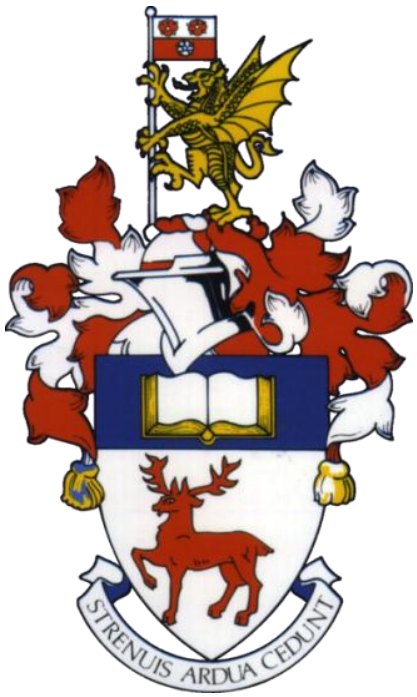
UNIVERSITY OF SOUTHAMPTON

THE LAW SCHOOL

Research Area:

Arbitration of Investment Dispute

2012/2013



Submitted for: Doctor of Philosophy

Title of the Thesis:

AGREEMENTS OF STATE-ENTITY AND STATE LIABILITY IN INTERNATIONAL INVESTMENT ARBITRATION

Candidate: **Assaduzzaman**
LL.B (Hons.) IIUM, LL.M Stockholm, Advocate

Supervisor: **Professor Renato Nazzini**
PhD (Milan), PhD (Lond), Solicitor, MCIArb

Advisor: **Professor Robert Merkin**
LLB (Wales) 1974; LLM (Lond) 1975

This page is intentionally left blank

To my Heavenly Mother and Father

This page is intentionally left blank

Abstract

Most often in an investment agreement between a State entity and a foreign investor the arbitral tribunal is faced with the question of the liability of the State for the conduct of its entities. To make it precise the crucial findings of this research is whether or to what extend the States hall be liable for the commercial conduct of its entities? State affiliates in general includes, 'state organ, 'state agency', 'instrumentality', 'state-owned entity', 'state-owned company', 'publicly owned corporation', 'government business enterprise', 'public sector undertaking' and 'parastatal entity'. 'State entities' with separate legal personality do not include the 'state organ', 'agency' and 'political subdivision' for which a State is responsible under the principle of customary international law. The main highlights of this research is whether the State shall be liable for the commercial, non-governmental activities of 'State entities' with separate legal personality having substantial structural and functional government control over them while they enter into investment agreements with foreign investors.

This leads to the critical arguments to establish in the first place whether the State is a party to the investment agreements of its separate legal entities with foreign investors. To respond this, findings of this research leads to the point that has been highlighted in relation to the true separation of these State entities from the government. It is that the significance of structural and functional control by the governmental over the habitual affairs of these entities. For this purposes two significant reasons are taken into consideration. First, whether the government officials or members of the cabinet preside as the head of the corporations or entities? Second, whether they administer the daily affairs of the entities such as participating in the negotiation and decision making process while entering into the agreement with foreign investors. If that is satisfied then the requirement for a State to be a party to the investment agreement of its entities is considered fulfilled.

The most striking point of this research is then whether the State and its entities are entitled to immunity both from jurisdiction and execution. However, following the greater participation of State through State entities in the international trade and foreign investment the restrictive approach of immunity has seen a resultant raise in relation to the jurisdiction of arbitral tribunal. As regard to immunity from the enforcement measure the final stumbling block is the process of identification of public assets which are held by the State to perform its sovereign non-commercial functions often mixed with the assets allocated for commercial purpose against which enforcement can be done, is continued to be an issue at large. The emphasis of this research has been extended to have a closer look at the State immunity laws internationally in relation to the limitations of various conventions and codifications and judicial precedent that address the issue of enforcement in investment arbitration.

This page is intentionally left blank

Table of Contents

This page is intentionally left blank

Table of Cases

Arbitration Awards

Amco Asia Corporation and others v. Republic of Indonesia, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports;

ICC Case No. 7640*, American corporation v. W (State-owned company), X (State-owned company), Y (State-owned company) and Z (State-owned company), Sept. 9*, 1999 Award, unpublished;

Attorney General v. Mobil Oil NZ Ltd., (ICSID Case No.ARB/87/2) 1987;

BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic award, Oct. 10, (1973);

CSOB v. Slovakia, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review Foreign Investment Law Journal 251, 268-271 (1999);

Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co. v. Maharashtra Power Compania de Aguas del Aconquija SA and Vivendi Universal (formerly *Compagnie Générale des Eaux*) v. *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, *6 ICSID Reports 340*, para.96;

Cable TV v. St. Kitts and Nevis, 13 January 1997, ICSID Review Foreign Investment Law Journal 324 (1998);

Ceskoslovenska Obchodni Banka AS v Slovakia, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/4, dated (May 24, 1999);

Compagnie NOGA importation et exportation v. The Russian Federation, Yearbook Comm. Arb.'n XXVI(2001);

CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, p. 48 (July 17, 2003) (Decision of the Tribunal on Objections to Jurisdiction);

*Clerget v. Representation Commerciale de la Republique Democratique du Viet-Nam,*JPC, Ed. G., Pt. II, No. 15954 (1969);

ICC Case No. 12913, *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co. v. Maharashtra Power Development Corp. Ltd.,* Maharashtra State Electricity Board and the Stateof Maharashtra, Apr. 27, 2005 Final Award, 20(5) INT'L ARB. REP. C-1 (2005);

Court Decisions

Table of Legislation

Conventions

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958, (the "New York Convention");

Convention on the Settlement of Investment Disputes between States and Nationals of other States, adopted on 18 March 1965, came into force in 14 October 1966;

North American Free Trade Agreement (NAFTA) 1994;

The Energy Charter Treaty, Dec. 17, 1994;

International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, Brussels, 1926, and Additional Protocol, Brussels, 1934, 176 League of Nations Treaty Series (LNTS) 201;

The European Convention on State Immunity 1972, CETS No. 074;

Working Group of Sovereign Wealth Funds; Generally Accepted Principles and Practices (Santiago Principles) (October 2008);
United Nations Convention on Jurisdictional Immunities of States and Their Property on December 2, 2004;

Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331;

The UNESCO Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970;

The Unidroit Convention on Stolen or Illegally Exported Cultural Objects was signed in June 1995;

Bilateral Investment Treaties

Agreement between the Government of the Republic of Chile and the Government of the Republic of Peru for the Promotion and Reciprocal Protection of Investments", art. 2, (Feb. 2, 2000);

The Treaty of Friendship, Commerce and Navigation between the U.S. and Denmark, 421 U.N.T.S.;

Agreement Between the Government of Islamic Republic of Pakistan And the Government of the Italian Republic of the Promotion and Protection of Investment 1997;

Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investment 1990;

Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Peoples' Republic of Bangladesh 1980;

Algiers accords January 19, 1981 Declaration of the Government of the Democratic and Popular Republic of Algeria;

