the ship. The officers must be commissioned by the government, having their names in the service list and the crew of the ship being under the discipline of the regular armed forces.³⁶⁶ Although the concerned conventions relating to aircrafts do not define the State aircrafts from the perspective of its control, Wouters and Verhoeven advocated to revisit the legal definition of State aircrafts and to

³⁵⁹ [1992] WL 298002 (SDNY).

³⁶⁰ [2001] 241 F3d 135, 2001 AMC 2080 (2d Cir).

³⁶¹ [2002] (Tex App Houston 14th Dist) 94 SW3d 50.

³⁶² [2002] (8th Cir) 285 F3d 677, 62 USPQ 2d (BNA) 1514.

³⁶³ [1945] 324 US 30.

³⁶⁴ The ILC Draft 1991 (n 71) commentary on art 6 (2) (b), para 12.

³⁶⁵ The Convention on the High Seas 1958 art 5 (1) emphasized on the control of the State over the Ship while examining the genuine link between them. In order to establish the control, it states the exercise of exclusive jurisdiction of the State, as well as control over the administrative, technical and social matters of the Ship.

³⁶⁶ The United Nations Convention on Law of the Sea (the UNCLOS) 1982 art 29.

concentrate on the physical control over the aircrafts, in coherence with the definition of State-owned ships given in the UNCLOS (1982).³⁶⁷

3.3.4. *Beneficiary's interest test*

The Black Law Dictionary defined legal owner as “*one recognized by law as the owner of something; esp., one who holds legal title to property for the benefit of another.*”³⁶⁸ On the other hand, beneficiary owner is defined as “*one recognized in equity as the owner of something because use and title belong to that person even though legal title may belong to someone else; esp., one for whom property is held in trust.*”³⁶⁹ Beneficiary interest test assists to identify the *de facto* control over the assets, especially for the liquid assets. Because control over the liquid asset is comparatively difficult to establish. For instance, the direct control of the liquid assets of the sovereign wealth funds, the funds in accounts or the receivables from third parties are in the hands of the bank or the monetary authority primarily holding it as the agent of the account owner. The *de jure* control over these assets can be traced to their sovereign owner following the line of agency contract, trusteeship, or beneficiary assignments. Similarly, the *de facto* control can be proved based on the decision-making authority of managing the asset such as risk and investment.³⁷⁰

Nevertheless, the residual rights of control are not always identifiable or divisible,³⁷¹ such as in case of co-ownership for intangible assets. This can be a challenge for sovereign ownership, in the case of PPP, concession agreements with private parties or the long-term lease which extends the economic lifetime of the asset. Here, residual income rights come forward to distinguish the State's part of ownership. This residual income rights can be judged based on contractual arrangement via profit sharing agreement where the profit is verifiable. Establishment of control becomes difficult when the asset in question is intangible in nature such as intellectual property

³⁶⁷ Jan Wouters and Sten Verhoeven, ‘State Aircraft’ *Max Planck Encyclopedias of International Law* (Oxford Public International Law, July 2008), para 9.

³⁶⁸ The Black's Law Dictionary (n 62) ‘legal owner’

³⁶⁹ Ibid. ‘Beneficiary owner’.

³⁷⁰ Common law legal systems make a distinction between the legal ownership (*de jure* ownership) and the beneficial interest ownership (*de facto* ownership). The civil law legal systems do not make the distinctions. See for details, Elena Kryzhanovskaya, ‘the Beneficial owner concept in civil law countries. Scandinavian perspective’ (Master thesis, Lund University Department of Business Law, 2012); Hans J. Blommestein and Fatos Koc Kalkan, ‘Sovereign Asset and Liability Management: Practical Steps towards Integrated Risk Management’ (2008) 6-7 *Financial Forum/Bank-En Financierwezen* 360, 366.

³⁷¹ Foss and Foss (n 345) 27.

rights.³⁷² The asset may have been registered in the name of the autonomous research institutes or universities, but the residual rights of control may be at the hand of some other sovereign authority. In such cases, the residual income rights are considered as to the proportion of income at the disposal of the State.

The beneficiary's interest test becomes helpful for the liquid assets. In the beneficiary's interest test, the court evaluates whether the defendant State is the actual beneficiary of the asset in question although it is not the owner, or holder *per se* and does not even have control over the asset. For instance, *AIG v. Kazakhstan* (2005)³⁷³ the sovereign wealth fund was managed pursuant to a trust agreement where the Kazakh government was the beneficiary of the fund and received profit from the proceeds and the central bank of Kazakhstan was the trustee of the fund and entitled to control the fund. In this case, the interest of Kazakhstan is the beneficial interest which may be subjected to MoCs for enforcement if the benefits or proceeds are used for commercial purpose. Hence, the second question in the execution suit is the use of the assets. Thus, attribution of assets plays a major role in enforcement of sovereign asset instead of the asset itself. However, Hart criticized residual income test because of the risk of unverifiability of income in some cases.³⁷⁴ In this case, the voting rights of sovereign owner in the day-to-day management, the secondary market value of the government stake in the assets might be the alternative approaches.

In enforcement litigations, sovereign ownership requires not only exclusivity to the exercise of rights but also exclusive public use to qualify as sovereign assets and be entitled to immunity. Otherwise, the asset despite its sovereign ownership is deemed as private assets and thereby available for execution. Thus, after the determination of sovereign ownership, attribution of the assets is the next substantive issue before the court.

3.4. Attribution of the assets³⁷⁵

³⁷² Discussed in 4.4.5 of this dissertation.

³⁷³ *AIG Capital v. Kazakhstan* [2005] EWHC (Comm) 2239, [90]-[95].

³⁷⁴ Oliver Hart, *First, Contracts and Financial Structure* (Clarendon Press 1995), 63-64.

³⁷⁵ 3.3 of this dissertation has been published as a part of the conference proceeding. Ferdous Rahman, 'Economic Analysis of Sovereign Assets: Application by Courts in Determining Sovereign Immunity' (22 November 2019), the 10th Edition of the International Conference of Doctoral Students and Young Researchers, organized by the University of Oradea, Romania, University of Miskolc, Hungary, and International Business School from Botevgrad, Bulgaria.

The legal analysis of assets concentrates on the associated rights recognized and enforceable in law. On the other hand, the economic analysis of ownership refers to the various alternative uses of the same asset, controlled by the holder. Attribution of an asset means the possible uses of the asset.³⁷⁶ An asset itself cannot be public or private rather its use or purpose determines its kind as public or private³⁷⁷ and thereby its immunity from execution. In the enforcement cases against the sovereign asset, the deciding court not only relies on the legal definition of ownership and control of the asset but also its use. The forum State's court applies several tests to decide the status of the sovereign asset as immune or non-immune.

3.4.1. *The attribution tests*

Dmitri and Vark commented, “*whether an asset is for sovereign or non-sovereign purpose, depends not on the nature of the transaction in which it is (to be used) but rather on the purpose of such transaction.*”³⁷⁸ Three tests are commonly noticed: the nature test, the purpose test and the commercial activity test. Diverse provisions are found in the international regulations and the national legislations as to the applicability of these tests in determining the immunity of sovereign assets from execution. These tests do not come in a package but as privilege to the court to choose, which may cause diverse results.³⁷⁹

The ILC draft (1991) and ILA Draft (1982) both accepted the nature test instead of purpose test although the ILC Draft (1991) gave opportunity to the defendant State to present the purpose test after failing the nature test in its favor³⁸⁰ unlike the ILA Draft (1982).³⁸¹ The UN Convention (2004) puts the nature test ahead of the purpose test but the purpose test is made to be relevant when the parties agree thereto.³⁸² National legislations have various practices also. Such as the SIA (1978) of the UK emphasizes

³⁷⁶ Foss and Foss (n 345).

³⁷⁷ Yoram Barzel, ‘the Capture of Wealth by Monopolists and the Protection of Property Rights’ (1994) 14 *International Review of Law and Economics* 393.

³⁷⁸ Dmitri Zdobnoh and Rene Vark, ‘State immunity from Execution: In Search of a Remedy’ (2010) 4 *Acta Societatis Martensis* 161, 171.

³⁷⁹ Oddenino and Bonetto (n 173) 20; 26126/07 *Naku v. Lithuania and Sweden* [2016], EctHR (8 November 2016). The nature test was applied in this case of by the EctHR; *The Argentine Bond case* [2005] all civil sections, decision no 11225 of 27 May 2005, RDIPP, 2005, p. 1091 ff. the purpose test was applied in the *Argentine bond case* by the Italian court of Cassation.

³⁸⁰ The ILC Draft 1991 (n 71) art 2 (2).

³⁸¹ The ILA Draft 1982 (n 142) art I.

³⁸² The UN Convention 2004 (n 41) art 2 (2).

on the purpose of the assets,³⁸³ whereas The FSIA (1976) of the US asks for the commercial activity test.³⁸⁴

The ILC Drafts (1991) used the negative expression for the commercial purpose exception such as “*other than government non-commercial*” purposes.³⁸⁵ The commentary thereon explained the reason for doing so. It was to prevent the State from avoiding the MoCs by way of changing the status of the assets.³⁸⁶ The Basel Resolution (1991) termed the exception as used in commercial purpose.³⁸⁷ Although it did not define “commercial purpose”, the non-exhaustive list was included stating the similar commercial transactions. These were the commercial contract, supply of services, loans, guarantees, indemnities, industrial and intellectual properties, *etc.*³⁸⁸ The national legislations have a more structured approach. For illustration, the FSIA (1985) of Australia states that the immunity is not granted to the ‘commercial property.’ It defines the ‘commercial property’ as any sovereign assets excluding the diplomatic and military ones.³⁸⁹ The SIA (1978) of the UK applies the standard of ‘commercial purpose’ for the characterization of non-immune assets whereas the FSIA (1976) of the US applies the nature test.³⁹⁰ The nature test starts with the authority holding and/or using the asset. Immunity may be granted in the case of exercise of governmental authority. On the other hand, the commercial activity test is defined as a State act of commercial nature similarly to private entities without involving any sovereign function or authority.³⁹¹ If the asset is involved in any ‘commercial activity’, it loses its immunity even though it is listed as immune

³⁸³ The SIA 1978 (n 37) sec 13 (4).

³⁸⁴ The FSIA 1976 (n 37), sec 1610 (a) states, “*the property in the United States of a foreign state...used for commercial activity in the United States shall not be immune...*”

³⁸⁵ The ILC Draft 1991 (n 71) art 18 (1) I (c).

³⁸⁶ *ibid*, commentary art 18 (1) (c), para 11.

³⁸⁷ The Basel Resolution 1991 (n 237) art 4 (3).

³⁸⁸ *Ibid*, art 2 (2) (b).

³⁸⁹ The FSIA 1985 (n 166) art 32 (2), the commercial cargo and the ships carrying commercial cargo are not immune. Art 32 (3) defined, “*Commercial property is property other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purpose; and property that is apparently vacant or apparently not in use shall be taken to be being use for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.*”

³⁹⁰ The SIA 1978 (n 37) s 13 (4). The legislation defined, the term commercial purpose as “*Purpose of such transactions or activities as are mentioned in section 3 (3).*” Section 3 (3) denotes the commercial transactions as supply of goods and services, loan, finance and guarantee agreements, regarding financial obligations, and other transactions “*where the state engages otherwise than in exercise of sovereign authority.*”

³⁹¹ Richard Crawford Pugh, Oscar Schachter and Hands Smit, *International law: Cases and Materials*, Louis Henkin (eds) (3rd ed West Publishing Co September 1993).

asset.³⁹² Courts use these tests to determine the *acta jure imperii* and *acta jure gestionis*. In the battle between nature test and purpose test, diverse opinions exist. Such as *Oddenino and Bonetto* stood for nature test as the nature evidently establish the sovereign authority behind it to entitle immunity.³⁹³ Lord Diplock outlined the ‘purpose in context’ as the right approach to decide the immunity of the sovereign assets.³⁹⁴ In support of Lord Diplock, Wittich also termed the context as the catalyst of nature test.³⁹⁵

In view of the above, it is difficult to conclude the dilemma among the various tests, rather the context of the case demands the most focus. Such as in the case of *AIC Ltd. v. The Federal Government of Nigeria and the Attorney General of the Federation of Nigeria* (2003)³⁹⁶ the British High Court duly observed that when the State used the fund for payment to third party for goods and services, the fund remained non-immune whereas the same fund when used for payment to its employees, it became immune.

3.4.2. *The commercial activity test and the commercial purpose test of the assets*

The ILA Draft (1982) declared the asset used in commercial activity as available for attachment.³⁹⁷ In defining the ‘commercial activity’ it gave a broader definition by mentioning as “*regular commercial conduct or particular commercial transaction or act*”³⁹⁸ than the ILC Draft (1991). On the other hand, the ILC Draft (1991) adopted an exhaustive definition of commercial transaction as including and limited to sale of goods and services, contract for loan, guarantee, indemnity, and any other contract of commercial, industrial, trading, or professional nature.³⁹⁹ While there are no specific tests in international law, there are some references to tests in prominent national laws such as the FSIA (1976) of the US requires the asset to be ‘used for commercial

³⁹² K Reece Thomas, ‘Enforcing against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used ‘Context’ when Applying the ‘Commercial Purpose’ Test’ (2015) 2 (1) *Journal of International and Comparative Law* 1, 6.

³⁹³ *Oddenino and Bonetto* (n 173), 20

³⁹⁴ *Alcom v. Republic of Colombia*, [1984] AC 580, 2 WLR 750, para. 604, Lord Diplock.

³⁹⁵ Stephan Wittich, ‘Article 2 (1) (c) and (2) and (3)’ in Roger O’Keefe and Christian Tams (eds) *The United National Convention on the Jurisdictional Immunities of States and Their Properties, A Commentary*, (OUP 2013), 69.

³⁹⁶ *AIC Ltd.* [2003] EWHC 1357 (QB), [2003] ALL ER (D) 190 [57].

³⁹⁷ The ILA Draft 1982 (n 142) art III.

³⁹⁸ *ibid*, I 1 (C).

³⁹⁹ The ILC Draft 1991 (n 71) art 12 (1) (c).

activity’,⁴⁰⁰ whereas the SIA (1978) of the UK applies the ‘use for commercial purpose’ test.⁴⁰¹ The ILC definition of commercial activity corresponded with the definition given by the SIA (1978) of the UK. Besides, the FSIA (1976) of the US asks for the commercial activity test for the non-immune assets.⁴⁰²

The convergence between ‘commercial activity’ and ‘commercial purpose’ plays a vital role in distinguishing the character of the asset in question. It determines the scope of facts to be considered for judging the nature of the use. The activity can be commercial, but the purpose of the act can be public in nature. For instance, investing in financial markets is a commercial activity. Hence, investment of sovereign wealth funds is a commercial activity whereas from the analysis of purpose, the proceeds from sovereign wealth funds can be a public fund. The common purposes of sovereign wealth funds are macro-economic development and promotion of national economic interests, *etc.*⁴⁰³

The use for commercial activity denotes a regular use of the asset in commercial activity whereas the use for commercial purpose indicates the use of the asset in a particular point of time such as the time of cause of action. The terms ‘military aircraft’ and the ‘aircrafts used for military purposes’ should not be used interchangeably. For instance, the Convention on International Civil Aviation of 1944 (the Chicago Convention) adopts a functional approach in the case of any State aircraft. State aircraft usually serve public purposes, but they can be used for commercial or non-governmental purposes at a certain point of time. The purpose of the particular voyage is taken into account in order to determine its purpose for the applicability of the Chicago Convention.⁴⁰⁴ For the sake of jurisdictional immunity, the Convention for the Unification of Certain Rules for International Carriage by Air (1999) (the Unification Convention) also takes the same approach for State-owned

⁴⁰⁰ The FSIA 1976 (n 37) sec 1610 (a).

⁴⁰¹ The SIA 1978 (n 37) sec 13 (4).

⁴⁰² The FSIA 1976 (n 37) sec 1610 (a) states, “*the property in the United States of a foreign state...used for commercial activity in the United States shall not be immune [...]*”

⁴⁰³ Sovereign Wealth Fund Institute, ‘What is a Sovereign Wealth Fund?’

<<https://www.swfinstitute.org/research/sovereign-wealth-fund>> accessed 15 November 2021.

⁴⁰⁴ The Convention on International Civil Aviation Convention 1944 (the Chicago Convention) art 3 (b).

and operated aircraft and the cargo therein under art. 3 (1). The nature of the use at the time when the cause of action arises is considered.⁴⁰⁵

In ‘commercial activity’ test, the transaction in issue where the asset is used is examined. The primary question is whether the key transaction is accomplished on the basis of a private law relationship and secondarily whether the action can be made by an individual.⁴⁰⁶ In determining the nature of the commercial transaction, the features of contracts and its purposes are to be taken into account.⁴⁰⁷ Even if the contract is commercial in nature, the sovereign needs to explain the purpose of the transaction.⁴⁰⁸ Test for commercial activity limits the scope of fact examination to the present use whereas the commercial purpose test includes the potential commercial use in future despite the difficulty to prove the future uses.⁴⁰⁹ On the other hand, the narrow interpretation of commercial activity excludes any activities “*which are incidental or auxiliary not denoting the essential character of the use of the funds in question.*”⁴¹⁰ Finally, the commercial activity test scrutinizes the characteristics of transaction where the asset is used, instead of the purpose of the transaction. Hence, the purpose test allows to investigate the motive of the State for any commercial activity whereas the activity test reduces the burden of proof for the judgment creditor. For the attribution of the assets, the purpose test corresponds better than the mere activity test.

Apart from the questions of tests to be applied, the parties need to establish the test in the context of the concerned case with appropriate evidence. Thus, they are also concerned about procedural matters such as applicable law, burden of proof, standard of proof, appropriate MoCs, *etc.* The complex web of procedural issues increases transaction costs for the parties as well as brings inconsistent precedents.

3.5.Procedural issues in enforcement litigations

⁴⁰⁵ The Unification Convention 1999 art 3 (1).

⁴⁰⁶ Brownlie (n 117) 328.

⁴⁰⁷ The ILC Draft 1991 (n 71) art 2 (2).

⁴⁰⁸ The FSIA 1976 (n 37) sec 1603 (d). It defines commercial activity “a regular course of commercial conduct or a particular commercial transaction or act.” The SIA (n 37) defines commercial transaction “(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in exercise of sovereign authority.” The ILC draft 1991 (n 71) art 10 accepts the same definition of commercial transaction from the SIA 1978 (n 37).

⁴⁰⁹ Zdobnoh and Vark (n 378), 169.

⁴¹⁰ The LETCO case [1986] 89 ILR 360, [365].

Heß clarified the relation of international law and national procedural law when it comes to foreign sovereign immunity. He commented, “*It is the special feature of state immunity that it is at the point of intersection of international law and national procedural law*”.⁴¹¹ The determination of immunity is a complex question of law and fact. This dissertation focuses only on the questions of procedural law limited to sovereign assets in enforcement litigation. The procedural part in a complex enforcement litigation starts with questions of applicable law and the role of international law, their convergence with other relevant laws regarding the asset in question. After the applicable law being decided, it comes to interpretation of clauses *e.g.*, waiver clause to scrutinize whether the immunity from execution is waived. The next question comes regarding the evidence proving the commercial use or purpose of the asset in question. Here, presumption of use, proof of use, standard of evidence, burden of proof, *etc.* play a vital role. The applicable law determines the existence of presumption of use. Thereby, the existence of presumption results in shifting the burden of proof. Furthermore, the applicable law also determines which standard of proof is to apply. Thus, the dilemma among various tests to decide the attribution comes along. The interplay becomes more complicated when the targeted assets have been used for both commercial and public purposes. This part of the study concentrates on the procedural questions that the parties to the proceedings and the adjudicatory body investigate concentrating only on the sovereign asset. Finally, it examines the diversity of MoCs as a judgment creditor expects the enforcement litigation to end with.

3.5.1. *Applicable laws*

As the above discussion infers, the use of the assets in question is the prime concern for both parties as well as the court. The applicable law governs the determination of ownership and the attribution of the assets. According to the principles of procedural laws, the *lex fori* is applied in quest of the answers to the above raised questions. The *lex fori* may require applying the internal municipal law or the rules of private international law of the forum State. The discussion in the previous chapter shows the diverse approaches in national legislations when comes to law of foreign sovereign

⁴¹¹ Burkand Heß, ‘the International Law Commission’s Draft Convention on the Jurisdictional Immunity of State and their Property’ (1993) 4(1) European Journal of International Law 269.

immunity. Nevertheless, the defendant State may have its own regulation governing the transfer or use of the asset and the exhibition of the object, *etc.*⁴¹²

The debate is not only between the two national legislations of the defendant State and the forum State, but also the convergence between the national legislations and the international law regarding foreign sovereign immunity. Due to the diverse position of the courts in determining the relationships among the three legal frameworks, the judgments are found inconsistent. Such as, the international law expressly distinct the jurisdictional immunity and the immunity from execution, and therefore, the waiver from jurisdictional immunity and/or consent to the adjudicative process of enforcement litigation, do not constitute as the waiver from the immunity from execution in many jurisdictions. Nevertheless, case laws show the attempts to accommodate the enforcement of a judgment even where the international rule provides no execution.

The applicable law acts as a pitfall, especially in the case of mixed accounts, assets owned by the SOEs, export of artistic and cultural objects having value. The applicable law also determines the existence of any presumption of sovereign use, the burden of proof, and the standard of evidence. Such as for the bank accounts in the name of the foreign sovereign maintained in the forum State are governed by the municipal banking law of the forum State whereas the defendant State still controls the use of balance therein as the owner of the account.

3.5.2. *Treaty provisions concerning waiver of immunity from execution*

After deciding the applicable law, the court reviews the waiver clause in the concerned contract. A waiver clause to the satisfaction of the court can avoid further arguments on use or purpose of assets for immunity. If the court finds a satisfactory waiver provision sufficient for the targeted asset, the judgment creditor does not need to proceed for the attribution tests. The similar practice is visible in France,⁴¹³ Germany,⁴¹⁴ the US⁴¹⁵, the UK,⁴¹⁶ *etc.*

⁴¹² Fox (n 5) 373.

⁴¹³ See *Procureur v. SA Iptrade, France* [1978] 65 ILR 75; *Procureur v. LIAMCO, France* [1979] 65 ILR 78. *Societe Air v. Guathier, France* [1984] 77 ILR 510.

⁴¹⁴ *The Philippines Embassy Bank Account Case*, (n 113) [167], [181], Ground C.1.5 and 6, 185, Ground C.II.3.

⁴¹⁵ The FSIA 1976 (n 37) sec 1610

The restrictive immunity from execution for the commercial use of the asset and/or waiver from immunity does not bring fruitful results all the time. The outcome of the execution attempts by a petitioner against Russia illustrated the challenges for three different forms of assets, such as, State-owned ships and fighter jets, balance in bank accounts, cultural exhibitions, *etc.*⁴¹⁷ The petitioner, *Noga*, a Swiss company, had a loan agreement with Russia under which Russia defaulted. Pursuant to the waiver of immunity in the loan agreement, the petitioner received an arbitral award in its favor and initiated the execution proceedings in France for a State-owned ship, used for research purpose by the Murmansk State Technical University (MSTU), and the funds in the bank account in the name of the Russian embassy in France and the Russian permanent delegation to the UNESCO and the funds in the name of the Central Bank of Russia.⁴¹⁸ The court denied execution against all the assets. The execution against funds in embassy accounts was rejected because of lack of specific waiver as the court refused to accept the general waiver for the diplomatic ones. The funds in the name of the central bank and the ship were rejected because of the separate legal entities of the Central Bank and the MSTU. The court held that the assets of the State agencies having separate legal entities were liable for the debt of itself not of any third party, and the State hereby was held as third party for this case.⁴¹⁹ Hence, the valid debt of the petitioner remained unpaid due to the immunity of the State from execution although the arbitration proceeding was completed with the general waiver from immunity. Nevertheless, the express waiver of immunity from the foreign State also opens the door for execution to the creditors.

Three approaches are visible from the court practices in different jurisdictions when it comes to interpretation of the waiver of immunity from execution clause. The court gives either a narrow interpretation by requiring the waiver to be express and specific or a broad one by accepting an implied waiver clause. The third approach is to presume the waiver of immunity from execution from the treaty provisions regarding

⁴¹⁶ The SIA 1978 (n 37) sec 13.

⁴¹⁷ *NOGA v. State of Russia*, [10 August 2000], Court of Appeal, Paris; *NOGA v. Murmansk State Technical University and Association Brest* [24 July 2000]; *Noga SA v. The Russian federation* [enforcement of a French award in Switzerland and art. 1506 of the French code of civil procedure] bge/atf 135 iii 136, no. 4a_403/2008 – Swiss international arbitration law reports (sialr) – 2009 VOL. 3 NOS. 1 & 2

⁴¹⁸ *Ibid.*

⁴¹⁹ *Ibid.*

the waiver of immunity from jurisdiction or the consent to arbitration as constituting the waiver of immunity from execution.

In the case of *NML Capital* (2011), the judgment creditor targeted the bank accounts of the Argentine embassy in France and its UNESCO delegation in Paris.⁴²⁰ The French Court of Cassation required the waiver clause to be express and specific for attaching the diplomatic bank accounts. However, neither the VCDR (1961), the VCCR (1963), nor the UN Convention (2004) require the waiver clause to be specific. These instruments require the waiver provision only to be expressed.

In 2013, the same judgment creditor filed another enforcement case requesting MoCs against a bundle of Argentine assets such as “*taxes owed by Air France’s Argentinian branch to Argentina, oil royalties owed by Total Austral to Argentina, and taxes and social contributions owed by BNP Paribas’s local branch to Argentina*”⁴²¹ The French Court of Cassation required the same standard of “express and specific” waiver in treaty provisions for granting MoCs. It stated:

Pursuant to international customary law, as reflected in the UNCSI (the United Nations Convention on Sovereign Immunity), state can waive by written contract, the immunity from execution on assets or categories of assets used or intended to be used for public purposes but can only be waived in an explicit and specific way, mentioning assets or categories of assets for which the waiver is granted.⁴²²

Such precedents raise the bar of standard of proof for the judgment creditors in enforcement litigation. It also puts the diplomatic assets and the other cross-border assets in the same bucket, although the diplomatic assets enjoy higher level protections. Nevertheless, France modified its Code of Civil Enforcement Procedures in 2016. The modified provisions require the waiver clause to be express and specific for the diplomatic assets.⁴²³ Similarly, the FSIA (Australia) requires both “express and

⁴²⁰ *NML Capital v. Republique Argentine* [2011] Court of Cassation [Cass.] [Supreme Court for Judicial Matters] 28 September 2011 No. 09-72.057; (*NML Capital* (2011)).

⁴²¹ *NML Capital v. Republique Argentine et autre* [2013] France, Court of Cassation Civil Division 28 March 2013, (3 decisions) Nos. 10-25.938, 11-13.323, 11-10.450 (*NML Capital* 2013).

⁴²² *Ibid.* translated taken from Jaroslav Kudrna, ‘Fall of State Immunity from Execution in France: Let the States Beware’ (2016) 19(5) *International Arbitration Law Review* 133, 136.

⁴²³ The Code of Civil Enforcement Procedures, France (n 269), a L.111-1-3.- Provisional or enforcement measures cannot be taken on the property including bank accounts, used, or intended to be used for the exercise of functions of diplomatic missions of the foreign States or their consular posts,

specific” waiver for the diplomatic and military assets,⁴²⁴ but not for other assets. Subsequently, in the case of *Commisimpex*.⁴²⁵ the French Court of Cassation took a creditor friendly approach in interpreting the standard of waiver clause for a successful enforcement case. Instead of being the clause “express” and “specific”, mere express waiver of immunity from execution was held sufficient. Such inconsistent interpretation even before the same forum State makes the jurisprudence fragile and unpredictable. The Swiss Supreme Court allowed the attachment of BNP Paribas and the accounts of Central Bank of Russia relying on express waiver clause without any requirement of “specificity.”⁴²⁶

The UK court applies narrow interpretation of waiver clause when it comes to the diplomatic assets.⁴²⁷ The UK Court stated in *A Co Ltd. v. Republic of X* (1990):

A contractual waiver of State immunity from jurisdiction and enforcement will not be sufficient to waive the inviolability and immunity of either the premises and/or property of a diplomatic mission, or the private residence and/or property of a diplomatic agent, enjoyed under respectively articles 22 and 30 of the Vienna Convention on Diplomatic Relations.⁴²⁸

Relying on this precedent, in the case of *Orascom Telecom Holding SAE v. Chad* (2008),⁴²⁹ the UK court interpreted Chad’s acceptance of International Chamber of Commerce Arbitration Rules (1998) (ICC Arbitration Rules), article 28 (6) as sufficient waiver for the execution of the arbitral award before the UK court.⁴³⁰ Nevertheless, this precedent was not followed in another case against Congo in 2015.

On the other hand, in some cases, mere acceptance of jurisdiction or agreement to arbitration had been interpreted as an implied waiver of immunity from execution. In

special missions or their missions to international organizations unless there is an express and special waiver [of immunity] by the States concerned.”

⁴²⁴ The FSIA 1985 (n 166), art 31 (4).

⁴²⁵ [2015] Court of Cassation [Cass] [Supreme Court for Judicial Matters] 13 May 2015,

⁴²⁶ *Compagnie Noga d’Importation et d’Exportation v. Federation de Russie 5A* [2008] Tribunal Federal [TF] [Federal Supreme Court] 10 January 2008, 618/2007

⁴²⁷ *A Co Ltd. v. Republic of X* [1990] High Court, Queen’s Bench Division, 2 Lloyd’s Rep. 520; 87 ILR 412.

⁴²⁸ Ibid.

⁴²⁹ *Orascom Telecom Holding SAE* [2008] EWHC 1841 (Comm) [2009] 1 All ER (Comm) 315; [2008] 7 WLUK 862 (QBD (Comm)).

⁴³⁰ The ICC Arbitration Rules 1998 art 28 (6) states, “Every award shall be binding on the parties. By referring their dispute to arbitration under these Rules the parties undertake to execute forthwith any award. The parties shall be deemed to have waived any remedy capable of being waived.”

the case of *Creighton v. Qatar* (2000), the agreement to arbitration was deemed as implied waiver of immunity. The Regional Court of Appeal, Paris interpreted:

[...] the acceptance of the mandatory nature of the award resulting from the acceptance of the arbitration agreement operated in view of the principle of good faith as a waiver of immunity from execution unless [the parties] provided otherwise [...] Considering that the commitment of the State of Qatar, a signatory to the arbitration clause, to execute future awards in terms of article 24 of the ICC arbitration rules [...] implies a waiver of immunity from execution by that state.⁴³¹

The narrow interpretation puts a higher burden of proof on the shoulder of the judgment creditor limiting the access to the sovereign assets for execution. On the other hand, the broader interpretation of the waiver clause causes interference to the defendant States' exercise of its sovereignty. No clear distinction of external and internal sovereignty applies in enforcement litigations. Honoring the court's judgment is a part of its obligation under international commercial contracts *i.e.*, exercise of external sovereignty. On the contrary, its compliance with judgment debt requires macro-economic changes and shuffling with other international obligations which are part of its internal exercise of sovereignty. The courts from the forum State do not accept the similar approach of breakdown of internal sovereignty when there is a question of interference to an external one. Capacity to undertake any international obligation is an attribute of external sovereignty. Thus, any condition limiting this capacity faces narrow interpretation given the length of the contract or treaty in question and the generic meaning of the words.⁴³²

The third approach is the presumption of waiver of immunity from execution if the waiver from jurisdiction is already established. This approach acts as an unconvincing stretch and eventually leaves the interpretation at the discretion of the national courts. The tools of interpretation are thereby undoubtedly essential for coherent and predictable precedents. A waiver clause under an international convention may not be

⁴³¹ *Societe Creighton v Ministre de Finances de l'Etat du Qatar et autre*, [2003] Cour d'appel de Paris [CA], France, Court d'Appel, Paris, 12 Dec 2001 *Revue de l'arbitrage* 417, [417] and [418], translation taken from Kudrna (n 422), 138.

⁴³² James Crawford, 'Sovereignty as a legal value' in James Crawford and Martti Koskenniemi (eds) *The Cambridge Companion to International Law*, (Cambridge University Press 2012), 117.

sufficient under the domestic law of the forum State in granting MoCs.⁴³³ The forum States' court exercises a vast discretion in interpreting the waiver clauses.⁴³⁴

Where the relatively restrictive sovereign immunity is granted for jurisdiction, few forum States interpret the acceptance of jurisdiction as an implied waiver of immunity from execution.⁴³⁵ They argued that such interpretation ensures the compliance of the judgments given pursuant to the acceptance of jurisdiction. The international conventions are still inclined to grant immunity from execution whereas the domestic courts have contributed to the development of restrictive immunity in this regard. The Australian Law Commission proposed a distinct basic principle. It affirmed that the court having the jurisdiction to decide a case, must have the power to make necessary orders including the interlocutory and final orders, the substantive and procedural orders to give the judgments into full effect.⁴³⁶ The Swiss court agreed with this proposition and argued the flow of power to order the MoCs against the foreign sovereign, from the power of adjudication.⁴³⁷ The highest court of Switzerland construed the waiver of jurisdictional immunity as the implied waiver from the immunity from enforcement unless the concerned assets had been earmarked for sovereign purpose.⁴³⁸ The Italian Court of Cassation followed the same principle by mentioning "*if immunity from jurisdiction does not apply to activities jure privatorum, (private acts), the same must be true for immunity from execution of a judgment that has recognised a private claim, where the foreign state does not comply with that judgment [...]*"⁴³⁹

⁴³³ Such as the judgment creditor relies on the waiver of the defendant State in an agreement pursuant to art. 53 of the ICSID Convention 1966. The domestic court may interpret the waiver clause not sufficient for the execution. Art. 54 (3) of the ICSID Convention 1966 does not exclude the possibility of domestic Court's interpretation of such waiver while hearing an enforcement proceeding against sovereign assets for the purpose of enforcement of an ICSID arbitral award. See more, Gerlich (n 20) 70.

⁴³⁴ Discussed critically in 3.5.2 of this Dissertation.

⁴³⁵ *The Distomo Case*, (n 304).

⁴³⁶ Australian Law Reform Commission Report no 24, Foreign State Immunity [1984] para 137.

⁴³⁷ *United Arab Republic* (n 288); *Banque Centrale de la République de Turquie v. Weston Compagnie de Finance e' d'Investissement SA and Another* [1978] Federal Tribunal of Switzerland 65 ILR 417, [424-425], Ground 4d.

⁴³⁸ *Republique Arabe d'Egypte v. Cinetel*, [1979] Tribunal Federal Suisse, 20 July 1979, 65 ILR 425 at 430, "*A foreign state which in a particular case does not enjoy jurisdictional immunity is not entitled to immunity from execution either unless the measures of execution concern assets allocated for the performance of acts of sovereignty.*"

⁴³⁹ *Condor* (n 114) [401], cited from *Libya v. Rossbeton SRL, Italy* [1989] Italy, Court of Cassation (plenary session) Case no. 2502, 25 May 1989, 87 ILR 63, [67].

However, the International Court of Justice (ICJ) denied this type of interpretation of forum States.⁴⁴⁰ The Chairman of the ILC Working Group observed “*if such power is recognized, there are also different views as to which property may be subject to measures of constraint.*”⁴⁴¹ Therefore, States and their assets still enjoy comparatively higher immunity [*albeit* not absolute] from execution than immunity from jurisdiction. The ILC (1999) reported the forum States being inclined to apply restrictive immunity from execution.⁴⁴² Besides, the ratification of international instruments forming judicial authorities is interpreted as an express waiver from immunity from execution for any disputes arisen or settled under the same instruments, *e.g.*, the ICSID Convention,⁴⁴³ the ECOWAS treaty.⁴⁴⁴ In the case of *Government of Zimbabwe v. Louis Karel Fick and Others*,⁴⁴⁵ the defendant State was bound by the Protocol of the ECOWAS treaty. The South African Constitutional Court interpreted the ratification of the ECOWAS treaty and its Protocol as an express waiver from the jurisdiction of the court of the forum State and enforcement as well. Therefore, such presumption can reduce the prolonged debate on the interpretation of waiver clause for immunity from execution.

3.5.3. *Presumption of use*

There are two types of presumption of use: the presumption in law and the presumption in fact. In the case of presumption in law, [also known as statutory presumption], the court presumes the use of the asset either as commercial or as sovereign pursuant to the statute in effect. On the other hand, the presumption in fact applies where the court presumes the use of assets by virtue of establishing a *prima facie* case, either by the plaintiff or by the defendant State. In both cases, the opposite party has the option to rebut the presumption by submitting contrary evidence. For instance, the court presumes the sovereign use of a certain funds in diplomatic bank account by virtue of a certificate from the head of the diplomatic mission; or hypothetically, the court may presume the commercial use of certain funds when the

⁴⁴⁰ *The Jurisdictional Immunities of the State* (n 172) [113].

⁴⁴¹ A/C.6/48/L.4, para 11.

⁴⁴² The ILC Report 1999 II (n 234), para 122.

⁴⁴³ The ICSID Convention 1966, art 53.

⁴⁴⁴ The ECOWAS Treaty 1975 and revised on 1993. Protocol A/P.I/7/91 on the Community Court of Justice, article 16, 19 and 22 (3).

⁴⁴⁵ *Government of Zimbabwe v. Louis Karel Fick and Others* [2013] the Constitutional Court of South Africa, ZACC 22.

plaintiff primarily submits evidence of previous commercial use of those funds. In absence of the statutory presumption, the risk of losing immunity lies on the State⁴⁴⁶ unless it proves the *prima facie* case in favor of the sovereign purpose of the asset to raise the presumption in fact.

The general prohibition on granting any MoC against certain sovereign assets having sovereign purpose, raises the presumption of use.⁴⁴⁷ Walter commented that the absolute immunity principle was shifted to restrictive immunity by way of raising the presumption of use.⁴⁴⁸ For instance, The SIA (1978) of the UK in section 13 (2) states, “*the property of a State shall not be subjected to any process for the enforcement of a judgment or arbitration award or in an action in rem, for its arrest, detention or sale.*” Such language raises the presumption of public purpose of all sovereign assets. On the other hand, the FSIA (1985) of Australia in section 32 (1) states the attachability of the commercial asset of foreign State. Its section 32 (3) defined, “*Commercial property is a property other than diplomatic property and military property that is in use by the foreign State concerned substantially for commercial purposes.*” From such text, the presumption goes in favor of the commercial use of all the assets and the presumption of sovereign use of diplomatic and military assets. The legal implication of such presumption is that the party relying on the benefit of presumption does not have the burden of proof to establish a *prima facie* case.⁴⁴⁹

3.5.4. *Burden of proof*

The presumption can be rebutted with evidence of the contrary use. With the presumption, the burden of proof lies on the party who intends to rebut the presumption. Cases against the bank accounts of the diplomatic mission, assets of the central bank are examples. Hence, the burden of proof depends on the nature of the presumption. For the presumption in fact, the burden lies on the party who intends to establish the *prima facie* case. For the presumption in law, the burden of prove falls on the party who intends to rebut the presumption. Therefore, the party intending to

⁴⁴⁶ Dr. Peter Fritz Walter, ‘Evidence and Burden of Proof in Foreign Sovereign Immunity Litigation: A Procedural Guide for international lawyers and Government Counsel’ (Doctoral thesis, Sirius-C Media Galaxy LLC Delaware, 2017) 583.

⁴⁴⁷ Fox (n 5) 380.

⁴⁴⁸ Walter (n 446), 576.

⁴⁴⁹ Ibid

rebut, relies on the contrary use of the asset. Such as, for enforcement proceeding before the Australian courts, the State must prove the public purpose of the assets as the presumption is in favor of commercial use. On the contrary, in a British court, the claimant has to rebut the presumption of sovereign use by proving the commercial use of the assets.⁴⁵⁰ The Spanish Constitutional Court commented on the standard of burden of proof for the immune or non-immune assets:

The degree to which property held by foreign state in the state of forum [...] is treated as not immune from execution varies from refusal to recognize even the slightest exception to immunity on the one hand to notably advanced position which requires that such property be unequivocally allocated to activities *jure imperii* on the other hand.⁴⁵¹

To prove the sovereign purpose of the diplomatic assets, the certificate from the ambassador is accepted but not as conclusive. The rebuttal remains open at the hands of petitioner under section 13 (5) of the SIA (1978) of the UK. In the *Alcom* case (1984), the House of Lords put the burden of proof on the judgment creditor as to the commercial use of the sovereign assets and/or earmarking of the asset for commercial purpose.⁴⁵² The FSIA (1976) of the US, does not assign any burden of proof to prove the purpose of the asset or the intended use of the unallocated fund strictly either on the judgment creditor or the foreign sovereign.⁴⁵³

Given the undetermined burden of proof, the defendant State may complicate the situation by changing its use or allocating it for some public purpose. Such an attempt causes the judgment creditor severe difficulties to prove the commercial use or purpose. The challenge is higher with the mixed use of the assets *e.g.*, the bank account of the diplomatic mission.⁴⁵⁴ Therefore, Schreuer advocated for shifting the burden of proof on the defendant State to present evidence that the MoCs would result

⁴⁵⁰ Saloni Kantaria, 'The Enforcement of a Foreign Arbitral Award against a Sovereign State in Australia' (2010) 14 *Vindobona Journal of International Commercial Law & Arbitration* 401, 412. The author concluded that once the claimant confirms the express waiver from the State as to the immunity from enforcement, the enforcement of award in Australia is "straightforward" which implies the shifting of burden of proof on the State as to non-commercial use of the property.

⁴⁵¹ *Abbot v. Republic of South Africa* [1992] ILR 113 (19) 413 [420].

⁴⁵² *The Alcom* case (n 394).

⁴⁵³ Georges R. Delaume, 'the Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later' (April 1994) 88(2) *the American Journal of International Law* 257, 266.

⁴⁵⁴ Discussed in 4.2.1.4 of this dissertation.

at interference to its sovereign functions.⁴⁵⁵ In the case of *Abbott v. South Africa*, (1992),⁴⁵⁶ the dissenting judge of the Spanish Constitutional Court also suggested the same shift of burden of proof. Belgian court shifted the burden of proof on the sovereign for the purpose of account although the decision was subsequently reversed by the Brussels Court of Appeal in 2002. The Brussels court observed the existence of power of the receiving State under article 36 (2) of the VCDR to check the use of bank account. It was held:

It is not to be contrary to the letter and spirit of the Convention (VCDR) for the nature of the deposits of funds made to an embassy to be debated before the courts of the receiving state particularly where the state acting as an ordinary individual ‘entered into a contract according to the form of private law [...] behaved as a private person [...] and clearly and specifically intended to waive its prerogatives as sovereign power.’⁴⁵⁷

The procedural due process requires the burden of proof to be on the party who brings the claim.⁴⁵⁸ Therefore, shifting the burden of proof on the defendant State causes undue duress on it. Instead, the balance must be made depending on the judgment creditor’s right to execution and the inference to the sovereign authority of the defendant State. Given the unique nature of the defendant State as sovereign, the burden of proof may be determined based on the required standard of evidence, *e.g.*, who is in a better position to prove.

3.5.5. *Standard of evidence*

For commercial use, assets can be tangible or intangible. The proof of use for tangible assets are easier out of its ownership and possession. It can be difficult with the change of user *e.g.*, war ship. Proving the purpose of intangible assets such as funds and security deposits in banks in the name of the foreign State is complex. Immune assets require minimum evidence as to their use or purpose. Such as the Brussels Convention (1926), amended by its additional protocol (1934), accepts a certificate signed by the diplomatic representative of the defendant State stating the non-

⁴⁵⁵ Schreuer (n 20) 155.

⁴⁵⁶ [1992] Spain Constitutional Court (2nd Chamber), 1 July 1992, 113 ILR 412, [428].

⁴⁵⁷ *Iraq v. Dumez* [1995] 106 ILR 285.

⁴⁵⁸ Charles T Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, (Oxford University Press, 2017) 157-202.

commercial purpose of the ship or cargo as conclusive evidence unless proved otherwise.⁴⁵⁹ Thereby the burden of proof is shifted upon the judgment creditor.⁴⁶⁰ In case of failure to prove otherwise, the ship and its cargo are protected from any MoC.

The standard of evidence varies in terms of the applicable law and the presumption of use but has no impact on the burden of proof.⁴⁶¹ In some cases, absence of use of the asset acts as evidence in favor of the plaintiff. The FSIA (1985) of Australia states the attachability of vacant assets.⁴⁶² Therefore, the plaintiff may need to prove the asset not in use for the time being. In order to prevent the grant of any MoC, the defendant State needs to prove the allocation of assets for sovereign purpose. Similar practice has been shown in a Swiss case of *United Arab Republic v. Mrs. X*, (1960)⁴⁶³ where the Swiss Federal Tribunal permitted MoC against the sovereign funds which were not earmarked for any specific purpose during the continuation of the proceeding. In this case, the defendant State claimed the previous use of the funds for weapon purchases. On the other hand, for the use of sovereign asset, laws from the UK, Singapore, Pakistan require a reduced standard of proof upon receiving the certificate of use from the head of the diplomatic mission, or the concerned ministry.⁴⁶⁴ The US court relies on the affidavit or testimonies from the head of missions.⁴⁶⁵

The nature of the certification in question broadly depends on the discretion of the court. In *Harris v. Vao Intourist, Moscow* (1979), the US court accepted a letter from the Soviet Ambassador to raise the presumption of use.⁴⁶⁶ In terms of the conclusiveness of the certificates States' practices also vary. The German Constitutional Court held the further investigation as to the public purpose/use of sovereign asset.⁴⁶⁷ Nevertheless, the evidential value of the certificate varies based on the nature of the asset and the hierarchical position of the person certifying the use.⁴⁶⁸

⁴⁵⁹ The Brussels Convention 1926 (n 186) and the Additional Protocol to this Convention 1934 art 3, 5.

⁴⁶⁰ Shaw (n 37) 747.

⁴⁶¹ Walter (n 446), 579.

⁴⁶² The FSIA 1985 (n 166) art 32 (3) (b).

⁴⁶³ [1960] Switzerland, Federal Tribunal 10 February 1960, 65 ILR 384, [392].

⁴⁶⁴ Walter (n 446), 576.

⁴⁶⁵ *Ibid.*, 579. Affidavit is the written form of declaration as to the statement of facts, declared as true, by the person signing thereof.

⁴⁶⁶ [1979] EDNY 481 F Supp 1056; [1982] 63 ILR 318.

⁴⁶⁷ *The Philippines Embassy Account Case* (n 113).

⁴⁶⁸ Walter (n 446), 586, commented, “the quality of proof offered in support of a foreign state’s immunity claim notably depends on the position of the witness in the internal hierarchy of the foreign state.”

Such as, the certificate acts more as conclusive evidence for the military assets, central bank assets, where the statutes provide stricter immunity rules.⁴⁶⁹

After the court's presumption, the party intending to rebut the presumption brings contrary evidence or quash the evidential value of the certificate or affidavit. Such as for presumption in favor of public use, the burden of proof has shifted to the judgment creditor for rebuttal. Due to the VCDR (1961), cross examination of the ambassador or the head of the diplomatic mission, providing the certificate is not possible.⁴⁷⁰ The judgment creditor can either submit factual evidence with witness presentation, submission of counter affidavit or by proving the preponderance of the evidence. In *De Sanchez v. Banco Central de Nicaragua* (1982),⁴⁷¹ the US court accepted the declaration of the witness of the plaintiff as evidence, although finally dismissed the claim whereas in *Mol Inc. v. Bangladesh* (1983),⁴⁷² the plaintiff deposited the affidavit in support of the motion before the US court.

3.5.6. *Proof of use of the assets*

Notwithstanding the different types of assets and standards used by the States [discussed in the next chapter], the parties need to prove the use of assets in their favor. The defendant State intends to prove the sovereign use. The judgment creditor attempts to prove either the absence of sovereign use or the presence of commercial use as the applicable law requires. Two-fold challenges exist here: firstly, how the use of assets can be substantiated and how to determine the question of immunity when the concerned asset has use of both sovereign and commercial use. For the first question, diverse approaches are visible as to the commercial activity test and the purpose test,⁴⁷³ The second challenge is that the court applies extra scrutiny for the assets having mixed purposes.

For both tangible and intangible assets, past, present, and future uses are judged. The FSIA (1976) of the US asks for past use as "*property used for commercial activity.*" The SIA (1978) of the UK goes for both past and future use as it says, "*used or intended to use for commercial purpose*" However, the French Court emphasized on

⁴⁶⁹ Ibid, 578.

⁴⁷⁰ The VCDR 1961 (n 191) art 31 (2).

⁴⁷¹ [1982] EDLa 515 F Supp 900, 63 ILR 584.

⁴⁷² [1983] D Or 572 F Supp 79, [82].

⁴⁷³ Discussed in 3.3.1 of this dissertation.

origin and destination of the asset. The advocate general in the case of *Eurodif* (1984) mentioned that the intended use was difficult to be proved without specific allocation by the State.⁴⁷⁴ It was stated:

The absence of any specific allocation of the funds in disputes makes it necessary to have recourse to the test of ownership and at the same time to their designation as public funds whose use will depend on a decision at the discretion of the owner. The necessarily voluntarist nature of the notion of the intended use of funds thus becomes a matter of pure discretion wherever as here, the foreign government has not made its intentions known explicitly [...] in practical terms. The result will be tantamount to a return to the absolute nature of immunity from execution. The absolute nature of immunity in such circumstances would constitute a retreat to the time when governmental activity was confined to acts of public authority [...] it would seriously endanger the security of international economic relations if states could merely by remaining silent, protect themselves from any measure of execution aimed at securing compliance with their obligations.⁴⁷⁵

It stated that any assets other than diplomatic and military ones, substantially in use for commercial purposes, were available for attachment. Past use of asset is relevant where asset is currently vacant unless the State can prove present earmarking of the asset for public purpose.⁴⁷⁶ The District court of Frankfurt observed:

If the exercise of jurisdiction is permissible, attachment to the local assets of a foreign sovereign is also admissible. Only those assets which are dedicated to the public purpose of the state are exempted from forcible attachment and execution. In the present case, the petitioner's attachment seeks to reach the respondent's cash and securities account *i.e.*, assets which are not in public service of the respondent. A possible use of the assets in future to finance state business cannot serve to establish the present immunity.⁴⁷⁷

⁴⁷⁴ Fox (n 5) 402.

⁴⁷⁵ *Islamic Republic of Iran v. Eurodif*, Court of Cassation [14 March 1984], 77 ILR 513, [520], [521], 598 UN legal materials 1062. Submission made to the court by advocate general Gulphe, JDO (1984).

⁴⁷⁶ The FSIA 1985 (n 166) art 32 (3) (a), (b).

⁴⁷⁷ *Non-Resident Petitioner v. Central Bank of Nigeria* [1977], UN Legal material 290 at 292, translated in Fox (n 5) 397.

For the future use, the FSIA (1985) of Australia eases the burden of proof for currently vacant assets as the defendant State needs to prove the allocation of the asset for some public use.

3.5.7. *Nexus*

The judgment creditors can get paid only when they find some assets in the forum State, available for attachment. Nexus requirement prevents the arbitrary judicial decisions against the sovereign assets which may have no connection with the forum State and/or the dispute in question. Conventions and case laws identified several factors for the nexus. The ILA Draft (1982) required the nexus between the asset and the claim in questions.⁴⁷⁸ However, unlike the ILA Draft (1982), the Basel Resolution (1991) made the assets of any State instrumentalities available for the debt of the State irrespective of its legal personality⁴⁷⁹ whereas the legal identification of the liable entity would be a relevant factor to attach the sovereign assets for execution. The ILC draft (1991) also attached some linking conditions under article 18.⁴⁸⁰ Another commonly required nexus was between the asset in question and the liable entity.⁴⁸¹ Finally, the UN Convention (2004) asks for the connection of the targeted asset with the defendant entity and the territorial nexus with the forum State.⁴⁸²

According to the *lex fori* of some jurisdictions, assets are required to have nexus with the claim and/or the forum State. Among the national jurisdictions, the FSIA (1976) of the US requires the nexus between the claim and the asset in question for execution. For instance, in the execution of sovereign debt litigations, the lender needs to prove the connection of his claim with the asset subjected to execution.⁴⁸³ The territorial connection is essential to succeed in an enforcement litigation in the US. The possible territorial nexus between the asset and the US as forum State can be proved when the asset has an *in-situs* position in the forum State.⁴⁸⁴ For the intangible assets having no physical situs, the nexus is determined by legal fiction, accepted by the court. Such as, for the garnishment order, the US court considered the location of

⁴⁷⁸ The ILA Draft 1982 (n 142) art VIII A 2.

