SOVEREIGN IMMUNITY AND ARBITRATION

STATE AS A PARTY TO ARBITRATION: WHAT DOES THE IMMUNITY SHIELD CLOAK?

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ABBREVIATIONS

AAA	American Arbitration Association
AALCC	Asian-African Legal Consultative Committee
AC	Law Reports, Appeal Cases (Third Series)
AIR	All India Reporter
All ER	All England Law Reports
ALR	American Law Reports
Am. J Comp. L	American Journal of Comparative Law
Am. J Int'l L	American Journal of International Law
Anglo-Am. L Rev.	Anglo-American Law Review
Ann. Surv. Int'l & Comp. L	Annual Survey of International & Comparative Law
AOI	Arab Organization for Industrialization
App. Cas.	Law Reports, Appeal Cases (Second Series)
Arb. Int'l	Arbitration International
Art.	Article
Baylor L Rev.	Baylor Law Review
BILC	British International Law Cases
BITs	Bilateral Investment Treaties
Bom.	Bombay High Court Reports/ Indian Law Reports, Bombay Series*
Brook. J Int'l L	Brooklyn Journal of International Law
BU Intl LJ	Boston University International Law Journal
Bull. Civ.	Bulletin des Arrets de la Chambre Civile de la Cour de Cassation
Bus. Law.	Business Lawyer
BverfGE	Entscheidungen des Bundesverfassungsgerichts
BYIL	British Year Book of International Law
CA	Court of Appeal
Cal.	Indian Law Reports, Calcutta Series*
Cir.	Circuit Court of Appeal
CLJ	Cambridge Law Journal
Clunet	Journal de Droit International
Colum. J Transnat'l L	Columbia Journal of Transnational Law
Colum. L Rev.	Columbia Law Review
Comm.	Commercial Law Reports**
CPC	Indian Code of Civil Procedure
D.D.C.	District Court for District of Columbia

Dep't St. Bull.	Department of State Bulletin
Disp. Resol. J	Dispute Resolution Journal
Dod.	Dodson's Admiralty Reports
ECSI	European Convention on State Immunity 1972
Ed.	Edgar's Decisions, Court of Session
EJIL	European Journal of International Law
ER	English Reports
EWCA Civ.	Court of Appeal (Civil Division) - England & Wales
EWHC	England & Wales High Court (Administrative Court) [Neutral Citation]
F.2d	Federal Reporter (Second Series)
F.3d	Federal Reporter (Third Series)
F Supp	Federal Supplement
Fordham Int'l LJ	Fordham International Law Journal
FSIA	Foreign Sovereign Immunities Act 1976
FTA	Free Trade Agreement
GA	General Assembly (UN)
Ga. J Int'l & Comp. L	Georgia Journal of International & Comparative Law
Geneva Protocol of 1923	Geneva Protocol on Arbitration Clauses of 1923
Geneva Convention of 1927	Geneva Convention on the Execution of Foreign Awards of 1927
Guj.	Indian Law Reports, Gujarat Series*
Hague Recueil	Recueil des Cours de l'Académie de droit International
Harv. Int'l LJ	Harvard International Law Journal
Ibid.	Au même endroit
IBL	International Business Lawyer
ICC Int'l Ct. Arb. Bull.	ICC International Court of Arbitration Bulletin
ICC	International Chamber of Commerce
ICC Rules	Rules for the Court of Arbitration of the International Chamber of Commerce
ICJ	International Court of Justice
ICLQ	International Comparative Law Quarterly
ICSID Rev. - FILJ	ICSID Review - Foreign Investment Law Journal
ICSID Rev.	ICSID Review

ICSID	International Centre for Settlement of Investment Disputes 1965
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
Int'l & Comp. LQ	International & Comparative Law Quarterly
Int'l ALR	International Arbitration Law Review
Int'l Law.	International Lawyer
J Bus. L	Journal of Business Law
J Int'l Arb.	Journal of International Arbitration
J Mar. L & Com.	Journal of Maritime Law & Commerce
JDI	Journal du Droit International (Clunet)
JWTL	Journal of World Trade Law
Law & Pol'y Int'l Bus.	Law and Policy in International Business
Lloyd's Rep.	Lloyd's List Law Reports
LR	Law Reports
Mealey's Int'l Arb. Rep.	Mealey's International Arbitration Report
MLR	Modern Law Review
New York Convention	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NYIL	Netherlands Yearbook of International Law
NYUJ Int'l L & Pol.	New York University Journal of International Law & Politics
Parl. Deb. HL	Parliamentary Debates of the House of Lords
PD	Law Reports, Probate, Divorce & Admiralty Division
QB	Law Reports, Queen's Bench (Third Series)
QBD	Law Reports, Queen's Bench Division
Rev. Arb.	Revue de l'Arbitrage
Rev. cr. dr. internat. Privé	Revue critique de droit international Privé
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
SAR	Stockholm Arbitration Report
SC	Supreme Court Cases, India*
SCC	Stockholm Chamber of Commerce
SIA	The UK State Immunity Act 1978
Tex. Int'l LJ	Texas International Law Journal

Tex.	Texas Supreme Court Reports
Tul. L Rev.	Tulane Law Review
U Pa. L Rev.	University of Pennsylvania Law Review
UNCITRAL	United Nations Commission on International Trade Law
UN State Immunity Convention	United Nations Convention on Jurisdictional Immunities of States and their Property
US (Cranch)	Cranch's Supreme Court Reports
US	United States Reports
Washington Convention	Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965
WLR	Weekly Law Reports
Yale Stud. World PO	Yale Studies in World Public Order
YB Com. Arb.	Yearbook of Commercial Arbitration
YBILC	Year Book of International Law Commission
YLJ	Yale Law Journal
ZaoRV	Zeitschrift fur Auslandisches Offentliches Recht und Volkerrecht

* when associated with AIR
** when associated with England & Wales

SUMMARY

Following the greater participation of States in international trade, State involvement in arbitration too has seen a resultant rise as more and more private parties are resorting to international commercial arbitration. Although arbitration has its plus points when dealing with disputes involving States, it also has its fair share of limitations and problems.

A key shortcoming of the arbitral process is the defense of state immunity that States can invoke at any stage of the arbitral proceedings and the overwhelming protection it affords not only the State but also its entities. This problem is compounded given that state immunity laws differ between different jurisdictions and there exists no supranational law that governs sovereign immunity.

The focus of this thesis will be to look closely at the state immunity laws in different jurisdictions, the current position regarding sovereign immunity in arbitration, and the limitations of the various conventions and codifications that address the issue of award enforcement in arbitration.

INTRODUCTION

"… All trade potentially involves disputes, and successful trade must have a means of dispute resolution other than force…"[1]

- Lord Mustill

While international trade has been present throughout much of human history, its economic, social, and political significance has seen a steady rise in recent centuries, especially under the impact of major developments like industrialisation, improvements in transportation and communications, globalisation of trade, and the establishment of multinational corporations. Among these factors, the most compelling in recent times has perhaps been the trend of globalisation, which has been around since the late twentieth century.

Globalisation has overseen, in the last few decades, a complex series of economic, social, technological, and political change along with increasing interdependence and interaction between people and companies in disparate locations, distant countries even. Its implications are multifold – on one hand, where it has brought economic and social prosperity to the developing countries and added wealth to the first world nations, it has also been charged with bringing along evils like corporate imperialism, profiteering, cultural assimilation, human rights violations, etc., on the other. Nevertheless, its place in the world as we know it today cannot be underestimated, and despite much criticism and protest, it is here to stay.

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[1] Mustill, *Arbitration: History and Background*, 6 J Int'l Arb. 43.

Economic liberalization has meant the elimination of inter-State trade barriers and expansion of international markets – that the four major assets of any country, namely its human, financial, natural resource and power capitals have become mobile with respect to the global economy. Modern governments are, unlike in the past, as a result engaged in commercial activities extensively, where a sovereign State may enter into a commercial transaction either directly or through one of its agencies with another sovereign State, its agencies or a party thereof.

A major shortcoming of globalisation, however, is that the disparity in the rates of economic integration and the harmonization of universally enforceable laws and standards governing such integration in other areas has been the cause of much angst in the international community. One of the spin-offs of this unfortunate circumstance is the absence of an institutionalised dispute resolution mechanism for the various kinds of disputes that arise out of such transnational transactions and activities. This is the fundamental reason behind most complexities confronted today in the affairs of private individuals and countries, and the interactions between them.

In the absence of an institutionalised dispute resolution mechanism at the international level, the uncertainty of law applicable to such transnational disputes and the diverseness of relevant systems of law have often resulted in conflicting views of rights and obligations assignable to the parties involved, especially when the dispute is between a State or its instrumentality and a private party. Thus, when such complications arise in dispute cases and the parties concerned have failed to reach a

solution by the conventional means of negotiation and mediation, dispute resolution by either litigation in a national court or international arbitration before an arbitral tribunal becomes the preferred alternative.

Properly used, arbitration is an effective method of resolving disputes – its very efficacy lying in its flexibility, adaptability and legitimacy. In fact, arbitration has found much success in the settlement of disputes between private traders belonging to different nations.[2] Arbitration as a dispute resolution mechanism only works because of the complex regime of laws that holds its framework in place. Even the simplest of arbitration proceedings is, in reality, a very complex affair involving not only varied systems of laws pertaining to the various stages of the arbitral process but also, possibly, international treaties and the national laws of many different nations.[3] This dependence on different, and sometimes conflicting, rules of national and international law gives rise to complexities and problems that are, in a sense, unique to international arbitration. For example, the mere impleading of a foreign State, directly or indirectly, in a case compounds the already controversial issue of whether a domestic court or a national authority may exercise jurisdiction over a particular controversy.[4]

One major hurdle in the arena of international dispute resolution, thus also reflected in arbitration, is the defense of state or sovereign immunity, which States regularly

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2 M Sornarajah, *International Commercial Arbitration: The Problem of State Contracts*, Singapore (1990) at p. 5.

3 Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, (2nd edn) London (1991) at p. 1.

4 Ernest K Bankas, *The State Immunity Controversy in International Law*, Berlin (2005).

resort to when faced with legal proceedings of any kind. This question of state immunity and its implications on international arbitration is certainly not a new one. In fact, practitioners and scholars alike have addressed it on many occasions. Notwithstanding this, state immunity continues to present a problem in arbitration proceedings due to the fact that despite significant deliberation many aspects of the issue still remain unresolved and also because many States are inexperienced in matters concerning sovereign immunity.

Most of these unresolved issues, in fact, do not directly concern the international arbitral tribunal, which renders such awards. The reason for this being that once an award has been rendered, any subsequent measures taken with respect to the award are typically beyond the control and authority of the arbitrators. These issues then arise after the award has been rendered and the winning side seeks to enforce it. Nevertheless, this is not to say that the question of state immunity does not arise for the arbitrators at all.

State immunity is based on the concept of sovereignty in the sense that a sovereign may not be subjected without its approval to the jurisdiction of another sovereign. The law of sovereign immunity connotes that a State, unless it chooses to waive its immunity, is not submissive to the jurisdiction of a foreign court. Conversely, it precludes the assertion of jurisdiction by the national courts of a foreign country over a sovereign or State, without the latter’s consent.

Most Western and industrialised countries today broadly endorse the notion of restrictive state immunity. The former Soviet Union, certain other former socialist States and some developing countries, however, adhere to the opposite and more traditional view, namely the doctrine of absolute state immunity.

According to the classical or absolute theory of immunity, the sovereign of a foreign State has to be accorded jurisdictional immunity for all activities attributable to the State irrespective of both the nature of those activities and the capacity in which a State or its organ entered into such transactions. This theory, which espouses unqualified immunity, is rooted in the principles of sovereign equality, independence or sovereignty, and dignity of States.

The Doctrine of Restrictive Immunity, on the other hand, believes that state immunity should be restricted. It seeks to make a distinction between the public and commercial acts of a State, according state immunity to the former and not the latter. It is based on the presumption that where a State or sovereign is involved in commercial activities with private parties, the equality and contractual rights of the latter as well as the unjustified freedom to avoid contractual obligations that immunity affords the participating States need to be addressed in matters of dispute. Accordingly, a State is entitled to jurisdictional immunity only in respect to acts that are official or sovereign in character, public in purpose, or governmental in nature.

Even though the principle of restrictive immunity is easily formulated and generally accepted, there are a number of open questions associated with it. One such question is the extent to which immunity is, or perhaps should be, restricted when it comes to execution of court judgements and arbitral awards against assets of a State. Also, it is not always without problems to distinguish between commercial and sovereign acts where a State is concerned. In fact, much of the debate during the last decades has focused on this distinction.

Yet, a key advantage of international arbitration over other forms of dispute resolution is that the State, by agreeing to submit to arbitration, is considered to have waived its defense of immunity and is thus, precluded from invoking jurisdictional immunity before the arbitral tribunal and that the ancillary role extends to the declaration of enforceability of an arbitral award. In several legal systems it is, however, still unresolved whether such waiver should extend also to the execution of an arbitral award.

When a private party initiates arbitral proceedings against a State, it runs the risk that the State may decline to participate on the grounds of sovereign immunity. It may also be possible that the private party encounters the plea of sovereign immunity when it tries to seek recognition and enforcement of the arbitral award against a State. Since arbitration arises out of an agreement that is essentially voluntary, the question that needs to be addressed is whether the State can rely on the defense of sovereign

immunity where it has previously entered into an agreement to arbitrate with another party.

In order to facilitate discussion on the different issues that are at stake when a State or its entity enters into an agreement to arbitrate, the thesis will be divided in 5 chapters following the Introduction. Chapter 2 will examine the concept of sovereign immunity, its background, legal nature, and historical development. It will also explore the transformation of the Doctrine of Absolute Immunity to the restrictive immunity doctrine and further investigate the relevance of this development to the arbitrational process.

Chapter 3 deals with issues related to different state practices in submitting disputes to arbitration, the effect of an agreement to arbitrate by a State or its entities, a State's liability for the conduct of its instrumentality and whether a State's agreement to arbitrate, which constitutes a waiver of immunity from jurisdiction, also extends to immunity from execution. It also looks at how a distinction can be drawn between the *acta jure imperii* and *acta jure gestionis* of a State and provides an analysis of the current law of sovereign immunity in different jurisdictions.

Chapter 4 will analyse the enforcement of awards under different codifications of state immunity, the Doctrine of Act of State, its distinction from the Doctrine of Sovereign Immunity, the problems that may arise during the enforcement of awards

against sovereign property and the extent to which a State can claim immunity from enforcement in execution proceedings.

Chapter 5 examines the enforcement procedures under the New York and ICSID Conventions and the pitfalls in award enforcement under these conventions. It also analyses the UN State Immunity Convention on Jurisdictional Immunities of States and their Property.

Chapter 6 will then conclude the discussion by evaluating the findings of the above Chapters, in line with recent international developments and trends, and recognizing the need for an understandable and predictable law of sovereign immunity.

CHAPTER TWO

NATURE OF SOVEREIGN IMMUNITY

2.1 Introduction

The Doctrine of Sovereign Immunity precludes the institution of any legal proceedings against a sovereign or State in the courts of another country, unless it consents to the jurisdiction of the forum State. The main purpose of sovereign or state immunity is to promote the smooth functioning of all governments by protecting States from the burden of having to defend litigation in a foreign country.

In the nineteenth century, foreign States were entitled to absolute immunity. This Doctrine of Absolute Immunity was justified at the time, for the reason that States only engaged in activities that were restricted to the public or government domain then.

The twentieth century, however, saw a tremendous growth in international trade and commerce, with more and more States getting involved in commercial activities spanning one or more nations. The upshot was an ever-growing number of international trade disputes. Consequently, the question of prosecution of States on matters of cross-border investment concerning foreign States, which had embarked on bilateral and multilateral treatises on investment protection that incorporated an option for the private parties ('investors') involved to arbitrate certain matters ('investments'), became an area of mounting concern. As these scenarios became

more frequent, there no longer remained any justification for allowing a foreign State the freedom of avoiding the economic costs of its own actions.

The law of state immunity has undergone major changes in the last few decades. The concept of absolute immunity as the predominant approach to state immunity has given way to the Doctrine of Restrictive Immunity. The traditional notions of state immunity, such as dignity of the State and that States are above the law, have been dismissed as no longer valid.

The prevailing practice now is of according immunity only to those activities of foreign States that fit into certain carefully restricted areas of public activity. Under this new doctrine, the forum State has no obligation to grant immunity to the *acta jure gestionis* of the foreign State; thus, limiting the latter's privilege to *acta jure imperii.*

A State could be involved in commercial contracts in a myriad different ways. Its standing as a contracting party and, hence, its commitment to an arbitration clause could lead to protracted disputes before either arbitral tribunals or the State courts. However, as parties to these disputes often lack confidence in the domestic courts of the forum State, international commercial arbitration has emerged as the favoured means of resolving these contentious issues.

Yet, international commercial arbitration is bridled with its own share of problems when one of the parties to the dispute is a State. As Delaume put it, "The presence of

the state as a party to the dispute gives a particular coloration to the arbitration process."[1] The problem of state immunity is compounded in cases where the State has agreed to arbitrate a dispute without an express waiver of immunity. In such cases, the State is still able to avoid legal responsibility whenever the immunity defense is available.

The present chapter discusses the concept of the doctrine of state immunity, its legal nature and the transformation of the Doctrine of Absolute Immunity to the Doctrine of Restrictive Immunity. It also explores the relation between sovereign immunity and arbitration, highlighting the significance and scope of study.

2.2 State Immunity: Its Legal Nature

Stein defined sovereign immunity as "The right of a state and its organs not to be held responsible for their act by the (judicial) organs of the state."[2]

Sovereign immunity or state immunity, in the context of public international law, generally refers to the legal principles and rules based on which a foreign State may claim exemption from or non-amenability to the legislative, judicial or administrative jurisdiction of another State.

State immunity, as reflected by Brohmer,[3] aims to describe that set of negative rules wherefore a court may not hear a case. Hence, after having established jurisdiction,

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1 Georges R Delaume, *Sovereign Immunity and Transnational Arbitration*, 3 Arb. Int'l 28 (1987).

2 Torsten Stein: *Immunitat*, in Seidl-Hohenveldern, Ignaz (ed), Lexikon des Rechts-Vilkerrecht, 2 Auflage, Lauchterhand (1992) at p. 132 *et seq* (Translated by Brohmer Jurgen).

the court has to verify whether the rules pertaining to immunity are applicable to the defendant in question. Should the rules be applicable, the court would have to refrain from adjudicating despite the fact that were it not for the particular circumstance from which immunity flows, the court would normally have had jurisdiction to adjudicate. Most importantly, therefore, in the context of state immunity, the focus is on the defendant and his 'personal' status, commonly referred to as *ratione personae*, which is the decisive factor.

The practical importance of state immunity lies in the power of the territorial State to adjudicate, to determine questions of law and fact, and to administer justice, as normally exercised by the judicial and administrative authorities of the territorial State, in matters concerning trade disputes involving foreign States that fall within their purview. Even so, it is generally recognised that immunity of the foreign State must neither be undermined nor circumvented by subjecting either the organ or the person who acted on its behalf to the jurisdiction of the forum State.

While contemporaneous international law only requires the territorial State to respect the immunity of the foreign State with regard to *acta jure imperii* or the property-serving public purposes of the foreign State, domestic law may well go beyond the ambit of this edict and accord the foreign States 'absolute' immunity, covering both *acta jure gestionis* and property, in general.

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[3] Brohmer Jurgen, *State Immunity and the Violation of Human Rights*, The Hague (1997) at p. 38.

2.3 Origin and Development of the Doctrine of Sovereign Immunity

2.3.1 Concept of State Immunity

Sovereign immunity is a doctrine that precludes the institution of a suit against the sovereign (government) without its consent. It is an attribute of the State alone and pertains to the acts of a sovereign or State that are immune. As observed by Lord Atkin,

> The courts of a country will not impede a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.[4]

The concept developed during the course of the appearance of territorial entities, which claimed exclusive power over all subjects within their territoriality. This theory of immunity is actually rooted in the inherent nature of power and the ability of those who hold power to shield themselves. Its origin can be traced to the period of personal sovereignty when the Monarchy, theoretically, could do no wrong and where the exercise of authority by one sovereign over another, in any form, indicated hostility or superiority. It followed from the conviction that since all rights flowed from the sovereign, there could be no legal right against the authority that made the law on which the right depended.

Classical writers on international law, during its formative stages, largely dealt with only the personal immunities of sovereigns and ambassadors. Badr[5] mentions a distinction that was already drawn between a foreign sovereign's or an ambassador's

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4 *The Cristina*, (1938) AC 485 at p. 490.

5 Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View*, The Hague (1984) at p. 1.

public acts and property and his private acts and property. Another writer has even gone to the extent of holding that the goods of a sovereign, however acquired, whether of public or private nature, were liable to process to compel an appearance.[6] The same author also states that the property of a sovereign, private or public, is subject to the authority of the Judge of the place.

The rules of immunity, per se, stem from the judicial practices of individual nations followed in the nineteenth century. And, although the concept of sovereign immunity has undergone much change with time, the courts have retained sovereign immunity chiefly to avoid possible embarrassment to those responsible for the conduct of a nation's foreign relations.

2.3.2 Historical Background

According to Justice TO Elias, The first and earliest period in history was characterised by the basic arrangements regulating struggle between empires, kingdoms and city-States. The medieval period saw the consequent rise of nation States based upon the Cult of Political Sovereignty articulated by Jean Bodin and others.[7] It has been suggested[8] that historical records show that Jean Bodin, a French political scientist and jurist, was the first among writers to develop the concept of

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6 Cornelius van Bynkershoek, *De Foro Legatorum Liber Singularis: A Monograph on the Jurisdiction over Ambassadors in Both Civil and Criminal Cases*, 1744 at p. 36. [Cited by the US Attorney in *The Schooner Exchange v McFadden and Others*, 11 US (7 Cranch) 116 (1812)].

7 TO Elias, *Africa and Development of International Law*, Boston/ London (1988) at p. 63.

8 Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts*, Berlin (2005) at p. 2.

sovereignty in the sixteenth century.[9] Bodin maintained that sovereignty is a supreme power over citizens and, this supreme power being the source of law, is not bound by any laws of the realm.[10]

Several other scholars, such as Thomas Hobbes, John Locke, Rousseau, Jeremy Bentham and John Austin contributed greatly to the development of the theory of sovereignty.[11] The writings of these scholars set the pace for the understanding that immunity of States must be seen as a theoretical derivation from supreme power, which meant that in the absence of power to enact laws backed by the coercive powers to enforce them, a State cannot be recognised in international law.[12] In other words, sovereignty, which denotes supreme power, is an essential characteristic of the State and continues to be part of it as long as the State subsists.[13] In essence, the law of sovereign immunity can be traced back to the period of Bodin, Hobbes, Austin and other scholars.

The evolution of the law of state immunity was based on the influence of these scholars who laid the foundation for the determination of State equality based on the principles of independence, dignity of States, the need for comity among States, the legal nature of the sovereign property and their diplomatic function in relation to their international personality. In fact, the view that sovereignty is unlimited, indivisible,

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9 George Sabine, *A History of Political Theory*, (4th edn, Rev. by Thomas Landon Thorson) Hinsdale (1973) at p. 348-385; Appadorae, *The Substance of Politics*, New Delhi (1968) at p. 48.

10 Appadorae, *The Substance of Politics* at p. 48.

11 Bertrand Russell, *A History of Western Philosophy*, (10th edn) London (1964) at p. 491.

12 McNair, *The Stimson Doctrine of Non-Recognition*, 14 BYIL (1933) 65.

13 Bhattacharyya, *A First Course of Political Science with Constitutions of Indian Republic and Pakistan*, Calcutta (1949) at p. 48.

inalienable and exclusive is an attribute of absolute immunity. The probable reason for this, as suggested by one author, may be that the sovereign had control over the police, the army and was also at the same time the lawmaker, judge and executor.[14] However, it is highly doubtful whether these views would be accepted today without criticism or strong opposition.

The concept of state immunity soon after developed out of the decisions of the Municipal Courts. Doctrinal opinions and international conventions became instrumental in the process of shaping the rules of state immunity only much later. The starting point of state immunity was the local State's exclusive territorial jurisdiction. The purpose of granting immunity was to encourage the functioning of the government by protecting the State from the burden of having to defend any litigation abroad. States, thus, were not required to litigate in foreign courts unless it had consented to a trial and a matter in dispute was, for that reason, determinable by litigation only if a local State wished it so.

A State is wholly protected under the classical or absolute theory of immunity. In other words, acts of a State could not have been done in any private character, but were done, whether right or wrong, in the character of the sovereign of a foreign State. Under the absolute rule of state immunity, immunity applies to any activity that has the character of State involvement.

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[14] George Sabine, *A History of Political Theory* at p. 348-385.

During the twentieth century, as instances of governments getting involved in commercial transactions of an international nature became evermore common, courts became increasingly cautious of granting States immunity for all their activities, whether governmental or commercial. To this end, the courts began to draw a distinction between those activities of a State that were public and those that were private. English and US courts began to develop a Doctrine of Restrictive Immunity at common law as a consequence to the greater involvement of States in commercial activities. This move to modify the absolute immunity rule was, basically, to impose the stricter application of immunity only to government acts.

The law of state immunity as it stands now as a customary rule of international law is based on various general principles of international law.[15] It is important to sum up these principles because a proposal to restrict state immunity is possible only if it does not conflict with the general principles of international law.[16]

2.3.3 Doctrine of Absolute Immunity

"*Non enim una civitas potest facere legem super alteram, quia Par in parem imperium non habet imperium*" is popularly believed to be the origin of the absolute theory of sovereign immunity. The maxim, known to have come from the pen of the fourteenth century Italian jurist, Bartolus, means an equal has no power over an equal, thus making it impossible for one State to assume jurisdiction over another. The doctrine conceptualizes the fundamental principle of international law that the

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15 Lauterpacht, *The Problems of Jurisdictional Immunities of Foreign States*, 28 BYIL (1951) 220 at p. 226.

16 Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, MLR, Vol. 54 (1991) 664.

government of a foreign nation, State, political subdivision, or agent or instrumentality thereof, shall not be subjected to domestic adjudication without the former's consent.

As a consequence of this equality of States, a State is essentially immune to the jurisdiction of all other States, as the latter have no authority over the former. The theory holds that any assumption of jurisdiction over a foreign State is equivalent to an exercise of hostility towards it and that, because it is nearly impossible to distinguish between acts that are *acta jure imperii* and *acta jure gestionis* where a State is concerned, all acts of a State are *acta jure imperii*.

According to this classical or absolute theory of immunity, the sovereign of a foreign State has to be accorded jurisdictional immunity for all activities attributable to the State – irrespective of both the nature of those activities and the capacity in which a State or its organ did it. Not surprisingly, therefore, Michael Singer points out in one of his articles that absolute immunity offers a State the freedom to develop its economic and political objectives without regard to global considerations, and so favours the so-called mercantilist model of world order.[17]

According to Badr,[18] US was the first to announce a theory of immunity for foreign States and their agents – foreign sovereign immunity in its modern sense – as opposed to the earlier personal immunity of foreign sovereigns and their ambassadors. One of

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[17] Michael Singer, *Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe*, 26 Harv. Int'l LJ 1 (1985) at p. 2.

[18] Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* at p. 9.

the major first cases in this area was *the Schooner Exchange v McFadden*,[19] in which a naval ship entered Philadelphia under stress of weather. McFadden and his partner claimed that this was their ship, the Exchange, which had been seized by the French Navy. They libeled against the ship, but the claim was dismissed in the Federal District Court. The Circuit Court, however, reversed this order and so, the US attorneys appearing against the claimants appealed to the Supreme Court. Chief Justice Marshall of the Supreme Court, in his ruling, called attention to the fact that the immunity claimed was for the naval ship. He observed that although the personal property of the sovereign might possibly be subject to the territorial jurisdiction of a foreign State, the same did not apply to any portion of his armed forces. This was, in actual fact, the theory of absolute immunity being applied. Under the theory, a foreign sovereign was answerable to a US court only if he had consented to be sued.[20]

The Doctrine of Absolute Immunity was also prevalent at the time in countries other than the United States. In England, the case of *The Prins Frederik*[21] provided the first occasion for consideration of the sovereign immunity issue. The Prins Frederik, a public ship of war belonging to the Dutch Navy, on voyage from the East Indies to the Island of Texel, off the coast of Netherlands, was carrying a cargo of spices and other goods. She met with rough seas off the Isles of Scilly and suffered damage. A British brig, the Howe, came to her rescue and brought her into an English port. The master and crew of the Howe claimed salvage. It was argued in favour of the Prins Frederik before the Court of Admiralty that the ship was immune from arrest. It was

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19 11 US (7 Cranch) 116 (1812).
20 *Dexter & Carpenter, Inc v Kunglig Jarnasvagsstyrelesen*, 43 F.2d 705 (2d Cir. 1930).
21 2 Dod. (1820) 451.

submitted that public property intended for public use was exempt from all private claims. It was further argued that ships of war belonging to the State were in this category of public property and, for that reason, immune from all claims. This argument in favour of immunity of the ship in *The Prins Frederik* was based on factual consideration, namely that the ship was *extra commerciu*. It has been suggested that this distinction although subtle is real and relevant for the better understanding for the Doctrine of Absolute Immunity.[22]

In another case, *The Charkieh*,[23] which was also a public vessel owned by a foreign prince, the Khedive of Egypt, was being used for commercial carriage of goods under a charter to a British subject. Justice Phillimore denied the ship immunity on the ground that the ship had been chartered by a private individual and was engaged in commercial activity. The often-cited passage of the decision reads

> No principle of international law, and no decided case, and no dictum of jurists of which I am aware, has gone so far to authorise a sovereign prince to assume the character of a trader, when it is for his benefit; and when he incurs obligation to a private subject to throw off, if I may so speak, his disguise, and appear as a sovereign, claiming for his own benefit, and to the injury of a private person, for the first time, all the attributes of his character.

Justice Phillimore made his views clearer in the case of *The Parlement Belge*[24] where he went a step further and denied immunity to the vessel which was carrying mail packs owned by the King of Belgium and officered by commissioned officers of the Belgium Navy on the grounds that the vessel was partially engaged in trade. This trend in the English case law suffered a set back when the Court of Appeal[25] reversed

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22 Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* at p. 15.
23 LR 4A and E59 (1873).
24 (1879) 4 P.D. 129.
25 (1880) 5 P.D. 197.

the decision. The Court of Appeal held that "…as a consequence of the absolute independence of every sovereign authority and of international comity… each and every [State] declines to exercise by means of its own courts, any of its territorial jurisdiction…"[26] The courts of other common law countries also, presumably, followed this position, for e.g., the doctrine was observed in Germany until 1945.[27]

The doctrine was at its peak during the 1920s with several prominent cases, such as *The Porto Alexandre*[28] and *The Pesaro*.[29] *The Porto Alexandre* was considered the high-water mark in the acceptance of the Doctrine of Absolute Immunity by the English courts[30] and the climax[31] of this doctrine in English case law. In *The Porto Alexandre*, the Court of Appeal granted immunity to a State-owned vessel used exclusively for trading purposes.

The Parlement Belge was the English position on sovereign immunity for over a century until the case of *Rahimtoola v Nizam of Hyderabad*. In *the Rahimtoola case*, the House of Lords granted immunity unanimously, but on varying grounds. Lord Denning, while arriving at the same conclusion, called for a return to the first principles of a distinction between *acta jure imperii* and *acta jure gestionis*, and in effect argued for applying a similar test to other jurisdictions. He noted that

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26 (1880) 5 P.D. 197 at p. 217, 219 and 220.

27 BVerfGE 16, 27 (34); RGZ 103, 274 (*the Ice King case*) (1921), where the Court held that "a foreign state cannot be sued in the domestic courts even for claims purely within private law" (Translated by Brohmer Jurgen).

28 (1918-1919) All ER 615.

29 271 US 562 (1926).