National Legislation

US Foreign Sovereign Immunity Act 1976;

UK State Immunity Act 1978;

Singapore State Immunity Act 1979;

Pakistan State Immunity Ordinance 1981;

Australian Foreign Sovereign Immunity Act 1985;

English Arbitration Act 1996;

Swedish Arbitration Act 1999;

The Bangladesh Industrial Development Corporation Order, 9th May 1972 (President's order no. 39 of 1972);

US Restatement (Second) of Contracts S. 42 (1981);

U.S. Uniform Commercial Code 1998;

Civil Code of the Russian Federation;

Venezuelan Investment Law 1993;

This page is intentionally left blank

Declaration of Authorship

I, Assaduzzaman,

declare that the thesis entitled

'Agreements of State-entity and State Liability in International Investment Arbitration'

and the work presented in the thesis are both my own, and have been generated by me as the result of my own original research. I confirm that:

- this work was done wholly or mainly while in candidature for a research degree at this University;
- where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
- where I have consulted the published work of others, this is always clearly attributed;
- where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
- I have acknowledged all main sources of help;
- where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
- none of this work has been published before submission.

Signed: …….

Date: 13 November 2012.

This page is intentionally left blank

Acknowledgements

First and foremost I would like to acknowledge Dr. Patricia Shaughnessy who has implanted the passion for reading the law of arbitration in me and has helped me in preparation of my thesis proposal and getting me admitted to the School of Law, University of Southampton.

I am delighted to acknowledge my supervisor, Professor Renato Nazzini, School of Law, University of Southampton, for all of his dedicated support and passionate commitment for review and correction. This thesis would have been incomplete in more ways than one, if it had not been for his kind patience and gentle guidance. The successful completion of this thesis is the outcome of his successful supervision.

I am grateful to Professor Robert Merkin for his excellent support and dominating guidance in restructuring the thesis at its first journey. This thesis could not have been completed with this sharp speed without his leading guidance. I am always grateful to his hospitable personality and meaningful attitude towards research activities.

I am also grateful to Professor Stephen Saxby, Professor Nicholas Hopkins and Professor Natalie Lee for their continuous human and administrative support throughout this research. I owe a debt of gratitude especially to Professor Saxby for selecting me for this prestigious scholarship grant for my PhD during his period as head of postgraduate research.

Finally I am thankful to the School of Law, University of Southampton, for granting me a place in its prestigious PhD research programme and awarding me the postgraduate research scholarship and supporting me with all the necessary resources that was need for the completion of this research.

This page is intentionally left blank

CHAPTER 1 General Introduction

International trade and foreign investment have experienced in the last few decades, a dynamic policy change through establishment of regional economic blocks and trade regulatory institutions along with increasing interdependence and collaboration between governmental investments and multinational private corporations in developed and developing nations. Its implications are diverse where it has brought economic and social change and ostensible prosperity to the developing countries though with the cost of environmental damage and added wealth to the developed nations, it has also been charged with creating giant capitalist market-economy establishing corporate imperialism, profiteering, cultural assimilation, human rights violations, and so on. Nevertheless, its place in the world as we know it today cannot be underestimated, and despite much criticism and anti-globalisation protest, it is becoming stronger day by day which has created a new cold-economic-war between supper power nations.

Free trade and economic liberalisation have abolished the delimitation of inter-State trade barriers and expansion of international market economy that the four major assets of any country, namely its workforce, finance capital, natural resource and knowledge economy have become mobile with respect to the global economy. This has been contributed in a greater degree through State involvement in international trade and commerce. 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 or instrumentalities with another sovereign State, its agencies or entities thereof. This State involvement in commercial activities with private investors has directed to a new legal development in the area of public and private international law which leads to a mixed nature of legal order. This is because most of these transactions take place between State, state agency, instrumentality or entity and private investors. In one hand, State is governed by public international law and the foreign investors are governed by private international law on the other hand.

A major shortcoming of capitalist market economy, however, is that the disparity in the rates of economic integration and the harmonisation of universally enforceable laws and standards governing such integration in other areas has been the cause of much anxiety in the international community. One of the major offshoots 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 commercial transactions and activities. This is the fundamental reason behind most complexities confronted today in the commercial affairs of private individuals and State entities incorporated by sovereign States, and the interactions between them in investment activities.

In the absence of an institutionalised dispute resolution mechanism at the international level, the uncertainty of law applicable to such transnational disputes involving foreign investment 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 entity and a private party. Here State entities do not include the organ of a State, agency, political subdivision which do not enjoy their separate legal personality for which a State is directly liable. Thus, when such complications arise in a dispute and the parties concerned have failed to reach a solution by the conventional means of negotiation and mediation, international arbitration before an arbitral tribunal becomes the preferred alternative. Although ICSID was established to end this anxiety in investment disputes between the foreign investors and the State but it seems lacking of proper solutions in case of any disagreement regarding the final award, or the award is being disregarded by the State or State refuse to participate in the agreed arbitration. Moreover, not all the investment arbitration takes place under the auspicious of ICSID or covered by the jurisdiction of ICSID.

1. The Problem

Under the principle of public international law State organ, agency and constituent subdivision do not have international separate legal personality, they represent the State or act on behalf of the central Government of the Federation, which they in fact constitute

integral parts thereof. If such an organ, agency and a constituent subdivision enter into an investment agreement with foreign investors it is obvious that the conduct will be attributed to the State. However, there is no uniform consensus regarding the attribution of the conduct of sovereign wealth fund to the State if it is engaged in commercial non-governmental activities. Besides above, State affiliates in general, are introduced in this research as State entity and instrumentality. They are different from state organ, agency, constituent subdivision and sovereign wealth fund as defined separately followed by next paragraph. The finding of this research will concentrate on the commercial conduct of State entity whether they are to be attributed to the State?

The question at the heart of this PhD research is towards finding the essential characteristics and significance of investment agreement between the State entity and the foreign investors. Whether the States hall be liable for the commercial non-governmental activities of its entities in relation to investment agreement between State entities and foreign investors? In response, discussions are advanced into five dimensions. First of all it examined the State *privity* to the agreement of its entities in investment arbitration. The second, it scrutinised the State consent and its limitation to investment arbitration in the agreement of State entities. Third, it discussed the issue of jurisdictional immunity of State entities in investment arbitration. Then it analysed the relation of immunity from the enforcement of arbitral award against the property of State entity. Finally and most importantly it investigated the issue of state liability for the conduct of its entities in investment arbitration.

1.1 State entity

There is no customary definition of a State entity or state-owned corporation, although both of these terminologies can be used interchangeably. The defining characteristics of these entities are that they have a distinct legal personality and they are incorporated to operate in non-governmental commercial affairs on behalf of the State. State-controlled enterprises, with separate legal personality, ability to trade and to enter into contract of private law, though wholly subject to the control of their incorporating State, are well-known feature of

the modern commercial scene. This distinction between them, and their governing State, may appear artificial but it is an accepted distinction in the law of England and other States.[1] Disregard of this distinct personality can be seen in different in different jurisdiction based on the nature of entities' conduct.