⁴⁷⁹ The Basel Resolution 1991 (n 237) art 4 (4) (b)

⁴⁸⁰ The ILC Draft 1991 (n 71) commentaries to art 18 (1), para 7.

⁴⁸¹ *Ibid*, art 8 (1) (c).

⁴⁸² The UN Convention 2004 (n 41) art 19 (c).

⁴⁸³ The FISA 1976 (n 37) s 1610 (a) (2); *Republic of Argentina v. Weltover Inc.* [1992] 2nd Cir Court 112 S. Ct. 2160.

⁴⁸⁴ Yang (n 20) 403

tangible asset for nexus, precisely at the point when it decided the question of immunity from execution, not when the litigation was filed or the garnishment order was sought.⁴⁸⁵ On the other hand, for the intangible asset, the situs was the location of the garnishee when the question of immunity was being determined.⁴⁸⁶

Similar court practices in relation to the nexus requirement are visible in other forum States. In the *Julius Bar* case (1956), the place of payment in Switzerland was regarded as the origin of dispute, thereby connected with the forum State.⁴⁸⁷ In the case of *Libya Oil Concession* (1981) case, the Swiss court refused the execution due to lack of the nexus of the dispute with Switzerland.⁴⁸⁸ The French court followed the same requirement of nexus in the *Eurodif* case (1979). It required the nexus between the commercial activity which was the origin of the assets and the underlying claim.⁴⁸⁹ However, such nexus was not essential when a waiver of immunity from execution was there.⁴⁹⁰

Among the other dominant jurisdictions, the UK does not require nexus between the asset and the claim as it permits attachment of any assets available in its territory.⁴⁹¹ The German court⁴⁹² as well as the Dutch court did not require the territorial requirement or any connection between the cause of action and the forum State.⁴⁹³

This dissertation stands in favor of nexus requirement among the asset in issue, the defendant State, the claim in question and the forum State to prevent the multiplicity of proceeding and the arbitrary enforcement decisions from the dominant forum States. However, the burden of proof of the required nexus is undetermined.⁴⁹⁴ The challenge also arises whether the direct link should be either between the asset and the

⁴⁸⁵ *FG v. Congo* [2006] 5th Cir 455 F 3d 575, [590].

⁴⁸⁶ *Ibid*, [589-590].

⁴⁸⁷ *Royaume de Grece v. Banque Julius Bar & Cie*, [1956] Tribunal 107 suisse suisse, 6 June 1956, ATF 82 I 75; 18 ILR 195.

⁴⁸⁸ *Liamco v. Libya*, [1981] Ad hoc Arbitration Arbitral award 12 April 1977, 20 ILM 1.

⁴⁸⁹ *Republique democratique du Congo v. Syndicat des coproprietaires de l'immeuble Residence antony CHatenay* [2005] France, Court of Cassation, 25 January 2005 No. 03-18.176.

⁴⁹⁰ *Creighton* (n 431) [418]. The court observed, "Considering that assets assigned by the state to the satisfaction of the claim at stake or allocated by it for that purpose can be seized failing which any other foreign state's property situated in the territory of the forum and used for commercial purpose can be seized." Translation taken from Kudrna (n 422) fn 17.

⁴⁹¹ The SIA 1978 (n 37) sec 13 (3) and (4).

⁴⁹² *Non-resident Petitioner* (n 280).

⁴⁹³ *Société Européenne d'Etudes et d'Enterprises v. Socialist Federal Republic of Yugoslavia*, [1975] Supreme Court, Netherlands Judgment of Oct 26, 1973, 65 ILR 356, 14 ILM 71 (1975),

⁴⁹⁴ *Delaume* (n 453), 266.

claim in question; or the dispute and the forum State; or the claim, and the holder of the assets. The last one opens the question of State instrumentalities. In addition, the court has the authority to grant attachment order against the asset specifically allocated for the debt [known as earmarked assets].⁴⁹⁵

3.6. Diversity in MoCs

An enforcement litigation starts with the expectation of MoCs against the asset and ends with the grant or refusal of the order against the sovereign asset. It is deemed a success for the judgment creditor when MoC is granted. The defendant State succeeds if the court denies it. Two determining factors that control the nature of the MoC to be granted are the specific measure that the judgment creditor asks for depending on the asset in question, and the legal system of the forum State. Hence, diversity is visible from forum State to forum State and the types of assets.

Fox defined the MoCs as “*immunity from execution also concerns immunity from the imposition without its consent of forcible measures against the property of a foreign state by the judicial or administrative authorities of another state.*”⁴⁹⁶ Such measures are taken against the sovereign assets as well as its officials. The measures against the sovereign assets are commonly known with different names in different jurisdictions.⁴⁹⁷ In order to mitigate the jurisdictional differences, the ILC proposed to use the MoCs to refer to the forcible actions ordered against the sovereign assets for enforcement of judgments. It reasoned this name by commenting “*That general reference [...] would also include all other measures of judicial constraints under domestic law, including certain types of interlocutory injunctions that might not be strictly considered as attachment, arrest, or execution.*”⁴⁹⁸ Thereby, MoCs are used in this dissertation to indicate the orders passed by the domestic court of the forum State against the sovereign asset in order to levy the judgment debt. Commentary to the ILC Draft (1991) clarified that the term MoC is used as generic term without indicating any technical form of enforcement measures,⁴⁹⁹ but, inclusive of both pre-judgment

⁴⁹⁵ Discussed in 4.3.3 of this dissertation.

⁴⁹⁶ Fox (n 5) 372.

⁴⁹⁷ Such as, Belgium referred as safeguarding measures, attachment in execution; the FSIA 1976 (n 37) term as attachment in aid of execution, execution, the UK jurisdiction name in the SIA 1978 (n 37) as enforcement of judgment, *etc.*

⁴⁹⁸ The ILC Report 1985 (n 330), 55 para 230.

⁴⁹⁹ The ILC Draft 1991 (n 71) commentary to part IV, para 2.

and post-judgment orders. Thereby, further discussion is required to explain the common forms of MoCs granted by the domestic courts against the sovereign assets.

The MoCs are divided into two categories. Firstly, the interim measures, also known as the safeguard measures, are granted for conservatory purposes, pending litigation, effective during the stages of adjudication and execution. The other category is the forcible measures “*restricting the foreign State’s proprietary rights over its property*”⁵⁰⁰ for the post judgment execution. For the post-judgment MoCs, the court acts more cautiously as it interferes with the exercise of the sovereignty of the foreign State and the order has a longer affect than interim measures. Therefore, no justification can be enough to treat the foreign State like a private entity in the given situation.

The MoC is further divided into two classes: *in rem* and *in personem*.⁵⁰¹ The *in rem* MoC is granted against the assets of the sovereign which also binds the third party to honor the court’s order such as the holder of the assets whereas the *in personem* MoC is against the person of the sovereign to comply with the order.⁵⁰² The following chart shows the three categories of MoCs: pre-judgment, post-judgment and punitive.

⁵⁰⁰ Yang (n 20) 378.

⁵⁰¹ The *in rem* MoCs are passed to be bound by any persons (over whom the court giving the order has jurisdictions) regardless of the relationship with the dispute and/or the assets, such as the *Mareva* Injunction. On the other hand, the *in personem* MoCs are passed against the persons involved in the dispute and/or the assets in question, such as the Garnishment order, the Anton Piller order.

⁵⁰² Yang (n 20) 374.

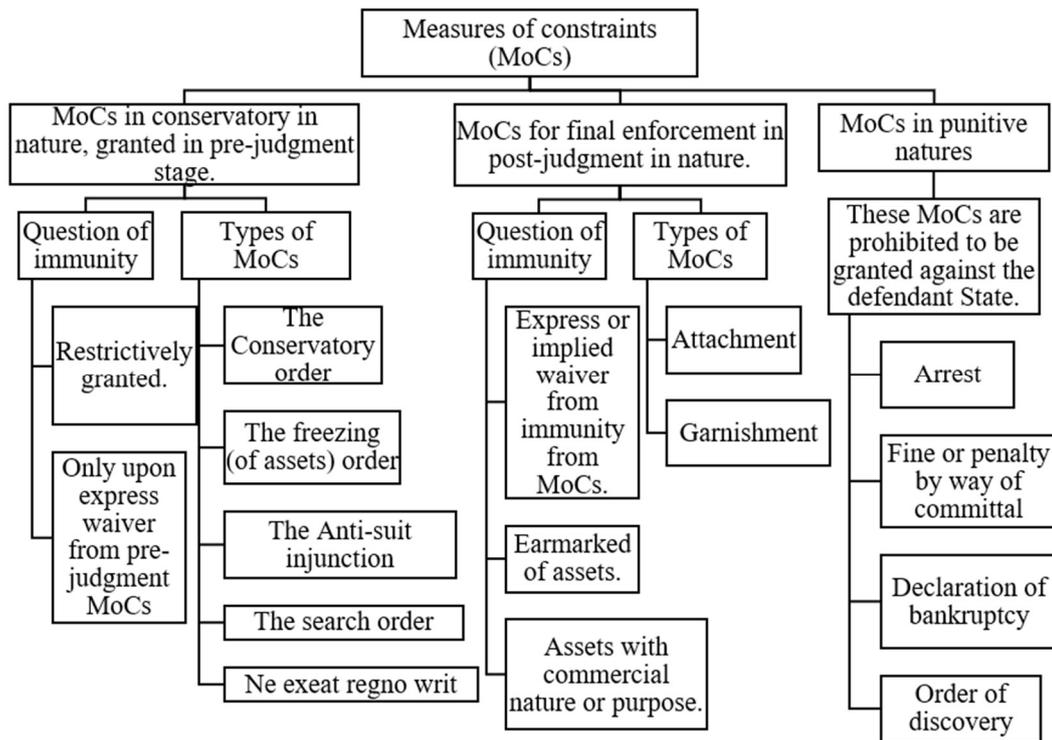


Figure 2: Types of measures of constraint

Certain common forms of the MoC are not applicable for the States without disrupting the diplomatic relations or interfering with the internal sovereignty of the defendant State. To avoid such any adverse impacts, the courts are reluctant to require specific performance of the defendant State, or order arrest of the concerned officials in civil prison, *etc.* for the execution proceedings.⁵⁰³ In the case of *Democratic Republic of Congo v. Belgium* (2000), the ICJ reaffirmed the prohibition on issuance of arrest warrant against the officials of the foreign sovereign. In this case, the domestic court of Belgium issued an arrest warrant against the minister of foreign affairs of Congo and circulated it internationally for execution. The ICJ held such measures in violation of international obligation of the forum State, “*in that it failed to respect the immunity of that Minister and more particularly infringed the immunity from criminal jurisdiction and the inviolability that enjoyed by him under international law.*”⁵⁰⁴ Following the same line of argument, the SIA (1978) of the UK

⁵⁰³ *The Radiation Contamination Claim* [1988] Australian Supreme Court 14 April 1988, 86 ILR 571. The court denied granting injunction order against the foreign sovereign from building a nuclear reactor in the defendant state’s territory.

⁵⁰⁴ *The Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* [2002] Judgment of 14 February 2002 para 70; Antonio Cassese, When May Senior State Officials be Tried for

prohibits the imposition of fines for failure of the State to disclose any information,⁵⁰⁵ granting injunction and order specific performance or recovery of land or other assets.⁵⁰⁶ The Dutch courts also refused to declare a foreign State bankrupt, stating “*this (declaring the foreign state bankrupt and appointing trustee for administration of the bankruptcy proceeding) would constitute an acceptable infringement under international law of the sovereignty of the foreign state concerned.*”⁵⁰⁷ As the punitive MoCs are not granted against sovereign assets in an enforcement litigation for commercial judgment debt, rather against its officials, this kind of MoC is not discussed further. For the purpose of this dissertation, the pre-judgment and the post-judgment MoCs are analyzed as follows.

3.6.1. *Prejudgment MoCs*

As the name suggests, prejudgment attachment means the attachment made before the entry of judgment and/or recognition of the arbitral award, against the assets irrespective of their use or intended use.⁵⁰⁸ Yang distinguished between the post judgment MoCs and the prejudgment attachments as the former is granted *in rem* whereas the latter are *in-personem*.⁵⁰⁹ The law of foreign sovereign immunity is still under development when it comes to prejudgment MoC. The international conventions and national legislations take stringent position for prejudgment MoC whereas few case laws show the grant of prejudgment. The ILC draft (1991) had no express provision in this regard but its commentary implied a bar on prejudgment attachment.⁵¹⁰ On the other hand, the ILC Report (1999) elaborated the pre-judgment attachment available in case of advance or *ad-hoc* consent thereto, as and when the international law permitted, against the earmarked assets for the debt, the assets owned by the respondent State agency having separate legal entity.⁵¹¹ Some jurisdictions allow prejudgment attachment only because the assets in question are in control of the forum State. This kind of jurisdiction is called *jurisdictio ad*

International Crimes? Some Comments on the Congo v. Belgium Case (2002) 13 European Journal of International Law 853.

⁵⁰⁵ The SIA 1978 (n 37) sec 13 (1).

⁵⁰⁶ Ibid, sec 13 (2).

⁵⁰⁷ *WL Oltmans v. The Republic of Surinam* [1992] the Dutch Supreme Court, 28 September 1990, NYBIL 442 [447].

⁵⁰⁸ *Delaume* (n 453), 270

⁵⁰⁹ *Yang* (n 20) 385.

⁵¹⁰ The ILC Draft 1991 (n 71) commentary to art 18 (1), para 4.

⁵¹¹ The ILC Report 1999 I (n 232) para 80.

fundandum’ which is considered exorbitant by some States. The Constitutional Court of South Africa granted prejudgment attachment on the ground that the court’s jurisdiction was based on the presence of the assets within its territory. It relied on the commercial nature of the transportation contract as the source of the dispute.⁵¹²

Notwithstanding the gradual inclination toward restrictive immunity from execution, the prejudgment attachment orders are still allowed conservatively. The FSIA (1976) of the US refuses prejudgment attachment to avoid political disturbance in diplomatic relations of two States. Most of the international and national legal instruments require express waiver of immunity from execution for prejudgment attachment against sovereign assets. The ECSI (1972), the FSIA (1976) of the US, the SIA (1978) of the UK take a narrow approach permitting prejudgment attachment only when the State waives its immunity from execution. Prejudgment MoCs can be based only on express waiver from prejudgment MoCs in the agreement whereas for post judgment attachment, waiver can be explicit or implied.⁵¹³

The courts are found more hesitant in granting prejudgment attachments than the final execution ones. The domestic courts are open to deny the defense of immunity from execution for final execution orders in case of commercial activities, waiver from immunity, consent to the proceedings, *etc.* However, for the pre-judgment attachment orders, the courts take a more stringent position. For instance, for prejudgment attachment, express waiver is needed whereas for the final execution, waiver can be explicit or implied.⁵¹⁴ The prejudgment attachments are permitted only with the written consent of the State.⁵¹⁵ Again, different practices are available at the different jurisdictions, for instance, the French court did not distinguish its power to grant pre and post execution orders.⁵¹⁶

In *Libra Bank Ltd. V. Banco Nacional de Costa Rica*, the US Court of Appeals for the Second Circuit granted a prejudgment order relying on a promissory note issued by Costa Rica, waiving all claims of immunity in all legal proceedings.⁵¹⁷ Subsequently,

⁵¹² *Forth Tugs v. Wilmington Trust* [1987] 3 SLT 153. *Kaffraria Property Co (PTY) v. Govt. of Zambia* [1980] SALR No. 2.

⁵¹³ Yang (n 20) 387; discussed in 3.5.2 of this dissertation.

⁵¹⁴ *Ibid.*

⁵¹⁵ The UN Convention 2004 (n 41) art 18; the ECSI 1972 (n 41) art 23; the SIA 1978 (n 37) sec 13 (2) (a); the FSIA 1976 (n 37) sec 1610 (b).

⁵¹⁶ *Islamic Republic of Iran* (n 475); *Caisse v. Societe Midland, France* [1983] 77 ILR 524.

⁵¹⁷ *Libra Bank Ltd. v. Banco Nacional de Costa Rica* [1982] 2nd Cir, 676 F 2d 47.

pending the litigation before the Courts of Appeal, Costa Rica closed the accounts in New York and the Court denied to order Costa Rica to return the fund in the US.⁵¹⁸ The US courts also allowed a mandatory injunction against foreign State agency to extend a letter of credit in favor of the private judgment creditor as a preventive MoC.⁵¹⁹

The UK courts reasoned the prejudgment attachments stating that such orders were not in contrary to international law given the commercial assets.⁵²⁰ The French and the Italian courts also granted prejudgment attachment to the extent of preventing the transfer from their territories. The French law's requirement of nexus between the assets and the claim makes the jurisdiction of interlocutory orders limited. The German court limited such orders against the State agency with separate legal entity only and avoided granting pre-judgment MoCs against the State itself.⁵²¹ The New Zealand court denied distinguishing between the question of immunity from execution and the immunity from adjudication, therefore, granted the measures of restrains against the foreign sovereign.⁵²² With the increasing number of execution litigations, the courts are being innovative in grating the MoCs against the foreign sovereign assets,⁵²³ and thereby resulted as inconsistency and uncertainties. Despite the restricted position of international conventions, national legislations and the case-laws, this dissertation argues in favor of the pre-judgment MoC with possible safeguards protecting the converse interests of the parties.

3.6.1.1. The search or discovery order and the conservatory orders

Because of confidentiality between the sovereign owner and the holder of sovereign issues, judgment creditors face challenges in locating sovereign assets within the territory of the forum State. In some cases, they apply to the court for a search order

⁵¹⁸ [1983] SDNY 570 F Supp 870, [885].

⁵¹⁹ *Attwood Turkey Drilling v. Petroleum Brasileiro* [1989] 5th Cir 875 F 2d 1174.

⁵²⁰ *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] UK Court of Appeal 64 ILR 111; *Hispano Mercantil SA v. Central Bank of Nigeria* [1979] UK Court of Appeal, Civil Division 25 April 1979 64 ILR 221, 2 Loyd's Rep. 277.

⁵²¹ *Re Prejudgment Garnishment against National Iranian Oil Co.* [1984] German Federal Constitutional Court judgment on 12 April 1983 ILM 22, 1279.

⁵²² *The New Zealand Wine Box Case, Controller and Auditor General v. Sir Ronald Davidson* [1996] the New Zealand Court of Appeal, NZLR 517 and 319.

⁵²³ For instance, although the order of discovery is not granted against the foreign sovereign, the US Supreme Court upheld the order of discovery against the Republic of Argentina in the case of *Republic of Argentina v. NML Capital Ltd.* [2014] the US Supreme Court 134 S.Ct. 2250 and [2014] 134 S.Ct 2819 (2014).

or discovery. According to banker-client confidentiality, banks usually deny providing any information on their clients including the sovereign ones. With order, the judgment creditors can collect information of the sovereign bank accounts, their balance, and past uses. Such order is known as *Anton Piller* order in common law jurisdictions.⁵²⁴ According to this order, the plaintiffs receive an order from the court to discover the assets of the defendant State as evident for litigation and/or the subject matter of the freezing injunction without prior notice given to the defendant. This is also an *in-personem* order, the violation of which constitutes contempt of court.

Upon the discovery of assets, the judgment creditors need to ensure the assets are not being removed from the jurisdiction of the forum State. Two common prejudgment MoCs are found in this case: the conservatory seizure also known as *Saisie conservatoire*, and the freezing order also known as the temporary injunction [called as the *Mareva* injunction in common law jurisdictions]. As the name suggests, it is granted as an interim measure to preserve the asset in question and prevent the defendant State from removing the asset from the court's jurisdiction.

The ECSI (1972) duly recognized the purpose of the conservatory seizure *i.e.*, to ensure the final execution of the judgment.⁵²⁵ Therefore, this kind of order is granted only for the asset which is involved in dispute. The judgment creditors seeking a conservatory order need to prove an arguable case along with an irreparable loss if the order is not granted.⁵²⁶ They are required to show an imminent risk of removal of the asset from the jurisdiction of the court before the settlement of the case.⁵²⁷ On the other hand, in order to prevent the court from granting such order, the foreign State needs to show the serious interference with its sovereign functions pursuant to the prejudgment MoCs.⁵²⁸

There is another order called the *saisie-arrêt*. It means the attachment order against the asset held by a third party for the benefit of the claimant. The major difference between these two is that the first order is given even when the asset is in possession

⁵²⁴ *Anton Piller v. Manufacturing* [1976] EWCA Civ 12, Ch 55.

⁵²⁵ The Explanatory Report on the ECSI 2006 (n 181) para 106, commentary on art 26.

⁵²⁶ *Coalition for Reform and Democracy (CORD) v. Kenya National Commission on Human Rights, Kenya* [2014] petition on 628 and 630 of 2014, para 60.

⁵²⁷ Fox (n 5) 372.

⁵²⁸ Hans Van Houtte, 'Towards an Attachment of Embassy Bank Accounts' (1986) 19 *Revue belge de droit International* 70.

of the State, therefore it is an *in personem* order. On the other hand, the latter is granted against the third party holding the assets as an *in-rem* order. Nevertheless, in both cases, authority of the State reduces over the asset to a certain extent such as, disposal or removal of the asset from the territory of the forum State or creating new encumbrances thereover.⁵²⁹

Another form of prejudgment MoC is the freezing order. It is available for *in-personem* action between two private persons, legal or natural. The Ontario Court of Appeal defined the same as an interlocutory, discretionary equitable remedy to the plaintiff, granted in exceptional circumstances, pending the final determination of the dispute.⁵³⁰ According to this order, the court would freeze the asset of the debtor to require him to keep all his assets within the control of jurisdiction. Before giving the right to lien over the assets of the debtor, the court measured the balance of convenience to the parties as to the irreparable damage to the plaintiff from the removal of assets and the inconveniences of the debtor from not being able to transfer the assets at his intention. Such an approach of the court brings the question of interpretative tools such as principle of proportionality discussed in the fifth chapter of this dissertation.

The difference between the freezing injunction and the conservatory seizure is that the scope of the former covers all the assets within the territorial control of the jurisdiction whereas the later has restricted scope of only the asset in connection with the dispute and/or the claim. In the case of *Aetna Financial Services Ltd. v. Feigelman*, the Canadian Supreme Court granted the freezing order in limited cases where “*there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction.*”⁵³¹ Because of the broader scope, the freezing order is granted in exceptional cases. It becomes rarer in cases involving sovereign interests. It was briefly granted against the Central Bank of Nigeria in multiple cases.⁵³² While deciding whether the freezing order should be passed against sovereign assets, Justice Saville emphasized on the prior determination of the question of immunity instead of

⁵²⁹ Stefaan Voet and Pieter Gillaerts, ‘Cross Border Enforcement of Monetary Claims- interplay of Brussels I, A Regulation and National Rules’ (National Report University of Maribor Faculty of Law, August 2018), 2.

⁵³⁰ *R v. Consolidated Fastfrate Transport Inc.* [1995] 40 CPC 3d 160.

⁵³¹ *Aetna Financial Services Ltd. v. Feigelman*, [1985] Supreme Court of Canada 1 SCR 2.

⁵³² *Trendtex v. Central Bank* [1977] QB 529, [572]; *Hispano* (n 552), [279-280].

discharging the petition for freezing order as an interlocutory matter.⁵³³ Even after the determination of immunity questions, the standard of proof was higher for the cases against the sovereign debtor. Donaldson MR refused the judgment creditor's prayer for a freezing order against the Egyptian government. He reasoned his judgment relying on the absence of "*solid evidence that a major friendly foreign state with funds in this country was intending to remove them simply to avoid paying an arbitration award, albeit one for a quiet for large amount.*"⁵³⁴

Another form of prejudgment MoC is the restraining order against the State disabling it from avoiding the enforcement litigation. It is requested by the plaintiff to the court to prevent the abscond of the defendant from the jurisdiction of the court to avoid the enforcement of the judgment. Such order is granted as an interim measure pending the enforcement proceeding, against the body of person.⁵³⁵ Because of the nature of this interim order, the courts are reluctant to grant such prejudgment MoCs against the defendant State in the enforcement cases of commercial judgment as it is passed against the officials of the State instead of its assets. Nevertheless, Yang argued that along with the *Mareva* injunction, this order is filed by the plaintiff to prevent the officials of the defendant State from leaving the territory of the forum State.⁵³⁶ This remedy may commonly be available for the tax disputes.

3.6.1.2. The anti-suit injunction and the security of cost

Pending the enforcement litigation, the judgment creditor requires protection from the vindictive action of the defendant State to vitiate the enforcement attempts. One possible risk is to sue the judgment creditor or other concerned stakeholder in the national court of the defendant State. The anti-suit injunction gives protection to the judgment creditor from the apprehended risk. Another risk of the judgment creditor is to have the paper judgment despite the MoC being granted by the court. Deposit of security for cost by the defendant State at least gives protection to the judgment creditor as to the recovery of its cost of enforcement litigation.

The anti-suit injunction is an *in-personem* order issued by the court against a party to the litigation to refrain the party from litigating simultaneously in another

⁵³³ *A Company Ltd.* (n 22), [524-525].

⁵³⁴ *SPP (Middle East) Ltd.* (n 149).

⁵³⁵ F.M. Auburn, 'Ne exeat Regno' (Nov. 1970) 28(2) *The Cambridge Law Journal*, 183.

⁵³⁶ Yang (n 20) 385.

jurisdiction.⁵³⁷ This kind of order is popular in the US as the courts therein do not hesitate to order the subjects before its jurisdictions from any actions even though those activities are taken place outside the territory of the forum State. For this reason, these kinds of orders are also called extra-territorial injunctions. In the case of *the Republic of the Philippines v. Westinghouse Elctro. Corp.*,⁵³⁸ the District Court of New Jersey ordered the Philippines authority not to continue any proceeding concerning the same subject matters in its national courts. The litigants applied for this injunction based on the allegation that the Philippine government threatened the witnesses of the case with the litigations commenced in the domestic court of Philippines. The Third Circuit Court of Appeal prevailed the order of the district court stating that the Philippines failed to defend the evidence presented by the litigant and thereby constituted as waiver of the argument at the appeal stage.⁵³⁹

Such orders are inconsistent with the international comity, a common law concept, followed by the US courts.⁵⁴⁰ The US Supreme Court defined comity in *Hilton v. Guyot*:

Comity [...] is the recognition which one nation allows which its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.⁵⁴¹

Therefore, when the national court passes any order to intervene in the judicial functions of another sovereign, it violates the international comity. Such an order implies the extent of the court of forum State exercising its power while granting MoCs against the foreign sovereign. As a measure of safeguards, the national courts need to balance various interests of the litigant, the sovereign defendant,⁵⁴² as well as the future implications of such decisions such as the reciprocity principle between the forum State and the defendant State, the divergence from the established comity.

⁵³⁷ George A. Bermann, 'the Use of Anti-Suit Injunctions in International Litigation' (1990) 28 Columbia Journal of Transnational Law 589, 589.

⁵³⁸ [1994] 43 F 3d 65 (3rd Cir).

⁵³⁹ *The Republic of the Philippines v. Westinghouse Elctro. Corp.* [1994] 43 F 3d 65 (3rd Cir) [71].

⁵⁴⁰ William S. Dodge, 'International Comity in American Law' (December 2015) 115(8) Columbia Law Review 2071.

⁵⁴¹ [1895] 159 US 113 [163-64].

⁵⁴² Tariq Mundiya, 'Extraterritorial Injunctions against Sovereign Litigants in US Courts: The Need for a Per Se Rule' (1995) 44(4) International & Comparative Law Quarterly 893, 895.

The engagement of enforcement litigation against the foreign sovereign involves a lot of financial resources with some uncertainties as to the compliance of the court order on the part of the defendant State. In the case of *Republic of Costa Rica v. Erlanger* (1876), Mellish LJ justified this MoC by stating, “*The plaintiff was a foreign republic having no property in this country, and if the defendant succeed they will probably not get their costs unless they have security.*”⁵⁴³ In the same case, James LJ commented, “*under the old practice no doubt the rule of the Court of Chancery was that if the plaintiff was abroad whether he was a sovereign, sovereign state or an individual, he should give security for costs.*”⁵⁴⁴ Such practice is found in both the UK and Australia. The Australian court commented on the amount of security for costs. It mentioned the amount to be equivalent to the costs necessary for the process of registering the judgment in foreign country and expenses for executing the same.⁵⁴⁵ One common precondition for this prejudgment MoC is the unavailability of defendant’s assets in the territory of the forum State,⁵⁴⁶ regardless of the diplomatic relation between the forum State and the defendant State.⁵⁴⁷

The prejudgment MoCs interfere with the public functions of the defendant State. Nevertheless, the findings of this dissertation suggest that the interference can be reduced with the establishment of *prima facie* case of commercial use of the asset in question. Instead of granting an umbrella injunction covering all the possible assets of the defendant State, the prejudgment MoC can be limited to the targeted asset only. Furthermore, interests of the parties to the enforcement litigation can be balanced with the application of appropriate interpretative tools which has been discussed in detail in the fifth chapter.

3.6.2. *Post-judgment MoCs*

The post-judgment MoCs are granted against the sovereign assets in question for the final execution of the judgment. The above chart [figure- 2] illustrates the common post-judgment MoCs. Notwithstanding the narrow approach of the court in granting the MoC against foreign States, there are usually two types of post-judgment MoCs

⁵⁴³ [1876] 3 Ch D 62 [69].

⁵⁴⁴ *Republic of Costa Rica v. Erlanger* [1876], 3 Ch D 62 [68].

⁵⁴⁵ *Connop v. Varena Pty Ltd* [1984] 1 NSWLR, 71.

⁵⁴⁶ *Ministry of Foreign Affairs of the Republic of Italy v. Paula Simeone*, [2016] Docket number: D 4356/2011 District Court of Queensland, (13 April 2016, 24 June 2016) p 25.

⁵⁴⁷ *Re Independent State of Papua New Guinea* [1999] 2 Qd R 365

granted by the courts depending on the control of the asset and the rights of third party. If the defendant State has control over the asset, the attachment order is given. Alternatively, if the asset is at the control of a third party and/or encumbered with any third party's right, the garnishment order is ordinarily granted.

3.6.2.1. Attachment

An attachment order is made as one of the final measures to enforce the judgment at the post-judgment stage. The purpose of this order is to sell the asset in question and apply the sale proceeds to discharge the judgment debt.⁵⁴⁸ Under the attachment order, the defendant State loses its ownership and control over the asset. For the attachment of asset, two issues are considered by the court *i.e.*, location of the asset and the ownership. A relevant case in the first issue is *Peterson v. Islamic Republic of Iran*,⁵⁴⁹ the US court denied passing the attachment order, because of the funds sought for attachment was owed to Iran in France.

The second issue could be discussed in light of the case of *Crystallex International Corporation v. PDV Holdings*.⁵⁵⁰ In this case, the private judgment creditor targeted the assets of State-owned oil and gas company including the oils to be sold by PDV Holdings to a private buyer. Despite the other legal issues involved in this case, such as attachability of the assets of SOE (discussed later), the claimant expected to attach the oil and sell it otherwise (privately or publicly) to recover their judgment value. It was hypothetically argued that if the oil in question were sold under the FOB (free on board) Venezuela shipping terms, the oil would have not been subjected to attachment order,⁵⁵¹ as in FOB contracts, the title to the property was shifted upon the loading of the oil in ship at the port of origin. In case of refusal of the attachment order, the claimant also requested for the garnishment order for final enforcement of the judgment.

3.6.2.2. Garnishment

⁵⁴⁸ Voet and Gillaerts (n 529), 2.

⁵⁴⁹ [2010] 627 F. 3d 1117, 1131-32 (9th Cir).

⁵⁵⁰ [2017] Case No. 16-CV-1007 (D.Del.) (the US).

⁵⁵¹ Kenneth Reisenfeld, Mark Cymrot and Joshua Robbins, 'Suits Against Foreign Sovereigns: Mixed Bag for Energy' Cos. Law360, (17 January 2017 New York)

<<https://www.bakerlaw.com/webfiles/SuitsAgainstForeign.pdf>> accessed 4 April 2021.

Garnishment is a popular post-judgment MoC for the recovery of judgment debt. For this order, the asset in question is in possession of a third party who owes to the defendant State. Under this order, the executing court orders the third party to pay any deliverables, [owing to the debtor State] to the judgment creditor instead of the debtor State.⁵⁵² In the case of *Bennett v. Islamic Republic of Iran*,⁵⁵³ the Ninth Circuit of the US Court of Appeal permitted garnishment order against two US citizens (known as the garnishee) who owed debt to Iran. Pursuant to this order, the garnishees were required to pay the judgment creditor instead of Iran. For the purpose of the garnishment order, the court considered the purpose of the asset e.g., the taxes and the royalties on which the order was passed instead of the source of the assets.⁵⁵⁴ It was also granted in a series of execution cases against Congo. The judgment for default in debt of USD 6.5 million was levied against the royalties and taxes of Congo accrued from certain oil companies where the oil companies were ordered to pay the amount of taxes to the judgment creditor, instead of Congo until the discharge of judgment debt.⁵⁵⁵

The questions of assets owned by the SOE and the territorial location thereof play vital role before granting garnishment order. The French court ignored the separate entity of the SOE in law and upheld the garnishment order against the assets of the SOE in the cases filed against the Soviet Trade Delegation.⁵⁵⁶ In the *FG Hemisphere* case, the US court required the assets to be in US for the garnishment order,⁵⁵⁷ whereas in the case of *Neustein v. Indonesia*, the Austrian court granted the garnishment order in cases when the assets was outside its jurisdiction.⁵⁵⁸ Hence, the contradictory practices are available regarding garnishment order, as to the ownership of the asset, territorial nexus of the asset and the forum State, etc. Therefore, nexus is a pre-requisite for the post-judgment MoC.

3.7. Conclusion

⁵⁵² *Alcom* (n 394); *Phillip Brothers v. Sierra Leone*, England, 1993/1994 [1994] 1 Lloyd's Rep. 111.

⁵⁵³ [2002] 313 F.3D 83.

⁵⁵⁴ *Connecticut* (n 294) [247], [251].

⁵⁵⁵ *Ibid.*; *AF-CAP* (n 52), [364]; *FG Hemisphere v. Congo* [2006] 5th Cir 455 F3d 575.

⁵⁵⁶ *NIOC Revenues Case*, Germany [1983] 65 ILR 215 [221]; *Ground AI, NIOC Legal State Case*, Germany [1980] 65 ILR 199.

⁵⁵⁷ *FG Hemisphere* (n 555) [586].

⁵⁵⁸ *Neustein v. Indonesia* [1958] Oberster Gerichtshof, 6 Aug 1958, 65 ILR 3 [9].

Historically, States enjoyed more immunity from execution in enforcement cases than jurisdictional issues. For instance, the ILC Draft (1986) entailed no hardship on the State. It only limited to the adverse impact on the merits of the case.⁵⁵⁹ As a consequence, despite having a judgment against the foreign sovereign, courts were reluctant to order any forcible measures against foreign sovereign assets for the enforcement of the judgment. The defendant State was also not required to deposit any cost of the proceeding.⁵⁶⁰ However, the legal dynamics have changed with the vast engagement of State in non-sovereign activities *i.e.*, *jure gestionis*. Now, international as well as national legislation permits enforcement of judgment against sovereign assets based on the commercial or non-sovereign purpose.

The majority of the deciding courts examine immunity from execution considering two substantive issues: ownership of the sovereign asset in question and its attribution. Ownership is a complex web of legal, social, and economic aspects of property rights. Hence, the economic analysis of ownership including the holders' right, beneficial interest, entitlement of residual rights is significant for the purpose of execution. It also questions how the court analyzes ownership to decide whether the assets are immune or not from execution. Sovereign ownership is a more complex web of property rights than a mere documentary title. Therefore, ownership should not be taken as a single unit but as a divisible combination of property rights. The rights of control for physical control as well as control over its income should be taken as a trait of ownership.

The enforceability of sovereign assets varies according to the approach taken by the courts in deciding the sovereign immunity questions. The approaches toward sovereign assets are diverse in accordance with the questions of forum State. For attribution, various tests such as nature test, purpose test, commercial transaction test, *etc.* have come out from the analysis of literature without any established practice of their application. The commercial purpose test has a comparatively settled footing although the decisions are not uniform.

The validity of the immunity in question lies in international (customary) law and/or the national laws of the forum States. However, procedural matters are determined

⁵⁵⁹ The ILC Draft 1991 (n 71) art 22 (1).

⁵⁶⁰ *Ibid* art 22 (2).

according to the law of the forum (*lex fori*). The varieties in the procedural standards result at the inconsistent practices of domestic courts because of the underlying differences in their *lex fori*.⁵⁶¹ Therefore, cases regarding each specific asset would give a detail view of the judicial approach. Where this chapter makes an overall analysis of substantive and procedural issues of enforcement litigation, the next chapter scrutinizes the case laws under the heads of immune and non-immune assets followed by the commonly targeted sovereign assets.

⁵⁶¹ Bankas (n 16) 341.

Chapter 4: Sovereign assets under scrutiny

4.1. Categories of sovereign assets and their interpretation

Sovereign assets can be classified into two broad categories: (a) public assets of the State (*domaine public*) and (b) assets held by the State in a private capacity (*domaine prive*).⁵⁶² The assets held in a private capacity are usually non-immune assets whereas the public assets enjoy immunity from execution. The ILC Drafts (1982) listed four kinds of assets as immune, namely (a) diplomatic assets, (b) military assets (c) assets of the central bank and (d) assets of a State monetary authority.⁵⁶³ The ILC Drafts (1991) had similar assets as immune but added two more as the cultural heritage and archives of a State and the assets forming part of an exhibition of objects of scientific, cultural, or historical interests.⁵⁶⁴ In addition, the ILC Draft (1982) mentioned certain assets as non-immune assets such as assets used for commercial purposes or in commercial activity, assets taken in violation of international law, and mixed financial accounts.⁵⁶⁵

The list of non-immune assets confirms the deviation from the previous rule of absolute immunity of sovereign assets from execution. Fox questioned whether the presumption of public use of assets should be removed to determine which categories of the assets in question belong to. She advocated for a separate list of assets with immunity so that evidence would be redundant for them.⁵⁶⁶ Zdobnoh and Vark continued the argument that it is the characteristics of the assets targeted by the judgment creditor which determine the issue of immunity from execution.⁵⁶⁷ For the non-immune assets, different jurisdictions accept different tests and various levels of evidence. The common test for the non-immune category is commercial use. Varieties are also found for a mixed account and pre-judgment attachments discussed in the third chapter before. For assets of the State agency, the separate legal standing and control of the defendant State in the management of the State agency matter the most.

⁵⁶² Badr (n 20) 108.

⁵⁶³ The ILC Draft 1982 (n 142) art VIII.

⁵⁶⁴ The ILC Draft 1991 (n 71) art 19 (1).

⁵⁶⁵ The ILC Draft 1982 (n 142) art VIII (A).

⁵⁶⁶ Fox (n 5) 401.

⁵⁶⁷ Zdobnoh and Vark (n 378), 166.

In view of the above, this chapter starts with the list of immune assets and non-immune assets as identified in different legal instruments. Finally, it focuses on the sovereign assets located outside its territory or beyond any territorial limit, such as sovereign wealth funds, receivables from a third party, intellectual properties owned by the State or State instrumentalities, *etc.* Where the previous chapter discussed the use of nature and purpose test from a procedural perspective, this chapter aims at analyzing the commercial or public purpose/nature of the assets with case-laws for assets listed as immune/non-immune and commonly targeted for enforcement.

4.2. Immune assets

Several assets are listed as immune in both international instruments and various national legislations [discussed below]. The scholars also supported the approach of listing assets as immune. The list of immune assets proposed by the ILA Draft (1983) included (i) assets and bank accounts in the name of diplomatic missions and consular posts under the VCDR (1961) and the VCCR (1963) (ii) assets with a military purpose (iii) assets of the central bank and other monetary authorities of State.⁵⁶⁸ The ILC Draft (1991) had the same three categories of assets with two additional types, *i.e.*, (iv) the cultural heritage or the archives of the foreign State not intended for sale (v) scientific, cultural, and historical objects for exhibition, not intended for sale.⁵⁶⁹ Finally, all these five categories of assets are also found in the UN Convention (2004) as immune from MoCs.⁵⁷⁰

In relation to the adherence of immune assets in some national legislations, three approaches are available. The first approach is to restate some of the assets from the list in various national legislations and in some cases, add new assets to the list. Australia, Russia, France, Belgium, *etc.* follow this approach. For instance, the FSIA, 1985 (Australia) recognizes diplomatic and military assets as immune.⁵⁷¹ The Law on Jurisdictional Immunity, 2015 of Russia also includes all the five categories of assets, mentioned above as enjoying immunity by virtue of statutory presumption of their

⁵⁶⁸ The ILA Draft 1982 (n 142) art VI (c).

⁵⁶⁹ The ILC Draft 1991 (n 71) art 19.

⁵⁷⁰ The UN Convention 2004 (n 41) art 21 (1), stating “*The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c).*”

⁵⁷¹ The FSIA 1985 (n 166) art 31 (4), “*A waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates the property to which the waiver applies.*”

sovereign purpose.⁵⁷² The Judicial Code of Belgium also declares the immunity of cultural objects of foreign States and the assets of the central bank of foreign States.⁵⁷³ The Code of Civil Enforcement Procedure of France includes one additional type of sovereign asset as immune, *i.e.*, tax or social debt of the State.⁵⁷⁴

The second approach is to accept the international law prevailing from time to time in their national legal framework by reference, such as Germany.⁵⁷⁵ The third approach is to expressly mention immunity to certain assets and leave the others at judicial interpretation and executive discretion. The SIA (1978) of the UK states the immunity of the assets in the name of the central bank of a foreign State whereas for the other assets,⁵⁷⁶ it adopts the commercial purpose test.⁵⁷⁷ China has its single specific domestic legislation declaring absolute sovereign immunity to the central bank's assets.⁵⁷⁸ For other assets, the Chinese courts follow the interpretation provided by the executive body of their government.⁵⁷⁹ Nevertheless, although these assets are listed as immune, there are judicial decisions from different jurisdictions declaring them as non-immune.

4.2.1. *Assets and bank account of the diplomatic and consular mission*

The diplomatic assets including the bank accounts in the name of diplomatic missions, diplomatic premises, and consular offices are immune under the VCDR

⁵⁷² The Federal Law on Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation (n 274), art 17 (3). The list includes "*the properties use for diplomatic or military purposes, items of cultural heritage or achieves that are not intended for sale, property that forms part of various scientific, cultural, or historical exhibitions not intended for sale and property of the central bank or another supervisory body of a foreign state that is responsible for bank supervision.*"

⁵⁷³ The Judicial Code 1967 (n 286) art 1412 *ter* and *quarter*.

⁵⁷⁴ The Code of Civil Enforcement Procedures 1889 (n 284) art L.111-1-2 (incorporated by the *Sapin II* Law of 2016) (n 269). "Article L.111-1-2 (3): the following property is in particular considered as property specifically used or intended to be used by the State for government non-commercial purposes: (a) property, including any bank account which is used or intended to be used in performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or its delegations to organs of international organizations or to international conferences; (b) property of a military character or properties used or intended to be used in the performance of military functions; (c) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (d) property forming part of an exhibition of objects of scientific, cultural or historical interests and not placed or intended to be placed for sale (e) tax or social debts of the State."

⁵⁷⁵ The Basic Law 1949 (n 278) art 25, except the cases where the ECSI 1972 (n 41) applies.

⁵⁷⁶ The SIA 1978 (n 37) sec 14.

⁵⁷⁷ *Ibid.* sec 13.

⁵⁷⁸ Law of the People's Republic of China on Immunity of the Property of Central Bank from Compulsory Judicial Measures (n 289).

⁵⁷⁹ Discussed in 2.6 of this dissertation; also see Dahai Qi, 'State Immunity, China and its Shifting Position' (2008) 7 (2) Chinese Journal of International Law 307.

(1961) and the VCCR (1963).⁵⁸⁰ Given the vast number of ratifications of these two international instruments, immunity to the diplomatic assets stands on a strong international footing as well as national legislations.⁵⁸¹ The diplomatic assets have also been accepted as immune under the UN Convention (2004) and other national legislations, because of the clear mutual benefits.⁵⁸² However, the extent of immunity varies according to the verities existing in diplomatic relations such as permanent missions, visits by the head of the State, and/or government, special missions, participation of foreign States' representatives in *ad hoc* or periodic conferences, etc.⁵⁸³ Nevertheless, immunity is unequivocally granted to the permanent missions and their assets from any MoCs.

Houtte argued only the assets located within the embassy as immune under article 23 of the VCDR (1961). Such rigid interpretation of the VCDR (1961) raises concerns about the assets outside the diplomatic mission such as its bank account in the receiving State's bank. On the contrary, Salmon brought forward article 30 (2) of the same Convention which protected any diplomatic asset regardless of its location. Fox supported Salmon. Her argument was focused on the due function of the diplomatic mission without any impediment from execution.⁵⁸⁴

Despite the immunity in international conventions and national legislations, diplomatic assets may be held as non-immune subject to certain conditions. Such as firstly, whether there is any waiver of immunity from execution as to the diplomatic assets and secondly, in absence of any waiver clause to the satisfaction of the court, whether the diplomatic asset is used for commercial purposes. The first issue raises concern of the scope of the waiver clause and its drafting. The second issue has challenges of the extent of court's investigation to the use of diplomatic assets, especially in the case of the mixed use of the diplomatic asset, and the interference cause in the diplomatic functions due to the investigation and/or MoC.

⁵⁸⁰ Discussed in 2.4.3.2 and 2.4.3.3. of this Dissertation.

⁵⁸¹ According to the UN Treaty Collection, 193 States have ratified the VCDR 1961 (n 191). <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=III-3&chapter=3&clang=_en> accessed 13 November 2021.

⁵⁸² Rosalyn Higgins, *The Abuse of Diplomatic Privileges, and Immunities: Recent United Kingdom experience, Themes and Theories* (Oxford University Press 2009) 383.

⁵⁸³ Ibid. fn 1; see also the Convention on Special Missions, Annex to the UN General Assembly Resolution, 2530 (XXIV) (08 December 1969).

⁵⁸⁴ Fox (n 5) 405.

4.2.1.1. Waiver clause for diplomatic assets

In order to remedy the creditor, diplomatic means are proposed to resolve, and/or the creditors may obtain a waiver of immunity from execution. However, such practice is rare. In *A Co. Ltd v. Republic of X* (1989),⁵⁸⁵ the UK court denied the request for MoCs against the diplomatic premises, private residence of the diplomatic agents, despite the contractual waiver of immunity from both jurisdictions and execution. The European cases are found to be consistent in favor of the immunity of diplomatic assets regardless of the waiver clause. In *Russia v. NOGA* (2000),⁵⁸⁶ the Regional Court of Appeal in Paris did not allow the attachment of diplomatic bank accounts of the Russian embassy in France despite the express waiver of immunity from execution.

The French Court of Cassation in *NML Capital v. Argentina* (2011),⁵⁸⁷ set a higher requirement of waiver for granting MoCs against the diplomatic assets. The waiver should not only be express but also specific to diplomatic assets. The court observed, “*according to customary international law, diplomatic missions of foreign states have, for the operation of the representation in the receiving state and the needs of its mission of sovereignty, an autonomous immunity from execution which can only be waived by an express and specific waiver.*”⁵⁸⁸ It further added:

Funds assigned to diplomatic missions enjoy a presumption of public utility [...] embassy bank accounts are presumed to be allocated to the performance of the functions of diplomatic missions so that it is on the creditor who intends to seize them to prove that the property would be used for a private or commercial activity.⁵⁸⁹

Such a higher standard of requirements for a waiver clause is a *de facto* impossibility. Nevertheless, the judgment creditor may succeed with earmarked assets. The House of Lords of the UK allowed attachment only for earmarked assets.⁵⁹⁰

4.2.1.2. Investigation of the use of diplomatic asset

⁵⁸⁵ [1990] 2 Lloyds Rep. 520; 87 ILR 412.

⁵⁸⁶ *Federation de Russie v. Compagnie NOGA* [2000] Cour d’appel de Paris [CA] [Regional Court of Appeal] JurisData No. 2000-120182. 10 August 2000.

⁵⁸⁷ *NML Capital* (n 420); *NML Capital* (n 421).

⁵⁸⁸ *Ibid*, translation taken from Kudrna (n 422), 135.

⁵⁸⁹ *Ibid*.

⁵⁹⁰ *The Alcom case* (n 394).

As the waiver of immunity from execution does not guarantee enforcement against diplomatic assets, the commercial use of diplomatic assets is the other option. In order to prove the use of funds in the embassy's bank account, the common practice is to accept the certificate from the ambassador. This certificate and/or affidavit acts as the conclusive proof of the sovereign purpose of the account and is thereby protected from MoCs. Nevertheless, various jurisdictions have diverse opinions regarding the further investigation of the use of diplomatic assets after the certificate from the head of the mission.

The leading case in this regard is the *Philippines Embassy Bank Account Case*⁵⁹¹ before the German jurisdiction. The German Constitutional Court closely reviewed the use of an embassy account to determine its purpose as sovereign or non-sovereign. The German court concluded that the transactions in an embassy account should not be subjected to scrutinization by the courts of the forum State. Instead, its sovereign purpose should be presumed, as certified by the head of the mission. The day-to-day payments for goods and services in relation to the mission did not make the purpose of the accounts commercial. The Swiss court also set up an enquiry for mixed use of diplomatic bank account.⁵⁹²

There are jurisdictions where the certificate from the head of the mission is not conclusive. The court undertakes a further investigation into the use of diplomatic assets. The Supreme Court of Turkey decided that there was no absolute immunity for the accounts; the purpose of using the bank account and the embassy expenses should be evaluated and a decision should be made accordingly. It stated:

Considering Articles 22, 23, and 24 of the Vienna Convention on Diplomatic Relations, enforcement cannot be enforced in respect of a proceeding against a current general bank account of a foreign embassy or consulate which is held for the sole purpose of meeting the expenses and operating costs of the embassy or consulate. While the court should investigate whether the money in the bank account subject to the complaint has this purpose or not, and decide according to the result to be obtained, it is not correct to remove the lien on these moneys with an incomplete examination, and the request for the

⁵⁹¹ The *Philippines Embassy Bank Account Case* (n 113); [1984] BVerfGE 46, 343 [399].

⁵⁹² Fox (n 5) 408.

removal of the lien protection application and the letters regarding the suspension from the voyage regarding the aircraft operating in the commercial field is rejected. While it is necessary to decide, it is wrong to accept the complaint about this by misinterpreting Article 22 of the Vienna Convention.⁵⁹³

In the case of *Alcom Ltd. V. Republic of Colombia* (1984),⁵⁹⁴ the Court of Appeal in London went into deeper interpretation of “running an embassy” as stated in the certificate of the ambassador. The Court of Appeal permitted the enforcement against the embassy account despite its diplomatic nature. It stated that the direct purpose of the balance in the bank account was to buy goods and services that are required to run the embassy. Procurement of stuff was taken as a commercial purpose. During the hearing of leave to appeal to the House of Lords, Sir John Donaldson MR also commented in favor of garnishment order, stating:

The purpose of the money in a bank account can never be ‘to run an embassy’. It can only pay for goods and services to enter into other transactions which enable the embassy to run. Again, I can find no trace of wording the Act [the SIA (1978) of the UK] which could justify the distinction between commercial and consumer activities.⁵⁹⁵

However, the decision of the Court of Appeal in London was reversed in the House of Lords subsequently. The House of Lords held the immunity of the embassy accounts under customary international law unless the accounts were solely earmarked for commercial purposes.