30 Sinclair, *The Law of Sovereign Immunity: Recent Developments*, The Hague (1980) at p. 127.

31 Sompong Sucharitkul, *State Immunities and Trading Activities in International Law*, London (1959) at p. 66.

> Applying this principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of dispute. Not on whether conflicting rights have to be decided, but on the nature of the conflict. Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislation or international transaction of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such disputes canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.[32]

It appears that there was general consensus at the time that even when the doctrine of immunity was absolute, immunity was never so. Brohmer agrees with this view and notes that a State could always consent to the proceedings and waive its own immunity.[33] He also points out that the doctrine was in operation even when States rarely acted in a private capacity and that immunity was often granted in those times in cases where it would still be granted today. Another scholar opines that even when the absolute theory was accepted, its exact content was unclear because immunity had always existed in varying degrees.[34]

It is also pertinent to note the view expressed by Lakshman Marasinghe[35] that the absolute view, historically, is devoid of any authority and immunity of the sovereign is, in fact, limited. In reaching such a conclusion, he took support from Lord Denning's view in *the Rahimtoola case*.[36] Here, Lord Denning states that the courts had, from ancient times, maintained a distinction between *acta jure imperii* and *acta*

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32 ILR 1957 at p. 157.

33 Brohmer Jurgen, *State Immunity and the Violation of Human Rights* at p. 16.

34 Wilfred Schaumann: *Die Immunitat auslandischer Staaten nach volkerrecht*, in *Berchte der Deutschen Gesellschaft fur Volkerrecht*, Vol. 8 (1968) (Transl. by Brohmer Jurgen at p. 17).

35 Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, MLR, Vol. 54 (1991) 664 at p. 674.

36 (1958) AC 379.

jure gestionis, thereby restricting any claims of immunity from jurisdiction to the former and excluding it from the latter. Apparently, two other classical writers, Vattel and Bynkershoek, shared this view.

2.3.4 Emergence of Restrictive Immunity

Complications in commercial transactions became rather commonplace in the twentieth century, especially in situations where governments were involved. As the number of such cases appearing before national courts kept on mounting, courts grew wary of granting governments immunity for all activities, whether governmental or commercial.[37] They began discerning on the issue of immunity, and attempts were made to make a distinction between those State activities that were public in nature, and therefore merited immunity, and those that were private in disposition.

The wisdom of retaining the Doctrine of Absolute Immunity was vigorously questioned following dramatic changes in the nature and functioning of sovereigns, especially in the last half century.[38] This change in legal opinion sprang from the belief that people involved in business with governments engaged in commercial activities ought not be wholly without remedy and, conversely, that governments who are acting not in a sovereign capacity but rather as private individuals, should be treated accordingly.

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[37] Dicey & Morris, *The Conflicts of Law*, (12th edn) London (1993) at p. 241.

[38] Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BYIL 220 (1951).

The English courts began developing a doctrine for restrictive immunity at common law following this greater involvement of States in commercial activities. This move to modify the absolute immunity code was basically to impose the strict application of immunity to government acts only. Lord Mustill exposed the rationale behind this shift in *the Kuwait Airways Corporation v Iraqi Airways Co case*[39] as

> Where the sovereign chooses to doff his robes and descend into the market place, he must take the rough with the smooth, and having condescended to engage in mundane commercial activities he must also condescend to submit himself to an adjudication in a foreign court on whether he has in the course of those activities undertaken obligations which he has failed to fulfill.

The Doctrine of Absolute Immunity was, as a result, eventually abandoned in favour of limited sovereign immunity amid growing concerns for individual rights and public morality. A key factor contributing to this cause was the fact that governments were progressively becoming more involved in commercial activities that had previously been regarded as private pursuits. It was contended, therefore, that the argument in support of absolute sovereignty is *non sequitur* and perhaps outdated, given the changes that had taken place both in domestic as well as international law.[40]

Although courts have retained sovereign immunity – largely, to avoid potential mortification to those in charge of conducting a nation's foreign affairs[41] – it is now clear that under the restrictive rule, States may enjoy immunity from the jurisdiction of local courts only in connection with certain classes of acts. As pointed out by Dixon, the restrictive theory of sovereign immunity is meant to try and accommodate

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39 (1995) WLR 1147 at p. 1171.

40 Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* at p. 10.

41 *The Jurisdictional Immunity of Foreign Sovereigns*, The Comment, 63 YLJ 1148 (1954).

and protect the interests of individuals involved in business activities with foreign governments. As opposed to the absolute immunity doctrine, it permits the determination of the legal rights of such individuals by the courts. At the same time, it also shelters the interests of foreign governments by allowing them the freedom to perform certain political acts without having to undergo the embarrassment or hindrance of defending the propriety of such acts before a foreign court.[42] He, however, astutely notes that the greatest difficulty for supporters of the restrictive doctrine lies in formulating a reasonably clear distinction between *acta jure imperii* and *acta jure gestionis*, where a State is concerned.

For a meaningful application of the Doctrine of Restrictive Immunity, it becomes imperative that a clear distinction is made between *acta jure imperii* and *acta jure gestionis*. *Acta jure imperii* are acts of a State that are of a sovereign nature and, therefore, immune. *Acta jure gestionis* are commercial acts for which the State is not immune and is subject to the jurisdiction of the territorial sovereign. Courts make this division by considering the purpose of the transaction, its nature and subject matter.[43] This distinction is significant because it delineates situations where a State can be treated as a normal litigant, as opposed to a sovereign where it exercises the power of sovereign, by the court.[44]

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42 4th Report on Jurisdictional Immunities of States and their Property, prepared for the ILC by Special Rapporteur, YBILC (1982) II-1, at p. 161.

43 *I Congreso del Partido*, (1983) 1 App. Cas. 244.

44 Martin Dixon, *Cases and Materials on International Law*, (4th edn) Oxford (2003) at p. 160.

The British courts had begun making changes in their approach to this issue even before the UK State Immunity Act 1978 came into force. This was reflected in *the Rahimtoola case*[45] where Lord Denning, in his famous concurring opinion, challenged the theory of absolute immunity as an "ill-considered dicta" and held that immunity should be granted only when it relates to public transactions. This view was reiterated in *Thai-Europe Tapioca Service Ltd v Pakistan*[46] and *The Philippine Admiral*.[47] Many scholars regard the case of *The Philippine Admiral* as the turning point in England's approach towards state immunity.[48] This new approach finally prevailed in *Trendex Trading Corp v Central Bank of Nigeria*.[49] The House of Lords, subsequently, unanimously supported the stand taken by Lord Denning in *I Congreso del Partido*.[50]

In the United States, to avoid the potential politically embarrassing effect that a court's rejection of a foreign State's claim to sovereign immunity could have on diplomatic relations, the judiciary have by and large followed the State Department's directives on granting immunity from domestic litigation to a particular foreign State. For instance, US courts decided not to afford immunity to foreign government-owned corporations, except when they had been performing public functions, after the widely publicized 'Tate Letter' from Jack B Tate, who was the Acting Legal Adviser of the Department of State to the Acting Attorney General. This letter made it clear

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45 (1958) AC 379.
46 (1976) 1 Lloyd's Rep. 1, 5 (C.A. 1975).
47 (1977) AC 373.
48 Ress, *Entwicklungstendenzen der Immunitat auslandischer Staaten*, 40 ZaoRV (1980) 217 at p. 236 (Translated by Brohmer Jurgen).
49 (1977) 1 Lloyd's Rep. 581, 593 (C.A. 1976).
50 (1983) 1 App. Cas. 244.

that the policy of the State Department was to decline immunity to foreign sovereigns in suits arising from their private or commercial activities.[51]

The current trends in practice under common law indicate that the courts have moved towards the restrictive doctrine. A report prepared by Sucharitkul[52] indicates that majority of States where the immunity aspect has been considered at some point or other favour the Doctrine of Restrictive Immunity. Harris[53] points out that most States adhering to the Doctrine of Restrictive Immunity belong to the West and that the former Soviet Union and most developing countries did not follow it. Nonetheless, in practice, these States do enter into bilateral agreements that permit the exercise of jurisdiction in cases where a commercial contract has been signed on the territory of another State party.[54] Following the disintegration of the USSR, the Doctrine of Absolute Immunity is, at present, being followed only in China and a small number of other developing nations. In countries where the law has remained uncodified, the restrictive doctrine has made much progress as a result of judicial pronouncements; however, immunity rules in these countries are not always harmonious.

Many commonwealth countries have adopted the Doctrine of Restrictive Immunity because "in practice, it has the advantage of providing a remedy for aggrieved

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51 Letter of the State Department's Acting Legal Adviser, Jack B Tate, Department of Justice, May 19, 1952, 26 Dep't St. Bull. 984 (1952).

52 4th Report on Jurisdictional Immunities of States and their Property, prepared for the ILC by Special Rapporteur, YBILC (1982) II-1, at p. 199.

53 DJ Harris, *Cases and Materials on International Law*, (5th edn) London (1998) at p. 307.

54 MM Boguslavsky, *Foreign State Immunity: Soviet Doctrine and Practice*, 10 NYIL (1979) at p. 167.

individuals while at the same time encouraging growth of trade and commerce."[55] Domestic legislations of a number of States are reflective of the fact that a majority of States has accepted the doctrine.[56] Acceptance of the restrictive theory is also mirrored in the firm recognition it received in the 1972 European Convention on State Immunity. The Convention put forward thirteen instances in which the defense of sovereign immunity would be denied. This was indicative of the Convention's desire to obliterate the Doctrine of Sovereign Immunity.[57]

It is worthwhile here to note the significant efforts of the International Law Commission (ILC) on the UN Convention on State Immunity. The latter culminated in the adoption of the United Nations Convention on Jurisdictional Immunities of States and their Property (UN State Immunity Convention).[58] According to the preamble of the draft convention, jurisdictional immunities of States and their property are generally accepted as a principle of customary international law. The proposed convention is supposed to enhance the role of law and legal certainty, particularly in the dealings of States with natural or juridical people. It also aims to contribute to the codification and development of international law along with the

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55 4th Report on Jurisdictional Immunities of States and their Property, prepared for the ILC by Special Rapporteur, YBILC (1982) II-1, at p. 161.

56 US Foreign Immunities Act 1976, the UK State Immunity Act 1978, the Singapore Immunity Act 1979, the Pakistan State Immunity Ordinance 1981, the South African Foreign Immunities Act 1981, the Canadian State Immunities Act of 1976 and the Australian Foreign States Immunities Act 1985.

57 AO Adede, *The United Kingdom Abandons the Doctrine of Sovereign Immunity*, 6 Brook. J Int'l L 197 (1980).

58 The General Assembly adopted the UN State Immunity Convention on December 2, 2004 and opened it for signature on January 17, 2005 for two years. It will enter into force thirty days following its thirtieth ratification (Article 30).

harmonization of practice in this area, taking into account developments in state practices.

The proposed UN State Immunity Convention would apply to the immunity of a State and its properties from the jurisdiction of the courts of another State. It also defines the restrictions to the right of immunity for a State entering into commercial activities. Such limits would cover, among other things, commercial transactions, employment contracts, personal injuries and damage to property, ownership of property, intellectual and industrial property, and participation in companies or other collective bodies. The draft convention would not affect State privileges and immunities accorded to diplomatic activities, which are traditionally granted immunity.[59] A detailed study of the Convention and its implications on the international arbitral process, where a State enters into an agreement to arbitrate, will be dealt with in the fifth chapter.

Today, the restrictive theory appears to be well established in common law. Many countries of the world have made distinctions between sovereign and non-sovereign activities of foreign sovereign States. While the sovereign activities of a sovereign State are not subject to judicial process in any country, the non-sovereign activities of sovereign States are, in some countries, subject to and controlled by the judicial process of that country.[60] The restrictive theory of sovereign immunity, thus, demands that when a State enters a market place or competes in a private capacity with other

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[59] http://www.un.org/News/Press/docs/2004/gal3268.doc.htm, last visited on July 16, 2006.

[60] *Halsbury's Laws of England*, (4th edn) Vol. 18, para 1548-1557.

actors engaged in commercial activities, it should not benefit from any immunity defense which the other actors, similarly situated, do not enjoy.

2.4 Sovereign Immunity and Arbitration

Arbitration is only one of the methods prescribed by the United Nations for the resolution of international disputes.[61] However, due to the strong participation of States and State-owned enterprises in international business, international commercial arbitration has emerged as the preferred option for the international trading community in dispute resolution. This is especially true when the private parties involved are short of confidence in the domestic courts of the territorial nations. As recourse, arbitration involving State parties has become a frequent issue before international arbitral tribunals.

Arbitration is, inherently, a private proceeding between the involved parties, and so one key advantage it offers is that the proceedings and the resultant arbitral awards receive little publicity – ensuring privacy for all concerned. The growing use of arbitration as a means of resolving such transnational disputes is, thus, primarily due to the many advantages that are to be derived from the arbitral process – principle ones being the neutrality of arbitrators, confidentiality of proceedings and flexibility of the arbitral process. Furthermore, the fact that the end result is an arbitral award that is legally binding and enforceable, adds much value to its worth as a meaningful conflict-resolution mechanism.

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[61] UN Charter, Cl VI, Art. 2, para 3.

The downside is that the State party may sometimes, with a view of preventing the enforcement of the arbitration agreement or the resultant award, invoke the Doctrine of Sovereign Immunity. Also, a substantial part of the disputes arriving before arbitral tribunals is related to investments involving private parties and governments of the developing countries, and it is not uncommon for these nations to insist on the submission of disputes only to their national courts.

The presence of a State as party to arbitration raises a number of concerns. Arbitration involving States may involve highly diversified issues, such as questions relating to the procedural aspects of the proceedings or the law applicable to the disputes. Beyond these issues, the issue of sovereign immunity may also be relevant at the time of enforcement of the agreement or in connection with the recognition and enforcement of an arbitration award.

Qualified deference towards sovereignty, as practiced by the Doctrine of Restrictive Immunity, bears the fundamental predicament of having to differentiate between the acts of a sovereign that incur liabilities and those that deserve protection. Therefore, when a State enters into an arbitration agreement for the settlement of a transnational commercial dispute, it becomes significant that two key aspects be examined – firstly, the extent to which such an agreement to arbitrate, in the absence of an express waiver of immunity, constitutes an implicit waiver of its immunity from the enforcement of the resultant award and secondly, its consequences to the arbitral process.

Arbitration derives its worth from the ease of enforcement of arbitral awards before national courts under both the New York Convention of 1958 and ICSID arbitration. Hence, the issue of immunity of States before these national courts assumes vital importance whenever an award is not complied with voluntarily. While civil law countries are still relying on case laws, common law countries like the UK and the US have enacted special legislations that deal with the immunity issue. For example, the US Foreign Sovereign Immunities Act (FSIA) was recently revised to eliminate a number of doubts that had arisen in the past few years with regards to its proper ambit and scope in recognition and enforcement proceedings with State parties.

According to Vibhute,[62] the generally accepted principle is that if, by entering into an agreement to arbitrate, a foreign State has waived any right to claim sovereign immunity, then it should follow that such waiver also extends to the enforcement of the arbitral award. It was opined that, otherwise, there would be little point to the arbitral process if the State against which the award was made could later avoid enforcement proceedings by yet another plea of sovereign immunity. However, other writers argue that since the refusal by a foreign State to honour an arbitral award could be viewed as a separate act by the State, the plea of sovereign immunity can be raised again as a defense in the enforcement proceedings.

The prevalent general perception of state immunity, among the international instruments in America, Europe and the Afro-Asian countries, is that an agreement by

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[62] KI Vibhute, *Waiver of State Immunity by an Agreement to Arbitrate and International Commercial Arbitration*, J Bus. L 550 (1998).

a State to arbitrate transnational commercial disputes implies a willingness to submit itself to the supervisory jurisdiction of the courts of another State. Accordingly, such an agreement is treated as an implicit waiver of state immunity from jurisdiction. States, commonly, take up the plea of sovereign immunity right from the stage of enforcement of the arbitration agreement and ultimately hold on to it till the enforcement of the award, if any is passed against it. It is, now, well accepted that the waiver of immunity is implicit in a State's agreement to arbitrate and is almost irrevocable.[63]

An equally important issue that arises is whether the implied waiver of immunity can be extended to the resultant award. This is relevant in the sense that most legal systems distinguish between the waiver of immunity from jurisdiction and the waiver of immunity from execution.[64] This fact is explicitly accepted in the Second Report on Jurisdictional Immunities of States and their Property.[65] This issue will be dealt with in detail in the fourth and fifth chapters.

Although the New York Convention provides for a general obligation to recognise as binding all foreign arbitral awards, there is some disagreement regarding its compliance. Some commentators are of the opinion that the text and *travaux preparatoires* of the Convention does support the position that a State, which has agreed to submit a dispute to arbitration, is required to comply with the resulting

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63 KI Vibhute, *International Commercial Arbitral Tribunal and Sovereign Immunity: Some Conceptual Reflections*, 3 CLJ 86 (1996).

64 Section 1610(a)(1) and Section (b)(1) of FSIA; Section 13(3) of SIA; and Article 23 of ECSI.

65 Doc A/CN.4/331 reprinted in YBILC, Vol. II, part 1 (1980) 199 at p. 209-210.

arbitral award and cannot plead immunity. A few others are of the view that where the question of enforceability of the award is concerned, it is necessary that the law of the country where the enforcement is sought be examined.[66] This seems logical because the courts of the country where enforcement is sought will eventually apply their own notions of sovereign immunity.

It can be seen, therefore, that even in cases where the restrictive approach is taken, rules may differ from jurisdiction to jurisdiction and many States follow their own codes. For example, in Switzerland no enforcement is allowed against a foreign State's property when there are no sufficient jurisdictional connections with Switzerland.[67] Similarly, France requires a link between the property to be attached and the claim.

There is, thus, no consensus with regard to whether an arbitral award can actually be enforced against a foreign State or its entities. As a consequence, in some cases, the agreement by a State to submit to arbitration may not imply its consent to jurisdiction of the courts of the State where enforcement is being sought or even its consent to the award's execution. Similarly, a State could object to the execution measures against its properties either as a provisional measure before an award is passed against it or even after the final award has been passed.

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66 Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards: the New York Convention of 1958*, London (2001) at p. 191.

67 *LIAMCO*, 20 ILM 151.

2.5 Conclusion

State immunity as a bar to the arbitral process has now almost disappeared and logically so, as a State's consent to arbitration must constitute a waiver of immunity, even though it is arguable whether such a plea has any relevance in the consensual arbitrational process. Yet, proceedings for the enforcement of an arbitration award are beyond the control of the tribunal and fall within the purview of national courts, where immunity can be raised as a plea against both jurisdiction as well as execution to prevent enforcement of the award. Sovereign immunity, thus, may still act as a bar against the forum court determining the legal responsibility of a foreign State and its actions.

The risk of the plea of sovereign immunity and the obstacles it presents in bringing claims before national courts may influence the decision to have recourse in international commercial arbitration. However, there will be little sense in engaging in an expensive arbitration, if the plea of sovereign immunity prevents the successful party from enjoying the fruits of the award. Linking of the arbitral process at the enforcement stage, whether at the provisional remedies or to the final awards, to the national courts makes the issue of sovereign or state immunity directly relevant. An effort will be made in the following chapters to study these issues and come up with practical solutions.

CHAPTER THREE

STATES IN THE INTERNATIONAL ARBITRAL PROCESS

3.1 Introduction

The last century has been a witness to multifold increases in international business. The hard work of nations across the world to globalise their economic areas has resulted in the dismantling of trade barriers and codification of new standards that facilitate international commerce. Hitchhiking on the back of this worldwide globalisation and economic liberalization, transnational trade and commerce between States has prospered beyond expectations following the elimination of inter-State trade barriers and expansion of international markets.

Contrary to the belief that the incidence of States being a party to commercial contracts would definitely be on the decline following globalisation and economic liberalization, the fact of the matter remains that the instances of States outsourcing the procurement of important infrastructure projects and specialised services to outside providers have steadily been on the increase. General trends have revealed extensive privatisation of State assets and continuous transition of businesses that had until recently been considered an inalienable part of State responsibility to the private sphere, for e.g., the utilities and natural monopolies. The conclusion of arbitration agreements involving State parties has, therefore, been a reasonably frequent occurrence and can be safely concluded to remain so.

A number of instances of arbitration agreements involve State parties on both sides these days.[1] A key contributory factor to this trend is the States' increasingly positive approach to arbitration as the preferred method for dispute resolution. Although few States have out-rightly prohibited its organs and agencies from engaging in arbitration, for e.g., France,[2] such prohibition is not expected to extend to the area of international arbitration. Yet, this cannot be taken to imply that domestic legislation, which sets out the separate legal status of any entity, can be ignored.

Cross-border investment has risen in recent times with many States concluding a number of bilateral and multilateral treaties on investment. Recent years have seen a rise in the number of Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs). These treaties usually allow foreign investors the option for arbitration where their rights as investors are infringed in certain matters ('investments'). However, pure breach of contractual claims, covered by the BIT, is not amenable to arbitration and may have to be determined under the dispute resolution provisions of the contract.[3]

It is natural that even in cases not covered by the BIT, foreign investors should prefer to have a State drawn into an arbitral proceeding even when the State is not, on the face of the contract, a party to the contract. The reason for this desire will be discussed in this chapter and an overall conclusion drawn that it is only in the rarest

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1 K-H Böckstiegel, *States in the International Arbitral Process*, in *Contemporary Problems in International Arbitration*, Julian DM Lew (ed), London (1987) at p. 40.

2 This is still the case in respect of domestic contracts, i.e., where the counter party is a French entity, but not in the case of international commercial contracts.

3 *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco*, (2003) 42 ILM 609; *SGS v Pakistan* and *SGS v Republic of the Philippines*, both available on the ICSID website, http://www.worldbank.org/icsid/cases/awards.htm.

of circumstances that a State can be made to take responsibility for the actions of its entities and vice versa.

3.2 State Practice in Submitting to Arbitration

Arbitration has come forward as the preferred dispute settlement mechanism in international business relations during the past few decades. This is proven by the fact that international arbitration has been more widely used by States for the settlement of their disputes in comparison to the International Court of Justice. Although a majority of the parties appearing in international arbitral processes are still private parties, the process has been and still continues to be used to growing extents by State parties too – the primary reason for this partiality towards arbitration being that States are, directly or indirectly, increasingly taking part in international trade and commerce, which had previously been the realm of private individuals.[4] Although most of these trade enterprises have legal personalities distinct from that of the State, they experience differing degrees of control from the State. For example, in socialist countries, foreign trade is the monopoly of the State and is part of the economic and legal national system while in the developing countries with principally private economy systems, a major part of foreign trade is reserved for the State and State-controlled corporations.

According to a statistical analysis of arbitration cases in recent years, there was an increase in the number of arbitrations involving State parties that were submitted to

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[4] K-H Böckstiegel, *States in the International Arbitral Process*, in *Contemporary Problems in International Arbitration* at p. 47.

the International Chamber of Commerce in the last five years. Although the number of arbitration cases relating to investment is much smaller when compared to the volume of international trade, the involvement of States is higher especially in the developing countries and socialist economies where the State is directly concerned with and, therefore, active in relation to foreign investors. As a State's involvement in commercial contracts can take on many forms in its standing as a contracting party, its commitment to an arbitration clause can occasionally lead to protracted disputes before arbitral tribunals and State courts.

An agreement to arbitrate in foreign investments involving States is found in two kinds of situations: firstly, there could be a BIT or FTA between the host State or the capital importing State and the capital exporting State, which may call for arbitration in case of disputes; secondly, there could be contracts between the host State and the investor that provide for arbitration.

There are several hundreds of Bilateral Investment Treaties between the Western countries and the developing nations, and most these treaties provide for arbitration as a means for settlement of disputes. Most of these treaties only provide for arbitration between States. However, direct arbitration between an investor and the host State is provided for under the Convention on Settlement of Investment Disputes between States and Nationals of Other States (1965) by the creation of an International Centre for Settlement of Investment Disputes (ICSID). Around 155 countries have, hitherto,

signed this convention out of which 143 States have deposited their instruments of ratification.[5]

International arbitration involving States usually entails the risks associated with the distinct status that a State could possibly claim by arguing immunity either against the jurisdiction of the tribunal or the enforcement of its award. In recent past, the legitimacy of allowing States or its entities to claim such a 'distinct' status during arbitrational proceedings with private parties has been challenged vociferously. Many contenders are of the opinion that according such special consideration to the State amounts to unfair competition and is without justification. Noticeably, in the field of arbitration of State contracts, the trend has increasingly been for the State party to be treated no differently from its private co-contractor. Indeed, as States become more frequently involved in commercial activities, special regimes for States and State-owned parties often appear unsustainable and incompatible with the requirements of international trade, which necessitates as a prerequisite that the agreements freely entered into by all parties concerned be respected.[6]

The claim to immunity by a State is a frequent issue in international arbitrations concerning States and State-owned entities. In addition to the plea of immunity, States are also sometimes said to disrupt proceedings bringing the entire arbitral process to a standstill. The reason, as put forward by Fox, is that States have a very different concept of arbitration as a means of resolving disputes. Expectations of a

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5 http://www.worldbank.org/icsid/constate/c-states-en.htm, last visited on July 16, 2006.

6 E Gaillard & J Edelstein, *Recent Developments in State Immunity from Execution in France: Creighton v Qatar*, 15 Mealey's Int'l Arb. Rep. 49 (2000).

State resorting to commercial arbitration differ very considerably from those of private parties also engaged in the same. Here, it may be prudent to remember that unlike the position of the private party who opts for the flexibility of the arbitral process as an escape from the strict requirements of litigation, arbitration in any form is for the State a loss of liberty and an acceptance of constraints from which it is otherwise free.[7]

Although this argument seems logical with regards to submission to the jurisdiction of the tribunal, it cannot however be said to be accurate as far as the tactics that a State may resort to for disruption of the proceedings are concerned – the employment of such tactics is not unique to arbitration involving States alone.[8] The reason for only instances of States resorting to such tactics coming to public light is that arbitration involving States is given much more publicity by private parties, a counter-tactic usually employed by them to compel States to come to a settlement for fear of losing future investments into the country. Practically speaking, any arbitration inevitably witnesses the disgruntled defendant attempting to circumvent proceedings, especially by challenging the jurisdiction of the tribunal.[9] For this reason, it is justified to opine that States can take up the plea of immunity, to which they are entitled to under national as well as international law.[10]

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7 Hazel Fox, *States and the Undertaking to Arbitrate*, 37 ICLQ 1 (1988) at p. 4.

8 Richard Boivin, *International Arbitration with States: An Overview of Risks*, 19 (4) J Int'l Arb. 285 (2002).

9 For a comparison of various arbitration cases involving states, P Lalive, *Arbitration with Foreign States or State-controlled Entities: Some Practical Questions*, in *Contemporary Problems in International Arbitration*, Netherlands (1987) at p. 289.

10 A Jan Van den Berg, *The New York Arbitration Convention and State Immunity*, in *Acts of State and Arbitration*, K-H Böckstiegel (ed), (3rd edn) Berlin (1997) at p. 41.

States attempt to challenge the arbitral process from the very outset of the proceedings if the *situs* of the tribunal is in its local jurisdiction, thus even precluding the tribunal from determining its jurisdiction in accordance with the principle of competence-competence.[11] This can be particularly more problematic if the local court rules that the agreement to arbitrate is null and void. The tribunal is, under such circumstances, faced with the predicament of whether to put an end to the entire proceeding or to proceed with arbitration disregarding the court order, thereby rendering an unenforceable award. This situation was aptly put into words by one author as "after all your efforts and success, you are left perplexed with an award that is worth no more than the paper on which it is typed."[12]

Therefore, the seat of arbitration becomes crucial when opting for arbitration with States as a means of dispute resolution. As appositely pointed out by an author,

> One of the ways that parties achieve maximal reduction of risk is by carefully negotiating the arbitral seat, understanding that this choice will carry with it a baseline of procedural fairness and a safety net of judicial intervention and review of arbitral awards.[13]

3.3 Effect of an Arbitration Agreement

One of the most important implications of a valid arbitration agreement is that it acts as a bar to court proceedings. Although state immunity is based on the principle that a sovereign may not be subjected to the jurisdiction of the courts of another State, the

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11 For a detailed discussion regarding the principle of competence-competence, *Fouchard, Gaillard, Goldman on International Commercial Arbitration,* E Gaillard & J Savage (eds), The Hague (1999) 650-660.

12 Hazel Fox, *States and the Undertaking to Arbitrate* at p. 41.

13 N Rubins, *The Arbitral Seat is No Fiction: A Brief Reply to Tatsuya Nakamura's Commentary,* "*The Place of Arbitration in International Arbitration: Its Fictitious Nature and Lex Arbitri*", 15 Mealey's Int'l Arb. Rep. 23 (2001) at p. 26.

generally accepted view is that a sovereign State is not immune to the jurisdiction of the arbitral tribunal, once it has entered an agreement to arbitrate. In effect, an agreement to arbitrate by the State has various consequences flowing from the date of agreement to the execution of the resultant award.

When a State enters into an agreement to arbitrate, the State or its entities usually rely on the plea of immunity from jurisdiction to avoid being a party to the arbitral proceeding. It is this plea of immunity by the State or its entities, which influences the private parties to have recourse in arbitration rather than any of the other available modes of dispute resolution. On the other hand, it may also be true that the confidentiality factor in arbitration, as pointed out by Fox,[14] is another reason for the otherwise unwilling State to agree to arbitration. Arbitration prevents the State from having to defend against its affairs being publicly decided by another State's legal system.

Various issues have to be considered to completely understand the full implications of an agreement by a State to arbitrate with private parties. Firstly, the issues of arbitrability of the disputes as well as the authority of the public officials to bind the State with a valid arbitration agreement may arise. A second issue that could arise is whether an agreement to arbitrate constitutes an implied waiver of immunity from jurisdiction. Thirdly, should the agreement to arbitrate imply a waiver of immunity from jurisdiction, the question that raises its head is whether the waiver of immunity can be extended to the enforcement and execution of a resultant award?

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[14] Hazel Fox, *States and the Undertaking to Arbitrate* at p. 41.

3.3.1 Authority to Waive

The initial problem that arises is regarding the arbitrability of the disputes involving States and the authority of public officials to bind their principle. The question, however, does not have an obvious and universal answer.[15] As pointed out by Delaume, "Too often, the issue is not fully explored at the outset and surfaces during arbitrational proceedings."[16]

The State party may argue, every so often, that it had never consented to arbitration – an issue that may require interpretation of the terms of the contract. The agreement to arbitrate by a State is usually sufficient to establish its consent to arbitration. However, there could be circumstances under which contracts or agreements entered between foreign investors or individuals and State parties or entities are not validly entered. It is, therefore, possible for the State to argue that since the official who represented the State party was not legally competent under the domestic laws or the statutes under which the entity was created, it is not bound by the agreement to arbitrate. Here, the question that arises is whether such an agreement to arbitrate binds the State or its entity? To put it another way, as suggested by Kahale,

> Does a state by relying on violations of, non-compliance with its law, constitutional or statutory, repudiate its consent to arbitration or can it be held to have waived immunity even when the contract had been entered by an incompetent official?[17]

It is common in investment agreements concluded between foreign investors and State entities for the investor to seek assurances from higher authorities of the host

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15 Georges R Delaume, *Transnational Contracts*, Charles E Stewart (ed), New York (1997), Chapter XIII, para 13.07.