These entities may also have public policy objectives, but they should be distinguished from other forms of government agencies or state affiliates established to pursue purely sovereign non-commercial objectives. A state-owned entity, government-owned corporation, state-owned company, state enterprise, publicly owned corporation, government business enterprise, commercial government agency, public sector undertaking or parastatal entity is a separate legal entity incorporated by the State to undertake commercial non-governmental activities on behalf of an owner government.

1.2 Instrumentality

In general instrumentality means an organisation that serves a public purpose and is closely tied to the State government, but is not a government agency. Many instrumentalities are private companies, and some are incorporated directly by state government or by Federal government in a situation where there is federal system of government in a federation.[2] Instrumentalities are subject to a unique set of laws that shape their activities. In the United States the term instrumentality is popularly used compared to the other part of the world. For example, Fannie Mae[3], Ginnie Mae[4], and Freddie Mac[5] are all federal instrumentalities

[1] *C. Czarinkow v. Rolimpex*, [1979] App.Cas. 351, 364.

[2] Defined by Investopedia Dictionary, www.investopedia.com/terms/i/instrumentality.asp.

[3] Pickert, Kate (2008-07-14) TIME Business & Money; http://www.fanniemae.com/portal/index.html; "A Brief History of Fannie Mae and Freddie Mac" The Federal National Mortgage Association commonly known as Fannie Mae, was founded in 1938 during the Great Depression as part of the New Deal. It is a government-sponsored enterprise (GSE), though it has been a publicly traded company since 1968.

[4] http://www.ginniemae.gov/; The Government National Mortgage Association (GNMA), or Ginnie Mae, was established in the United States in 1968 to promote home ownership. As a wholly owned government corporation within the Department of Housing and Urban Development (HUD), Ginnie Mae's mission is to expand affordable housing in the U.S. by channeling global capital into the nation's housing finance markets.

[5] http://www.freddiemac.com/; The Federal Home Loan Mortgage Corporation (FHLMC), known as Freddie Mac, is a public government-sponsored enterprise (GSE), headquartered in the Tyson's Corner CDP in unincorporated Fairfax County, Virginia.

in the United States. So are many other financial services organisations, including the Federal Reserve Banks, national banks, commercial banks, most thrifts, most credit unions and insurance companies.

In *First Nat'l City Bank v. BancoPara El Comercio Exterior de Cuba* the court stated that "due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude as the courts of Great Britain have concluded in the other circumstances that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such".[6] Therefore, an instrumentality under USA and UK jurisdiction is treated separate from the State in relation to any state liability that may arise for the investment activities of the State instrumentality.

1.3 Constituent subdivision

Constituent units of a State have neither separate international legal personality of their own nor any treaty-making power. In those cases where the constituent unit of a federation is able to enter into international investment agreements on its own account,[7] the foreign investors may claim recourse not only against the constituent unit in the event of a breach but also from the federal State. The investment agreement of a constituent unit will always involve the responsibility of the federal State and will fall within the scope of the State responsibility and will be attributed to the State.

Constituent subdivision of a State is a broader concept under the ICSID Convention[8] which covers a wide range of State entities depending on whether a particular country is a unitary or federation. In unitary States, borough, county, municipalities or any other local administrative divisions may fall under this category, whereas in a federation provinces, federated states or semi-autonomous dependencies come under the ambit of this class.

[6] See First Nat'l City Bank v. BancoPara El Comercio Exterior de Cuba, 462U.S. 611, 624, 626-27 (1983).

[7] See, e.g., articles 56, paragraph 3, and 172, paragraph 3, of the Constitution of the Swiss Confederation of 18 April 1999.

[8] Convention on the Settlement of Investment Disputes between States and Nationals of other States, adopted on 18 March 1965, came into force in 14 October 1966.

Some of the countries designated their constituent subdivision to the Centre such as Australia designated the States of New South Wales, Victoria, Queensland, South Australia, Tasmania, The Northern Territory and The Australian Capital Territory as constituent subdivisions. The United Kingdom designated Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Falkland Islands (Malvinas) Dependencies, Gibraltar, Montserrat, Anguilla, St. Helena, St. Helena Dependencies, Turks & Caicos Islands, Bailiwick of Guernsey, Bailiwick of Jersey and the Isle of Man as its constituent subdivisions.[9]

1.4 Organ of a State

An organ of a State means any department of State or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a governmental function or exercising a public power or performing a public function.[10] Such organs of State and departments of government can be, and are often, constituted as separate legal entities within the internal legal system of the State. They do not have international separate legal personality as a sovereign entity; they could nevertheless represent the State or act on behalf of the central Government of the State, which they in fact constitute integral parts thereof. Such State organs or departments of government comprise the various ministries of a Government,[11] including the armed forces,[12] the subordinate divisions or departments within each ministry, such as embassies, special missions and consular posts[13] and offices, commissions, or councils which do not form part of any ministry but are themselves autonomous State organs answerable to the

[9] "Contracting states and measures taken by them for the purpose of the convention" (April 2008), http://www.worldbank.org/icsid.

[10] Sec.239 of South African Constitution.

[11] *Bainbridge v. The Postmaster General* (1905) (United Kingdom, The Law Reports, King's Bench Division, 1906, vol. I, p. 178); *Henon v. Egyptian Government and British Admiralty* (1947) (Annual Digest. . ., 1947 (London), vol. 14 (1951), case No. 28, p. 78).

[12] *See*, for example, the opinion of Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and others* (1812) (W. Cranch, Reports of Cases . . ., (New York, 1911), vol. VII, 3rd ed., pp. 135-137).

[13] The Vienna Convention on Diplomatic Relations; the Convention on Special Missions. See also the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character.

central Government or to one of its departments, or administered by the central Government.

These State organs consist of different legal persons such as ministries or other legal entities are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State and state organs are treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of the conduct of State organ to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to the conduct of state organ, whether an act or omission, which is attributable to the State.

1.5 State Agency

A government or state agency is a permanent or semi-permanent organisation in the machineries of government that is responsible for the oversight and administration of specific functions, such as an intelligence agency. There is a notable variety of agency types, although usage differs, a government agency is normally distinct both from a department or ministry, and other types of public body established by government. The functions of an agency are normally executive in nature, since different types of organisation such as commissions are normally used for advisory functions, but this distinction is often blurred in practice. A government agency may be established either by a federal government or by a State government within a federation. The term is not normally used for an organisation created by the delegated powers of a local government body. Agencies can be established by legislation or by executive powers. The autonomy, independence and accountability of government agencies also vary widely.

State agencies are distinct from the State corporation engaged in commercial non-governmental activities on behalf of the owner-State. This short introduction of State agency is to distinguish the nature and function of the State agency from the State entities.