4.2.1.3. Interference in the diplomatic functions

While assessing the use of diplomatic assets, consideration is given to its role in diplomatic function. Any interference in diplomatic duties entitles the asset to be immune. Three practices are visible in this case: no necessity to investigate the possible interference, the presumption of overall interference resulting from MoC

⁵⁹³ [2004] The Court of Cassation of Turkey, 12th Civil Chamber, 2004/6469 E., 2004/13007 K. 25.05.2004.

⁵⁹⁴ [1984] 2 WLR 750.

⁵⁹⁵ *The Alcom* case (n 394), [588-589].

without requiring any specific risk or threat and finally, the assessment of State's specific condition to identify the apprehended interference.

The leading case in this regard is the *Philippine Embassy Account* case (1977) decided by the German Constitutional Court and has been referred by other jurisdictions. In this case, the German court relied on the preamble of the VCDR and article 3 while refusing to dissect the use of bank account for unimpeded functioning of the mission.⁵⁹⁶ In order to evaluate the 'unimpeded functioning' the German Constitutional court did not rely on the financial position of the State, but the sovereign equality of States guaranteed in international law. It opined such protection was granted in international law for abstract risk, thus, it did not require any specific impediment to the defendant State to be caused by MoC. The underlying reason behind this approach is that even when scrutinization in isolation is possible for any case, it constitutes interference with the internal sovereignty of the sending State. The Austrian court followed the second approach. It held, "*international law made the area of protection enjoyed by a foreign State very wide and determined it by reference to the typical abstract danger and not to a specific threat to its ability to function.*"⁵⁹⁷

The US follows the third approach. The US court followed the test of specific interference with consideration of State's context in *Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations* (1992).⁵⁹⁸ In this case, the US court considered the effect of MoCs to the diplomatic functions of the mission in addition to the use of the funds in account. The US court did not allow the execution against the embassy accounts relying on the statement of the defendant embassy that such MoC would not only be in violation of the UN Charter and the VCDR, but also force Uganda to cease its diplomatic operation in the US.

4.2.1.4. Mixed uses of diplomatic assets

The mixed uses of tangible assets such as buildings, diplomatic premises, and equipment are divisible. However, it is a challenge for intangible assets. A common example of intangible assets is the liquid funds in bank accounts, receivables from third parties, etc. The House of Lords of the UK reversed the decision of the Court of

⁵⁹⁶ *The Philippine Embassy Bank Account Case* (n 113).

⁵⁹⁷ *L-W Verwaltungsgesellschaft mb H & Co. KG v. DVA* [1986] Oberster Gerichtshof 30 April 1086, 77 ILR 489.

⁵⁹⁸ [1992] SDNY, 99 ILR 138.

Appeal, London construing the use of money in the bank account in a narrower scope.⁵⁹⁹ They considered the mixed uses of the bank account and decided the uses as indivisible. Lord Diplock reasoned the decision by relying on the certificate of use given by the ambassador. He observed:

Such expenditure (the day-to-day expenditure for the embassy) will no doubt include some moneys due under contracts for the supply of goods or services to the mission, to meet which the mission will draw upon its current bank account; but the account will also be drawn upon to meeting many other items of expenditure which fall outside even the extended definition of ‘commercial purposes’ [...]. The debt owed by the bank to the foreign sovereign state and represented by the credit balance in the current account kept by the diplomatic mission of that state as a possible subject matter of the enforcement jurisdiction of the court is however one and indivisible; it is not susceptible of anticipatory dissection into the various uses to which money drawn upon it might have been put in the future if it had not been subjected to attachment by garnishee proceeding.⁶⁰⁰

The House of Lords commented that commercial purpose exception entitles the attachment of the assets only when it is “solely” used for commercial purposes.⁶⁰¹ Following the precedent of the *Alcom* case, the diplomatic assets having mixed purposes may receive protection in the UK.

In *Benamar v. Embassy of the Democratic and Popular Republic of Algeria* (1989)⁶⁰² the judgment creditor obtained a garnishment order against the letter of credit payment in favor of the Algerian embassy in Rome which was subsequently vacated by the Italian Supreme Court. It held that the funds in favor of the embassy were immune even when it had mixed purposes. It emphasized that unless the sole non-sovereign use was proved, the funds enjoyed immunity. The Austrian court also held the same requiring the judgment creditor to prove that the embassy account, “*has been used exclusively for private purposes and hence [...] is not immune from*

⁵⁹⁹ UK, House of Lords, [1984] 2 A11 ER 6, 7411.11, [182].

⁶⁰⁰ *The Alcom* case (n 394), [604].

⁶⁰¹ *Ibid.*

⁶⁰² [1989] 72 *Rivista de Diritto Internazionale* 416.

execution.”⁶⁰³ This ruling may not necessarily be followed in other [non-diplomatic] State accounts such as procurement, granting loans or other general purposes.

Nevertheless, the US courts follow a different approach. In the case of *Birch Shipping Corporation v. Tanzania*, (1980),⁶⁰⁴ the district court of Columbia [the US] affirmed the attachment of the bank account of the diplomatic mission of Tanzania for the judgment passed against Tanzania. The account was used for both commercial and non-commercial purposes.⁶⁰⁵ The US court justified its order by stating that if any property became immune for “some minor public purpose” use and thereby execution would be denied, it would put the judgment creditor without a remedy. The US court opined that minor use for public purpose would hide the assets majorly used for commercial purposes from attachment.⁶⁰⁶ Hence, segregation of accounts was advised to avoid attachment.

A contrary decision is also found in the US. In *Application of Liberian Easter Timber Corporation v. the Government of Liberia* (1987),⁶⁰⁷ the US court refused to consider the incidental use of the embassy account (argued by the petitioner) to deny its immunity. The US district court of Columbia denied viewing the use of diplomatic account in a piecemeal basis.⁶⁰⁸ The court acknowledged a portion of the funds used for commercial activities related to day-day operation of the diplomatic mission, but it commented, the partial use of funds in commercial activity did not result in or from the loss of immunity for the full account.

Fox summarized the current practice regarding the mixed uses of diplomatic bank account as ‘flux’ and courts were inclined to the diplomatic protection.⁶⁰⁹ Thus, the mixed uses of diplomatic assets receive less protection when it comes to immunity than the diplomatic assets fully used for public purposes. But the diplomatic assets with mixed uses still receive higher protection than other categories of sovereign assets.

⁶⁰³ *L-W Verwaltungsgesellschaft mb H & Co. KG* (n 597).

⁶⁰⁴ [1979] 63 ILR 524 (decided in 1980).

⁶⁰⁵ *Birch Shipping Co. v. United Republic of Tanzania* [1980] D.C. of Columbia 507 F. Supp. 311.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ The LETCO case (n 410).

⁶⁰⁸ *Ibid.*

⁶⁰⁹ Fox (n 5) 409.

Nevertheless, the German court allowed enforcement of the arbitral award against the bank accounts of the Russian embassy in Berlin in *Sedelmayer v. Russia* (2002). The court stated the failure of the debtor State to prove the sovereign use of the assets:

The debtor did argue that the assets [at issue] were earmarked for sovereign aims. However, it merely supported its assertion by arguing that [the bank where the assets were held] was not a private law credit institution managing a ‘normal account’ for the debtor. Nor are the sovereign aims [of the assets] explained in a substantial manner. Hence the debtor enjoys no immunity from execution.⁶¹⁰

MoCs against diplomatic assets are challenging because of direct interference with the sovereign function of the defendant State and the apprehension of adverse impact on the mutual diplomatic relation. Therefore, courts are reluctant to grant enforcement against diplomatic assets. To receive an execution order, the petitioner carries a higher burden of proof to show the sole commercial use of the diplomatic asset. Such an approach leaves the petitioner without any remedy despite the right to execution. A unique decision was given by the Constitutional court of the Republic of Columbia in *Garcia de Borissow and Others v. Supreme Court of Justice, Labor Chamber, Embassy of the Lebanese Republic in Colombia, and Embassy of the USA*.⁶¹¹ The court held the immunity of the concerned embassies and also acknowledged the constitutional rights of the petitioners to enforce their judgments. The constitutional court ordered the executive branch of the State to pursue diplomatic channels to recover the judgment value. However, this type of initiative via judicial order is rare. Such a judicial approach takes a reverse journey to the dispute settlement mechanism in international law. The legal protection for recovery of debt from a sovereign has come a long way from the gun-boat diplomacy. Therefore, when the judgment creditor targets for a diplomatic asset, s/he needs to act cautiously.

4.2.2. *Assets of military forces*

⁶¹⁰ [2002] Oberlandesgericht [Court of Appeal] Frankfurt am Main, 26 September 2002, No. 26 W 101/02, [7]. The debtor was Russian Federation, and the appellant was Franz Sedelmayer (Germany). Translation taken from Albert J. Van den Berg, *Yearbook Commercial Arbitration* (Kluwer Law International 2004) 508.

⁶¹¹ [2016] Constitutional Court of the Republic of Colombia, Judgment SU-44316, 18 August 2016.

The commentary to the ILC draft (1991) stated the military assets as immune but it hardly provided any scope of this type of assets. It only mentioned that the military assets included the assets of the navy, air force and army.⁶¹² The assets owned by the military forces of the defendant State are presumed to be used for sovereign purposes even when the assets are not in use at the relevant time. Thus, these assets are protected from any MoCs. A broader definition of military assets is found in the FSIA 1985 (Australia). It includes any State-owned ships or assets used for military activities or under the control of the military for military or defense purposes.⁶¹³ The Working Group VI of UNCITRAL (2019-ongoing) regarding the judicial sale of ships, drafted a Convention on Judicial Sale of Ships (the Beijing Draft).⁶¹⁴ Article 3 (2) of the Beijing Draft expressly excluded the warships, naval auxiliaries, and other State-owned ships unless used for commercial purposes from the scope of this draft instrument.

In the case of *Wijsmuller Salvage BV v. ADM Naval Services* (1989),⁶¹⁵ Peru delivered a warship to a Dutch company for servicing. The Dutch company applied to the Dutch court for an interlocutory injunction against the warship for payment of its salvage claim. However, the Dutch court denied ordering the injunction on the ground of State immunity to the warship, even during the sea trial of the ship. The absence of commercial use supported the immunity claim of the defendant State. Similar immunity is granted to military aircraft. In another case of the British military aircraft,⁶¹⁶ the military aircraft landed on a Spanish merchant container ship without prior permission of the master and/or the crew of the ship. The ship's crewmen applied to the Spanish Permanent Maritime Court to seize the aircraft of the British Royal Navy for their salvage payment. However, the Spanish court refused to order

⁶¹² The ILC Draft 1991 (n 71) art 19 (1) (e); commentaries on art 19 (1) (e), para 7.

⁶¹³ The FSIA 1985 (n 166) art 3, "*Military property means (a) a ship of war, a government yacht, a patrol vessel, a police or customs vessel, a hospital ship, a defense force supply ship or an auxiliary vessel, being a ship or vessel that at the relevant time, is operated by the foreign State concerned (whether pursuant to requisition or under a charter by demise or otherwise.) or (b) property (not being a ship or vessel) that is: (i) being used in connection with a military activity; or under the control of a military authority or defense agency for military or defense purposes.*"

⁶¹⁴ UNCITRAL, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft. <https://uncitral.un.org/sites/uncitral.un.org/files/wp.90_advance_copy.pdf> accessed 3 April 2021.

⁶¹⁵ [1989] District Court of Amsterdam (19 November 1987), NYIL (1989) 294.

⁶¹⁶ Geoffrey Marston, 'United Kingdom Materials on International Law' (1985) 56 British Yearbook of International Law 363, 462-7; Fox and Webb (n 20) 521.

any salvage payment on the ground of foreign sovereign immunity to the military aircraft.

In *Ministry of Defense v. Cubic Defense* (2004),⁶¹⁷ the Ministry of Defense (MoD) of Iran won an arbitral award against a US military equipment supplier, named the Cubic Defense. The disputed contract was related to the purchase of military equipment. The Cubic defense owned the award to the MoD of Iran. A private judgment creditor of Iran (from another unrelated case) requested the US court for a garnishment order against the Cubic Defense to pay him instead of the MoD in order to satisfy his judgment value. The judgment creditor relied on the determination of *Joseph v. Office of the Consulate Gen. of Nigeria* (1987)⁶¹⁸ and *McDonnell Douglas Corp. v. Islamic Republic of Iran* (1985)⁶¹⁹ in his favor. In the *Joseph* (1987) case, the US court held, “a contract to purchase military supplies, although clearly undertaken for public use, is commercial in nature and therefore subject to the commercial activity exception.” A similar finding was reached in *McDonnell Douglas Corp.* case (1985) against Iran. The US court stated, “the intent of the sovereign to purchase the goods for military purposes does not take the transaction outside of the commercial exception to sovereign immunity.”⁶²⁰ Thus, the act of the MoD in relation with the *Cubic* was held as commercial. In response to the claim of the MoD as to the military ownership over the arbitral award, the US court relied on the FSIA House Report defining the scope of military assets under the FSIA (1976) of the US. It defined the military assets consisting of equipment such as weapon, ammunition, military transports, warships, tanks, and communication.⁶²¹ The definition also included assets those were not of military character but used or essential for military operations, such as, food, clothing, fuel, office equipment, etc.⁶²² Finally, the US court concluded, “even if MOD had argued that the proceeds from the Cubic judgment were destined to fund military activities such as indirect relation between the property at issue and military activities may not be sufficient to make te exemption applicable.”⁶²³

⁶¹⁷ *Ministry of Defense, Iran v. Cubic Defense* [2004] (9th Cir) 385 F.3d 1206.

⁶¹⁸ [1987] (9th Cir) 830 F.2d 1018.

⁶¹⁹ [1985] (8th Cir) 758 F.2d 341, [349].

⁶²⁰ *Ibid.*

⁶²¹ The FSIA House Report No. 94-1487 (1976), 31.

⁶²² Eleanor C. McDowell (ed), *Digest of United States Practice in International Law 1975* (Department of State Publication September 1976) 367.

⁶²³ *Ministry of Defense, Iran* (n 617), [19].

In *Republic v. High Court Accra, Ex parte Attorney General* (2013)⁶²⁴ the Supreme Court of Ghana quashed the injunction order given by the Commercial Division of the High Court of Accra (CDHCA) over the Argentine warship. The CDHCA granted an injunction order pursuant to the execution proceeding of the judgment in favor of NML Capital. The CDHCA passed the order considering the waiver clause in the bond agreement between Argentina and the judgment creditor.⁶²⁵ The CDHCA relied on the interpretation of the same waiver clause given by the UK Supreme Court in a related case. The UK Supreme Court allowed MoCs against Argentina based on the same waiver clause.⁶²⁶ In order to ensure the release of the warship, Argentina pursued to the International Tribunal for the Law of the Sea (ITLOS) and won the order in favor.⁶²⁷ Argentina confirmed the use of the warship as a training vessel (unlike commercial use) and thereby the warship was entitled to immunity under the UNCLOS (1982).⁶²⁸

Therefore, military assets in tangible nature such as weapons, ships, aircraft are presumed to serve public purposes. Granting immunity to these military assets even when the liabilities accrued directly from the assets, is inevitable. Nevertheless, liquid and/or intangible assets may not receive the same level of protection in an execution suit as there is no presumption of public use of such funds or assets. Proof of their use or purpose requires evidence of direct use.

4.2.3. *Assets of the central bank or other monetary authority of the State*

The assets of the central bank of the defendant State receive protection from MoCs under two heads: firstly, the central bank stands as a separate legal entity and maintains its functions distinct from the State; secondly, the public functions of the central bank and public purpose of the funds owned by the central bank. The absolute immunity to the assets of a central bank is justified by its supervisory functions over the other banks. The central bank is responsible for keeping the deposits from the other banks of the defendant State as liquidity reserves and maintaining the foreign

⁶²⁴ [2013] The Supreme Court of Ghana (June 2, 2013), Civil motion no. J5/10/2013.

⁶²⁵ *NML Capital Ltd. Republic of Arg.* [2012], (High Ct. Accra Oct. 11, 2012) No. RPC/343/12 [12].

⁶²⁶ *NML Capital Ltd. v. Republic of Arg.* [2011] UKSC 31 [2011] 2 AC 495 (on appeal from Eng.).

⁶²⁷ *ARA Libertad (Argentina v. Ghana)* [2012] (ITLOS, December 15, 2012) Case no. 20, provisional measures reported by James Kraska 'The "ARA Libertad" (2013) 107 (2) American Journal of International Law 404.

⁶²⁸ *Ibid*, [40].

currency reserves on behalf of the State. The purpose of these reserves is to maintain the liquidity in the financial sectors which is regarded as a sovereign purpose.

The ILA Drafts (1981),⁶²⁹ the ILC Draft (1991),⁶³⁰ and the UN Convention (2004)⁶³¹ expressly listed central bank assets as immune. The ECSI (1972) does not expressly declare immunity to the central bank's assets. Nevertheless, its grant of absolute immunity from execution to all sovereign assets unless waived, applies to the central bank's assets as well.⁶³² Several national legislations also list the central bank's assets as immune from execution. For instance, the SIA (1978) of the UK expressly provides immunity for the assets of the central bank or monetary authority of the defendant State.⁶³³ The FSIA (1976) of the US includes the central bank in the definition of foreign State as an agency or State instrumentality.⁶³⁴ It also lists the assets of a central bank as immune.⁶³⁵ The legislation of Canada ensures the same immune status to the assets of the central bank unless waived.⁶³⁶ Hence, under these legislations, the assets of the central bank held in its own name cannot be subjected to MoCs unless

⁶²⁹ The ILA Draft 1982 (n 142) art VIII: “C. Attachment or execution shall not be permitted if: 3. The property is that of a State central bank held by it for central banking purposes; or 4. The property is that of a State monetary authority held by it for monetary purposes.”

⁶³⁰ The ILC Draft 1991 (n 71) art 19: “Specific categories of property: 1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial purposes under paragraph 1 (c) of article 18 [...]: (c) property of the central bank or other monetary authority of the State which is in the territory of another State [...]”

⁶³¹ The UN Convention 2004 (n 41) art 21 (c).

⁶³² The ECSI 1972 (n 41) art 23.

⁶³³ The SIA 1978 (n 37) sec 14 (4): “Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity sub-sections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.”

⁶³⁴ The FSIA 1976 (n 37) sec 1603 (b): “Agency or instrumentality of a foreign state means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.”

⁶³⁵ The FSIA 1976 (n 37) sec 1611 (b): “Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immunity from attachment and from execution if: (1) the property is that of a foreign central bank or monetary authority held for its own account unless such bank or authority or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution or from execution, notwithstanding any withdrawal of the waiver which the bank, authority, or government may purport to effect except in accordance with the terms of the waiver...”

⁶³⁶ The SIA 1982 (n 167) sec 12 (4): “Subject to subsection (5), property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial activity is immune from attachment and execution.” Section 12 (5) is same as the FSIA 1976 (n 37) for the waiver clause.

the waiver is given. Nevertheless, the interpretation of the waiver clause is still under a gray area of the laws on immunity from execution.⁶³⁷

The question arises as to the scope of the assets of the central bank. The British High Court defined the assets of the central bank as asset having any legal, equitable, contractual or any other forms of interests therein regardless of its capacity of holding the assets which include real or personal assets.⁶³⁸ The Chinese legislation on State immunity defines the central bank's assets under two heads: the 'foreign central bank' and the 'assets of foreign central bank'. It states:

The term "foreign central banks" as mentioned in these Measures (compulsory judicial measures) refers to the central banks of foreign countries and regional economic integration organizations, or those financial administrative organs performing the functions of central banks. The term "properties of foreign central banks" as mentioned in these Measures refers to the cash, bills, bank deposits, securities, foreign exchange reserves and gold reserves, as well as real estates and other properties of foreign central banks.⁶³⁹

For the FSIA (1976) of the US, the provision is formulated slightly differently. It states, "*property of a foreign central bank or monetary authority held for its own account.*"⁶⁴⁰ The legal implication of such wording is the absolute immunity to the central bank's funds even used for commercial purposes.⁶⁴¹

In the case laws, the immunity of the central bank is permitted and/or denied immunity in light of three questions: its separate entity from the defendant State, its supervisory functions distinct from other commercial banks and finally, its commercial functions or commercial purpose of the specific asset in question.

4.2.3.1. Separate legal status of the central bank

⁶³⁷ Discussed in 3.5.2 of this dissertation.

⁶³⁸ *AIG Capital* (n 373), [90]-[95].

⁶³⁹ Law of the People's Republic of China on Immunity of the Property of Central Bank from Compulsory Judicial Measures (n 289).

⁶⁴⁰ The FSIA 1976 (n 37) s 1611 (b) (1).

⁶⁴¹ Andrew Dickinson and Rae Lindsay and James P. Loonam, *State Immunity: Selected Materials and Commentary* (1st edn, Oxford University Press 2004), 326.

In enforcement cases against the assets of the central bank, the central bank claims its distinct and separate legal entity from the defendant State. This issue works both as a sword and a shield for the central bank. For instance, when the judgment debt is against the central bank (not the State), the central bank claims immunity arguing its status as a State agency or instrumentality despite its separate legal status. On the other hand, when the claim is against the defendant State, the central bank argues its separate legal entity distinct from the defendant State. Hence, the burden of proof lies on the petitioner to establish a compelling case before the court to pierce the veil of the central bank.

In *Banque Nationale v. Alcaj GmbH* (1931)⁶⁴² the Swiss Federal Court denied immunity to the Belgian central bank because of its corporate legal entity as a stock corporation. Hence, the central bank held a separate personality from the sovereign State. Subsequently in *Banque Centrale de la Republique de Turquie v. Weston Compagnie de Finance d'Investissement SA* (1978),⁶⁴³ the Swiss Federal Court did not consider the legal status of the central bank but its activity while deciding the question of its immunity. The German court refused to grant immunity to the Central Bank of Turkey because of its independent legal standing.⁶⁴⁴ The Frankfurt Court of Appeal followed the same line of argument when it came to the Central Bank of Yemen by stating:

Only legally dependent monetary authorities of a foreign state could claim personal immunity and immunity from attachment in assets located in Germany whereas the defendant (the central bank of Yemen) is not entitled to immunity as a legally separate entity.⁶⁴⁵

In *Amdassade de la federation de Russie en Frnace v. Societe NOGA* (2000)⁶⁴⁶ the Court of Appeal in Paris, refused attachment of central bank's funds considering it as a separate legal entity, therefore not liable for the debt of a third party. When deciding the separate legal status, the US courts apply the *Bancec* test [discussed in detail for

⁶⁴² Decision on 6 November 1931 published in [1931] NZZ no. 2183

⁶⁴³ *Banque Centrale de la République de Turquie* (n 437).

⁶⁴⁴ [1997] OLG Frankfurt am Main OLG Rep. 227.

⁶⁴⁵ [2000] Frankfurt Court of Appeal, 3 August 2000, 26 W 82/2000.

⁶⁴⁶ [2001] Cour d'Appel Paris, 1st Chamber section A, 10 Aug. 2000 128 JDI 116.

the assets of SOE].⁶⁴⁷ the US Supreme Court introduced this test in *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)* (1983).⁶⁴⁸ It prevailed the separate legal entity of the SOE unless the judgment creditor puts forward a compelling case of extensive sovereign control over the SOE resulting at the abuse of corporate form by the defendant State causing fraud and/or injustice.⁶⁴⁹ In *LNC Invs., Inc. v. Republic of Nicaragua* (2000)⁶⁵⁰ the petitioner targeted certain funds in the accounts of the central bank of Nicaragua maintained with the Federal Reserve Bank of New York. The US court applied the *Bancec* test and denied piercing the corporate veil of the central bank as the petitioner failed to prove the abuse of the corporate form by Nicaragua and its extensive control over the assets of the central bank. In *EM Capital v. Republic of Argentina* (2007)⁶⁵¹ the petitioner targeted two funds held by the central bank of Argentina after the decrees passed by the Argentine government to appropriate the funds for settling the debt of the International Monetary Fund (IMF). The US court denied the execution as the petitioner failed to satisfy the *Bancec* test⁶⁵² as to the rebuttal of presumption in favor of the central bank's separate legal entity. The US court further refused to construe the repayment of debt to IMF from the fund as commercial because of Argentina's borrowing relationship with IMF as a sovereign.⁶⁵³ Furthermore, the court required "actual use or designation for use" for the attachment order not some hypothetical use. Mere publication of the decree was not sufficient to pass an attachment order.⁶⁵⁴ In *EM Capital v. Banco Central de la Republica Argentina* (2015),⁶⁵⁵ the assets of the central bank of Argentina were held as immune for the debt of Argentina as a sovereign State, because of the presumption of legally separate and distinct status of the central bank. The US court commented that the presumption would have been rebutted: firstly, if the agent-principal relationship between Argentina and the central bank was proved and secondly, such separate legal status of the central bank would

⁶⁴⁷ Discussed in 4.4.5 of this dissertation.

⁶⁴⁸ *First National City Bank* (n 34).

⁶⁴⁹ *Ibid.*

⁶⁵⁰ [2000] (SDNY June 8, 2000) No. 96 Civ. 6360 (JFK), 2000 WL 745550, [*5].

⁶⁵¹ [2007] (2nd Cir) 473 F 3d 463.

⁶⁵² *First National City Bank* (n 34).

⁶⁵³ [2007] (2nd Cir) 473 F 3d 463 [483].

⁶⁵⁴ *Ibid.*

⁶⁵⁵ [2015] (2nd Cir) Nos 13-3819-cv (L), 13-3821-cv (CON), August 31, 2015

result at fraud or injustice. These requirements act as the *litmus* test for determining the immunity of the central bank on the ground of a separate legal entity.

4.2.3.2. Regulatory functions of the central bank

While considering the mandate of a central bank in any sovereign State, the German court viewed the acts of holding and managing foreign reserve assets as a sovereign task of the central bank.⁶⁵⁶ The regulatory functions of a central bank also include controlling the State reserve of gold, foreign, exchangeable foreign currencies, special drawing rights (SDR), permission to use foreign reserve for emergency import of essential goods, settlement of payments with other States, *etc.*⁶⁵⁷ In the *National Iranian Oil Company* (1983), the assets targeted for attachment were the bank accounts in the name of a SOE of Iran. Nevertheless, part of the fund in the targeted bank accounts was earmarked for transferring to the Central Bank of Iran. The German Federal Constitutional Court stated in its *obiter dictum* that the assets of the entities serving the monetary policies (which were sovereign in nature) were immune from execution.⁶⁵⁸ It stated:

[With respect of the foreign reserve of the central bank] In this case, no decision is needed regarding the qualification of deposits held for monetary purposes by the foreign state in bank accounts in the forum state; under such circumstances it would be directly assumed that a sovereign purpose was intended.⁶⁵⁹

Similar approach was taken by the US court in *Josefina Najarro De Sanchez v. Banco Central de Nicaragua* (1985).⁶⁶⁰ The US court of appeal reviewed the power of the central bank to issue a cheque in foreign currency and held that such authority was regarded as sovereign activity and thereby should enjoy immunity.

In *AIG Capital v. Republic of Kazakhstan* (2005)⁶⁶¹ the British High Court held the fund created by Kazakhstan as immune from MoC as the fund was established by government decree and put under the management of the National Bank of

⁶⁵⁶ *The National Iranian Oil Company* (n 357) [45].

⁶⁵⁷ Krauskopf and Steven (n 299).

⁶⁵⁸ *The National Iranian Oil Company* (n 357).

⁶⁵⁹ *Ibid.*

⁶⁶⁰ *De Sanchez* (n 129).

⁶⁶¹ *AIG Capital* (n 373), [90]-[95].

Kazakhstan. While deciding the immunity of the assets held in the name of the central bank, the court reviewed the function of the central bank as the guardian or regulator of the monetary system, distinct from commercial purposes. The decision was subsequently criticized as to the lack of scrutinization of the function of the central bank in this case. Here, the central bank acted as trustee of the fund for the government and received fee and commission in discharge of the service which could have been performed by any private fund manager as well.

The funds in the Argentine central bank were targeted again for execution in the case of *NML Capital and EM Ltd.* (2011).⁶⁶² The funds were previously appropriated in repaying the debt of the IMF. The judgment creditor argued such appropriation of the funds of the central bank as the control of Argentina over the assets of its central bank and the disposal of the same without any obstruction from the management of the central bank. The US court held the assets of the central bank as immune with a broader interpretation of “held for its own account” as inclusive of any assets either for commercial or non-commercial purposes.⁶⁶³ The decision of the US court relied on the presumption in favor of the public purpose of the central bank’s assets and the central bank’s function test. The court reviewed the other uses of the funds by the central bank such as to buy US dollar to manage foreign reserve, transfer the US dollars to different Argentine banks to control its currency, replenish the reserve pursuant to the regulatory exchange.⁶⁶⁴ All these uses of the funds were the functions of a central bank. Hence, while determining the central bank’s function test, the US court emphasized on the use of the funds “to pay Argentine banks that sought to reduce the amount of their US dollar reserves” distinct from the functions as an intermediary bank like any private banks. Therefore, the funds were established to be assets of the central bank held for its own account and thereby immune from execution, although previously used to repay the IMF’s debt upon the instruction of the government,

4.2.3.3. Commercial purpose of the funds and/or the commercial activity of the central bank

⁶⁶² *NML Capital and EM Ltd. v. Banco Central De La Republica Argentina and the Republic of Argentina* [2011] (2nd Cir) 652 F 3d 172.

⁶⁶³ *Ibid.*, [193]-[194].

⁶⁶⁴ *Ibid.*, [196].

The question of immunity of the central bank is vitiated with commercial use of the funds and/or engagement of the central bank in commercial activity. Such as, in *Libya v. Actimon SA* (1985), the Swiss tribunal refused to grant immunity to the central bank merely relying on its legal status. The tribunal asked for the specific purpose of the bank deposit targeted for execution.⁶⁶⁵

In the case of *Englander v. State Bank of Czechoslovakia* (1969),⁶⁶⁶ the Court of Cassation, France decided in favor of the execution of a monetary judgment against the funds of the State Bank of Czechoslovakia (the central bank for previous Czechoslovakia). The court relied on the fact that the account was operated in the *Bankque commerciale pour l'Europe du Nord*. A part of the balance was applied for repayment of commercial debts of some SOEs as well as the participation cost of the Czech State in international organizations. Mixed uses of the account balance could not sustain its immunity. The court held that the impossibility of differentiating the private use of the funds from the public use did not entitle it to immunity.

In *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* (1977),⁶⁶⁷ a letter of credit (L/C) was opened in London at the request of the Central Bank of Nigeria for purchasing cement from an English company by the Ministry of Defense of Nigeria. Before processing the payment of the L/C, military intervention occurred in Nigeria and Nigeria stopped the payment. Lord Denning MR acknowledged the status of the central bank as a government department but emphasized the nature of the contract based on which the execution suit was filed. In this case, the L/C was the basis for the claim which was nothing but purely a commercial transaction. Hence, the immunity was not entitled.⁶⁶⁸ Similar facts as in the *Trendtex* case, was found in the case of *YMN Establishment v. Central Bank of Nigeria* (1975) before the Frankfurt court.⁶⁶⁹ In this case, the German court allowed the attachment of central bank's assets to levy the distress of the judgment creditor.⁶⁷⁰

⁶⁶⁵ *Libya v. Actimon SA*, [1985] Swiss Federal Tribunal (24 April 1985) 82 ILR 30.

⁶⁶⁶ [1970] The Court of Cassation, France, (1970, REV. CRIT. 101' 1969 Journal Du Droit International 923.

⁶⁶⁷ [1977] 2 WLR 356 CA.

⁶⁶⁸ *Ibid*, [369].

⁶⁶⁹ [1975] The Provincial Court of Frankfurt, 8th Chamber for Commercial Matters, (2 December 1975).

⁶⁷⁰ *Ibid*.

Immunity was denied in the case of *Hispano Americana Mercantil Case* (1979)⁶⁷¹ focusing on the use of funds in commercial purposes,⁶⁷² although this case was decided after the enactment of the SIA, 1978 (the UK) and this Act grants immunity to the funds of the central bank.⁶⁷³ Higgins posed a divergence between the assets of the central bank and the funds held in the central bank.⁶⁷⁴ In the former, the assets are owned by the central bank and thereby immune under the SIA, 1978 (the UK) whereas in the latter case, the assets may not be owned by the central bank but received as trustee or in form of deposit from the beneficiaries and therefore, may not be immune. In *the Central Bank of Nigeria Case* (1975)⁶⁷⁵ while commenting on which kind of use might substantiate the designated use of cash and securities held by the central bank, the German court reviewed only the present or past use of the funds. It eliminated the possible future use of funds to finance State business from its consideration while deciding the immunity of the assets of the central bank.

In *Weston Compagnie de Finance et D'Investissement SA v. La Republica del Ecuador* (1993)⁶⁷⁶ the Southern District Court of New York held the funds of central bank as attachable relying on the facts that the central bank was holding the funds on behalf of the private parties. Therefore, the court did not hesitate to go behind the veil of the account owner and examine the *de facto* owner of the fund.

Similarly, in *Banco Central de Reserva del Peru v. Riggs National Bank* (1994)⁶⁷⁷ the US court allowed attachment of funds in the accounts of the central bank of Peru. The US court relied on the previous use of funds in financing certain commercial entities. Following the same line of argument, in *Banca Carige SpA Cassa di Risparmio Geneva e Imperia v. Banco Nacional de Cuba and another, Ch.D* (2001),⁶⁷⁸ the British Company Court denied to grant immunity to the shares held by the central bank. The court reasoned its decision by stating that although the assets of the central bank enjoyed immunity, the transfer of shares was held as purely a commercial act.

⁶⁷¹ [1979] EWCA Civ J0425-1.

⁶⁷² Higgins (n 582) 406.

⁶⁷³ The SIA 1978 (n 37) s 14 (4).

⁶⁷⁴ Higgins (n 582) 406.

⁶⁷⁵ [1976] Landgericht, Frankfurt, 2 Dec. 1975 Neue Juristische Wochenschrift 1044 65 ILR 131.

⁶⁷⁶ [1993] SDNY 823 F Supp 1106 [1114].

⁶⁷⁷ [1994] DDC, 919 F Supp 13 17.

⁶⁷⁸ [2001] (Companies Court, the UK), 11 Apr 2001 3 All ER 923.

In the case of *Olympic Chartering SA v. Ministry of Indus. & Trade of Jordan* (2001)⁶⁷⁹ the US court distinguished between the funds both held in the name of the central bank but “*used or held for central banking purposes rather than funds used solely to finance the commercial transactions of other entities or foreign States.*” Nevertheless, a contrary precedent was found in the UK jurisdictions. In *AIC Ltd. v. Federal Government of Nigeria* (2003)⁶⁸⁰ the UK court observed, “*moneys in a bank account of a central bank with another bank are immunity from execution irrespective of the source of the funds in the account or the use of the account or the purpose for which the account is maintained.*” In *Banque Centrale de la République de Turquie*, (1984), the central bank of Turkey acted as the intermediary between the English bank and the Turkish bank. The Swiss court refused immunity relying on the nature of the legal relationship.⁶⁸¹

Therefore, although the international instruments as well as the national legislation state the central bank’s assets as immune, there is no automatic immunity to the funds. Instead, the burden of proof lies on the judgment creditor. The commercial nature of the transactions, the previous commercial use of funds, the functions of the central bank like any other commercial banks vacate immunity to its assets.

4.2.4. Assets forming cultural heritage and/or having scientific, cultural, and historical interests for exhibition, not intended for sale

The ILC draft (1991) added the assets forming cultural heritage and the scientific, cultural, and historical objects in two separate provisions subjected to the same condition that the assets in question should be for the purpose of exhibition and not for sale.⁶⁸² However, no clear distinction was made between these two provisions in the explanatory notes. The scholars also used both provisions indicating the same class of assets.⁶⁸³ The relevant international conventions discussed below did not attempt to separate them either.

⁶⁷⁹ [2001] SDNY 134 F Supp 2d 528.

⁶⁸⁰ *AIC Ltd* (n 396).

⁶⁸¹ *Banque Centrale de la République de Turquie* (n 437).

⁶⁸² The ILC draft 1991 (n 71) art 19 (d) and I.

⁶⁸³ Riccardo Pavoni, ‘Cultural Heritage and State Immunity’ in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press October 2020); Chechi (n 329).

The Hague Convention (1954) defines cultural assets for the purpose of their immunity. Although the Convention is formulated for exceptional circumstances *i.e.*, the event of armed conflict, the definition of cultural asset may serve the purpose of this dissertation. The Convention provides a broader definition including the scientific and historical objects. The definition in article 1 of the Hague Convention (1954) characterizes the cultural asset (including the scientific collections and historical and artistic interests) as moveable or immovable asset having ‘great importance to the cultural heritage of every people’ whether ‘religious, secular, archaeological’.⁶⁸⁴ The definition includes the monuments of architecture, manuscripts, books or other objects of artistic or historical interests, scientific collections, and archives of these assets. This Convention also protects the buildings and cultural centers whose purpose is to exhibit these assets.⁶⁸⁵

On the other hand, the UNESCO Convention (1970), although does not deal with the question of immunity, also provides a definition of cultural assets. It defines the cultural asset as the asset, whether religious or secular, being specifically designated by the State as cultural asset because of its importance for “archaeological, prehistory, literature, art or science.”⁶⁸⁶ Another convention defining cultural asset is the UNIDROIT Convention (1995)⁶⁸⁷ although it also contains no provision related to the question of immunity. It relies on the same definition as found in the UNESCO Convention (1970), but instead of giving the exhaustive list of assets in the definition, it has attached the list in the annex.

The case laws give an insight into the immunity of cultural objects. The commonly targeted cultural assets are the arts, assets of information centers, cultural exchange centers, *etc.* There are attempts of the judgment creditors targeting the cultural centers,⁶⁸⁸ information offices,⁶⁸⁹ of the defendant State to receive MoCs. The famous

⁶⁸⁴ The Hague Convention 1954 (n 198) art 1 (a).

⁶⁸⁵ *Ibid*, art 1 (b) and (c).

⁶⁸⁶ The Convention on the Means of Prohibiting and Preventing the Illicit, Export and Transfer of Ownership of Cultural Property 1970 art 1. This Convention provided a long exhaustive list of cultural properties which includes both cultural, historical, and scientific collections.

⁶⁸⁷ The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 art 2.

⁶⁸⁸ *Espagne v. X SA, Office des poursuites du canton de Berne et President tu Tribunal d'arrondissement 4 du canton de Berne* [1986] Tribunal federal Suisse 30 Apr 1986, ATF 112 Ia 148; *Annuaire Suisse de droit international* 158; 82 ILR 38 [41].

⁶⁸⁹ *Republique Arabe d’Egypte* (n 438).

case in this regard is the *Jurisdictional Immunities Case*, (2012)⁶⁹⁰ decided by the ICJ. In this case, the Italian court granted the MoCs ordered against the cultural exchange center of Germany, in the territory of Italy, for the enforcement of a tort case against Germany.⁶⁹¹ Germany brought a case before the ICJ which held the MoCs, granted by the Italian court against the cultural exchange center as a violation of international law on State immunity.⁶⁹²

For the cultural centers, the States' practices are found to be homogenous. The Spanish Institute in Switzerland had been held as having public purposes by the Swiss court.⁶⁹³ In qualifying the public purposes, it commented, "*immunity from forced execution extends to assets which a foreign State possesses in Switzerland and which it has designated for its diplomatic service or other task incumbent upon it in the exercise of its sovereign powers.*"⁶⁹⁴ Similarly, the Goethe Institute and the German Archaeological Institute in Athens were targeted for the enforcement of a claim against Germany.⁶⁹⁵ The executives denied giving permission for bringing a formal execution suits against this cultural center following the same line of argument. In *Republique Arabe d'Egypte v. Cinetel* (1979)⁶⁹⁶ the Swiss Federal Court commented, "*only the patrimonial assets of these authorities [the information centers of the foreign State] and not their administrative assets, may be seized, because the latter are assets of the local authority directly allocated for the performance of its tasks under public law.*"⁶⁹⁷ The "patrimonial assets" are defined as the assets which do not increase the national wealth or no longer intended for public purpose.⁶⁹⁸

The major determining point is the objective of earning profit from the targeted assets and serving the public purposes. In *Magness v. Russia Federation* (2000)⁶⁹⁹ the US court denied executing a judgment against the cultural objects of Russia which were

⁶⁹⁰ *The Jurisdictional Immunities of the State* (n 172).

⁶⁹¹ *Ferrini v. Germany*, [2004] Court of Cassation, Italy No. 5044, March 11, 2004.

⁶⁹² *The Jurisdictional Immunities of the State* (n 172).

⁶⁹³ *Kingdom of Spain v. Company XSA* [1986] Switzerland Federal Tribunal 30 April 1986, 82 ILR 38 [41].

⁶⁹⁴ *Ibid.*

⁶⁹⁵ *Prefecture of Boeteia v. Germany* [2002] Full Court judgment Nos. 36 and 37/2002, 28 June 2002.

⁶⁹⁶ *Republique Arabe d'Egypte* (n 438).

⁶⁹⁷ *Ibid.*, [435].

⁶⁹⁸ *Francisco I. Chavez v. Public Estates Authority and Amari Coastal Bay Development Corporation* [2002] the Supreme Court of the Republic of the Philippines GR No. 133250, July 9, 2002.

⁶⁹⁹ [2000] SD Ala 84 F Supp 2d 1357.

brought to the US for exhibition. The court received statement from the executive body of the US stating:

[the paintings] imported from abroad for the temporary exhibition without profit within the United States are of cultural significance [...]. These objects are imported pursuant to a loan agreement with a foreign lender [...] and their exhibition is in the national interest.”⁷⁰⁰

Relying on this statement of the execution body, the US court held these objects as immune. In the cases of *Campuzano v. Iran* (2003),⁷⁰¹ a district court of the US refused to enforce a judgment against the cultural object of Iran that had been lent to American institutions for scientific study. In the same year, in *Rubin v. Iran* (2003)⁷⁰² the judgment creditor asked for an attachment order based on the commercial use of the historical objects under section 1610 (a) (7) of the FSIA (1976) of the US. The museum [holding the object in the US] countered the claim relying on the fact that the objects were being held under trustee process. In the trustee process, the museum was the trustee whereas Iran held the beneficiary interest. Therefore the commercial use of the object did not belong to Iran. The US court accepted the counter argument of the museum and did not investigate the museum’s commercial use in this case.⁷⁰³ The same plaintiff brought several execution cases targeting different cultural and historical objects of Iran and in all these cases, the US court concluded in favor of immunity to the cultural objects relying on the inconveniences and impairment of rights of the museums, borrowing the objects.⁷⁰⁴ In the case of *Rubin v. Islamic State of Iran* (2016)⁷⁰⁵, certain US institutions received cultural and historical objects from Iran under a loan agreement. The institutions returned a few of the items and committed to return the others. The contractual arrangement between the US institutions and Iran as to the objects, was in the form of an agency contract unlike the previous case [the trustee contract]. Therefore, the commercial use of the cultural

⁷⁰⁰ [1998] 63 Fed Regis 30567.

⁷⁰¹ [2003] DDC 281 F Supp 2d 258.

⁷⁰² *Rubin v. Islamic Republic of Iran* [2013] 1st Cir 709 F 3d 49 [50]-[51]; *Rubin v. Islamic Republic of Iran* [2003] D Mass 456 F Supp 2d 228 [230].

⁷⁰³ *Ibid.*, [234].

⁷⁰⁴ *Rubin v. Islamic Republic of Iran* [2004] ND III 349 F Supp 2d 1108; [2010] DDC 270 FRD; [2016] 7th Cir F 3d 470; [2018] 138 S Ct 816.

⁷⁰⁵ *Ibid.*, [481].

objects by Iran, as the sovereign owner of the objects, might result at MoCs against the cultural objects in question.

In *General Consulate of Peru in Milan v. Tabibnia* (2015)⁷⁰⁶ Peru obtained possession of the artefacts pursuant to a criminal proceeding against the plaintiff, which was subsequently annulled, but Peru refused to return the objects to the plaintiff. The Italian court refused immunity to the artefacts allegedly claimed by Peru. In view of the court, Peru failed to establish its ownership of the objects. Nevertheless, the immunity to the cultural objects may be pierced if the holders received the assets in violation of international law, therefore, not being the rightful owner of the assets.⁷⁰⁷

The US amended its FSIA 1976 in 2016 to incorporate the cultural property exception.⁷⁰⁸ The amended provision states that, subject to some exceptions, any object brought in the US for the purpose of temporary exhibition is not deemed as having commercial purpose for the question of immunity thereto.⁷⁰⁹ The US law attached three conditions for the protection of cultural and historical objects: (i) the objects having cultural significance, (ii) being brought to the US for exhibition on non-profit basis and (iii) the exhibit serving the national interest. Following the new amendment of 2016, the US Supreme Court refused to grant MoCs against the cultural object loaned by Iran to a US institution on the ground of non-commercial use of the object in *the Nixes Seizures of Iranian Art Objects* (2018).⁷¹⁰

Similar laws have been passed in European jurisdictions, such as France,⁷¹¹ Germany,⁷¹² Austria,⁷¹³ etc. protecting the lending of cultural objects for

⁷⁰⁶ [2015] Italian Court of Cassation, 5 October 2015, No. 19784, ILDC 2458 (IT 2015), commented by Pierfrancesco Rossi, 'Immunities' in Benedetto Conforti, Luigi Ferrari Bravo and Francesco Francioni eds., *The Italian Yearbook of International Law volume XXV* (1st edn, BRILL NIJHOSS, 2016), 511.

⁷⁰⁷ Nout Van Woudenberg, 'State Immunity and Cultural Objects on Loan' [2011] University of Amsterdam Digital Academic Repository, 306 commented "*the object cannot be considered as war trophy.*" Discussed in 4.3.4. of this Dissertation.

⁷⁰⁸ The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act 2016 (the US). Public Law 114-319. This Act amended the chapter 97, of title 28, United States Code to clarify the exception to the foreign sovereign immunity set forth in section 1605 (a) (3) of the FSIA 1976 (n 37).

⁷⁰⁹ *Ibid.*, sec 2.

⁷¹⁰ [2018] 19 IFAR J. nos. 1 & 2., [2]. [3].

⁷¹¹ Act No 94-679 dated 8 August 1994. Published in Journal Officiel de la Republique Francaise, 11888.

⁷¹² Law on the Implementation of the European Community Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and on the Alteration of the Act to Prevent the Exodus of German Cultural Property Law of 15 October 1998, *Budengesetzblatt [Federal Law GAZETTER]* 1998 I No 70, 3126.

exhibitions.⁷¹⁴ Hence, quashing the immunity of this type of assets is difficult, unless the judgment creditor can show certain profitability or commercial use of the assets by the defendant State. The protection of cultural, historical, and scientific assets is essential for maintaining international cultural diplomacy and international affairs among States.

4.3. Non-immune assets

The ILC Report (1999)⁷¹⁵ stated the States' demand to revisit the categorization of the list of immune assets in the ILC Draft (1991).⁷¹⁶ Two dominant views were visible. One group opined to make a clear list of immune assets to “*avoid unnecessary limitations on the cases in which property might legitimately be subject to “measures of constraint”*” and the other group preferred to establish the principles that would govern the question of immunity of the sovereign assets.⁷¹⁷ Consensus was achieved by incorporating two articles (articles 19 and 21) in the UN Convention (2004): a list of the specific categories of immune assets whose sovereign purpose is presumed;⁷¹⁸ and the characteristics of the non-immune assets.⁷¹⁹

A similar approach is followed in some national legislations. For instance, the FSIA 1985 (Australia) states that the immunity is not granted to the ‘commercial property’.⁷²⁰ The French Court of cassation also recognized that the attachability of the commercial assets for the enforcement of commercial arbitral awards.⁷²¹ The SIA 1978 (the UK) adopts the standard of ‘commercial purpose’ for the characterization of non-immune assets. The popular terms to express the non-immune assets are either the commercial purpose and/or activity used [discussed in 4.3.1] or non-governmental

⁷¹³ The Federal Act on the Temporary Immunity of Cultural Property Loans for the Purpose of Public Exhibition 30 December 2003, *Bundesgesetzblatt (BGBl) [Federal Gazette]* I No. 133/2003 as amended by BGBl I No. 65/2006.

⁷¹⁴ Woudenberg (n 707), 427.

⁷¹⁵ The ILC Report 1999 II (n 234), para 114.

⁷¹⁶ The ILC Draft 1991 (n 71) art 19.

⁷¹⁷ The ILC Report 1999 II (n 234) para. 168.

⁷¹⁸ The UN Convention 2004 (n 41) art 19 (c) and art 21 (1).

⁷¹⁹ Ibid art 19 (c).

⁷²⁰ The FSIA 1985 (n 166) art 32 (2) stated that the commercial cargo and the ships carrying commercial cargo are not immune. Art 32 (3) defined, “*Commercial property is property other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purpose; and property that is apparently vacant or apparently not in use shall be taken to be being use for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.*”

⁷²¹ *Creighton Ltd. v. Gouvernement de l'Etat du Qatar* [2000] Court of Cassation 1st Civil 6 July 2000, translated in (October 2000) 15 Mealey's International Arbitration Report A-1.

purpose [discussed in 4.3.2].⁷²² Arguably, these two approaches are not interchangeable, however, an analysis of the case laws discussed below brings a more comprehensive view. This part of the fourth chapter of the dissertation aims at examining the terms used in explaining non-immune assets and their interpretation in case laws. This discussion helps in scrutinizing the interpretation of commercial/public purpose of commonly targeted sovereign assets [discussed in 4.4].

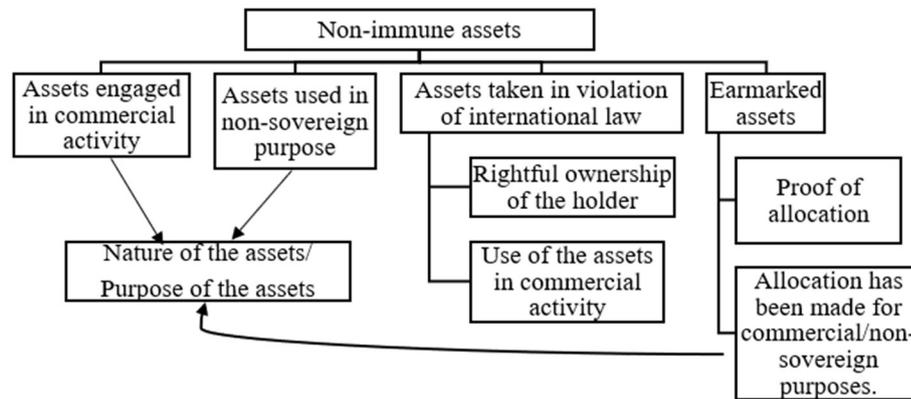


Figure 3: non-immune assets

4.3.1. *Assets having commercial purpose or used in commercial activity.*

In an enforcement case against Republic of Nauru (2004), the Australian court qualified “commercial” as:

The term commercial is used in distinction from “non-commercial” and must be given content. The group of defining qualities in the generality [...] significantly omit criteria such as ‘political’, ‘diplomatic’, ‘governmental’ ‘intelligence’, ‘foreign policy’, or ‘domestic’. No doubt other significant fields of human activity are omitted.⁷²³

On the other hand, the same court attempted to illustrate the commercial purposes as:

The incorporation of only subsidiary or minor ‘commercial, trading, business, professional, industrial or loke’ elements in a transaction which is predominantly of a political, diplomatic, governmental or intelligence

⁷²² Thomas (n 392) 13.