16 Georges R Delaume, *Transnational Contracts*, Chapter XIV, para 14.02.

17 George Kahale III & Martias A Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 Colum. J Transnat'l L 211 (1979).

State. Writers, however, express opposing views on whether such agreements or assurances can legitimately bind a State. It has been argued that the mere presence of an arbitration clause is not sufficient to assume a waiver of immunity. An arbitration clause, although entered, will be considered *ultra vires* if the officials who entered the agreement lacked the authority under the constitution or laws of the State to submit to arbitration.[18] Therefore, such waiver of immunity cannot be assumed. According to an opposing point of view that has been expressed, it is objectionable that a State should be allowed the freedom to invoke its internal legal or constitutional prohibitions to deprive the private party of its legitimate contractual expectations, particularly so when the official representing the State had the authority to enter into the agreement in question or when the private parties concerned did not have the facility or opportunity to verify his official credentials. It is argued that should such a concession be granted to the State, it would not only lead to a violation of the doctrine of estoppel but also go against the spirit of *international ordre public*.[19] In actual fact, however, what has been observed is that 'an approval' does not amount to a 'personal guarantee' by the approving authority.[20]

The argument that State officials are legally bound to disclose the precise extent of their authority or competence to submit to arbitration and to bind the State under the contract, prior to entering into an agreement to arbitrate with private parties is

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18 M Sornarajah, *Problems in Applying the Restrictive Theory of Sovereign Immunity*, 33 ICLQ 661 (1982).

19 KI Vibhute, *Waiver of State Immunity by an Agreement to Arbitrate and International Commercial Arbitration*, J Bus. L 550 (1998).

20 See, for example, *SPP* and *Westland Helicopter* cases.

strongly advocated by arbitrators.[21] On the other hand, the counter viewpoint put forward by the courts that private parties ought to ascertain the validity of the consent given by such officials or entities to arbitrate is also understandable. As the matter of who among the two, the arbitrators or the courts, is correct in the above issue is still in doubt, it is in the best interests of foreign investors, as suggested by Delaume, to seek legal advice from a local counsel regarding the competency or authority of the contracting official before drafting any arbitration clauses.[22]

3.3.2 Waiver of Immunity by Agreement to Arbitrate

The plea of sovereign immunity could get in the way of smooth conduct of arbitrational proceedings and its outcome, even subsequent to the satisfactory resolution of the issues of arbitrability and authority to consent. This issue of immunity is compounded because of the lack of uniformity in rules and regulations among different jurisdictions.

States enter into agreements to arbitrate, just as private parties do, in the course of commercial transactions and it is now a well-accepted fact, as has been pointed out earlier, that sovereign immunity is not a bar to the jurisdiction of an arbitral tribunal. It is taken for granted that an undertaking to arbitrate is a waiver of immunity from jurisdiction of the domestic courts in compelling arbitral proceedings. As Wetter put it, "A possible consequence is the denial of the plea of sovereign immunity before the

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21 *Lahore Development Authority v Khalid Javed & Co*, 9 YB Com. Arb. 167 (1984) at p. 168.
22 Georges R Delaume, *Transnational Contracts*, Chapter XIV, para 14.02.

domestic courts which has supervisory jurisdiction over arbitration."[23] There is an overwhelming authority of decisions by international and domestic tribunals, treaty and statutory provisions found in the ECSI, and other similar statutes on state immunity, which are of the view that State party is precluded from asserting immunity in order to frustrate the purpose of the agreement.[24] These decisions, accordingly, treat the submission by a State of current or future disputes to arbitration as an implicit waiver of state immunity.[25] However, unlike SIA, FSIA and other statutes relating to immunity, there are clear provisions in the recent codification of the UN State Immunity Convention to compel enforcement of the agreement to arbitrate.[26] It is, therefore, justified that a State, which has agreed to submit disputes to arbitration, is not immune in the domestic courts related to arbitration.

It is equally significant that in denying the plea of immunity, the domestic court adheres strictly to the terms of the arbitration agreement in order to prevent the case from meeting with the same consequence as in *MINE v Guinea*.[27] In this case, which involved a Liechtenstein corporation and Guinea, the agreement provided for ICSID

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23 JG Wetter, *Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunal*, 2 J Int'l Arb. 7 (1985).

24 Georges R Delaume, *Transnational Contracts*, Chapter XIV, para 14.03 at p. 18.

25 KI Vibhute, *Waiver of State Immunity by an Agreement to Arbitrate and International Commercial Arbitration*, J Bus. L 550 (1998).

26 Article 17 of UN State Immunity Convention
If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:
(a) the validity, interpretation or application of the arbitration agreement;
(b) the arbitration procedure; or
(c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

27 *Maritime International Nominees Establishment (MINE) v Guinea*, 693 F.2d 1094 (D.C. Cir. 1982).

arbitration in case of disputes. However, when a dispute did arise, the parties were referred to arbitration under the auspices of the American Arbitration Association (AAA) and not ICSID by the District Court in an action meant to compel arbitration. Guinea challenged the award rendered by AAA before the Court of Appeal, which reversed the order of the District Court by holding that Guinea could not be compelled to arbitrate under AAA just because of its agreement to arbitration under ICSID in the contract. As pointed out by some, "by compelling arbitration before the AAA, the District Court had not preserved the integrity of the arbitration agreement but has clearly departed from it."[28]

All recent codifications on state immunity contain references to the agreement to arbitrate as an exception to immunity, although with considerable variations.[29] As pointed out earlier, consent to arbitration may be construed as a waiver of immunity from proceedings in the domestic courts dealing with the arbitration. Therefore, in view of this uncertainty on the proper extent of such waivers, some States have provided for an express waiver of immunity with regards to an agreement to arbitrate. For example, the UK State Immunity Act (SIA) does not provide for immunity with respect to proceedings in court that relate to arbitration. However, it also does not apply to arbitration between States.[30]

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[28] Christoph H Schreuer, *State Immunity: Some Recent Developments*, Cambridge (1988) at p. 73.

[29] For a detailed discussion on the effect of an agreement to arbitrate by States, see Christoph H Schreuer, *State Immunity: Some Recent Developments* at p. 63 *et seq*.

[30] Section 9 of SIA

(1) Where a State has agreed in writing to submit disputes which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of United Kingdom which relate to arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

In the United States, FSIA was enacted as the law governing action against foreign sovereigns in order to depoliticise the granting of immunity by the State Department in the US. FSIA initially did not contain a reference to arbitration and merely referred to the waiver of immunity, either expressly or impliedly. However, following the amendment of FSIA in 1988, all agreements to arbitrate have been considered as waivers of immunity.[31] Under FSIA, the US courts have jurisdiction only if the claim against sovereigns comes under one of the exceptions to the Immunity Act or under any applicable international agreement.[32] The following cases can be taken as examples to demonstrate the different stands that the United States courts have taken, within the ambit of FSIA, on the single subject of waiver of immunity in a variety of circumstances –

In *S & Davis Intern v Republic of Yemen*,[33] it was held that a foreign sovereign did not impliedly waive its sovereign immunity to jurisdiction in the United States courts by agreeing to arbitrate any dispute arising under the grain purchase agreement with a country which was a signatory to the Convention on the Recognition and

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[31] Section 1605 of FSIA
(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this Section or Section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

[32] *Saudi Arabia v Nelson*, 507 US 349.

[33] 218 F.3d 1292 (11th Cir. 2000).

Enforcement of Arbitral Awards while the foreign sovereign itself was not a signatory to the Convention. However, in this particular case, the court went on to hold that the foreign sovereign was not entitled to immunity under FSIA because it did actually arbitrate and engage in 'commercial activity'.[34]

In *Creighton v Government of Qatar*,[35] it was held by the US courts that the foreign sovereign had not demonstrated the requisite intent to implicitly waive its sovereign immunity to the suit brought in the United States by its agreement to arbitrate in France any contractual disputes with the contractor, hired to build a hospital in Qatar. Although France was a party to the New York Convention permitting the enforcement of foreign arbitral awards in the United States, Qatar was not.

Under FSIA, an agreement to arbitrate and have a judgement entered upon an award constitutes an express waiver of immunity. The US courts in the decision for *Sokaogon Gaming Enterprise Corp v Tushie-Montogomery Associates, Inc* championed this view.[36]

In the case of *Trans Chemical Ltd v China National Machinery Import and Export Corp*, an action by a Pakistani corporation for confirmation of an arbitral award against a Chinese corporation, which was an 'agency or instrumentality' of the Chinese Government, was upheld by the US courts. The courts arrived at the decision

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34 Section 1605(a)(6)(B) of FSIA.
35 181 F.3d 118 (C.A.D.C. 1999).
36 *Sokaogon Gaming Enterprise Corp v Tushie-Montogomery Associates, Inc*, 86 F.3d 656 (7th Cir. 1996).

that having contracted to arbitrate in the United States any claims arising out of a construction contract, the Chinese corporation and thereby the Chinese Government had waived its sovereign immunity.[37]

The European Convention on State Immunity (ECSI) denies immunity a propos proceedings which relate to the validity or interpretation of an arbitration agreement, the arbitration procedure and the setting aside of the award with respect to commercial matters, but does not apply to arbitration between States.[38] Similarly, the provision with regard to effect of an agreement to arbitrate according to the UN State Immunity Convention, which was adopted by the UN General Assembly in December 2004, is almost identical to the ECSI.[39] Legislations in other countries where sovereign immunity has been codified, such as South Africa, Pakistan and Singapore are almost identical to Section 9 of the SIA.

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[37] *Trans Chemical Ltd v China Natl. Machinery Import and Export Corp*, 161 F.3d 314 C.A. 5 (Tex.) 1998.

[38] Article 12 of ECSI

(1) Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to:
   (a) the validity or interpretation of the arbitration agreement;
   (b) the arbitration procedure;
   (c) the setting aside of the award, unless the arbitration agreement otherwise provides.

(2) Paragraph 1 shall not apply to an arbitration agreement between States.

[39] Article17 of UN State Immunity Convention

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity, interpretation or application of the arbitration agreement;
(b) the arbitration procedure; or
(c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

3.3.3 Territorial Link and Waiver

The exception to waiver is generally narrowly construed. An agreement to arbitrate may well be sufficient to constitute an implicit waiver of sovereign immunity. However, there seems to be no general consensus on the question whether a domestic court can assume jurisdiction over an arbitral proceeding, which does not have territorial link or contact with the forum State. Conversely, can a State by agreeing to submit disputes to arbitration be deemed to have waived immunity irrespective of the forum where the action is to be brought?

This controversy is limited only to non-ICSID arbitration. The underlying reason, as rightly pointed by Delaume,[40] is twofold. Firstly, the ICSID machinery excludes intervention by domestic courts at all levels of the proceedings. And secondly, the obligation imposed upon the courts of the contracting States removes jurisdictional consideration from the process of recognition of an award.[41] By cancelling out the very involvement of domestic courts from the entire arbitral proceeding, ICSID arbitration is able to effectively circumvent the above-mentioned controversy entirely.

Under the US FSIA, the waiver of immunity is implicit "…where a foreign State has agreed to arbitration in another country."[42] The matter of whether the waiver of immunity by a State is implied as long as the seat of arbitration is outside the territory of the State party to the arbitration agreement under FSIA is, however, open to interpretation. This vague reference to arbitration in the provision relating to implied

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40 Georges R Delaume, *Transnational Contracts*, Chapter XIV, para 14.03.
41 Article 54 of ICSID.
42 Section 1605(a)(1) of FSIA.

waiver of immunity under FSIA has led to some uncertainty. Private parties to arbitration agreements have, as a result, tried to exploit this situation repeatedly by asserting that such an arbitration clause allows US courts the jurisdiction to try their claims.

The first case that considered this issue was *Verlinden BV v Central Bank of Nigeria*.[43] Here, a foreign company sued a foreign sovereign State in the United States as a result of a failed cement contract. The issue was whether an alien *prima facie* domiciled abroad could sue a foreign sovereign State in the United States. The court held that although the private party had the right to sue, it had failed to show sufficient direct effect of the commercial activity in the US to command jurisdiction under FSIA. The court also opined that such undertaking by foreign States to submit to arbitration within the framework of the International Chamber of Commerce (ICC) in Paris was not sufficient basis for the assumption of waiver of immunity from jurisdiction. This decision was followed in a number of subsequent cases.[44]

However, another interpretation was given to this issue in *Ipitrade Int'l, SA v Federal Republic of Nigeria*.[45] In this case, the court held that Nigeria's agreement to ICC arbitration in Paris was according to Swiss law a waiver of immunity under FSIA, since the ICC award in the case was subject to the New York Convention. This view

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43 647 F.2d 320 (2d Cir. 1981).

44 *Ohntrup v Firearms Centre Inc*, 516 F Supp 1281 (ED Pa 1981); *Chicago Bridge v Islamic Republic of Iran*, 506 F Supp 981 (ND III 1980); *Birch Shipping v The Embassy of United Republic of Tanzania*, 507 F Supp 311 (D.D.C. 1980).

45 465 F Supp 824 (D.D.C. 1978).

was endorsed by the Department of State as *amicus curiae* brief in *LIAMCO*,[46] where an agreement on the seat of arbitration in a country that is party to the New York Convention, albeit outside the United States, constitutes a waiver of immunity.

Some writers have criticized the court's reasoning in *the Ipitrade case* on the grounds that an arbitration clause entered into by the parties involved, not anticipating the United States as the *situs* for the proceedings, does not meet due process standards.[47] However, there is also an overwhelming authority who argue that the interpretation in *the Ipitrade case* is the one which is to be preferred.[48] The amended provision in FSIA does not solve this problem, as it does not deal with situations where the award is rendered in a country outside the United States with which it does not have a treaty commitment. The net effect is that any award is unenforceable in the US unless there is jurisdiction of the United States courts.[49]

The Australian FSIA is clearer in the sense that no nexus is required between the forum State and seat of arbitration for the enforcement of an award.[50] However, the UK State Immunity Act, Section 9(1) is ambiguous in this regard and it could be argued that the local courts have supervisory jurisdiction over any arbitration for which a State has consented to arbitration. Taken in its widest sense, it could also be

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46 *Libyan American Oil Co v Socialist People's Libyan Arab Jamahiriya*, (1981) 20 ILM 161.

47 George Kahale III & Martias A Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 Colum. J Transnat'l L 211.

48 Georges R Delaume, *Sovereign Immunity and Transnational Arbitration*, in *Contemporary Problems in International Arbitration* at p. 313; Gary B Sullivan, *Implicit Waiver of Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits*, 18 Tex. Int'l LJ 329 (1983).

49 Georges R Delaume, *Transnational Contracts*, Chapter XIV, para 14.03.

50 Section 17(2) of Australian FSIA, which states expressly that a State is not immune.

argued that consent to arbitration anywhere in the world will be deemed as consent to enforcement of the arbitral award by the English courts.[51]

In some countries, where the law remains uncodified, the courts have held that submission to arbitration constitutes a waiver of immunity.[52] However, it is not clear whether waiver would apply regardless of the nexus between the forum State and seat of arbitration. The recent UN State Immunity Convention is clearer and removes any ambiguity in this regard, specifying that a State cannot invoke immunity from jurisdiction before the courts of another State, which is "otherwise competent",[53] in a proceeding that relates to the validity, interpretation or application of the arbitration agreement, the arbitration procedure, or the confirmation or the setting aside of the award.[54]

The above analysis goes to show that although the usual State practice is to recognise the agreement to arbitrate as an exception to immunity, the scope of such exception may vary significantly from one State to another. It is now settled that an agreement to arbitrate constitutes a waiver of immunity and that such waiver of immunity is in direct contravention to immunity of jurisdiction to arbitrators as well as to the domestic courts handling ancillary issues regarding arbitration. However, the issue of such waiver extending to the execution of the resultant award is still an unresolved

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51 Hazel Fox, *Sovereign Immunity and Arbitration*, in *Contemporary Problems in International Arbitration* at p. 323; Hazel Fox, *The Law of State Immunity*, Oxford (2004) at p. 271.

52 For example, this is the case in Netherlands and France.

53 The commentary to the Article 17 of UN State Immunity Convention states that choice of the territory of the forum State as the seat of arbitration or the location of the assets or its law as the applicable law has appropriate jurisdictional connection.

54 Article 17 of UN State Immunity Convention.

one in international arbitration. The allegation is that the sovereign immunity defense negates some of the benefits of arbitration. Some writers argue that by refusing to recognise or enforce an arbitration agreement or award foreign governments will be able to deprive the arbitrational proceedings of any practical importance, until the issue of foreign sovereign immunity is resolved. As Fox put it, "Immunity although not directly bar to arbitration, special status of the States and its entities makes it mandatory to require consideration at every stage of arbitration." It is the general opinion of many writers that ratification of the UN State Immunity Convention should be able to resolve these issues by providing a uniform norm globally.

3.3.4 Commercial Activity Exception and Arbitration

With the emergence of the Doctrine of Restrictive Sovereign Immunity, the shield of immunity became restricted merely to governmental or public acts (*jure imperii*) and its extension to commercial activities (*jure gestionis*) of a State or its entities was brought to an end. However, development of a clear distinction between acts of a State that were commercial in nature and those that were public in disposition became a considerable problem for the courts and tribunals. This distinction was significant not only for the meaningful application of the Doctrine of Restrictive Immunity but also because it would help delineate the situations where a court could treat the State as a normal litigant rather than granting it the status of a sovereign.

The courts developed the 'purpose test' as a guide for determining whether any State activity was commercial or public in spirit, before the codification of the various

immunity acts. The purpose test tries to shed light on the nature of any State activity by taking into consideration the purpose of the transaction, its nature and subject matter. The test clarifies *jure imperii* as those acts, which have a 'public purpose'. For example, purchase of shoes for the army is considered a sovereign function, thus, is for a public purpose.

The purpose test has its own shortcomings, however, as each country views trade differently. Many socialist and developing countries, where foreign trade is the monopoly of the State or State-owned corporations, consider trade to be a sovereign function, thus, allowing all activities to be carried out in the name of the sovereign as public acts, including the State's commercial activities. Under such logic, all acts could be construed to be for a public purpose by certain States, making immunity absolute in their case and, in effect, rendering the 'purpose test' non-practical.

An attempt was made in *the Victory Transport case* to draw a distinction between *jure imperii* and *jure gestionis* using the 'purpose test'. The court came up with five categories to which cases of 'public acts' could be said to belong, namely, (1) internal administrative acts, such as expulsion of an alien, (2) legislative acts, such as nationalization, (3) acts concerning the armed forces, (4) acts concerning diplomatic activities, and (5) public loans. These criteria, which were set out in *the Victory Transport case* to tell apart governmental acts of different natures were followed by a majority of the courts till statutes relating to immunity were codified.[55]

[55] *Aerotrade Inc v Republic of Haiti*, 376 F Supp 1281 (S.D.N.Y. 1974), where the subject matter of the transaction based on which the cause of action arose involved military equipment, even though

FSIA was the first statute to be enacted in order to standardise the law relating to immunity. It set forth the law that was to be used for resolving questions on sovereign immunity that were being raised by foreign States and their entities before the domestic courts.[56] FSIA purported to codify the principle of restrictive immunity as recognised under international law.[57] Accordingly, the nature of the goods or services, procured via a contract but to be used for a public purpose, was deemed irrelevant. Instead, it was the commercial nature of the activity or transaction that was considered crucial. The same approach has been adopted in the codification of immunity statutes of other countries as well. This approach virtually nullifies the argument raised by the State of Nigeria, in the case of *Texas Trading and Milling Corp v Federal Republic of Nigeria*, regarding its purported intent for using the purchased material for military purposes.[58] Some writers have come up with new tests to make up for the inadequacies regarding the definition of 'commercial activity' in the purpose test while others have argued that "what should be looked into is not the overall scope of government entity nor its profitability but whether particular transaction involved was carried out for remuneration."[59]

The implications of the commercial activity exception are seen to a greater extent in arbitration rather than in the legal actions of courts, even though the issue of

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Haiti used these equipment for non-military purposes; *Isbrandsten Tankers, Inc v President of India*, 446 F.2d 1198 (2d Cir. 1971), where application of the test indicated that a contract for grain was commercial, but immunity was granted because the State Department recommended it.

56 25 ALR 3d 322 (1980) at p. 366.

57 Section 1603(d) of FSIA.

58 *Texas Trading and Milling Corp v Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); *National American Corp v Federal Republic of Nigeria*, 597 F.2d 314 (2d Cir. 1979).

59 Michael G Cosby, *Commercial Activity under the Foreign Sovereign Immunity Act 1976: Towards a More Practical Definition*, 34 Baylor L Rev. 295 (1985).

commercial activity crops up before both the tribunal and the courts at every stage of the proceedings. This is because the norm of 'commercial transaction' is a basic criterion for the determination of the nature of a transaction in a plea for immunity. As a majority of the arbitration cases involving States and private parties involve commercial transactions, some of the statutes codifying arbitration as an exception to immunity restrict immunity to public transactions.

For example, the ECSI refers to arbitration of a 'civil or commercial matter'.[60] Likewise, the initially adopted International Law Commission's (ILC) Draft Convention on State Immunity had an expression similar to that of the ECSI, i.e., 'commercial contract' and 'civil or commercial matter'. Although some States were in favour of this broader definition,[61] other socialist and developing countries had reservations against it. And so, furnishing this definition with such a wide scope did not succeed. The ILC, finally, decided to limit non-immunity to arbitration in relation to commercial transactions. Similarly, the United Nations Convention on State Immunity also limits non-immunity in arbitration to differences relating to a 'commercial transaction'.[62] However, at the insistence of the United Kingdom, an Annexure was added to the UN State Immunity Convention containing a clarification with reference to Article 17, which states that the term 'commercial transaction' includes 'investment matters' as well. The SIA and Australian Acts, meanwhile, do

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60 Article 12 of ECSI.

61 United Kingdom, Australia and some other countries were in favour of this. For detailed comments, see YBILC, Vol. II, part 1 (1988) at p. 96.

62 Article 17 of UN State Immunity Convention.

not contain clauses expressly limiting the arbitration exception to commercial activity.

A view has been expressed that provisions not containing references to 'commercial activity' are preferable.[63] The reason put forward in support of this argument is that "the rationale of denying immunity in cases involving agreement to arbitrate is consent and should not be combined with other exceptions."[64] On the other hand, it could also be argued that the approach taken by the UN State Immunity Convention on the subject matter of the jurisdictional immunities of States and their properties should be favoured since it is in consonance with the Doctrine of Restrictive Immunity, and so preserves the strict application of immunity to *jure imperii* or public acts. The definition of 'commercial transaction' in the UN State Immunity Convention is proof that it too recognises the commercial activity exception in sovereign immunity.

In determining whether a contract or transaction is a 'commercial transaction' under paragraph 1(c) of Article 2 of the UN State Immunity Convention, reference should be made primarily to the nature of the contract or transaction. However, its purpose should also be taken into account if the parties to the contract or transaction have so

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63 Christoph H Schreuer, *State Immunity: Some Recent Developments* at p. 69; Claudia Annacker and Robert T Greig, *State Immunity and Arbitration*, ICC Int'l Ct. Arb. Bull., Vol. 15, No. 2 (2004) at p. 70.

64 Christoph H Schreuer, *State Immunity: Some Recent Developments* at p. 69.

agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.[65]

Thus, commercial activity clauses, I would opine, convince States to consent on arbitration as a means for resolving disputes or differences that may arise with private parties. The other reason why this approach should be preferred is that the issue of commercial activity could arise at different stages of arbitration, such as the stages of enforcement or setting aside of awards and ultimately, at execution of the awards. For this reason, it would be meaningless to have different standards for different stages of the same proceeding intended to make an award unenforceable.

3.4 States and Immunity in Arbitration

As discussed earlier, it is now well established that the plea of immunity from jurisdiction is no longer available in arbitrational proceedings for the reason that consent to arbitrate is today considered a waiver of immunity from jurisdiction. However, the State can claim the plea of immunity at the stage of execution, all the same, seeing that the principle of immunity is inherent in the very nature of States, implying that States may invoke the shield of sovereign immunity whenever available to it. In his paper regarding arbitration with States, Prof. Dr. Karl-Heinz Böckstiegel summarized the issue of immunity in the following terms,

> As far as international commercial arbitration is concerned, arbitral tribunals and courts may decide on immunity in a different way with regard to, on one hand, the question whether a state party may not have to enter into an arbitration procedure due to its immunity and, on the other hand, whether that same state party may not be subject to enforcement of an arbitral award due to its immunity. Also, it may make a difference whether the state corporation has a

[65] Article 2(2) of UN State Immunity Convention.

separate legal personality from the state or not. And even if it does have a separate legal personality, it may make a difference whether it is a corporation in public law or a corporation in private law. And finally it may make a difference whether the contract and the arbitration only concerns commercial activities (*acta jure gestionis*) or whether it also deals with acts of public authority (*acta jure imperii*) as may often be the case in investment disputes.[66]

The courts have addressed this issue and seem to have embraced the traditional distinction between commercial acts, thus limiting the enforcement of awards to against only those State assets that have been used for commercial purposes. Sovereign assets are accordingly immune from enforcement actions unless the State at issue can be said to have waived immunity from execution.[67] Some writers have also expressed the view that parties to a contract should include a stipulation regarding waiver of immunity to execution.[68] However, verdicts of the courts on this matter have indicated a split in opinion. For example, decisions of the Court of Appeal in France have shown that even explicit waiver of immunity to execution does not guarantee enforcement of an arbitral award.[69] In a contrasting judgement, the Court of Cassation held that by virtue of entering into arbitration and accepting to submit arbitration under the rules of the International Chamber of Commerce (ICC), a State is deemed to have waived its immunity from execution. Even though some have hailed this decision as a "major step forward in ensuring the enforceability of arbitral

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66 K-H Böckstiegel, *The Legal Rules Applicable in International Commercial Arbitration Involving States or State-controlled Enterprises*, in *International Arbitration: 60 Years on a Look at the Future*, Paris (1984) at p. 117, 145 *et seq.*

67 This is the case in Austria, England, Germany, France and the United States [see, generally Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 5-41 at §10-58, (3rd edn) London (1999)].

68 Georges R Delaume, *State Contracts and Transnational Arbitration*, 75 Am. J Int'l L 784 (1981) at p. 817.

69 *Ambassade del la Fédération de Russie, et al v Compagnie NOGA d'Importation et d'Exportation*, 1 Rev. Arb. 116 (2001), also known as *the NOGA case*.

awards in France,"[70] others have accused it of being "unconvincing and far fetched."[71] A detailed discussion on the correctness and implication of this decision will be dealt with in chapter four.

3.4.1 State and State Entities in Arbitration

The dilemma of a State's involvement in disputes under the framework of international arbitration, arising from disagreements between foreign investors and State entities, is not a recent one. In fact, the number of case laws that have dealt with countless aspects of this issue is quite enormous.

On many occasions, State entities have tried to escape their contractual obligations by arguing that the breach in contract was a result of the State's conduct in exercise of its sovereign power. The abovementioned contention was proved true in the case of *Jordan Investments Ltd v Sojusnefteksport*,[72] where the arbitral tribunal held that the entity was a separate legal personality from the Soviet State and that measures taken by the State had a *force majeure* effect on the entity. This proposition was reiterated in *Czarnikow v Rolimpex*,[73] where, in a contract for the sale of sugar by a Polish entity, Rolimpex, both arbitrators and the courts held that the State entity was not responsible for the export ban imposed by the sovereign. In a subsequent case,

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70 E Gaillard & J Edelstein, *Recent Developments in State Immunity from Execution in France: Creighton v Qatar*, 15 Mealey's Int'l Arb. Rep. 49 (2000).

71 N Meyer-Fabre, *Enforcement of Arbitral Awards against Sovereign States, A New Milestone: Signing ICC Arbitration Clause entails Waiver of Immunity from Execution held French Court of Cassation in Creighton v Qatar, July 6, 2000*, Mealey's Int'l Arb. Rep. 48 (2000).

72 ILR 27 (1963) 631.

73 (1979) AC 351.

Cubazucar v IANSA,[74] involving contract of sale of sugar under similar circumstances, the Court of Appeal held that as the contract had been frustrated by the abrupt termination of commercial relations, it could see no reason to distinguish it from *the Rolimpex case*.[75] The same question also came up for decision in *SPP v Arab Republic of Egypt*,[76] where SPP contended that there was an essential governmental identity between EGOTH and the Egyptian State. However, the French court held that EGOTH was a separate legal person from that of the State and hence, Egypt was not bound by the arbitration clause concluded by the instrumentality.

Thus, it can be seen that the identity between States and its entities has always been a central issue in international arbitration involving States. This is, on the other hand, not an issue in arbitration under ICSID because of the specificities of the ICSID Rules. Articles 4 & 5 of the ICSID Rules, concerning arbitration of States, stipulate that any State organ will be considered as an Act of State under international law.

3.4.2 State-owned Entities: Arbitration and Immunity

Under the theory of absolute immunity, the valid criterion for immunity of an entity is its identity with the foreign State – the stronger the independence of the entity the weaker its chance of claiming sovereign immunity. With the acceptance of the restrictive theory of immunity, when a State entity with a separate legal personality is party to arbitration, court decisions and academic writings are to the effect that the State and its wholly owned or controlled enterprises consider themselves to be

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74 ILR 64 (1983) 195.
75 It is to be noted that in spite of this, the court found in favour of *IANSA* on other grounds.
76 22 ILM 752.

functionally the same, whether a State is seeking immunity from jurisdiction or from execution against State-owned property, so that the activities of State enterprises are considered to be carried out by the State in its exercise of sovereign authority. Hence, no immunity can be claimed with respect to *jure gestionis* or commercial activities of the State.[77]

In contrast, when considering immunity from enforcement of the award, findings of an international research study conducted by the Institute of International Business Law and Practice of the International Chamber of Commerce[78] indicate that the claim of immunity may sometimes be accepted once enforcement of the award against the State party is at stake. The reasoning for this seems to be that enforcement is more of an interference with the right of a State and that submission to arbitration may be treated as no more than a waiver of immunity vis-à-vis the arbitrational proceedings.

English courts followed this approach before the enactment of SIA and decisive factors, such as incorporation and the degree of government control, were considered at the time of granting immunity. This structuralist approach is best illustrated in *the Trendex case*,[79] which is regarded as the beginning of a leaning in English practice towards the restrictive approach, even prior to the enactment of SIA. Thus, the issue of whether an entity merited immunity depended on whether it was established for the purpose of sovereign function and not on the sovereign or commercial nature of the

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77 Christoph H Schreuer, *State Immunity: Some Recent Developments* at p. 137 *et seq*.

78 K-H Böckstiegel, *Arbitration and State Enterprises: Survey on the National and International State of Law and Practice*, Deventer (1984).

79 (1977) Q.B. 529.

particular transaction that gave rise to the claim.[80] The pre-FSIA approach in the United States courts was also structuralist, with clear emphasis on the status of the entity. Although the general object and purpose of the entity were also taken into account, the general tendency was to deny immunity to State entities.[81]

Following the adoption of the restrictive approach of immunity, the status of the entity lost its importance altogether. A State entity, even though it had a separate legal entity, was granted immunity only if the transaction was governmental in nature. Hence, the decisive factor was no longer the status of the entity, but whether the transaction that gave rise to the claim was of governmental or private nature.

The European Convention on State Immunity[82] and the UK State Immunity Act 1978[83] proceed from a structuralist standpoint qualified by the functional test. Agencies and instrumentalities are accepted under the definition of 'State' if they do not possess distinct legal personalities. However, immunity is, in actual practice, granted to separate legal entities if it is shown that these entities perform sovereign functions. Thus, although the presumption is against the sovereign status and hence, against the granting of immunity to an entity which possesses a separate legal personality, this resistance to the granting of immunity to State entities can be overcome by demonstrating that the particular act or omission giving rise to the claim was performed in the exercise of a sovereign function.

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80 KW Wedderburn, *Sovereign Immunity of Public Corporations*, 6 ICLQ 290 (1976).
81 PJ Kincaid, *Sovereign Immunity of Foreign State-owned Corporation*, JWTL 10 (1976) 110 at p. 113.
82 Article 27 of ECSI.
83 Section 14(1) of SIA.