1.6 Sovereign Wealth Fund

Sovereign wealth funds are long-horizon investors using public funds and therefore should look to invest in illiquid public assets that earn long-term returns commonly known as SWFs. It is a special investment vehicle fully owned and controlled by the government. Created by the sovereign State for macroeconomic purposes, SWFs hold, manage, or administer public assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatisations, fiscal surpluses, and/or receipts resulting from commodity exports. [14]

Some of these sovereign wealth funds are held under the custody of the central bank, which accumulates the funds in the course of its management of a nation's banking system; this type of fund is usually of major economic and fiscal importance. Other sovereign wealth funds are simply the State savings that are invested by various entities for the purposes of investment return, and that may not have a significant role in fiscal management. SWFs are typically created when governments have budgetary surpluses and have little or no international debt. This excess liquidity is not always possible or desirable to hold as money or to channel into immediate consumption. This is especially the case when a nation depends on natural resources exports like oil & gas, copper or diamonds. In such countries, the main reason for creating a SWF is because of the properties of resource revenue, high volatility of resource prices, unpredictability of extraction, and exhaustibility of resources.

2. Methodology

This research is considered to be a *doctrinal* or *pure legal research*, since it is concerned with the issue of legal development in investment arbitration in relation to private and public international law. *Non- doctrinal* research, in other word social research, which is done

[14] International Working Group of Sovereign Wealth Funds, *Generally Accepted Principles and Practices, 'Santiago Principles'*, Appendix I. Defining Sovereign Wealth Funds, available at: http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf.

mostly based on survey concerning people, social values and social institutions.[15] On the other hand, this research is concerned with legal propositions and doctrines critical of existing law on investment arbitration, accompanied by arguments for legal reform by means of judicial development. The sources of this research are treaties, conventions, statutes, general principles of law, judicial precedent and opinion of legal scholars.[16] This was essentially a library-based study in which materials were collected from the libraries, archives and other online databases. The basic aim of my research was to discover, explain, examine, analyse and present, in a dynamic way, facts, principles, provisions, concepts, theories or the working of international laws or legal institutions to protect investors as well as other contracting states in relation to the investment dispute.

Doctrinal method of research was essential for the completion of this research because it proposed reform towards establishing a bridge between existing approach of public and private international law in relation to investment dispute. Parties in such a dispute are private investors and the States or state owned entities which may be entitled to immunity both from jurisdiction and execution under public or customary international law. The application of doctrinal method in this research was concerned with legal documents, and not instant public opinion, which are authoritative. This was the most authentic method to analyse and examine the loopholes of the existing translational legal approach in establishing a healthy environment for investment dispute worldwide. To that end the structure and development of this research went on with the following journey in this thesis.

2.1 Mechanism of agreement of State entity

Arbitration has found much success in the settlement of disputes between private investors and States or State entities belonging to different nations.[17] 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 international arbitration proceedings is, in reality,

[15] Nuffield Inquiry on Empirical Legal Research, 2006; Anwarul Yaquin, Principle of Legal research, 2007;
[16] *Ibid*; Faruque, *Essentials of Legal Research,* Palal Prokashoni, 2009.
[17] M Sornarajah, *International Commercial Arbitration: The Problem of State Contracts,* (Longman Singapore 1990) at. P. 5.

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.[18] 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 State will be liable for the agreement of its entity?

In *privity* to an arbitration agreement of a State corporation whether commercial or public, the consent to the agreement is not always as straightforward as it is for a business corporation. This is because of substantial governmental influence over the structure, function and control of the State corporation which sometimes refers to the State and the State corporation as single economic unit. The question is when this independent State entity enters into an investment agreement with a foreign investor under the auspices and directing mind of the owner State can the State raise the argument of separate legal personality of its entity in case of any liability of a State entity? What is the main reason for the incorporation of independent State entity by the State? If it is to be found that the State is an alter ego of the entity and the entity is working as a shadow of the incorporating State shall it be a party to the agreement of its entity?

2.2 Scope, complexity and limitation of the agreement

Consent to the jurisdiction of arbitral tribunal where the parties are State entity and foreign investor is the foundation of international investment arbitration. This consent is sometimes affected by *privity* of contract and often circumscribing by the parties during the contract formation. Often this consent is subject to conditions and approval by the State in relation to contract between the State entities and foreign investors. The ICSID Convention allows the parties to limit their consent to a subset of disputes, and parties in international investment agreement do limit their consent in this way. On the other hand, numbers of

[18] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, (4th edn Sweet & Maxwell London (1991) at ch. 1.

investment treaties limit consent to arbitration of certain disputes and disputes arising after the treaty's entry into force. Some went on even more restrictively to disputes based on factual circumstances arising after the treaty's entry into force.

Reasonable question arise here regarding whether the tribunal should seek to ascertain and apply the shared intention of the parties to the relevant agreement regarding what disputes are within the tribunal's jurisdiction or accept to the literal approach of treaty's entry into force? Besides this, limitation of consent is an issue in the national legislation as well when it offer consent in a generic terms. Whether the foreign investors are allowed to limit their consent with regard to certain disputes only? The discussion is extended towards the examination of the issues of state consent and its limitations in relation to the agreements of State entity and foreign investors whether a Sate is a party to the agreement to arbitrate?

2.3 Jurisdictional mechanism of the agreement of State entity

Under the doctrine of foreign state immunity, one State is not subject to the full force of rules applicable in another State; the doctrine bars a national court from adjudicating or enforcing certain claims against foreign sovereign States. At one time, States enjoyed "absolute" immunity all proceedings against foreign States were barred without their consent. With the incising number of State involvement in commercial activities through incorporation of State entity, many jurisdictions began to apply a "restrictive" theory of immunity in relation to cases brought by private parties.[19] Under the restrictive approach, courts continue to recognise immunity for "sovereign" acts, but deny immunity for "commercial" acts of State or State entities. One purpose of the commercial exception is to protect the legitimate expectations of foreign investors that engage in commercial transactions with foreign States or State entities. The restrictive approach is now widely

[19] *See*, Hazel Fox, *The Law of State Immunity* (Oxford 2008); *I' Congresso del Partido* [1981] 2 All ER 1062, 64 ILR 307; *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (reprinting the so-called Tate Letter of May 19, 1952).

reflected in case law, national statutes and international conventions, although it cannot yet be said to be universally recognised.[20]

The concept of jurisdictional immunity evolved mostly in relation to the activities of sovereigns and States. But the restrictive approach of immunity developed in relation to State participation in commercial activities through state affiliates. The questions arise based on the nature of the activities and the status of the State affiliates whether they form state organ, separate entity, instrumentality or sovereign wealth fund? If the State affiliates that engage into the commercial activities with foreign investors are organ of the State and its commercial activities are purely for the public benefit, will then the restrictive approach of immunity be applied? In other cases where the State entities are separate legal personality also performing public function but the nature of their activities are commercial, will they enjoy immunity from jurisdiction? Finally, whether the commercial activities of sovereign wealth funds will be covered by immunity? In cases where the commercial activities of sovereign wealth funds are mixed with the property of central bank and under the custody of central bank will they enjoy immunity?[21]

2.4 The exceptionality of enforcement measure

Restrictive theory of immunity is being now fairly practiced by most of the civil law and common law countries around the world as regard to immunity from jurisdiction of the tribunal in a dispute between a State or State entity and foreign investor.[22] However, sovereign States are still more watchful about withdrawing immunity from execution of a judgement given against the property of State or State entity. Certain properties of State

[20] *See* e.g., *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480,488 (1983); *Alcom Ltd. v. Republic of Columbia*, [1984] 2 All ER 6, 74 ILR 179. As Hazel Fox has noted, "This distinction between *acta dejure imperii*, acts in exercise of the public or sovereign powers of a State, and *acta dejure gestionis*, acts performed as a private person or trader, is crucial to the present law of State immunity."