⁷²³ *Well Fargo Bank Northwest National Association v. Victoria Aircraft Leasing Limited and Others* [2004] VSC 262, 185 FLR 48, [107].

character or an admixture of those elements, in my view will not render it as a commercial [...] ⁷²⁴

Like the above definitions, the term commercial purpose has only received illustrations rather than an exhaustive definition. The identification of the commercial purpose is also left unresolved. ⁷²⁵ The practice exists as to the acceptance of certificate from the diplomatic representative or the competent authority confirming the non-commercial purpose of the asset as a conclusive proof of the purpose. ⁷²⁶ The purpose of an asset depends not only on the use of the asset but also on the nature and its owner. Thereby the parameters of scrutinizing the commercial purpose of the asset vary according to the nature of the asset.

While explaining the industrial and commercial use, the explanatory report on the ECSI referred to the same standard as used for a private person under article 7. Notwithstanding the creditor friendly conventions, the case laws favor the debtor State as taking a rebuttable presumption of sovereign purpose of the asset ⁷²⁷ and shifting the burden of proof to the claimant of the commercial purpose of the asset. ⁷²⁸ Another challenge arises in the case of mixed purposes of the asset where both the parties bring their favorable evidence before the court. The Austrian Supreme Court permitted attachment of embassy account for execution relying on its mixed purposes ⁷²⁹ till 1986 when the same court denied enforcement unless the plaintiff could prove the sole commercial purpose of the account. ⁷³⁰

When the discussion comes to commercial activity, the ‘commercial activity’ denotes that any sovereign asset even when falls within a category specifically designated as immune. Asset can be subjected to MoCs if it has been put in commercial activity. ⁷³¹ The determination of the activity of the asset vastly depends on the context of the case. The UK court in the case of *SerVaas Inc. v. Rafidain Bank* (2012) ⁷³² emphasized

⁷²⁴ Ibid, [109].

⁷²⁵ Reinisch (n 28) 836.

⁷²⁶ The UN Convention 2004 (n 41) art 16 (6).

⁷²⁷ *Societe Eurodif v. Iran* [1984] Court of Cassation (1st Civil Chamber 14 March 1984) *Revue critique de droit international prive* 644; *Islamic Republic of Iran* (n 475).

⁷²⁸ Reinisch (n 28); *the Philippines Embassy Bank Account Case* (n 113).

⁷²⁹ *Neustein* (n 590).

⁷³⁰ *L-W Verwaltungsgesellschaft mbH & Co. KG v. DVA* [1986] Oberster Gerichtshof, 30 Apr 1986; 77 ILR 494.

⁷³¹ Thomas (n 392), 6.

⁷³² *SerVaas Inc* [2012] UKSC 40; [2013] 1 AC 595.

on taking the expression of ‘in use for commercial purposes’ in its ordinary and natural meaning in view of the context of the case. In the *Sonatrach* case (1985), the French Court of Cassation commented that assets allocation for “economic or commercial activity of a private law nature” can be subjected to MoCs.⁷³³ In *Eurodif* case (1984), it commented: “*the assets of public entities, distinct from the foreign State whether or not enjoying legal personality, which are part of a group of assets (patrimoine) which been dedicated to activities in the private law sector, may be seized by all creditors of the public entity.*”⁷³⁴

Not all jurisdictions investigate the ‘commercial’ purpose in the issue of immunity of sovereign assets. Some jurisdictions focus on the ‘public purpose’ while deciding the same question of immunity. These two approaches are interchangeable with each other. The approach determines the scope of the court’s consideration of facts. The convergence is more visible when the same judgment creditor knocks the door of several domestic jurisdictions for the enforcement of the judgment against foreign sovereign’s assets. The series of *NML Capital* cases are one of them. While deciding the *NML Capital v. Argentina* (2013), the US court decided the commercial nature of the funds,⁷³⁵ whereas the French court considered the public nature of the assets.⁷³⁶ The following discussion concentrates on how the domestic courts may determine the non-governmental purposes of the assets for the question of immunity from enforcement. Here the term non-governmental purposes have been interchangeably used with ‘not in public purposes’, or ‘non-sovereign use’ of the sovereign assets.

4.3.2. *Assets having non-governmental purposes.*

Various terms are visible to address the commercial or non-governmental purpose of the asset such as non-sovereign purpose,⁷³⁷ non-public service assets,⁷³⁸ ‘not destined for public service functions’,⁷³⁹ not allocated for act of sovereignty.⁷⁴⁰ The first draft of ILC also added “non-governmental” purposes, which were subsequently replaced

⁷³³ *Societe Sonatrach v. Migeon* [1985], Court of Cassation (1st Civil Chamber) 1 October 1985, 77 ILR 525. Translation taken from Reinisch (n 28) 821, fn 117.

⁷³⁴ *Societe Eurodif* (n 727); *Islamic Republic of Iran* (n 475) [515].

⁷³⁵ *NML Capital* (n 523).

⁷³⁶ *NML Capital* (n 421).

⁷³⁷ *The Philippines Embassy Bank Account Case* (n 113).

⁷³⁸ *NV Cabolent* (n 284).

⁷³⁹ *Condor and Filvem* (n 114).

⁷⁴⁰ *Republique Arabe d’Egypte* (n 438) [430].

with “commercial purposes.”⁷⁴¹ Similar terminology was inserted in the UN Convention (2004). Nevertheless, the European jurisdictions (other than the UK) focus on the absence of sovereign purpose, instead of the presence of commercial purposes, while expressing the immunity to sovereign assets. The national courts of different EU member States use various terms to explain the commercial or non-governmental purpose of the asset such as non-sovereign purpose,⁷⁴² non-public service assets,⁷⁴³ ‘not destined for public service functions’,⁷⁴⁴ not allocated for act of sovereignty.⁷⁴⁵

The Swiss law grants immunity to the assets “allocated for the performance of acts of sovereignty.”⁷⁴⁶ The national legislation of Russia uses a reductionist approach in determining the immunity of sovereign assets. It states that immunity cannot be claimed if the asset in question is used or intended to be used for purpose “*unrelated to the exercise of sovereign power*”.⁷⁴⁷ The old private international law of Hungary stated, “*no enforcement measures can be effected on the state’s property in Hungary that serves the fulfillment state’s public function, the operations of its state organ.*”⁷⁴⁸ However, the new Hungarian Private International Law has shifted to ‘*other than non-commercial purpose*’ for the immunity from enforcement.⁷⁴⁹

The French court of Cassation defined the non-governmental use or non-immune assets as “*where they have been allocated for an economic or commercial activity under private law which is at the origin of the title to the attaching creditor [...]*”⁷⁵⁰ When deciding the leading case on the diplomatic mission’s bank account, the German Constitutional Court considered “[...] *in so far, as those things serve sovereign purposes of the foreign state, at the time of the commencement of the enforcement measures.*”⁷⁵¹ The Dutch court applied a more positive wording by stating that the sovereign assets enjoy immunity from MoCs as long as they serve the

⁷⁴¹ The ILC Report 1999 II (n 234) para 167-168 and fn 111.

⁷⁴² *The Philippines Embassy Bank Account Case* (n 113).

⁷⁴³ *NV Cabolent* (n 284).

⁷⁴⁴ *Condor and Filvem* (n 114).

⁷⁴⁵ *Republique Arabe d’Egypte* (n 438) [430].

⁷⁴⁶ *Ibid.*

⁷⁴⁷ The Federal Law on Jurisdictional Immunity of a Foreign State and a Foreign State’s Property in the Russian Federation 2015 (n 274).

⁷⁴⁸ The Act 13 of 1979 on Private International Law s 62/E/(2) (Hungary) (repealed).

⁷⁴⁹ The Act XXVIII of 2017 on Private International Law s 85 (3) (Hungary).

⁷⁵⁰ *Societe Sonatrach* (n 733); Translation taken from Reinisch (n 28) fn 117.

⁷⁵¹ *The Philippines Embassy Bank Account Case* (n 113).

public purposes.⁷⁵² In the case of *Prefecture of Voioitia v. Germany* (2002),⁷⁵³ the Greek Supreme Court held that enforcement proceeding was permitted against the sovereign assets unless the assets served *jure imperii*. It indicated that MoC could be granted against foreign sovereign assets when they were in non-governmental use.

The Italian Constitutional Court⁷⁵⁴ as well as its Court of Cassation, held a similar view that assets which were not in “*destined to accomplish the public functions of the foreign state*” were available for MoCs.⁷⁵⁵ The French Court of cassation also recognized that the attachability of the assets (not serving public purpose) for the enforcement of commercial arbitral awards.⁷⁵⁶ Reinisch concluded after observing the cases of sovereign immunity from enforcement measures before the European States’ court, “*it is the exact determination of whether or not this requirement of public purpose is fulfilled which forms the core issue of the majority of enforcement immunity decisions.*”⁷⁵⁷

The legal significance between the use of “commercial purpose” and the “non-sovereign purpose” of the asset, is that the scope of court’s consideration becomes broader with the use of ‘non-sovereign purpose’. Such as in the above stated case of *NML Capital* against Argentina, the French court considered the origin of the assets while scrutinizing the purpose of the assets instead of their current nature or purpose.⁷⁵⁸ In order to determine the non-sovereign purpose of the assets, the origin and destination of the assets were taken into account,⁷⁵⁹ while the same might not hold much significance when its engagement in commercial activity was to be judged. Besides, when the assets are judged based on the presence or absence of public purpose, many assets which would have fallen into the categories of non-immune

⁷⁵² *NV Cabolent* (n 284), [148].

⁷⁵³ [2002] Full Court judgment Nos. 36 and 37/2002, 28 June 2002; The ECtHR’s *Kalogeropoulou* case (n 317); Reinisch (n 28) 816.

⁷⁵⁴ *Condor and Filvem* (n 114) [402].

⁷⁵⁵ *Libya* (n 439), [66].

⁷⁵⁶ *Creighton Ltd.* (n 721), translated in 15 Mealey’s International Arbitration Report A-1, (October 2000).

⁷⁵⁷ Reinisch (n 28) 808.

⁷⁵⁸ *Republic of Argentina v. NMC Capital LTD* [2000] Belgium, the Supreme Court, Nr. C.11.0688.F, 22 November 2012. The same claimant initiated another enforcement proceeding before the Belgian courts and sought attachment order against the bank accounts of the Argentine diplomatic mission in Brussels. The Supreme Court of Belgium refused to grant the attachment order due to lack of ‘explicit and specific waiver of immunity’ in respect of the diplomatic asset.

⁷⁵⁹ *Paul Clerget v. Banque Commerciale pour l’Europe de Nord and Banque de Commerce Ecterieure du Vietnam* [1971] France, Paris Court of Appeal 2 November 1971, 65 ILR 54, [56].

assets, become excluded, such as taxes and governmental fees for public services.⁷⁶⁰ According to the fiscal laws, the purpose of tax is to undertake the governmental expenses which are public in nature,⁷⁶¹ whereas if the commercial use test had been applied, the current ‘commercial’ use of the fund derived from the taxes would have made it non-immune.

The legal challenges in using two separate approaches are threefold: firstly, the States practices are inconsistent. Secondly, the diverse practices among States make it difficult for the defendant State to manage its cross-border assets. The States do not know until an enforcement proceeding is initiated, which forum State the judgment creditor would target. Finally, the preparation of litigation strategies for both the claimant and the defendant State become uncertain as to the inconsistent practices.

4.3.3. *Earmarked asset*

The earmarked asset⁷⁶² is commonly accepted as non-immune in international instruments.⁷⁶³ The ILC Draft (1991) reasoned the insertion of the earmarked asset as an exception to immunity from MoCs. Such provision would prevent the multiplicity of enforcement proceedings against the defendant States and the impediment to State’s intention to set aside some specific assets for certain claims.⁷⁶⁴ At the same time, it acknowledged the challenges in determining whether any particular assets had been earmarked or not. Therefore, the evidential determination of earmarked asset was left upon the courts for final decision.⁷⁶⁵ While interpreting the earmarked asset, the French Court of Appeal in Paris held:

Goods destined by a State for the satisfaction of the claim in question or reserved by it to this end may be seized, instead of all other goods of the foreign State situated in the forum State or intended to be used for commercial purposes without it being necessary to establish that such goods

⁷⁶⁰ Gerlich (n 20) fn 152.

⁷⁶¹ Geoffrey Brennan and James M. Buchanan, *The Power to Tax: Analytic Foundations of a Fiscal Constitution*, (Cambridge University Press, 1980).

⁷⁶² The term ‘earmarking’ is the allocation of asset or establishment of funds for the satisfaction of any specific debt of the State. Mag Eva Wiesinger, ‘State Immunity from Enforcement Measures’ (Research Monograph, University of Vienna July 2006) 8.

⁷⁶³ The UN Convention 2004 (n 41) art 18 (b).

⁷⁶⁴ The ILC Draft 1991 (n 71) commentary to art 18 (1) (b) para 10.

⁷⁶⁵ *Ibid.*

were destined for the entity against which the proceeding had been brought.⁷⁶⁶

Giving a broader interpretation of earmarked asset, the French court held that the allocation of any asset for commercial purpose was sufficient for granting MoC.⁷⁶⁷ The French appellate court confirmed the same ruling regarding earmarked asset that these assets could be subjected to MoCs for satisfaction of judgment value against foreign Sovereign, instead of all other assets within the territory of the forum State or intended for commercial use.⁷⁶⁸ Such broader interpretation of earmarked asset was also accepted by the House of Lords (the UK) in the *Alcom* Case for the embassy account designated for commercial expenses.⁷⁶⁹ In the *Alcom Case* (1984), the House of Lords observed that the asset which was otherwise immune, might be subjected to MoCs if the judgment creditor had proved the earmarking of the asset solely for commercial purposes.⁷⁷⁰ Lord Diplock stated:

Unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that the bank account was earmarked by the foreign state solely (save for *de minimis* exceptions) for being drawn upon to settle liabilities incurred in commercial transaction as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot in my view be sensibly brought within the crucial words of the exception for which section 13 (4) provides.⁷⁷¹

The limitation of this interpretation of earmarked asset is to identify the asset earmarked ‘solely’ for commercial purposes. As the previous discussion of the diplomatic asset used in mixed activities shows the difficulty in proving the mixed purposes of assets,⁷⁷² the defendant State may easily hide the earmarked asset behind the veil of some public uses.

⁷⁶⁶ *Societe Creighton Ltd* (n 431) [527]; Translation taken from Reinisch (n 28) fn 116.

⁷⁶⁷ *Sociealist Federal Republic of Yugoslavia v. Societe Europeenne d’Etudes et d’Entreprises* [1971] Tribunal de grande instance Paris, 6 July 1970, 98 *Journal de Droit International* (1971) 131, 65 *ILR* 46 [49].

⁷⁶⁸ *Societe Creighton Ltd.* (n 431); Translation taken from Reinisch (n 28) 820, fn 116.

⁷⁶⁹ *The Alcom case* (n 394).

⁷⁷⁰ *Ibid* [187].

⁷⁷¹ *Ibid* [605].

⁷⁷² Discussed in 4.2.1.4 of this Dissertation.

Despite the procedural challenges in proving earmarking of assets, this kind of asset is comparatively easier to be targeted for the MoCs. Not only the earmarked asset for the existing debt, but also earmarking of the same asset for any previous commercial use also acts as favorable evidence for the judgment creditor. The court considers the past earmarking of the asset for commercial use as evidence of commercial use of the asset and thereby declares it as non-immune from execution. Nevertheless, the defendant State may vitiate the evidential value of the past commercial use of earmarked the asset by showing some present public purposes of the same asset.

4.3.4. *Asset received or exchanged in violation of international law*

The ILA Draft (1982) added the assets received or exchanged in violation of international law as a non-immune asset.⁷⁷³ However, this provision was not inserted in the UN Convention (2004). From national legislations, the FSIA (1976) of the US expressly states this category of assets as non-immune.⁷⁷⁴ It states that the assets taken or exchanged in violation of international law are not immune in the execution suits in relation to the judgment establishing rights in the asset in question.⁷⁷⁵ This category of assets is also known as the expropriation exception to the immunity rules of sovereign assets. Although no exhaustive definition of assets received or exchanged in violation of international law can be given, certain illustrations are available from the precedents of the international and domestic courts. The Hague Convention (1954) and the UNESCO Convention (1970) regarding the protection of cultural objects refuse to protect the assets which have been received pursuant to illicit import, export, and transfer of ownership of cultural objects.

During the World War II, certain assets of the German and the Hungarian citizens were confiscated by Czechoslovakia pursuant to the decree on 12 of 21 June 1945.⁷⁷⁶ Among the other assets, there was a painting of the Dutch artist Pieter van Laer. The painting was owned by Prince Franz Josef II of Liechtenstein. This was the case where the convergence was laid between the artistic assets lent for exhibition without

⁷⁷³ The ILA Draft 1982 (n 142) art VIII.

⁷⁷⁴ The FSIA 1976 (n 37) sec 1610 (3). The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 2016 (n 708) reinstated the properties received or exchanged in violation of international law as an exception to the immunity granted to the properties with cultural, scientific, and historical values.

⁷⁷⁵ Ibid sec 1610 (a) (3)

⁷⁷⁶ *The Case Concerning Certain Property, Liechtenstein v. Germany* [2005] International Court of Justice judgment of February 10, 2005.

any intention for sale and the same assets obtained in violation of International Law. In 1991, Czechoslovakia lent the painting to Germany for exhibition in museum. A successor of Prince Franz Josef brought a case before the German courts and subsequently before the ECtHR for the recovery of paintings. However, none of the court held the verdict for the return of the painting. Liechtenstein took the case to the ICJ in 2005 and claimed that in 1995, Germany treated the assets of Liechtenstein as its external assets for the purpose of the Settlement Convention.⁷⁷⁷ Although the claim of Liechtenstein failed, the ICJ investigated whether Germany violated its international obligations toward Liechtenstein in relation to its assets and if yes, what liability would be constituted out of such violation.

The precedents from national jurisdictions provide the lists of issues considered by the domestic courts. In the case of *Malewicz v. City of Amsterdam*,⁷⁷⁸ before the final dismissal of the case, the US court considered the four issues: firstly, the rightful ownership of the plaintiff to the assets; secondly, the sovereign authority as the final possessor of the assets in question, to determine whether the asset was taken in violation of international law. In this case, the museum authority received the paintings from the safekeeper of the paintings, who was entrusted by the actual owner;⁷⁷⁹ thirdly, the timing of filing the litigation which the court commented to be during the presence of the assets within its jurisdiction and the location of the cultural objects at the time of the litigation and finally, the nature of the activity in which the assets in question were involved. In this given case, the paintings were brought to the US for exhibition in the museum. The US court interpreted that lending of painting for exhibition qualified for commercial activity as both the public and private museums make the cross-border lending. As to the commercial use of the paintings in this case, the US court observed, “*there is nothing sovereign about the act of lending art pieces even though the pieces themselves might belong to a sovereign. Loans between and among museums (both public and private) occur around the world.*”⁷⁸⁰

⁷⁷⁷ The Settlement Convention was signed among the US, the UK, France, and Germany in 1995 in relation to the reparations of German external assets and other properties seized in connection with the Second World War.

⁷⁷⁸ [2005] DDC 362 F Supp 2d 298.

⁷⁷⁹ Ibid, [301]. Although the claimant raised objections as to the authenticity of the letter presented by the museum authority as evidence of the rightful lending to them by the safekeeper, such discussion was broadly based on the question of facts, and thereby out of the scope of this dissertation.

⁷⁸⁰ Ibid, [314].

The first issue received a clear view in the case of *Altmann v. Republic of Austria* (2001).⁷⁸¹ This case was concerning paintings looted during the *Nazi* era. The paintings were held by Austria and the Austrian Gallery in the US advertised for exhibition of the paintings. The US court observed three elements to be proved for a successful attachment of the paintings in favor of the plaintiff: assets taken in violation of international law, owned by a State agency or instrumentality and the agency engaged in commercial activity in the US. Finally, the US court interpreted as the actions of the Austrian Gallery as of using the paintings in advertising, lending them to the US museums as commercial in nature.⁷⁸² The US court held the holding of the paintings by the Austrian museum as non-rightful and therefore, in violation of international law.⁷⁸³

As to the second issue from the *Malewicz* case, of taking the object in violation of international law, the US court gave a broader interpretation including domestic taking in the case of *Philipp v. Germany* (2017).⁷⁸⁴ Germany argued that the claim of the plaintiff as to the taking in violation of international law did not act when the State took objects from its own nationals whereas the US Supreme Court gave the broader interpretation of the phrase “rights in property taking in violation of international law” as inclusive of domestic takings.

In relation to the third issue of the *Malewicz* case, the court order becomes a mere paper judgment when the cultural object is already removed from the jurisdiction of the forum State. Compliance remains at the sweet will of the defendant State. In *Agudas Chasdei Chabad v. Russia Federation* (2006)⁷⁸⁵ the historical objects consisting of books and archives of pages were taken by Russia. The plaintiff filed the litigation before the US court for surrender of the objects, alleging the taking in violation of international law. The US Court held that Russia enjoyed no immunity regarding these objects and thereby was bound to return the same to the plaintiff. The plaintiff could not enforce the judgment as the objects were removed from the US before the final judgment.

⁷⁸¹ [2001] CD Cal 142 S Supp 2d 1187.

⁷⁸² Ibid, [1204] and [1205].

⁷⁸³ *Republic of Austria v. Altmann* [2004] 124 S.Ct 2240 (No. 03-13).

⁷⁸⁴ [2017] DDC 248 F Supp 3d 59.

⁷⁸⁵ [2006] DDC 466 F Supp 2d 6, [10], [12].

For the final issue of the *Malewicz* case, the plaintiff lost the case because of the absence of commercial use of the asset in question in *Westfield v. Federal Republic of Germany* (2011).⁷⁸⁶ Mere commercial activity was not enough for the US court. The petitioner also needed to establish the adverse impact on the US market if the remedy were not granted. The plaintiff attempted to recover certain paintings, seized by the Nazis. However, the US court granted immunity to Germany as the plaintiff failed to prove the commercial activity of Germany regarding the seized paintings. In *De Csepel v. Hungary* (2011)⁷⁸⁷ the cultural objects owned by a private collector were taken by Hungary during the World War II which were subsequently put under a bailment agreement between the plaintiff and Hungary. After failing to recover the assets upon several requests, the plaintiff filed the litigation in the US court. The plaintiff successfully argued the abovementioned prerequisites. The US court refused to apply the commercial exception in this case due to lack of direct effect of the repudiation of the bailment contract in the US market.⁷⁸⁸

In addition to issues mentioned in the *Malewicz* case, the petitioner needs to exhaust the other available remedies before suing the foreign sovereign. Such as in *Re Borrowed Gravestones* (1985),⁷⁸⁹ the Swiss Federal Court refused to grant MoC because of lack of administrative action on behalf of the Swiss government to return the assets from Italy. Certain gravestones with historical and archeological value under the Italian Civil Code, were taken to Italy from Switzerland for some criminal investigation under the European Convention on Mutual Assistance in Criminal Matters 1959 but the Italian authorities did not return the gravestones to Switzerland. The Swiss appellate court observed that Italy should not be benefited from this conduct and thereby not be entitled to immunity as they violated their obligation to return the gravestone in accordance with the European Convention (1959). However, the Swiss Federal Supreme Court held a contrary view, “*it should be observed at the outset that Italy has not arbitrarily procured possession of the stones; on the contrary, they were duly handed to it by the competent Swiss authorities after mutual*

⁷⁸⁶ [2011] 6th Cir 633 F 3d 409 [413].

⁷⁸⁷ [2011] DDC 808 F Supp 2 d 113; [2013] DC Cir 714 F 3d 591; [2016] DDC 169 F Supp 3d 143. [2017] DC Cir 869 F 3d 1094.

⁷⁸⁸ [2016] DDC 169 F Supp 3d 143, [158-163].

⁷⁸⁹ *Re Borrowed Gravestones* [1987] the Bundesgericht (Swiss Federal Supreme Court) 6 February 1985, ECC 36. 82 ILR 24.

assistance proceeding took place.”⁷⁹⁰ It emphasized on the necessity of request from Switzerland to Italy to return the stones and in absence of this, Italy should not be held in violation of international law⁷⁹¹ and therefore it enjoyed immunity in relation to the gravestones.⁷⁹²

The US court followed a similar approach of denying MoC without appropriating other course of action for remedy. In *Cassirer v. Kingdom of Spain* (2006)⁷⁹³ the issue in this case was the defendant State was not the one who took the objects in violation of international law. The US court reviewed the question as to whether the FSIA (1976) exception would apply or not. The court held in favor of the application of the FSIA (1976) exception against Spain. However, the US court refused the appeal on the grounds of non-exhaustion of available remedies by the plaintiff.

4.4. Commonly targeted sovereign assets

The nature of the non-immune assets receives a comprehensive view when scrutinized from the aspects of specific asset in question. Zdobnoh and Vark duly observed, “(Sovereign immunity from execution) *depends...rather on the characteristics of the assets that the judgment creditor is trying to levy execution upon.*”⁷⁹⁴ Sovereign assets are located not only within its own territory but also in other States’ territory. Given the defendant State enjoys full immunity in its territory, its national courts may be hesitant to apply restrictive sovereign immunity.⁷⁹⁵ The judgment creditors target the sovereign assets beyond the territorial jurisdiction of the defendant State’s courts and specially target the jurisdictions with more creditors-friendly legislations. Searching for sovereign assets is a challenging task. This task is often conducted with either of the two objectives: to find an asset for the enforcement of judgment or arbitral award or to find any misappropriated assets by any deposed political leaders.⁷⁹⁶ The first one

⁷⁹⁰ [1987] ECC 36, [18].

⁷⁹¹ Ibid, [20].

⁷⁹² Ibid, [21].

⁷⁹³ [2006] CD Cal 461 F Supp 2d 1157; [2010] 9th Cir 616 F 3d 1019; [2010] 9th Cir 49 ILM 1492.

⁷⁹⁴ Zdobnoh and Vark (n 378) 166.

⁷⁹⁵ George K. Foster, ‘Collecting from Sovereigns: The Current Legal Framework for Enforcement Arbitral Awards and Court Judgments against States and their Instrumentalities and Some Proposals for its Reform’ (2008) 25 (3) Arizona Journal of International & Comparative Law 665, 670.

⁷⁹⁶ Nicholas Peck, Martin Stone and Allison Everhardt, ‘Sovereign Asset Tracing: A Whole New World’ (June 2020), Nardello & Co. <<https://www.nardelloandco.com/insights/sovereign-asset-tracing-a-whole-new-world/#>> accessed 13 November 2021.

is considered for this dissertation whereas the other one is exclusively kept outside the scope of this dissertation.

Among the main two types of assets: moveable and immoveable assets, the immoveable sovereign assets are not immune when it comes to the debt in relation to the particular asset. On the other hand, the immunity of moveable assets brings all the above discussed questions in place. The location of the liquid assets, the holder of the assets, control over the asset, *etc.* are the catalysts for the question of immunity. Sovereign ownership raises a preliminary presumption of immunity from MoCs. Besides, certain sovereign assets enjoy absolute immunity under international conventions.⁷⁹⁷ Nevertheless, the proof of commercial use rebuts the presumption. As the above discussion shows, the courts of some forum States grant MoCs relying on the commercial purpose of the assets despite the protection granted under the international conventions.

On the other hand, States manage their assets through SOEs with separate legal entity as the alter ego. In the case of assets held by SOEs, it is difficult to convince the court to pierce the corporate veil even in the most creditors' friendly jurisdictions such as the US or the UK.⁷⁹⁸ Therefore, despite the characteristics of non-immune assets enumerated above, specific types of cross-border assets which are commonly targeted for enforcement, demand deeper examination to determine the question of immunity.

4.4.1. *Immoveable assets*

Immoveable assets are defined as assets that are permanently attached to the earth.⁷⁹⁹ States' immoveable asset does not enjoy immunity from execution in case of the disputes resulting out of the same asset situated in the forum State's territory.⁸⁰⁰ The Swedish Supreme Court rightly observed:

The expression [in use...by the State for other than government non-commercial purposes] should however, be considered to mean that there is immunity from enforcement in merely for the reason that the property in

⁷⁹⁷ Discussed in 4.2. of this Dissertation.

⁷⁹⁸ Discussed in 4.4.4. of this Dissertation.

⁷⁹⁹ Black's Law Dictionary (n 62) 'Immoveable property'. It defined as "*property that cannot be moved; an object so firmly attached to the land that it is regarded as part of the land.*"

⁸⁰⁰ The UN Convention 2004 (n 41) art 13; The ECSI 1972 (n 41) art 9, 10.

question is owned by the state and used by it for non-commercial purposes.⁸⁰¹

Similarly, national legislations take immoveable property as the exception to the rule of absolute sovereign immunity.⁸⁰² The immoveable assets of the defendant States can be subjected to MoCs for the debt arising out of the dispute from the same property. The ECSI (1972), article 9 states the immunity from jurisdiction does not apply in the proceedings related to rights, interests, use or possession of immovable assets as well as the obligations arising out of the immovable assets. Article 29 (c) excludes the application of this Convention in disputes related to customs duties, taxes, and penalties.⁸⁰³ The combined effect of these two provisions is that the immunity of immoveable assets cannot be claimed under the ECSI (1972) in relation to the debts derived from this asset. The UN Convention (2004) has similar provision in its article 13 as article 9 of the ECSI; however, it lacks the provision as article 29 (c) of the ECSI (1972). In view of the provisions of the ECSI (1972), the taxes arising out of any immovable asset owned by the defendant State may be enforced against the particular asset. It was commented in the Explanatory Report (2006) to the ECSI (1972):

The exclusion of these matters from the field of application of the present Convention does not by any means imply that [...] judgments given in these fields can be enforced in the State of the forum against property of a foreign State. It means only that since the provisions of the Convention may not be invoked, recourse must be had to general rules of law.⁸⁰⁴

In the *Hungarian Embassy case* (1969)⁸⁰⁵ while deciding the question of immunity of the lands of the embassy [not currently used for diplomatic purposes], the German court applied the test of “*whether the ability of diplomatic mission to function would*

⁸⁰¹ *Sedelmayer v Russian Federation* [2011] Supreme Court of Sweden No. O 170-10 (2011) Nytt Juridiskt Arkiv 475, [14]. Translation taken from Pal Wränge, ‘Sedelmayer v. Russian Federation’ (April 2012) 106 (2) the American Journal of International Law 347, 349.

⁸⁰² The FSIA 1976 (n 37) sec 1605 (a) (4); The SIA 1978 (n 37) sec 6; The SIA 1982 (n 167) sec 12 (1) (c).

⁸⁰³ Similar provisions are available in the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 art 1, para 2 (6) and (7) and para 3.

⁸⁰⁴ The Explanatory Report to the ECSI 2006 (n 181) para 114.

⁸⁰⁵ [1969] the Bundesgerichtshof, 26 Sept. 1969 65 ILR 110.

be impaired.” Finally, the German Court held that the embassy’s immovable asset “no longer used for diplomatic purposes” could be subjected to MoCs.

The FSIA (1976) of the US, section 1610 (a) (4) puts the immovable asset as an exception to the immunity from attachment and execution. It infers that the immovable asset owned by any foreign State situated in the US does not enjoy any immunity unless it is used for diplomatic or consular missions. In the case of *City of New York v. Permanent Mission of India*, (2010)⁸⁰⁶ the twenty-six-floor building was owned by the Permanent Mission of India in the US where the first six floors were used for diplomatic mission and the other twenty floors were used for accommodation of low-level employees. According to the laws of the city of New York, tax exemption was given for the real estate assets of the foreign State, used exclusively for diplomatic purposes and accommodation of high-level officials. The local government kept taxing the twenty floors of the building whereas India claimed tax exemptions for the whole estate as a sovereign State. The City of New York proceeded to enforce the tax liability of the Permanent Mission of India against the building and succeeded in the circuit court. The Second Circuit Court of Appeal emphasized on three issues when it came to enforcement against immovable asset of the defendant State: firstly, the asset was located in the forum State, secondly, the asset was owned or possessed by the defendant State and finally, debt was accrued from any obligation relating to the immovable asset in question.⁸⁰⁷ Such dispute could be tax liability, tortious liability arising from the immovable asset, insurance claim, *etc.* India appealed to the US Supreme Court which was rejected subsequently.⁸⁰⁸ This precedent of the US Supreme Court restricted the availability of immovable asset from MoCs for the debts arising from commercial contracts unrelated to the asset.

In the case of *Sedelmayer v. Russian Federation* (2011),⁸⁰⁹ *Sedelmayer* received an investment arbitral award against Russia and attempted to enforce the same against the real estate of Russia in Sweden against the rent owed by the tenants to Russia. The real estate in question consisted of a multi-unit building which was used by the

⁸⁰⁶ [2010] 2nd Cir No. 08-1805.

⁸⁰⁷ *Ibid.*

⁸⁰⁸ *Permanent Mission of India to United Nations* (n 336).

⁸⁰⁹ *Sedelmayer* (n 801); Translation taken from *Wrange* (n 801) 349.

Russian Embassy until 1970s but later, was not notified as official premises anymore. The building had mixed uses of commercial and diplomatic uses. Fifteen out of forty-eight apartments in the building were leased to the employees of the Russian Embassy, two were rented to the commercial companies, and others were used for the Swedish-Russia scientific exchange and other governmental purposes. The ground floor was jointly used by the Russian trade mission and the embassy. The garage was reserved for diplomatic vehicles. The Supreme Court of Sweden relied on article 19 of the UN Convention (2004) and article 18 of the VCDR (1961) and held the official use of the garage, apartments leased to the embassy employees as public purpose and hence, immune from MoCs.⁸¹⁰ It applied the test of “*official purposes and purposes that were closely connected to official activities*” other than “*commercial or other private law activities*.”⁸¹¹ For the apartment opened for rent on non-profit basis as part of the bilateral agreement between Sweden and Russia as to the scientific exchange, the court found the rent agreement between the individual and Russia “*not so closely connected with the fulfilment of the [bilateral] agreement*”.⁸¹² Hence, the court decided the mixed uses of the building as official [*i.e., jure imperii*] and as commercial [*i.e., jure gestionis*]. However, in response to the question of whether use of the whole real estate should be in specific purpose, the court replied, the limited use of the building for official purpose did not entitle the whole building to be immune, hence, the execution was allowed against the part of the building used for non-official purposes.⁸¹³

Hence, when targeting immovable asset for execution, the petitioner needs to prove the nexus of the asset with the claim in question and courts investigate the use of the immovable assets and the impact of the MoCs upon the public functions of the defendant State. Nevertheless, a contrary precedent was the case of *Zimbabwe v. Louis Karel Fick, Etheredge, Campbell, and President of the Republic of South Africa* (2013).⁸¹⁴ In this case, the claimants received an arbitral award against Zimbabwe for the expropriation of their land and attempted to enforce part of the award in South Africa. The High Court of South Africa enforced the award by confiscating and

⁸¹⁰ Ibid, [21].

⁸¹¹ Ibid, [8], [16].

⁸¹² Ibid, [22].

⁸¹³ Ibid, [23].

⁸¹⁴ *Zimbabwe* (n 445).

subsequently selling the immoveable assets of Zimbabwe located in South Africa. The decision of enforcement against immoveable asset of Zimbabwe was also confirmed by the Constitutional Court of South Africa. Nevertheless, the South African courts did not enquire into the use of the immovable asset in question while granting MoC.⁸¹⁵ This precedent went beyond the stand of international convention and practices of other jurisdictions. It allowed MoC against the immoveable asset for an unrelated judgment debt. Such practice is hardly observed in other jurisdictions.

4.4.2. *State-owned ships and cargo therein*

Ships are the moveable asset of the States. When they are used in any purpose other than for military purposes and/or for public uses, they enjoy no immunity in international law.⁸¹⁶ Ships that are not used for warships or for any governmental purposes are called as merchant ships.⁸¹⁷ There are various kinds of merchant ships such as cargo ships, dry cargo ships, specialized cargo ships, coasters, passenger ships, *etc.*⁸¹⁸ Irrespective of the kinds [except military ships], the merchant ships are available for enforcement of any judgment debt of the sovereign.⁸¹⁹ The flag raised in the ship indicates its place of registration and its nationality and thereby acts as the documentary proof of its ownership.⁸²⁰ Determination of the ownership also acts as the catalyst for the jurisdiction of States,⁸²¹ and possibility of MoCs to be taken against the ship in question.

The Brussels Convention (1926) states the immunity to the State-owned ships intended for public purposes.⁸²² The UNCLOS (1982) states the immunity of warships and government owned ships when used for non-commercial purposes.⁸²³ It means the

⁸¹⁵ Tawanda Hondora, 'South Africa's Law on Foreign State Immunity: A Puzzle of Phantom Waivers in Red Herrings, and Dark Continents', (April 2, 2017) <<https://ssrn.com/abstract=2945051>> accessed 31 July 2022.

⁸¹⁶ The UNCLOS 1982 (n 366), art 32, 95 and 96.

⁸¹⁷ *Ibid*, art 29-32.

⁸¹⁸ Lagoni (n 349) para 6. There are ships with special kind of propulsion such as fishing boats, considered as a separate category in international law. However, it does not fall within the discussion of this dissertation.

⁸¹⁹ *ibid*.

⁸²⁰ The UNCLOS 1982 (n 366) art 91 (1). Nevertheless, in the case of *the Grand Prince (Belize v. France)* [2001] ITLOS, List of Cases no. 8 (20 April 2001). In this case, the International Tribunal for the Law of the Sea (ITLOS) refused to apply 'an element of friction' to establish the ownership based on mere rise of flag and/or any expired certificate of registration.

⁸²¹ *The 'Juno Trade' case Saint Vincent and the Grenadines v. Guinea-Bissau*, [2004] ITLOS Case. 13 (December 18, 2004), para 9.

⁸²² Discussed in 2.4.4.1 of this Dissertation.

⁸²³ The UNCLOS 1982 (n 366) art 32.

use of the ship receives the sole consideration for the question of its immunity. Even before the Brussels Convention (1926), the State-owned ships enjoyed immunity for the sake of diplomatic relations. In *Schooner Exchange v. McFadden* (1812)⁸²⁴ an armed vessel of France was attempted to be seized by a US plaintiff. Chief Justice Marshall denied the enforcement action on the grounds of public nature of the vessel. He found that allowing such action would impugn the dignity of defendant State and violate the mutual relation and ‘interchange of good offices’ among the States.⁸²⁵

In the *Rigmore* (1942)⁸²⁶ a month after the German invasion of Norway during the World War II, the Norwegian government requisitioned the *Charente* and nine other ships, registered in Norway. These ships were subsequently chartered (by demise) to the UK. The British government used the ships for carrying cargoes of semi-finished and finished commercially purchased materials of its own. The application was made in the lower court of Gothenburg for the arrest of these ships where the UK’s claim of immunity was upheld. Later, the court of appeal denied immunity. Thus, the case went before the Swedish Supreme Court which allowed the immunity of the ships, relying on the evidence given by the UK as to the exclusive governmental use of the cargo for the promotion of the war efforts.⁸²⁷ The Swedish Supreme Court deviated from the provision of the Brussel Convention (1926). Under the Brussels Convention, any carriage of supplies on behalf of the State for its population is deemed as commercial.⁸²⁸ Nevertheless, the court allowed the immunity after concluding, “*A State involved in way may if it engages in carriage for purposes of this kind is regarded as engaged in a practice of a purely state character must be considered to have received a certain recognition by virtue of the provisions of Article 7 of the 1926 Brussels Convention.*”⁸²⁹

⁸²⁴ *The Schooner Exchange* (n 100).

⁸²⁵ [1812] USSC 11 US 116, [119] and [137].

⁸²⁶ [1942] Nytt Juridiskt Arkiv 1 (NJA) para. 69. For translations of the judgment: Erik Hagbergh, ‘Supreme Court of Sweden: Judgment in the “Rigmore” Case’ (1943) 37 (1) American Journal of International Law 141.

⁸²⁷ *Ibid*, 150.

⁸²⁸ The Brussels Convention 1926 (n 186) art 1.

⁸²⁹ *Ibid*, art 7 states, “*In time of war each Contracting State reserves to itself the right of suspending the application of the present Convention [...] to the effect that neither ships owned or operated by that State, nor cargoes owned by it shall be subject to any arrest, seizure, or detention by a foreign Court of Law [...]*”

The French jurisdiction applied the restrictive sovereign immunity in *Societe Laul Liegard v. Capitain Serdjuk and Mange* (1964).⁸³⁰ The French court spelled out the private use and the public use of the State-owned ships by stating:

A ship belonging to a foreign State which carries freight by sea for a private person performs a private commercial act which has nothing in common with the performance of a public or governmental service. The rules concerning the immunity of State ships do not therefore apply to such ships, which can be subjected to attachment if liability may have been incurred in the court of such carriage.⁸³¹

With the increasing use of restrictive sovereign immunity, the Privy Council denied immunity to a commercial trading ship owned by the Philippines government due to its engagement in commercial voyage in the *Philippine Admiral* (1977).⁸³²

In the *I Congreso del Partido* (1978)⁸³³ two Cuban ships were delivering sugar to a Chilean buyer. One of the ships, namely *the Playa Larga* was owned by a Cuban SOE and the another, namely *the Marble Islands*, was chartered by the same SOE from a Liechtenstein corporation. During the voyage of the ships, the Cuban government froze all Chilean assets, and diverted all its ships from the voyage due to deterioration of its relationship with Chile. Thus, the ships could not deliver the cargoes to the buyer. The Cuban government subsequently gifted the cargo in the *Marble Islands* to North Vietnam. Thus, the buyer applied to the British court, based on the bill of lading, for recovery of its costs for non-performance of the contract. Justice Robert Goff recognized that a mere breach of contract did not entitle the claim of immunity, but he also observed, “*the character of the contract cannot necessarily preclude a breach of being held to result from an actus jure imperii in which event sovereign immunity may be claimed in respect of such breach.*”⁸³⁴ Therefore, he decided in favor of Cuba as the diversion of both ships arose out of the exercise of sovereign act of foreign policy,⁸³⁵ because the given instructions of the diversion of the ships could

⁸³⁰ *Societe Laul Liegard v. Capitain Serdjuk and Mange* [1964], Tribunal de commerce, La Rochelle, 14 Oct 1964, 65 ILR 38.

⁸³¹ *Ibid.*, [39].

⁸³² [1977] A.C. 373 (Privy Council) 400.

⁸³³ [1978] QB 500 (Robert Goff J).

⁸³⁴ *Ibid.*, [530].

⁸³⁵ *Ibid.*, [533].

not have been given by any private entity.⁸³⁶ When the case was brought before the House of Lords [the UK], immunity for both ships was denied.⁸³⁷ For the *Playa Larga*, the House of Lords decided unanimously against the claim of immunity stating, “everything done by the Republic of Cuba in relation to the *Playa Larga* could have been done and so far as evidence goes, was done as owners of the ship: it had not exercised and had no need to exercise sovereign powers.”⁸³⁸ For the other ship namely, the *Marble Islands*, Lord Wilberforce and Lord Edmund had dissenting opinion. They commented on the lack of contractual relationship between Cuba and the plaintiff. They relied on the facts that confiscation of Chilean cargo, diversion of ship and gifting the same to another State were the public acts of Cuba.⁸³⁹ The House of Lords [the UK] in this case considered of the conduct in context whether acted under contractual or proprietary powers.⁸⁴⁰

In *Wijsmuller Salvage BV v. ADM Naval Services* (1989),⁸⁴¹ the Peruvian warship was delivered to a Dutch company for repairing. It faced some difficulties while going for a sea trial. The petitioner aided the ship which entitled the petitioner to its salvage payment. In fear of losing the opportunity to get paid, the petitioner applied for attachment to the ship. The petitioner argued the ship was not serving any public purpose but instead taken for refitting which was usual for any other private ships as well. The Dutch court held the ship as immune from MoCs as commenting:

A warship delivered by a foreign State to Dutch companies for refitting not only has to spend a long time in dock but must also undergo sea trials, during which it sails under national command and is manned in part by a national crew, should also be regarded as a ship intended for use in the public service even during the execution of the work.⁸⁴²

⁸³⁶ Ibid, [528]- [29].

⁸³⁷ [1983] 1 AC 244.

⁸³⁸ Ibid, [261] and [267].

⁸³⁹ Ibid, [277].

⁸⁴⁰ Brownlie (n 117) 330-31; James Crawford, ‘International Law, and Foreign Sovereigns: Distinguishing Immune Transactions’ (1984) 54, British Yearbook of International Law 75, 91.

⁸⁴¹ [1989] NYIL 294-296.

⁸⁴² *Wijsmuller Salvage BV v. ADM Naval Services* [1989] District Court of Amsterdam, 19 November 1989, <<http://www.cahdidatabases.coe.int/Contribution/Details/193>> accessed 02 August 2022; translation taken from Reinisch (n 28) 825, fn 147.

In another case of *the Russian Federation v. Pied-Rich BV* (1994), the Dutch Supreme Court held that, the State-owned ships, used for commercial shipping company, are not entitled to similar immunity. The Dutch Supreme Court held:

There is no unwritten international law to the effect seizure (provisional or otherwise) of a vessel belonging to the State and intended for commercial shipping is permissible only if the seizure is levied for the purpose of insurance or to recover a (maritime) claim resulting from the operation of the vessel.⁸⁴³

When deciding the public or commercial purpose of the ship, the historical context also plays a vital role. In *Odyssey Marine Exploration v. Spain* (2011)⁸⁴⁴ the *Mercedes* was a Spanish warship that was sunk in international water in 1804. In 2007 the plaintiff discovered it along with its cargo and claimed it as a shipwrecked vessel. Spain filed a motion to dismiss the claim over the *Mercedes* as the US court lacked jurisdiction over the warship of Spain. Based on the magistrate judge's report, the US court confirmed the ownership of Spain over the *Mercedes* and its cargos. The sovereign ships carrying commercial activity did not enjoy immunity. The plaintiff claimed that 75% of the space in the *Mercedes* was commercially rented for carrying private cargo. Nevertheless, the US court reviewed the historical background of the *Mercedes*. It confirmed the immunity to the ship and its cargo and commented:

Although the *Mercedes* did transport private cargo of Spanish citizens for a charge, the transport was of a sovereign nature. According to Spanish naval historians, providing protection and safe passage to property of Spanish citizens was a military function of the Spanish Navy, especially in times of war or threatened war.⁸⁴⁵

4.4.3. State-owned Aircraft and cargo therein

Similar to the State-owned ships, State-owned aircrafts used for public purposes are immune from any enforcement.⁸⁴⁶ State-owner aircrafts are defined as owned and

⁸⁴³ *The Russian Federation v. Pied-Rich BV*, [1994] Supreme Court of Netherlands, NJ 1994, no. 329.

⁸⁴⁴ [2011] 11th Cir 657 F 3d 1159.

⁸⁴⁵ *Ibid*, [1177].

⁸⁴⁶ The Convention on the Regulation of Aerial Navigation (the Paris Convention) 1919 art XXXII.

controlled by government and serving public purposes.⁸⁴⁷ Besides the ownership of the aircrafts, purpose of the aircraft is the determining factor for immunity. The Convention on the Regulation of Aerial Navigation (the Paris Convention) of 1919 listed the police, customs, and postal services as the public services.⁸⁴⁸ The Chicago Convention (1944) excludes the State aircrafts from this scope of application and therefore defined it as aircrafts used for military, customs or police services.⁸⁴⁹ The purposes listed in the Chicago Convention (1944) are not exhaustive, therefore the other purposes *inter alia* search and rescue, firefighting, scientific purposes, disaster relief distribution, *etc.* remain open for interpretation. On the other hand, aircraft serving civil purposes are known as civil aircraft. When the civil aircrafts are owned and operated by the governmental agency for commercial purposes, they are deemed as any other privately owned civil aircrafts under the Chicago Convention.⁸⁵⁰ Like the State-owned merchant ships and aircrafts, the cargo therein, are treated the same way as any cargo carried in private commercial vessels.⁸⁵¹

In *Socialist People's Libyan Arab Jamahiriya v. Rosseton* (1989),⁸⁵² the lower court in Italy allowed prejudgment attachment against two State-owned aircrafts of Libya upon application of the judgment creditor. While deciding this case, the Italian Supreme Court opined that except the sovereign assets “*used in the exercise of sovereign functions or devoted to public purposes*”, others were available for execution. In light of this case, the court was convinced as to the commercial use of the State-owned aircrafts. Nevertheless, the judgment creditor did not get the MoC in his favor because the court denied the enforcement due to the absence of ministerial authorization for the MoCs against Libyan State's assets.⁸⁵³

Nevertheless, execution is permitted when the judgment debt is accrued from the liability of the airline. Such as, in the case of *Air Zaire v. Guathier et al* (1984)⁸⁵⁴ the compensation order for the wrongful termination case of a group of Belgian pilots was enforced by the attachment of an aircraft of Air Zaire. The Court of Appeal held

⁸⁴⁷ Wouters and Verhoeven (n 367), para 1.

⁸⁴⁸ The Paris Convention 1919 (n 846) art XXX; The UN Convention 2004 (n 41) art 18.

⁸⁴⁹ The Chicago Convention 1944 (n 404) art 3 (b).

⁸⁵⁰ *Ibid*, art 77-79.

⁸⁵¹ The Brussels Convention 1926 (n 186).

⁸⁵² [1989] SRL 72 *Rivista di Diritto Internazionale* 691.

⁸⁵³ [1989] Decree dated March 29, 1989. 25 *Rivista di Diritto Internazionale Privato E Processuale* 477.

⁸⁵⁴ [1984] Court of Appeal, Paris (January 31, 1984) 1984 RECUEIL DALLOZ SIREY (12 April) 160.

the use of the aircraft as “purely commercial” and disregarded its claim of immunity from execution. The challenge arises when the judgment creditor attempts to enforce the debt of the defendant State against State-owned aircrafts or assets of State-owned airline. In *Hercaire Intern., Inc v. Argentina* (1987),⁸⁵⁵ *Hercaire* successfully received attachment order from the trial court to enforce the judgment against the Boeing 727 of the national airline of Argentina relying on the fact that hundred percent of the shares in the airline was held by Argentina. The 11th Circuit Court of Appeal denied the attachment order by commenting, “*if Aerolineas lacks separate status, then the Boeing 727 seized by the Marshals certainly is Argentina’s commercial property found in the United States.*” The court again applied the *Bancec* test and decided against the attachment order. It was found that the petitioner failed to prove the extensive control of Argentina over the airline company despite its full ownership over its shares and/or any fraud or injustice in form of abuse of corporate status.

In the *Thai Airplane* case (2011),⁸⁵⁶ the Munich court ordered the attachment of the Boeing 737, which landed in the Munich airport pursuant to an outstanding debt of \$43.4 million owed by the Thai government to a German construction firm. The Thai foreign minister emphasized on the ownership of the aircraft in the name of the Thai Royal family instead of the Thai government. Nevertheless, the court refused to reverse the order unless €20 million was given as a guarantee. The plane was subsequently released upon the payment of the guarantee.⁸⁵⁷

One common question for both State-owned ships and State-owned aircrafts is the operation and management of these sovereign assets under the veil of corporate structure. The State owns the shares in the SOE and leaves the day-to-day operation of these assets to its SOE. The SOE holds the documentary title over these assets. Not only ships and/or aircrafts, but State also uses the corporate form for its various other asset management activities, *e.g.*, sovereign wealth funds, State-owned intellectual properties, certain subsidized industries, *etc.*

⁸⁵⁵ *Hercaire Intern., Inc. v. Argentina* [1987] 11th Cir 821 F 2d 559.

⁸⁵⁶ Spiegel International, Diplomatic Dispute: Thai Prince’s Private Jet to Remain Impounded in Munich, (26 July 2011) <<https://www.spiegel.de/international/germany/diplomatic-dispute-thai-prince-s-private-jet-to-remain-impounded-in-munich-a-776718.html>> accessed 01 March 2022.

⁸⁵⁷ Charlotte Chelsom-Pill, German court to release Thai prince’s plane for a fee, (20 July 2011) <<https://www.dw.com/en/german-court-to-release-thai-princes-plane-for-a-fee/a-15253912>> accessed 01 March 2022.