It is interesting to note that US FSIA,[84] the Australian Immunity Act[85] and the UN State Immunity Convention[86] eliminate investigations into the legal status of any entity, thus relieving the burden of laborious investigations into this matter for the courts and tribunals. Instead, the emphasis is placed on the act of the entity in any particular case, thus making same the criteria for determining immunity for both States and State entities. This seems practical and should be preferred. It is also consistent with the recent UN State Immunity Convention, which defines the term 'State' to include, *inter alia*, "agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State."[87] According to this definition, a legal action or arbitration commenced against a State agency, enterprise, or instrumentality would be considered to be against the State itself. This view finds support in the work of Schreuer, where he discusses the different roles of State entities.[88]

However, this does not dispose off the issue of sovereign immunity when a State enterprise is a party to international arbitration. In the approach taken in the quoted UN State Immunity Convention, the definition appears to be functional rather than structural, given the use of the phrase "to the extent that." Thus, no matter what the status of the State agency, instrumentality, or enterprise vis-à-vis the State, so long as

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84 Section 1603 of FSIA.
85 Section 3(1) of Australian FSIA.
86 Article 2(1)(b) of UN State Immunity Convention.
87 Article 2(1)(b) of UN State Immunity Convention.
88 Christoph H Schreuer, *State Immunity: Some Recent Developments*, Chapter V at p. 92 *et seq*, where he says that almost all recent codifications on state immunity show clear trends of a functionalist approach.

the enterprise "is entitled to perform and is performing acts in the exercise of sovereign authority of the State,"[89] it can invoke sovereign immunity as the State.[90]

The issue involved in whether a State can be made responsible for the action of its entities in international arbitration cases is different from that in BIT cases.[91] The difference lies in the fact that in case of the former, an attempt to require the State to take legal responsibility for the acts of its entity can be successful where there is a substantial identity between the State and its entity or where there is any contractual assumption of these obligations. In contrast, under the provisions of BITs, the obligation may come into force on the basis of a much less stringent test, even where the entity is merely controlled by the State through a substantial share holding.

3.4.3 State's Liability for Conduct of its Instrumentality

The significance of examining whether execution can take place against a State for the conduct of its instrumentality is directly linked to the principles governing sovereign immunity, whether from jurisdiction or from execution. Evidently, the immunity enjoyed by States, regarding both the immunity from jurisdiction as also enforcement, is now considerably reduced than before. It is no longer accepted that State property used for commercial purposes is immune from execution.

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89 Article 2(1)(b)(iii) of UN State Immunity Convention.

90 AFM Maniruzzaman, *State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends*, Disp. Resol. J 77 (2005).

91 *Salini Costruttori SPA and Italstrade SPA v Kingdom of Morocco,* (2003) 42 ILM 609.

The notion of instrumentality is far more problematic where determination of State liability is concerned. This is because the issue of whether a State entity is an organ or instrumentality of the State needs to be determined in accordance with the internal laws of the State concerned. Should the entity be found to be an instrumentality, the predicament then shifts to whether the State in question should be regarded as party to the arbitration agreement. Awards in these cases have to deal with the issue of whether a State should be held liable for the conduct of its instrumentalities, even though it was never a party to the contract.[92]

This problem of a State's liability for the conduct of its instrumentality is compounded by the issue of whether a State can be made a party to an arbitration agreement under the theory of alter ego, agency, estoppel, or a similar legal theory. The problem crops up mainly in cases where the State is a participant, not in its own name, but in the name of a political subdivision, an agency, legal entity of public law or any other subset of the State apparatus, either as an integral part thereof or as an entity which according to the internal legislation of that country qualifies as a legal entity under public law (i.e., regional municipality).

The matter of determining a State's liability may become more complicated under extraordinary circumstances. For instance, the State may frequently set up legal entities of private law, for e.g., wholly or partially owned companies limited by

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[92] See, for example, recent cases such as *Capital Power Mauritius I and Energy Enterprises (Mauritius) Company v Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board and the State of Maharashtra*, ICC Case No. 1293, final award dated April 27, 2005, available at http://ita.law.uvic.ca/documents/Dabhol_award_050305.pdf. (last visited on January 7, 2006) and *Svenska Petroleum Exploration AB v Government of The Republic of Lithuania, AB Geonafta*, (2005) WL 3027194 [Q.B.D. (Comm. Ct)].

shares. In other cases, several different States could be contracting using the same entity as vehicle, which could lead to doubts as to which State should be made party to the arbitration. To make matters worse, the issue of sovereign immunity could also crop in. Here, it is worth pointing out that the question of whether an agreement to arbitrate by a State entity can bind a State or States is the same, irrespective of the fact that the entity is owned by a single State or multiple States. Another facet could be added to this problem in situations where an entity of public or private law, which cannot directly be regarded as an emanation or instrumentality of a State, has entered into an arbitration agreement. The issue of determining whether the State can be made a party to the arbitration in such scenarios can be especially challenging.[93]

Matters of pure contractual interpretation could also arise, for e.g., whether the State by participating in a certain way in the process of development and implementation of a certain business venture intends to become bound as a party to the contract incorporating the arbitration clause. The answer is, as a rule, obviously negative. Nonetheless, this has not prevented lengthy litigation with conflicting results.

A majority of arbitration cases involving State parties and private individuals involves investment contracts. In almost all cases, the disputes that arise between States and State-owned entities are similar to those seen between private parties. In a few cases, however, disputes have been distinctive, where they were related to the relationship between the State and the State entity.[94] In case of States, the scope of an

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93 *Bridas SAPIC v Government of Turkmenistan*, 315 F.3d 347.

94 George Rosenberg, *State as Party to Arbitration*, Arb. Int'l, Vol. 20, No. 4, at p. 387.

arbitration clause signed by a separate legal entity has been extended to the State and vice versa. This is a question that has been considered on occasion and decided in actual practice.

3.4.4 Extension of Arbitration Agreement by State-owned Entity to the State

The establishment of a State's liability for the conduct of its entity presupposes that the State is a party to the arbitrational proceedings. In most cases, it is the State entity and not the State that has entered into the contract containing arbitration clauses with the private party. Attempts are made, in such cases, then to include the non-signatory State into the arbitrational proceedings. This can, however, be unsuccessful on occasion. The following case studies illustrate the prominent issues that have arisen in agreements between private parties and various State-owned or controlled enterprises and the decisions that the courts and tribunals have arrived at –

The famous *Pyramids*[95] and *Westland*[96] cases dealt with the abovementioned situation. *The Pyramids case* involved a contract concerning the construction of two tourist centres, one of which was to be established in the proximity of the Pyramids. The contract was concluded between a Hong Kong company (SPP) and an Egyptian State-owned entity (EGOTH). The contract included an ICC arbitration clause and contained, in addition to the signatures of the parties, the words "approved, agreed

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95 *SPP (Middle East) Ltd, Southern Pacific Properties Ltd v Arab Republic of Egypt General Company for Tourism and Hotels*, ICC Award No. 3493, February 16, 1983 and the subsequent decisions of the Paris Cour d'appel (1984) 23 ILM 1048 and the Cour de Cassation, January 6, 1987, (1987) 26 ILM 1004.

96 *Westland Helicopters Ltd v Les Emirats Arabes Unis, le Royame d'Arabie Saudite, l'Etat de Qatar and the Arab Organization for Industrialization*, ASA Bull., April 19, 1994 and subsequent Geneva and Swiss Federal Court decisions, (1989) 28 ILM 687.

and ratified" followed by the signature of the Minister for Tourism of Egypt. Following the scuttling of the project by Egyptian authorities, SPP initiated arbitrational proceedings against both the Egyptian State-owned entity and the State of Egypt itself. The Egyptian State opposed jurisdiction invoking the argument that it had not become bound to the arbitration agreement entered upon by the Egyptian Minister as a consequence to the above-quoted confirmation. The Egyptian State pleaded sovereign immunity and alleged that it never waived its immunity of jurisdiction. However, the tribunal found that it had jurisdiction and ordered the Egyptian State to pay damages to the Hong Kong claimant.

Subsequently, Egypt brought an action in Paris to have the award annulled, in which it was successful. The Court of Appeal found that the words "approved, agreed and ratified" should be understood only as an approval of the project by the relevant government authorities and not as an accession to the contract by the State as a party. The court held that the fact of defending the case on its merits before a court, after having raised its lack of jurisdiction, couldn't imply waiver of the jurisdictional defense.[97] The decision of the Court of Appeal was challenged before the Court of Cassation by SPP, which proved unsuccessful.[98] Nevertheless, it should be noted that the legislative act by the Egyptian Government would have been an act of *force majeure*, depriving the investor of remedy, if the State were not a party to the contract.

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97 (1984) 23 ILM 1048.
98 (1987) 26 ILM 1004.

Interestingly, in an ICC case involving Libya,[99] the arbitral tribunal followed the precedent set in *the Pyramids case* and held that the terms "approved and endorsed" could not be assumed to constitute consent by the State to be bound by the contract, including its arbitration clause, but only as an official authorisation indicating the go ahead for the project. It thus, made clear that a State's intention to be bound by an arbitration agreement, entered into by a State-owned entity, should be in unambiguous terms.

Similarly, attempts were made in *the Westland case* to bring arbitral proceedings against one or more States under a legal theory of control, alter ego or course of conduct. *The Westland case* is an illustration of the vagaries that disputants encounter in this area. Westland initiated arbitral proceedings against the Arab Organization for Industrialization (AOI), founded by four Arab States, and also against the founding States. The arbitral tribunal concluded that the founding States were bound by the AOI contract on looking at, *inter alia*, the expectations of Westland that the arbitration agreement extended to the four States.

In setting aside the proceedings, the Swiss Federal Tribunal held that AOI was a separate legal entity as evidenced by its bylaws, its legal, financial and procedural autonomy, and particularly the fact that it was authorised to sign arbitration clauses and submission agreements.[100] It was further held that the concerned States by letting AOI, which was held to be a legal entity in its own right, to subscribe to the contract

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[99] ICC Award No. 8035 (1995), *Party to an Oil Concession Agreement v State*, 124 JDI 1040 (1997).
[100] (1989) 28 ILM 687 at p. 691.

on its own with Westland had "manifestly shown that they did not want to be bound by the arbitration agreement."[101] This shows that when a State entity has a distinct legal personality, the arbitration clause entered into by the entity cannot be extended to drag the State into arbitration. However, in 1993 a second arbitral tribunal that was constituted also made an award against the founding States and this time the Swiss Federal Tribunal did not choose to set aside the award. It found, *inter alia*, that contractual ties can arise where a "party displays an attitude that the other party may legitimately believe, in good faith, that such intention does exist."[102]

In two recent ICC arbitration cases, *Bridas*[103] and *Yashlar*,[104] two different conclusions were arrived at even though facts of both cases stem from the same series of transactions. These contracts involved oil concessions in the State of Turkmenistan granted to an Argentinean company in a joint venture with a Turkmen State-owned company.

In *the Bridas case*, majority of the tribunal found that they had jurisdiction over the Government of Turkmenistan although the government was not a signatory to the disputed joint venture contract. However, a member of the tribunal, Dr. Hans Smith, who presented a dissenting opinion, found it impossible to agree with the majority by

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101 (1989) 28 ILM 687 at p. 692.

102 These cases are commented, *inter alia*, in *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, para 507-511 at p. 290; Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, section 1-101.

103 *Bridas SAPIC, Bridas Energy International Ltd and Intercontinental Oil and Gas Ventures Ltd* v *Government of Turkmenistan and Concern Balkannebitgazsenagat*, ICC Arbitration 9058 ('*the Bridas case*').

104 *Joint Venture Yashlar and Bridas SAPIC v Government of Turkmenistan (or Turkmenistan or the State of Turkmenistan and/or the Ministry of Oil and Gas of Turkmenistan)*, ICC Arbitration 9151 ('*the Yashlar case*'). The relevant award is the interim award dated June 8, 1999.

relying on two earlier cases.[105] The claimants tried to uphold the arbitrators' positive finding of jurisdiction on a number of legal assumptions like waiver of right to contest, agency, alter ego, estoppel and third party beneficiary. But, for all thier efforts the arbitrators' assertion of jurisdiction over the Government of Turkmenistan was set aside. The court held that although Turkmenistan was very much involved with Turkmeneft, "there is an insufficient showing of the complete domination or extreme control to warrant the finding that Turkmeneft was the alter ego of Turkmenistan.[106]

However, a different conclusion was arrived at on the same issue in *the Yashlar case*. The questions before the tribunal were whether a State party that was not named in the agreement could be treated as a party to the agreement; if it could be said that since the State entity that signed the agreement was an arm of the State, the State should be considered a party to the agreement on the principle of agency, alter ego or other legal consideration; and also whether the parties involved intended that the State be a party to the agreement. The tribunal disposed of these issues by holding that

> The Government of Turkmenistan obviously chose not to become a party to the JV Agreement but rather to authorise an agreement to be entered into by a body which was a legal entity in its own right having its own separate funds. Nor can it have escaped the notice of Bridas that the Government itself did not appear in the JV Agreement as their contracting partner. Whatever was said at the bidding round about the role of the Government, the Government did not become a signatory to the agreement and obviously must have made a deliberate decision not to do so. Nor is this surprising. The activities of the Turkmenian Party in the Joint Venture are commercial rather than sovereign activities. It need hardly be added that the Government's acts of authorisation and approval and its acts of control, however far reaching and do not of themselves make it a party to the JV Agreement.[107]

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105 *First Options of Chicago Inc v Kaplan and Other*, 514 US 938 (1995) and *the Pyramids case*.

106 ICC Case No. 9058, award dated June 25, 1999. Full text of the award available at www.mealeys.com.

107 ICC Case No. 9151, interim award dated June 8, 1999. Full text of the award available at www.mealeys.com.

This result is in contrast to the decision of the majority in *the Bridas case*, though very similar to the findings of the minority, which had said that mere control over a legally independent entity would neither make the government party to an arbitration commenced against it nor make the government liable under contract. This position seems logical. Writers have supported this view and pointed out that control of the State is evidence of the fact that the party exercising it has an interest in the performance of the contract concluded by its signatory and that it merely provides the backdrop against which the true intentions of the parties, whether implied or express, can be understood.[108]

In *Capital Power Mauritius I and Energy Enterprises (Mauritius) Company v Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board and the State of Maharashtra,* the Dabhol Power Corporation was to build two power plants that would supply electricity under the terms of the power purchase agreements to the State Electricity Board set up by the State of Maharashtra. Termination of the agreements resulted in arbitral proceedings. The tribunal, in deciding whether the State of Maharashtra was liable even though it was not a party to the contract, held that

> The state had the authority to control the MSEB board by appointing its members, removing them at pleasure, setting and directing its policies, and totally controlling its funding. The commitments made in the power purchase agreements were therefore entirely dependent on the willingness of the State of Maharashtra.[109]

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[108] *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, para 509 at p. 296.

[109] *Capital Power Mauritius I and Energy Enterprises (Mauritius) Company v Maharashtra Power Development Corporation Limited, Maharashtra State Electricity Board and the State of Maharashtra*, ICC Case No. 1293, final award dated April 27, 2005, available at http://ita.law.uvic.ca/documents/Dabhol_award_050305.pdf.

The ancillary nature of the contractual undertaking and its integration with other contracts and function in an overall contractual scheme may also be decisive in the proceedings for establishment of the extension of an arbitration agreement by a State-owned entity to a State. An example of where a State was held to have acceded to an arbitration agreement is *the Government Guarantee case*,[110] where a legal entity had entered into a major supply contract with a foreign party. The contract included an arbitration clause referring disputes to arbitration under the Stockholm Chamber of Commerce (SCC) Rules in Stockholm. In order to safeguard the foreign party's interest vis-à-vis a government entity, the Government of Kazakhstan issued a guarantee in favour of the foreign party. The government entity defaulted on its obligations, which resulted in arbitration. The sole arbitrator found that, in view of the government's undertaking as an integral part of the business venture established by the contract and the ancillary nature of third party pledges and guarantees, the government was in fact subject to the arbitration agreement and had the duty to have its guarantee reviewed by way of arbitration.

The legal arguments usually taken in these cases to establish the State's liability for the conduct of its entity are generally aimed at demonstrating that the purported 'entity' is an 'organ' of the State and, therefore, the State is liable. Alternately, as was seen in *Bridas* and *Yashlar* arbitrations, the entity is shown to be either an 'instrumentality' of the State or one of its 'organs' by pointing out one of the

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[110] SCC Case No.s 38 and 39/1997, the case has been reviewed in SAR 2003:1, at p. 273. An action to set-aside the award was unsuccessful (judgement by the Svea Court of Appeal in Case No. T4496-01).
http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/government_guarantee_case.pdf.

following – the economic reality behind the State contract, thus showing that either in economic terms the State and the entity are essentially the same or that the State has control over the conduct of the entity or pointing out the economic dependency of the entity on the State.

It seems clear that if a State is to be made liable for the conduct of its entity, specific evidence of governmental control is required. This, in part, flows from the dictum that was laid down in *the Barcelona Traction case*,[111] where the general separateness of the corporate entity was recognised, except in cases where the entity is a mere device or vehicle for fraud or evasion. Hence, it is justified to conclude that liability of the State requires an act of breach of obligation and the attribution of that act to the State. And, the mere fact that a State entity is owned by and under the control of the State may not be sufficient to make the State liable for the conduct of its instrumentalities.

3.4.5 Extension of Arbitration Agreement by State to the State-owned Entity

There may arise situations where an arbitration agreement signed by a State could be extended to a State-owned entity. It is also possible, given the extent to which a State may operate through its instrumentalities, that the award passed against the State may be enforced against the assets of its entity, holding that the entity and State are one and the same and for that reason, accountable for the obligations of the State. In other words, can an award rendered against a State be enforced against its instrumentality?

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[111] *Barcelona Traction, Light & Power Co (Belgium v Spain)*, 1970 ICJ 3.

In *the Petrogab Arbitration case*,[112] the issue that came up for consideration was whether an agreement signed by a State could be extended to a State-owned entity. In this case, a distributor in the oil industry had signed an oil purchasing agreement containing an arbitration clause with the Republic of Gabon. In the contract, the Deputy General Manager of a State-owned company had indicated his position in the company and added the words "on behalf of the Republic of Gabon."

In the arbitration that ensued as a result, the claimant attempted to make the State-owned company party to the arbitration. This was done on the assumption that the company had become bound by having one of its Director's sign the contract. In this case, the tribunal found that the wording "on behalf of the Republic of Gabon" demonstrated that the contract had not been entered into in the name of the State-owned company but for the account of the Republic alone. The Court of Appeal, in the proceedings related to the setting aside of the award, held that the arbitrators had correctly assessed the relation between SOC and Petrogab, on the one hand, and Gabon and Petrogab on the other, and rightfully held that Petrogab was not bound by the arbitration clause.

As can be seen from these examples, larger infrastructure projects can certainly be contracted solely between private parties and the State-formed entities. But, oftentimes the State or any political subdivision thereof may be involved to a greater or lesser extent either in an authorizing or monitoring role alone or, indeed, as a party

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[112] ICC Award No. 8035 (1995), *Party to an Oil Concession Agreement v State*, 124 JDI 1040 (1997).

itself. The above cases show that there must generally be a clear indication by the State of its intent to become a party to the relevant agreement containing the arbitration clause, for the State to become answerable in arbitral proceedings. This, however, does not constitute any departure from what generally applies in the context of interpreting contractual intent, which thus, applies irrespective of whether parties of public or private law are concerned, as can be seen from aforesaid examples.

It is argued that whether a State is treated as a party to a contract depends on the party's intentions. Considering the contradictory conclusions of two International Chamber of Commerce (ICC) arbitration awards – the *Bridas* and the *Yashlar* cases – it can be safely concluded that even when organs make commitments in their contracts which can only be carried out with the full support of the government, it does not mean that the entities intend the government to be a party to the agreement.

Another significant factor in ascertaining whether an instrumentality's assets are available to meet the State's liability under an award is the legal personality of the instrumentality and its relationship with the State. In this context two issues, which are mutually exclusive, are in focus - firstly, the legal personality of the entity and secondly, the issue of sovereign immunity. If the State entity against whom the enforcement is sought did not have any role in the underlying transaction and the concerned entity has a separate and distinct legal personality, not economically dependant on the State, the courts are likely to deny enforcement against its assets. Alternately, although inconsistent with the 'legal personality' defense, the entity may

claim immunity from enforcement since a claim of immunity acknowledges that the assets in question are those of the State itself.

On the other hand, alternative conclusions could be suggested if there is evidence of overwhelming control by the State as was held in *First National City Bank v Banco para el Comercio Exterior de Cuba (BANCEC).*[113] It is held that the presumption of separateness can be overcome by showing that the instrumentality "is so extensively controlled by its owner that a relationship of principle and agent is created" or where the recognition of a separate legal identity "would work fraud or injustice."[114]

There is still uncertainty in domestic and international law concerning the enforcement of obligation between States and its instrumentalities. Thus, what can be inferred from the above discussion is that when a State establishes independent entities having separate legal personalities, such entities cannot, because of the independence of assets, be held liable for the obligations of the State.

3.5 Sovereign Immunity in Different Jurisdictions

As a result of modern statutory, treaty and judicial developments, the Doctrine of Restrictive Immunity has replaced the old Doctrine of Absolute Immunity, which gave States complete immunity from suit. Under the restrictive theory, immunity is denied to foreign States engaged in commercial activities, as opposed to State activities carried out in a sovereign capacity.

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[113] 462 US 611.
[114] 462 US 611 at p. 629.

This Doctrine of Restrictive Immunity has gained acceptance in the European Convention on State Immunity.[115] The doctrine is also reflected in various domestic statutes, like Foreign Sovereign Immunities Act of 1976 (FSIA) in the United States, the State Immunity Act 1978 (SIA) in the United Kingdom and various similar statutes enacted in Canada, Australia, Singapore, Pakistan and South Africa. In countries where the law remains uncodified, the restrictive doctrine has made much progress following a number of judicial pronouncements to this effect; however, immunity rules in these countries are not always harmonious.

Thus, much uncertainty remains with regard to a number of issues concerning immunity, such as 1) the kind of persons who are entitled to plead immunity, 2) the type of acts performed by such persons, which entitles or denies them of immunity, 3) the manner in which immunity can be waived, and 4) the consequences of such waiver of immunity. Many countries of the world have drawn a distinction between the sovereign and non-sovereign activities of sovereign States. While the sovereign activities of a sovereign State are not subject to judicial process in any country, the non-sovereign activities of a sovereign State are, in some countries, subject to and controlled by the judicial processes of that country.[116] We will now examine the advancement in the law of immunity on the basis of statutes and judicial pronouncements in different jurisdictions.

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[115] The Convention came into force on June 11, 1976, upon ratification by Austria, Belgium and Cyprus.

[116] *Halsbury's Laws of England*, (4th edn) Vol. 18, para 1548-1557.

3.5.1 The United Kingdom

An independent sovereign State may not be sued in the English courts against its will and without its consent. This immunity from jurisdiction is derived from the rules of international law, which in this respect have become part of the Law of England. Such immunity is accorded upon the grounds that any exercise of jurisdiction would be incompatible with the dignity and independence of the superior authority enjoyed by every sovereign State. The principle involved is not founded upon any technical rules of law, but upon broad considerations of public policy, international law and comity.

In *Duke of Brunswick v King of Hanover*[117] and *De Haber v Queen of Portugal*,[118] the courts upheld immunity for sovereign acts or acts performed in a public capacity.[119] Like in *the Schooner Exchange v McFaddon*, these decisions quickly evolved to mirror the absolute immunity accorded the domestic sovereign.[120] In England, the theory of absolute immunity was first announced in *The Parlement Belge*[121] and followed and reiterated in *Compania Naviera Vascongada v SS Cristina*.[122] In *Rahimtoola v Nizam of Hyderabad*,[123] Lord Denning, however, challenged the theory of absolute immunity as an "ill-considered dicta" in his famous

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117 49 Eng. Rep. 724, 724-25 (M.R. 1844) (sovereign residing in foreign country immune from suit for acts performed in sovereign capacity).

118 117 Eng. Rep. 1246, 1258-62 (Q.B. 1851) (foreign monarch exempt from suit in England for acts performed in public capacity).

119 Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* at p. 63-70. Public and private acts may be distinguished by those acts which only a state may perform, compared with those which either a state or a private entity may perform.

120 Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* at p. 34-38.

121 (1880) 5 P.D. 197 at p. 197-98 (C.A.).

122 (1938) App. Cas. 485 at p. 485.

123 (1958) App. Cas. 379 at p. 422 (1957).

opinion and held that immunity should not be granted if the claim relates to commercial transactions. This view was restated in *Thai-Europe Tapioca Service Ltd v Pakistan,*[124] and finally prevailed in *Trendex Trading Corp v Central Bank of Nigeria*.[125] The House of Lords unanimously followed the view taken by Lord Denning in *I Congreso del Partido*.[126]

English Law for the purposes of immunity of foreign States from the jurisdiction does not distinguish between governmental activities (*acta imperii*) and commercial activities (*acta gestionis*). Immunity is not, therefore, limited to the actions arising out of official government transactions, but also covers actions arising out of personal contracts and trading activities. The courts of many other countries have drawn a distinction regarding these two kinds of State activities and it is possible that the English courts have extended the Doctrine of Sovereign Immunity further than international law requires. With respect to action *in rem*, immunity is not accorded to a vessel owned by a foreign government but being used either by the foreign government itself or by a third party for trading purposes, and not being used or not intended to be used for public service.

Under SIA, a foreign sovereign State may waive its immunity and submit to the jurisdiction of the English courts. This may be done, for example, by entering an unconditional appearance to the arbitration begun against it, with full knowledge of its right to immunity, with any proper authority from the competent organs of the

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124 (1976) 1 Lloyd's Rep. 1, at p. 5 (C.A. 1975).
125 (1977) 1 Lloyd's Rep. 581, at p. 593 (C.A. 1976).
126 (1983) 1 App. Cas. 244.

State. To be effective, waiver must take place at the time at which the court is asked to exercise jurisdiction – it cannot be inferred from a previous contract to submit to the court's jurisdiction, or from an agreement to submit to arbitration, or from an application to set aside an arbitration award.[127] Costs awarded cannot be recovered by execution and even if the State has submitted to jurisdiction it does not thereby waive the right to remove its property from the jurisdiction. Submission to jurisdiction for the purpose of determining liability does not constitute submission for the purpose of execution. By suing, a foreign State submits to jurisdiction for the purpose of an appeal against a decision in its favour.[128]

The UK State Immunity Act provides that States are "immune from the jurisdiction of the courts of the United Kingdom" except as provided elsewhere in the Act. The Act also provides that immunity is to apply even if the foreign State does not appear in the proceedings. Arbitration agreements are enforceable except where the agreement is solely between States or where the parties have, in writing, agreed otherwise. Section 9(1) of State Immunity Act 1978, which regulates immunity of a foreign State in the United Kingdom, provides that an arbitration agreement, subject to contrary provisions in the arbitration agreement, disentitles the foreign State to jurisdictional immunity. It says

> Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

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127 *Re Russian Bank for Foreign Trade*, (1933) Ch 745, 6 BILC 788.
128 *Sultan of Johore v Abubaker Tunka Aris Bendahar*, (1952) 1 All ER 1261.

This provision, therefore, strengthens the enforcement powers conferred upon the English courts as regards not only domestic awards resulting from references in England but also foreign awards obtained overseas.

English courts have, recently, decided on claims for enforcement of an award against the State by action against the assets of its instrumentality or the assets by held third parties on behalf of national banks. The issue came into consideration recently in *AIG Capital Partners Inc, CJSC Tema Real Estate Co Ltd v Republic of Kazakhstan,*[129] where the court while refusing to enforce an award against debts due from third parties held that the words "property of a state's central bank or other monetary authority" in Section 14(4), when construed using common law principles, meant any assets in which the central bank had some kind of 'property' interest, and assets which were allocated to or held in the name of the Central Bank, irrespective of the capacity in which the Central Bank held it, or the purpose for which the property was intended.[130]

In another instance, the court in *Occidental Exploration & Production v The Republic of Ecuador,*[131] on an application to challenge the tribunal's substantive jurisdiction, held that the court is competent to decide on the question of whether the principle of non-justiciability prevented the English court in entertaining a challenge to the award under a BIT.

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129 (2006) 1 Lloyd's Rep. 45.
130 (2006) 1 Lloyd's Rep. 45 at para 61.
131 (2005) EWCA Civ. 116.

3.5.2 The United States

The Supreme Court formulated the doctrine of foreign sovereign immunity in *the Schooner Exchange v McFaddon.* Chief Justice Marshall, while grounding the court's decision on the perfect equality and absolute independence of sovereigns, held that although a nation necessarily possesses exclusive and absolute jurisdiction within its own territorial boundaries, it implicitly waives jurisdiction over a foreign State's agent or property in the absence of prior notice.[132] The US Supreme Court extended the immunity granted to public warships in *The Schooner Exchange* to ships engaged in trading activities. But, contrary to the English position, the US courts were not prepared to grant immunity to a ship solely on the reason of its ownership. It was necessary that the ship was in the possession of the foreign State or alternatively, controlled and managed by the foreign State.[133]

Another distinguishing feature of US law was the US courts' deference to the Executive on the matter of foreign relations and their acceptance of the State Department's suggestions on whether immunity should be granted or denied to a foreign State in a particular instance. The Court's acceptance of these opinions transformed foreign sovereign immunity determinations from being strictly legal questions to those having political implications.[134] Courts were directed to "accept

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132 7 Cranch 116 at p. 137 (1812).

133 *The Roseric*, 254 F 154 (1918).

134 Jonathan Kaiden, *Millen Industries, Inc v Coordination Council for North American Affairs: Unnecessarily Denying American Companies the Right to Sue Foreign Governments under the Foreign Sovereign Immunities Act*, 17 Brook. J Int'l L 193 (1991) at p. 199.

and follow the Executive determination" whether a claim of sovereign immunity should be granted or rejected in the interest of foreign relations.[135]

In 1952, the State Department completely reversed the practice of absolute foreign sovereign immunity and committed itself to the Doctrine of Restrictive Immunity elucidated in the Tate Letter. However, in restricting application of the foreign sovereign immunity doctrine, the State Department failed to enunciate any clear guidelines for distinguishing protected State activities from unprotected ones. Thus, in cases where the State Department remained silent on the issue of foreign sovereign immunity, the judiciary lacked a standard by which to make a decision on the matter of immunity of State acts. Under these circumstances, the courts began exhibiting a reluctance to exercise jurisdiction over foreign sovereigns in the absence of a legislative enactment.[136]

In an attempt to reform US sovereign immunity laws, the Departments of State and Justice, in joint consultation with the Judiciary Committee of the House of Representatives, drafted the immunity act, which the Congress enacted as the Foreign Sovereign Immunities Act of 1976. The primary aim of the FSIA was to provide a comprehensive jurisdictional scheme for initiating suits against foreign States. The FSIA, through the commercial activity exception, adopted the restrictive theory of sovereign immunity advocated by Tate, thereby rendering foreign States immune to

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[135] David A Brittenham, *Foreign Sovereign Immunity and Commercial Activity: A Conflicts Approach*, 83 Colum. L Rev. 1440 (1982) at p. 1453.

[136] Caitlin McCormick, *The Commercial Activity Exception to Foreign Sovereign Immunity and the Act of State Doctrine*, 16 Law & Pol'y Int'l Bus. 477 (1984) at p. 485.

suits related to their public acts, but not to their commercial or private acts. The US FSIA set forth the procedures for adjudicating claims against foreign governments and their agencies before the American courts and vested overall authority with the judiciary for determination of whether a particular act of a foreign State was commercial or not.[137]

The FSIA covers three types of exceptions to immunity by waiver, i.e., waiver from adjudication, waiver from execution after judgement and waiver from attachment prior to the entry of judgement. Waiver from adjudication and execution could be either implied or explicit. An express waiver could be made by the State or its entity by a clause in a contract to that effect. However, implicit waiver could be deduced from its conduct implying intention to waive immunity, for e.g., by an agreement to arbitrate or by a forum selection clause.