[21] *See AIG Capital Partners Inc. and Another v. Kazakhstan*, [2005] EWHC 2239. ;Edwin M. Truman, *Sovereign Wealth Funds: Threat or Salvation?*, Peterson Institute for International Economics, Washington DC, September 2010, pp. 9-33.

[22] *See* US FSIA 1976*;* UK State Immunity Act 1978; Singapore State Immunity Act 1979; Pakistan State Immunity Ordinance 1981; Australian FSIA 1985. Hazel Fox, *Sovereign Immunity and Arbitration*, in *Contemporary Problems in International Arbitration* (OUP 2004) at p. 323.

entities are mixed with the public assets of foreign States which are always immune; therefore the involvement of a foreign State in the award makes it even more difficult to enforce the award. What if an award is given against the property of an independent State entity involved in commercial activities, and its properties are under the custody of an organ of the State? Is it possible to apply the restrictive approach of immunity in relation to the enforcement of that award? On the other hand, when an award is given against the property of an independent State entity involved in commercial activities can State claim immunity on the ground that the entity is an organ of that State?

The courts of a foreign State where the enforcement is sought against the property of a State are entitled to examine the nature and consequences of the execution and also the purpose of the object of execution. If an award is given against the property of a sate entity engaged in commercial activities serving the interest of public at large, will the domestic court enforce the award or the property of that entity be covered by immunity? Shall the forum court consider the nature and intended purpose of the use of State property or the property of State entity?[23] Further, in relation to the enforcement of an award against the property of sovereign wealth fund whether they are immune? What if the activities of a sovereign wealth fund are commercial, non-governmental in nature and they are under custody of central bank will then the restrictive approach be applied to enforce an award against the property of sovereign wealth fund?

2.5 Jurisprudence of State Liability

Most often States raise separate legal personality of State entities as a defence against the claim brought by the foreign investors for the liquidated debt of State entities in investment arbitration.[24] These entities are in fact incorporated by the relevant State which may have

[23] *AIG Capital Partners Inc. v. Kazakhstan* [2005] EWHC p. 2239; Christoph H Schreuer, *State Immunity: Some Recent Developments* at p. 15; Art. VII(C)3 of the ILA Draft Convention, prohibits attachment or execution if 'the property is that of a State central bank held by it for central banking purposes'.

[24] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46; ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on jurisdiction, 22 April 2005; *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co. v. Maharashtra Power*

separate legal personality but they lack absolute autonomy in relation to substantial structural & functional government control. These entities are created by the States to conduct commercial, non-governmental activities to serve the interest of the State. Very often the head of these corporations are the relevant minister of the government who negotiate the agreement of the entities and controls the decision making process of the corporations.[25] In this context it is reasonable to presume that the incorporation of separate entity by the State is to put a corporate veil to separate the liability of State entities from the State. The reasonable question here is whether the incorporating State will be directly or indirectly liable for the conduct of its entities? Should there be a hope to adopt a uniform set of rules for the recognition and enforcement of investment arbitration award in addressing issues relating to state liability for the conduct of State entities?

3. Original Outcome

At the end of this research the following outcomes were obtained in relation the agreement of State entity and state liability in international investment arbitration.

i. In addressing the issue of distinction between state organ and State entity in this research it established that if the affiliate is a State organ, the State is liable under the principle of public international law. However, the crucial question discussed in this thesis was whether the State is responsible for the conduct of its entities? The research has proven that the State can be liable for the commercial conduct of its entities if their functions form single economic reality.

ii. In answering whether the State is a party to the investment agreement between the State entity and foreign investors? This research has proven that

Development Corp. Ltd., Maharashtra State Electricity Board and the Stateof Maharashtra, Apr. 27, 2005 Final Award, 20(5) INT'L ARB. REP. C-1 (2005).

[25] *Wintershall A.G., et al. v Government of Qatar*, Partial Award on liability of 5ht February 1988, 28 ILM 795 (1989); *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced at [1995] *Rev. Suisse D. Int. Eur*., Vol. 5, at p. 593; *Dallah Real Estate and Tourism Holding Co* [2010] UKSC 46.

in fact the State is a party to the agreement of its entity if the State has substantial structural and functional control over the entity and has *de fecto* authority over the directing mind of the entity.

iii. In responding the crucial issue of sovereign immunity of both from jurisdiction and enforcement measure the finding of this research established that the State entities involved in commercial non-governmental activities are not entitled to immunity. One reservation can be made in relation to immunity, in execution against the property of State entities mixed with sovereign funds, is that it must be expressly writing.

iv. Finally, this research established that if the State is a party to the investment agreement of its entity and the entity is involved in non-governmental commercial conduct and the State and its entity forms single economic reality based of the control, the State will be liable for any foreign debt.

This page is intentionally left blank

CHAPTER 2 State *Privity* to the Agreement of its Entities in Investment Arbitration

2.1 Introduction

In most investment arbitrations where a State challenges the jurisdiction of the tribunal it argues that it is not a party to the arbitration agreement. A recent UK Supreme Court decision has established the precedent that the State is not a party to the arbitration agreement of its independent State entity.[1] The initial stage of establishing attribution of conduct of a State entity to the State in investment arbitration is to determine whether the State is a party to the arbitration agreement entered into by its entity. The significant characteristics of most State entities are that they have separate legal personality incorporated under national law by the government to undertake commercial activities on behalf of the State. Besides operating commercial affairs they also have public policy objectives, which entail State entities to serve the purpose of the government in some form similar to government agencies established to pursue purely non-financial objectives.

If we look at the basic principle of formation of contract, an agreement of a competent independent business corporation is clear to prove consent or directing mind of whether or not it is an absolute consent or influenced unduly or it was not its consent at all. On the other hand, when we look at the *privity* to an arbitration agreement of a State corporation whether commercial or public, the consent to the agreement is not always as straightforward as it is for a natural person or ordinary business corporation. This is because of substantial governmental influence over the structure, function and control over the State corporation which sometimes refers to the State and state corporations as a single economic unit.[2] Moreover, when it comes in relation to the question of attribution of state liability for the agreement of its entities, it would be unreasonable for the arbitral tribunal

[1] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 A.C. 763.

[2] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment law* (Oxford 2008) p.200; Gower and Davies, *Modern Company Law* (8th edn., Eweet & Maxwell 2008) p 203; Interim Award of September 23, 1982 in No.4131 (original in French), reprinted in IX ICCA Yearbook of Commercial Arbitration 131, 134 (1984); Yaraslau Kryvoi, 'Piercing the Corporate Veil in International Arbitration' (2011) vol. 1. 1:169 Global Business Law Review, p.174.

to predict whether they should separate the liabilities of State entities from the State or treat them as one single economic unit.