4.4.4. *Assets by State-owned enterprises (SOEs)*

State invests in SOEs to have controlling interests in the venture.⁸⁵⁸ The objectives of investing in SOEs are predominantly commercial in nature as well as the income received therefrom is also used for commercial purposes. The legal distinctions between the sovereign wealth funds and the SOEs are that sovereign wealth funds are held by State instrumentalities whereas the same instrumentality may own the shares in SOEs.⁸⁵⁹ The State instrumentalities and the SOEs hold legal distinctions. The State instrumentalities stand on the same footing as any sovereign entities whereas the SOEs possess the separate legal entities. The interest of the State in its SOE is limited to its shares and right to distribution whereas the SOE holds its assets in its own name and manages the same. With the SOE, sovereign ownership stays behind the corporate veil. Hence, piercing the corporate veil requires a more compelling case while targeting the assets of the SOEs for enforcement of any judgment debt of the State or vice-versa.

The ILA Draft (1982) included the State agency within the given definition of foreign State for the purpose of State immunity where either the agency in question had no separate personality or regardless of the separate legal personality, it had performed any *jure imperii* in exercise of the sovereign authority.⁸⁶⁰ The State instrumentalities are also relevant when the defendant State hides its assets behind the corporate veil of its SOEs. For illustration, in justifying the attachment of assets of one SOE for the debt of another, the US Supreme Court held, the foreign State abused the corporate structure, thus need to pierce the corporate veil for fraud.⁸⁶¹ Thus, the functions of State agencies or instrumentalities in the law of State immunity can be discussed under two questions: firstly, whether their assets are immune from execution, either for their own debts or the debts of the State itself. Secondly, whether the State agencies are entitled to immunity for their functions in the exercise of State authority delegated to them. Among these two issues, the first one is directly related to this dissertation. The second one is relevant as to the determination of State agency's legal

⁸⁵⁸ Shu Shang and Wei Shen, 'When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era: is There still a Black Hole in International Law?' (2018) 21 (4) *Leiden Journal of International Law* 915, 917.

⁸⁵⁹ Discussed in 4.4.7 of this dissertation.

⁸⁶⁰ The ILA Draft 1982 (n 142) art 1 (b).

⁸⁶¹ *First National City Bank* (n 34).

position as a separate legal entity or as a functional State instrumentality such as the status of the central bank and its assets.⁸⁶²

The delegation of government power to the private entities brings the question of entitlement of immunities for the exercise of governmental powers by private entities. In a question of immunity, the court considers the legal personality of the private actor [here the SOE], the nature of the authority delegated and the legal relationship between the delegator [here the State] and the delegate [here the SOE]. Finally, the court concludes with an emphasize on the nature of the act and the legal relationship with the State to grant or reject immunity to non-State actors.⁸⁶³ This approach makes either no asset as immune, or all the assets as immune unless the commercial use test is satisfied.⁸⁶⁴

As to the first question, the position of the US is stringent under the FSIA (1976) of the US section 1610. The State agency's assets are subjected to attachment of their own debt regardless of the origin and destination of the assets. The restriction as to commercial use is also not applicable when the aim of the agency is generally doing business. The reason behind such a strict position is to separate the application of corporate laws and related business laws from the laws on foreign sovereign immunity. However, the functions of SOEs sometimes overlap with the public functions of the State. Therefore, determination of the functions of SOE and the State is required to decide the question of immunity of the SOE's assets. The SIA (1978) of the UK confirms that assets of the State instrumentalities as not immune. However, when any separate entity acts in the exercise of sovereign power is entitled to immunity as State.⁸⁶⁵ This provision has two legal consequences: firstly, assets of SOE are not immune for its debt; secondly, if the SOE is involved in any public functions or exercises power, its assets are entitled to immunity for that function.

The question of non/immunity of a SOE's assets stands on both the laws of the foreign sovereign immunity and corporate law. The foreign sovereign immunity law does not extend the sovereign asset's immunity from execution to its SOEs. According to corporate law, the assets of SOE cannot be subjected to MoC for the

⁸⁶² Discussed in 4.2.3 of this Dissertation.

⁸⁶³ Oddenino and Bonetto (n 173) 23.

⁸⁶⁴ Byers (n 33) 887.

⁸⁶⁵ The SIA 1978 (n 37) sec 14 (2).

debt of the shareholders [here, the State]. However, the US Court of Appeal held the SOE of Venezuela as the State instrumentality and allowed to look beyond its corporate veil in order to attach its assets to enforce the judgment debt.⁸⁶⁶

The *CAVNOS* case (1977)⁸⁶⁷ was brought before the Court of Cassation of France over the assets of the Algerian pension fund in France for attachment. The fund claimed immunity from execution as a public service entity whereas the Court rejected the claim as the existence of the pension fund entity was distinct from Algeria as sovereign State. “*If they (SOEs) have not acted in the name of the puissance publique, there is no sovereign immunity.*”⁸⁶⁸ The mere nature of the public entity was not enough for *CAVNOS* to be entitled to immunity. The court in the *CAVNOS* case followed the precedent from the case of *Zavicha Blagojevic v. Bank of Japan* (1976).⁸⁶⁹ In this case, the Bank of Japan was not held as acting “in the name and account of the State.” The question of the scope of delegation of public service by the State to the concerned SOE was a core question here.

4.4.4.1. Separate legal entity of SOE

Assets of SOE are not immune due to the separate legal entity. Corporate law distinguishes the ownership of shares *i.e.*, the shareholders from the ownership of company’s assets. The State as the shareholder of the SOE is not the owner of SOE’s assets. The term corporate/separate legal entity in corporate law holds a different legal definition from the SOE’s separate entity from the State in law. According to corporate law, SOE as a corporate/separate legal entity is a legal person capable of owning and managing its own assets. It can sue and be sued for its own obligations. On other hand, for this dissertation, ‘separate legal entity’ denotes the separation of SOE as a legal entity from the State.

The UK High court, Queen’s Bench division, defined, ‘separate entity’ as distinct from the executive organ of the government of the State and capable of suing or being

⁸⁶⁶ *Crystallex v. Venezuela and Petroleos De Venezuela SA* [2019], US Court of Appeals, 3rd Circuit, Nos. 18-2797, 18-3124.

⁸⁶⁷ *Caisse algerienne d’assurance vieillesse des non-salaries (CAVNOS) v. Caisse nationale des barreaux francais*, [1977] The Court of Cassation, France, (December 7, 1977) 1978 REV. CRIT. 532.

⁸⁶⁸ Jan Paulsson ‘Sovereign Immunity from Jurisdiction: French Caselaw Revisited’ [Winter 1985] *International Lawyer* 277, Fn. 9.

⁸⁶⁹ [1976] Court of Cassation (19 May 1976) 1977 REV. CRIT. 359.

sued.⁸⁷⁰ SOEs' separate budget, management, and engagement in commercial or industrial purposes, despite the supervision from the State over the operation and management, put them on distinct footing. In another case, named, *Walter Fuller Aircraft Sales Inc. v. Republic of Philippines* (1992)⁸⁷¹ the US court stated five-point factors as to establish the control over the management of SOE [like the control test]⁸⁷² in order to overcome the presumption of separate judicial authority:

(1) the level of economic control by the government (2) whether the entity's profits go to the government (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs (4) whether the government is the real beneficiary of the entity's conduct and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States court while avoiding its obligations.

In *SDN BHD v. China National Coal Group Corporation* (2017)⁸⁷³ the Hong Kong court allowed the charging order against shares in a subsidiary company held by a Chinese SOE. The decision was based on three findings: the State office of the People's Republic of China confirmed that SOEs were not deemed as part of the State when acting in the commercial capacity; the SOE in question was not a part of the national register for assets supervision (namely State Asset Supervision and Administrative Commission) and finally, by applying the control test, the court found the SOE in question as an independently acting entity.

In the case of *Taurus Petroleum Ltd. v. State Oil Company of the Ministry of Oil of Iraq* (2017),⁸⁷⁴ the UK Supreme Court denied investigating the SOE given its distinct legal entity and the absence of State's control in the day-to-day management of the SOE. Apart from the control over the assets of SOE, the intention of the defendant State regarding the corporate form of SOE is also considered. The creation of a corporate form to commit fraud has been a compelling case in favor of the judgment creditor.

⁸⁷⁰ [2013] EWHC 3494 (Comm); [2014] 1 Lloyd's Rep. 432.

⁸⁷¹ [1992] 5th Cir 965 F 2d 1375, [1380], [n. 7].

⁸⁷² Discussed 'control test' in 3.3.3 of this dissertation.

⁸⁷³ [2017] HKCFI 1016.

⁸⁷⁴ [2017] UKSC 64.

The US Supreme Court gave a leading judgment in the case of *First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)* (1983).⁸⁷⁵ The *Bancec* test was formulated in this judgment. According to this test, the court would presume the separate or independent entity of SOE from its State unless, firstly, the corporate shield was being used in fraud or causing injustice; secondly, there was extensive control of the State over the SOE that the SOE was a mere ‘alter ego’ of the State.⁸⁷⁶ The judgment of the US Supreme Court held the *Bancec* was the alter ego of the Cuban government and held the assets of the *Bancec* non-immune for the claim of Citibank. The US Supreme Court relied more on the fact that after the liquidation of *Bancec*, the assets had been distributed in favor of the government of Cuba and the foreign trade enterprises of the Cuban ministry of Foreign Trade. Thus, the US Supreme Court held, it would result in inequity if the assets had not been allowed for MoCs in satisfying the claim of Citibank.⁸⁷⁷ The US Supreme Court commented, “*Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities.*”⁸⁷⁸ The US court applied the *Bancec* test in *Ministry of Defense v. Cubic Defense* (2004) and held:

In sum to determine whether the property of a foreign state agency or instrumentality can be attached to enforce a judgment against a foreign state, we apply two-step analysis. First, we look at whether the judgment is one for which the agency is not immune for attachment under FSIA and second if so, we determine whether the foreign agency or instrumentality should be held liable for attachment under the *Bancec*.⁸⁷⁹

In *Kensington International Limited v. Republic of Congo* (2005)⁸⁸⁰ the UK court allowed the attachment of assets in the name of the SOE when the creditors proved the sham creation of SOE by the defendant State to shield its assets from the reach of the creditors. The US court granted attachment orders against the assets of State agency for the defendant State’s debt despite its independent legal status from the

⁸⁷⁵ *First National City Bank* (n 34).

⁸⁷⁶ *Ibid* [627], [629].

⁸⁷⁷ *Ibid* [632].

⁸⁷⁸ *First National City Bank* (n 34) [2603].

⁸⁷⁹ *Ministry of Defense, Iran* (n 617).

⁸⁸⁰ [2005] EWHC (Comm) 2684, [193]-[202].

defendant State, on the justification of avoiding injustice and “internationally recognized equitable principles.”⁸⁸¹

Before applying the *Bancec* and control test, the court requires the judgment creditor to identify the specific assets of the SOE for execution instead of an umbrella claim. In *Debbie Walters v. Industrial and Commercial Bank of China and others* (2011)⁸⁸² the plaintiff attempted to enforce a default judgment against China from the assets owned by its SOEs, located in the US without mentioning any specific accounts of the SOE. Both the US court of first instance and the appellate court denied the execution upon two grounds: firstly, the petitioner failed to identify the specific accounts of the defendant Banks for scrutinizing their status under the FSIA (1976) of the US for immunity from execution and secondly, the petitioner also failed to provide evidence to rebut the presumption of separate legal entity of the State agency or instrumentalities in order to allow execution of China’s debt against its SOEs.⁸⁸³

Therefore, the deciding courts of the forum State investigate the State’s relation to its SOE applying the control test and pierce the corporate veil to investigate the possibility of fraud or causing injustice such as intention of the defendant State to deprive the judgment creditor.

4.4.4.2. Public nature of SOE’s assets

In some jurisdictions, the assets of SOE are not judged based on the separate entity from the State. Instead, the assets are considered as a public asset. The reason behind is the source of these assets is public funds. Thus, these assets are deemed as any other sovereign assets such as State-owned ships or aircraft. The French case laws do not give a clear answer to the assets of State instrumentalities. The delegation of power and the use of assets play a vital role in determining whether the assets in question should be entitled to immunity. Nevertheless, the French courts do not require the nexus for the assets of SOEs.⁸⁸⁴ In the case of *Dame Clerget v. People’s Republic of Vietnam Trade Mission* (1971)⁸⁸⁵ the French court gave the benefit of doubt to the funds in the name of SOEs until the determination of their origin and

⁸⁸¹ *First National City Bank* (n 34).

⁸⁸² [2011] 2nd Cir 651 F 3d 280.

⁸⁸³ *Ibid.*, [297] and [298].

⁸⁸⁴ *Sonatrach* (n 733); ‘Nexus’ requirement discussed in 3.5.7 of this dissertation.

⁸⁸⁵ [1971] Court of Cassation, France, November 2, 1971, Rev. crit. Dr. int. Pr. 1972, p. 310. JCP 1972 II, p. 16969

intended use. The court did not accept the plaintiff's argument of commercial origin and use of the funds. The same interpretation of the *Clerget* case was followed by the German Federal Constitutional Court in the case of *National Iranian Oil Company* (1984). The German court held that the immunity from execution should be determined by the national assets in question and its attribution to sovereign functions.⁸⁸⁶ Therefore, assets of SOE can get immunity if their source and functions are public in nature.

In the case of the *LEAMCO* case (1979)⁸⁸⁷ the French court vacated the earlier issued attachment order against the funds in the name of the Libyan Arab Republic and several Libyan SOEs, stating “*no distinction can be made at this time between funds allocated to sovereign or public-service activity and those derived from economic or commercial activities governed by private law*”.⁸⁸⁸ The novelty of this case was the investigation order of the court into the use of the funds. Nevertheless, the subsequent out of court settlement between the parties ended the investigation prematurely.⁸⁸⁹

The *National Iranian Oil Company case* (1983) raised the question of immunity of SOE.⁸⁹⁰ The credit balance in the account was targeted for execution. The Iranian SOE was the owner of the account according to the Bank's information. Nevertheless, the balance was earmarked by Iran to transfer to its central bank for its budgetary expenses. The German court emphasized on the nature of the particular transaction in question: whether it was public or commercial. It was not the corporate veil that could protect the assets of SOEs in German courts as the German Supreme Court did not take the formal classification of legal person distinct from its owner.⁸⁹¹ The case went before the German Constitutional Court (1983). It was held denying immunity to the credit balance on three grounds: firstly, Iran as a State was not in control of the assets, secondly, the future use of the earmarked property was not sufficient for immunity and finally, in the court's view, the MoCs granted against the credit balance would not

⁸⁸⁶ *The National Iranian Oil Company* (n 357).

⁸⁸⁷ *Procureur de la Republique v. LIAMCO* [1979] Trib. Gr. Inst. Of Paris (refere), 5 March 1979 Journal Du Droit International 859.

⁸⁸⁸ *Ibid*, [861].

⁸⁸⁹ Paulsson (n 868) fn 15.

⁸⁹⁰ [1981] Lower instance OLG Frankfurt am Main 64 B. Verf G E 1 NJW 2650.

⁸⁹¹ [1984] RIW 577, [578]. Translation taken from Krauskopf and Steven (n 299), 140.

interfere with the sovereign functions and public purposes of Iran.⁸⁹² The US court also followed the same principle in another case for the assets of State agency. The US court observed:

The assets of the foreign state are not subject to seizure, subject to exception in particular where they have been allocated for an economic or commercial activity under private law which is the origin of the title of the attaching debtor. On the other hand, the assets of public entities distinct from the foreign state, whether or not enjoy legal personality which are part of a group of assets which have been dedicated to activities in the private law sector may be seized by all creditors of the public entity.⁸⁹³

As the above discussion show, the answer to the question of immunity of SOE's assets is not so simple. States invest in SOEs with focus on certain industries. In some industries, SOEs enjoy market monopoly such as electricity, business to business internet service providing and in other cases, they compete with other private entities like in any open market industries. Therefore, cases where the SOE is the single provider of any essential services to the public, should its assets be considered as public? Similarly, sometimes, State provides subsidies to its SOEs in order to provide goods or services to its people at lower cost. Whether the subsidized inventories of SOEs should be deemed as public in nature for the sake of its immunity from MoCs? Among the non-immune assets, the determination of immunity of the SOE's assets is one of the challenging ones. The State practice of creating more State instrumentalities to carry out the commercial or non-governmental function is expanding over the period. It opens the door to the private judgment creditors to bring more enforcement cases and eventually, better interpretations of the SOE's assets.

4.4.5. *Income from State-owned intellectual properties*

States own intellectual properties including patents, copyrights, trademarks, *etc.* having economic values. In most cases, the patents are registered in the name of State

⁸⁹² *The National Iranian Oil Company* (n 357) para 1284, the German Constitutional Court observed, "Action against the account of the state treasury does not entail corresponding dangers. Seizures of claims accounting to \$200 million does not endanger the ability to function of a state of the size and financial resources of the Islamic Republic of Iran. Therefore, there is also no question of it being interference in the exclusive affairs of the Iranian state, its property, and its official activity."

⁸⁹³ *Sonatrach* (n 733).

instrumentalities *e.g.*, State-owned universities or research institutions.⁸⁹⁴ Besides, any inventions coming out of the governmental contracts or assignments, made by governmental employees are considered as the State-owned intellectual properties.⁸⁹⁵ State-owned intellectual property rights are entangled with its own challenges such as interference with private enterprises, unfair advantages in enforcement litigations, immunity from infringement, involvement of funds sourced from fiscal incomes, *etc.* Another challenge is the involvement of public trust doctrine as a determinant factor for these properties while granting any MoC against these properties. Nevertheless, for the purpose of this dissertation, the income generated from the State-owned intellectual properties is concerned. The State makes money from the sale and licensing of these properties such as royalties from copyrights, sale proceeds of the goods with State-owned trademarks or the licensing of the State-owned patents. In *Lloyd's Underwriters v. AO Gazsnabtranzil* (2000)⁸⁹⁶ the license fee owed by the private company to Moldova for using the domain name suffix was held attachable as the nature of the transaction was commercial activity in the US.

The fundamental concept of intellectual property rights is based on the uninterrupted and exclusive rights of commercial exploitation to the owner *vis-à-vis* the right of recognition.⁸⁹⁷ For the sake of enforcement of judgment debt, the income from the State-owned intellectual properties needs to go through the same test of proof of sovereign ownership as well as the commercial use of the same. The question remains open whether the fundamental purpose of protecting intellectual properties should be sufficient to declare these assets as non-immune or the subsequent use of the proceeds should act as the catalyst. Sandeen argued the public trust doctrine in order to scrutinize the non-immune nature of State-owned intellectual property rights. She stated, “*because state-owned intellectual property rights are developed or purchased with the use of tax revenues, states arguably hold such rights in trust for the benefit of*

⁸⁹⁴ Tejas N. Narechania, ‘An Offensive Weapon? An Empirical Analysis of the “Sword” of State Sovereign Immunity in State-owned Patents’ (October 2010) 110 (6) Columbia Law Review 1574, 1585.

⁸⁹⁵ Sharon Sandeen, ‘Preserving Public Trust in State-owned Intellectual Property: A Recommendation for Legislative Action’ (2001) 32 McGeoge Law Review 385.

⁸⁹⁶ [2000] No. CIV 1:00-MI-0242-CAP, 2000 WL 1719493, at n. 1-2. (ND Ga Nov. 2, 2000)

⁸⁹⁷ The World Intellectual Property Organization (WIPO) defined intellectual properties as property protected by law to enable people to earn recognition and financial benefits from their invention or creation. <<https://www.wipo.int/about-ip/en/>> accessed 25 October 2021.

the public and should use those rights with the public's interests in mind."⁸⁹⁸ Intellectual properties of the defendant State are not directly targeted for the enforcement cases rather the income generated from these sources are subjected to the execution cases under different other heads such as funds in account, receivables from third party and income held by SOEs.

4.4.6. *Receivables from a third party*

In the literature of accounting, the term 'receivables' means the payment due from the debtors in short term.⁸⁹⁹ Given the commercial contracts executed by State, it has such receivables from its commercial counterparts. The State has many receivables from its income sources from the third parties, such as royalties and taxes earned from the concession granted for the extraction of its mineral resources, internet licensing fees, use of its airspaces, maritime territory, *etc.* These receivables are the common targets of the judgment creditors for several reasons: firstly, the receivables are governed by the laws of the forum State due to the location of accrual of income and/or place of payment *i.e.*, the forum State; secondly, the payment is still due and at the hand of the third party. Thus, pursuant to a garnishment order of the court, the creditor can directly get the payment from the third party; finally, as the garnishee is bound by the law of the forum State, the defendant State cannot cause any future interference with the payment.

The challenge in this kind of asset is the proof of ownership and its attribution for commercial purposes. Usually, the payments received in the form of taxes are considered as public in nature. In the case of *Af-Cap Inc. v. the Republic of the Congo*,⁹⁰⁰ the judgment creditor asked for a garnishment order against the taxes and royalties owed to Congo. The US court reviewed the past use of 51% of the same taxes and royalties for direct payment to a creditor of Congo for settlement of its previous debt. This fact made the court decide the assets as commercial and thus subjected to execution by the subsequent creditor. Here the attribution of the taxes and royalties despite their public nature triggered the fund as commercial and hence subjected to MoC. The US court reasoned that although the exceptional and single

⁸⁹⁸ Sandeen (n 895), 418.

⁸⁹⁹ 'Receivables', Investopedia, <<https://www.investopedia.com/terms/a/accountsreceivable.asp>> accessed 13 November 2021.

⁹⁰⁰ [2004] 5th Cir 383 F 3d 361.

commercial use did not turn the use of the asset into a commercial one, the continuity, extension and value of that one-time commercial transaction were material to determine the attribution. The debt settlement with a previous debtor amounted to USD 26 million and continued for eleven years. The US court observed, “*Such a continuing, extended and monetarily significant use is neither exceptional nor de minimis.*” The proposed use of these taxes and royalties by Congo for another commercial debt even though did not use in actual, also supported the claim of judgment creditor. These taxes and royalties were not contemplated as sovereign assets to be used exclusively for its public acts but as available for any use as Congo found appropriate. The US court dismissed the claim of Congo as to the disruption of public acts because of MoC if granted.

In the *Eurodif* (1984) case,⁹⁰¹ the judgment creditor asked for a garnishment order against a debt owed by France and its State instrumentality to Iran under an agreement of production and distribution of enriched uranium. The Tribunal of Commerce of Paris ordered the garnishment whereas the Court of Appeal of Paris vacated the order. When the judgment creditor brought the case of Court of Cassation of France, the original garnishment order was reinstated. The Court of Cassation considered the nature of the agreement which was the source of the transaction and the basis of the fund.⁹⁰² The French court considered not only the destination of the fund *i.e.*, the future use but also the origin of the fund. This judgment contributed to the jurisprudence of sovereign immunity in three aspects: firstly, the judgment creditors might target for the funds not having direct connection with the claim itself and secondly, the French judicial practices carefully followed the jurisprudence of the US and the UK judgments in the matter of sovereign immunity from execution.⁹⁰³ Finally, as the French Court of Cassation commented, the assets allocation for “*economic or commercial activity of a private law nature*” could be subjected to MoCs. However,

⁹⁰¹ *Eurodif Corporation Et. Al. v. Islamic Republic of Iran* [1984], The Court of Cassation, First Chamber (March 14, 1984); Translation taken from International Legal Materials, (September 1984) 23 (5) 1062; *Islamic Republic of Iran* (n 475).

⁹⁰² *Ibid*; The Court of Cassation, France held, “[...] *in so holding, even though its decisions makes clear that attached claim was one held by the State of Iran against CEA and the French State under the loan agreement of 23 February 1975, and it thus followed that the origins of said claim were the same funds that had been allocated to the accomplishment of the Franco-Iranian program of production and distribution of nuclear energy, the rapture of which by the Iranian party had given rise to the action, the Court of Appeal, on which it was incumbent to determine the nature of this activity in order to decide the issue of immunity of execution had not given a legal basis for its decision.*”

⁹⁰³ Paulsson (n 868) 284.

the interpretation of private law keeps the ambiguity alive. The transaction in question is required to be the subject of private law.

The *Connecticut Bank* (2002) case⁹⁰⁴ was a leading case in this regard from the US jurisdiction. The judgment creditor sought a garnishment order against the payment owed to the Congo by Texas oil companies in form of taxes and royalties. The petitioner argued the commercial nature of the services provided by these oil companies to Congo; hence, the receivables owed under the contracts were commercial. Nevertheless, the Fifth Circuit court in the US observed, “*what matters under the statute is not how the Congo made its money but how it spends it. The amenability of these royalties and taxes to garnishment depends on what they are ‘used for’ not on how they were raised.*”⁹⁰⁵ The US court remanded the case to the district court for revisiting the use of the taxes and royalties to decide the garnishment order.⁹⁰⁶

The same reasoning was followed in subsequent cases. In the case of *AF-CAP INC. v. the Republic of Congo* (2004),⁹⁰⁷ the Republic of Congo defaulted on its debt payment secured with a hypothecation of its assets irrespective of the location based on its contractual waiver of sovereign immunity from jurisdiction and execution. Pursuant to a judgment from an English court in London, the judgment creditor received a garnishment order against five US companies who owed money to Congo in form of taxes and royalties for oil and gas exploration. The State court in Texas dismissed the suit, as the taxes and royalties asked for garnishment were public assets of Congo under its fiscal sovereignty. The US Federal Court remanded the case for determination of factual question of “*use of property*” instead of ‘*nature of property.*’ As Congo used these assets once to pay its debt after defaulting with a commercial entity, the creditor claimed the source of the property as commercial instead of its use. However, the court rejected the claim using the analogy of airplane obtained by the State through commercial transaction but using it for public purpose. It held that execution of judgment against this hypothetical airplane would be nothing but intervention in the public act of the State. The core legal question of this case was

⁹⁰⁴ *Connecticut* (n 294).

⁹⁰⁵ *Ibid* [251].

⁹⁰⁶ *Ibid* [260].

⁹⁰⁷ *Af-Cap Inc.* (n 52).

whether past commercial use should be considered for the determination of the commercial use of the assets for the question of immunity. The (US) Federal Court observed, “*determining the commercial (or non-commercial) status of a property's use requires a more holistic approach*” instead of taking a single use into account. While defining the holistic approach, it identified several factors to be considered: the complete circumstances surrounding the property, its uses including past uses and relevant facts to its present use. The court observed, “*under the FSIA, foreign property retains its immunity protection where its commercial uses, considered holistically and in context, are bona fide exceptions to its otherwise non-commercial use.*” Thus, the *bonafide* commercial use of the assets could be immune under the FSIA (1976) of the US with the application of “holistic approach” to it. The court accepted that a one-time commercial use of the asset did not make the use as commercial for the purpose of the FSIA (1976) of the US. However, when such single time use was for extended period and the commercial transaction in question was significant in value, this single use asked for careful consideration while taking the holistic approach. In another case brought by the same petitioner against the same defendant State, the US appellate court allowed garnishment because the taxes and royalties were used once to settle a law suit with a third party.⁹⁰⁸ The causal connection between the confiscation of the assets and the eventual interruption to the public acts of the State made the assets immune.⁹⁰⁹ Thus the absence of interruption to public act of the State makes the assets in question non-immune commercial assets.

In *Af-Cap Inc., v. Chevron Overseas (Congo) Limited, Republic of Congo and others* (2007)⁹¹⁰ the judgment creditor filed another enforcement litigation against four US companies for garnishment order to recover its judgment value against Congo. These four companies owed taxes and royalties to Congo for extraction of hydrocarbons, oil, and other of the Congo's natural resources. The Ninth Circuit court followed the test applied by the Fifth circuit court in the *Connecticut Bank* (2002) case and observed, the payment of the money in the US pursuant to a commercial contract did not entitle

⁹⁰⁸ [2004] 5th Cir 389 F 3d 503.

⁹⁰⁹ *Connecticut* (n 294).

⁹¹⁰ *Af-Cap Inc.*, [2007] 9th Cir January 25, 2007, Nos. 04-16387, 04-16388, 04-16788, 04-16810; [2007] 9th Cir 475 F 3d 1084.

the money to be used commercially in the US⁹¹¹ and held the receivables as immune.⁹¹²

In *Walker International Holdings Ltd. v. Republic of Congo* (2004)⁹¹³ the plaintiff targeted a similar type of asset and applied for a garnishment order against the third party who owed money to Republic of Congo in lieu of the oil exploration contract. Relying on the decisions of the *Connecticut Bank* (2002) case,⁹¹⁴ the US court refused to review as to how the money has been generated instead it focused on the current and past use of the money. In determining the commercial purpose of the funds owed to Congo, the US court considered the minor reimbursement of administrative and legal costs of the third party (whom the garnishment is claimed). It commented:

There is no evidence that the reimbursement would be anywhere near fifty percent. Beyond assertions of litigation and administrative reimbursements, there is no evidence in record showing how the signing bonus and other payments were actually used or even how other bonuses were used in the past [...] therefore no other inquiry into the use of the monies is necessary and for our purpose, we hold the funds were not ‘used for any commercial activity’.⁹¹⁵

The *Connecticut* (2002) precedent was also followed in *Export-Import Bank of the Republic of China v. Grenada* (2014).⁹¹⁶ The EXIM Bank of China requested for garnishment order to enforce a judgment of \$21 million against certain funds owed by third parties to Grenada. One of the funds was owed to Grenada after an arbitral award in favor of Grenada. Regarding this fund, the case became moot as the fund was transferred physically from the US to Grenada. Another fund was owed in the form of charges, fees, and taxes under a commercial contract for managing Grenada’s airport, seaports, and other facilities. The EXIM bank of China relied on the commercial nature of the contract between the third party and Grenada. Part of the second fund was the receivables from the International Air Transport Agency (IATA) for using the facilities in Grenada and subsequent investment of the same in bond in

⁹¹¹ Ibid [1094].

⁹¹² Ibid [1096].

⁹¹³ *Walker International Holdings Ltd* [2004] 5th Cir 395 F 3d 229.

⁹¹⁴ *Connecticut* (n 294).

⁹¹⁵ *Walker International Holdings Ltd* (n 913), [236].

⁹¹⁶ [2014] 768 F.3d 75 (2d Cir. 2014).

the US. The US court refused to investigate as the bond investment from the receivables from IATA because of lack of evidence from the end of the judgment creditor as to the location of issuance of bond, identities of the bondholders, manner, and location of trading of the bonds, methods of payments, *etc.* Nevertheless, the court allowed a pre-judgment discovery order against Grenada for collecting further evidence. For the remaining funds, the US court commented, it was not how the money was raised but what the money was used for. Hence, the services for which the money was used were public in nature, hence, the MoC was not granted against the public funds. In this case the US court vastly relied on the *Connecticut Bank* (2002) and the *AF-CAP v. Chevron (Congo)* case (2007).

Therefore, to receive execution order against the receivables from the third party, the popular nature of the assets stays immaterial if the petitioner can prove the use of the funds for commercial purposes. Nevertheless, there are other jurisdictions where the absolute immunity principle is followed. Such as China. In *FG Hemisphere Associates v. Democratic Republic of the Congo (DRC)*, (2011)⁹¹⁷ the judgment creditor claimed against the “mining entry fee” payable by a company in Hong Kong, owed to a DRC’s State-owned mining company. This mining entry fee was accrued out of a concession agreement regarding the rights to mining project in the DRC. The Hong Kong Court and the Court of Appeal granted the injunction upon the payment to be made to the DRC. Nevertheless, the Court of Final Appeal of the Hong Kong Special Administrative Region quashed the injunction order relying on the stand of the People’s Republic of China in favor of absolute sovereign immunity. Therefore, the Court of Final Appeal did not review the purpose or nature of the receivables from the Hong Kong’s company. It limited its comments on its lack of jurisdiction due to the DRC’s immunity as foreign sovereign.

4.4.7. *Sovereign wealth fund*

Both sovereign wealth funds and SOEs are concerned about economic investment and market participation. Both have their distinctive purposes in the State’s commercial activities. Unlike SOEs, State’s objective for its sovereign wealth funds is to accumulate profit without getting control over the venture. The foreign currency

⁹¹⁷ *FG Hemisphere Associates v. Democratic Republic of the Congo* [2011] the Hong Kong Court of Final Appeal (8 June and 8 September 2011), 14 HKCFAR 395. Judgment Summary, FACV 5,6 & 7/2010.

reserves maintained by the central bank of a State are protected by its immunity. It falls under the categories of central bank's assets.⁹¹⁸ Sovereign wealth fund is different from the foreign currency reserve of the central bank. Both the foreign currency reserve and the sovereign wealth fund are intended for accumulation of national wealth. For the purpose of this dissertation, the core distinction between these two is the different holders of these assets on behalf of the State. The foreign currency reserve is held and managed by the central bank whereas the sovereign wealth fund is held and managed by special agencies created for this purpose.⁹¹⁹

The sovereign wealth fund is not immune from MoCs. Shang and Shen commented, “*there is an international law black hole in which sovereign wealth funds have come to engage in commercial activities as well as exercise the public functions traditionally associated with states [acts jure imeperii].*”⁹²⁰ States invest their excess reserve funds (after maintaining the required liquidity for the economy) in equities, bonds, and other foreign assets. The popular forms of sovereign wealth fund are the portfolio investments in form of shares and stocks, corporate bonds, real estates, private equities, made by States in foreign currency-denominated assets, located in foreign territory.⁹²¹ IMF and the World Bank both defined sovereign wealth fund from the perspective of its ownership and purpose. IMF emphasized on the sovereign ownership *i.e.*, fully owned, and managed by sovereign entities,⁹²² and the World Bank drew the attention on the purposes of income and intergenerational wealth transfer.⁹²³

⁹¹⁸ Discussed in 4.2.3 of this dissertation.

⁹¹⁹ Ronald Beck and Michael Fidora, ‘Foreign Exchange Reserves and Sovereign Wealth Funds: Will They Change the Global Financial Landscape?’ in Arjan B. Berkelaar, Joachim Coche and Ken Nyholm (eds) *Central Bank Researves and Sovereign Wealth Management* (Palgrave Macmillan, 2010), 309-310.

⁹²⁰ Shang and Shen (n 858), 915.

⁹²¹ Stephen Jen, ‘Sovereign Wealth Funds, What They are and What’s Happening’ (October-December 2007) 8 (4) *World Economics* 1.

⁹²² International Working Group of Sovereign Wealth Funds, *Sovereign Wealth Funds Generally Accepted Principles and Practices “Santiago Principles” 2008* <https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf> accessed 31 July 2022; D. Gaukrodger, ‘Foreign State Immunity and Foreign Government Controlled Investors’ (OECD Working Papers on International Investment 2010).

⁹²³ Olivia S Mitchell, John Piggott, and Cagri Kumru, ‘Managing Public Investment Funds: Best Practices and New Challenges’ (Pension Research Council Working Paper PRC WP 2008-07, University of Pennsylvania 2008).

The exclusive sovereign ownership makes the purpose of this fund as public and commercially motivated.⁹²⁴ The objective of sovereign wealth fund is to reduce the tax burden on the citizens by using the return from these assets for budgetary allocation, accumulation of assets for future generation, and public interest. States follow different approaches in managing their unused funds. It can be either an independent entity *e.g.*, a SOE or the central bank to ensure operational independence. Depending on its way of management, the answer to the question of immunity varies in enforcement cases. Arguably, the central bank enjoys a higher degree of protection. Nevertheless, as evident from the previous discussion, the assets of the central bank, the nature of the functions of the central bank and the purposes of the particular fund in question play a vital role here.

From the nature of such investment, it is commercial regardless of who is investing and the source of fund as any private person does the same investment with the same objective of earning profit. On the other hand, the purpose of the return from investment is public *i.e.*, to reduce the fiscal burden. When the question of immunity comes, more immediate use of the return of sovereign wealth fund is considered. Therefore, two inconsistent outcomes may be reached if the forum State's court applies different tests between nature test or purpose test.

In the case of *Sozialistische Lybische Volks-Jamahiriya v. Actimon SA* (1985),⁹²⁵ the targeted funds were the assets in securities in the name of the Libyan government, but it failed to prove the public purpose of those securities. The Swiss court avoided any embedded analysis of the distinction between public and commercial acts. Nevertheless, it commented on the immunity of administrative assets serving public purposes and presumption of possible commercial use for the pecuniary assets.⁹²⁶ It held:

Immunity can therefore only be claimed by reason of nature of the assets subjected to the attachment where those assets are allocated in an identifiable manner for the performance of a sovereign function [...] a plea of immunity

⁹²⁴ Shang and Shen (n 858), 919.

⁹²⁵ [1985] Federal Tribunal of Switzerland, 24 April 1985 111 Ia BGE 62.

⁹²⁶ [1985] 108 III BGE 109 *et seq.*, 86 I BGE 32.

is inadmissible in respect of money and securities unless the documents or specified sums have been designated for the performance of such tasks.⁹²⁷

The Swiss court also refused immunity not only to central bank's fund but also to any liquid sovereign asset such as funds or securities "*unless the documents or specified sums have been designated for the performance of such tasks [the performance of the sovereign functions]*" Hence, the attachment order was permitted as the foreign State "*failed to give any details as to the designated purpose of the deposit [which] could equally well form part of the private fiscal assets of the Libyan Central Bank.*"⁹²⁸

Similarly, in *AIG Capital v. Republic of Kazakhstan* (2005)⁹²⁹ the judgment creditor targeted the sovereign wealth fund, kept under the trust of the central bank of Kazakhstan, and managed with a London Bank. The sovereign wealth fund was created in 2000 by virtue of a presidential decree and put under the trust management of the central bank where the central bank was earning management fee and commission out of profit. The government was listed as a beneficiary in the trust agreement. The judgment creditor claimed that the purpose of the fund was to earn profits like any private person. However, the UK court relied on the certificate issued by the Kazakhstan ambassador as to the public purpose of the sovereign wealth funds and found the fund as immune as the defendant State successfully connected the fund with the general purpose of accumulation of assets for public purpose.

While scrutinizing the uses or purposes of the fund, the future or potential use is not sufficient. The petitioner needs to substantiate the existing or past use of the fund in commercial purposes. In *Aurelis Capital Partners LP v. the Republic of Argentina* (2009)⁹³⁰ the distressed bondholder of Argentina attempted to enforce their claim against the pension funds of Argentina invested in the US for profits. Argentina enacted a new law requiring the transfer of the funds, previously managed by private companies, to a newly formed government entity, called 'SGF'. The new law establishing the SGF confirmed the use of the funds exclusively for the social security benefits of the Argentine workers. The district court in the US allowed the execution despite the determination of the status of SGF as a political sub-division of Argentina.

⁹²⁷ Ibid [35].

⁹²⁸ Ibid [36].

⁹²⁹ *AIG Capital* (n 373), [90]-[95].

⁹³⁰ [2009] 2nd Cir 584 F.3d 120.

It relied on the commercial use of the funds which in the view of the court was to earn profits and the apprehended/future use of the funds to non-pension governmental purposes.⁹³¹ Nevertheless, the Second Circuit Court of Appeals vacated the district court's order. It observed that the possible future uses of the funds did not constitute the contemplated commercial use within the meaning of the FSIA (1976) of the US. Here, the attachment order was made within two days from the enactment of the law establishing the SGF. Thus, the appellate court observed:

Because the order attaching the assets of the Administration [here the SGF] became effective immediately upon the passing of legislation transferring the assets from the private corporations to the Administration [the SGF], neither the Administration [the SGF] nor the Republic [Argentina] had the opportunity to use the funds for any commercial activity whatsoever.⁹³²

It also noted that the mere transfer of the control of the funds to a governmental agency did not make the funds available for execution.⁹³³ When deciding the question of immunity of the sovereign wealth funds, the entity responsible for managing the fund and its legal status play a vital role. Such as in *Kuwait v. X* (1994)⁹³⁴ Kuwait Investment Office (KIO) was the majority shareholder (96%) of Grupo Torras, a Spanish holding company. KIO was a separate entity from the Kuwait government, and it acted as the investment arm thereof. Grupo Torras failed to pay in the processing of acquiring part of the subsidiary company named Sarrío, another Spanish company. Sarrío successfully obtained the attachment order against the bank accounts of KIO in Zurich and Geneva to secure the payment. The Kuwait government argued the immunity of the assets of KIO as for the protection of the future generations of the Kuwaiti people after the exhaustion of the oil reserve. It stated the position of KIO as the asset manager of the State and thereby entitled to immunity. However, the Spanish court denied the immunity on the ground of the separate entity of KIO in accordance with the Kuwaiti laws, the statement of operations of KIO and other relevant

⁹³¹ Ibid [126], [127].

⁹³² Ibid [130].

⁹³³ Ibid.

⁹³⁴ [1995] Swiss Federal Tribunal (24 January 1994). The case was unreported but partially reproduced in (1995) 5 Rev. Suisse D. int. eur. 593. Gaukrodger (n 922) 16; the plaintiff brought the same case before the UK court simultaneously (*Sarrío SA v. Kuwait Investment Authority*, [1996] EWCA Civ. 575 rev'd, [1997] UKHL 49. Nevertheless, the UK court refused jurisdiction because of the earlier filed suit in Switzerland.

documents. The Spanish court also clearly stated the insufficiency of evidence to link the fund with the future generation failed to entitle the fund for immunity.⁹³⁵

Another ground for considering the sovereign wealth fund as immune is the fund being held in the name of the central bank.⁹³⁶ States tend to maintain their sovereign wealth fund either with the central bank or under some corporate form. It is not necessarily to hide the assets from the reach of the judgment creditor but to engage more professional management of the funds. Hence, although the State holds the beneficial interest in the fund, it is difficult to prove the future purpose of any liquid asset such as sovereign wealth fund. It can be associated with the certificate from the concerned governmental body, the governing rules, or by-laws of managing the fund, the holding authority, relationship between the holding authority and the defendant State, past use of the proceeds, *etc.* to establish the fund's use as commercial or public.

4.4.8. *Funds in accounts*

The funds available in the bank accounts are also easily targeted assets for execution. All States have foreign bank accounts and many State-owned banks have branches in foreign territory. The accounts in foreign banks located in the forum States' territory enjoy immunity if kept in the name of the central bank of the defendant.⁹³⁷ Similarly, funds available in the bank accounts registered in the name of the diplomatic missions or embassy are protected under the VCDR (1961) and the VCCR (1963).⁹³⁸ Nevertheless, there are some precedents passed by forum States' courts allowing enforcement against the funds in the diplomatic bank accounts based on its allocation for any particular debt *i.e.*, the earmarked assets. Apart from these, the accounts held by the defendant States usually do not enjoy immunity unless earmarked for public purpose.⁹³⁹ Alternatively, execution is granted when the court finds a satisfactory waiver clause in the related contract. Crawford observed:

In the case of state funds, it is still uncertain whether execution will ever be permitted: though the weight of doctrine favors the possibility, the

⁹³⁵ Gaukrodger (n 922), 17, fn 33.

⁹³⁶ Discussed in 4.2.3. of this dissertation.

⁹³⁷ *Ibid.*

⁹³⁸ Discussed in 4.2.1 of this dissertation.

⁹³⁹ Discussed in 4.3.3 of this dissertation.

jurisprudence is by no means so clear. As any rate, attachment will only be possible against assets or a separate funds shows to be clearly devoted to non-immune purposes.⁹⁴⁰

In the case of *Procureur General v. Vestig* (1946),⁹⁴¹ the French Court of Cassation allowed the attachment of funds held by a French bank. The account was maintained in the name of the Norwegian government, although the fund belonged to a Norwegian citizen. The court pierced the veil of immediate customer of the bank and focused on the beneficiary of the same. In *Orascom Telecom Holding SAE v. Chad* (2008)⁹⁴² although the funds in the account was the proceeds from selling oil and earmarked for the repayment of the World Bank's debt, the British High Court held the use of the fund as commercial within section 13 (4) of the SIA (1978) of the UK. A contrary decision is found in the same jurisdiction. In *SerVaas Inc v. Rafidain Bank* (2012)⁹⁴³ the British Supreme Court refused to consider the source of the State's fund in the account while determining the question of immunity and limited its scope of review to the use of the funds.

Following the *Connecticut* decision from the US regarding the receivables from a third party, the Canadian court focused on the use of fund instead of its source or origin. In *Bombardier Inc. v. AS Estonian Air and the Republic of Estonia* (2013),⁹⁴⁴ Republic of Estonia was the shareholder of the AS Estonian Air. The funds accrued from the operation of the Estonian Air was targeted for enforcement of judgment against Estonia. The Canadian court held that the State act of holding share in an airlines company was commercial, nevertheless "*the fact that that object (the fund in question) is achieved by entering into commercial transaction [does not mean] that the funds are used for commercial purposes.*"⁹⁴⁵ and therefore held the funds as immune.

On rare occasions, the court considers the special circumstance of the defendant State when determining the purpose of the funds. Such as, in *Firebird Global Master Fund*

⁹⁴⁰ Crawford (n 20) 843.

⁹⁴¹ [1946] The Court of Cassation, France, (February 5, 1946) 1947 SIREY (I) 1937; 1946-1949, Journal Du Droit International, 1.

⁹⁴² *Orascom Telecom Holding SAE* (n 429).

⁹⁴³ *SerVaas Inc* (n 732).

⁹⁴⁴ [2013] 115 OR (3d) 183

⁹⁴⁵ *Ibid* [193] [49].

II Ltd. v. Republic of Nauru (2015)⁹⁴⁶ the judgment creditor filed an execution case before the Australian court targeting the funds in the accounts, in the name of Nauru, maintained with an Australian bank. The Ministry of Finance of Nauru issued the certificate of sovereign use of the accounts which was acceptable evidence under section 41 of the Australian FSIA (1985). The certificate showed that many of the targeted accounts were not in use for a considerable amount of time. The Australian court denied the execution as the funds were held as immune in Australia under section 32 (3) of the FSIA (1985) of Australia. Chief Justice French, Justice Kiefel and Justice Gageler in this case confirmed:

The words ‘in use’ do not refer to particular uses to which bank accounts may be put but serve to distinguish accounts in which money is idle as where foreign state sets funds aside. In such a case, the purpose of the account cannot be readily discerned from the use to which they are put, and it would be a simple enough matter for a foreign State to assert that they were intended for future government purpose.⁹⁴⁷

According to section 32 (3) (b) of the FSIA (1985) of Australia, any vacant or not in use assets are deemed as commercial. Hence in view of the law and idle status of the accounts, they should have been held as non-immune. Nevertheless, the court observed, “*the words ‘in use... for commercial purposes’ and ‘set aside otherwise than for commercial purposes’ direct attention to the reason why, objectively the property is used or set aside.*”⁹⁴⁸ The court held the accounts immune considering the geographical and demographic condition of Nauru. It justified the decision stating:

Evidence of this kind (lack of commercially viable acts for private entities in Nauru) is relevant and necessary in order to understand that what might otherwise be thought to be a commercial enterprise is in fact no more than the provision of essential services to those residents in a foreign State by its government. It is to be expected that the circumstances of one foreign State

⁹⁴⁶ *Firebird Global Master Fund II Ltd. v. Republic of Nauru* [2015] High Court of Australia 289 FLR 398.

⁹⁴⁷ *Ibid* [107].

⁹⁴⁸ *Ibid* [115].

may differ from another, especially when the foreign State in question has a small population and is remote.⁹⁴⁹

Attachment is also commonly allowed when the judgment creditor can satisfy the court with the waiver clause. The *Ipitrade* (1978)⁹⁵⁰ was a successful enforcement case in France for the judgment creditor against the bank accounts of the Federal Republic of Nigeria relying on an unequivocal waiver of immunity from execution. Subsequently the parties negotiated for the voluntary compliance with the judgment and resulted the termination of the case on the same issue in the US.⁹⁵¹ In *Creighton Ltd. v. Qatar* (2000),⁹⁵² the French Court of Cassation allowed the attachment of bank accounts in the name of the Qatar Government in France based on a waiver clause in the arbitration agreement. It stated, “*the commitment, taken by State signatory to the arbitration clause to enforce the award in the terms of article 24 of the ICC Rules implied a waiver of immunity from execution by the State.*”⁹⁵³ Nevertheless, how and what extent the waiver clause needs to be drafted are yet to be determined.⁹⁵⁴

In *Commisimpex v. Republic of Congo* (2015),⁹⁵⁵ the judgment creditor attempted execution of an arbitral award against the bank accounts in the name of the Congo’s embassy and its delegation of UNESCO in Paris. The French Court of Cassation limited its decision in favor of the execution by stating, “*by virtue of rules of customary international law on State immunity from execution [...] customary international law does not require a waiver of immunity from execution other than express.*”⁹⁵⁶ The judgment has been criticized on the ground of failure to analysis the nature or use of the funds in the account.⁹⁵⁷ After this decision, the French Civil

⁹⁴⁹ Ibid [125].

⁹⁵⁰ *Procureur* (n 413).

⁹⁵¹ *Ipitrade International v. Federal Republic of Nigeria* [1978] DDC 465 F Supp 824.

⁹⁵² *Creighton* (n 721) translation taken from Kudrna (n 422).

⁹⁵³ Ibid; translation taken from Kudrna (n 422), 134.

⁹⁵⁴ Discussed in 3.5.2 of this dissertation.

⁹⁵⁵ No. 13-17.751, The Court of Cassation, France, 1st Chamber, May 13, 2015; Unreported 13 May 2015, Kudrna (n 422).

⁹⁵⁶ Ibid [2], [4].

⁹⁵⁷ *Eloise Gluchsmann, Commisimpex v Republic of Congo* [2011], No. 13-17.751; (April 2017) 111 (2) the American Journal of International Law 453, 455.

Enforcement Proceeding Code was amended to make the provisions as to execution against foreign sovereign assets clearer and specific.⁹⁵⁸

Tracing such (non-immune) bank accounts is difficult because of the banker-client confidentiality. The banks refuse to share any information regarding their clients with any third party unless ordered by courts. The dynamics between confidentiality and the question of transparency play a vital role here. For example, the strong maintenance of privacy by the Swiss banks attracted many States to put their assets in Switzerland and in some cases, the money launderer took the advantage of this strong confidentiality. Nevertheless, in October 2010, Switzerland passed the Restitution of Illicit Assets Act to identify terrorism funding and return the misappropriated sovereign assets. Hence, the interplay between these two principles of confidentiality and transparency is standing at two sides of the scale.

The common practice before the US court is to grant an order of discovery to bind the banks for extraction of information on sovereign bank accounts. The order of discovery is a pre-judgment order. The court is found hesitant to grant the same. In the case of *Argentina v. NML*,⁹⁵⁹ Argentina appealed to the US Supreme Court against the discovery order against it issued by the Southern District Court of New York. The US Supreme Court rejected the appeal based on immunity from the pre-judgment order and upheld the discovery order. A similar order was granted against the Democratic Republic of the Congo (DRC),⁹⁶⁰ which DRC failed to comply with resulting in civil contempt of court.⁹⁶¹ Therefore, the funds in bank account (other than diplomatic bank accounts) of the defendant State do not enjoy immunity unless the defendant State can substantiate the fund's use in public purpose.

4.5. Conclusion

The possibility of getting paid from the available assets is again limited by the interpretation of purposes of the sovereign assets. Given the absence of effective international convention and the limited number of international tribunal's judgment,

⁹⁵⁸ The Code of Civil Enforcement Procedures 1889 (n 269), incorporated provisions titled, transparency, fight against corruption and the modernization of economic life, effective from 10 December 2016.

⁹⁵⁹ [2014] USSC 573 US 134.

⁹⁶⁰ *FG Hemisphere Assocs., LLC v. Democratic Republic of the Congo* [2009] DDC 603 F Supp 2d 1, [2].