The agreement to arbitrate by a State or the choice of law or forum selection constituting waiver of immunity in subsequent proceedings in the US courts has presented problems.[138] The exception provides for the need of a nexus between the United States and the country where the arbitration is intended to take place by way of a reference to the parties' intention. Therefore, an agreement to arbitrate in the US or an agreement to submit future disputes in accordance with US laws will constitute a waiver before US courts, but not where such consent to jurisdiction or choice of law

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137 Section 1602 of FSIA.

138 George Kahale III, *Arbitration and the Choice of Law Clauses as Waivers of Jurisdictional Immunity,* NYUJ Int'l L & Pol. 14 (1981) at p. 29.

relates to a foreign or a third State.[139] Similarly, an agreement to arbitrate under the auspices of ICSID has been held not to constitute a waiver of immunity from execution, as ICSID does not contemplate the involvement of Municipal Courts. However, some US courts have held that an agreement to arbitrate by a State which is party to the New York Convention, thereby undertaking to enforce the resultant award rendered in other contracting States, waives immunity from the jurisdiction of US courts to enforce such awards, pursuant to Section 1605(a)(1).[140]

To deal with the problems arising from the implicit waiver of immunity by an agreement to arbitrate or to confirm an arbitral award pursuant to such arbitration and with regard to the enforcement of an award, the FSIA was amended in 1988. Subsection 6 was added to Section 1605(a) to permit an action to enforce an arbitration agreement to which a foreign State was a party if: A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this Section or Section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

The effect of this amendment is far reaching in a sense that following immunity before the US courts would not be available if the arbitration agreement provides for

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139 *Verlinden BV v Central Bank of Nigeria*, 647 F.2d 320 (2d Cir. 1981).
140 *Ipitrade International SA v Federal Republic of Nigeria*, 465 F Supp 824 (D.D.C. 1978).

either arbitration in a State which is a party to the New York Convention or a choice to the arbitrators to select a New York Convention State as the forum for arbitration. With respect to enforcement of a judgement based on an order confirming an arbitral award, FSIA is much boarder than other similar statutes on immunity. The Section 1610(a)(6) that was added permits execution of any property without express waiver by the State. This provision is curtailed, however, by the overreaching requirement of Section 1610(a) that says that for the property to be not immune from execution, the property of the foreign State in the United States must be used for commercial activities in the United States.

3.5.3 India

India, unlike other countries like the US, UK and other common law countries does not have a comprehensive immunity act. In India, immunity granted is limited and governed by enacted laws – no immunity is enjoyed from judicial process by any one except to the extent as may be indicated by the relevant provisions of some enactment of the Parliament made in terms of Article 253 of the Constitution of India. Sections 84, 85 and 86 of the Civil Procedure Code prescribe situations where and how a suit could be instituted against a foreign State, an envoy of a foreign State, etc. Section 86 of the CPC also stipulates that a foreign State cannot be sued in India without consent of the Central Government.

In *Mirza Ali Akbar Kasini v United Arab Republic*,[141] the Supreme Court held that Section 86(1) of the Civil Procedure Code as it stood at the relevant time was the statutory provision covering the field, which would otherwise be covered by the doctrine of immunity under international law, and save and except in accordance with the procedure indicated in Section 86 of the Code, a suit against a foreign State would not lie. Section 86 of the Code clearly lays down that suits cannot be instituted against foreign States except with the consent of the Central Government.

The CPC, unlike other immunity acts, does not define foreign State elaborately or specify constituting elements for an agency or instrumentality of a State to qualify for state immunity. It defines a 'foreign State' to mean any State outside India that has been recognised by the Central Government and directs every court in India to take judicial notice of the fact whether a State has or has not been recognised by the Central Government.[142] In deciding whether a State is recognised by the Central Government, *de facto* and *de jure* recognition have the same value for the purpose of deciding immunity of a foreign State.[143]

In the absence of a complete definition of a 'foreign State' in the CPC, the question arises as to which entity or instrumentality of a foreign State can claim immunity in India. In *Royal Nepal Airline Corporation v Monorama*,[144] the Calcutta High Court deduced a set of principles for immunity in India. One of the principles was that a suit

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141 AIR 1966 SC 230.
142 Section 87A (1)(a), 87A (2)(a).
143 *German Democratic Republic v Dynamic Industrial Undertaking*, AIR 1972 Bom. 27.
144 AIR 1966 Cal. 319.

does not lie against an agent of a foreign State, where the act complained of is purported to be done as such an agent. The court further held that when an incorporated body is engaged in business, it falls outside the protective umbrella of immunity.

However, the Supreme Court of India in *VEB Deutfracht Seereederei Rostock v New Central Jute Mills Co Ltd,*[145] set aside the order of the Calcutta High Court which had held that consent of the Central Government was not required for the institution of suits against a body or an organ of a foreign State. The Supreme Court held that consent of the Central Government was, indeed, required, even with regard to agreements relating to commercial trading contracts of a company or a corporation of a foreign State.

This rule vests authority with the Central Government to determine claims regarding state immunity and is thought to have prevented the Indian courts from applying international law principles in determining their jurisdiction, even though it is possible for the courts to review the reasonableness of the decision taken by the Central Government.[146] It is, however, to be noted that the limitations prescribed in the CPC are basically meant for placing restrictions on the institution of suits and cannot be applied to restrict or abridge the powers of the High Court under Article 226 of the Constitution of India.[147]

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145 AIR 1994 SC 516.

146 *Harbhajan Singh Dhalla v Union of India*, AIR 1987 SC 992.

147 *Tractor and Farm Equipment Ltd v Secretary to the Govt. of Assam, Dept. of Agriculture and Ors*, Unreported judgement in Writ Appeal No. 458 of 2003.

The CPC, therefore, does not explicitly look into the question of whether an agreement to arbitrate amounts to a submission to the jurisdiction of the Indian courts. However, it is significant to note that the Government of India, in its Memorandum on State Immunity[148] submitted to the Asian-African Legal Consultative Committee (AALCC), referring to the frequent insistence by traders entering into contracts with foreign States on the insertion of an arbitration clause, stressed that a foreign State by taking upon itself the role of a trader, waives its claim of immunity with respect to its commercial transactions. Further, one of the High Courts in India refused to accede to the argument advanced by the Central Government of India that an arbitral clause in the charter party contract, obliging it to make a reference to a foreign arbitration, amounts to a denial of its sovereign status and that such an agreement is valid and binding between citizens of different States only.[149] Indian law on state immunity, ultimately, does not allow a foreign State to take shelter behind the state immunity rules to avoid its agreed arbitral and contractual commitments.

3.5.4 Australia

An independent sovereign State cannot be impleaded in the Australian court without its consent. Like many common law countries, Australia has enacted the state immunity legislation. Under Article 17(2) of the Australian Foreign States Immunities Act 1985,[150] a foreign State is not immune in a proceeding concerning a transaction or event where the foreign State is a party to an agreement to submit to

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148 For text of the Memorandum, see Asian-African Legal Consultative Committee, Third Session, Colombo, 1960, issued by the Secretariat of the AALCC, New Delhi, India, at p. 58-62.

149 *Union of India v Owners of Vessel Huegh Orchid & their Agents*, AIR 1983 Guj. 34.

150 Act No. 196 of 1985, (1986) 25 ILM 176.

arbitration a dispute about the transaction or event. Also, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding concerning the recognition or the enforcement of an award made pursuant to such arbitration.

Thus, unless the arbitration agreement entered into by a State expressly makes an exception for enforcement, under the Australian Foreign States Immunities Act, an agreement to arbitrate has the effect of waiving immunity, even with respect to non-commercial properties of a State. It authorizes the Australian courts to exercise such jurisdiction relating to all proceedings in which the State is not immune. The property of a foreign State is immune from process or order by Australian courts for the satisfaction of any judgement or other order,[151] unless the foreign State has agreed to waive its immunity from execution. However, submission to jurisdiction does not constitute waiver of immunity.[152]

3.5.5 Singapore

In Singapore, state immunities are codified in the State Immunity Act of 1979, which resembles closely the United Kingdom State Immunity Act of 1978. Singapore's State Immunity Act, for e.g., has phraseology identical to that of Section 9 of SIA, and does not allow a foreign State, which has agreed to submit a dispute to arbitration, to claim jurisdictional immunity in judicial proceedings relating to the agreed arbitration. It reads, "where a State has agreed in writing to submit a dispute which has arisen, or

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[151] Section 30 of Australian FSIA.
[152] Section 31 of Australian FSIA.

may arise, to arbitration, the state is not immune as respects proceedings in the courts in Singapore which relate to the arbitration."[153]

3.5.6 France

Like many civil law countries, France too has not enacted state immunity legislations. French courts directly apply the customary international law rules of state immunity, including the rule that State property used for commercial purposes is generally not immune from execution. French courts have drawn a strict distinction between recognition and execution of arbitral awards. They consider the confirmation of an arbitral award as 'merely the necessary sequel to the award', and thus deny a foreign State's immunity in recognition proceedings.[154]

French courts were divided on the general principle of whether a State's agreement to arbitrate deprives it of immunity in proceedings for the enforcement of the arbitral award against non-commercial property. A leading line of cases stood for the proposition that an agreement to arbitrate does not, in and of itself, imply waiver of immunity from execution. Instead, a waiver of immunity from execution requires a separate manifestation of unequivocal intention to affect such a waiver by the foreign State.[155] However, in *Societe Bec Freres v Office des Cereales de Tunisie*, the Court

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153 Section 9 of Singapore Immunity Act 1978.

154 *Socialist Federal Republic of Yugoslavia v Societe europeenne d'Enterprises*, 98 JDI 131(1971); *Benvenuti & Bonfant SARL v Government of the People's Republic of Congo*, 108 JDI 843 (1981).

155 *Islamic Republic of Iran et al v Eurodif*, (1983) 72 Rev. cr. dr. internat. Privé 101.

of Appeal in Rouen opined that by submitting to ad hoc arbitration, the Tunisian Government department had waived its immunity from execution.[156]

This conflict seems to have been laid to rest, at least in the context of an ICC arbitration clause, by the Court of Cassation's decision in *Creighton v Qatar*.[157] Qatar had expressly consented to arbitrate pursuant to ICC Rules of Arbitration. The court held based on the language of Article 24 of the applicable 1988 rules that "the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made," and that there had been an implied waiver of the State's immunity from execution. Whether this decision would extend beyond an ICC arbitration agreement or other agreements incorporating rules with similar language is unclear. For example, it is uncertain whether the Court of Cassation would reach the same conclusion as the Court of Appeal in Rouen in case of an ad hoc arbitration.

However, the decisions of the French court in *NOGA v Russian Federation*[158] showed that matters could be more complex and involve both an issue of legal personality as well as management over State property. The basis was an arbitration award against the Russian State. The court reasoned that in spite of a sweeping waiver of sovereign immunity in the arbitration agreement, the seized vessel, the Sedov, which was the property of a Russian University, was to be released on the grounds that the University had a separate legal personality in accordance with the Russian civil law

156 (1997) Rev. Arb. 263.
157 Bull. Civ. 2000. I 135, No. 207.
158 (2005) Int'l ALR 34.

and thus, could not be made liable for the state's obligation. The reasoning of the court does not seem to be in accord with international norms and practices relating to sovereign immunity, as the fact that Russia had waived its immunity from execution should have been sufficient to mean that any asset, except diplomatic assets, would be available for execution of the award.

3.6 Conclusion

The above discussion points firmly to the fact that several aspects of the state immunity issue in arbitration are as yet unresolved and the positions of different jurisdictions on these issues either uncertain or conflicting. The most common questions that keep propping up in arbitrations involving States are those regarding the authority of parties entering a contract to agree to arbitration and waive immunity on behalf of the State, the validity of the arbitration agreement and arbitrability of the dispute in question, extent of the State's liability for the conduct of its instrumentality and vice versa, recognition and enforcement of the arbitral awards, and lastly, whether waiver of immunity from jurisdiction can be extended to waiver of immunity from execution.

In the absence of any universal, supranational law regulating international arbitration, it falls to the domestic courts of the forum State to determine each of these issues. Under such circumstances, the different national systems of law that may need to be consulted, depending on where the arbitration is taking place and what the involved issues are, become significant keeping in mind the differences that may exist in the

legal positions of these jurisdictions. For instance, the rules applicable to immunity from jurisdiction and immunity from execution should not typically be different, in the sense that there should be no immunity from execution where there is no immunity from jurisdiction. However, in practice, this is not always achieved. Some legal systems deny execution against the property of a foreign State even after judgement against the State concerned has been passed. The role that could be played by the UN State Immunity Convention, when ratified, assumes great significance in view of the above disparity, as it could help bring much uniformity and better predictability in the law regulating international arbitration.

It is, therefore, only appropriate to conclude with the words of Fox according to whom, "The extent to which immunity should be enjoyed by agencies, connected to the state but not so closely as to constitute central organs of government, remains a perennial problem in the law of state immunity."[159]

[159] Hazel Fox, *The Law of State Immunity* at p. 237; AFM Maniruzzaman, *State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends*, Disp. Resol. J 77 (2005).

CHAPTER FOUR

ENFORCEMENT AGAINST STATE PARTY TO ARBITRATION

4.1 Introduction

Enforcement of an arbitral award is a corollary to assumption of jurisdiction by the domestic courts over a foreign sovereign. As put by Crawford, "It would not only be half-hearted but also would largely nullify the progress made in the protection of the private individuals, if the result of the award is not enforced."[1] Despite the fact that a majority of cases reveal that most international arbitration awards are complied, irrespective of whether they are against private parties or States, there are cases where the awards are not complied with voluntarily. Unlike the judgements entered in most litigation cases, the arbitrators who render the arbitral awards cannot enforce them.[2] In such circumstances, successful parties have to seek means outside the process of arbitration to enforce the award.

State practices show that States are more cautious about withdrawing immunity from execution than from jurisdiction. The reason for this, according to some writers, is that actual measures of enforcement are more drastic than the mere assumption of decision-making power and is more likely to rouse the sensitivity of foreign States.[3] This has led, in some countries, to the adoption of different standards for immunity from jurisdiction and immunity from execution – immunity from jurisdiction for most

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1 J Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 Am. J Int'l L 820 (1981) at p. 854.

2 De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 Tul. L Rev. 42 (1982) at p. 47.

3 LJ Bouchez, *The Nature and Scope of State Immunity from Jurisdiction and Execution*, 10 NYIL 3 (1979) at p. 18; K-H Böckstiegel, *Arbitration and State Enterprise* at p. 50.

foreign States is commonly restricted although there exist measures to ensure immunity from enforcement.[4] However, recent trends have shown a tendency to restrict immunity from execution, subject to certain exception to State property.

The enforcement of awards in transnational State contracts primarily depends on whether the domestic courts of the forum State are willing to enforce the award under their legal system. The involvement of a foreign State in the award makes the enforcement proceedings difficult because of the doctrine of jurisdictional immunity and justiciability with the forum's legal system. The reason for this being that the enforcement of an award by execution against the State is an issue that should be decided in accordance with the rules governing the laws of immunity of the forum where execution is sought.

However, actual execution can be sought only after the award has been recognised in the form of confirmation or granted *exequatur* in the forum State. The nature of these proceedings is still under some controversy. States argue that recognition or granting *exequatur* is the preliminary phase of execution. However, court decisions have proved otherwise.[5] This latter view adopted by the courts has found support from many writers who have argued that only actual execution can constitute a separate phase from the arbitral award and, so, issues of immunity raised during recognition

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4 MC Del Bianco, *Execution and Attachment under the Foreign Sovereign Immunities Act of 1976*, 5 Yale Stud. World PO 109 (1978) at p. 110.

5 *Ipitrade International SA v Federal Republic of Nigeria*, 465 F Supp 824 (D.D.C. 1978). *Ipitrade* reasoning was also followed in *Libyan American Oil Company v Socialist People's Libyan Arab Jamahiriya*, 482 F Supp 1175 (1980).

and enforcement procedures of the arbitral awards should only be viewed as issues of immunity from jurisdiction.[6]

The Doctrine of Restrictive Immunity is not applied to actual execution procedures in most States, but in cases where the restrictive immunity doctrine is applied, different tests like the nature of funds tests or the nature of activity tests are used to determine whether a particular act qualifies for exception to immunity. Some States even require a connection or link between the claim and the legal relationship based on which the award is passed. Apart from the legal point of view, this issue also bears a financial connotation for the forum States involved – when a country does apply the principles of restrictive immunity to these proceedings, the actual execution of an award could result in foreign States abstaining from making future investments in States where their properties could be subject to execution.

Two very fundamental issues often creep in at the stage of execution in arbitrational proceedings – firstly, whether waiver of immunity by an agreement to arbitrate can be extended to a waiver of immunity from execution; and secondly, whether the property against which execution is being sought is used for sovereign purpose or otherwise. The attachment of a State's assets in execution is a very delicate issue, for the reason that it is likely to have a direct effect on the friendly relations between the forum State and the foreign State.

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[6] Giorgio Bernini and A Jan Van den Berg, *The Enforcement of Arbitral Award against a State: The Problem of Immunity from Execution*, in *Contemporary Problems in International Arbitration* at p. 359.

This chapter will consider the situations that arise when a State claims immunity at the time of actual execution of the award arising from State contracts and the various codifications and conventions under which an award may be sought to be enforced. It will also throw some light on the political, economical and legal obstacles created by the issues of sovereign immunity and the Act of State Doctrine once the award has been recognised or granted *exequatur,* in addition to citing the properties of a State that are available for execution.

4.2 Enforcement of Awards under Different Codifications of State Immunity

States usually raise the plea of immunity at every stage of the arbitrational proceeding, whenever possible, rather than wait until the actual measure of execution against them. As pointed out earlier, most legal systems differentiate between immunity from jurisdiction and immunity from execution, and in doing so adopt absolute immunity vis-à-vis execution. Acceptance of the theory of restrictive immunity, which does away with immunity for the commercial acts of a foreign State, has made enforcement of an award against the State party much easier. Yet, disparate standards adopted for immunity from jurisdiction relative to immunity from execution has led to unpredictability with regard to enforcement of an arbitral award. As pointed out by Professor Sucharitkul, ILC's Special Rapporteur, the fact remains that immunity from execution remains the "last fortress, the last bastion of state immunity."[7]

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[7] Commentary to ILC Draft Articles, Article 18, para 1, C/An.4/L/452/Add 3.

ECSI prohibits all measures of constraint or preventive measures against the State property of a contracting State, subject to an express waiver of immunity.[8] However, at the same time it provides for an obligation on the contracting States to abide by the judgement given against them.[9] The provisions of ECSI concerning enforcement were not accepted in other codifications. Perhaps the reason for this non-acceptance was that these ECSI provisions were based on a general confidence between the European countries, which could not have been generalized. Like some writers who have pointed it out, it needs to be seen in future whether voluntary compliance of the judgements rendered in other convention States are enforced.[10]

Prior to the enactment of FSIA, properties of a State were immune from attachment and execution. Section 1609 preserved immunity for foreign States and their instrumentalities. However, there were exceptions to this general rule and immunity was denied with regard to property being used for commercial activities.

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8 Article 23 of ECSI
No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.

9 Article 26 of ECSI
Notwithstanding the provisions of Article 23, a judgment rendered against a Contracting State in proceedings relating to an industrial or commercial activity, in which the State is engaged in the same manner as a private person, may be enforced in the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity, if:
a. both the State of the forum and the State against which the judgment has been given have made declarations under Article 24;
b. the proceedings which resulted in the judgment fell within Articles 1 to 13 or were instituted in accordance with paragraphs 1 and 2 of Article 24; and
c. the judgment satisfies the requirements laid down in paragraph 1.b of Article 20.

10 JF Lalive, *Swiss Law and Practice in Relation to Measures of Execution Against State Property of a Foreign State*, NYIL, Vol. 10 (1979) 153.

FSIA provides for the execution of an award that has been confirmed, judicially against the foreign States, if the property against which execution is sought is used for commercial purposes in the United States. It proclaims that States are not immune in so far as the claim is based on commercial activity.[11] The FSIA further requires that the property executed against "is or was used for the commercial activity on which the claim is based."[12] Restrictions placed in Section 1610(d) do not apply to an agency or instrumentality of a foreign State engaged in commercial activity as per Section 1610(b)(1) and (2). FSIA draws a distinction between execution against the foreign State property and execution against an instrumentality of a State. Unlike execution against State property, execution against a foreign entity does not require a nexus between the claim on which the award is based and the commercial property of the State entity which is subject to execution.[13]

The rule still remains strict with reference to attachment before judgement and property of a State can be attached only subject to Section 1610(d). Notwithstanding Section 1610, Section 1611 preserves immunity with respect to different types of State property, for e.g., property of a designated international organisation, property of a foreign central bank or its monetary authority for its own account, unless such bank or authority has explicitly waived immunity as regards post-judgement execution, and all the properties used in connection with military activities. Thus, under FSIA, a foreign State property that is being sought for attachment or execution

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11 Section 1602 of FSIA.
12 Section 1610(a) of FSIA.
13 Section 1610(a)(2) of FSIA.

should be linked with the commercial activity involved. Meanwhile, no such link is required for execution against an agency or instrumentality of a State.

The British SIA, which is based on the ECSI, was originally in favour of immunity from execution. However, severe criticism by Lord Denning and Lord Wilberforce against this approach paved the way for significant amendments to restrict jurisdictional immunity and immunity from execution.[14] The UK SIA treats immunities from jurisdiction and execution distinctly. As it stands now, the SIA provides that a State is not immune from proceedings relating to commercial activities[15] and with regard to property 'used' or 'intended to be used' for commercial purposes or when the State has explicitly waived its immunity with reference to enforcement proceedings.

SIA holds that the property of a State's Central Bank or other monetary authority is not regarded for the purpose of Section 13(2) to be 'in use' or 'intended to use'. However, the complications that can possibly arise due to mixed accounts were illustrated in the case of *Alcom Ltd v Republic of Colombia*,[16] wherein the property which was for the time being 'in use' or 'intended to use' came in for consideration. At first instance, the court held that bank accounts were immune from attachment based on the Ambassador's certificate pursuant to Section 13(5), on the grounds that bank accounts held by the Embassy were *prima facie* non-commercial in nature. On appeal, however, the Court of Appeal reversed the order of the court below and held that the

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14 388 Parl. Deb. HL (5th Ser.) col. 67, 70-74, 1501-11 and 1520-30 (1978).
15 Section 3(1) of SIA.
16 (1984) 1 All ER 1.

accounts were not immune, as they had been used for transactions mentioned in Section 3(3). Subsequently, the House of Lords restored the order of the first court wherein it had held that the accounts held by the bank were immune under the Section 14(4) on the grounds that funds held by the Embassy were immune under international law, as observed by the German Federal Constitutional Court in *the Philippine Embassy case*.[17]

In a similar case, *AIG Capital Partners Inc and Another v Republic of Kazakhstan*,[18] the question arose as to whether an award was enforceable in England against assets held by third parties on behalf of a national bank. In this case, the intervener, the National Bank of Kazakhstan, applied to discharge the interim orders on the basis that cash and securities held by third parties were subject to immunity from enforcement pursuant to Section 14(4) of SIA. The Queens Bench Division (Commercial Court) held that the debt owed by third parties to the intervener bank, ultimately for the defendant, does not mean that there was a debt due to the defendant in respect of those accounts. The court relying on *the Alcom case* and *AIC Ltd v Federal Government of Nigeria*,[19] held that the term 'property' appearing in Section 14(4) included all real and personal properties and embraced any right or interest – legal, equitable or contractual in assets that might be held by a State or any 'emanation of State' or central bank or other monetary authority – that came within Section 13 or Section 14, irrespective of the capacity or purpose for which it is held, and is therefore, immune from enforcement.

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17 65 ILR 146 (1984).
18 (2005) EWHC 2239 (Comm.); (2006) 1 Lloyd's Rep. 45.
19 (2003) EWHC 1357 (Q.B.).

Views have been expressed that as Section 9 of SIA provides that when a State agrees to arbitration, it is not immune to any proceedings that relate to arbitration in the United Kingdom courts, it can be extended to enforcement of arbitral awards as well.[20] The suggestion, however, does not seem logical in the sense that Section 9 should only be read in conjunction with Section 3, which explicitly grants immunity to actions of the State that are not commercial in nature. Mann, who argues that English courts may recognise and enforce arbitral awards only in respect to State property used for commercial purposes, supports this argument.[21]

However, it is pertinent to note that unlike FSIA, the SIA does not make a distinction between execution of property as regards State and State entity. Yet, the State entity enjoys immunity under Section 14(2) if proceedings relate to anything done by it in the exercise of sovereign authority and the circumstances are such that a State would have been so immune. Hence, a separate entity can claim immunity under Section 13(1) to (4) or Section 14(2) of SIA as the State. Similarly, SIA does not make a distinction, unlike FSIA, with regard to commercial and non-commercial activities for the purpose of execution. Statutes on state immunity in other jurisdictions based on the British SIA do not require that the claim must arise out of the use of the property.[22]

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[20] Hazel Fox, *Sovereign Immunity and Arbitration*, in *Contemporary Problems in International Arbitration* at p. 323; Lord Wilberforce, 389 Hansard HL Comm. col. 1524.

[21] FA Mann, *State Immunity Act 1978*, 50 BYIL 43 (1979) at p. 58.

[22] See for example, Section 15 of Singapore State Immunity Act 1979; Section 14 of Pakistan State Immunity Ordinance 1981; Section 32 of Australian FSIA 1985.

The position, not surprisingly, is not different in countries where there is no legislation specifically concerning the status of property of a foreign State as regards execution.[23] The courts have generally held that when a State has waived its immunity by submitting to arbitration, the waiver also extends to proceedings that relate to confirmation or recognition of the resultant award.[24] National statutes, trade agreements and international instruments on state immunity are silent on whether an agreement to arbitrate extends to waiver of immunity in relation to enforcement of the resultant award. It can, nevertheless, be safely concluded from the above discussion that immunity from execution for all State property is no longer available.

The trend amongst major jurisdictions is that property of a foreign State 'in use' or 'intended to use' for public purposes are immune from attachment whereas properties of foreign States 'in use' or 'intended to use' for commercial purposes can be subjected to attachment and execution. In addition to this, the property of a State entity that enjoys a separate legal personality is subject to attachment and execution in the same manner as an ordinary commercial person or entity. It is, however, worth noting here that there is no general consensus on whether the agreement to arbitrate constitutes an implicit waiver of immunity from execution and decisions on the matter often depend upon the existing rules governing immunity at the forum State even now.

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23 Giorgio Bernini and A Jan Van den Berg, *The Enforcement of Arbitral Award against a State: The Problem of Immunity from Execution*, in *Contemporary Problems in International Arbitration* at p. 359.

24 *Ipitrade International SA v Federal Republic of Nigeria*, 465 F Supp 824 (D.D.C. 1978); *Eurodif v Republique Islamique d'Iran*, (1984) Clunet 598; *SEEE v Republique Socialiste Federal de Yougoslavie*, (1971) Clunet 131.

4.3 Act of State as a Bar to Enforcement of Award

The Act of State Doctrine provides an exception to the general proposition that courts may adjudicate all claims over which they have jurisdiction. It prevents domestic courts from adjudicating claims brought against sovereign States for conduct occurring within their territories, despite the fact that jurisdiction exists.[25] Courts usually decide any claim brought before it as long as it has the jurisdiction to decide the matter, but in the case of claims against a foreign sovereign, jurisdiction initially rests upon whether the claim fits into one of the several exceptions to the Doctrine of Sovereign Immunity, now codified under the immunity acts of different States.

Act of State is an issue, which might creep into the enforcement proceedings of an arbitration award in the forum States. The Act of State Doctrine was primarily intended to protect government officials from suit for conduct within their national borders, when acting in their official capacities. A commentator has expressed the view that, in fact, Act of State is a corollary to the Doctrine of Sovereign Immunity.[26] The doctrine was first enunciated in *Underhill v Hernandez,*[27] wherein the courts began to view Act of State as having an independent footing and held that "every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another within its own territory." This decision is considered to have defined the Act of State Doctrine in the concept of territorial sovereignty.

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25 *First National City Bank v Banco Nacional de Cuba*, 406 US 759 (1972).
26 *First National City Bank v Banco Nacional de Cuba*, 406 US 759 (1972).
27 168 US 250 (1897).

The early twentieth century witnessed the courts' concern for international comity for Act of State cases, which is evident from the decision that the court arrived at in the case of *Oetgen v Central Leather Company*,[28] wherein the court held that

> … rest at last upon the highest consideration of international comity and expediency. To permit the validity of the acts of one sovereign state to be examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.

This decision clearly articulates the courts' rationale for the Act of State Doctrine as territoriality and concern for the issues of international amity and harmony.

In another leading case, *Banco Nacional de Cuba v Sabbatino*,[29] the court held

> The judicial branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognised by this country at the time of suit, in the absence of a treaty unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.[30]

Fox opines that even though international comity and choice of law rules played a part in arriving at such decisions, deference of the courts to the Executive appears to have played a more significant role in them.[31] The Congress after the decision in *the Sabbatino case* introduced an exception, which had the effect of reversing the Supreme Court's judgement in so far as taking of the property in violation of international law, was concerned.[32] The decision confined the Act of State Doctrine to

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28 246 US 297 (1918).
29 376 US 398 (1964).
30 376 US 398 (1964) at p. 428.
31 Hazel Fox, *The Law of State Immunity* at p. 483.
32 Section 1605(a)(3) of FSIA.

an act of a foreign State 'within its own territory' and the courts in subsequent decisions emphasized this requirement.[33]

In the UK, the principle articulated in *Underhill v Hernandez* has been adopted into the English law as a defence of Act of State, the scope of which has been stated in Dicey & Morris as

> A governmental act affecting any private property right in any movable and immovable thing will be recognised as valid and effecting in England if the act was valid and effective by the law of the country where the thing was situated (*lex situs*) at the moment when the act takes effect and not otherwise.[34]

The difference between the US and English Acts of State is that in the UK, the defense is available to acts committed outside the territory of UK or its colonies against the person or property of an alien.

In *Buttes Gas v Hammer*,[35] Lord Wilberforce held that

> There exists in English law a general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, its seems desirable to consider this principle, if existing, not as a variety of "acts of state" but one for judicial restraint or abstention.

This principle was based on case laws, which recognised that acts done by virtue of sovereign authority are not justifiable before English courts.[36]

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33 *Braka v Bancomer*, 762 F.2d 222.
34 Dicey & Morris, *The Conflicts of Law*, Rule 122.
35 (1982) AC 888 at p. 938.
36 Hazel Fox, *The Law of State Immunity* at p. 489.

4.4 Sovereign Immunity and Act of State: The Distinction

The Doctrine of Sovereign Immunity as it stands now does not grant absolute immunity, unless an exception applies and the conduct of foreign sovereign is governmental or public in nature. The Act of State Doctrine and the Doctrine of Sovereign Immunity have some degrees of overlap. Both are rooted in the respect for independent authorities, State equality and limitations for domestic judiciary to sit in judgement on the actions of another State. It can also be seen that both these doctrines stem from the seventeenth century European practice of affording personal immunity from suit to foreign nations.[37] The function of the Doctrine of Sovereign Immunity was to protect States from suits while, on the other hand, the Act of State Doctrine was designed to avoid any judicial review of a foreign sovereign's official acts. This was clearly illustrated in *Braka v Bancomer*,[38] where it was held that "while the effect of sovereign immunity is to shield the person of the foreign sovereign, and by extension, his agents from the jurisdiction, Act of State doctrine shields the foreign sovereign's internal law from intrusive scrutiny." Unlike foreign sovereign immunity, the Act of State Doctrine has never been codified. The doctrine is purely considered to be a judge-made rule that has been subject to much controversy and uncertainty.