When independent state Corporations enter into investment agreements with foreign investors under the substantial control and supervision of the State to realise a common economic transaction, advance planning for dispute resolution becomes an inherently complex mechanism.[3] One of such complexities involves lifting the corporate veil of State entities whether the State to be a party to the agreement of its entity. The crucial impression such veil piercing leaves is that of uncertainty and unpredictability of the party hood of its parent State. Such uncertainties are detrimental to the legitimate expectations of the parties to a contractual relationship, and involve serious risks associated with the enforcement of arbitration awards. Often in international arbitration the arbitral tribunals refer to the group of companies' doctrine, to treat the principle as an alter ego of the entity or the arguments of single economic unit in relation to the agreement of State entities for piercing the corporate veil. The aim of this chapter is to examine the rationale behind the formation of a State entity and whether the home State is a party to the agreement of its entity. To this end an attempt will be made to analyse the negotiators and directing minds of State entity when they conclude investment agreement with foreign investors. This will also scrutinise and explain the specific relevance of piercing the corporate veil of State entities in investment agreement.

2.2 Rationale behind the formation of a state-entity

In general State entities have separate legal personality and their conducts shall be treated as distinct from the activities of the government and shall not be attributed to the State. However, several exceptions may qualify these principles and hold the State liable for the agreements of its entities; the separate legal personality may not be respected if the corporate veil has been created as a means for fraud and evasion.[4] Besides, the conduct of State entities will be attributed to the States in cases where the corporations exercise public

[3] Gillis Wetter, 'A Multi-Party Arbitration Scheme for International Joint Ventures', (1987)3 ARB. INT'L 2.
[4] *Barcelona Traction Case*, Judgement, 5 February 1970, ICJ Rep. (1970) 3, 39, paras 56-58.

power.[5] Another exception concerns a situation of ownership by the State where control is exercised in order to achieve a particular result.[6] To better understand the concept of piercing the corporate veil, it would be helpful to examine the need for having the corporate form of state-entities in the first place.

According to Janet Dine, the limited liability corporation is the greatest single discovery of modern business and trade practice in the world, because a greatest portion of the world's business and trade is conducted by corporations.[7] However, corporations are most often used by the incorporator as a tool to avoid liability of any unforeseen debt incurred in the course of business conduct. In relation to State entity, the purpose is same to ordinary business corporations; they are created by government to undertake commercial activities on behalf of an owner government. Arguably, the main function of corporate law is defining the property rights over which the participants in a commercial firm can enter into contracts.[8] Henry Hansmann and Rainier Kraakman explained that "the essential role of organisational law is to provide for the creation of a pattern of creditors' rights a form of 'asset partitioning' that could not be practically established otherwise."[9] Therefore, it is obvious that rationale behind the incorporation of separate legal entity by a sovereign State is to put a veil between the entity and the State's assets against any foreign debt of its entity.

Corporate law scholars divide the benefits of corporate limited liability into three groups namely separation of assets, improved monitoring, and ease of coordination with creditors. Ronald Coase was probably the first to explain the corporate form by the need for the reduction of transaction costs of market coordination with third parties.[10] Limited liability facilitates the transfer of ownership by allowing owners to separate corporate liabilities

[5] *See* e.g. *Philips Petroleum v Iran, 21 Iran* USCTR (1989) 79.

[6] *See* J Crawford, *The International Law Commission's Articles on the StateResponsibility (2002)* 113, para 6.; also *Foremost Teheran v Iran*, 10 Iran- USCTR (1986) 288; *American Bell v Iran,* 12 Iran-USCTR (1986)170.

[7] Janet Dine, Company Law (3rd edn., Macmillan, 1998) p.1; See Len Sealy, *Company Law and Commercial Reality* (Sweet & Maxwell, 1984).

[8] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 440 (2000).

[9] Hansmann & Kraakman, at 390.

[10] *See* R.H. Coase, *The Nature of the Firm*, 4 Economica 386 (1937).

from their own.[11] While, in theory, partitioning of assets with each and every creditor separately may be technically possible, the transaction costs would be prohibitively high.[12] Similar to the corporate asset partitioning, incorporation of a State entity legally separate from the State, therefore, shifts the burden of monitoring the State governing authorities' from the State to the foreign investors in relation to any foreign debt. Other benefits of asset partitioning include shielding the assets of a sovereign State from the various local creditors and foreign investors of sovereign debts, and the costs of conducting commercial activities through the creation of independent State entities.

To separate incorporators and the participants from the liability of the corporation corporate scholars rely on two major theories concerning corporate personality which are the theory of legal entity, and the theory of legal fiction. The entity theory is based on the principle that the State created the corporation by granting it a charter, and, therefore, it has a separate "personhood."[13] On the other hand, according to the legal fiction theory, a corporation is an outcome of contracts, a more convenient way of structuring relationships with third parties, thereby limiting the participants' personal liability. The private corporation or firm is simply one form of legal fiction which serves as a nexus for contractual relationships and which is also characterised by existence of divisible residual claims on the assets and cash flows of the organisation which can generally be sold without permission of the other contracting individuals. [14]

The theory of legal fiction supporters argues that the property might be given special qualities by the State or through contract, but remains property all the same.[15] Thus, the existence of a corporation independent of its owners is a fiction "the rights and duties of an incorporated association are in reality the rights and duties of the persons who incorporate

[11] Hansmann & Kraakman, at 426.

[12] Hansmann & Kraakman, at 406-07.

[13] *Dallah Real Estate and Tourism Holding Company,* para 8; See, e.g., Mark Hager, 'Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory', [1989] 50 u. Pitt. L. Rev. 575-77.

[14] *See, e.g.* Michael C. Jensen & William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. Fin. Econ. (1976) 305, 311.

[15] Victor Morawetz', '*A Treatise on the Law of Private Corporations 2'* (2d ed. Boston, Little, Brown and Co., 1886).

it, and not of an imaginary being."[16] The entity theory school regards a corporation as an autonomous institutional actor separable from those with an interest in it.[17] In most cases in investment arbitration when it comes to the matter relating to state liability for its entities, the State argues on the basis of separate legal personality of the entities.[18] However, it has been noticed that states also argue to pierce the corporate personality to save its entity's asset from being paying foreign debt.[19] If we apply the theory of legal fiction it is obvious that the owner-State shall be liable for the commercial conduct of its entity. On the other hand, while the States apply the theory of legal entity but argue to pierce the corporate personality to safeguard the entity's assets it proves that the State and State entity are the same in two distinguished form. Therefore, the ultimate rational for incorporation of State entities is to safeguard the State assets from being paying foreign debt claimed by investors.