⁹⁶¹ [2011] DC Cir 637 F 3d 373.

the courts of the forum States sometimes consider the judgments from the other national jurisdictions with persuasive value [though not binding].⁹⁶² Peters rightly acknowledged the development of this discipline of international law *i.e.*, law on foreign sovereign immunity from execution, based on the interpretations of the case laws.⁹⁶³ Oddenino and Bonetto had a similar opinion. They observed that it was the national court [of the forum State] playing the most vital role in developing the law of immunity apart from a few cases from the ECtHR and the ICJ.⁹⁶⁴ The judgments from the national courts of the forum States formulate the international law in relation to immunity from execution: as they form the State practice thereby, the *opinio juris*⁹⁶⁵ and set the precedents of interpretation of international law with persuasive value for subsequent cases of both the international and national courts.⁹⁶⁶ Interpretation of sovereign assets in this chapter again proves that a treaty or national practice receives the *de facto* validity from the judicial practices or loses its contemporariness by the precedent.⁹⁶⁷ Charney commented, “*Nations forge new law by breaking existing law, thereby leading the way for other national to follow.*”⁹⁶⁸ Therefore, this chapter focuses on the various kinds of the assets and the diverse approaches of the forum States in determining the questions regarding these assets for their immunity from execution.

For the diplomatic assets, it receives protection from both international conventions *e.g.*, the VCDR (1961) and the VCCR (1963) as well as national legislations. Still MoCs were granted in some cases against the diplomatic assets. There are some challenges for both the judgment creditor and the defendant State when it comes to diplomatic assets. It is difficult for the judgment creditor to convince the court to investigate further into the use of diplomatic assets disregarding the certificate from the head of the diplomatic mission. Because such an investigation may act as an

⁹⁶² Fox (n 5) 3.

⁹⁶³ Peters (n 118) 6.

⁹⁶⁴ Oddenino and Bonetto (n 173) 23.

⁹⁶⁵ Yang E. Kadenes and EA Young, ‘How Customary is Customary International Law’ (2013) 54 (3) William & Mary Law Review 885.

⁹⁶⁶ Oddenino and Bonetto (n 173) 24.

⁹⁶⁷ Pierre-Hugues Verdier and Erik Voeten, ‘Does Customary International Law Change? The Case of State Immunity’ (2015) 59 International Studies Quarterly 209, 212. The authors commented “*this is not true of treaties or domestic statutes which derive their validity from formal ratification and remain legally binding despite violations. By contrast, if many states defect from a CIL (Customary International Law) rule, the rule can change or lose its status as CIL.*”

⁹⁶⁸ Jonathan I. Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1985) 56 British Yearbook of International Law 1, 21.

interference to the sovereign function of the defendant State. The major problem with the diplomatic asset is the use of the assets in mixed purposes.⁹⁶⁹ A proposal was made to segregate the accounts for diplomatic purposes and for day-to-day operation of the diplomatic mission. However, such a proposal may not work as the clear distinction of the commercial purposes from the operation of a diplomatic mission is not possible. A diplomatic mission performs several acts on the behalf of its sending State or State instrumentality which are not directly diplomatic function *per se* but out of courtesy. This dissertation analyzes the scrutinization of purposes of diplomatic assets from two aspects: firstly, when the diplomatic mission is the judgment debtor and secondly, when the diplomatic assets are targeted for the debt owed by the sending State.⁹⁷⁰ For the first situation, where the diplomatic mission itself is the judgment debtor, the diplomatic asset should not be presumed to be used in public purpose with a mere certificate from the head of the mission. Rather, the court should investigate further to honor the judgment creditor's right to execution. On the other hand, for the second case, [where the sending State is the defendant] the certificate should be taken as conclusive and further investigation should be deemed as interference to the diplomatic functions of the mission.

Military assets come second on the list of immune assets. Its inherent nature raises the presumption of public purpose and thereby is immune. The challenge in the military asset for the question of its immunity is the scope of this kind of asset. Should it be only to the assets directly used in military purposes such as warships, or weapons? or should it include also the assets used for/by military forces? Such as food, vehicles other than particularly designed for military purposes, money [intending to use for military purposes]. This dissertation would emphasize the status of the non-military assets but in the process of use for military forces. For example, the purpose of the regular transport to send rations to the military forces should not be taken as commercial. Because the act of delivery of ration may be a commercial purpose in ordinary meaning, whereas its destination to the military forces makes it public purpose. Impediment in sending the ration to the military forces due to the MoC may act as interference to the military function of the defendant State. On the other hand,

⁹⁶⁹ Discussed in 4.2.1.4 of this dissertation.

⁹⁷⁰ The sending State is the State whose diplomatic mission is set up in the hosting State *i.e.*, the forum State for this dissertation.

liquid assets such as money or funds intended to be used for military purposes may be interpreted as commercial based on the given context. Because liquid assets have no purpose until they are in use. This approach also receives support from the case laws related to receivables from third party and funds in accounts.⁹⁷¹

Another kind of sovereign asset consistently found as immune in international conventions and national legislations is the assets of central bank. The discussion of the assets of SOEs is relevant while scrutinizing the central bank's assets. The central bank argues two defenses to protect its assets: its separate legal entity from the defendant State and the sovereign monetary purpose of its assets. This dissertation proposes to take the status of the central bank as the holder of the asset.⁹⁷² The assets held by a central bank in discharge of its functions as currency regulator, custodian of foreign reserve or the banker of last resort should enjoy immunity despite its status as State instrumentality. On the other hand, asset held by the central bank as trustee or agent of the State should be put through tests of attribution to determine its status as commercial.⁹⁷³ The question of immunity for central bank leaves a question: should the foreign reserve of the defendant State in the central bank be taken for enforcement of its commercial [judgment] debt. This dissertation argues that the public purpose and the commercial functions of the defendant State to be kept separate. The beneficiary of the foreign reserve is the citizens of the defendant States. The macroeconomic interest of a State should not be compromised for the sake of a private judgment creditor. Following the same line of argument, the fifth chapter of this dissertation focuses on the interpretative tools balancing the interests of the defendant State, its subjects as well as the judgment creditor.

The cultural objects with scientific, cultural, and historical significance enjoy immunity in the receiving State as a part of cultural diplomacy⁹⁷⁴ *via* exchange of cultural objects. The case laws show a consistent practice with the emphasize on two issues: firstly, the legal arrangement of exchange, whether the exchange was made

⁹⁷¹ Discussed in 4.4.6 and 4.4.8 of this dissertation.

⁹⁷² The typology of owner and holder of the asset is discussed in 3.3.2 of this dissertation.

⁹⁷³ Discussed in 3.4 of this dissertation.

⁹⁷⁴ The term cultural diplomacy means "Cultural Diplomacy may best be described as a course of actions, which are based on and utilize the exchange of ideas, values, traditions and other aspects of culture or identity, whether to strengthen relationships, enhance socio-cultural cooperation, promote national interests and beyond; Cultural diplomacy can be practiced by either the public sector, private sector or civil society." Institute for Cultural Diplomacy <https://www.culturaldiplomacy.org/index.php?en_culturaldiplomacy> accessed 27 August 2022.

under agency contract, trustee contract, diplomatic memorandum of understanding (MoU), etc. and secondly the intention of earning profit from the exchange/exhibition. The defendant State needs to be careful while entering into the legal arrangement for this kind of exchange. Clear expression of no intention of earning profit may go further in protection of cultural object. This dissertation further argues that following the same line of argument as the assets of the central bank, the cultural objects are priceless assets for the history and culture of the defendant State, therefore owing significantly to its subjects. Allowing enforcement against cultural objects at the hand of the private judgment creditor would be a ‘*slippery slope*’ with no return. The private judgment creditor may sell the object to another State for value. This sale would cost not only monetary value to the defendant State but the emotional, cultural, and historical value to the subjects. Nevertheless, while deciding the immunity of cultural objects, objects taken in violation of international law should be considered.⁹⁷⁵

After the immune assets, there are connotations of non-immune assets. Despite the absence of any list of specific non-immune assets, the consensus shows the grant of MoC against earmarked assets. This dissertation proposes the mitigation of enforcement litigation challenges by way of creating *lien* or hypothecation over the asset to earmark it for certain debt. Such legal securitization gives the certainty to the creditor, reduces the transaction cost for the parties,⁹⁷⁶ and prevents multiplicity of proceeding and forum shopping.⁹⁷⁷ In case of failure to earmark any asset, or the

⁹⁷⁵ Discussed in 4.3.4 of this dissertation.

⁹⁷⁶ The enforcement litigations in various jurisdictions increase the cost of future borrowing for the defendant State, reduce the price of its sovereign bonds, and exclude it from international capital market. Schumacher, Trebesch and Enderlein (n 19) found that the probability of exclusion from global capital market increases by 16% when litigation was filed and by 23% if attachment attempt was made. State’s attempt to hide and/or remove its assets from the jurisdiction of the forum State also cause additional cost. State also hesitates to take strict regulatory measures in fear of MoCs. It increases the cost of regulatory functions of the State as additional administrative cost of implementation, consistent cost of possible adjudication, cost of possible reduced control over extra-territorial assets, etc. Similarly, the costs of investment increase for its commercial counterparts as they can no longer rely on mere waiver clause. See for more, Ugo Panizza, Federico Sturzenegger and Jeromin Zettelmeyer, ‘The Economics and Law of Sovereign Debt and Default’ (2009) 47 (3) *Journal of Economic Literature*, 651; Schumacher, Trebesch and Enderlein (n 19); Fox (n 5) 373; Weidemaier (n 49) fn 8; Blackman and Mukhi (n 253); Sadie Blanchard, ‘Republic v. High Court Accra, *ex parte* Attorney General’ (January 2014) 108 (1) *The American Journal of International Law* 73, 79.

⁹⁷⁷ Parties to a commercial contract agree on the forum for dispute settlement before signing the contract. However, this provision does not include the forum for enforcement litigations. The judgment creditor shops for the forums to seek enforcement of the judgment/award depending on the availability of defendant State’s assets or the creditor friendly nature of the forum States. Forum shopping not only results at multiplicity of proceeding but also increases the transaction costs for the parties. See for

mixed use of earmarked asset, the deciding court may apply the proportionality test⁹⁷⁸ to interpret the purposes of the asset.

The other category of non-immune assets is the asset taken in violation of international law. The limitation of the enforcement proceeding against this kind of asset is that the proceeding is limited to the rights or ownership related to the asset. This kind of asset cannot be targeted for enforcement of any other commercial claim or debt. The question may be raised as to the asset taken by a host State in violation of international investment law pursuant to unlawful expropriation. In a hypothetical case of unlawful expropriation under international investment law, the host State cannot enjoy immunity from execution in a proceeding in relation to the [unlawfully] expropriated asset. The literature and case laws show that in unlawful expropriation cases under international investment law, the question of immunity to assets hardly comes. Rather the arbitration tribunal decides the magnitude of compensation for expropriation based on lawfulness and unlawfulness of the action.⁹⁷⁹

Although there is no list of specific categories of assets declared as non-immune, the characteristics of non-immune assets are mentioned in the concerned legal instruments. Such as, assets with ‘commercial purpose’ or used in ‘commercial activity’. The divergence is visible as to the use of ‘commercial purpose’ or ‘non-sovereign purpose’. This dissertation argues that use of mere ‘commercial purpose’ or ‘non-sovereign purpose’ can hardly balance the interests of the judgment creditor or the defendant State. Instead, an appropriate interpretative tool may help to decide the purpose of sovereign assets given the context of the case. In order to illustrate the context, this chapter reviewed the case laws from certain commonly targeted sovereign assets, such as immovable asset in the territory of the forum State, receivables from a third party, funds in bank accounts, assets of SOEs, State-owned ships and aircrafts, intellectual properties, sovereign wealth funds, *etc.*

more, Kudrna (n 422), 137; Christopher Whytock, ‘the Evolving Forum Shopping System’, Legal Studies Research Paper Series no. 2011-25, University of California, Irvine, School of Law, 529; Russell J. Weintraub, ‘Introduction to Symposium on International Forum Shopping’ (2002) 37 Texas International Law Journal 463, 463-64.

⁹⁷⁸ Discussed in 5.2.2 of this dissertation.

⁹⁷⁹ David Khachvani, ‘Compensation for Unlawful Expropriation: Targeting the Illegality’ (2017) 32 (2) ICSID Review 385.

Assets can be movable or immovable. The immovable sovereign assets enjoy immunity in the forum State until the debt is accrued in relation to the asset. This kind of asset also faces less challenge as to the mixed uses because of their divisibility. Its tangible nature makes the commercial uses divisible from the public uses. Besides, the nexus requirement between the asset and the debt also protects the defendant State and its external sovereign functions in the forum State. State-owned ships and aircraft and the cargo therein are the common moveable sovereign assets targeted for enforcement. Both ships and aircraft are governed by their respective international conventions such as the Brussels Convention (1926) and the UNCLOS (1982) for ships and the Chicago Convention (1944) for aircraft. These conventions state the non-immunity to ships and aircraft used in commercial purposes. In terms of sovereign ownership, these assets are held and operated through the State agency or special legal entities like SOEs. Therefore, the control test and the beneficiary interest test [discussed in the previous chapter] play a vital role here.⁹⁸⁰

Deciding immunity for SOEs' assets is a complex web of concerned laws such as laws on foreign sovereign immunity, corporate law, laws related to the asset in question, by-laws of the SOE owning the assets, any agreement with the State concerning the use or purpose of assets, *etc.* This dissertation found two types of practices among States: firstly, the forum States follow the corporate principles of separate legal entity of the SOE and secondly, the forum States take the SOE's assets as public assets and thereby apply the same commercial activity test or the purpose test. This dissertation argues in favor of separate legal entity of the SOE and its ownership and use of the assets, distinct from the defendant State. The corporate law principles permit investigation and piercing of the corporate veil of the SOE for any compelling case of fraud, injustice, or abuse of corporate personality. Therefore, denying the separation of corporate nature of SOE and the defendant State would result in a conflicting position between the two canons of laws. On the other hand, in the second case of considering the SOEs' assets as public assets, the judgment creditor stands on a favorable footing when targeting the SOE's assets. Because the imminent objectives of SOE to engage in commercial ventures and earn profits make it non-immune. The SOE relies on its public nature to get immunity. Proving the

⁹⁸⁰ Discussed in 3.3.3 and 3.3.4 of this dissertation.

public nature of the SOE and its assets would intervene with the confidentiality of the defendant State and SOE's management before the court of the forum States. Moreover, ignoring the separate legal entity of SOE and letting its asset being non-immune for the debt of the defendant State would also cause hardship in the providing the services/goods to the subjects of the defendant State, especially in those where the SOE is the single provider of the commodity such as electricity.

Among the intangible sovereign assets, there are State-owned intellectual properties, sovereign wealth funds, receivables from third party, funds in accounts. These assets enjoy no immunity when there is a waiver of immunity from execution or earmarking of assets for commercial debt. However, even without any of these two, the liquid assets may not be immune. The core principle for liquid assets is that these assets have no certain purpose like the diplomatic purpose for diplomatic assets or national security purpose for military assets. Their purposes are derived from what they are used for. The deciding court reviews the nature of the transaction in which the liquid asset is being used *i.e.*, the commercial activity test. This dissertation argues that while examining the transaction as the source of liquid asset, the deciding court should review the context of the defendant State. The transaction may be deemed as commercial on its face but can be public in the context of the defendant State. The case of Nauru before the Australian court targeting the bank accounts can be a relevant example here.⁹⁸¹ The services, usually procured commercially may not be a case for the defendant State. Therefore, while interpreting the purpose of liquid assets, the defendant State may be given a certain degree of deference like the margin of appreciation [discussed in the next chapter].⁹⁸²

The commercial activity test alone does not give a comprehensive view of the intangible assets. The purpose of the asset should be considered. There is hardly any presumption of public purpose for liquid assets despite their form or nature. Such as the liquid assets levied in the forms of taxes and royalties apparently seem as public due to the fiscal source but were held as commercial. State collects taxes and royalties for bearing its public expenses.⁹⁸³ However, the past use of taxes to pay off the commercial debt was held as sufficient to grant garnishment order. The common

⁹⁸¹ *Firebird Global Master Fund II Ltd.* (n 946). Discussed in 4.4.8 of this dissertation.

⁹⁸² Discussed in 5.2.3 of this dissertation.

⁹⁸³ William D. Popkin, *Introduction to Taxation* (6th ed. LexisNexis, 2013).

challenge for all these liquid assets is whether the prospective or future use of the asset should be considered. This dissertation supports reviewing only the past and/or present use of liquid assets to decide its purpose. Taking the future uses/purposes would motivate the State to avoid its judgment debt. It would also bring procedural ambiguities to the evidence to prove future use. However, single, or mere incidental uses in past should not be the sole ground for granting a MoC.

The parties argue in the enforcement cases targeting the sovereign wealth fund that the court should consider the immediate commercial purpose of the fund *i.e.*, the accumulation of wealth or the long-term purpose of fiscal burden reduction, budgetary allocation, intergenerational wealth transfer, *etc.* The long-term purposes of the fund also include avoiding future default in debt payment. The cost of its default in payment ultimately falls on its subjects.⁹⁸⁴ In one way or another, the defendant State needs to pay the debt or bear the cost. Therefore, this dissertation negates the argument of immediate commercial purpose or long-term public purpose as in both cases, the sovereign wealth fund may not be immune.

Unequivocally, the court practices from different jurisdictions are diverse even regarding the same types of assets. Evidently, many assets which enjoy immunity under relevant international conventions had been subjected to MoCs in different cases from various jurisdictions. For instance, in case of State instrumentalities, when the definition of State instrumentalities in national legislation does not fall within the narrow definition of States, the private judgment creditor may be succeeded in getting

⁹⁸⁴ The price of the MoC ultimately falls on the taxpayers of the defendant State. The prospective income from the asset in question used for payment of debt would otherwise be used for welfare of the subjects. In the *CME v. Czech Republic* [2003] *ad hoc* arbitral tribunal under the UNCITRAL arbitration rules, the judgment debt of \$355 million over a dispute regarding media license was equivalent to its domestic health care budget of Czech Republic. The debt of the *NML Capital* case (2012) amounting \$1.33 billion exceeded the GDP of Argentina at that time. With the reduced access to future borrowing, increased transaction cost, cost of capital, attempts in hiding or removing assets from forum State affect the internal budgetary earning and expenditure. The defendant State is left with no option but to increase income from fiscal sources and reduce the development budget. These decisions increase eventually the financial burden on its citizens. See for more, Julie A. Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54 (2) *Virginia Journal of International Law* 367, 391; Mihir A. Desai and Alberto Model, 'Czech Mate: Expropriation and Investors Protection in a Converging World' (2008) 12 (1) *Review of Finance, European Finance Association* 221, 221-222; Robert Flood and Nancy Marion, 'Getting Shut Out of the International Capital Markets: It does not take much' (IMF Working Paper WP/06/144 2006), 3; UNCTAD, Argentina's 'vulture fund' crisis threatens profound consequences for international financial system (2014) <<https://unctad.org/news/argentinas-vulture-fund-crisis-threatens-profound-consequences-international-financial-system>> accessed on 16 April 2021.

a MoC against the assets owned by the State instrumentalities.⁹⁸⁵ On the other hand, when an expansionary definition of State [inclusive of State instrumentalities] is adopted to cover the myriad agencies and instrumentalities, the chances of granting MoC are minimal. Inconsistency and unpredictability are caused by the undetermined areas of laws of foreign sovereign immunity leaving the judgment creditor without any remedy. The defendant State's public functions and its relationship with its subjects and other States are also affected. More consistent and predictable results may be achieved with the application of certain interpretative tools, discussed in the next chapter.

⁹⁸⁵ Yang (n 20) 386.

Chapter 5: Alternative approaches for interpretation

5.1. Interpretation of sovereign assets

The preceding chapters analyzed the substantive and procedural aspects of enforcement litigation against foreign sovereign assets from the relevant international conventions, and national legislations as well as case-laws from different jurisdictions. The fourth chapter concluded with the challenges for interpreting the purposes of various kinds of sovereign assets in deciding the question of immunity from execution. The adverse impact due to the unpredictable and inconsistent interpretations falls not only on the judgment creditors and the defendant State but also its subjects and its inter-States relations.⁹⁸⁶ The diplomatic relation between the defendant State and the forum State also becomes vulnerable.⁹⁸⁷ Taking piecemeal actions for each asset as suggested in the fourth chapter does not solve the overall challenges because it is uncertain which asset would be targeted by the judgment creditor; the approaches followed by different jurisdictions also vary in accordance with their legal systems and economic mandate. Therefore, this chapter scrutinizes different interpretative tools to reduce or eliminate these uncertainties and ensure coherence. The final research question of this dissertation is to examine whether and to what extent various interpretation techniques may be applied to decide the purpose or use of the sovereign assets. Where the previous chapter reviewed the practices of

⁹⁸⁶ The uncertainty causes the increase of transaction cost, reduced or expensive access to future borrowing [discussed in n 986 of this dissertation], increase of fiscal burden on the taxpayers of the defendant State [discussed in n 984 of this dissertation]. These affects its relations with its subjects. The subjects of the defendant State pay the ultimate price of the MoC. Despite the involvement of significant public interest issues, the defendant State prefers to keep the award confidential and, in some cases, makes out of court settlement at a higher price to avoid negative publicity in media and in fear of losing the subjects' confidence. Due to lack of available public data, these settlement deals stay out of public knowledge. It affects the transparency between the State and its subjects. See for more, Blackman and Mukhi (n 253); Prabhash Ranjan, 'The White Industries Arbitration: Implications for India's Investment Treaty Program' (Investment Treaty News, IISD 13 April 2012) <<https://www.iisd.org/itn/en/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/>> accessed 20 April 2021; Fox (n 5) 373.

⁹⁸⁷ The forum State fears of losing future investment of foreign reserve from the defendant State. such loss of business would affect the economy of the forum State and its interested parties. It also puts the exchange of objects with cultural, historical, and/or scientific values, for exhibition, as a part of cultural diplomacy at risk. Austria faced a similar situation in 1998 when its two paintings got confiscated for prejudgment attachment in New York due to refusal of the New York Court in granting immunity to the cultural objects of Austria. After the denial of immunity to the cultural objects of Austria in New York, Taiwan refused to lend their cultural objects in France and also in Germany in fear of litigations from China for confiscation of these objects in the territory of borrowing State. It had less or no confidence in the domestic jurisdictions of the borrowing States in interpreting the public purpose of these cultural objects and thereby losing the immunity. See for more, Krauskopf and Steven (n 299) 145; *Altmann* (n 297), *Republic of Austria* (n 783); Chang (n 298); Woudenberg (n 707), 301.

the forum States' courts, this chapter borrows the tests from other relevant areas of laws. Such as the margin of appreciation from the judgments of the ECtHR, the doctrine of proportionality from administrative law, the debates between international rule of law or international law-based rule of law, *etc.* These alternative interpretative approaches might bring the desired consistency, certainty and reduce the possible conflicting position among different areas of laws in the enforcement litigations. Finally, it ends with the possibility of having a model law in maintaining consistency and coherence.

5.2. Alternative interpretive approaches

Defining the purposes of the sovereign assets is a constant challenge for the courts in enforcement proceedings. The conjunction between the private interests of the judgment creditors and the public acts of the defendant State is present. The public purpose or use of sovereign assets is decided by the judges of the forum State who are non-national of the defendant State.⁹⁸⁸ Although there are procedural safeguards in the *Lex fori* to prevent any conflict of interest, this is a substantive challenge in determining the purpose of the asset in question from the aspect of 'best-judge' principle. Arguably, each of the judges of the forum States emphasizes certain groups' interests. Such as, States having more free market economy promote the interests of judgment creditors,⁹⁸⁹ whereas States with regulated economy (comparatively from free market economy) prioritize to honor the interest of the defendant State as sovereign.⁹⁹⁰ This is one of the possible reasons for the judgment creditors to select the jurisdictions having more creditors' friendly legislations *e.g.*, the US, the UK, *etc.* This is also a reason for the defendant States to have commercial assets in these jurisdictions.

While deciding the execution cases, the courts have been innovative in interpreting the purpose of sovereign assets and offered various alternatives. Such as the French Court of Cassation suggested to include a list of assets for which the State waives its

⁹⁸⁸ Ferdous Rahman, 'Determination of Public Purposes by Non-national Adjudicators in International Commercial Disputes' (IILLM thesis, Academy of European Public Law 2021).

⁹⁸⁹ Schumacher, Trebesch and Enderlein (n 19).

⁹⁹⁰ *FG Hemisphere Associates* (n 917) [62]. The Hong Kong Court of Final Appeal (Hong Kong's *de facto* supreme court) refused to enforce the judgment against Congo relying on China's strict position in favor of absolute immunity.

right to immunity from execution.⁹⁹¹ This decision was criticized for suggesting an ‘unreasonable’ drafting of a waiver clause for a successful MoC. Such exhaustive drafting is not possible and even if added, may not bring certain results. Blanchard observed:

One should therefore expect future contractual waivers to be more specific about the categories of assets they include and exclude, so as to address both of those sources of uncertainty. Additionally, in light of the prospect that courts may decline to enforce even an express and specific waiver against sensitive categories of assets [...].⁹⁹²

Hence, instead of incorporating an exhaustive list of assets waiving the immunity or the purposes of the assets, a uniform and coherent mechanism may be introduced to interpret the public purpose of assets. A process of interpreting the public purpose and/or the necessary content therein can ensure the desired consistency and predictability. It might bring the balance between the judgment creditor and the defendant State in future execution litigations and eventually, benefit the parties as well as the subjects of the defendant State.

5.2.1. Acceptance of the public purpose as forwarded by the defendant State

The judges from the forum States are not in the same position as the defendant State’s authorities to state the public purposes of the assets.⁹⁹³ Hence, they may accept the interpretation of the public purpose as provided by the defendant State. This proposal receives its support from the ‘best judge’ principle,⁹⁹⁴ and the perspective of majoritarianism. Such as, the VCDR (1961) and the VCCR (1963) declare the certificate from the diplomatic mission or the consular as to the purpose of the diplomatic assets as sufficient proof of their purposes.

The defendant State as the sovereign authority should be the judge of its own assets’ attribution. Given the maximum impact of an adverse decision on its subjects,⁹⁹⁵ the

⁹⁹¹ *NML Capital* (n 420 and 421).

⁹⁹² Blanchard (n 976), 79.

⁹⁹³ *Handyside v. UK* [1976], ECtHR, 7 December 1976, p 48; the ECtHR observed, “*State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them.*”

⁹⁹⁴ Robert E. Goodin, ‘Liberalism and the Best-judge Principle’ (1 June 1990) 38(2) *Political Studies* 181. “*Each person must be taken to be the best judge of his own interest.*”

⁹⁹⁵ Discussed in n. 984 of this dissertation.

manifestation of the purpose of the assets should be taken from the representatives of the subjects, known as the majoritarianism.⁹⁹⁶ Majoritarianism entrusts a broad value judgment from the legislature where the budget allocations are decided and also in some cases, by the executives when the attribution of certain assets are decided to serve the public purpose. In case of any internal disputes, the national court examines the public purposes in question. Nevertheless, when the substantial public purpose decisions are in issue, the court usually hesitates to review the content of the decisions.⁹⁹⁷ Rather, it observes the authority being empowered by law to make the decision, considers the wider account of political and economic factors. Even when these considerations are regarded as subsidiary purposes, the main decision does not get invalidated because of the ancillary purposes and/or considerations.⁹⁹⁸ In other words, the court is open to revisit the public purpose decisions based on procedural illegality and fairness instead of the substantive basis of the purpose or use of the assets.

The national court of the [defendant] State receives the legitimacy from the constitution (in case of Constitutional supremacy) or from the parliament (in case of parliamentary supremacy) to decide the public purpose of its sovereign assets. Despite such legitimacy, it is reluctant to question the purposes forwarded by the legislature or the executives. Hence, the legitimacy of the non-national court of the forum State to scrutinize the purposes even once sworn by the defendant State, can be subjected to argument. It arguably receives no legitimacy. Following the same line of proposition, the question of immunity from execution may be decided based on the interpretation of public purpose as adduced by the defendant State. Receiving the support from majoritarianism and the best judge principle, letting the defendant State decide its own public purpose would protect its subject from the adverse impact of inconsistent judgments. For example, the certificate from the head of the diplomatic mission as to the public use of the diplomatic account should be accepted as conclusive evidence. The court of forum State should refrain from making further scrutinization of the same.

⁹⁹⁶ Gordon Anthony, 'Public Interest, and the Three Dimensions of Judicial Review' (2013) 64(2) Northern Ireland Legal Quarterly 125, 129.

⁹⁹⁷ *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] Court of Appeal of England and Wales, 1 KB 223.

⁹⁹⁸ *Regina v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte, World Development Movement Ltd.*, [1995] the Queen's Bench Division 1 WLR 386 [401].

On the other hand, allowing such unrestricted power to the defendant State to define the public purpose supporting its entitlement of immunity from execution limits the rights of the judgment creditors to enforce their claim. This approach would make the settlement of any commercial dispute with States unenforceable and thereby increase the transaction cost of the commercial contract for States. Given the similar challenge in international investment law, Kingsbury and Schill suggested to apply the public law concepts, such as proportionality to bring the desired equilibrium between the contesting interests of the defendant State and its commercial counterparts.⁹⁹⁹ Alternatively, principle of proportionality provides a comparatively stricter framework than the unrestrained discretion of the defendant State and reduce the apprehended enforcement challenges.

5.2.2. *Doctrine of proportionality*

The proportionality test is used in public law to resolve the conflicting position of two rights.¹⁰⁰⁰ In this dissertation, these two rights are the defendant State's right to immunity from execution and the right of the judgment creditors to enforce their judgment/award. The proportionality principle(s) "*do not work in an "all or nothing fashion" but allow for "a more or less."*"¹⁰⁰¹ It measures the dimensions of weight of the two contesting rights.¹⁰⁰² The German Constitutional Court emphasized on the balance by stating:

When one seeks to maximize both (the individual's right to profession and the State's right to regulate for public purpose) [...] demands in the most effective way, then the solution can only lie in a careful balancing of the meaning of the two opposed and perhaps conflicting interests.¹⁰⁰³

In terms of the methodology of applying this test, the Supreme Court of Canada followed a three-step process. The process starts with assessing the targeted objective,

⁹⁹⁹ Benedict Kingsbury and Stephan W. Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest- the Concept of Proportionality', in Stephan W. Schill. (ed), *International Investment Law and Comparative Public Law*, (Oxford University Press, 2010), 77.

¹⁰⁰⁰ J Schwarze, 'The Principle of Proportionality and the Principle of Impartiality in European Administrative Law' (2003) 1 *Rivista Trimestrale di Diritto Pubblico*, 53.

¹⁰⁰¹ Ronald Dworkin, *Taking rights seriously*, (Harvard University Press, 1978) 24.

¹⁰⁰² Robert Alexy, *A theory of Constitutional Rights* tr Julian Rivers (Oxford University Press, 1986), 50.

¹⁰⁰³ *The Apothekenurteil* case [1958] Germany the Federal Constitutional Court, BVerfG 7, 377, [404]-[5].

on a non-arbitrary, fair, and rational basis, secondly, the cautious impairment of rights as less as possible and finally, the proportionality of the objectives and the effects of the measure.¹⁰⁰⁴ The test was also applied in the case of *Bank Mellat* (2013),¹⁰⁰⁵ where four questions were identified while using the proportionality test. These questions were:

(1) Whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective and (4) whether balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective to the extent that the measure will contribute to its achievement, the former outweighs the latter.¹⁰⁰⁶

The principle of proportionality is popularly applied to “*manage tensions and conflicts between rights and freedoms on the one hand and the power of the EC/EU and of Member States on the other.*”¹⁰⁰⁷ This is also used in the cases before the European Court of Justice,¹⁰⁰⁸ the ICJ,¹⁰⁰⁹ the World Trade Organization¹⁰¹⁰ and other multilateral adjudicators. The methodological question of how to apply the proportionality principle is rooted in the words of the Court of First Instances of the European Communities (third chamber):

The principle of proportionality which is one of the general principles of Community law, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to

¹⁰⁰⁴ *R v. Oakes*, [1986] Supreme Court of Canada, 1 SCR 103, [139].

¹⁰⁰⁵ *Bank Mellat (Appellant) v. Her Majesty's Treasury (Respondent) (No. 1)* [2013] the UK Supreme Court UKSC 38.

¹⁰⁰⁶ *Ibid* [74].

¹⁰⁰⁷ Alec Stone Sweet and Jud Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 144.

¹⁰⁰⁸ C-58/08 *Vodafone and Others*, Judgment of 8 June 2010, *European Court Reports 2010 I-04999*; Joined Cases C-92 and 93/09 *Volker und Markus Schecke GbR*, judgment of 09 November 2010, *European Court Reports 2010 I-11063*; Case C-236/09 *Association belge des Consommateurs Test-Achats and Others*, judgment of 1 March 2011, Reports of Cases 2011 I-00773.

¹⁰⁰⁹ *Nicaragua v. USA* [1986] ICJ judgment, 27 June 1986, ICJ Reports 1986. The Case concerning the dispute regarding Navigational Rights, Military and Paramilitary Activities in and against Nicaragua.

¹⁰¹⁰ *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef* [2000] WTO Appellate body 11 December 2000, WT/DS161/AB/R, Report of the Appellate Body, [164].

attach the legitimate objectives pursued by the legislation in question and where there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued.¹⁰¹¹

The proportionality test may be applied to determine the public purpose of the sovereign assets as to how and to what extent the MoCs against the assets intervenes into serving the public purpose of the defendant State. The judges of the forum State may also consider the availability of any other assets with less adverse impact on the defendant State and its subjects, but with equally effective means for enforcement. This test also requires the [non-national] judges of the forum States to assess certain regulatory (or sovereign) decisions of the defendant State which they may not be in the best position to decide according to the best judge principle. On the other hand, at the final level of proportionality *stricto sensu*, where the judges compare the effects of the MoCs on the State's public purpose objectively. The objective analysis can possibly be made based on the transaction costs, future impact on States' commercial contracts, the cost efficiency of enforcement attempts of the judgment creditors, the length of interference via MoCs, *etc.*¹⁰¹² Therefore, where the first two approaches rely on the subjective analysis of the asset's public purpose and the impact on the defendant State and its subjects, the final part of the test *i.e.*, comparative analysis based on quantitative representation of the cost-benefit analysis gives a more objective perspective.

5.2.3. *Margin of appreciation (MoA)*

Several approaches are prevalent from the judgments of the forum States in interpreting public purposes of foreign sovereign assets. The scope of margin of appreciation as an alternative approach for the forum States in adjudicating the issue of immunity from execution can be assessed. This approach receives the justification from the principle of "differential decision making". It is defined as differential judicial decision making as a means of honor to the separation of power and showing

¹⁰¹¹ *Pfizer Animal Health SA v. Commission* [2002] ECR Judgment 23 November 2002, II-3305 Case T-13/99, [411].

¹⁰¹² *Kingsbury and Schill* (n 999) 87.

hesitance in deciding the cases involving political issues.¹⁰¹³ Bollee commented that the reason behind the French Court of Cassation's setting a higher standard for waiver clause, was to avoid the enforcement of the ECtHR judgment against the French government's assets.¹⁰¹⁴ The application of margin of appreciation may remove or at least reduce the fear from the forum State's mind.

Margin of appreciation is a doctrine applied extensively by the ECtHR.¹⁰¹⁵ It recognizes the appreciation granted to national lawmakers as well as judges in enacting and interpreting their own measures to achieve a legitimate purpose. This interpretative tool brings the check and balance with the supervisory power of the ECtHR to ensure, "*both the aim of the measure challenged and its necessity; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.*"¹⁰¹⁶ In this legal doctrine, the degree of discretion varies from wide to narrow in margin of appreciation. Such as a wide margin is applied in the cases involving "culturally, morally or religiously" sensitive questions;¹⁰¹⁷ or the divergence between the private and public interests at stake.¹⁰¹⁸ On the other hand, at the question of a "strong European consensus in non-sensitive issues" such as freedom of press, private life issues, *etc.*, a restrictive margin is applied.¹⁰¹⁹ Similarly, the extent of discretion of defendant State may gradually increase in the enforcement cases from the assets listed as immune to the non-immune assets and the least degree of deference as to the commonly commercial assets such as commercial ships or passenger aircrafts for freight.

Lemmens identified three types of cases where the ECtHR applies the margin of appreciation:¹⁰²⁰ the absence of law, questionable use of law in the fact in issue and the cases pertaining to the positive obligations of the States.¹⁰²¹ All these three

¹⁰¹³ Koen Lemmens, 'The Margin of Appreciation in the ECtHR's Case Law' (2018) 20 (2-3) European Journal of Law Reform, 78.

¹⁰¹⁴ Sylvain Bollee, "L'abandon de l'exigence de specialite de la renunciation a l'immunité d'execution" (2015) 5 Dalloz 1936, translation taken from Kudrna (n 422), 136.

¹⁰¹⁵ Lemmens (n 1013), 84.

¹⁰¹⁶ *Handyside* (n 993) [49].

¹⁰¹⁷ Lemmens (n 1013), 90.

¹⁰¹⁸ *Paradiso and Campanelli v. Italy* [2017] ECtHR, 24 January 2017, Application no. 25358/12 [182].

¹⁰¹⁹ Lemmens (n 1013), 92. *Redaktsiya Gazety Zemlyaki v. Russia* [2017] ECtHR, 21 November 2017, application no 16224/05, [35] and [39]; *Animal Defenders International v. UK*, [2013] ECtHR (GC), 22 April 2013, application no 48876/08, [102].

¹⁰²⁰ Lemmens (n 1013), 87.

¹⁰²¹ *Ibid.*

characteristics match with the enforcement cases against foreign sovereign assets. Such as none of the international or national law provides objective standard of proof for the question of sovereign assets' immunity from execution. Given such a lack of standard, the defendant State and the judgment creditors bring different sets of facts to prove in their favor. Finally, the objective of courts is to ensure the obligation of the State to honor its judgment debt. Apart from the question of where this test is applied, the methodological question is equally significant to determine whether it can be regarded as an alternative approach of the judges in an enforcement proceeding.

This test is applied in three forms: firstly, as a substantive one to balance the individual right. In this dissertation, it is the rights of the judgment creditors. Secondly, the collective goal. Here, the collective goal is the right of the defendant State to immunity. Finally, as a structural one concerned with the review process determining the purpose of the sovereign assets.¹⁰²² The margin of appreciation test grants a certain degree of discretion to the defendant State in determining the legitimacy of the measures limiting the rights.¹⁰²³ Similarly, in the execution suits, the defendant State may enjoy a certain degree of deference and the court of the forum State may examine the legitimacy of the purpose of the sovereign assets claimed by the defendant State. The defendant State enjoys a certain degree of deference in determining their defense and the adjudicators adopt customized standards as per the condition of the defendant State. The margin of appreciation test can be applied where the defendant State puts forward its subjective circumstances distinct from the usual form of commercial or public use of sovereign assets for which the court may examine the circumstances at the standard of reasonableness. This also mitigates the adversity for judgment creditors.

In the case of *Export-Import Bank of the Republic of China v. Grenada* (2014),¹⁰²⁴ the US court considered the existing context in Grenada and concluded that the purposes of the funds used by Grenada *i.e.*, managing its airports, seaports, and other civic facilities, were public although, these purposes had been usually procured from private persons in other countries. Similar in *Firebird Global Master Fund II Ltd. v.*

¹⁰²² George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 80-81.

¹⁰²³ Benvenisti Eyal, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics*, 843.

¹⁰²⁴ [2014] 2nd Cir court, F 3d WL 4773451 CA 2.

Republic of Nauru and Another (2014),¹⁰²⁵ the Australian High Court considered the geographical size and location as well as economic condition of Nauru while hearing an enforcement case against certain bank accounts in its name. The Australian High Court commented:

In determining substantial commercial purpose, it is also important to bear in mind the individual circumstances of Nauru. Its remote location and small geographical size and population render the provision of many commercial services uncommercial for private entities (such as banking and aviation services and the provision of fuel) [...] it is in this context that the government operates many services beyond what may be considered core functions of government (such as police and fire fighting services) in order that its citizens may survive.¹⁰²⁶

While applying this test, the ECtHR starts with presumption in favor of the State acts as legitimate and justifiable.¹⁰²⁷ It examines the legitimacy of the State's act and the underlying objectives considering the ECHR and also the necessity of the objectives in a democratic society in applying this test.¹⁰²⁸ The question of the limit of that appreciation of the national government was decided in respect of the measure at issue.¹⁰²⁹ The ECtHR, in some cases, quashed the States' defense of public purposes and upheld the private rights.¹⁰³⁰ The case laws of the ECtHR clearly indicate that a

¹⁰²⁵ *Firebird Global Master Fund II Ltd.* (n 946), [176].

¹⁰²⁶ *Ibid.*

¹⁰²⁷ Gary Born, Danielle Morris and Stephanie Forrest, 'A Margin of Appreciation: Appreciating its Irrelevance in International Law' (2020) 61 (1) *Harvard International Law Journal* 65, 79. In *Greece v. United Kingdom (the Cyprus case)* [1958] European Commission (Plenary) Application no. 176/56, Yearbook of European Convention on Human Rights, para 132, the European Commission stated, "*the assessment whether or not a public danger existed is a question of appreciation*" and accepted the appreciation made the UK Government as to the existence of a public danger.

¹⁰²⁸ In the case of *Castells v. Spain* [1992] ECtHR 14 EHRR 445, the politician of the opposition party was prosecuted for criticizing the government. The ECtHR observed that the opposition politicians have more freedom of expression in a democratic society to scrutinize the government and their actions. The statements regarding government in power actions receives higher protection. The ECtHR in *Von Hannover v. Germany* [2004] EMLR 379 [63] stated, "[...] a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating [...] to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest" [...] it does not do so in the latter case."

¹⁰²⁹ *The Cyprus case* (n 1027), [143].

¹⁰³⁰ For instance, In the case of *Von Hannover* (n 1028), the petitioner complained against the publication of their photos in the newspaper as violation of their right to privacy under art 8 of the ECHR whereas the State argued for the freedom of press as essential right in a democratic society.

mere legitimate objective is not sufficient, the State also needs to ensure the safeguard to prevent the possible abuse of the same and compensate the damage caused to the private person.¹⁰³¹ Similar approach can be a useful technique to examine the certificate forwarded by the defendant State. The good faith of the defendant State and its *bonafide* intention to honor the judgment debt may be considered as an indication of the fair exercise of its deference under the margin of appreciation test.

Like the previous two approaches, margin of appreciation also comes with some challenges. The judges of the ECtHR [applying the margin of appreciation] receive their legitimacy from the ratification of the ECHR by the defendant State. However, the forum State's judges get no direct legitimacy from the defendant State except the acceptance of their jurisdiction by the defendant State for the dispute. Moreover, in a case before the ECtHR, the ECHR acts as the basis of the concerned national legislation of the defendant State in question and the jurisdiction of the ECtHR as a quasi supra national court. Interpreting the same instrument with the deference of the defendant State reduces the risk of bias among the judges. However, the national legislation of the forum State on foreign sovereign immunity is the basis for the interpretation of commercial purpose of sovereign asset in enforcement litigation but it is not the basis of the regulatory management of the asset by the defendant State. Therefore, again the deference of the defendant State and the discretion of the forum State are not standing on the same source.

5.2.4. Safeguards under international legal instruments

Interpretation of commercial agreements plays a vital role in enforcement of claims such as the treaty provisions on waivers of immunity from enforcement. In the case of *Eurodif* (1983) the French court refused to rely on the waiver clause in the arbitration clause when the arbitral award came before the court for enforcement.¹⁰³² On the other hand, in the case of *Societe Bec Freres v. Office des cereals de Tunisie* (1997) the

Nevertheless, the ECtHR said the domestic court failed to balance the freedom of expression of the press and the freedom of privacy of the petitioner.

¹⁰³¹ In the case of *Vukota-Bojic v. Switzerland* [2016] ECtHR Application no. 61838/10, Judgment 18 October 2016, the government argued that the alleged secret surveillance upon the aggrieved person is applied in a small number of cases and thereby necessary for public interest to prevent insurance fraud and ensure the due appropriation of public fund. Nevertheless, the ECtHR denied the justification and observed the failure of the legal framework to set out sufficient safeguards against abuse of this measures cannot be overlooked and thereby held the State responsible for violation.

¹⁰³² *Republique islamique d'Iran v Eurodif* [1983] France, Regional court of appeal, Paris 21 April 1982, Rev. crit. DIP 101.

French court provided a wider interpretation of the waiver clause stating the agreement in question should be interpreted in good faith.¹⁰³³ Similarly the French Court of Cassation permitted the enforcement of arbitral award against the bank accounts of the Qatar government with a French bank relying on the consent to arbitrate under the ICC Arbitration Rules.¹⁰³⁴ It stated, “*the commitment taken by a State signatory to arbitration clause to enforce the award in the terms of article 24 of the ICC Rules implied a waiver of immunity from execution by the State.*”¹⁰³⁵ Similar precedents are available where the express waiver in concerned international commercial agreement acted as the sole ground for allowed the MoCs against the assets of foreign sovereign which would otherwise enjoys immunity from execution.¹⁰³⁶ Hence, the interpretation of clauses in international agreement plays a vital role here.

The Vienna Convention on the Law of the Treaties (VCLT) (1969) puts certain standards to be followed while interpreting a treaty provisions, such as interpreting the provision in good faith, in the ordinary meaning of the terms, based on the context, in light of the objectives and purposes.¹⁰³⁷ Furthermore, this Convention (1969) requires the interpretation of any treaty provision to be guided by the relevant rules of international law, regarding the parties and their relationships.¹⁰³⁸ Kulick commented on the scope of ‘rules’ in article 31 (3) I of this Convention (1969) being inclusive of all the sources of international law as contemplated by the ICJ Statute.¹⁰³⁹ The scope of sources of international law under the ICJ Statute (1945) include international custom and the general principles of law.¹⁰⁴⁰ In the case of *Sapphire Arbitration* (1963), the sole arbitrator relied on the quasi-international character of the agreement between the State entity and the private investor and applied the general principles of law as a source of law under article 38 of the ICJ Statutes (1945).¹⁰⁴¹

¹⁰³³ [1997] France, Regional Court of Appeal Rouen, 20 June 1996, Rev. arb. 263.

¹⁰³⁴ *Creighton* (n 721).

¹⁰³⁵ *Ibid.*; translation taken from Kudrna (n 422), 134.

¹⁰³⁶ *Procureur* (n 413).

¹⁰³⁷ The VCLT 1969 (n 76) art 31 (1).

¹⁰³⁸ *Ibid.*, art. 31 (3) (c).

¹⁰³⁹ Andreas Kulick, *Global Public Interest and International Investment Law*, (Cambridge University Press, 2012), 170.

¹⁰⁴⁰ The Statute of International Court of Justice 1945 (the ICJ Statutes) art 38.

¹⁰⁴¹ *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, [1963] Arbitral Award (ad hoc arbitration) 15 March 1963.

The challenges exist in applying these safeguards in the enforcement cases. Firstly, commercial agreements executed by States with the private parties do not fall under the scope of public international law but are subjected to private international law.¹⁰⁴² In the *Serbian Loans Case* (1929), the PCIJ decided the municipal law to be the applicable law in case of the contracts between sovereign and private person.¹⁰⁴³ The applicable law in interpreting these contracts are already subjected to several considerations: the choice of law clause in the contract, the stabilization clause,¹⁰⁴⁴ the jurisdictions with closest connection.¹⁰⁴⁵ In this situation, the scope of applying the VCLT is minimum. Secondly, although article 38 of the ICJ Statute makes no hierarchical sources, the application of the general principles of international law is not made subject to other sources. The ICJ precedents show the use of general principles of international law, only “*in order to corroborate with an interpretation already derived from analysis treaty law or custom.*”¹⁰⁴⁶ Thus, application of the general principles of international law may hardly contribute to the interpretation of public purposes by the national courts of the forum States. Thirdly, the requirement of interpretation based on the context entrusts the [non-national] judges of the forum State with higher discretion. Many other factors in addition to the purposes of sovereign asset, come within the scope of ‘context’ *inter alia* the decision of defendant State as to purposes of the asset in question, the reasonableness of the decision, the deciding authority, alternative options, opportunity costs of the decision. Such broad scope of context gives higher discretion of the judges of forum State. Moreover, investigation by the judges of forum State while determining the ‘context’ acts as interference to the exercise of internal sovereignty of the defendant State. Finally, upon the application of general principles of international law, the judgment creditors may claim the application of general principles of international law as to define ‘international public purpose’ devoid of the domestic context in such interpretation to avoid ambiguities and bring more objective standard.

¹⁰⁴² Irmgard Marboe and August Reinisch, ‘Contracts between States and Foreign Private Law Persons’ in *Max Planck Encyclopedias of International Law*, (Oxford University Press, May 2011) Oxford Public International Law, para 2.

¹⁰⁴³ *France v. Serb Croat-Slovene State* [1929] Permanent Court of International Justice, judgment 12 July 1929 PCIJ series A no 20 (the *Serbian Loans* case).

¹⁰⁴⁴ The stabilization clause in the agreement between a State and private commercial counterpart means that in case of any subsequent dispute, the laws of the State will be applicable as it was at the time of the execution of the contract. Marboe (1042), para 12.

¹⁰⁴⁵ *Ibid*, para 3 and 11.

¹⁰⁴⁶ Kulick (n 1039), 204.

5.2.5. *International public purpose instead of the national public purpose*

The commercial counterparts of foreign sovereigns wish to have an expressly defined public purpose. Such express definition reduces the discretion of the defendant State while claiming the use of the assets as public. Should there be any international public purpose instead of subjective public purpose of the assets advocated by the defendant States?

In support of this option, the New York Convention (1958) may be relevant to a certain extent. According to article V (2) of the New York Convention (1958), the forum State where the enforcement is sought, may refuse enforcement if “*the recognition and enforcement of the award would be contrary to the public policy of that country*”. From the apparent reading of the provision, the forum States rightfully interpret the ‘public policy’ at their national standard without reviewing the merit of the award. Nevertheless, Berg commented the term “public policy” in article V (2) of the New York Convention implies the international public policy.¹⁰⁴⁷ He justified his position on the ground of the distinctions between the national public policy and the international public policy as the subjectivity, and best judge principle. He further commented that application of the international public policy instead of the domestic ones would make the scope of enforcement of foreign arbitral award broader.¹⁰⁴⁸ He referred to the ICSID Convention where violation of public policy was not recognized as a ground for refusal of enforcement of ICSID award.¹⁰⁴⁹

This approach may also contribute to balance the right of the judgment creditors to enforce and the immunity to sovereign assets. Taking inspiration from this approach in the New York Convention (1958), the question may arise whether any universal or at least global definition of public purpose exists in international law for sovereign assets. The UNGA Resolution on Permanent Sovereignty over Natural Resources (1962) provided a broader description of public purpose, as inclusive of “*public utility, security or the national interest which are recognized as overriding purely*

¹⁰⁴⁷ Albert Jan van den Berg, *New York Convention of 1958 Annotated List of Topics* (2013), <<http://www.newyorkconvention.org/11165/web/files/document/1/5/15975.pdf>> accessed 6 April 2021, 53.

¹⁰⁴⁸ *Ibid* 29.

¹⁰⁴⁹ *Ibid* 9; The ICSID Convention 1966 art 54 (1), declares the automatic recognition of the ICSID award and proceeds to subsequent stages for enforcement.

*individual or private interests, both domestic and foreign.*¹⁰⁵⁰ Having international public purpose would act as an objective standard for the sovereign assets in enforcement proceeding.

However, the challenges of this approach are numerous. Firstly, there is a definitional crisis. There is hardly any evident consensus as to the definition of or at least the defined scope of public purposes. Vig emphasized on the scope of public purpose, fitting into the national context instead of an international definition.¹⁰⁵¹ Secondly, the interpretations of public purposes for the assets given by the forum States' courts might be inconsistent, therefore, unable to provide a comprehensive and coherent view of the scope of public purposes. Thirdly, the majority of the targeted assets are liquid in nature. Hence, attaching any specific purpose regardless of national or international is difficult and subject to proof.