It is true that sovereign immunity and the Act of State Doctrine can be raised at the same time, and often in instances where the foreign State or its entity is itself a party to an action, but the two rules are distinct for the reason that the former concerns the amenability to suit and the latter deals with the appropriateness of a court sitting in

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37 Michael J Bazyler, *Abolishing the Act of State Doctrine*, 134 U Pa. L Rev. 325 (1986) at p. 331.
38 762 F.2d 222.

judgement of a foreign government's act. The difference is that the Doctrine of Sovereign Immunity addresses the question of jurisdiction over cases involving foreign sovereigns as defendants, whereas the Act of State addresses the question of whether a court with proper jurisdiction over a State should review sovereign acts within its own territory.[39] Despite the clear differences between the two doctrines, the Act of State Doctrine in the nineteenth century was considered an extension of the Doctrine of Sovereign Immunity. This was perhaps so because in any case involving a foreign sovereign as defendant, the Doctrine of Sovereign Immunity would preclude jurisdiction from the very beginning.

The transition to the restrictive theory of sovereign immunity had significant implications for the relationship between the Doctrines of Act of State and Sovereign Immunity. By accepting the restrictive theory, the courts were able to effectively separate the jurisdictional sovereign immunity question from the prudential issue of Act of State. That is, cases could now exist where sovereign immunity did not bar adjudication, but the Act of State still did. Such cases would include those in which a court concluded that, for policy reasons, adjudication should not occur, despite the fact that the act of the foreign sovereign was found to be commercial in nature, and therefore, adjudicable under the restrictive theory of sovereign immunity.[40]

Although the restrictive view of sovereign immunity has allowed greater judicial examination of foreign actions by the domestic courts of a country, these actions are

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[39] Hazel Fox, *The Law of State Immunity* at p. 525.

[40] Russ Schlossabach, *Arguably Commercial, Ergo Adjudicable?: The Validity of a Commercial Activity Exception to the Act of State Doctrine*, 18 BU Int'l LJ 139 (2000).

necessarily limited to activities carried out in or related to that country. The Act of State, in contrast, encompasses activities of foreign States in their own territories. For example, in the case of *WS Kirkpatrick & Co v Environmental Tectronics Corp Int'l*,[41] it was held that the Act of State Doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid.

The Doctrine of Sovereign Immunity addresses the jurisdiction of the courts, whereas the Act of State Doctrine addresses the permissible scope of inquiry by courts into the particular issue presented before it. In short, it would only be appropriate to say that sovereign immunity renders an action non-adjudicable, whereas the Act of State Doctrine prevents the consideration of the validity of a government's actions.

If we consider these two doctrines in the backdrop of the commercial exceptions to each of these rules, it can be seen that the two commercial exceptions require separate characterisation. According to some courts, the commercial exceptions to the two doctrines should be uniform so as to "effectuate the legislative intent that FSIA not be undermined by the improper assertion of the Act of State defense."[42] Although this decision seems to be a well reasoned one, this argument only addresses those cases where the government, which committed the purported 'Act of State', is also a party to the action. However, as discussed above, the Act of State Doctrine is not limited to

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41 493 US 400 (1990) at p. 409.

42 *Sage Int'l Ltd v Cadillac Gage Co*, 534 F Supp 896 (1981); *Alfred Dunhill v Republic of Cuba*, 425 US 682 (1976).

such instances alone. The doctrine is often invoked in cases where the named government is not a party at all. The acts of foreign governments may be an issue far more frequently under the Act of State Doctrine than under foreign sovereign immunity when governments themselves are directly involved in controversies.

4.5 Act of State and Arbitration

As discussed earlier, sovereign immunity is directed against the very assumption of jurisdiction by the arbitral tribunal. Arguments have been raised during arbitral proceedings that a dispute cannot be subjected in cases where a State is respondent for the reason that material events, which have given rise to the claim, partake a sovereign character and hence, cannot be adjudicated upon by the tribunal.[43] This is more so when State-owned entities rely on the acts of their respective governments as exonerating them from their liability under *force majeure*, so as to restrict the tribunal from enquiring into the motives of the act.[44] In contrast, international tribunals do not recognise the Act of State Doctrine as one limiting the jurisdiction of arbitrators to review sovereign acts.[45]

A court is not required to rule on the merits of a State's actions, the merits of which have already been determined by arbitrators, when enforcing an award against that State. Accordingly, the United State's policy notes that the enforcement of arbitral

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43 JG Wetter, *Pleas of Sovereign Immunity and Act of Sovereignty before International Arbitral Tribunal*, 2 J Int'l Arb. 7 (1985).

44 *Czarnikow v Rolimpex*, (1979) AC 351 at p. 364.

45 *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, (1993) 32 ILM 933; *Marine Drive Complex Ltd (Ghana) v Ghana*, 19 YB Com. Arb. 11 (1994); *Wintershall AG v Government of Qatar*, (1989) 28 ILM 795; *LETCO*, 26 ILM at 666-67; *LIAMCO*, 20 ILM at 85-87; *Texaco Overseas*, 17 ILM at p. 37.

agreements, confirmation of arbitral awards, and execution of arbitral awards shall not be refused on the basis of the Act of State Doctrine. For example, in the case of *Libyan American Oil Co v Socialist People's Libyan Arab Jamahiriya*,[46] the company sought enforcement of the award rendered pursuant to an agreement to arbitration between the parties. The District Court held, however, that even though it had jurisdiction to enforce the award under Section 1605(a)(1) of the FSIA, the Act of State Doctrine prohibited it from exercising that jurisdiction and thus, dismissed the action brought for enforcement of award. The court seemed to have combined arbitrability with Act of State in this case since the Act of State Doctrine prevents the court from enquiring into any act of a foreign State that has effects within its own territory.[47] Subsequently, the United States Government appeared as *amicus curiae* and argued that the Act of State Doctrine does not apply to the enforcement of arbitration awards, and so also to this case.[48] The United States' attempt in *the LIAMCO case* to prevent the application of the Act of State Doctrine to arbitration indicates that the Act of State Doctrine can, in certain situations, be a barrier to the enforcement of an award.

Attempts by the States and State-owned entities to restrict the tribunal from adjudicating certain acts of the respective States are typical examples of the Act of State Doctrine. As a spin-off to this approach resorted to by States, private litigants may also at times raise the plea of Act of State, even when the State is not a party to

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46 684 F.2d 1024 (D.C. Cir. 1981).

47 M Sornarajah, *International Commercial Arbitration: The Problem of State Contracts*, Singapore (1990) at p. 235.

48 20 ILM 161 (1981), Brief submitted by United States as *amicus curiae*.

the claim. This is with the intention of basing their defense on the fact that certain government acts being measures of legislative and executive character amount to an Act of State and so, cannot amount to a breach of contract. This was seen in the case of *International Association of Machinist and Aerospace Workers v OPEC*.[49]

In *Buttes Gas and Oil Company v Hammer*,[50] Lord Wilberforce considered the justiciability of certain disputes, which necessitated an inquiry into Acts of State. He stated

> In my opinion there is, and for long has been, such a general legal principle starting in English law, adopted and generalized from the law of United States of America which is effective and compelling in English courts. This principle is not one of discretion but is inherent in the very nature of judicial process.[51]

But, those who oppose this view make a distinction by saying that courts are concerned with justiciability while international arbitral tribunals are concerned only with arbitrability. They derive their support from the inherent nature of the international arbitrational process, i.e., to adjudicate upon the transactions of the sovereign States within the jurisdictional bounds of valid arbitration agreements.

Present international arbitration practices apparently have not recognised the Act of State Doctrine or any similar doctrine limiting the ability of arbitrators to review sovereign acts. The Federal Arbitration Act now provides that "enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgements

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49 649 F.2d 1354 (1981) at p. 1359; *WS Kirkpatrick & Co v Environmental Tectronics Corp Int'l*, 493 US 400 (1990).

50 (1982) AC 888.

51 (1982) AC 888 at p. 932.

based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine."[52]

Arbitral tribunals have now reviewed foreign State expropriations that, under *Sabbatino*, could not have been reviewed in the United States courts due to the implications of the Act of State Doctrine.[53] But, contrary views have also been expressed that certain acts, like exchange control measures or environmental measures, are not adjudicable on the basis that the arbitrator cannot subject such Acts of State to decision.[54] Should this view be accepted, arbitration will no longer remain a solution to these kinds of disputes because breach of contract in such circumstances ordinarily occurs as a result of a sovereign act, and a claim challenging this breach when considered within the ambit of the Act of State Doctrine would preclude arbitrators from deciding the claim.

4.6 Enforcement of Award Against Sovereign Property

Recent codifications on state immunity and state practice make a distinction between 'State' and 'State-owned property', which are subject to enforcement procedures. Article 18 of the ILC's Draft Articles on Jurisdictional Immunities of States and their Property specifies that no measures of constraint may be taken against the property of a State unless the State has consented to such measures either by an international agreement or an arbitration agreement. Other preconditions to execution against State

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52 George Kahale III, *New Legislation in the US Facilitates Enforcement of Arbitral Agreements and Awards Against Foreign Sovereigns*, 6 J Int'l Arb. 57 (1989).

53 *Southern Pacific Properties (Middle East) Ltd v Arab Republic of Egypt*, (1993) 32 ILM 933.

54 M Sornarajah, *International Commercial Arbitration: The Problem of State Contracts* at p. 169.

property include the fundamental provisions that firstly, the State must have allocated the property in question to be specifically used or intended to be used by the State for commercial activities, and secondly the territory of the forum State should have a connection to either the claim or the instrumentality against which the proceedings are directed.[55]

This distinction between commercial State property, which is not immune, and non-commercial public property, which is immune, is adopted widely for execution against State property. The criteria employed for execution against State property are different from those used in jurisdictional issues. The 'purpose test', which was discarded in favour of the determination of the nature of transaction for the purpose of establishing immunity from jurisdiction,[56] is still of vital importance where the question of execution against the State property is concerned – ascertaining the purpose or intended use of the State property for commercial or non-commercial activities is pivotal in ascertaining whether the property in question can be executed against. In one of the early cases, namely *Duff Development v Kelantan Government*,[57] the English court held that the intention of the Kelantan Government in agreeing to submit disputes to arbitration and seeking assistance from the English court to set aside an award against it was in no way proof of its willingness to submit to enforcement of the award by the English court.

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55 Report of the International Law Commission (1991) at p. 13.
56 Christoph H Schreuer, *State Immunity: Some Recent Developments* at p. 15.
57 (1924) AC 797.

Certain kinds of State properties are designated for public use and hence, immune from execution. These include diplomatic and consular premises, military equipments, warships, etc. At the same time, properties of the State that are prone to attachment and execution are bank accounts, Embassy accounts, Central Bank accounts, and earmarked funds. The latter will be in focus in the following paragraphs.

The UK SIA provides that

> The property of a state shall not be subject 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 immunity may be waived by written consent not by merely submitting to jurisdiction of the courts.[58]

While there is no immunity from execution for property in use or intended for use in commercial activities,[59] there is an exception that this shall not apply in case of the Central Bank of a State or other monetary institutions.[60] The property in use or intended for use for commercial purposes is subject to Section 17 of SIA, which defines 'commercial purposes' to mean all transactions mentioned in Section 3(3).

The criteria for 'in use or intended use' was decided in *Alcom Ltd v Republic of Columbia*,[61] often described as a case involving a question of 'outstanding international importance.' Here, the court held that a bank account would not fall within the Section 13(4) exception relating to commercial purposes, unless it could be

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58 Section 13(2)(b) of SIA.
59 Section 13(4) of SIA.
60 Section 14(4) of SIA.
61 (1984) 2 All ER 6.

shown by the person seeking to attach that the bank account was earmarked by the foreign State solely to settle the liabilities incurred in commercial transactions.

Under the US FSIA, Section 1610 specifies the circumstances under which the State property can be executed against, for e.g., express waiver is required before attachment of a commercial property prior to the judgement[62] whereas post-judgement attachment could be effected against the property belonging to a State entity or an instrumentality of the State engaged in commercial activities in the United States even without waiver.[63] However, execution against property of State is possible only if the property in use for commercial activities is the one on which the claim is based.[64]

Thus, under FSIA, a connection or link is necessary for execution against the State property while no such requirement exists regarding the property of an entity or instrumentality. In spite of the provisions for execution against State property, FSIA preserves immunity much like the Section 14(4) of the UK SIA for certain types of properties, such as the property of an international organisation, property of a Central Bank or other monetary authorities of the State, and property used for military activity.[65] The recent UN State Immunity Convention is also in accord with the immunity acts of UK in relation to measures of execution, except that Articles 18(a)(ii) and 19(a)(ii) of the said Convention allow pre- and post-judgement measures

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62 Section 1610(d) of FSIA.
63 Section 1610(b) of FSIA.
64 Section 1610(a) of FSIA.
65 Section 1611 of FSIA.

against the State in cases where the State has expressly consented to such measures by entering into an arbitration agreement. This provision is very significant in the sense that execution against the State property will become possible once the Convention comes into effect. The insertion of a waiver clause from execution in the arbitration agreement itself will enable the pre- and post-judgement actions against the State.

Even though, as a general rule, immunity is available to certain types of properties of a State, such as property of a Central bank or its Embassy accounts, the approach of national courts to the issue of whether enforcement measures, such as orders of attachment, are available against State property remains unsure. In fact, enforcement against a State that is voluntarily unwilling to comply with an award is more often than not extremely difficult and long-drawn-out, and there being no safety net, assets of the State or its agency may be hard to identify and their ownership open to question.[66] This point of view is made stronger on a closer look at the decisions arrived at by the courts in different jurisdictions.

In the *Alcom* and *AIC Ltd v Federal Government of Nigeria*[67] cases, the court held that whatever the connection of the bank with the foreign State, even if it is shown that the property is in use or intended for use for commercial activities, the property of the Central Bank is immune. In another interesting case, *AIG Capital Partners Inc*

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66 Nigel Rawding, *Protecting Investments under State Contracts: Some Legal and Ethical Issues*, Arb. Int'l, Vol. 11, No. 4 (1995) 347.

67 (2003) EWHC 1357 (Q.B.).

and Another v Republic of Kazakhstan,[68] the question arose as to whether an award was enforceable in England against assets held by third parties on behalf of a National Bank. The Queens Bench Division (Commercial Court), relying on *the Alcom case* and the case of *AIC Ltd v Federal Government of Nigeria*,[69] held that the debt owed by third parties to the intervener bank, ultimately for the defendant, does not mean that there was a debt due to the defendant with regard to those accounts.

It is significant to note that the UK and US statutes differ with respect to the extent to which a Central Bank is given immunity under these different statutes. For example, the UK SIA allows attachment in cases where the State has given consent whereas the US FSIA prohibits any kind of pre-judgement attachment even when there is an express waiver. Again, under the US FSIA, the phrase "held for its own account" preserves the distinction between an account held for the State in connection with its banking activities and those for other commercial purposes, whereas the UK Act does not contain any such wording, thereby affording wider immunity to assets held in Central Banks. However, the English position, under SIA, with regard to enforcement against the State-owned bank accounts is difficult to interpret in view of the reliance placed on the provisional respect of the Foreign Ambassador's certificate.

There are numerous decisions on immunity relating to bank accounts held by Embassies. In *the Philippine Embassy Bank Account case*,[70] the German

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68 (2005) EWHC 2239 (Comm.); (2006) 1 Lloyd's Rep. 45.
69 (2003) EWHC 1357 (Q.B.).
70 65 ILR 146 (1984).

Constitutional Court held that "there was no need to prove the specific threat to the functioning of the Embassy. An abstract danger was sufficient to uphold immunity."

As discussed above, in *Alcom Ltd v Republic of Colombia*,[71] considered to be a leading case law in this respect, the House of Lords restored the order of the court of first instance, wherein it was held that accounts held by the bank were immune under the Section 14(4), not counting the grounds that funds held by the Embassy were immune under international law. This judgement relied on the decisions arrived at by the German Federal Constitutional Court in *the Philippine Embassy Bank Account case*.[72]

In *Banamar v Embassy of the Democratic and Popular Republic of Algeria*,[73] the court held that the rule of customary international law prohibits measures of execution against the property used for sovereign purposes of a foreign State, located in the territory of the forum State, by ordering execution against bank accounts in the name of that State's Embassy. However, this position was altered in *Condor and Filvem v Minister of Justice*,[74] wherein the Italian Constitutional Court held that it could no longer recognise the international customary rule forbidding absolutely coercive measures against the foreign State's property. It went on to add that immunity is available, unless it is demonstrated that the activity or transaction is *jure*

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71 (1984) 1 All ER 1.
72 65 ILR 146.
73 84 Am. J Int'l L 573 (1990).
74 101 ILR 394.

gestionis or the property against which execution is sought is destined for public functions of the foreign State.

The decision of the French Court de Cassation in *Creighton v Qatar*[75] came along the lines of the decision of the Italian Constitutional Court in the case above, but was based on a very different reasoning. In this case, enforcement of an arbitral award was sought against the money in the account of Qatar National Bank. The Court of Appeal ordered, on the premise that Qatar had not waived immunity and the basis of lack of proof, that the property was commercial in nature. However, the Court de Cassation reversed this decision on the basis that agreement to arbitrate under the ICC Rules provide that "the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar that such waiver can be validly made."[76] This decision does not seem well-reasoned as different institutional arbitrational rules contain binding effects on the award rendered under it and decisions made with regard to waiver of immunity from execution, by mere reference to one or another set of arbitrational rules, cannot be said to be rational.

Matters, however, again did a volte-face when NOGA, a Swiss company, made attempts to enforce an award against the Russian Federation. Initially, an attempt was made to attach two fighter jet planes that had participated in an air show. However, this endeavour failed to materialise as the planes flew away before the order of arrest

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75 French Cour de Cassation, July 6, 2000, YB Com. Arb. XXV (2000) 458.
76 Article 28, ICC Rules (1998).

could be affected. Thereafter, efforts were redirected on attaching a school sailing ship, the Sedov. This was initially successful but the attachment was later lifted on the grounds that the ship did not belong to Russia but to the University of Murmansk, which was a separate entity. Attempts were, then, made to attach certain bank accounts held by the Russian Embassy. In spite of an unequivocal intent to waive diplomatic immunity, the court held that the accounts were immune from attachment.

The above discussion only goes to prove that a waiver of immunity with regard to arbitration does not essentially mean that the State has surrendered the immunity of its assets, but should also be understood to preclude enforcement against all assets of the State. The assumption that immunity is available to a State's public assets, which are held by the State to perform its sovereign functions, as opposed to assets used for its commercial activities is not conclusive. The recent UN State Immunity Convention seems to be more realistic in relation to execution against Central Banks and other monetary authorities. Article 19(1)(c) of the Convention states that the property of a Central Bank or other monetary authority of a foreign State shall be immune unless

> Property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

4.7 Conclusion

In spite of the fact that the lawful position of Act of State is different from one country to another, it is still to the point when said that such a plea cannot be

exercised by the State either as a bar to the jurisdiction of an international tribunal or to restrict the arbitrators' power to adjudicate upon matters relevant to the determination of a dispute. However, a different perception of the Act of State Doctrine is evident when viewed from the perspective of enforcement proceedings before the Municipal Courts. It is interesting to note that none of the national legislations on immunity or the different codifications, including the recent UN State Immunity Convention, touch up on the Act of State Doctrine.

The issue of whether a contractual agreement to arbitrate by a State can be construed to constitute an implicit waiver of its immunity from attachment and execution is still unclear, for the reason that, as a rule, immunity from jurisdiction is clearly distinct from immunity from attachment and execution. And, it is widely accepted that greater caution needs to be exercised when a waiver of immunity clause is being extended to assumption of jurisdiction regarding attachment and execution measures.

Trends seen in recent court decisions are indicative of an inclination to limit the scope of immunity enjoyed by a State from enforcement proceedings, when the property sought to be enforced against is commercial in nature. Those supporting this view would argue that the State has a moral obligation to abide by an award rendered against it. Nevertheless, it is doubtful whether enforcement of the said award can be thrust on the State in the absence of an explicit 'waiver of immunity from execution clause' in the arbitration agreement itself, as enforcement proceedings constitute an entirely new action.

Due to the existing inconsistency in state practice and the absence of any clear-cut decisions defining the Act of State Doctrine,[77] all parties involved in arbitrational proceedings, including the judges and tribunals, continue to deal with knotty and intractable problems created by sovereign immunity and the Act of State Doctrine. It would be a definite advantage, therefore, to both the investor and the host State if the Doctrines of Sovereign Immunity and Act of State were carefully explored – taking into consideration all relevant issues from the points of view of both developing and developed nations – so as to strike a balance between the two and a precise definition given to the circumstances under which a State could invoke immunity or the Act of State. Such transparency will not only help remove the uncertainty associated with this issue, such as matters of execution against State property, ownership of the property, etc., but also make matters much easier all round for the parties concerned.

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[77] M Singer, *The Act of State Doctrine of the United Kingdom: An Analysis, with Comparison to United States Practice*, 75 Am. J Int'l L 283 (1981).

CHAPTER FIVE

ENFORCEMENT OF AWARDS UNDER INTERNATIONAL CONVENTIONS

5.1 Introduction

Arbitration involving States involves highly diversified issues, like questions relating to procedural aspects of the proceedings or even the law applicable to the disputes. Beyond these issues, the issue of sovereign immunity may also be relevant at the time of enforcement of the agreement or in connection with the recognition and enforcement of an arbitration award.

States are occasionally reluctant to abide by their agreements to arbitrate and, in these cases they are prone to invoke the defense of sovereign immunity from jurisdiction and execution. Usual State practice is to take up the plea of sovereign immunity right from the stage of enforcement of arbitration agreement up to the enforcement of arbitral award, should any be passed against it.

International instruments on state immunity prevailing in America, Europe and the Afro-Asian countries generally perceive that agreement by a State to arbitrate transnational commercial disputes implies that it is willing to submit itself to the supervisory jurisdiction of the courts of another State and accordingly, treat this as an implicit waiver of state immunity from jurisdiction. It is now widely accepted that waiver of immunity from jurisdiction is implicit in a State's agreement to arbitrate and

is almost irrevocable,[1] even though the relevance of such a plea in the consensual arbitrational process has been disputed by some writers.[2] Regardless, the fact remains that the proceedings for enforcement of an arbitration award is beyond the control of the arbitral tribunal and is a matter for the national courts, where immunity can once again be raised as a plea to jurisdiction as well as execution with the aim of preventing award enforcement. An equally important issue that may arise is whether implied waiver of immunity to jurisdiction can be extended to the resultant award.

One frequent hold-up is the enforcement of an arbitration award when the recalcitrant party is a State asserting sovereign immunity.[3] This assertion of immunity is significant, as discussed in the previous chapter, seeing that most legal systems distinguish between waiver of immunity from jurisdiction and waiver of immunity from execution. This fact is expressly accepted in the Second Report on Jurisdictional Immunities of States and their Property as well.[4]

It is now universally accepted that greater caution needs to be exercised in relation to execution proceedings than when deciding issues related to jurisdiction. The present chapter discusses the manner and extent of impact that sovereign immunity could have on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and the International Centre for Settlement of Investment

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1 KI Vibhute, *International Commercial Arbitral Tribunal and Sovereign Immunity: Some Conceptual Reflections*, 3 CLJ 86 (1996).

2 Hazel Fox, *State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution against the State Property?* Arb. Int'l, Vol. 12 (1996) at p. 89.

3 Martin Domke, *The Enforcement of Maritime Arbitration Agreements with Foreign Governments, Shorter Articles and Comments*, 2 J Mar. L & Com. 617 (1971).

4 Doc A/CN.4/331 reprinted in YBILC, Vol. II, part 1 (1980) 199 at p. 209-210.

Disputes for the enforcement of awards. And, a conclusion will be drawn that, even though, there is a trend in favour of limiting the scope of immunity from attachment and enforcement, sovereign immunity is still an obstacle in the path of execution of awards against a State's assets under these conventions.

5.2 Sovereign Immunity and New York Convention

Arbitration derives its efficiency from the ease of enforcement of arbitral awards before national courts under the New York Convention. As a result, the issue of immunity of States before national courts takes on vital importance whenever an award is not complied with voluntarily. Among the significant problems that arise here is the interrelation between the Convention on the recognition and enforcement of the arbitral awards (New York Convention) and sovereign immunity. If we were to go into the history of the New York Convention, it can be seen that the Convention was adopted in response to the international community's striving for a proper mechanism for the enforcement of international arbitral awards through unification of enforcement standards as the previous international agreements on arbitration, such as the Geneva Protocol and the Geneva Convention, had proved ineffective with respect to enforcement of awards.[5]

Under the New York Convention, every Member State is under an obligation to incorporate the Convention under domestic law, but it also permits a State to have reservations on whether it is to apply the Convention to disputes that "are considered

[5] Leonard V Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YLJ 1049 at p. 1054-55; P Contini, *International Commercial Arbitration*, 8 Am. J Comp. L 283 (1959).

commercial under the national law of the forum state." Enforcement of awards is made on the basis of the domestic statutes incorporating the New York Convention and so, it has been argued that an award based on internationalisation of contracts cannot be enforced under the New York Convention.[6] The defendant State may attempt to defeat the enforcement of award on the basis of sovereign immunity or the Act of State Doctrine, not including the regular pleas of defense available to it under the Convention itself, which may create further problems whenever an award is being sought to be enforced against the State or State entities.[7]

5.2.1 Enforcement under New York Convention

In dealing with the enforcement of arbitral awards under the New York Convention and the issue of sovereign immunity, it needs to be seen whether remedies under the New York Convention are available to arbitral disputes arising between States and private individuals. A mere glance at Article I of the New York Convention is enough to show that it refers only to "arbitral awards arising out of differences between persons, whether physical or legal", thus, leaving much ambiguity concerning whether 'legal persons' would also include States. Some writers are of the view that paragraph 2 of Article I indirectly deals with State-controlled entities being involved in arbitration, as there is a reference to awards made as arbitral awards rendered by 'permanent arbitral bodies'. It is argued that the reason for this is to cover under the

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6 A Jan Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, Deventer (1981).

7 M Sornarajah, *International Commercial Arbitration: The Problem of State Contracts* at p. 237.

New York Convention disputes arising between State entities of the Member States involved in international trade.[8]

The above position is supported by the view that the *travaux preparatoires* of the New York Convention, which deals with the term 'legal person' mentioned in Article I, includes State enterprises, State subdivisions and States, themselves.[9] But, as pointed by Bouchez, on the assumption that a State may act in more then one capacity, it becomes apparent that further clarification is required to imply that the New York Convention will apply to only those acts done by a State which are commercial activities or *jure gestionis* and not to its public acts or *jure imperii*, unless there is an express agreement between the parties.[10]

It has also to be seen whether enforcement of an award, wherein one of the parties is a State or its entity claiming sovereign immunity or Act of State Doctrine, was contemplated under the New York Convention since States enjoyed absolute immunity against enforcement at the time when the Convention came into existence. This view is further fortified by the arguments put forward by Professor Sornarajah, who argues that New York Convention provides wide grounds for escaping enforcement, which leaves many questions unanswered as to whether the Convention was intended with awards rendered pursuant to disputes arising between State and

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8 Leo J Bouchez, *The Prospects for International Arbitration: Disputes Between States and Private Enterprises*, J Int'l Arb. 81 (1991).

9 L Capelli-Perciballi, *The Application of New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity*, Int'l Law. 198 (1978).

10 Leo J Bouchez, *The Prospects for International Arbitration: Disputes Between States and Private Enterprises*, J Int'l Arb. 81 (1991).

private individuals.[11] Apart from this, Article III of the New York Convention provides that "the contracting State shall enforce arbitral awards in accordance with the rules of procedure where the award is relied upon." It is, however, silent on the obligation of the contracting State with regard to immunity of State property.

Also worthwhile noting is the fact that disputes arising from contracts involving natural resources are not enforceable under the New York Convention due to compelling arguments that support the position that permanent sovereignty over natural resources constitutes *jus cogens* in international law.[12] Although this principle was rejected in *the Aminoil Arbitration*,[13] the theory of internationalisation has been taken aback by the evolution of the principle of permanent sovereignty over natural resources. The significance of this development is that developing nations have adopted these principles in their domestic laws as part of their constitution's investment codes,[14] which makes it virtually impossible to enforce awards rendered against States under the Convention.

According to some commentators, the New York Convention provides for a general obligation to recognise as binding foreign arbitral awards, and its text and *travaux preparatoires* support the position that a State, which has agreed to submit a dispute to arbitration, is required to comply with the resulting arbitral award and cannot plead immunity. For example, the New York Convention, which was adopted in the US,

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11 M Sornarajah, *International Commercial Arbitration: The Problem of State Contracts* at p. 241.

12 I Brownlie, *Legal Status over Natural Resources in International Law*, 163 Hague Recueil 25 (1979) at p. 271 (cited in Sornarajah at 31).

13 (1982) 21 ILM at p. 1021-1022.

14 TW Walde, *Transnational Investment in the Natural Resources Industries*, 11 Law & Pol'y Int'l Bus. 691 (1979).

provides jurisdiction for actions to enforce foreign arbitration agreements and awards rendered in any of the signatory States.[15]

The sovereign immunity defense in enforcement actions also raises queries on the issue of whether a sovereign's agreement to arbitration in a signatory country under the New York Convention has the same effect as an agreement to arbitrate in the US, as construed under the waiver exception of FSIA.[16] Some have also expressed the view that the law of the place, where the award is to be enforced, be examined because eventually, the courts of the country where the enforcement is sought will apply their own notions of sovereign immunity.[17] For example, India ratified the New York Convention in 1960 and subsequently enacted the Foreign Award (Recognition and Enforcement) Act 1961 to give effect to the Convention. However, in doing so it clarified that the Act would not apply to arbitral disputes under contracts governed by Indian law. The effect of this reservation is that any awards made in another country in relation to disputes governed by Indian law are characterised as domestic awards and would not be, therefore, enforceable under the New York Convention.

Writers who argue in favour of denying States immunity from execution suggest that if by entering into an agreement to arbitrate, a foreign State is thought to have waived any right to sovereign immunity, then it should follow that such waiver extends also

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15 Tara A O'Brien, *The Validity of Foreign Sovereign Immunity Defense under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 Fordham Int'l LJ 321 (1983-1984).

16 Tara A O'Brien, *The Validity of Foreign Sovereign Immunity Defense under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 Fordham Int'l LJ 321 (1983-1984) at p. 324.

17 Domenico Di Pietro & Martin Platte, *Enforcement of International Arbitration Awards: the New York Convention of 1958* at p. 191.

to the enforcement of the arbitral award. It was noted that otherwise there would be little point in applying the waiver principle and engaging in arbitral proceedings, if the State against which the award is made could later avoid enforcement proceedings by yet another plea of sovereign immunity.[18] Others that oppose the above rationalization argue that refusal by a foreign State to honour an arbitral award constitutes a separate act by the State, and that sovereign immunity can, so, be raised again as a defense to the enforcement proceedings.

Therefore, it can be seen that even where a restrictive approach is taken, rules and views differ from jurisdiction to jurisdiction, for e.g., in Switzerland no enforcement against the State property is allowed if there is no sufficient jurisdictional connection with Switzerland[19] – immunity is denied only if there is sufficient contact between the underlying transaction and Switzerland. When this is not the case, the Swiss courts decline jurisdiction and refuse to permit execution against the assets of a foreign State. Similarly, France also requires a link between the property to be attached and the claim.

Those who support the view that the defense of sovereign immunity is not available under the New York Convention argue that it is doubtful that the Convention, which governs most recognition and enforcement proceedings around the world, actually does permit the immunity defense. They base their arguments on the premise that sovereign immunity would neither render an agreement null and void nor would it

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18 Hazel Fox, *The Law of State Immunity* at p. 262.
19 *LIAMCO*, 20 ILM 151.

render the subject matter of the dispute incapable of settlement by arbitration.[20] They dispute that even though the treaty provides exhaustive grounds for refusing enforcement, the only basis that might in reality be available for resting the claim for immunity is on the grounds of 'public policy'. However, courts have narrowly construed this exception.[21] The only cases that have actually seen the public policy exceptions being invoked successfully are those relating to, for e.g., the legality of Securities Act or antitrust violations, rather than jurisdictional issues.