The concept of legal fiction theory has probably started to emerge after the decision in *Salomon v Salomon* on the separate legal personality of a corporation.[20] This theory has not just separated the incorporators and subscribers from company but also from its subsidiaries and holding companies. Frequently, reorganisation of corporate structure in corporate groups involves exclusion of especially risky activities in selected subsidiaries to shield the group as a whole from tort liabilities.[21] As Professor Blumberg put it, in such business planning, traditional entity law is being utilised to attempt to create a safe harbour for corporate groups seeking to externalise the costs of a subsidiary's negligence in conducting highly risky activities.[22] Similarly, very often purpose of incorporation of state-owned entities is to reduce the risk of reimbursements from the sovereign asset in case of entities' foreign debt. The principles of State sovereignty and political territoriality make

[16] Victor Morawetz,.

[17] Gunther Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person', [1988]36 am. J. Comp. L. 130.

[18] *See Dallah Real Estate*; ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan,* Decision on jurisdiction, 22 April 2005, para. 199.

[19] *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced at [1995] Rev. Suisse D. int. eur., Vol. 5, at p. 593.

[20] *Salomon v Salomon* [1897] AC 22.

[21] See, e.g. Richard Rothman, *A Veiled Threat: Minimizing Parental Liability for U.S. Subsidiaries*, Practical Law Company, August 23, 2007.

[22] Phillip Blumberg, *The Law of Corporate groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations* (Little, Brown and Co. 1987).

separation of assets even more attractive. When corporations are dispersed across jurisdictions with different rules of corporate law, the corporate form allows even more flexibility for the owners to structure their assets and limit the reach of creditors.

The commercial world regards the principle of separation of legal identity and liability between different companies and entities as a universal legal assumption. All legal systems of major industrial countries recognise this principle.[23] The development of sophisticated multinational corporate structures was a response to various commercial factors, such as business expansion and diversification, the need for specialisation and efficient productive processes, raising capital finance, or reducing taxation liabilities. The invention of the concept of independent state-owned corporation is another development to that extent in support of advanced cross-border trade practice participated by the State. Almost every sovereign State has incorporated independent state-owned entity or sovereign wealth fund to serve sovereign commercial conducts. Majority of them are dealing with petroleum of energy sectors for example, 77 percent of the world's oil reserves are held by national oil companies with no private equity, and there are thirteen giant state owned entities with more reserves than ExxonMobil, the largest multinational oil company"[24]

2.3 Rationale for limited liability of state-entity

There are various kinds of State entities one of which as noted in the Santiago Principles are known as sovereign wealth funds. These principles[25] were developed by the International Working Group of Sovereign Wealth Funds in 2008, e.g., Singapore's Temasek and GIC, Malaysian Petronas, The Abu Dhabi Investment Authority (ADIA) and Qatar General petroleum Corporation (QGPC). The Principles further divide separate legal entities into separate legal "identities" (legal entities under public law with full capacity to act and governed by a specific constitutive law) and state-owned corporations. Most often

[23] Gower and Davies, p. 193; OECD, *'Responsibility of Parent Companies for Their Subsidiaries'* pp. 6, 24 (1980).
[24] Tina Rosenberg, *The Perils of Petrocracy*, N.Y. Times Magazine, Nov. 4, 2007, at 42; *See also* International Working Group of Sovereign Wealth Funds; Generally Accepted Principles and Practices (Santiago Principles) (October 2008), available at http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf.
[25] See Santiago Principles (October 2008).

structurally these entities are of two different types, e.g. an independent State-owned legal entity such as a State-owned enterprise; and a structure that is part of the State without separate legal personality.

For a number of reasons, however, the motive behind the incorporation and structure of these state-owned entities are of great importance for the State. Primarily, the inquiry may have shifted largely to one about the nature of the transaction, in close cases the structural and operational independence of the entity from the State may be an important factor in characterising the conduct as sovereign or commercial. However, the structure of the entity may now be of secondary importance with regard to immunity from jurisdiction of arbitral tribunal in commercial matters, it can be again raised as an issue with regard to immunity from execution of arbitral award.

In general, two principal approaches are taken into consideration for the relationship between State entities and the host State.[26] Under the European Convention on State Immunity 1972, common law jurisdiction in the United Kingdom together with most of its commonwealth countries and most civil law States, such companies are considered separate from the State providing that they operate independently from the State. The European Convention uses separate legal personality and the capacity to sue and be sued as the factors to determine whether an entity or company operates independently of the State. The ECSI distinguishes agencies of the State from its organs by excluding from the expression "Contracting State" any legal entity of a Contracting State which is distinct therefrom and is capable or suing and being sued. Such distinct entities are not part of the State even if they have been entrusted with public functions. Under Article 27(2), proceedings may be brought against such entities "in the same manner as a private person" except in respect of sovereign acts.[27]

[26] Such enterprises are addressed under national laws and treaties under various rubrics, including "separate entities" (UK, Australia), "agencies and instrumentalities" (US) and "legal entities" (ECSI).
[27] Article 27 of The European Convention on State Immunity 1972.

In a broader sense, separate entities are not entitled to immunity either from jurisdiction or execution if they are engaged in commercial non-governmental activities. ECSI has gone a bit further in relation to the performance of governmental functions by an independent State entity. Under ECSI such entities are immune only if they carry out acts in the exercise of sovereign authority and there is accountability to the government, which means government has substantial structural and functional control over the management of the entity. In contrast to the European approach, the US Foreign Sovereign Immunities Act of 1976 defines the overall foreign State more broadly. It includes certain majority state-owned companies under its definition of "agencies and instrumentalities" of the foreign State. The US uses its broader definition of the State for purposes of determining when to plead immunity for a US agency in a foreign court. As noted above, the decision on immunity rests with the foreign court. [28] Therefore, to plead for immunity under US Foreign Sovereign Immunities Act of 1976 State entities shall be either agent or instrument of the State structurally and functionally.

Rational behind the incorporation of independent state-entity or sovereign fund may be characterised based on arguments put forward by the sovereign State of Kuwait in *In the Sarrio proceedings* against its two entities. [29] Sarrio, a Spanish company, brought an action against the Kuwait Investment Authority and Kuwait Investment Office a sovereign fund of Kuwait. Because Kuwait Investment Office, a long established branch in London, was merely a branch of Kuwait Investment Authority, therefore, the two entities were treated as a single economic unit. In English proceedings, Sarrio described the entities as the investment arm of the government of Kuwait, with a separate legal identity from the government and State. Kuwaiti State entities held more than ninety-five percent share in Grupo Torras which had entered into an insolvency procedure. The dispute arose based on failure to comply with the payment to Sarrio by one of Grupo Torras's affiliate. Therefore, Sarrio sought to impose liability for the alleged breach of contract on Kuwaiti State entity in its capacity as

[28] Gaukrodger, D. (2010), "Foreign State Immunity and Foreign Government Controlled Investors", *OECD Working Papers on International Investment*, 2010/2, OECD Publishing. doi: 10.1787/5km91p0ksqs7-en.

[29] *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced at [1995] Rev. Suisse D. int. eur., Vol. 5, at p. 593.

the dominant shareholder of Grupo Torras.[30] This was because under Spanish law, a dominant shareholder of an insolvent company can be made liable for that company's debts under certain circumstances.