Instead of defining the public purposes, the way of interpreting the public purposes can be an alternative option. In the commercial disputes between States and commercial counterparts, rule of law has been a key argument point. The judgment creditor requests the court to consider the contract law-based rule of law whereas the defendant State emphasizes the international rule of law.

*5.2.6. Rule of law in mitigating inconsistencies*¹⁰⁵²

Rule of law can be applied to mitigate the above-mentioned inconsistencies while determining the questions of immunity of sovereign assets and possible alternative approach to international law-based rule of law. In commercial litigation before a domestic court, procedural law is usually the *lex fori* (law of the forum).¹⁰⁵³ Notwithstanding the procedural safeguard in the *lex fori*, the vulnerability increases when a sovereign is brought before a foreign court (national court of another State)

¹⁰⁵⁰ The United Nations on Permanent Sovereignty over National Resources 1962, (UNGA Resolution no. 1803, (XVII) art I, para 4 <[https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803\(XVII\)](https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803(XVII))> accessed 6 April 2021.

¹⁰⁵¹ Zoltan Vig, *Taking in international Law* (Pattrocinium, 2019) 73. “*More important issue is what is covered by this concept (i.e., the terms explaining public purpose or public interest) than what term is used to express it.*”

¹⁰⁵² This part of the dissertation has been published as Ferdous Rahman, ‘Defining Sovereign assets from immunity from execution: International Rule of Law versus International Law-based Rule of Law’ (2021) 5 *Journal of Legal, Political and Social Theory and Philosophy* 165.

¹⁰⁵³ Dolinger J and Tiburcio C, ‘The Forum Law Rule in International Litigation: Which Procedural Law Covers Proceedings to be Performed in Foreign Jurisdiction: Les Fori or Lex Diligentiae’ (1998) 33 *Texas International Law Journal* 425, 428.

and the sovereign assets are not entitled to absolute immunity on the ground of being used or having purpose of *jure gestionis*.¹⁰⁵⁴ Barr warned for cautious application of the FSIA (1976) of the US avoiding adverse impact on international relations.¹⁰⁵⁵ Moreover, as illustrated before, the legal framework for the foreign sovereign immunity, particularly in the case of sovereign assets, is not exhaustive. The question of rule of law may safeguard the interest of foreign sovereign and fill up the vacuums. Rule of law connotes three popular meanings: formal,¹⁰⁵⁶ substantive¹⁰⁵⁷ and *a-culture*.¹⁰⁵⁸ Nevertheless, engagement of States in the law of foreign sovereign immunity brings the relevance of international rule of law. The scope of international rule of law is broader than Dicey's definition of rule of law.¹⁰⁵⁹ From the theoretical perspective, the actors of international legal order *i.e.*, the States stand on horizontal relation unlike the subjects in domestic legal order. Hence, the international legal order demands the rule of law to be defined appropriate to its nature as distinct from the national legal order. Moreover, where the national rule of law aims at achieving justice, the international rule of law values the stability in international legal order more than justice.¹⁰⁶⁰ Such objective of international rule of law corresponds with the thick definition of rule of law which means the substantive notion of justice, distinct

¹⁰⁵⁴ Matti S. Kurkela and Santtu Turunen, *Conflict Management Institute, Due Process in Commercial Arbitration* (2nd edn Oxford University Press, 2010), 2; They argued that the parties to the arbitration proceeding need to be protected with the due process standards because arbitration is a not a proper (normal) court and the application of due process compensate them for their revocation of access to court right.

¹⁰⁵⁵ Barr (n 51).

¹⁰⁵⁶ In formal rule of law, application of due process with the expectation of social justice is the prime objective. Neumann Franz, *The Rule of Law: Political Theory and the Legal System in Modern Society*, (Leamington Spa: Berg, 1985).

¹⁰⁵⁷ The substantive rule of law has broader periphery as to the formulation of a legal order regulating the aspects of social, economic, and political life of a State. B.S. Chimni, 'Legitimizing the International Rule of Law' in James Crawford and Martti Koskenniemi, (eds) *the Cambridge Companion to International Law*, (Cambridge University Press, 2012), 290.

¹⁰⁵⁸ A-culture concept of rule of law concentrates on the conceptualization of the same of a single culture and measures the others on its standard.

¹⁰⁵⁹ Albert Venn Dicey, *Introduction to the study of the law of the constitution* (10th edn, Palgrave Macmillan, 1961), 42 "[Rule of law] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government [...] It means again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts [...] [and] lastly, [...] that in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."

¹⁰⁶⁰ Simone Chesterman, 'Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis' (2007) 28 (3) Michigan Journal of International Law 553.

from the justice understood relying on a set of ideals or some fixed process such as giving the remedy to the judgment creditor. Strong stated:

The rule of law is intimately connected with some conception of justice which can reflect “corrective”, substantive, distributive, social, procedural, organizational, interactional, interpersonal, communicative, communitarian, restorative and transitional” values, depending on the circumstances.”¹⁰⁶¹

The objective of maintaining international legal order keeps the concept of international rule of law fluid. For defining international rule of law, ‘principles’ and ‘rules’ need to be distinguished. Rules are made based on principles. Principles are more generic and fundamental in nature. In other words, rule of law is not limited to some rules rather it presents the concepts of procedural due process by the ideals of fairness and natural justice.¹⁰⁶² Drawing the conclusion relying on the previous argument that the international rule of law as a set of principles, the question remains open whether the court should be guided with international rule of law or international law-based rule of law. Both are discussed below.

5.2.6.1. International rule of law in execution cases

From the structural position, Chesterman analyzed three meanings of international rule of law: application of rule of law principles in relation to the States and other subjects of international law, supremacy of international law over national law and emergence of global rule of law with normative regimes.¹⁰⁶³ Chimni identified four approaches from more pragmatic view,¹⁰⁶⁴ such as the liberal,¹⁰⁶⁵ the realist,¹⁰⁶⁶ the critical and the third world approach.¹⁰⁶⁷ These approaches are subject to the

¹⁰⁶¹ SI Strong, ‘General Principles of Procedural Law’ (2018) 122 (2) Pennsylvania State Law Review 347, fn. 144.

¹⁰⁶² Jeremy Waldron, ‘The Concept and the Rule of Law,’ (2008) 43 (1) Georgia Law Review 7.

¹⁰⁶³ Chesterman (n 1060).

¹⁰⁶⁴ Chimni (n 1057).

¹⁰⁶⁵ The liberal view assumes international law strong enough to censor the State conducts whenever necessary to make them comply therewith.

¹⁰⁶⁶ The realist approach brings the question of international policies and the accumulation of power. Hence, except in the rare cases where no national interests are involved, cooperation is found to establish rule of law.

¹⁰⁶⁷ The third world approach requires the rule of law to reflect the reality of international community, distinct from the international law brought by some elite States. Robert McCorquodale, ‘Defining the International Rule of Law: Defying Gravity?’ (April 2016) 65 International and Comparative Law Quarterly 277, 296. B S Chimni, ‘Third World Approaches to International Law: A Manifesto’ in A Anghie *et al* (eds) *The Third World and International Order: Law Politics and Globalization* (Martinus Nijhoff, 2003).

concerned role of international laws and this role varies from the conflicting interpretations to embrace the national interests from time to time. Therefore, the embraced international rule of law has no concrete meaning, but a set of principles varying with the development and economic growth of the international legal order. The international organization forwards the principles in the name of international rule of law, promoting its own mandate. Such as, the UN defines rule of law as obedience to existing international laws and its fundamental principles embodied in the UN Charter. The fundamental principles in the UN Charter consist of sovereign equality, non-intervention in external and internal affairs, peaceful settlement of international dispute, principles of fulfilling good faith obligation derived from international law.¹⁰⁶⁸ There are also some non-binding international instruments attempting to list different principles as the standard of international rule of law. For instance, International Bank for Reconstruction and Development proposed confidence on law, obedience thereto, quality of contract enforcement as the ideals of rule of law in international legal order.¹⁰⁶⁹

For interpreting sovereign assets, the international rule of law is taken with its formal objective. The formal objective is to apply the due process in the transactions concerning the interests of the sovereign as well as the private litigants. According to the rule of law principles of Dicey, due process of law is to prevent arbitrary power of the State authorities, equality of all including the government officials before law, and constitutional law as fundamental law.¹⁰⁷⁰ The procedural law requires the court to follow the rule of law in assessment of the damage caused by the breach and pronouncement of the consequence of the same.¹⁰⁷¹ One way of defining general principles of procedural law for international rule of law is content based approach where rule of law acts as standard.¹⁰⁷² Nevertheless, application of rule of law is manifestly subjected to the public policy and order of the forum State. The Rome Convention duly emphasized “*the application of rule of law of any country specified by the convention may be refuted only if such application is manifestly incompatible*

¹⁰⁶⁸ The UN Charter (n 88) art 2.

¹⁰⁶⁹ Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Governance Matters VI: Governance Indicators for 1996-2006*, World Bank Policy Research Working Paper No. 4280 (July 2007).

¹⁰⁷⁰ Dicey (n 1059).

¹⁰⁷¹ The Rome Convention on the Law applicable to Contractual Obligations 1980 art 10 (1) (c).

¹⁰⁷² Strong (n 1061).

with the public policy (public order) of the forum.”¹⁰⁷³ That means, it diverts the interpretation again to the standard of non-national adjudicators in execution cases bringing the same inconsistency and unpredictability.

Since, there is no conclusive definition of international rule of law but a combination of several values, the international rule of law may require a specific set of principles to assess the purpose of the sovereign assets, other than the popular principles listed as international rule of law. However, setting the principles is a major challenge¹⁰⁷⁴ because of a few States being the epicenter of execution cases. The questionable role of the dominant forum States is one of the significant pitfalls here. For instance, in sovereign debt litigation, the US proposed a collective action clause after rejecting the proposal of sovereign debt restructuring mechanism advocated by IMF.¹⁰⁷⁵ Moreover, the sovereign debt litigation is controlled by few States’ courts. Thus, their procedural practices and interpretations of international legal instruments in this regard dominate this area of law.¹⁰⁷⁶ Strong stated:

International arbitration is controlled by a small cadre of industry ‘insiders’ because the various procedural norms are effectively ratified by States through adherence to the relevant treaties and through judicial interpretations of treaty norms that are highly consistent across national borders.¹⁰⁷⁷

Fundamental principles of any industry derive from the practice of the prominent players of that industry. The same crisis exists in enforcement against sovereign assets and the question of sovereign assets’ immunity from execution. This system lets the dominant States to set their own general principle such as adoption of restrictive sovereign immunity in commercial matters instead of absolute ones. Following the ‘a-culture’ meaning of rule of law discussed above, the dominant States’ domestic law forms the basis of international law on foreign sovereign immunity and here the principles of international rule of law. These States put national stake as the priority. They could not overcome the conflicting needs of the international forum and their

¹⁰⁷³ The Rome Convention 1980 (n 1071) art 16.

¹⁰⁷⁴ Barr (n 51).

¹⁰⁷⁵ Ferdous Rahman, ‘Critical Review of the International and Contractual Measures for Optimal Restructuring’ (2020) 14(4) Law and Financial Markets Review 249, 253.

¹⁰⁷⁶ Susan D Frank, James Freda, Kellen Lavin, Tobias Lehmann, and Anne Van Aaken, ‘The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration’ (2015) 53 Columbia Journal of Transnational Law 429, 467-468.

¹⁰⁷⁷ Strong (n 1061), 398

self-interest. In following these meanings, it again returns to the question of ‘an unqualified human good’ and ‘cultural achievement of universal significance’.¹⁰⁷⁸ States define the principles of international rule of law from different perspectives because of their various regional and group interests. Such as, in international investment law, the capital exporting home States no longer define the foundational principles of sovereignty from the perspective of its immunities, exemption, or exclusiveness but from State responsibility to protect the foreign investors.¹⁰⁷⁹ On the other hand, the capital importing host States promote the non-interference to exercise sovereign authority and emphasize on the corporate responsibility to domestic laws of the host State. The advocates of welfare State emphasis on State responsibility to protect its citizen, compliance with democratic governance and international human rights laws.¹⁰⁸⁰

5.2.6.2. International law-based rule of law in interpreting sovereign assets

In order to converge the various group-interests, should the international law-based rule of law be the alternative instead of international rule of law?¹⁰⁸¹ The concept of international law-based rule of law can be explained as implementing the similar objectives of rule of law but through international law. The objectives of rule of law, as identified by Dicey were the limitation of governmental power to ensure the people’s right and freedom and the legal certainty.¹⁰⁸² Undoubtedly, these objectives do not work in their literal meaning for international legal order, because of the different standing of States in international legal order unlike the subjects in domestic legal order. Here, the purpose of rule of law is not only to protect the subjects from the States but the States from other nation States at the international level.¹⁰⁸³ From the perspective of international law, the objectives could be *inter alia* (i) the legal certainty in interpreting international law and (ii) the limitation of the interpretative

¹⁰⁷⁸ EP Thompson, *Wings and Hunters, the Origins of the Black Act*, (Pantheon 1975); Roberto Mangabeira Unger, *Law in Modern Society* (Free Press 1976).

¹⁰⁷⁹ Muthucumaraswamy Sornarajah. *The International Law on Foreign Investment* (Cambridge University Press, 2017).

¹⁰⁸⁰ Chirwa (n 91), 4.

¹⁰⁸¹ Rodoljub Etinski and Bojan Tubic, ‘International Law and the Rule of Law’ (January 2016) 64(3) *Anali Pravnog fakulteta u Beogradu* 57; Simone Chesterman, ‘Panel on the 2012 UN Declaration on the Rule of Law and its Projections’ (2012) *American society of International Law Proceedings*, 107/2013/, 468.

¹⁰⁸² Dicey (n 1059) 120.

¹⁰⁸³ Jeremy Waldron, ‘Are Sovereigns Entitled to the Benefits of the International Rule of Law?’ (2011) 2 *the European Journal of International Law* 316, 324.

power of the legal and non-legal authorities, acting in international legal order. Likewise, Chesterman stated the aim of rule of law in international legal order to maintain the ‘order’ not ‘justice’ as it is in domestic level.¹⁰⁸⁴ These two objectives also receive support from the Working Group III of the UNCITRAL (2020).¹⁰⁸⁵ In order to ensure legal certainty, interpretation of international law needs to be consistent, coherent, and predictable. On the other hand, international law is no more interpreted solely by the international courts but also by international arbitration tribunals (such as in ISDS arbitrations), domestic courts (for instance, in execution cases) and other non-legal international organizations. The broad and abstract nature of international law acts as a boon in disguise. Its abstract nature gives the flexibilities which is required to maintain the order.¹⁰⁸⁶

From a comparative view, the international rule of law can be termed as ‘internationalization of rule of law’ whereas the international law-based rule of law as ‘rule of law internationalized’.¹⁰⁸⁷ In ‘internationalization of rule of law’, a new set of principles are formulated to fit the concept of rule of law into international legal order. In the latter case, the objectives of rule of law are to be promoted in international legal order. It makes the scope of international law-based rule of law narrower than international rule of law. Thereby, the precise question is whether any international treaty, any State act pursuant to international law, any given interpretation of the treaty and/or the States’ act under the treaty conforms with the principles of rule of law.

The challenges in defining international rule of law to resolve the open questions in sovereign assets’ immunity, can be mitigated with the application of international law-based rule of law, *albeit* cannot be eliminated. For instance, in sovereign debt litigation, the holdout creditor argues the contract law-based rule of law requiring the State to honor its debt.¹⁰⁸⁸ In contrast, the sovereign debtor relies on the international

¹⁰⁸⁴ Chesterman (n 1081), 468.

¹⁰⁸⁵ Discussed in 5.2.7 of this dissertation.

¹⁰⁸⁶ Etinski (n 1081), 62.

¹⁰⁸⁷ Andre Nollkaemper, Jan Wouters, and Nicolas Hachez, ‘Accountability and the Rule of Law at International Level’ (2008)

<<https://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf>> [accessed 12 February 2021]

¹⁰⁸⁸ WMC Weidemaier and Anna Gelper, ‘Injunctions in Sovereign Debt Litigation’ (2014) 31 (1) Yale Journal on Regulation 189.

law-based rule of law concerning its sovereignty and uninterrupted power of determining its monetary policy and intends to pay the debt accordingly. The State takes the forceful payment pursuant to an execution order of a foreign court as an encroachment to its internal sovereignty under the international law-based rule of law.¹⁰⁸⁹ Therefore, as to the first objective of certainty in interpreting the purpose of sovereign assets, which areas of international law should receive the priority in following international law-based rule of law? Whether it should be private international law respecting the right of the judgment creditor to be paid or public international law honoring sovereignty of the defendant State.

On the other hand, in terms of the second objective of limiting the extent of discretion of the interpreting authority, the power of the dominant forum States in interpreting *jure imperii* and *jure gestionis* needs to be limited by bringing equal representation of States' interest in interpretation of international law on immunity of sovereign assets from execution. A consensus-based interpretation of *jure imperii* and *jure gestionis* can be a solution to achieve the objective.

5.2.7. Global initiatives to bring consistency and predictability

Unpredictable precedents make the legal framework shaky which affects the stability of global financial market.¹⁰⁹⁰ Besides, the uncertainties in enforcing the awards and judgments against foreign sovereign increase the cost of investment for the commercial counterparts and reduce the States' access to financial market.¹⁰⁹¹ Thus, it demands a certain and specific legal framework while adopting remedial measures.¹⁰⁹² Foster opined to have an international convention as an alternative to the enforcement attempts before forum States and proposed to have a surety mechanism instead of several enforcement litigations.¹⁰⁹³ Should there be any global initiative to bring consistency, coherence, and predictability in the enforcement proceedings against foreign sovereign assets? Such as with a view to ensuring the stability in ISDS reforms, the UNCITRAL Working Group III has been considering various reform options including the establishment of multilateral investment

¹⁰⁸⁹ Ibid.

¹⁰⁹⁰ Lee C Buchheit and G Mitu Gulati, 'Responsible Sovereign Lending and Borrowing, Law and Contemporary Problems' (Fall 2010) 73(4) *A Modern Legal History of Sovereign Debt* 63.

¹⁰⁹¹ Discussed in n 986 of this Dissertation.

¹⁰⁹² Fisch and Gentile (n 51)

¹⁰⁹³ Foster (n 795).

tribunal,¹⁰⁹⁴ and/or option for appeal from the decision of the investor-State arbitral tribunal,¹⁰⁹⁵ and enforcement issues for the investor-State arbitral awards.¹⁰⁹⁶ Finalization of these instruments is expected to achieve the desired coherence and consistency.

Another area of international commercial law involving sovereign interest but having the crisis of inconsistent precedents from domestic jurisdictions is sovereign debt litigation. The Argentine debt default in 2001 resulted in the vast number of execution litigations. The scholars negated the establishment of international court for sovereign debt litigations as an alternative to mitigate the crisis.¹⁰⁹⁷ In view of the above, how can the global consensus contribute to the enforcement challenge for the judgment creditor as well as protect the sovereign assets from unjustified MoCs? The previous initiative in preparing an international convention related to foreign sovereign immunity (*i.e.*, the UN Convention) did not become successful as the UN Convention has not been effective yet since its acceptance in 2004. Moreover, the political economy among the forum States, the defendant States as well as States having interest in protecting commercial counterparts would act as an impediment in achieving the consensus. Such as States with less regulated market economy would prefer a narrower definition of public purpose as they mostly hold interest in protecting the private commercial creditors, whereas State with mixed and highly regulated economy would be inclined to have a broader scope in public purposes to prevent any MoC against their assets. The narrower interpretation empowers the private interest of the judgment creditors, and the broader interpretation makes more assets immune. Hence, no such global initiative can be seen in the near future to solve the challenges in enforcement of judgments against sovereign assets.

¹⁰⁹⁴ UNCITRAL, Possible reform of investor-State dispute settlement: Selection and appointment of ISDS tribunal members (2021), <<https://undocs.org/en/A/CN.9/WG.III/WP.203>> accessed 8 April 2021.

¹⁰⁹⁵ UNCITRAL, Possible reform of investor-State dispute settlement: Appellate mechanism and enforcement issues (2021), <<https://undocs.org/en/A/CN.9/WG.III/WP.202>> accessed 8 April 2021.

¹⁰⁹⁶ UNCITRAL, Working Group III: Investor State Dispute Settlement Reform https://uncitral.un.org/en/working_groups/3/investor-state accessed April 8, 2021.

¹⁰⁹⁷ Michael Bradley, James D Cox, and G. Mitu Gulati, 'The Market Reaction to Legal Shocks and their Antidotes: Lessons from the Sovereign Debt Market' (January 2010) 39 (1) *The Journal of Legal Studies* 289.

5.3. Conclusion

The core focus of this dissertation is the interpretation of the purpose of the sovereign assets for determining immunity from execution in enforcement litigations. There is international instrument *e.g.*, the UN Convention (2004) and regional conventions like the ECSI (1972) regarding immunity of foreign sovereigns and their assets. The dominant forum States *e.g.*, the US, the UK, Germany have not ratified the UN Convention (2004). Although the UN Convention (2004) has not been effective yet, many jurisdictions follow its principles with persuasive value. The case-laws from the dominant forum States fill up the vacuum in the law of foreign sovereign immunity. Given the current gap in legal framework, various approaches are advocated by the concerned stakeholders. For instance, the defendant State advocates accepting its statement of public purpose of the asset as it stands on the best position to determine. On the contrary, the judgment creditor emphasizes more on the scrutinization from the forum States instead of accepting the mere certificate from the defendant State.

On the other hand, the judges of the forum States apply various tests in different cases such as control tests, beneficiary interest tests, the *Bancec* test, proportionality test, MoA, *etc.* for examining the purpose. Coherence, consistency, and predictability are the desired outcome for each of these approaches which are yet to be achieved through these tests. After observing the fate of the UN Convention (2004) in terms of its effectiveness, any possible global initiative to define international public purpose or international rule of law is also doubtful. Therefore, in a given situation, a model law may be an approach to bring consistency and certainty in interpreting the purpose of sovereign assets. Model laws are the comprehensive legislative texts whereas model texts are taken as non-legislative texts open for adoption as model clause in agreements.¹⁰⁹⁸ Therefore this dissertation uses the term ‘model law’ instead of model text for its purpose. Model laws are developed for modernization and harmonization of national laws where strict uniformity is not required. The study shows that States are more inclined to consider a model law while codifying their national legislation

¹⁰⁹⁸ UNCITRAL ‘A guide to UNCITRAL Basic Facts about the United Nations Commission on International Trade Law’ United Nations (2013) < <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf> > accessed 01 October 2022 para 37 “A model law is a legislative text that is recommended to States for enactment as part of their national law”.

than signing and ratifying an international convention.¹⁰⁹⁹ Development of model law is less expensive as it requires less negotiation sessions. Nevertheless, its flexibility of letting States make some changes according to their own legal system makes it more lucrative than an international convention which creates an obligation and is difficult for amendment.

States may negotiate to prepare the model law and adopt it on a consensus basis. Subsequently the model law may act as a guiding principle for the domestic legislation on sovereign immunity from execution. Such model law can limit the arbitrary and inconsistent interpretation of the domestic jurisdictions and ensure coherent interpretation of sovereign assets and their immunity, because where the forum State is allowing execution against the defendant State's asset, it would also rely on the absolute sovereign immunity when it comes to its own assets.¹¹⁰⁰ Thus, a model law would bring both the forum State and the defendant State at the same page. International collaboration among the concerned organizations including UNCITRAL can be helpful for preparing the model law. The next chapter concludes the dissertation with a few suggestions as to the content of the model law.

¹⁰⁹⁹ Ibid para 38

¹¹⁰⁰ Verdier (n 967) 211.

Chapter 6: Conclusion

The inherent nature of sovereignty demands immunity for its sovereign assets from any MoC before any foreign court. Sovereign assets serving commercial purposes or use are not immune. Similarly, the State may waive its waiver of immunity from MoC. This practice of restrictive sovereign immunity opens the doors of the forum States' courts against any sovereign entity for enforcement of commercial awards or judgments against its assets. After the commercial counterpart receives an arbitration award or a monetary judgment against the defendant State, the next step is the recognition of the award or judgment in a forum State where the enforcement will be sought. The judgment creditor targets one or more sovereign assets to seek MoCs in the court of the forum State where the assets are situated. Pursuant to the application of judgment creditor, the court of the forum State determines the character of the sovereign assets and decides whether to grant and/or reject immunity to the asset.

In the past, the judgment creditor used to pursue diplomatic channel for payment of award value. Even till date, few scholars opined to return to diplomatic channel to ensure the honor of judgment debt.¹¹⁰¹ Some of them advised for preparing new convention to mitigate the dysfunctions of the current enforcement mechanism against foreign State.¹¹⁰² Nevertheless, failure of the UN Convention (2004) to receive required number of ratifications for effectiveness raises doubt as to the viability of another new international convention. Therefore, instead of allowing diplomatic channel or military recourse to get the judgment debt paid and/or ratifying existing international convention, major capital exporting States open their court rooms for enforcement litigations against foreign sovereign assets, by recognizing the restrictive immunity principle for immunity from execution.¹¹⁰³ This is also one of the reasons why the legal concepts from the common law jurisdictions have taken a vital part in developing the legal framework and in the following proposals for model law in this dissertation.

¹¹⁰¹ Irina Tarsis and Elizabeth Varner, 'Reviewing the *Agrudas Chasidei Chadab v. Russia Federation, et al. Dispute*,' (March 19, 2014) 18(8) American Society of International Law <<https://www.asil.org/insights/volume/18/issue/8/reviewing-agudas-chasidei-chabad-v-russian-federation-et-al-dispute>> accessed 15 August 2022.

¹¹⁰² Foster (n 795).

¹¹⁰³ Weidemaier and Gelpert (n 1088), 68.

The first research question of this dissertation was to map out the legal framework of law on foreign sovereign immunity when the foreign sovereign assets enjoy immunity from execution. The findings of this question, as discussed in the second chapter, show that immunity is granted for the assets of public nature or having public purpose. Since there is no comprehensive international convention, the national legislation has taken over. Three distinct practices are visible among States: States having specific statutory law on foreign immunity; States following the prevailing international law from time to time and State directing its courts to follow the briefs sent by its executive organ. Although a few States fall in the third category, sending executive notes to the courts is not unusual for the other two categories of States as well. Since the interests of another foreign States, the inter-State relations, diplomatic tensions are concerned with the question of foreign sovereign immunity, it is a practice among the courts to follow the executive brief. The courts ignoring the executive brief are criticized for breach of international comity.¹¹⁰⁴ Nevertheless, this dissertation suggests that:

The court should consider the notes from the executive organ with persuasive value instead of a binding one. When a judgment has already been passed against the foreign Sovereign, execution of the same should be the inevitable consequence. Therefore, scope of the executive authority's intervention should be limited to certain things such as the recognition of the Statehood of the defendant State, any information regarding the public purpose of the asset in question, *etc.* The executive authority should refrain from making any direct comment on the case before the court, rather it may clarify its current approach to contemporary international law, *etc.* This limitation ensures judicial independence and separation of power and increases the confidence of the litigating parties upon the judicial administration of the forum State.

Neither the international conventions nor the national legislations have made a clear distinction between the public assets and the assets with commercial purposes. From the functional comparison of the legal instruments, a mere list of immune assets and

¹¹⁰⁴ International comity is discussed in detail in n 59 of this dissertation. *NML vs. Argentina*, [2011] 952 NE 2d 482. The decision of the court was criticized on the grounds of breach of international comity by way of ignoring the amicus brief sent by the US government and granting the injunctive remedy going beyond the US law of equitable remedy. See more, Barr (n 51).

the characteristics of non-immune assets are derived. Hence, the case laws play a vital role in determining the purposes of sovereign assets in question. When it comes to case laws, substantive and procedural questions are the core issues. The second research question concentrated on these questions. The substantive questions consist of ownership of the asset and its attribution whereas the procedural questions are related to applicable law, presumption of use, burden of proof, interpretation of waiver clause, *etc.*

The findings regarding the substantive questions entail that construing ownership as a single unit prevents certain sovereign assets from being targeted for execution. While determining the ownership of the assets, the beneficiary interest and the control interest come into question. Generally, States hold control interest, however, in few cases, they hold a mere beneficiary interest [a unique common law concept of ownership].¹¹⁰⁵ In the latter case, the legal ownership of the assets is usually not bestowed upon the defendant State. Hence, the assets are not available for attachment for the State's debt. It also means that these assets do not enjoy immunity in an enforcement litigation for the debt of the SOE even though their legal owner is a State-instrumentality. Such as, the sovereign wealth fund is managed in the name of the SOE as the legal owner whereas the State is the beneficiary of the fund. In this case, if only *de jure* ownership is considered, the fund cannot be executed for the debt of the State. Similarly, this fund does not enjoy immunity if the judgment debt is owed by the SOE managing the fund. Therefore, this dissertation recommends that:

Instead of taking the ownership as a single unit, the divisible property rights should be acknowledged such as right to receive proceeds, right to control the proceeds, distinct from the assets *per se*.

The second substantive question before the court is attribution of the asset. Different tests are advocated. For instance, nature test, commercial purpose test, commercial activity test. Among these tests, purpose test has a comparatively settled footing although the judicial interpretations are not uniform. The finding also shows that no single test can bring consistent outcome while determining the immunity of sovereign assets from execution, especially for the liquid assets. The majority of the targeted sovereign assets are liquid in nature such as receivables from third parties, funds in

¹¹⁰⁵ For instance, *AIG Capital* (n 373); *Rubin v. Iran* [2003] DDC 456 F. Supp. 2d 234

bank accounts, the central bank's assets, sovereign wealth funds, *etc.* The challenge with liquid assets is that their apparent purpose is always commercial such as procurement of goods or services, payment of consultation fees, *etc.* These assets have no inherent purpose. Therefore, this dissertation suggests that:

Tests should be varied based on the types of assets and in some cases, combination of multiple tests can be useful. Such as, for the diplomatic assets, the purpose test is appropriate whereas for the assets held in the name of central bank, the commercial activity test [*e.g.*, regulatory functions of the central bank] and the nature test [*e.g.*, separate legal entity of the central bank, defendant State's control over its governance, *etc.*] can bring more consistent result.

Moreover, for liquid assets, the court should consider the purpose of the use instead of the source of fund. Such as appropriation of funds in purchasing military equipment. In this example, procurement is a commercial activity but the purpose of the procured object [*i.e.*, the military equipment] is public. It removes the question related to the transaction which might or might not be public. Such an approach allows the focus of both the defendant State and the judgment creditor exclusively on the use of the liquid asset instead of the nature of the transaction from which it was earned. The precedent of the *Connecticut* case¹¹⁰⁶ can be a relevant reference here. Its acceptance in other jurisdictions with persuasive precedential value, even outside the US indicates its legitimacy.

Another part of this research question was procedural issues in an enforcement litigation dealing with sovereign assets and their immunity from execution. The finding shows inconsistent procedural legal practices as to the proof of the asset's purpose, nature, and/or its use, the interpretation of waiver clause, nexus requirement, burden of proof, standard of evidence, *etc.*

Interpretation of waiver clause has been another controversial issue in the law of foreign sovereign immunity. Three different types of interpretations are found. Firstly, courts providing narrow interpretation of waiver clause requires the waiver of immunity from execution to 'express' and 'specific'. If the asset in question falls in

¹¹⁰⁶ *Connecticut* (n 294); Discussed in 4.4.6 and 4.4.8 of this dissertation.

the list of immune assets *e.g.*, diplomatic assets, in some cases, courts require it to be specific to the asset. Such strict requirement for the waiver clause makes the outcome of enforcement litigations more unpredictable. Secondly, courts providing liberal interpretation accept the implied waiver clause for the immunity from execution. Finally, there are a few jurisdictions which presume the waiver of immunity from execution if jurisdiction of the court is established. This approach was followed by the Constitutional Court of South Africa¹¹⁰⁷ and the Swiss courts.¹¹⁰⁸ Because of such diverse interpretations, the outcome of enforcement litigations varies even when all of them rely on the same waiver clause.

Uniformity as to the waiver clause for the immunity from execution can be ensured by accepting a single express waiver clause for both the immunity from jurisdiction and immunity from execution. It does not reduce the protection for States, but rather increases the confidence of their private commercial counterparts. Such confidence reduces the transactional cost of commercial contracts for States.

Similarly, the standard of proof varies as to the nature of the assets such as tangible or intangible assets. The burden of proof varies as per the *lex fori* of the case. The unsettled burden of proof causes some challenges for the judgment creditor in proving the commercial use or purpose. The question of burden of proof determines whether judgment creditor is required to prove the *prima facie* case of commercial purpose or rebut the presumption of public purpose of the asset in question. The situation gets worse in the case of assets with mixed purposes. How and to what extent the burden proof can be divided in case of mixed uses of asset? Inconsistent precedents have been found in case of mixed uses of assets, especially in case of diplomatic accounts.¹¹⁰⁹ Few courts denied to distinct the partial commercial use of the assets

¹¹⁰⁷ *Zimbabwe* (n 445), [60]- [61]. The Constitutional Court of South Africa, observed, “*rule of law is a foundation value [...] and it is settled that the rule of law embraces the fundamental right of access to courts [...] The right to an effective remedy or execution of a court order is recognized as a crucial component of the right of access to courts.*”

¹¹⁰⁸ *Royaume de Grece* (n 487) 198. The Swiss Federal Supreme Court opined, “*as soon as one admits that in certain cases a foreign State may be a party before Swiss courts to an action designed to determine its rights and obligations under a legal relationship in which it had become concerned, one must admit also that that foreign State may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. It that were not so, the judgment would lack its most essential attribute, namely that it will be execution even against the will of the party against which it is delivered.*”

¹¹⁰⁹ Discussed in 4.2.1.4 of this dissertation.

from its public use and some other courts commented that partial public use of the same does not entitle the assets to immunity. These challenges affect the enforcement strategy, increase transaction cost, and reduce the cost and time efficiency of the enforcement litigation. Meanwhile, the defendant State may complicate the situation by changing its use or allocating it for some public purposes. Therefore, this dissertation proposes that:

The challenge of interpreting mixed uses can be mitigated with the help of earmarked assets. If the asset has been earmarked for commercial use, it loses its immunity for the earmarked portion. Nevertheless, earmarking of the asset may not be available in all cases. Therefore, in these cases, proportionality test may be relevant.¹¹¹⁰ The proportional ratio between the public use and the commercial use of the asset, the prolong length of commercial and public use can help the court to decide the immunity.

Another developing area of the procedural question for immunity of sovereign assets is the grant of pre-judgment attachment. It has also been a controversial issue in the laws of foreign sovereign immunity. International instruments, national legislations as well as some courts show hesitance in granting pre-judgment MoCs. Courts granting pre-judgment MoCs received criticisms. The finding shows that the international conventions do not allow prejudgment MoCs unless the defendant State expressly consented thereto. The national legislation also follows stringent provisions for this. Nevertheless, some case laws are found granting prejudgment MoCs against the defendant State to prevent removal of assets from the jurisdiction of the forum State or as security for the cost of litigation. The dilemma behind such a converse position between the legal framework and the judicial practice is to protect the interest of the judgment creditor and simultaneously, not to interfere with the sovereign functions of the defendant State. Therefore, this dissertation proposes that:

The prejudgment MoCs should be allowed with the same waiver of immunity from execution. Because absence of these MoCs vitiates the purpose of the execution suits. Various forms of pre-judgment MoCs serve various purposes supporting both the defendant State and the judgment creditor. Order of discovery helps the judgment creditor to target only the local sovereign assets

¹¹¹⁰ Discussed in 5.2.2 of this dissertation.

in the forum State's territory, cost of security discourages the judgment creditor from bringing multiplicity of proceedings. It also reduces the risk of removal of assets from the forum State's territory.

The coherence is yet to be reached for the requirement of nexus between the jurisdiction and the assets in question or between the targeted assets and the debt to be recovered. The requirements of nexus of the judgment debt with the assets, the judgment debt with the forum State and the forum State with the targeted assets have not been settled. Different jurisdictions follow different approaches.¹¹¹¹ Without the territorial nexus, the forum State may entertain a case where it has no direct control over the asset in question and thereafter leaving the judgment creditor with a mere paper judgment. This dissertation advocates in favor of nexus requirement. It suggests that:

The nexus requirement should receive more emphasis than now. The judgment creditor should prove the nexus before opening the other substantive questions before the court. This requirement of not entertaining an enforcement litigation without proving the nexus with the jurisdiction would prevent the multiplicity of proceeding and enforcement attempts of the judgment creditor in various jurisdictions. It will also reduce the risk of vulture litigations.

The nexus requirement between the debt in question and the targeted asset for enforcement should also have some nexus so that the judgment creditor cannot abruptly choose and pick the assets for the enforcement litigation. It will also reduce the interference to the non-related public functions of the defendant State in the territory of forum State.

The courts' interpretations of the purpose of sovereign assets play a vital role in determining the loose ends of the legal framework of foreign sovereign immunities. Therefore, to have pragmatic view of substantive and procedural issues in an enforcement litigation, this dissertation proceeds with some specific assets scrutinized in enforcement litigations in its fourth chapter. The third research question was how the deciding courts interpret the purposes of various sovereign assets for the question

¹¹¹¹ Discussed in 3.5.7 of this dissertation.

of their immunity from execution. It further pondered into the consistency and coherence of the interpretations of the purposes of various sovereign assets. List of immune assets, characteristics of non-immune assets [as the outcome of the first research question], and commonly targeted sovereign assets are scrutinized. The case analysis shows that many assets listed as immune in international instruments and national legislations were subjected to MoCs and similarly, many assets commonly taken as non-immune were held as immune by the deciding courts. The lack of a comprehensive and effective interpretation of purpose results in inconsistency and unpredictability. It adversely affects the inter-State relations as well as the relations of the defendant State with its subjects. The core finding of this research question is the desired convergence between the law of foreign sovereign immunity and the other related areas of law such as fiscal law, laws related to real property, business and corporate law, banking and financial laws, intellectual property law, *etc.* Therefore, this dissertation proposes that:

Relevant international commercial laws should be considered to reduce divergence between the public functions and the private activities. Reference to the separate entity in law can be an appropriate example here. The defendant State uses the defense of separate legal entity of the legal owner of the asset, both as sword and shield. This defense is relevant for multiple categories of assets including the central bank's assets, cultural institutions, SOEs, *etc.* The issue of separate legal entity relies on corporate and business law for its foundation. Under the law of corporate governance, piercing the corporate veil is allowed only in limited cases. A similar approach can be followed here. The separate legal entity should be denied when used by the defendant State to hide its sovereign assets. Otherwise, the mass use of piercing the corporate veil would disrupt the international business functions of these corporate entities. Therefore, the judgment creditor targeting the assets of SOEs should carry a higher burden of proof.

On the other hand, when the judgment creditor establishes the case with strong evidence, protection should be granted in exceptional cases to prevent interference to the sovereign function through its SOEs using the concession agreements. Hence, instead of granting the immunity to the non-State actors

for their delegated acts and applying the international norms to them, the presumption should be contrary to it [*i.e.*, the State instrumentalities do not enjoy immunity] unless the entity claiming the immunity proves their function as State authority. Such non-applicability presumption receives support from the effectiveness of rule of law as the administrative separation of power does not work in question of immunity. It is also coherent with the principles of international law as the State itself is the subject of immunity. Hence, automatic grant of immunity to non-State actors contradicts the international norms of sovereign immunity.

Where the third research question concludes with suggestions for specific types of assets in convergence with their related areas of laws, the next research question explores certain interpretative techniques. The research question is to what extent the interpretive tools from other areas of laws can contribute to achieve more consistency, coherence, and predictability in interpreting the purposes of sovereign assets. The finding shows that the divergence in group-interests of States and mandate of international organizations have failed to agree on a uniform process of interpretation of purpose of sovereign assets. Such as, accepting the public purpose argument given by the defendant State without contest is unfair to the judgment creditor. Similarly, requiring the purpose of the asset to be an international public purpose devoid of its local context is a burden to the defendant State and its subjects. Therefore, this dissertation advocates that:

Despite the *jure gestionis* of the defendant State, its standing as a sovereign State and its responsibility to its subjects should also receive attention. The precedent of the Australian High Court in *Firebird Global Master Fund II Ltd. v. Republic of Nauru and Another* (2015)¹¹¹² showed the importance of context specific considerations before granting any MoCs. The application of margin of appreciation as an interpretative tool can balance the interests of both the defendant State and the judgment creditor.¹¹¹³ Its application on one hand protects the judgment creditor from heavier burden of proof and on the other, helps the defendant State to put forward its special context before the court. With the presumption of public use of the sovereign assets, the burden

¹¹¹² *Firebird Global Master Fund II Ltd.* (n 946) [176].

¹¹¹³ Discussed in 5.2.3 of this dissertation.

of proof lies with the judgment creditor to bring convincing evidence as to the commercial use of the same. With the application of margin of appreciation, the judgment creditor carries the burden of *prima facie* evidence, and the defendant State shows its side of the evidence with its deference. This approach is in support of the highly indebted poor countries. The instances of vulture funds show the devastating effect on the least developed countries and/or countries with special circumstances.¹¹¹⁴ This approach also helps the courts to distinguish between an economically vulnerable defendant State and a stubborn defendant State intentionally defaulting in payment.

Finally, this dissertation advocates for developing an inter-States consensus-based model law to have uniform principles of sovereign assets' immunity in international law with a view to bringing consistency, coherence, and predictability with legitimacy. The scholars argued the shift in international law paradigm as a valid ground to reconsider the role of the non-State actors in international lawmaking.¹¹¹⁵ The legal certainty of interpreting the sovereign assets is one of the objectives of the international law-based rule of law and introduction to the definitive interpretative tools can reduce the discretion of the forum State's courts in this regard.¹¹¹⁶ Forum States consensus as to the interpretative tools, delimitation of executive organs, the standards of waiver clause, burden of proof, nexus requirements, interpretation of mixed assets can contribute to the development of international rule of law regarding the laws of foreign sovereign.

¹¹¹⁴ Defined 'vulture funds' in n 51 of this dissertation.

¹¹¹⁵ Oddenino and Bonetto (n 173).

¹¹¹⁶ Discussed in 5.2.6 of this dissertation.

Bibliography

List of secondary sources

Books

Alexy R, *A theory of Constitutional Rights* Julian Rivers (tr) (Oxford University Press, 1986)

Austin J, *The Province of Jurisprudence* (John Murray, 1832)

Badr G M, *State Immunity: An analytical and prognostic view*, (Springer, 1984)

Bankas E K, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* (Springer, 2005)

Beck R and M Fidora, 'Foreign Exchange Reserves and Sovereign Wealth Funds: Will They Change the Global Financial Landscape?' in Arjan B. Berkelaar, Joachim Coche and Ken Nyholm (eds) *Central Bank Reserves and Sovereign Wealth Management* (Palgrave Macmillan, 2010)

Berg A J V, *Yearbook Commercial Arbitration* (Kluwer Law International 2004)

Brennan G and J M Buchanan, *The Power to Tax: Analytic Foundations of a Fiscal Constitution*, (Cambridge University Press, 1980)

Brousseau E and M Fares, 'Incomplete Contract and Governance Structures: Are Incomplete Contract theory and New-Institutional Economics Substitutes or Complements?' in Menard C (ed) *Institutions, Contracts, Organizations, Perspectives from New Institutional Economics* (Edward Elgar Publication, 2000)

Brownlie I, *Principles of Public International Law* (4th Ed., Oxford University Press 1990)

Chimni B S, 'Legitimizing the International Rule of Law' in James Crawford and Martti Koskenniemi, (eds) *the Cambridge Companion to International Law*, (Cambridge University Press, 2012)

Chimni B S, 'Third World Approaches to International Law: A Manifesto' in A Anghie *et al* (eds) *The Third World and International Order: Law Politics and Globalization* (Martinus Nijhoff, 2003)

Crawford J, *State Responsibility: The General Part* (Cambridge University Press, 2013)

Demsetz H, *Toward a Theory of Property Rights, Ownership, Control and Firm*, (Basil Blackwell, 1988)

Dicey A V, *Introduction to the study of the law of the constitution* (with an introduction by ECS Wade) (10th edn, Palgrave Macmillan, 1985)

Dicey A V, *Introduction to the Study of the Constitution, Liberty Classics*, (Macmillan, 1915)

Dickinson A, R Lindsay and J P Loonam, *State Immunity: Selected Materials and Commentary* (1st edn, Oxford University Press 2004)

Dworkin R, *Taking rights seriously*, (Harvard University Press, 1978)

Febri H R, 'Regulating Trade, Investment and Money' in James Crawford, and Martti Koskeniemi (eds) *The Cambridge Companion to International Law* (Cambridge: Cambridge University Press, 2012)

Fellmeth A and M. Horwitz, *Guide to Latin in International Law* (Oxford University Press 2011)

Fox H, *The Law of State Immunity* (Oxford University Press, 2002)

Fox H and P Webb, *The Law of State Immunity* (3rd Oxford University Press, 2013)

Franz N, *The Rule of Law: Political Theory and the Legal System in Modern Society*, (Leamington Spa: Berg, 1985)

Garner B A (ed) *Black's Law Dictionary* (8th edn, West Thomson Reuters, 2004)

Gearey A, W Morrison and R Jago, *The Politics of the Common Law: Perspectives, Rights, Process Institutions*, (Routledge-Cavendish, 2009)

Hafner G, 'Historical Background to the Convention, the United Nations Convention on Jurisdictional Immunities of State and their Properties' in Roger O'Keefe, Christian J. Tams, Antonios Tzanakopoulos, (eds) (Oxford University Press, 2013)

Hart O, *First, Contracts and Financial Structure* (Clarendon Press, 1995)

Higgins R, *The Abuse of Diplomatic Privileges, and Immunities: Recent United Kingdom experience, Themes and Theories* (Oxford University Press 2009)

Honore AM 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (Oxford University Press 1961)

Isidro M R, 'Exequatur' *Max Planck Encyclopedias of International Law* (Oxford University Press, 2019).

Kingsbury B and S W Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest- the Concept of Proportionality', in Stephan W. Schill. (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010)

Kovacs C, *International Arbitration Law Library*, 45, (Kluwer Law International, 2018)

Kulick A, *Global Public Interest and International Investment Law* (Cambridge University Press, 2012)

Kurkela M S and S Turunen, *Conflict Management Institute, Due Process in Commercial Arbitration* (2nd edn Oxford University Press, 2010)

Lagoni R, 'Merchant Ships' *Max Planck Encyclopedias of International Law* (Oxford University Press, 2011)

Lamm C B and E R Hellbeck, 'The Enforcement of Awards' in Chiara Giorgetti (ed) *Litigating International Investment Disputes*, (Brill: Nijhoff, 2014)

Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007)

Madl F and L Vekes, *The Law of Conflicts and of International Economic Relations*, Mihaly Kocsis (tr) (Academic K. 1998)

Marboe I and A Reinisch, 'Contracts between States and Foreign Private Law Persons' in *Max Planck Encyclopedias of International Law*, (Oxford University Press, May 2011)

McDowell E C (ed), *Digest of United States Practice in International Law 1975* (Department of State Publication September 1976)

Mills A, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the international constitutional ordering of Private Law*, (Cambridge University Press, 2009)

Okeke E C, *Jurisdictional Immunities of States and International Organization* (Oxford University Press, 2018)

Paulsson J, N Rawding and L Reed, *Guide to ICSID Arbitration*, (Kluwer International, 2010)

Peters A, ‘Immune against Constitutionalization?’ in A. Peters, E. Lagrange, S. Oeter and C. Tomuschat (eds) *Immunities in the Age of Global Constitutionalism*, (Maritnus Nijhoff, 2014)

Popkin W D, *Introduction to Taxation* (6th edn LexisNexis, 2013).

Pugh R C, O Schachter and H Smit, *International law: Cases and Materials* Louis Henkin (ed) (3rd edn, West Publishing Co. 1993)

Riccardo P, ‘Cultural Heritage and State Immunity’ in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press October 2020)

Rossi P, ‘Immunities’ in Benedetto Conforti, Luigi Ferrari Bravo and Francesco Francioni (eds) *The Italian Yearbook of International Law volume XXV* (1st edn, BRILL NIJHOSS, 2016)

Schreuer C H, *State immunity: Some Recent Developments* (Grotius Publications Limited, 1988)

Schreuer C H and others, *The ICSID Convention: A Commentary* (2nd edn Cambridge University Press, 2009)

Shaw M N, *International Law*, (6th ed Cambridge University Press, 2008)

Sornarajah M, *The International Law on Foreign Investment* (Cambridge University Press, 2017).

Thompson E P, *Wings and Hunters, the Origins of the Black Act*, (Pantheon 1975)

Tomka P, ‘Are States Liable for the Conduct of their Instrumentalities? Introductory Remarks’ in E. Gailard, J. Younan (eds) *State Entities in International Arbitration, IAI Series on International Arbitration* (Juris Publishing 2008)

Unger R M, *Law in Modern Society* (Free Press 1976).