It is also pertinent to note that according to Article I (3) of the Convention, signatory States are permitted to qualify their accession or ratification to the Convention by adopting certain reservations. The second reservation limits application of the Convention to differences that are considered commercial under the law of the ratifying State. Does this imply that the Convention recognises sovereign immunity in the nature of *jure imperii*? The United States, for e.g., adopted both these reservations and in doing so, limited its application of the Convention's "commercial legal relationships", an area that is not available to sovereign immunity defense in the country under international law.[22]

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[20] Tara A O'Brien, *The Validity of Foreign Sovereign Immunity Defense under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 Fordham Int'l LJ 321 (1983-1984).

[21] *Revere Copper & Brass, Inc v Overseas Private Inv. Corp*, 628 F.2d 81 (D.C. Cir.), the court held that the "public policy exception is not available to every party who manages to find some generally accepted principles which is transgressed by the award. Rather, the award must be so misconceived that it compels the violation of law or conduct contrary to public policy."

[22] Tate Letter, reprinted in 26 Dep't St. Bull. 984 (1952), Letter from Jack B Tate, Acting Legal Advisor to Dept. of State, to Philip B. Perlman, Acting Attorney General. United States accepted the restrictive theory in 1952, which rejected sovereign immunity for all disputes arising from commercial or private acts of a foreign state.

It will also be meaningful to note here whether a treaty obligation can be a bar to the immunity defense. At the same time, it should also be taken into consideration whether a signatory State is under an obligation to provide for an alternative procedure or mechanism whereby effective enforcement can be obtained in the national jurisdiction.

5.2.2 Conclusion

The most important advantage that arbitration offers to private parties, over other dispute resolution systems, is that it actually is a remedy. Capital importing countries are aware of the fact that they cannot bring in investments for their economies without offering certain guarantees to foreign investors regarding their investments. So, in a sense, inclusion of an arbitration clause in the contract between a State and a private party creates a contractual equilibrium.

An arbitration clause not only acts as a guarantee for the private party but also for the State. Its success depends not only on the sound assessment of a party's legal position but also on the recognition of the facts that might have prompted the State to take action in defense of public interest. It is important that arbitrators make their awards taking into consideration the State's point of view and their legitimate interest as can be seen in the case of *Grands Moulins de Dakar v The Malagasy*,[23] wherein the parties had signed a preliminary agreement for the establishment of a lumber venture and flour industry. Upon consideration of the preliminary work concluded, the Government granted certain privileges to the company. The project, however, turned

[23] Unpublished award of May 1, 1972.

out soon to be complicated and the company demanded more benefits to ensure profitability in the project. The government declined to meet this increased demand resulting in negotiations being broken off. Arbitrators found that the tentative agreement had not been breached and that negotiations by the government had been in good faith. The arbitrators' award to the company was only for reimbursement of certain expenses on the basis of equity.[24] Similarly, in *the Kuwait-Aminoil case*,[25] the tribunal while not directly challenging the principle of private value as the sole criterion for compensation emphasized the importance of a 'balanced indemnification' and of an award based on a 'reasonable rate of return' as contrasted to 'speculative profits'. The company was allowed compensation for nationalisation that was lawful. The tribunal argued for a concrete as opposed to a theoretical approach to the problem and held

> That the determination of the amount of an award of 'appropriate' compensation is better carried out by means of an enquiry into all the circumstances relevant to the particular concrete case than through the abstract theoretical discussion.

However, it is a fact that arbitral awards can be jeopardized by the issue of immunity from execution invoked by States when the private party commences an action for enforcement. Unlike restrictive immunity from jurisdiction, there is no uniform system with respect to immunity from execution, since laws differ from one legal system to another with respect to enforcement against the assets of a foreign State.

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[24] Philippe Cahier, *The Strength and Weakness of International Arbitration Involving State as a Party*, in *Contemporary Problems in International Arbitration* at p. 241.

[25] (1982) 21 ILM 976.

5.3 ICSID and Sovereign Immunity

As a result of globalisation there has been a steady increase in international commercial activities across the globe. A significant part of these commercial relations is associated with investment, which involves private parties and the governments of developing countries. This is more so in view of the fact that a State's involvement in investment and foreign trade is considered almost indispensable. In circumstances where private parties lack confidence in the impartiality of the courts of the State party and the State, likewise, is not comfortable in submitting itself to the jurisdiction of a foreign Municipal Court, "arbitration imposes itself for lack of an acceptable alternative."[26]

The creation of this international machinery was a giant leap forward for the resolution of disputes between a private party and a sovereign State. The Washington Convention established ICSID. The primary objective of ICSID was to promote a climate of mutual confidence between investors and States so as to increase the flow of resources to developing countries under reasonable conditions – it was widely regarded as an instrument of international policy for promoting investment and economic development.[27] Unlike other conventions, the ICSID Convention was a major breakthrough in two significant areas. Firstly, it gives standing to private investors involved in commercial disputes against foreign States[28] and secondly, it

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[26] William W Park, *Arbitration of International Contract Disputes*, Bus. Law. 1783 (1984).

[27] Ibrahim FI Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 ICSID Rev. - FILJ 1 (1986) at p. 4.

[28] PF Sutherland, *The World Bank Convention on the Settlement of Investment Disputes*, 28 Int'l & Comp. LQ 367 (1979).

depoliticises commercial dispute resolution by obviating the need to consider the issue of immunity from jurisdiction.[29]

However, questions are often raised whether the provisions of the Convention promote effective enforcement of ICSID arbitral awards. This is due to the place accorded domestic law in resolving questions of sovereign immunity in the enforcement of arbitral awards and other issues that seem to impinge on the effective enforcement of ICSID awards.[30]

5.3.1 ICSID and Jurisdictional Immunity

One of the primary objectives for setting up ICSID was to provide foreign private investors with a reliable means for settling investment disputes.[31] Under the Convention, consent to arbitration under the auspices of ICSID is exclusive to any other remedy. The courts of a country, which has ratified the ICSID Convention, is under an obligation to decline jurisdiction if a dispute is brought before it in contravention of an ICSID arbitration clause. Article 26 of the Convention expressly provides that, "consent of the parties to arbitration under this convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other

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29 Richard J Coll, *United States Enforcement of Arbitral Awards against Sovereign States: Implications of the ICSID Convention*, 17 Harv. Int'l LJ 401 (1976).

30 Vincent O Orlu Nmehielle, *Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 Ann. Surv. Int'l & Comp. L 21 (2001).

31 Okezie Chukwumerije, *ICSID Arbitration and Sovereign Immunity*, 19 Anglo-Am. L Rev. 166 (1990).

remedy." This being so, the Convention does not affect jurisdiction of courts to recognise, enforce and execute awards made pursuant to ICSID arbitration.[32]

The above position was illustrated in *MINE v Guinea*,[33] wherein the parties entered into a contract containing an ICSID arbitration clause. When dispute arose, *MINE* chose to approach the District Court of Colombia to compel arbitration before AAA. Guinea did not appear before the arbitrators and an award was passed against it. The District Court confirmed this award, but the Court of Appeal reversed the decision on the grounds that Guinea had not waived immunity from suit under FSIA. The court, however, did not take into consideration the exclusive character of ICSID arbitration; especially as FSIA only applies subject to an international agreement to which US is a party.[34]

5.3.2 Enforcement of ICSID Awards and Immunity

One of the most important aspects of any dispute resolution mechanism is the enforcement of judgements or awards passed under it, without which the redress against any recalcitrant party would be illusory. Article 53(1) of the ICSID Convention provides that parties are bound by the award and that the award is not subject to any appeal or to any other remedy, except as provided under the Convention. The Convention requires an award passed under it to be treated as if it were a final judgement of a court, but this provision for recognition and enforcement

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[32] A Jan Van den Berg, *Some Recent Problems in the Practice of Enforcement under the New York and ICSID Conventions*, 2 ICSID Rev. 439 (1987).
[33] 693 F.2d 1094.
[34] Section 1604 of FSIA.

of the award will in no way mean that the award can be executed overriding the rules relating to immunity in the country where the award is sought to be enforced.

The Convention makes a clear distinction between recognition and execution of an award. Recognition is in the form of confirmation, *exequatur* or other similar proceedings. Recognition accords the award the status of a judgement of a Municipal Court in whose jurisdiction the award is sought to be executed. Article 54(1) requires each contracting State to recognise an award rendered under the Convention as binding and enforce the pecuniary obligations imposed by the award within its territories as if it were a final judgement of a court of that State. Thus, a State party to ICSID arbitration cannot obstruct the award on the plea of sovereign immunity or public policy.[35] In *Benvenuti & Bonfant v Congo*,[36] the Court of Appeal held

> The provisions of the ICSID Convention offers a simplified procedure for recognition and enforcement and restricts the functions of the court designated for the purpose of convention by each contracting state to ascertaining the authenticity of the award certified by the Secretary General of International Centre for Settlement of Investment Disputes.

Thus, the Convention treats recognition of an award as the ultimate stage of an arbitral process. However, rules differ at the stage of execution, which involves execution of award against the State property. The sole basis for non-enforcement of an award permitted under the Convention is sovereign immunity from execution. Execution of awards depends on the laws of execution in different jurisdictions where the award is sought to be enforced. Thus, while Article 54(1) requires that each contracting State shall enforce the pecuniary obligations imposed by that award

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35 Georges R Delaume, *Transnational Contracts - Applicable Law and Settlement of Disputes: a Study in Conflict Avoidance*, 14.06, New York (1975).

36 20 ILM 878 at p. 881.

within its territories as if it were a final judgement of a court in that State, it also immediately qualifies the obligation by providing in Article 55 that this constitutes no derogation of any immunity of the contracting State or any foreign State from execution. Hence, enforcement of an ICSID award may depend upon the law of sovereign immunity prevailing in a particular country where the enforcement of the award is being sought.

The distinction between recognition and execution of an award was made clear in *Benvenuti & Bonfant v Congo*[37] cited above, where the Court of Appeal held that an order granting recognition and enforcement of an arbitral award does not constitute a measure of execution, but only a decision preceding possible measures of execution and therefore, cannot deal with the issue of execution, which relates to the question of the immunity from execution of foreign States.

In *SOABI v Senegal*,[38] SOABI sought recognition of the award in France. The Court of Appeal in Paris, disregarding its earlier decision in *Benvenuti*, vacated the recognition order on basis that the French *exequatur* proceeding, the recognizing court, has the right to deny recognition to a foreign award on certain (limited) grounds, including public policy. Reversing this decision of the Court of Appeal in Paris, the Court of Cassation, however, granted recognition to the award against Senegal, holding that the ICSID Convention requires recognition of ICSID awards, notwithstanding domestic legislations applicable to other types of arbitral awards.

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37 20 ILM 878.
38 (1991) 30 ILM 1167.

Thus, under French law, the question of immunity from execution is not considered until the award is recognised or granted *exequatur*.[39]

The above position was reiterated in *SEEE v Yugoslavia*,[40] wherein the court held that granting *exequatur* decision was only the necessary sequel to an award and was limited to a confirmation of its validity and in no way curtailed a State's immunity from execution. This distinction supported the position that even though a State cannot plead sovereign immunity at the stage of recognition and enforcement, it can still rely on the plea of immunity at the stage of execution, provided such a plea is available under the laws of the State where execution is sought.[41] The Report of the Executive Directors on the ICSID Convention supports the above position and states

> Article 54 requires contracting states to equate an award rendered pursuant to the convention with a final judgment of its own courts. It does not require them to go beyond that and to undertake forced execution of awards rendered pursuant to the convention in cases in which final judgments could not be executed.[42]

In *Liberia Eastern Timber Corporation v Liberia*,[43] LETCO sought to execute its judgement against tonnage and registration fees collected in the United States from ship owners flying the Liberian flag. Liberia claimed immunity from execution under the principle of sovereign immunity under FSIA because the fees were designed to raise revenue for the Republic of Liberia. LETCO argued that the fees arose from commercial activity, and were as a result not immune from attachment or execution

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39 Susan Choi, *Judicial Enforcement of Arbitration Award under ICSID and New York Convention*, 28 NYUJ Int'l L & Pol. 175 (1995-96).

40 (1959) Clunet at p. 1074; 98 JDI 131 (1971).

41 Okezie Chukwumerije, *ICSID Arbitration and Sovereign Immunity*, 19 Anglo-Am. L Rev. 166 (1990).

42 (1965) 4 ILM 524 at p. 525.

43 650 F Supp 73 (1986).

under FSIA. Liberia, on the other hand, argued that because the property under consideration was Liberian tax revenue, its collection should be viewed as sovereign and not commercial in nature.[44] However, following the rationale in *MINE v Guinea*, the court denied the motion to vacate the judgement to recognise and enforce the award on the grounds that by consenting to ICSID arbitration, the State had waived immunity from recognition and enforcement proceedings. The Court, however, vacated the motion to execute the award on the basis that assets were immune from execution under FSIA.

It was suggested that though the result of *LETCO* fulfils US obligations under the Convention, the reasoning of the court conflicts with the language of the Convention, which may undermine its effectiveness.[45] This only shows that ICSID does not completely eliminate the issue of immunity from execution. The immunity rules applicable in the jurisdiction where execution is being sought prevents forced execution against the State property. The Convention merely ensures that ICSID award can be recognised and enforced.

Decisions of the Court of Cassation in *the SOABI case* and, its US counterpart, in *the LETCO case* are encouraging acknowledgments of the effectiveness of the Convention's recognition provisions. However, these decisions in essence show that consent to arbitration by the State constitutes implicit waiver of immunity from

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[44] Anne Joyce, *Arbitration: United States Court Recognition of ICSID Arbitral Award - Liberian Eastern Timber Corp v Republic of Liberia*, 29 Harv. Int'l LJ 135 (1988).

[45] Dorothy Black Franzoni, *Enforcement of International Centre for Settlement of Investment Disputes Arbitral Awards in the United States*, 18 Ga. J Int'l & Comp. L 101 (1988).

jurisdiction with respect to recognition and enforcement proceedings but has no bearing on immunity from execution.

In a recent case, *AIG Capital Partners Inc and Another v Republic of Kazakhstan*,[46] an ICSID award was passed against the Republic of Kazakhstan. The question arose as to whether an award was enforceable in England against assets held by third parties on behalf of a national bank. In this case the intervener, the National Bank of Kazakhstan, applied to discharge the interim orders on the basis that cash and securities held by third party were subject to immunity from enforcement pursuant to Section 14(4) of SIA. The Queens Bench Division (Commercial Court) held that the term 'property' appearing in Section 14(4) included all real and personal properties, irrespective of the capacity or purpose for which it is held, and therefore is immune from enforcement. This shows that even when rules relating to immunity are restrictive, execution against certain assets of the State may still not be possible.

The reason for ICSID Convention not providing immunity from execution is because a majority of States is supportive of the retention of their existing rules of immunity from execution.[47] Considering the fact that the Convention was intended to encourage investment, it is surprising that State parties failed to agree on the matter regarding

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46 (2005) EWHC 2239 (Comm.); (2006) 1 Lloyd's Rep. 45.

47 A Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution,* 2 ICSID Rev. 287 (1987).

the waiver of immunity from execution[48] – the issue of abandonment of immunity from execution, in fact, found support from only one representative.

There are also instances where the court has endeavoured to overcome this situation and bring efficacy to the arbitral process as is seen in *Creighton v Qatar*, where the court held that by agreeing to ICC arbitration, a State waives immunity not only from jurisdiction but also from execution.[49] It has, however, been suggested that the wording of Article 24 referred to in *the Creighton case* is not clear enough for the deduction of such a waiver from execution.[50]

The defense of sovereign immunity in arbitration, even though permitted by Article 55 of the ICSID Convention, may not be an absolute obstacle to the enforcement of award, the reason being that most legal systems do not recognise immunity in cases involving commercial activities. In addition, there is also an obligation on the contracting State to give effect to the award[51] and this obligation remains in spite of the availability of the defense of sovereign immunity.[52]

The situation may not be all that different with respect to assets of State entities that have agreed on ICSID arbitration. Thus, participation by State entities in ICSID

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48 Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, (4th edn) London (2004) at p. 464.

49 N Meyer-Fabre, *Enforcement of Arbitral Awards against Sovereign States, A New Milestone: Signing ICC Arbitration Clause entails Waiver of Immunity from Execution held French Court of Cassation in Creighton v Qatar, July 6, 2000*, Mealey's Int'l Arb. Rep., Vol. 15 (2000) 48.

50 R Carrier, *France: Shrinking of Immunity from Execution and Discovery of Diplomatic Immunity from Execution*, Mealey's Int'l Arb. Rep., Vol. 18 (2003) at p. 46.

51 Article 53 of ICSID Convention.

52 Richard J Coll, *United States Enforcement of Arbitral Awards against Sovereign States: Implications of the ICSID Convention*, 17 Harv. Int'l LJ 401 (1976).

arbitration cannot be construed as a waiver of immunity from execution, since Article 55 preserves immunity in unequivocal terms.[53]

Even though there are sanctions for non-compliance of an ICSID award, such as Article 27, which states that no contracting State shall give diplomatic protection or bring an international claim concerning a dispute, unless the contracting State has failed to comply with the award rendered in such dispute. These sanctions are not as effective as forcible execution against the State property. Nevertheless, the advantage of this convention over others is that it offers parties a dispute resolution mechanism that does not interfere with the decision-making processes of arbitration, with the exception of interference permitted at the stage of actual execution alone. However, it still cannot be said that such interference by the Municipal Court at the stage of execution has diminished significantly following the acceptance of the restrictive doctrine of immunity.

Enforcement provisions in the ICSID Convention are much stronger when compared to those of the New York Convention. Although the New York Convention provides that awards are binding, the scope of review given to the Municipal Courts in enforcement proceedings severely undercuts the finality of the awards. The New York Convention provides a number of instances for non-enforcement, which suggests among other things the power exercised on the part of the forum court to substantially review the validity of an award. The ICSID Convention forbids any such

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[53] AFM Maniruzzaman, *State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends*, Disp. Resol. J 77 (2005).

review.[54] This, in essence, limits the possibilities of review of an ICSID award thereby, establishing a stronger regime in comparison with the New York Convention.

Scholars have opined that in spite of its effectiveness, ICSID Convention does not fulfill the objectives it was created for. The problem of sovereign immunity still remains an unresolved issue in the enforcement of an ICSID award.[55] The above discussion brings us to the conclusion that awards passed under ICSID against a State are as vulnerable as any other awards, since the execution of the award will still depend on the rules relating to immunity in the jurisdiction where the award is being sought to be enforced. Even when execution against a State's assets located in the forum State is legally possible, political considerations between the forum State and the foreign State may discourage the forum State's support of execution. As aptly put into words by Prof. Sornarajah, "the experience with the enforcement of ICSID awards reinforces the view that sovereign immunity remains an impediment not at the jurisdictional stage but at the stage of execution, to enforcement of both ICSID and non ICSID awards."[56]

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54 C Vuylsteke, *Foreign Investment Protection and ICSID Arbitration*, 4 Ga. J Int'l & Comp L 343 (1974).

55 Richard J Coll, *United States Enforcement of Arbitral Awards against Sovereign States: Implications of the ICSID Convention*, 17 Harv. Int'l LJ 401 (1976); Vincent O Orlu Nmehielle, *Enforcing Arbitration Awards under the International Convention for the Settlement of Investment Disputes (ICSID Convention)*, 7 Ann. Surv. Int'l & Comp. L 21 (2001).

56 M Sornarajah, *International Commercial Arbitration: The Problem of State Contracts* at p. 230.

The question here is whether a State or State enterprise can expressly waive immunity from execution of an ICSID award in a contractual arbitration clause.[57] Hazel Fox suggests that they should. She is of the opinion that States should make certain that the law of the forum State ensures that the law of state immunity relating to enforcement of an arbitral award confirms with minimum international standards.[58] However, this would essentially depend on the law of the particular jurisdiction where enforcement is sought.

For example, a French court denied execution of an award against the Russian Federation, even though Russia had expressly waived immunity from execution, by refusing to execute against the Russian assets in France.[59] In retrospect, therefore, agreement by a State to submit to arbitration may not be sufficient to imply consent to the jurisdiction of the court in the State where enforcement is being sought, nor to imply consent to execution in some cases. The requirements for express consent are set out in Articles 7 and 18(2) of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property, which will be discussed in the following sections. These draft provisions, which were later adopted by the United Nations as the UN State Immunity Convention, clarify that waiver of sovereign immunity is considered as having been made if the State has expressly given its consent to execution.

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57 K-H Böckstiegel, *Arbitration and State Enterprise* at p. 40.

58 Hazel Fox, *State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model Law Mark II for Execution against the State Property?* 12(1) Arb. Int'l 89 (1996).

59 Dominic Pellew, *Enforcement of the NOGA Arbitral Awards in France*, 34 Int'l ALR (2005).

5.3.3 Conclusion

The question still remains as to the identification of assets of a State used for public function or commercial activities, against which execution could be effected in jurisdictions where the restrictive approach to sovereign immunity is applied, as seen above in *the NOGA case*. The answer to this query is in the negative for ICSID and other awards, if the property against which execution is sought is used for public or sovereign functions. This position finds support from Schereur,[60] who points out that there is an overwhelming authority for the position that the nature test is applied for the purposes of deciding immunity from jurisdiction, but the test applied with regard to immunity from execution is usually the purpose for which the property is used or intended to be used.

5.4 UN State Immunity Convention on State Immunity

Originally, the prevailing international theory was that of absolute immunity, according to which actions against foreign States were inadmissible without the States' consent. The absolute theory of immunity eventually gave way to the restrictive theory, which granted immunity only to State properties of sovereign nature. The international development of state immunity has, since the 1970s, been determined by various national[61] and international[62] codifications, which have laid down the rules relating to immunity in different jurisdictions. The continued

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60 Christoph H Schreuer, *The ICSID Convention: A Commentary: A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Cambridge (2001) at p. 1160.

61 Foreign Sovereign Immunities Act, 1976 (USA); State Immunity Act, 1978 (UK) which was followed and identically worded in Singapore (1981), Pakistan (1981); State Immunity Act, 1982 (Canada); Foreign State Immunity Act, 1985 (Australia).

62 The European Convention on State Immunity (1972).

uncertainty in the law of immunity and the reluctance on the part of the third world countries regarding the development of international norms imposed by the first world countries, however, has prompted the UN General Assembly to include the topic of sovereign immunity in the work programme of the International Law Commission (ILC).[63]

The controversial nature of sovereign immunity is evidenced by the decades of effort put in by the International Law Association and the United Nations International Law Commission (ILC) to codify the rules relating to immunity. The ILC's efforts have resulted in adoption of the UN State Immunity Convention by the Sixth Legal Committee of the UN General Assembly and subsequently, by the General Assembly on 2 December 2004. The UN State Immunity Convention will enter into force thirty days following the date of its thirtieth ratification.[64]

The UN State Immunity Convention is based on ECSI, on state immunity as well as on state practice under various domestic statutory regimes and provides for, subject to specified exceptions, immunity available to a State in foreign jurisdictions. Under the Convention, an agreement to arbitrate is considered to be a waiver of state immunity with respect to proceedings for confirming and setting aside an arbitral award.[65] An example of a case upholding this principle is the decision of the Canadian Federal

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63 Burkhard Hess, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and their Property*, 4 EJIL 269 (1993).

64 Article 30 of UN State Immunity Convention.

65 Article 17 of UN State Immunity Convention.

Court in *TMR Energy Ltd v Ukraine*,[66] wherein the court sustained the seizure of a cargo aircraft to enforce an arbitral award against Ukraine on the grounds that agreement to arbitrate in a country party to the New York Convention without reserving its right to jurisdictional immunity, implies a waiver of its immunity in relation to recognition of the award.

However, Article 17 respects the generally accepted principle that waiver of immunity from jurisdiction does not constitute waiver of immunity from execution. Thus, an agreement to arbitrate will not affect a State's immunity a propos pre- and post- award measures of constraint, including execution. It is interesting to note that Article 17 adopted by the ILC in 1991 did not include any recognition proceedings since it was divided over the question whether waiver of immunity from jurisdiction applies to recognition proceedings. The reason for this exclusion was that recognition of awards as provided in Article 17 was deemed by several States, under their domestic civil law, as the first step towards execution.[67] The UN State Immunity Convention does not provide for immunity relating to recognition of an arbitral award, but requires an explicit waiver of immunity from execution against non-commercial and non-earmarked properties.

5.4.1 Enforcement under UN State Immunity Convention

Article 19 which deals with post-judgement measures of constraint sets out three exceptions to the general rule of immunity against the enforcement of judgements

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66 2003 FC 1517.

67 Report of the International Law Commission on the work of its Forty Second session, UN Doc A/45/10, YBILC, Vol. II, part 2 (1990) at p. 39.

against State assets. Article 19(a) sets out that a State may expressly consent to waive immunity by treaty, by written agreement or by an arbitration agreement. This waiver may be expressed by written agreement after the dispute has arisen, or by a unilateral written statement.

The UN State Immunity Convention makes it clear that Article 20 requires the waiver to be express in relation to the enforcement of a judgement. Therefore, a State's consent to the exercise of jurisdiction by a forum State will be insufficient to imply consent to the waiver of immunity from enforcement. In this context, it would be interesting to examine the French case of *Creighton v Government of Qatar*.[68] The entry into force of the UN State Immunity Convention would appear to question the Court of Cassation's decision.[69] The court held that there is an implied waiver of immunity from execution where a State undertakes arbitration in accordance with ICC Rules. The basis of the aforementioned conclusion was that the rules provide that the State agrees to carry out the award speedily and effectively, and that this will be sufficient to constitute a waiver of immunity from execution of the arbitral award. It would, however, not be possible under the UN State Immunity Convention to infer such a waiver of immunity from execution from an agreement to arbitrate.

Article 19(b) sets out the second exception to immunity from enforcement of judgements in cases where a State creates and identifies a fund to meet its liability. In

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[68] French Cour de Cassation, July 6, 2000, YB Comm. Arb, XXV 458 (2000).

[69] Claudia Annacker and Robert T Greig, *State Immunity and Arbitration*, ICC Int'l Ct. Arb. Bull., Vol. 15, No. 2 (2004) at p. 70.

the Alcom case,[70] Lord Diplock, addressing a claim of immunity with respect to an Embassy's bank account, recognised that there could be an exception under English law if the Embassy had opened an account specifically to deal with a commercial liability. For example, if a State hands over a budget to a State trading entity, it could be treated as a specific allocation of property for the activities of the trading of that entity. It could then be argued that such State property is commercial in nature and so subject to execution. Thus, the basic rule here is restrictive since no measures of constraint could be taken against a State property unless the State has allocated or earmarked property for the satisfaction of the claim that is the object of proceedings.

The aforementioned two exceptions revolve around specific conduct by the State accepting the possibility of execution. But, in relation to post-judgement measures of coercion, there is a third exemption in Article 19(c), which permits attachment of State property without the State's consent. This is possible when the property in the territory of the forum State is specifically in use or intended for use by the State for other than government non-commercial purposes, provided that such post-judgement measures of constraint are only taken against property which has a connection with the entity against which the proceeding is directed. This exemption is nevertheless narrow and limited to certain types of property.

The exemption under Article 19(c) has to satisfy three basic conditions for the exception to apply. Firstly, there is a territorial limitation, i.e., assets have to be within the forum State. Secondly, the property that is sought to be attached has to be "in use

[70] (1984) 2 All ER 6.

or intended for use by the State for other than governmental non-commercial purposes." The property 'in use or intended for use' has been elaborated in Article 21, which sets out five different categories of State property which shall not be regarded as property specifically in use or intended for use by the State for other than governmental non-commercial purposes under Article 19, subparagraph (c). The only way to attach the different categories of property mentioned in Article 21 is through express waiver by the State, which must, very specifically, be in relation to such property.

Nevertheless, the execution of an arbitral award may be very difficult as seen in the French case of *Ambassade del la Fédération de Russie, et al v Compagnie NOGA d'Importation et d'Exportation*,[71] where the arbitration award contained an express waiver of immunity from execution by Russia and so, was sought to be enforced in France. The Court of Appeal in Paris held that the award could not be enforced even though there was a waiver against the Embassy account, the assets of the Central Bank or against a training ship, which was arrested in France. This shows the narrow scope of Article 21 and extensiveness of protection over certain properties. In spite of Article 21(a), it is very widely accepted in state practice that diplomatic assets within the Embassy, the buildings or the account, are immune and cannot be attached.

The third exception to immunity from enforcement under Article 19(c) is that there must be a connection with the entity against which the proceedings are directed. In the 1991 ILC Draft Articles, the connection required was in relation 'to the subject

[71] Court of Appeal, August 10, 2000, Rev. Arb., No. 1, 114 (2001).

matter of the proceedings′ and this was subsequently changed to 'connection with the entity against which the proceedings were directed'. The latter is probably broader and certainly permits attachment against all properties of the entity involved in the proceedings, not merely what they had allocated or that, which is associated with the subject matter of the claim. In this respect, the UN State Immunity Convention is similar to the UK SIA, which permits the attachment of commercial assets and enlarges it even further as Article 19 says that "connection is not to be thought of as ownership or possession but is to be construed more widely." This might mean that an indirect interest in an asset of the entity to the proceedings might permit attachment.

The third exception, even though it appears broader, is narrowed by the definition of 'entity' against which proceedings are directed. For the purpose of this exception, Article 21 states that certain categories of properties may not be considered 'specifically in use or intended for use', unless otherwise agreed to by the State. The following categories of property of a State are not 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)

(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

(b) property of a military character or used or intended for use in the performance of military functions;

(c) property of the Central Bank or other monetary authority of the State;

(d) 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;

(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

The above definition breaks down the commonly used definition of a State to mean a State trading entity, a subunit of a State, a constitutional political unit or even a separate entity. Hence, there seems to be an apparent ambiguity here because Article 19 deals with enforcement against a State, with an exception that no measures of enforcement can be taken against State property, but against an entity as defined in Article 21.

There are a few issues that are not expressly addressed by the UN State Immunity Convention. Firstly, it does not deal with the enforcement of judgements and awards which are made in the forum State, but which are made abroad. In *AIC Ltd v Nigeria & Anor*,[72] a case was brought in England seeking to enforce a judgement against Nigeria that had been obtained in the Nigerian courts. The English court held that the commercial activity had occurred in Nigeria between a Nigerian national and his Government, which had nothing to do or no links with the applicable law in England. Hence, the absence of a jurisdictional link, even though the issue was related to a

[72] (2003) EWHC 1357 (Q.B.).

commercial matter, prevented the English court from exercising jurisdiction. In this instance, even though the Nigerian judgement was related entirely to a commercial activity, the English court ruled that on looking just at the judgement and not the underlying commercial transaction, the judgement could not be registered on jurisdictional grounds, and therefore immunity was applied and no exception to the general rule was available.

A second issue with considerable ambiguity in the UN State Immunity Convention relates to the funding of State entities. States tend to delegate a budget and also some regulatory powers to State entities. This makes it very difficult to know whether the State is involved or not and this is a problem that crops up in other areas such as *force majeure*. This situation arises where the State is involved in two different capacities, i.e., in the guise of a separate entity and also as an official State authority. As a result of this split personality, the claim of the defendant State entity is not presented in the form of sovereign immunity but as a supervening impossibility due to the prohibition by the State. The issue then arises as to whether the State is a party to the transaction.

5.4.2 Conclusion

The UN State Immunity Convention, in spite of its shortcomings, reflects an emergent global consensus that States and State enterprises can no longer claim absolute immunity from the jurisdiction of foreign courts, especially for commercial activities.[73] The UN State Immunity Convention will provide a solid foundation on

[73] David P Stewart, *The UN Convention on Jurisdictional Immunities of State and their Property*, Am. J Int'l L, Vol. 99 (2005) 194.

which States can base their domestic law, thereby resulting in the harmonization of laws relating immunity in different jurisdictions. This is evident from the seventh preambular paragraph of the General Assembly resolutions,[74] which states that the UN State Immunity Convention would contribute to the codification and development of international law and harmonization of practice in this area.