Vig Z, *Taking in international Law* (Pattrocinium, 2019)

Wittich S, 'Article 2 (1) (c) and (2) and (3)' in Roger O'Keefe and Christian Tams (eds) *The United National Convention on the Jurisdictional Immunities of States and Their Properties, A Commentary* (Oxford University Press 2013)

Wouters J and S Verhoeven, State Aircraft, *Max Planck Encyclopedias of International Law* (Oxford University Press, 2008)

Yang X, 'State Immunity in International Law' *Cambridge Studies in International and Comparative Law* (Cambridge University Press, 2012)

Journal articles

Arya T M, 'A Decade of Sovereign Debt Litigation: Lessons from the NML vs Argentina Case and the Road Ahead' (May 2016) 17 (2) *Business Law International* 83

Auburn F M, 'Ne exeat Regno' (Nov. 1970) 28 (2) *The Cambridge Law Journal* 183

Barr M, 'The Litigation Tango of La Casa Rosada and the Vultures: The Political Realities of Sovereign Debt, Vulture Funds and the Foreign Sovereign Immunities Act' (2016) 7 (2) *Santa Clara Journal of International Law* 567

Barzel Y 'The Capture of Wealth by Monopolists and the Protection of Property Rights' (1994) 14 *International Review of Law and Economics* 393

Bermann G A, 'The Use of Anti-Suit Injunctions in International Litigation' (1990) 28 *Columbia Journal of Transnational Law* 589

Blackman J I and R Mukhi, 'The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos and Other Legal Fauna' (Fall 2010) 73 (4) *Law and Contemporary Problems (A Modern Legal History of Sovereign Debt)* 47

Blanchard S, 'Republic v. High Court Accra, *ex parte* Attorney General' (January 2014) 108 (1) *The American Journal of International Law* 73

Blommestein H J and F K Kalkan, 'Sovereign Asset and Liability Management: Practical Steps towards Integrated Risk Management' (2008) 6-7 *Financial Forum/Bank-En Financierwezen* 360

Born G, D Morris and S Forrest, 'A Margin of Appreciation: Appreciating its Irrelevance in International Law' (2020) 61 (1) *Harvard International Law Journal* 65

Bradley M, J D Cox and G. M Gulati, 'The Market Reaction to Legal Shocks and their Antidotes: Lessons from the Sovereign Debt Market' (January 2010) 39 (1) *The Journal of Legal Studies* 289

Buchheit L C and G M Gulati, 'Responsible Sovereign Lending and Borrowing, Law and Contemporary Problems' (Fall 2010) 73(4) *A Modern Legal History of Sovereign Debt* 63

Byers M, 'State Immunity article 18 of the International Law Commission Draft' (1995) 44 (4) *International and Comparative Law Quarterly* 882

Cassese A, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case' (2002) 13 *European Journal of International Law* 853

Charney J I, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 *British Yearbook of International Law* 1

Cechi A, 'State Immunity, Property rights and Cultural Objects on Loan', (2015) 22 (2/3) *International Journal of Cultural Property* 279

Chemerinsky E, 'Against Sovereign Immunity' (May 2001) 53 *Stanford Law Review* 1201

Chesterman S, 'Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis' (2007) 28 (3) *Michigan Journal of International Law* 553

Cioni A, 'the First Pancake Always Has Lumps: Alberta Petroleum Companies, Arbitration and Arbitral Award Enforcement in the Russian Federation' (1997) 35 *Alberta Law Review* 726

Condorelli L and L Scoli, 'Measures of Execution against the Property of Foreign Sovereign: Italy' *NYIL* 1979

Crawford J, 'Execution of Judgments and Foreign Sovereign Immunity' (October 1981) 75 (4) *American Journal of International Law* 820

Crawford J, 'International Law, and Foreign Sovereigns: Distinguishing Immune Transactions' (1984) 54 *British Yearbook of International Law* 75

Crawford J, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25 (1) *ICSID Review* 127

Delaume G R, 'The Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later' (April 1994) 88 (2) *The American Journal of International Law* 257

Desai M A and A Model, 'Czech Mate: Expropriation and Investors Protection in a Converging World' (2008) 12 (1) *Review of Finance*, European Finance Association 221

Dodge W S, 'International Comity in American Law' (December 2015) 115 (8) *Columbia Law Review* 2071

Dolinger J and C Tiburcio, 'The Forum Law Rule in International Litigation: Which Procedural Law Covers Proceedings to be Performed in Foreign Jurisdiction: *Les Fori* or *Lex Diligentiae*' (1998) 33 *Texas International Law Journal* 425

Etinski R and B Tubic, 'International Law and the Rule of Law' (January 2016) 64(3) *Anali Pravnog fakulteta u Beogradu* 57

Eyal B, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics*, 843

Fortese F and L Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3 (1) *Groningen Journal of International Law* 110

Foss K, and N Foss, 'Theoretical Isolation of Contract Economics' (2000) 7 *Journal of Economic Methodology* 313

Foster G K, 'Collecting from Sovereigns: The Current Legal Framework for Enforcement Arbitral Awards and Court Judgments against States and their Instrumentalities and Some Proposals for its Reform' (2008) 25 (3) *Arizona Journal of International & Comparative Law* 665

Frank S D and others, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration' (2015) 53 *Columbia Journal of Transnational Law* 429

Garnett R, 'State Immunity in Employment Matters' (January 1997) 46 (1) *The International and Comparative Law Quarterly* 81

Gattini A, 'The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 *Leiden Journal of International Law* 173

Gerlich O, "State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System?" (June 1, 2015) 26 (1) *American Review of International Arbitration* 47

Goodin R E, 'Liberalism and the Best-judge Principle' (1 June 1990) 38(2) *Political Studies* 181

Gordon A, 'Public Interest, and the Three Dimensions of Judicial Review' (2013) 64 (2) *Northern Ireland Legal Quarterly* 125

Hagbergh E, 'Supreme Court of Sweden: Judgment in the "Rigmor" Case' (1943) 37 (1) *American Journal of International Law* 141

Harten G V, 'The Private-Public Distinction in the International Arbitration of Individual Claims against the State' (April 2007) 56 (2) *The International and Comparative Law Quarterly* 371

Heß B, 'the International Law Commission's Draft Convention on the Jurisdictional Immunity of State and their Property' (1993) 4(1) *European Journal of International Law* 269

Hohfeld W N, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 *Yale Law Journal* 710

Houtte H V, 'Towards an Attachment of Embassy Bank Accounts' (1986) 19 *Revue Belge de Droit International* 70

Huaang J and J Ma, 'Immunities of States and their Property: Practice of the People's Republic of China' (1988) 1 *Hague Yearbook of International Law* 163

Jen S, 'Sovereign Wealth Funds, What They are and What's Happening' (October-December 2007) 8 (4) *World Economics* 1.

Kadenes Y E and E A Young, 'How Customary is Customary International Law' (2013) 54 (3) *William & Mary Law Review* 885

Kantaria S, 'The Enforcement of a Foreign Arbitral Award against a Sovereign State in Australia' (2010) 14 *Vindobona Journal of International Commercial Law & Arbitration* 401

Kelsen H, 'The Principle of Sovereign Equality of State as a Basis for International Organization' (March 1944) 53 (2) *The Yale Law Journal* 207

Khachvani D, 'Compensation for Unlawful Expropriation: Targeting the Illegality' (2017) 32 (2) *ICSID Review* 385

Knuchel S, 'State Immunity and the Promise of Jus Cogen' (Spring 2011) 9 (2) *Northwestern University Journal of International Human Rights* 149

Krauskopf B and C Steven, 'Immunity of Foreign Central Banks under German Law' (2000) 2(4) *Journal of International Financial Markets* 138

Kudrna J, 'Fall of State Immunity from Execution in France: Let the States Beware' (2016) 19(5) *International Arbitration Law Review* 133

Lemmens K, 'The Margin of Appreciation in the ECtHR's Case Law' (2018) 20 (2-3) *European Journal of Law Reform* 78

Lim C L, 'Worldwide Litigation over Foreign Sovereign Assets' (2016) 10 *Dispute Resolution International* 145

Lowe L W, 'The International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property, the Commercial Contract Exception' (1989) 27 *Columbia Journal of Transnational Law* 657

Marston G, 'United Kingdom Materials on International Law' (1985) 56 *British Yearbook of International Law* 363

Mashaw J L, 'Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy Fairness and Timeliness in the Adjudication of Social Welfare Claims' (1974) 59 *Cornell Law Review* 772

Maupin J A, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54 (2) *Virginia Journal of International Law* 367

McCorquodale R, 'Defining the International Rule of Law: Defying Gravity?' (April 2016) 65 *International and Comparative Law Quarterly* 277

Michalchuk D J, 'Filling a Legal Vacuum: The Form and Content of Russia's Future State Immunity Law Suggestions for Legislative Reform' (Spring 2001) 32 *Law and Policy in International Business* 487

Mundiya T, 'Extraterritorial Injunctions against Sovereign Litigants in US Courts: The Need for a *per se* Rule' (1995) 44 (4) *International & Comparative Law Quarterly* 893

Mzikenge C D, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *Melbourne Journal of International Law* 1

Mzikenge C D, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 *Melbourne Journal of International Law* 1

Narechania, T N 'An Offensive Weapon? An Empirical Analysis of the "Sword" of State Sovereign Immunity in State-owned Patents' (October 2010) 110 (6) *Columbia Law Review* 1574

Panizza U, F Sturzenegger and J Zettelmeyer, 'The Economics and Law of Sovereign Debt and Default' (2009) 47 (3) *Journal of Economic Literature* 651

Paul JR, 'The Transformation of International Comity' (2008) 71 *Law & Contemporary Problems* 19.

Paulsson J 'Sovereign Immunity from Jurisdiction: French Caselaw Revisited' [Winter 1985] *International Lawyer* 277

Qi D, 'State Immunity, China and its Shifting Position' (2008) 7 (2) *Chinese Journal of International Law* 307

Rahman F, 'Questioning Chinese Government's Stand for Sovereign Immunity' (2017) 9 (1) *Transnational Corporations Review* 41

Rahman F, 'Elasticity of the Laws on Foreign Sovereign Immunity: Role of the Dominant Jurisdictions in Determining of Cause of Actions against the Foreign Sovereign' (2021) 1 *Studia Iurisprudentiae Doctorandorum Miskolciensium* 71

Rahman F, 'Defining Sovereign assets from immunity from execution: International Rule of Law versus International Law-based Rule of Law' (2021) 5 *Journal of Legal, Political and Social Theory and Philosophy* 165

Ramekers E, 'What is Property Law?' (2017) 37 (3) *Oxford Journal of Legal Studies*, 588

Reed O L, 'What is Property?' (Summer 2004) 41 (4) American Business Law Journal 459

Reinisch A, 'European court practice concerning State Immunity from Enforcement Measures' (2006) 17 (4) the European journal of International Law 803

Sandeen S, 'Preserving Public Trust in State-owned Intellectual Property: A Recommendation for Legislative Action' (2001) 32 McGeoge Law Review 385

Schwarze J, 'The Principle of Proportionality and the Principle of Impartiality in European Administrative Law' (2003) 1 Rivista Trimestrale di Diritto Pubblico 53

Shang S and W Shen, 'When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era: Is There still a Black Hole in International Law?' (2018) 21 (4) Leiden Journal of International Law 915

Sinclair S I, 'The European Convention on State Immunity' (1973) 22 International and Comparative Law Quarterly 254

Sinclair S I, 'The Law of Sovereign Immunity: Recent Development' (1980) 167 Hague Recueil 218

Singer M, 'Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe' (Winter 1985) 26 (1) Harvard International Law Journal 1

Smith H E, 'Property as the Law of Things' (2012) 125 Harvard Law Review 1691

Strong S I, 'General Principles of Procedural Law' (2018) 122 (2) Pennsylvania State Law Review 347.

Sweet A S and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 144

Thomas K R 'Enforcing against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used 'Context' when Applying the 'Commercial Purpose' Test' (2015) 2 (1) Journal of International and Comparative Law 1

Umbeck J, 'Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights' [1981] Economic Inquiry 38

Verdier P and E Voeten, 'Does Customary International Law Change? The Case of State Immunity' (2015) 59 International Studies Quarterly 209

Waldron J, 'The Concept and the Rule of Law, (2008) 43 (1) Georgia Law Review 7

Waldron J, 'Are Sovereigns Entitled to the Benefits of the International Rule of Law?' (2011) 2 the European Journal of International Law 316

Weidemaier W M C, 'Sovereign Immunity and Sovereign Debt' [2014] 1 University of Illinois Law Review 67

Weidemaier W M C and A Gelpern, 'Injunctions in Sovereign Debt Litigation' (2014) 31 (1) Yale Journal on Regulation 189

Weintraub R J, 'Introduction to Symposium on International Forum Shopping' (2002) 37 Texas International Law Journal 463

Wrange P, 'Sedelmayer v. Russian Federation' (April 2012) 106 (2) the American Journal of International Law 347

Wu C, 'One Country, Two State Immunity Doctrines: A Pluralistic Depiction of the Congo Case' (2014) 9 National Taiwan University Law Review 197

Zdobnoh D and R Vark, 'State immunity from Execution: In Search of a Remedy' (2010) 4 Acta Societatis Martensis, 161

Working papers and research thesis

Buchheit L, 'Sovereign Debt Restructuring: The Legal Context' (BIS paper no. 72, July 2013)

Fisch J E, and C M Gentile, 'Vultures or Vanguard? The Role of Litigation in Sovereign Debt Restructuring' (Faculty Scholarship Paper 1051, 2004)

Flood R and N Marion, 'Getting Shut Out of the International Capital Markets: It does not take much' (IMF Working Paper WP/06/144 2006)

Gaukrodger D, 'Foreign State Immunity and Foreign Government Controlled Investors' (OECD Working Papers on International Investment 2010)

Hoecke M V, 'Methodology of Comparative Legal Research' (DOI: 10.5553/REM/.000010, 2015)

Kaufmann D, A Kraay, and M Mastruzzi, 'Governance Matters VI: Governance Indicators for 1996-2006', World Bank Policy Research Working Paper No. 4280 (July 2007)

Kryzhanovskaya E., 'The Beneficial owner concept in civil law countries. Scandinavian perspective' (Master thesis, Lund University Department of Business Law, 2012).

Mitchell O S, J Piggott, and C Kumru, 'Managing Public Investment Funds: Best Practices and New Challenges' (Pension Research Council Working Paper PRC WP 2008-07, University of Pennsylvania 2008)

Oddenino A and D Bonetto, 'The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law' AperTO- Archivio Istituzionale Open Access dell'Universeta di Torino (February 25, 2020)

Polakiewicz J, 'The Contribution of Europe to State Immunity through its Conventions and the Case Law of the European Court of Human Rights, State Immunity under International Law and Current Challenges' (CAHDI Proceedings, 2017)

Schumacher J, C Trebesch, and H Enderlein, 'Sovereign Defaults in Court' European Central Bank, (Working Paper Series No 2135/February 2018)

Schumacher J, C Trebesch, and H Enderlein, 'What Explains Sovereign Debt Litigation' (CESifo Working Paper no 5319, April 2015)

Smolek M, 'The International Legal Framework on State Immunity, State Immunity under International Law and Current Challenges' (CAHDI Proceedings, 2017)

Voet S and P Gillaerts, 'Cross Border Enforcement of Monetary Claims- interplay of Brussels 1, A Regulation and National Rules' (University of Maribor, Faculty of Law. August 2018)

Walter P F, 'Evidence and Burden of Proof in Foreign Sovereign Immunity Litigation: A Procedural Guide for International Lawyers and Government Counsel', (Doctoral thesis, Sirius-C Media Galaxy LLC, Delaware 2017)

Whytock C, 'The Evolving Forum Shopping System', Legal Studies Research Paper Series no. 2011-25, University of California, Irvine, School of Law

Woudenberg N V, 'State Immunity and Cultural Objects on Loan' (University of Amsterdam Digital Academic Repository, 2011)

Online sources

Barten S and M Krestin, 'State Immunity from Enforcement in the Netherlands: Will Creditors be Left Empty Handed?' Wolters Kluwer (25 April 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/04/25/state-immunity-from-enforcement-in-the-netherlands-will-creditors-be-left-empty-handed/>> accessed 04 September 2022

Berg A J, 'New York Convention of 1958 Annotated List of Topics' (2013), <<http://www.newyorkconvention.org/11165/web/files/document/1/5/15975.pdf>> accessed 6 April 2021

Chelsom-Pill C, German court to release Thai prince's plane for a fee, (20 July 2011) <<https://www.dw.com/en/german-court-to-release-thai-princes-plane-for-a-fee/a-15253912>> accessed 01 March 2022.

Duhaime L, 'Legal Definition of Judgment Creditor' <<http://www.duhaime.org/LegalDictionary.aspx>> accessed April 29, 2021.

Dupoirier C, A Cannon and L Frac-Menget, 'A Law on Immunity from Enforcement in France' Herbert Smith Freehills (1 December 2016) <<https://hsfnotes.com/publicinternationallaw/2016/12/01/a-law-on-immunity-from-enforcement-in-france/>> accessed 19 July 2022.

Feng G, 'Do State-owned Enterprises Enjoy Sovereign Immunity?' King & Wood Mallesons (27 September 2018) <<https://www.chinalawinsight.com/2018/09/articles/dispute-resolution/do-state-owned-enterprises-enjoy-sovereign-immunity/>> accessed 04 September 2022

Gordon T F, Artificial Intelligence and Legal Theory at Law School, (2006) <<https://pdfs.semanticscholar.org/7328/d3b3796b17cc1d6ea6fdd811a653de303535.pdf>> accessed 18 December 2019

Hondora T, 'South Africa's Law on Foreign State Immunity: A Puzzle of Phantom Waivers in Red Herrings, and Dark Continents', (2 April 2017) <<https://ssrn.com/abstract=2945051>> accessed 31 July 2022.

Nollkaemper A, J Wouters, and N Hachez, 'Accountability and the Rule of Law at International Level' (2008)

<<https://www.mzes.unimannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf>> [accessed 12 February 2021]

Peck N, M Stone and A Everhardt, 'Sovereign Asset Tracing: A Whole New World' Nardello & Co. (June 2020), <<https://www.nardelloandco.com/insights/sovereign-asset-tracing-a-whole-new-world/#>> accessed 13 November 2021.

Ranjan P, 'The White Industries Arbitration: Implications for India's Investment Treaty Program' (Investment Treaty News, IISD 13 April 2012) <<https://www.iisd.org/itn/en/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/>> accessed 20 April 2021

Razak A A, 'Understanding Legal Research' (2009), available at <https://docuri.com/download/19-24-adilahpdf_59bf3a41f581716e46c48ff8_pdf> [accessed on 18 December 2019]

Reisenfeld K, M Cymrot and J Robbins, 'Suits Against Foreign Sovereigns: Mixed Bag for Energy Cos' Law360, New York, (January 17, 2017) <<https://www.bakerlaw.com/webfiles/SuitsAgainstForeign.pdf>> accessed April 4, 2021.

Spiegel International, Diplomatic Dispute: Thai Prince's Private Jet to Remain Impounded in Munich, (26 July 2011) <<https://www.spiegel.de/international/germany/diplomatic-dispute-thai-prince-s-private-jet-to-remain-impounded-in-munich-a-776718.html>> accessed 01 March 2022.

Tarsis I and E Varner, 'Reviewing the Agrudas Chasidei Chadab v. Russia Federation, et al. Dispute,' (March 19, 2014) 18(8) American Society of International Law < <https://www.asil.org/insights/volume/18/issue/8/reviewing-agudas-chasidei-chabad-v-russian-federation-et-al-dispute>> accessed 15 August 2022.

Toro J, 'Article 1412 quinquies of the Judicial Code: Immunity from Seizure of the Property of the Foreign State and of the International Organization' (31 October 2021) <<https://s-team.law/insights/article-1412quinquies-of-the-judicial-code-immunity-from-seizure-of-the-property-of-the-foreign-state-and-of-the-international-organization/>> accessed July 20, 2022.

Wex definitions Cornell Law School (July 2021)
<[#### Reports/Commentaries](https://www.law.cornell.edu/wex/proprietary_rights#:~:text=Proprietary%20rights%2C%20also%20termed%20property,or%20in%20respect%20of%20property.>
accessed 23 August 2022.</p></div><div data-bbox=)

American Bar Association Working Group, 'Reforming the Foreign Sovereign Immunities Act' (2002) 40 Columbia Journal of Transnational Law 489

Australian Law Reform Commission Report no 24, Foreign State Immunity (1984)

Chesterman S, 'Panel on the 2012 UN Declaration on the Rule of Law and its Projections' (2012) American society of International Law Proceedings, 107/2013/468

Commentary on the International Law Commission Drafts (1991), Part IV, paragraph 1 <https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf> accessed April 3, 2021.

Council of Europe, Pilot Project of the Council of Europe on State Practice Regarding State Immunities-Analytical Report, Committee of Legal Advisers on Public International Law, (30th Meeting, Strasbourg 04/08/05, 2005) prepared by the Directorate General of Legal Affairs.

Harvard Law School, Research in International Law (Reporter PC Jessup), Competence Courts in Regard to Foreign States (Supplement (1932) 26 American Journal of International Law) 451, 527.

Institute de Droit International 74 Sessions, (June 2010) 48 (2) Archiv des Volkerrechts 266.

Institute de Droit International Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, Basel Sessions (1991)

International Working Group of Sovereign Wealth Funds, Sovereign Wealth Funds Generally Accepted Principles and Practices "Santiago Principles" 2008 <https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf> accessed 31 July 2022

Preliminary report on jurisdictional immunities of state and their properties, (rapporteur Mr. Sompong Sucharitkul) United Nations, Yearbook of the International Law Commission, Vol II (1), (18 June 1979) Agenda 10, Document A/CN.4/323

The Explanatory Report to the European Convention on State Immunity (Basel, 16.V.1972), European Treaty Series No. 74. Paragraph 76 and 92. (the Explanatory Report to the ECSI)

The 60th Conference of the International Law Association, Montreal 29 September 1982. International Legal Materials, Vol 22, No. 2 (March 1983) 287

The Resolution on the Jurisdictions of Courts in proceeding against foreign State, sovereign and head of States (Hamburg session, 11 September 1891), Institute de Droit International,

The Immunity from Jurisdiction and Enforcement from Foreign State (Aix-en-Provence Resolution, 1954, Rapporteur Mr. Ernest Lemonon)

The Immunities from Jurisdiction and Execution of Head of State and of Government in International Law, Session of Vancouver (2001), the Thirteenth Commission, (Rapporteur Mr. Joe Verhoeven)

The United Nations Documents on the Development and Codification of International Law: (October 1947), 47 (4) Supplement to American Journal of International Law 292 <https://legal.un.org/ilc/documentation/english/ASIL_1947_study.pdf> accessed March 31, 2021.

The United States, the Foreign Sovereign Immunity Act House Report No. 94-1487 (1976)

The Yearbook of the International Law Commission, United Nations, (1999) II (2) A/CN.4/SER.A/1999/Add.1

UNCTAD, Argentina's 'vulture fund' crisis threatens profound consequences for international financial system (2014) <<https://unctad.org/news/argentinas-vulture-fund-crisis-threatens-profound-consequences-international-financial-system>> accessed on 16 April 2021.

UNCITRAL, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft.

<https://uncitral.un.org/sites/uncitral.un.org/files/wp.90_advance_copy.pdf> accessed 3 April 2021.

UNCITRAL, Possible reform of investor-State dispute settlement: Selection and appointment of ISDS tribunal members (2021), <<https://undocs.org/en/A/CN.9/WG.III/WP.203>> accessed 8 April 2021.

UNCITRAL, Possible reform of investor-State dispute settlement: Appellate mechanism and enforcement issues (2021), <<https://undocs.org/en/A/CN.9/WG.III/WP.202>> accessed 8 April 2021.

UNCITRAL Working Group III: Investor State Dispute Settlement Reform https://uncitral.un.org/en/working_groups/3/investor-state accessed April 8, 2021

List of primary sources

International conventions

The Convention on the High Seas 1958

The Convention on International Civil Aviation 1944

The Convention on the Means of Prohibiting and Preventing the Illicit, Export and Transfer of Ownership of Cultural Property 1970

The Convention on the Regulation of Aerial Navigation 1919

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1966

The Convention for the Unification of Certain Rules for International Carriage by Air 1999

The Economic Community of West African States Treaty 1975

The European Convention on Mutual Assistance in Criminal Matters 1959

The European Convention on State Immunity 1972

The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954

The International Convention for Unification of Certain Rules Concerning the Immunity of State-Owned Ships 1926

The Rome Convention on the Law applicable to Contractual Obligations 1980

The Statutes of International Court of Justice 1945

The Vienna Convention on Consular Relations 1963

The Vienna Conventions on Diplomatic Relations 1961

The Vienna Convention on the Law of the Treaties 1969

The United Nations Charter 1945

The United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources 1962

The United Nations Convention on Responsibility of States for Internationally Wrongful Acts 2001

The United Nations Convention on the Responsibility of States for Internationally Wrongful Acts 2015

The United Nations Convention on Law of the Sea 1982

The United Nations Convention on Jurisdictional Immunities of States and their Property 2004

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995

National legislations

The Act on Private International Law 2017 (Hungary)

The Basic Law 1949 (Germany)

The Basic Law 1990 (Hong Kong)

The Code of Civil Enforcement Procedures 1889 (France)

The Federal Act on the Temporary Immunity of Cultural Property Loans for the Purpose of Public Exhibition 2003 (Germany)

The Federal Law on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State 2015 (Russia)

The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act 2016 (the US)

The Foreign Sovereign Immunities Act 1976 (the US)

The Foreign Sovereign Immunity Act 1985 (Australia)

The Judicial Code modified in 2016 (Belgium).

The Law on the Implementation of the European Community Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and on the Alteration of the Act to Prevent the Exodus of German Cultural Property Law 1998 (Germany)

The Law on Transparency, Anti-corruption Measures and the Modernization of the Economy, 2016 (France)

The Legislative Decree No. 13, respecting private international law (Hungary) (repealed)

The State Immunity Act 1982 (Canada)

The State Immunity Ordinance 1981 (Pakistan)

The State Immunity Act 1979 (Singapore)

The State Immunity Act 1978 (the UK)

The National Code of Civil and Criminal Procedure 1977 (Argentina).

The Law of the People' Republic of China on Immunity of the Property of Central Bank from Compulsory Judicial Measures 2005 (China)

Cases from international courts: ECtHR

Animal Defenders International v. UK, [2013] ECtHR (GC), 22 April 2013, application no 48876/08

Castells v. Spain [1992] ECtHR 14 EHRR 445

Greece v. United Kingdom (Cyprus Case) [1958] European Commission (Plenary) Application no. 176/56, Yearbook of European Convention on Human Rights 132.

Handyside v. UK [1976], ECtHR, 7 December 1976

Kalogeropoulou and others v. Greece and Germany [2002] (Application no. 59021/00) sec 1 ECHR, 12 December 2002.

Naku v. Lithuania and Sweden [2016], ECtHR (8 November 2016).

Paradiso and Campanelli v. Italy [2017] ECtHR, 24 January 2017, Application no. 25358/12

Pfizer Animal Health SA v. Commission [2002] ECR Judgment 23 November 2002, II-3305Case T-13/99

Redaktsiya Gazety Zemlyaki v. Russia [2017] ECtHR, 21 November 2017, application no 16224/05

Von Hannover v. Germany [2004] ECtHR, EMLR 379

Vukota-Bojic v. Switzerland [2016] ECtHR Application no. 61838/10, Judgment 18 October 2016

Cases from international courts: PCIJ and ICJ

Chorzow Factory (Germany v. Poland) (Claim for Indemnity) [1927] PCIJ (ser A) No. 8, 21.

France v. Serb Croat-Slovene State [1929] PCIJ judgment 12 July 1929 PCIJ series A no 20 (the *Serbian Loans* case).

Nicaragua v. USA [1986] ICJ judgment, 27 June 1986, ICJ Reports 1986

The Case Concerning Certain Property, Liechtenstein v. Germany [2005] ICJ judgment of February 10, 2005

The *Jurisdictional Immunities Case*, (2012) *Germany v. Italy: Greece intervening* [2012] ICJ, Judgment of February 3, 2012

The Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) [2002] Judgment of 14 February 2002

Cases from international courts: ITLOS

ARA Libertad (Argentina v. Ghana) [2012] (ITLOS, December 15, 2012) Case no. 20, Provisional Measures reported by James Kraska at 107 AJIL 404 (2013).

The Grand Prince (Belize v. France) [2001] ITLOS, List of Cases no. 8 (20 April 2001).

The 'Juno Trade' case Saint Vincent and the Grenadines v. Guinea-Bissau, [2004] ITLOS Case. 13 (December 18, 2004),

Decisions from WTO Dispute Settlement Bodies and commercial arbitration tribunals

Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef [2000] WTO Appellate body 11 December 2000, WT/DS161/AB/R, Report of the Appellate Body

Liamco v. Libya, [1981] Ad hoc Arbitration Arbitral award 12 April 1977, 20 ILM 1.

Sapphire International Petroleum Ltd. v. National Iranian Oil Company, [1963] Arbitral Award (ad hoc arbitration) 15 March 1963

Cases from national jurisdictions

Australia

Connop v. Varena Pty Ltd [1984] 1 NSWLR, 71.

Firebird Global Master Fund II Ltd. v. Republic of Nauru [2015] HCA 43.

Ministry of Foreign Affairs of the Republic of Italy v. Paula Simeone [2016] Docket number: D 4356/2011 District Court of Queensland, (13 April 2016, 24 June 2016)

Re Independent State of Papua New Guinea [1999] 2 Qd R 365

The Radiation Contamination Claim [1988] Australian Supreme Court 14 April 1988, 86 ILR 571.

Austria

Dralle vs Republic of Czechoslovakia [1950] Supreme Court of Austria 17 ILR 155

L-W Verwaltungsgesellschaft mbH & Co. KG v. DVA [1986] Oberster Gerichtshof, 30 Apr 1986; 77 ILR 494.

Neustein v. Indonesia [1958], Oberster Gerichtshof, 6 Aug 1958, 65 ILR 3

Belgium

Iraq v. Dumez [1995] 106 ILR 285

Republic of Argentina v. NMC Capital LTD [2000] Belgium, the Supreme Court, Nr. C.11.0688.F, 22 November 2012

Soceite de droit irakien Rafidian Bank et crts v. Consarc Corporation, societe de droit americain et crts [1994] Brussels Court of Appeal 10 March 1993 JT 787.

Socobelge v. the Hellenic State [1951] 15 ILR 3

Canada

Aetna Financial Services Ltd. v. Feigelman, [1985] Supreme Court of Canada 1 SCR 2

Bombardier Inc. v. AS Estonian Air and the Republic of Estonia [2013] 115 OR (3d) 183

R v. Consolidated Fastfrate Transport Inc. [1995] 40 CPC 3d 160

R v. Oakes, [1986] Supreme Court of Canada, 1 SCR 103

Colombia

Garcia de Borissow and Others v. Supreme Court of Justice, Labor Chamber, Embassy of the Lebanese Republic in Colombia, and Embassy of the USA. [2016] Constitutional Court of the Republic of Colombia, Judgment SU-44316, 18 August 2016.

France

Air Zaire v. Guathier et al [1984] Court of Appeal, Paris (January 31, 1984) 1984 RECUEIL DALLOZ SIREY (12 April) 160.

Caisse v. Societe Midland, France [1983] 77 OLR 524

Caisse algerienne d;assurance vieillesse des non-salaries (CAVNOS) v. Caisse nationale des barreaux francais, [1977] The Court of Cassation, France, (December 7, 1977) 1978 REV. CRIT. 532.

Clerget v. Banque commerciale Pour'l Europe de Nord [1969] Court of Appeal, Paris 7 June 1969, 52 ILR 310

Commisimpex v. Republic of Congo [2015] No. 13-17.751, The Court of Cassation, France, 1st Chamber, May 13, 2015; Unreported 13 May 2015

Creighton Ltd. v. Gouvernement de l'Etat du Qatar [2000] Court of Cassation 1st Civil 6 July 2000, translated in (October 2000) 15 Mealey's International Arbitration Report A-1.

Creighton v. Minister, [2000] *France* 127 ILR 154

Creighton v Ministre de Finances de l'Etat du Qatar et autre, [2003] Court of Appeal, Paris Dec 12, 2001, REV ARB. 417

Dame Clerget v, People's Republic of Vietnam Trade Mission [1971] Court of Cassation, France, November 2, 1971, Rev. crit. Dr. int. Pr. 1972, p. 310. JCP 1972 II, p. 16969

Eloise Gluchsmann, Commisimpex v Republic of Congo [2011], No. 13-17.751; (April 2017) 111 (2) the American Journal of International Law 453

Englander v. State Bank of Czechoslovakia [1970] The Court of Cassation, France, (1970, REV. CRIT. 101' 1969 Journal Du Droit International 923

Eurodif v. Iran [1984] The Court of Cassation, France (23 May) La Semaine Juridique 20205

Iran v. Societe Eurodif, France [1984] 77 ILR 513

Islamic Republic of Iran v. Eurodif [1982] 65 ILR 93.

La Societe NML Capital v. Republique Argentina, [2013] Arret n 395 du 28 Mars 2013 (11-10.450).

Lambège et Pujol. [1849] French Court of Cassation, Sirey I, 81

NML Capital v. Republique Argentine [2011] Court of Cassation, France 28 September 2011, No. 09-72.057

NMP Capital v. Republique Argentine et autre [2013] 28 March 2013, (3 decisions) Nos. 10-25.938, 11-13.323, 11-10.450

NOGA v. State of Russia [2000] Court of Appeal Paris 10 August 2000 Swiss international arbitration law reports (sialr) - 2009 VOL. 3 NOS. 1 & 2

Paul Clerget v. Banque Commerciale pour l'Europe de Nord and Banque de Commerce Ecterieure du Vietnam [1971] France, Paris Court of Appeal 2 November 1971, 65 ILR 54

Procureur v. SA Iptrade, [1978] France 65 ILR 75

Procureur de la Republique v. S.A. Iptrade International [1979] Tribunal de grande instance of Paris (refere) (12 September 1978) *Journal de Droit International* 857

Procureur v. LIAMCO [1979] France 65 ILR 78

Procureur de la Republique v. LIAMCO [1979] Trib. Gr. Inst. Of Paris (refere), 5 March 1979 *Journal Du Droit International* 859

Procureur General v. Vestig [1946] The Court of Cassation, France, (February 5, 1946) 1947 SIREY (I) 1937; 1946-1949, *Journal Du Droit International*, 1

Societe Air v. Guathier [1984] France 77 ILR 510

Socete Eurodif v. Republique islamique d'Iran [1984] Court of Cassation (1st Civil Chamber) 14 March 1984 *Revue critique de droit international prive* 644, 77 ILR 513

Soiete Bec Freres v. Office des cereals de Tunisie [1997] France, Regional Court of Appeal Rouen, 20 June 1996, *Rev. arb.* 263.

Societe Sonatrach v. Migeon [1985], Court of Cassation (1st Civil Chamber) 1 October 1985, 77 ILR 525

Societe Creighton Ltd vs. Ministere des Finances et le Ministere des Affaires Municipales et de l'Agriculture du Gouvernement de l'Etat du Qatar [2003] France, Court d'Appel, Paris, 12 Dec 2001 *Revue de l'arbitrage* 417

Sociealist Federal Republic of Yugoslavia v. Societe Europeenne d'Etudes et d'Entreprises [1971] Tribunal de grande instance Paris, 6 July 1970, 98 *Journal de Droit International* (1971) 131, 65 ILR 46.

Zavicha Blagojevic v. Bank of Japan [1976] Court of Cassation (France) (19 May 1976) 1977 *REV. CRIT.* 359

Germany

Greek Citizens v. Federal Republic of Germany [2005] 129 ILR 556

NIOC Revenues Case [1983] 65 ILR 215, 221, Ground AI, NIOC Legal State Case, Germany 65 ILR 199

Non-Resident Petitioner v. Central Bank of Nigeria [1977] District Court of Frankfurt. 16 ILM 501 (1977); *Juristische Wochenschrift* [N.J.W.] 1004, 16 ILM 501 (1977); Germany Judgment of Dec 2, 1975, UN Legal material 290

Re Prejudgment Garnishment against National Iranian Oil Co. [1984] German Federal Constitutional Court judgment on 12 April 1983 ILM 22, 1279

Sedelmayer v. Russia [2002] Oberlandesgericht [Court of Appeal] Frankfurt am Main, 26 September 2002, No. 26 W 101/02

The Apothekenurteil case [1958] Germany the Federal Constitutional Court, BVerfG 7, 377

The Central Bank of Yemen, [2000] Frankfurt Court of Appeal, 3 August 2000, 26 W 82/2000.

The Central Bank of Turkey, [1997] OLG Frankfurt am Main OLG Rep. 227.

The Central Bank of Nigeria Case [1976] Landgericht, Frankfurt, 2 Dec. 1975 *Neue Juristische Wochenschrift* 1044 65 ILR 131

The Hungarian Embassy case [1969] the Bundesgerichtshof, 26 Sept. 1969 65 ILR 110

The National Iranian Oil Company case [1981] Lower instance OLG Frankfurt am Main 64 B. Verf G E 1 NJW 2650.

The National Iranian Oil Company case (1983), Decision of the Second Division [of the Federal Constitutional Court, Germany] of April 12, 1983, Docket nos. 2 BvR 678-683/81; 64 *Entscheidungen des Bundesverfassungsgerichts* 1.

The Philippines Embassy Bank Account Case, [1984] BVerfGE 46, 343; 65 ILR 146

YMN Establishment v. Central Bank of Nigeria [1975] The Provincial Court of Frankfurt, 8th Chamber for Commercial Matters, (2 December 1975)

Ghana

NML Capital Ltd. Republic of Arg. [2012] High Ct. Accra 11 October 2012 No. RPC/343/12

Republic v. High Court Accra, Ex parte Attorney General [2013] The Supreme Court of Ghana (June 2, 2013), Civil motion no. J5/10/2013

Greece

Prefecture of Voiotia v. Germany [2002] Full Court judgment Nos. 36 and 37/2002, 28 June 2002

Prefecture of Voiotia v. Federal Republic of Germany [2001] 4 May 2000, 95 AJIL 198.

Hong Kong

Democratic Republic of the Congo v. FG Hemisphere Associates LLC [2011] HKEC 747

FG Hemisphere Associates LLC v. Democratic Republic of the Congo [2010] 2HKLRD 66

FG Hemisphere Associates v. Democratic Republic of the Congo [2011] 14 HKCFAR 395.

Midland Inv. Co. v. Bank of Commc'ns [1956] 40 HKLR 42

SDN BHD v. China National Coal Group Corporation [2017] HKCFI 1016.

Italy

Benamar v. Embassy of the Democratic and Popular Republic of Algeria [1989] 72 Rivista de Diritto Internazionale 416.

Candor and Filvern v. Ministry of Justice, Italy [1992] 101 ILR 394 (Case on 329 15 July 1992).

Ferrini v. Germany, [2004] Court of Cassation, Italy No. 5044, March 11, 2004.

General Consulate of Peru in Milan v. Tabibnia [2015] Italian Court of Cassation, 5 October 2015, No. 19784, ILDC 2458 (IT 2015)

Libya v. Rossbeton SRL [1989] Italy, Court of Cassation (plenary session) Case no. 2502, 25 May 1989, 87 ILR 63

Socialist People's Libyan Arab Jamahiriya v. Rossbeton [1989] SRL 72 *Rivista di Diritto Internazionale* 691.

The Argentine Bond case [2005] all civil sections, decision no 11225 of 27 May 2005, RDIPP, 2005

The Distomo Case [2008] 133 (I) *Foro italiano* 1308

Kenya

Coalition for Reform and Democracy (CORD) v. Kenya National Commission on Human Rights [2014] Kenya, petition on 628 and 630 of 2014

Netherlands

Cabolent v. NIOC [1970] the Hague Court of Appeal, 28 Nov 1968, 1 NYIL (1970) 225

NV Cabolent v. National Iranian Oil [1968] 47 ILR138, Hague, UN Legal Materials 344

Russian Federation v. Pied-Rich BV [1994] Supreme Court of Netherlands, NJ 1994, no. 329.,

Société Européenne d'Etudes et d'Enterprises v. Socialist Federal Republic of Yugoslavia, [1975] Supreme Court, Netherlands Judgment of Oct 26, 1973, 65 ILR 356, 14 ILM 71

Wijsmuller Salvage BV v. ADM Naval Services [1989] District Court of Amsterdam (19 November 1987), NYIL (1989) 294

WL Oltmans v. The Republic of Surinam [1992] Netherlands Supreme Court, 28 September 1990, NYBIL 442

New Zealand

The New Zealand Wine Box Case, Controller and Auditor General v. Sir Ronald Davidson [1996] the New Zealand Court of Appeal, NZLR 517 and 319

Philippines

Francisco I. Chavez v. Public Estates Authority and Amari Coastal Bay Development Corporation [2002] the Supreme Court of the Republic of the Philippines GR No. 133250, July 9, 2002

Singapore

Maldives Airport Co. Ltd. v. GMR Male International Airport Pte Ltd. (2013) SLR 449

South Africa

Forth Tugs v. Wilmington Trust [1987] Constitutional Court of South Africa 3 SLT 153.

Kaffraria Property Co (PTY) v. Govt. of Zambia [1980] SALR No. 2.

Zimbabwe v. Louis Karel Fick, Etheredge, Campbell, and President of the Republic of South Africa [2013] the High Court of South Africa ZACC 22.

Spain

Abbot v. Republic of South Africa [1992] Spanish Constitutional Court, ILR 113 (19) 413

Sweden

Sedelmayer v Russian Federation [2011] Supreme Court of Sweden No. O 170-10 (2011) Nytt Juridiskt Arkiv 475

The Rigmöre [1942] Nytt Juridiskt Arkiv 1 (NJA).

Switzerland

Banque Centrale de la République de Turquie v. Weston Compagnie de Finance et d'Investissement SA and Another [1984] 65 ILR 417.

Banque Centrale de la Republique de Turquie v. Weston Compagnie de Finance d'Investissement SA [1978] Tribunal federal suisse 15 Nov. 1978 ATF 104 Ia 367; 65 ILR 385.

Banque Nationale v. Alcay GmbH [1931] Decision on 6 November 1931 NZZ no. 2183

Espagne v. X SA, Office des poursuites du canton de Berne et President tu Tribunal d'arrondissement 4 du canton de Berne [1986] Tribunal federal Suisse 30 Apr 1986, ATF 112 la 148; Annuaire Suisse de droit international 158; 82 ILR 38

Kingdom of Spain v. Company XSA [1986] Switzerland Federal Tribunal 30 April 1986, 82 ILR 38

Kuwait v. X [1994] Swiss Federal Tribunal (24 January 1994) (unreported) 5 Rev. Suisse D. int. eur. 593

Libya v. Actimon SA [1985] Swiss Federal Tribunal (24 April 1985) 82 ILR 30.

NOGA v. Murmansk State Technical University and Association Brest [2000] 24 July 2000 Swiss international arbitration law reports (sialr) - 2009 VOL. 3 NOS. 1 & 2

Re Borrowed Gravestones [1987] the Bundesgericht (Swiss Federal Supreme Court) 6 February 1985, ECC 36. 82 ILR 24

Republique Arabe d'Egypte v. Cinetel [1979] Tribunal feberal suisse, 20 July 1979, 65 ILR 425

Royaume de Grece v. Banque Julius Bar & Cie, [1956] Tribunal federal suisse, 6 June 1956, ATF 82175.

Societe Laul Liegard v. Capitain Serdjuk and Mange [1964] Tribunal de commerce, La Rachele, 14 Oct 1964, 65 ILR 38.

Sozialistische Lybische Volks-Jamahiriya v. Actimon SA [1985] Federal Tribunal of Switzerland, 24 April 1985 111 la BGE 62

United Arab Republic v. Mrs. X [1960] Federal Tribunal, Switzerland 10 February 1960, 65 ILR 384

The UK

A Company Ltd v. Republic X [1990] 2Loyed's Rep. 520 (QBD)

AIC Ltd. v. The Federal Government of Nigeria and the Attorney General of the Federation of Nigeria, [2993] EWHC 1357 (QB), [2003] ALL ER (D) 190

AIC Ltd. v. Federal Government of Nigeria (2003) [2003] EWHC 1357.

AIG v. Kazakhstan [2005] EWHC (Comm) 2239

Alcom v. Republic of Colombia [1984] AC 580

Anton Piller v. Manufacturing [1976] EWCA Civ 12.

Associated Provisional Picture Houses Ltd. v. Wednesbury Corporation [1948] Court of Appeal of England and Wales, 1 KB 223

Banca Carige SpA Cassa di Risparmio Geneva e Imperia v. Banco Nacional de Cuba and another, Ch.D [2001] (Companies Court, the UK), 11 Apr 2001 3 All ER 923.

Bank Mellat (Appellant) v. Her Majesty's Treasury (Respondent) (No. 1) [2013] the UK Supreme Court UKSC 38

Hispano Mercantil SA v. Central Bank of Nigeria [1979] UK Court of Appeal, Civil Division 25 April 1979 64 ILR 221, 2 Lloyd's Rep. 277

Holland v. Lampen-Wolfe [2000] UKHL 40

Kensington International Limited v. Republic of Congo [2005] EWHC (Comm) 2684

McLean Watson vs Department of Trade and Industry [1988] 3 WLR 1033

NML Capital Ltd. v. Republic of Arg. [2011] UKSC 31 [2011] 2 AC 495 (on appeal from Eng.).

Orascom Telecom Holding SAE v. Chad [2008] EWHC 1841 (Comm); [2009] 1 All ER (Comm) 315

Regina v. Secretary of State for Foreign and Commonwealth Affairs, Ex parte, World Development Movement Ltd., [1995] the Queen's Bench Division 1 WLR 386

Republic of Costa Rica v. Erlanger [1876] 3 Ch D 62

Sabah Shipyard (Pakistan) Ltd. V. Islamic Republic of Pakistan [2003] 2 Lloyd's Rep. 571 (CA).

Sarrío SA v. Kuwait Investment Authority, [1996] EWCA Civ. 575 rev'd, [1997] UKHL 49

SerVaas Inc v. Rafidain Bank [2012] UKSC 40; [2013] 1 AC 595

Taurus Petroleum Ltd. v. State Oil Company of the Ministry of Oil of Iraq [2017] UKSC 64.

The Cristina [1938] 1 All E.R. 719

The I Congreso del Partido [1978] QB 500 (Robert Groff J).

The Philippine Admiral [1977] AC 376 Privy Council (British Commonwealth) 400.

Trendtex Trading Corporation v. Central Bank of Nigeria [1977] UK Court of Appeal 64 ILR 111; [1977] QB 529

The US

AF-CAP INC. v. the Republic of Congo, and others [2004] 5th Cir. 383 F.3d 361

Af-Cap Inc., v. Chevron Overseas (Congo) Limited, Republic of Congo and others (2007) [2007] 9th Cir January 25, 2007, Nos. 04-16387, 04-16388, 04-16788, 04-16810.

Agudas Chasdei Chabad v. Russia Federation [2006] DDC 466 F Supp 2d 6

Alden v. Maine [1999] 527 US 706

Altmann v. Republic of Austria [2001] CD Cal 142 S Supp 2d 1187

Application of Liberian Easter Timber Corporation v. the Government of Liberia [1986] 89 ILR 360

Attwood Turkey Drilling v. Petroleum Brasileiro [1989] 5th Cir 875 F 2d 1174

Aurelis Capital Partners LP v. the Republic of Argentina [2009] 2nd Cir 584 F.3d 120.

Banco Central de Reserva del Peru v. Riggs National Bank [1994] DDC, 919 F Supp 13 17

Bank of China vs. Chan [1992] WL 298002 (SDNY 1992)

Behring Int'l v. Imperial Iranian Air Force [1979] DCNJ 475 F Supp. 383

Bennett v. Islamic Republic of Iran [2002] 9th Cir 313 F.3D 83.

Birch Shipping Corp v. Embassy of United Arab Republic of Tanzania [1980] 507 F. Supp 311

BP Chemicals Ltd. v. Jiangsu Sopo Corp. [2002] 8th Cir 285 F.3d 677, 62 U.S.P.Q.2d (BNA) 1514

Cassirer v. Kingdom of Spain [2006] CD Cal 461 F Supp 2d 1157; [2010] 9th Cir 616 F 3d 1019; [2010] 9th Cir 49 ILM 1492.

Campuzano v. Iran [2003] DDC 281 F Supp 2d 258.

City of New York v. The Permanent Mission of India to the United Nations [2010] 2nd Cir No. 08-1805.

Crystallex International Corporation v. PDV Holdings [2017] Case No. 16-CV-1007 (D.Del.)

Crystallex v. Venezuela and Petroleos De Venezuela SA [2019], US Court of Appeals, 3rd Circuit, Nos. 18-2797, 18-3124.

Connecticut Bank of Commerce v. Republic of Congo [2002] 5th Cir US 309 F3d 240

Debbie Walters v. Industrial and Commercial Bank of China and others [2011] 2nd Cir 651 F 3d 280.

De Csepel v. Hungary [2011] DDC 808 F Supp 2 d 113; [2013] DC Cir 714 F 3d 591; [2016] DDC 169 F Supp 3d 143. [2017] DC Cir 869 F 3d 1094.

De Sanchez v. Banco Central de Nicaragua [1985] 770 F.2d 1385 (5th Cir. 1985).

De Sanchez v. Banco Central de Nicaragua, [1982] 515 F.Supp 900 (EDLa 1981), 63 ILR 584 (1982).

Dole v. Patrickson, [2003] 538 US 468

Elliot Associate v. Republic of Panama [1997] SDNY 975 F. Supp. 332

EM Capital v. Republic of Argentina [2007] (2nd Cir) 473 F 3d 463

EM Capital v. Banco Central de la Republica Argentina [2015] (2nd Cir) Nos 13-3819-cv (L), 13-3821-cv (CON), August 31, 2015

Environmental Tectonics v. W.S. Kirkpatrick Inc [1988] 3rd Cir 847 F. 2d. 1052

Export-Import Bank of the Republic of China v. Grenada [2014] F 3d WL 4773451 CA 2.

FG Hemisphere Assocs., LLC v. Democratic Republic of the Congo [2009] DDC 603 F Supp 2d 1

First National City Bank v. Cuba [1983] 462 U.S. 611, 103 S.Ct. 2591, 77 L.Ed.2d 46

First National City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec) [1983] 462 US 611.

Foxworth v. Permanent Mission of the Republic of Uganda to the United Nations [1992] SDNY, 99 ILR 138

Friedar v. Government of Israel [1985] 614 F. Supp. 395

Harris v. Vao Intourist, Moscow [1982] 481 F.Supp 1056 (EDNY, 1979), 63 ILR 318

Hercaire Intern., Inc. v. Argentina [1987] 11th Cir 821 F 2d 559

Hilton v. Guyot [1895] 159 US 113

International Association of Machinists & Aerospace Workers vs OPEC [1981] 649 F.2d 1354

Iptrade International v. Federal Republic of Nigeria [1978] DDC 465 F Supp 824

Josefina Najarro De Sanchez v. Banco Central de Nicaragua [1985] (5th Cir) 770 F2d 1385.

Joseph v. Office of the Consulate Gen. of Nigeria (1987), (9th Cir) 830 F.2d 1018.

Libra Bank Ltd. v. Banco Nacional de Costa Rica [1982] 2nd Cir, 676 F 2d 47

Liberian Easter Timber Co. v. Govt of Liberia [1986] (the LETCO case) 89 ILR 360

LNC Invs., Inc. v. Republic of Nicaragua [2000] (SDNY June 8, 2000)) No. 96 Civ. 6360 (JFK), 2000 WL 745550.

Lloyd's Underwriters v. AO Gazsnabtranzil [2000] No. CIV 1:00-MI-0242-CAP, 2000 WL 1719493, at n. 1-2. (ND Ga Nov. 2, 2000)

Magness v. Russia Federation [2000] SD Ala 84 F Supp 2d 1357.

Malewicz v. City of Amsterdam, [2005] DDC 362 F Supp 2d 298.

McDonnell Douglas Corp. v. Islamic Republic of Iran [1985] (8th Cir) 758 F.2d 341, 349.

Mexico v. Hoffman [1945] 324 US 30

Ministry of Defense v. Cubic Defense [2004] (9th Cir) 385 F.3d 1206.

MOL Inc. v. Bangladesh [1984] 9th Cir 736 F.2d 1326

NML Capital and EM Ltd. v. Banco Central De La Republica Argentina and the Republic of Argentina [2011] 2nd Cir 652 F 3d 172

NML Capital v. Republic of Argentina [2014] USSC 573 US 134.

Odyssey Marine Exploration v. Spain [2011] 11th Cir 657 F 3d 1159

Olympic Chartering SA v. Ministry of Indus. & Trade of Jordan [2001] SDNY 134 F Supp 2d 528

Permanent Mission of India v. City of New York [2007] Supreme Court of the US, 46 ILM 737

Peterson v. Islamic Republic of Iran, [2010] 9th Cir 627 F. 3d 1117

Philipp v. Germany [2017] DDC 248 F Supp 3d 59

Practical Concept Inc. v. Republic of Bolivia [1987] DC Cir 811 F.2d 1543

Re China Oil and Gas Pipeline Bureau, [2002] Tex. App. Houston 14th Dist. 94 S.W.3d 50

Republic of Argentina v. NML Capital Ltd. [2014] USSC 134 S.Ct. 2250; 134 S.Ct 2819

Republic of the Philippines v. Westinghouse Elctro. Corp. [1994] 3rd Cir 43 F.3d 65

Rubin v. Islamic Republic of Iran [2003] D Mass 456 F Supp 2d 228

Rubin v. Islamic Republic of Iran [2013] 1st Cir 709 F 3d 49

Rubin v. Islamic State of Iran [2016] 830 F. 3d 470

SPP (Middle East) Ltd. v. the Arab Republic of Egypt [1994] CA, transcript 122, 19 March 1994

The Nixes Seizures of Iranian Art Objects [2018] 19 IFAR J. nos. 1 & 2

The Schooner Exchange v. McFaddon [1812] 11 U.S. (7 Cranch)

The Victory Transport Case [1964] 336 F.2d 354

US Titan, Inc. v. Guangzhou Zhen Hua Shipping Co. Ltd. [2001] 2nd Cir 241 F.3d 135; 2001 AMC 2080

Walker International Holdings Ltd. v. Republic of Congo [2004] 5th Cir 395 F 3d 229

Walter Fuller Aircraft Sales Inc. v. Republic of Philippines [1992] 5th Cir 965 F 2d 1375.

Walters v. Industrial and Commercial Bank of China and others [2011] 2nd Cir 651 F 3d 280.

Weston Compagnie de Finance et D'Investissement SA v. La Republica del Ecuador [1993] SDNY 823 F Supp 1106 [1114]

Westfield v. Federal Republic of Germany [2011] 6th Cir 633 F 3d 409