[74] General Assembly Resolution, GA 59/38.

CONCLUSION

Developing nations are actively chasing investments for their economic growth. However, private parties making these investments often see the high levels of risk involved in them as deterrents and so, keep away from them. Much of the risks associated with such transnational investments relate to activities that the host State may consider taking, viz., interference or expropriation of the investments by the host State. In view of the above, an investor who doubts the enforceability of the contract he is entering into will naturally be unwilling to invest his resources in that particular country. The only solution to this catch-22 like situation is that all parties concerned with the contract undertake to respect their contractual commitments and guarantee not to unjustifiably interfere with the investments. An arbitration clause in an investment contract tends to balance the conflicting interests of the host State and investor by providing, on one hand, the investor with the hope for redress, should the involved State default on its contractual obligations, and on the other, giving the State the security of knowing that should it be needed to arbitrate disputes arising from such agreements, it can still call upon the defense of immunity.

Every action taken by a State is, in a sense, an act of sovereignty as a consequence of the State's sovereign status. Nevertheless, the conclusion of an agreement to arbitrate by a State, although a sovereign act, is that it is more importantly a voluntary act that has in its limits the capacity to legally bind the State to its contractual commitments. In the field of arbitration of State contracts, the trend has increasingly been for the

State party to be treated no differently than its private co-contractor. As States become more frequently involved in commercial activities, entitling States and State-owned entities to special regimes appears irreconcilable with the requirements of international trade practice and the need to respect agreements freely entered into by the State or its entities.

Although it is now taken for granted that a State's contractual agreement to arbitrate is, in fact, a waiver of immunity as regards the jurisdiction of the arbitral tribunal, at the present stage of international law jurisprudence, it may not be possible for arbitration agreements entered into by States to be considered as an implied consent of the State to waive its immunity from proceedings for execution of an arbitral award. However, it is essential at same time that the State not be allowed to completely escape its obligations at the final stage of an arbitral proceeding. It would not be fair if a private party losing in an arbitral proceeding was required to comply with the arbitral award, but at the same time could not enforce the same award against a State party should it win. The worth of an unenforceable award to the winning party and the chastisement that such an award would mean to the losing party are, understandably, extremely questionable. It is argued, therefore, that a State should also be subject to enforcement of an arbitral award to the extent that the award is enforceable against properties of States that were used for commercial purposes. Otherwise, arbitration agreements freely entered into by States could be easily frustrated and rendered meaningless.

However, it is a fact that arbitral awards can be jeopardized by the issue of immunity from execution invoked by States when the private parties commence actions for enforcement. Even though there is a trend in favour of limiting the scope of immunity from attachment and enforcement, sovereign immunity is still an obstacle to the execution of awards against a State's assets under different codifications and Conventions. Unlike restrictive immunity from jurisdiction, there is no uniform system with respect to immunity from execution, as execution which is considered a separate act means that the plea of sovereign immunity can be raised again as a defense in the enforcement proceedings. Laws differ from one legal system to another with respect to enforcement against the assets of a foreign State and the question of whether such waiver should extend also to the execution of an arbitral award is still an open one. A classic example of this is the French courts' decisions in the *Creighton* and *NOGA* cases.

The argument that immunity is available to a State's public assets, which are held by the State to perform its sovereign functions, as opposed to assets used for its commercial activities is also not conclusive. There are overwhelming authorities that support the view that the State has a moral obligation to abide by an award rendered against it. It is reasonable to argue that measures of enforcement be taken against the property of a State, where the State has consented to the taking of those measures by an arbitration agreement. However, it is doubtful whether enforcement of the said award can be thrust on the State in the absence of an explicit 'waiver of immunity from execution clause' in the arbitration agreement itself, as enforcement proceedings

constitute an entirely new action, and are so open to the immunity defense. Another stumbling block is the process of identification of a State's assets, used for public function or commercial activities, against which execution could be effected and this continues to be an issue at large, as seen in *the NOGA case*.

Thus, although international commercial arbitration has its usefulness and place in international dispute resolution, it continues to struggle with a number of issues that hamper its effectiveness when dealing with States. The defense of sovereign immunity – although justified from a certain point of view – persists as the greatest obstacle in the path of award enforcement when the contract involves a State or State entity. States have, more often than not, been able to invoke the defense of state immunity and hide behind it even in the later stages of award enforcement in arbitrational proceedings and thereby successfully get away from having an award rendered against it or its instrumentality executed. The absence of adequate machinery for award enforcement and the difficulty in enforcing an arbitral award against a State or an entity of a State because of the presence of doctrines limiting such enforcement, namely the Doctrine of Sovereign Immunity and the Act of State Doctrine, are really the Achilles heel where international commercial arbitration is concerned.

From the above discussion, it can be safely concluded that the biggest hurdle in the success of international arbitration involving States, is the matter of jurisdiction and lies in the fact that there is no universal, supranational 'law' available for its

regulation. Instead, there are only many different national systems of law that may need to be consulted depending on where the arbitration is taking place and what the involved issues are. In effect, questions regarding the capacity of the parties to agree to arbitration, the validity of the arbitration agreement, the 'arbitrability' of the subject matter of the dispute and the recognition and enforcement of awards of arbitral tribunals all fall to be determined by national systems of law. Even where arbitration is governed by international law, references to national law are often unavoidable, especially when it comes to the recognition and enforcement of the awards.[1] This dependence on different, and sometimes conflicting, rules of national and international law gives rise to complexities and problems that are, in a sense, unique to international arbitration involving States.

Even the best solutions that international conventions have been able to come up with, in reality, have fallen well short of truly resolving issues associated with such arbitrations. For example, even the ICSID Convention, considered as the most comprehensive convention to date, does not provide a way out, so as to completely eliminate the obstacles created by the State on invoking the Doctrines of Sovereign Immunity and Act of State, at the stage of award execution. Nevertheless, the UN State Immunity Convention, in spite of its shortcomings, is a step in the right direction and reflects an emergent global consensus on this issue among States, from the points of view of both developed and developing nations. The Convention, when ratified, will provide a solid foundation on which States can base their domestic laws,

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[1] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, (2nd edn) London (1991).

and so will result in the harmonization of laws relating to immunity in different jurisdictions.

A more predictable law on state immunity would benefit both private entities dealing with foreign States and the foreign States themselves, because both could then plan transactions with more confidence on whether a particular transaction would be subject to execution. The UN State Immunity Convention seems to be more realistic with regards to execution of awards against a State’s assets used exclusively for commercial purposes and so, can safely be said to be an improvement over existing codifications and conventions.

In conclusion, when properly used, international arbitration is an effective method of resolving disputes – its very efficacy lying in its flexibility, adaptability and legitimacy. However, for the arbitral process to reach its due conclusion when the proceedings involve a State or State entity, it is necessary that the various shortcomings of the state immunity laws be resolved and the many kinks in the arbitral enforcement machinery ironed out. A comprehensive effort needs to be made to understand all the problem areas associated with the States' involvement in arbitration and address the reservations of each party.

The current deadlock might not see any clear or speedy resolution if the international community does not show the will to do so. A fresh approach needs to be taken and a new effort launched to arrive at an all-inclusive solution that would adequately reflect

the interests of all parties concerned. And, such an initiative will have to be on an international scale and boast the backing and support of a large number of sovereign States to meet with any credible success.

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APPENDIX I

UNITED STATES
FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

(as amended in 1988)

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter --

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "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.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to --

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration

all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided that --

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined

according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section (d). A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

§ 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

§ 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim --

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk

of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services - and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state --

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request, or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made --

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, apolitical subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

§ 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if --

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property --

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if --

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5), or 1605(b) of this chapter,

regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if --

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

§ 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune 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; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

APPENDIX II

UNITED KINGDOM
STATE IMMUNITY ACT OF 1978

An Act to make new provision with respect to proceedings in the United Kingdom by or against other States. To provide for the effect of judgments given against the United Kingdom in the courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of heads of State; and for connected purposes. [2Oth July 1978]

PART I. PROCEEDINGS IN UNITED KINGDOM BY OR AGAINST OTHER STATES

Immunity from jurisdiction

1. (1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this Part of this Act.

(2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question.

Exceptions from immunity

2. (1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission.

(3) A State is deemed to have submitted--

(a) if it has instituted the proceedings; or

(b) subject to subsections (4) and (5) below, if it has intervened or taken any step in the proceedings.

(4) Subsection (3)(b) above does not apply to intervention or any step taken for the purpose only of--

(a) claiming immunity; or

(b) asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.

(5) Subsection (3)(b) above does not apply to any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.

(6) A submission in respect of any proceedings extends to any appeal but not to any counterclaim unless it arises out of, the same legal relationship or facts as the claim.

(7) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.

3. (1) A State is not immune as respects proceedings relating to--

(a) a commercial transaction entered into by the State or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

(2) This section does not apply if the parties to the dispute are States or have otherwise agreed in writing; and subsection (1)(b) above does not apply if the contract (not being a commercial transaction) was made in the territory of the State concerned and the obligation in question is governed by its administrative law.

(3) In this section "commercial transaction" means--

(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; and

(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 the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.

4. (1) A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in the United Kingdom or the work is to be wholly or partly performed there.

(2) Subject to subsections (3) and (4) below, this section does not apply if--

(a) at the time when the proceedings are brought the individual is a national of the State concerned; or

(b) at the time when the contract was made the individual was neither a national of the United Kingdom nor habitually resident there; or

(c) the parties to the contract have otherwise agreed in writing.

(3) Where the work is for an office, agency or establishment maintained by the State in the United Kingdom for commercial purposes, subsection (2)(a) and (b) above do not exclude the application of this section unless the individual was, at the time when the contract was made, habitually resident in that State.

(4) Subsection (2)(c) above does not exclude the application of this section where the law of the United Kingdom requires the proceedings to be brought before a court of the United Kingdom.

(5) In subsection (2)(b) above "national of the United Kingdom" means a citizen of the United Kingdom and Colonies, a person who is a British subject by virtue of section 2, 13 or 16 of the British Nationality Act 1948 or by virtue of the British Nationality Act 1965, a British protected person within the meaning of the said Act of 1948 or a citizen of Southern Rhodesia.

(6) In this section "proceedings relating to a contract of employment" includes proceedings between the parties to such a contract in respect of any statutory rights or duties to which subject as employer or employee.

5. A State is not immune as respects proceedings in respect of--

(a) death or personal injury; or

(b) damage to or loss of tangible property, caused by an act or omission in the United Kingdom.

6. (1) A State is not immune as respects proceedings relating to--

(a) any interest of the State in, or its possession or use of, immovable property in the United Kingdom; or

(b) any obligation of the State arising out of its interest in, or its possession or use of, any such property.

(2) A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia.

(3) The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to

the estates of deceased persons or persons of unsound mind or to insolvency, the winding up of companies or the administration of trusts.

(4) A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property--

(a) which is in the possession or control of a State; or

(b) in which a State claims an interest, if the State would not have been immune had the proceedings been brought against it or, in a case within paragraph (b) above, if the claim is neither admitted nor supported by prima fade evidence.

7. A State is not immune as respects proceedings relating to--

(a) any patent, trade-mark, design or plant breeders' rights belonging to the State and registered or protected in the United Kingdom or for which the State has applied in the United Kingdom;

(b) an alleged infringement by the State in the United Kingdom of any patent, trade-mark, design, plant breeders' rights or copyright; or

(c) the right to use a trade or business name in the United Kingdom.

8. (1) A State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which--

(a) has members other than States; and

(b) is incorporated or constituted under the law of the United Kingdom or is controlled from or has its principal place of business in the United Kingdom, being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners.

(2) This section does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

9. (1) Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.

(2) This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

10.(1) This section applies to--

(a) admiralty proceedings: and

(b) proceedings on any claim which could be made the subject of Admiralty proceedings.

(2) A State is not immune as respects--

(a) an action in rem against a ship belonging to that State; or

(b) an action in personam for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

(3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, subsection (2)(a) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes.

(4) A State is not immune as respect--

(a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or

(b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

(5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship. (6) Sections 3 to 5

above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.

11. A State is not immune as respects proceedings relating to its liability for--

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) rates in respect of premises occupied by it for commercial purposes.

Procedure

12.(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.

(2) Any time for entering an appearance (whether prescribed. by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid.

(3) A State which appears in proceedings cannot thereafter object that subsection (1) above has not been complied with in the case of those proceedings.

(4) No judgment in default of appearance shall be given against a State except on proof that subsection (1) above has been complied with and that the time for entering an appearance as extended by subsection (2) above has expired.

(5) A copy of any judgment given against a State in default of appearance shall be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of that State and any time for applying to have the judgment set aside (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the copy of the judgment is received at the Ministry.

(6) Subsection (1) above does not prevent the service of a writ or other document in any manner to which the State has agreed and subsections (2) and (4) above do not apply where service is effected in any such manner.

(7) This section shall not be construed as applying to proceedings against a State by way of counter-claim or to an action in rem; and subsection (1) above shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction.

13.(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4) below--

(a) relief shall not be given against a State by way of injunction or order for specific performance or for the recovery of land or other property; and

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as a consent for the purposes of this subsection.

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes; but, in a case not falling within section 10 above, this subsection applies to property of a State party to the European Convention on State Immunity only if-

(a) the process is for enforcing a judgment which is final within the meaning of section 18(1)(b) below and the State has made a declaration under Article 24 of the Convention; or

(b) the process is for enforcing an arbitration award.

(5) The head of a State's diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State any such consent as is mentioned in subsection (3) above and, for the purposes of subsection (4) above, his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

(6) In the application of this section to Scotland--

(a) the reference to "injunction" shall be construed as a reference to "interdict";

(b) for paragraph (b) of subsection (2) above there shall be substituted the following paragraph--

"(b) the property of a State shall not be subject to any diligence for enforcing a judgment or order of a court or a decree arbitral or, in an action in rem, to arrestment or sale."; and

(c) any reference to "process" shall be construed as a reference to "diligence", any reference to "the issue of any process" as a reference to "the doing of diligence" and the reference in subsection (4)(b) above to "an arbitration award" as a reference to "a decree arbitral".

Supplementary provisions

14.(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom, and references to a State include references to--

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government, but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if--

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.

(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 subsections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority.

(5) Section 12 above applies to proceedings against the constituent territories of a federal State; and Her Majesty may by Order in Council provide for the other provisions of this Part of this Act to apply to any such constituent territory specified in the Order as they apply to a State.

(6) Where the provisions of this Part of this Act do not apply to a constituent territory by virtue of any such Order subsections (2) and (3) above shall apply to it as if it were a separate entity.

15.(1) If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State--

(a) exceed those accorded by the law of that State in relation to the United Kingdom; or

(b) are less than those required by any treaty. convention or other international agreement to which that State and the United Kingdom are parties. Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.

(2) Any statutory instrument containing an Order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

16.(1) This Part of this Act does not affect any immunity or privilege conferred by the Diplomatic Privileges Act 1964 or the Consular Relations Act 1968; and--

(a) section 4 above does not apply to proceedings concerning the employment of the members of a mission within the meaning of the Convention scheduled to the said Act of 1964 or of the members of a consular post within the meaning of the Convention scheduled to the said Act of 1968;

(b) section 6(1) above does not apply to proceedings concerning a State's title to or its possession of property used for the purposes of a diplomatic mission.

(2) This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and. in particular, has effect subject to the Visiting Forces Act 1952.

(3) This Part of this Act does not apply to proceedings to which section 17(6) of the Nuclear Installations Act 1965 applies.

(4) This Part of this Act does not apply to criminal proceedings.

(5) This Part of this Act does not apply to any proceedings relating to taxation other than those mentioned in section 11 above.

17.(1) In this Part of this Act-- "the Brussels Convention" means the International Convention for the Unification of Certain Rules Concerning the Immunity of

State-owned Ships signed in Brussels on 10th April 1926; "commercial purposes" means purposes of such transactions or activities as are mentioned in section 3(3) above; "ship" includes hovercraft.

(2) In sections 2(2) and 13(3) above references to an agreement include references to a treaty, convention or other international agreement.

(3) For the purposes of sections 3 to 8 above the territory of the United Kingdom shall be deemed to include any dependent territory in respect of which the United Kingdom is a party to the European Convention on State Immunity.

(4) In sections 3(l), 4(1), 5 and 16(2) above references to the United Kingdom include references to its territorial waters and any area designated under section 1(7) of the Continental Shelf Act 1964.

(5) In relation to Scotland in this Part of this Act "action in rem" means such an action only in relation to Admiralty proceedings.

PART II. JUDGMENTS AGAINST UNITED KINGDOM IN CONVENTION STATES

18.(1) This section applies to any judgment given against the United Kingdom by a court in another State party to the European Convention on State immunity, being a judgment--

(a) given in proceedings in which the United Kingdom was not entitled to immunity by virtue of provisions corresponding to those of sections 2 to ii above; and

(b) which is final, that is. to say, which is not or is no longer subject to appeal or, if given in default of appearance, liable to be set aside.

(2) Subject to section 19 below, a judgment to which this section applies shall be recognised in any court in the United Kingdom as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counter-claim in such proceedings.

(3) Subsection (2) above (but not section 19 below) shall have effect also in relation to any settlement entered into by the United Kingdom before a court

in another State party to the Convention which under the law of that State is treated as equivalent to a judgment.

(4) In this section references to a court in a State party to the Convention include references to a court in any territory in respect of which it is a party.

19.(1) A court need not give effect to section 18 above in the case of a judgment-

(a) if to do so would be manifestly contrary to public policy or if any party to the proceedings in which the judgment was given had no adequate opportunity to present his case; or

(b) if the judgment was given without provisions corresponding to those of section 12 above having been complied with and the United Kingdom has not entered an appearance or applied to have the judgment set aside.

(2) A court need not give effect to section 18 above in the case of a judgment--

(a) if proceedings between the same parties' based on the same facts and having the same purpose--

(i) are pending before a court in the United Kingdom and were the first to be instituted; or

(ii) are pending before a court in another State party to the Convention, were the first to be instituted and may result in a judgment to which that section will apply; or

(b) if the result of the judgment is inconsistent with the result of another judgment given in proceedings between the same parties and--

(i) the other judgment is by a court in the United Kingdom and either those proceedings were the first to be instituted or the judgment of that court was given before the first-mentioned judgment became final within the meaning of subsection (1)(b) of section 18 above; or

(ii) the other judgment is by a court in another State party to the Convention and that section has already become applicable to it.

(3) Where the judgment was given against the United Kingdom in proceedings in respect of which the United Kingdom was not entitled to immunity by virtue of a provision corresponding to section 6(2) above, a court need not give

effect to section 18 above in respect of the judgment if the court that gave the judgment--

(a) would not have had jurisdiction in the matter if it had applied rules of jurisdiction corresponding to those applicable to such matters in the United Kingdom; or

(b) applied a law other than that indicated by the United Kingdom rules of private international law and would have reached a different conclusion if it had applied the law so indicated.

(4) In subsection (2) above references to a court in the United Kingdom include references to a court in any dependent territory in respect of which the United Kingdom is a party to the Convention, and references to a court in another State party to the Convention include references to a court in any territory in respect of which it is a party.

PART III. MISCELLANEOUS AND SUPPLEMENTARY

20.(1) Subject to the provisions of this section and to any necessary modifications, the Diplomatic Privileges Act 1964 shall apply to--

(a) a sovereign or other head of State;

(b) members of his family forming part of his household; and

(c) his private servants, as it applies to the head of a diplomatic mission, to members of his family forming part of his household and to his private servants.

(2) The immunities and privileges conferred by virtue of subsection (1)(a) and (b) above shall not be subject to the restrictions by reference to nationality or residence mentioned in Article 37(1) or 38 in Schedule 1 to the said Act of 1964.

(3) Subject to any direction to the contrary by the Secretary of State, a person on whom immunities and privileges are conferred by virtue of subsection (1) above shall be entitled to the exemption conferred by section 8(3) of the Immigration Act 1971.

(4) Except as respects value added tax and duties of customs or excise, this section does not affect any question whether a person is exempt from, or immune as respects proceedings relating to, taxation.

(5) This section applies to the sovereign or other head of any State on which immunities and privileges are conferred by Part I of this Act and is without prejudice to the application of that Part to any such sovereign or head of State in his public capacity.

21. A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question--

(a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;

(b) whether a State is a party to the Brussels Convention mentioned in Part I of this Act;

(c) whether a State is a party to the European Convention on State Immunity, whether it has made a declaration under Article 24 of that Convention or as to the territories in respect of which the United Kingdom or any other State is a party;

(d) whether, and if so when, a document has been served or received as mentioned in Section 12(1) or (5) above.

22.(1) In this Act "court" includes any tribunal or body exercising judicial functions; and references to the courts or law of the United Kingdom include references to the courts or law of any part of the United Kingdom.

(2) In this Act references to entry of appearance and judgments in default of appearance include references to any corresponding procedures.

(3) In this Act "the European Convention on State Immunity" means the Convention of that name signed in Basle on 16th May 1972.

(4) In this Act "dependent territory" means--

(a) any of the Channel Islands;

(b) the Isle of Man;

(c) any colony other than one for whose external relations a country other than the United Kingdom is responsible; or

(d) any country or territory outside Her Majesty's dominions in which Her Majesty has jurisdiction in right of the government of the United Kingdom.

(5) Any power conferred by this Act to make an Order in Council includes power to vary or revoke a previous Order.

23.(1) This Act maybe cited as the State Immunity Act 1978.

(2) . . . . . .

(3) Subject to subsection (4) below, Parts I and II of this Act do not apply to proceedings in respect of matters that occurred before the date of the coming into force of this Act and, in particular--

(a) sections 2(2) and 13(3) do not apply to any prior agreement, and

(b) sections 3, 4 and 9 do not apply to any transaction, contract or arbitration agreement, entered into before that date.

(4) Section 12 above applies to any proceedings instituted after the coming into force of this Act.

(5) This Act shall come into force on such date as may be specified by an order made by the Lord Chancellor by statutory instrument.

(6) This Act extends to Northern Ireland.

(7) Her Majesty may by Order in Council extend any of the provisions of this Act, with or without modification, to any dependent territory.

The following provision has been omitted from the text for the reason stated:--

S. 23(2) ... ... repeals Administration of Justice (Miscellaneous Provisions) Act 1938 (c. 63) s.13 and Law

Reform (Miscellaneous Provisions) (Scotland) Act 1940 (c. 42), s. 7.

APPENDIX III

UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

The States Parties to the present Convention,

Considering that the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law,

Having in mind the principles of international law embodied in the Charter of the United Nations,

Believing that an international convention on the jurisdictional immunities of States and their property would enhance the rule of law and legal certainty, particularly in dealings of States with natural or juridical persons, and would contribute to the codification and development of international law and the harmonization of practice in this area,

Taking into account developments in State practice with regard to the jurisdictional immunities of States and their property,

Affirming that the rules of customary international law continue to govern matters not regulated by the provisions of the present Convention, *Have agreed as follows*:

Part I

Introduction

Article 1

Scope of the present Convention

The present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State.

Article 2

Use of terms

1. For the purposes of the present Convention:
   (a) "court" means any organ of a State, however named, entitled to exercise judicial functions;
   (b) "State" means:
      (i) the State and its various organs of government;
      (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
      (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;
      (iv) representatives of the State acting in that capacity;
   (c) "commercial transaction" means:
      (i) any commercial contract or transaction for the sale of goods or supply of services;
      (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;
      (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. In determining whether a contract or transaction is a "commercial transaction" under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

3. The provisions of paragraphs 1 and 2 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3

Privileges and immunities not affected by the present Convention

1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:
   (a) its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and (b) persons connected with them.

2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State ratione personae.

3. The present Convention is without prejudice to the immunities enjoyed by a State under international law with respect to aircraft or space objects owned or operated by a State.

Article 4

Non-retroactivity of the present Convention

Without prejudice to the application of any rules set forth in the present Convention to which jurisdictional immunities of States and their property are subject under international law independently of the present Convention, the present Convention shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the present Convention for the States concerned.

Part II

General principles

Article 5

State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.

Article 6

Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under article 5 is respected.

2. A proceeding before a court of a State shall be considered to have been instituted against another State if that other State:
   (a) is named as a party to that proceeding; or
   (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.

Article 7

Express consent to exercise of jurisdiction

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case:
   (a) by international agreement;
   (b) in a written contract; or
   (c) by a declaration before the court or by a written communication in a specific proceeding.

2. Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State.

Article 8

Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:
   (a) itself instituted the proceeding; or
   (b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment.

2. A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of:
   (a) invoking immunity; or
   (b) asserting a right or interest in property at issue in the proceeding.

3. The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

4. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.

Article 9

Counterclaims

1. A State instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counterclaim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.

Part III

Proceedings in which State immunity cannot be invoked

Article 10

Commercial transactions

1. 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 invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.

2. Paragraph 1 does not apply:
   (a) in the case of a commercial transaction between States; or
   (b) if the parties to the commercial transaction have expressly agreed otherwise.

3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:
   (a) suing or being sued; and
   (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 11

Contracts of employment

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State.

2. Paragraph 1 does not apply if:
   (a) the employee has been recruited to perform particular functions in the exercise of governmental authority;
   (b) the employee is:
      (i) a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961;

(ii) a consular officer, as defined in the Vienna Convention on Consular Relations of 1963;

(iii) a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference; or

(iv) any other person enjoying diplomatic immunity;

(c) the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;

(d) the subject-matter of the proceeding is the dismissal or termination of employment of an individual and, as determined by the head of State, the head of Government or the Minister for Foreign Affairs of the employer State, such a proceeding would interfere with the security interests of that State;

(e) the employee is a national of the employer State at the time when the proceeding is instituted, unless this person has the permanent residence in the State of the forum; or

(f) the employer State and the employee have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 12

Personal injuries and damage to property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 13

Ownership, possession and use of property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia; or

(c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.

Article 14

Intellectual and industrial property

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trademark, copyright or any other form of intellectual or industrial property which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State, in the territory of the State of the forum, of a right of the nature mentioned in subparagraph (a) which belongs to a third person and is protected in the State of the forum.

Article 15

Participation in companies or other collective bodies

1. A State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in

a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.

2. A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.

Article 16

Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service.

3. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

5. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

6. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 17

Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the validity, interpretation or application of the arbitration agreement;

(b) the arbitration procedure; or

(c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.

Part IV
State immunity from measures of constraint in connection with proceedings before a court

Article 18
State immunity from pre-judgment measures of constraint

No pre-judgment measures of constraint, such as attachment or arrest, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:
    (i) by international agreement;
    (ii) by an arbitration agreement or in a written contract; or
    (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding.

Article 19
State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:
    (i) by international agreement;
    (ii) by an arbitration agreement or in a written contract; or
    (iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or
(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in

the territory of the State of the forum, provided that postjudgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Article 20

Effect of consent to jurisdiction to measures of constraint

Where consent to the measures of constraint is required under articles 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.

Article 21

Specific categories of property

1. 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):
   (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;
   (b) property of a military character or used or intended for use in the performance of military functions;
   (c) property of the central bank or other monetary authority of the State;
   (d) 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;
   (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

2. Paragraph 1 is without prejudice to article 18 and article 19, subparagraphs (a) and (b).

Part V
Miscellaneous provisions

Article 22
Service of process

1. Service of process by writ or other document instituting a proceeding against a State shall be effected:
   (a) in accordance with any applicable international convention binding on the State of the forum and the State concerned; or
   (b) in accordance with any special arrangement for service between the claimant and the State concerned, if not precluded by the law of the State of the forum; or
   (c) in the absence of such a convention or special arrangement:
      (i) by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned; or
      (ii) by any other means accepted by the State concerned, if not precluded by the law of the State of the forum.

2. Service of process referred to in paragraph 1 (c) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 23

Default judgment

1. A default judgment shall not be rendered against a State unless the court has found that:
   (a) the requirements laid down in article 22, paragraphs 1 and 3, have been complied with;
   (b) a period of not less than four months has expired from the date on which the service of the writ or other document instituting a proceeding has been effected or deemed to have been effected in accordance with article 22, paragraphs 1 and 2; and
   (c) the present Convention does not preclude it from exercising jurisdiction.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in article 22, paragraph 1, and in accordance with the provisions of that paragraph.

3. The time-limit for applying to have a default judgment set aside shall not be less than four months and shall begin to run from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned.

Article 24

Privileges and immunities during court proceedings

1. Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purposes of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State shall not be required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a respondent party before a court of another State.

Part VI

Final clauses

Article 25

Annex

The annex to the present Convention forms an integral part of the Convention.

Article 26

Other international agreements

Nothing in the present Convention shall affect the rights and obligations of States Parties under existing international agreements which relate to matters dealt with in the present Convention as between the parties to those agreements.

Article 27

Settlement of disputes

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of the present Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which cannot be settled through negotiation within six months shall, at the request of any of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of, or accession to, the present Convention, declare that it does not consider itself bound by paragraph 2. The other States Parties shall not be bound by paragraph 2 with respect to any State Party which has made such a declaration.

4. Any State Party that has made a declaration in accordance with paragraph 3 may at any time withdraw that declaration by notification to the Secretary-General of the United Nations.

Article 28

Signature

The present Convention shall be open for signature by all States until 17 January 2007, at United Nations Headquarters, New York.

Article 29

Ratification, acceptance, approval or accession

1. The present Convention shall be subject to ratification, acceptance or approval.

2. The present Convention shall remain open for accession by any State.

3. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

Article 30

Entry into force

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

2. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance,

approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 31

Denunciation

1. Any State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations.

2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations. The present Convention shall, however, continue to apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the date on which the denunciation takes effect for any of the States concerned.

3. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in the present Convention to which it would be subject under international law independently of the present Convention.

Article 32

Depositary and notifications

1. The Secretary-General of the United Nations is designated the depositary of the present Convention.

2. As depositary of the present Convention, the Secretary-General of the United Nations shall inform all States of the following:
   (a) signatures of the present Convention and the deposit of instruments of ratification, acceptance, approval or accession or notifications of denunciation, in accordance with articles 29 and 31;

(b) the date on which the present Convention will enter into force, in accordance with article 30;

(c) any acts, notifications or communications relating to the present Convention.

Article 33

Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of the present Convention are equally authentic.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention opened for signature at United Nations Headquarters in New York on 17 January 2005.

Annex to the Convention

Understandings with respect to certain provisions of the Convention

The present annex is for the purpose of setting out understandings relating to the provisions concerned.

With respect to Article 10

The term "immunity" in article 10 is to be understood in the context of the present Convention as a whole.

Article 10, paragraph 3, does not prejudge the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to Article 11

The reference in article 11, paragraph 2 (d), to the "security interests" of the employer State is intended primarily to address matters of national security and the security of diplomatic missions and consular posts.

Under article 41 of the 1961 Vienna Convention on Diplomatic Relations and article 55 of the 1963 Vienna Convention on Consular Relations, all persons referred to in those articles have the duty to respect the laws and regulations, including labour laws, of the host country. At the same time, under article 38 of the 1961 Vienna Convention on Diplomatic Relations and article 71 of the 1963 Vienna Convention on Consular Relations, the receiving State has a duty to exercise its jurisdiction in such a manner as not to interfere unduly with the performance of the functions of the mission or the consular post.

With respect to Articles 13 and 14

The expression "determination" is used to refer not only to the ascertainment or verification of the existence of the rights protected, but also to the evaluation or assessment of the substance, including content, scope and extent, of such rights.

With respect to Article 17

The expression "commercial transaction" includes investment matters.

With respect to Article 19

The expression "entity" in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality.

The words "property that has a connection with the entity" in subparagraph (c) are to be understood as broader than ownership or possession.

Article 19 does not prejudge the question of "piercing the corporate veil", questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.