In May 1993, shortly after it commenced the Spanish proceeding, Sarrio attached Kuwait Investment Authority's bank accounts in Geneva and Zurich to secure the payment of the claim in Spain. Kuwait argued that the attached assets were immune because they were part of the Future Generations fund, established in 1976 by a decree of the Emir of Kuwait. It was managed by Kuwait Investment Authority and its office in London. The appeal was brought by the State of Kuwait, not by its entities. The court held that it is unnecessary to decide the issue of immunity because independent State entities might not have the power to invoke immunity. The issue of whether Kuwait Investment Authority was part of the State was not even relevant to immunity from jurisdiction because the conceded private law nature of the acts excluded immunity in any event. But it was relevant to immunity from execution the accounts were in the name of Kuwait Investment Authority and the court found that Kuwait would only have standing to claim immunity for the accounts if Kuwait Investment Authority were part of the State. The court held that the Kuwait Investment Authority was an independent state-entity from the State and that Kuwait was not the proper party to invoke immunity for them.

In refusing Kuwait's argument that Kuwait Investment Authority formed part of the State, the court held that the Kuwait Investment Authority was created as an independent state-entity under a 1982 law. In addition, the court relied on various documents including the entity's articles (*statutes*), and letters from its representatives to government and private parties. The court also underlined that Kuwait Investment Authority had previously brought legal suit in its own name in various proceedings in England and Spain as a separate independent legal entity. The government's economic dominance over the entity, including Kuwaiti ministers sitting on its council board, and that the fact that its investments were made to benefit the State were found to be of no relevance.[31]

[30] Gaukrodger, D. at p. 594.

[31] *Kuwait v. X*, at p. 593.

After denying the claim to immunity on the basis that Kuwait was not the proper party to bring the claim of immunity, the court suggested that a claim of immunity would have been denied in any event. The court's wording appears carefully chosen to leave open the question of whether it would be sufficient for the account to be linked to the future generation fund for it to be immune from execution. The court's principal finding was that the evidence was insufficient to establish that the attached assets were dedicated to the public service of the State. The court then went on to say that "moreover" *par ailleurs*, the evidence did not sufficiently link the account to the future generation fund. The court appeared to carefully avoid stating that the general finding was made because of the lack of evidence linking the fund to the account.

Based on the arguments brought by the government of Kuwait in this case it is assumed that the rationale behind the incorporation of State entities is either to exclude liability of state or to protect the sovereign interest on distinct circumstances where State entities incur foreign debt. In this case state argued to pierce the corporate veil of its entity to entitle the entity's property for sovereign immunity against execution. But it is now settled principle in international trade practice that in a commercial transaction the State cannot raise absolute immunity.[32] Therefore, motive behind the establishment of state-owned entities are to exclude liability of state or to use it as a shadow to act on behalf of the sovereign State towards its maximum benefit.

Company laws of almost all countries of the world permit business to be carried out with the benefit of limited liability for their incorporators. In the case of conventional limited liability company, liability of shareholders for the company's debt is limited to the amount they have paid or have agreed to pay to the company for its shares.[33] In case of quasi-

[32] The StateImmunity Act 1978 (UK SIA); State Immunity Act (1982) (Canada SIA); Foreign State Immunities Act 1985 (Australia FSIA); Immunities and Privileges Act 1984 (Malaysia); State Immunity Ordinance 1981 (Pakistan); State Immunity Act 1979 (Singapore); Gaukrodger, D. (2010), 'Foreign State Immunity and Foreign Government Controlled Investors', *OECD Working Papers on International Investment*, 2010/02, OECD Publishing. P. 11 http://dx.doi.org/10.1787/5km91p0ksqs7-en; Foreign State Immunities Act 1981 (South Africa); Hazel Fox, The Law of State Immunity, (2d ed. 2008) (hereinafter Fox) at p. 232.

[33] Gower and Davies, p. 193.

governmental entity or wholly-owned state-entity the purpose of incorporation is the same as the case above to limit the liability of the State if its entity goes insolvent. However, to look at the matter from the creditors' perspective, their claims are limited to the asset of the corporation or entity and cannot be asserted against the asset of the shareholders or in case of State entity the State. This can be regarded as a dogmatic rule because, if the opposite economic development occurs and the company is highly successful, the shareholders are likely to receive all the residual benefit of the success, once the creditors have been satisfied. So, there is apparent discrepancy in the risks and reward which are allocated to shareholders or incorporator. They benefit through limited liability, from a cap of their down-side risk, whereas the chance of up-side gain is unlimited.

Since, all modern company law systems permit trading on this basis, it might be wondered whether the rationale for limited liability of State entities are worth further analysis. It is suggested that some further analysis is worthwhile because the rationale so identified is likely to be helpful in determining the terms and conditions upon which limited liability is made available and more importantly the protection which should be put in place to guard against the abuse of limited liability.[34] A limited liability company can be very powerful weapon in the hands of incorporators determined on fraud and on defeating a creditor's rightful claims. Will the court make no exceptions to the rule that a company is wholly separate from those manage and control it?[35]

A survey of the case law shows that the courts do contravene the strict principle of independent legal personality of the corporation from time to time.[36] There is general agreement among those who have sought to analyse the relevant cases that the only principle that can be gleaned from them is that the court will look at the human reality behind the corporate veil if the interest of justice provide a compelling reason for doing

[34] Gower and Davies, p. 194.
[35] Janet Dine, *Company Law* (3rd edn, 1998 Macmillan) p.26.
[36] Janet Dine, pp.26-30.

so.[37] This may sound an excellent principle, but when the huge variety of fact situation that are likely to arise are considered, such a vague notion makes it extremely difficult to predict how a court will behave in given situation. When the existence of a corporation is disregarded, commentators have called it lifting or piercing the corporate veil.

There are several cases decided by national courts and arbitration tribunals which are clearly relevant to the sanctity of the veil of incorporation, for example, In *Barcelona Traction case*, the International Court of Justice ('ICJ') stated, 'the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.' In particular, the Court noted, 'the wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser or to prevent the evasion of legal requirements or of obligations. [38] But the whole principle of company law is riddled with examples of the validity of acts depending on the effect they will have on the members of the corporation.[39]

In case of State entity it is often argued that the proper personality to sue is to redress a wrong done or for a breach to foreign investors to the entity itself. However, there is an exception to this rule to prevent those in charge or directing mind of the entity causing damage or responsible for any breach to creditors or foreign investors, for example by taking entity's assets or using them in distinct state matter or compelling the entity disappear. Therefore, the law must always recognise the reality of the fact that the entity can do nothing without human operators those are directing mind of it and that those

[37] Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal p.*250; Jennifer Payne, 'Lifting the Corporate Veil: A Reassessment of the Fraud Exception' (1997) 56 *Cambridge Law Journal* 284.

[38] *Macaura v Norther Assurance Co.* [1925] AC 619; *Harrods v Lemon* [1931]2 KB 157; *Williams v Natural Life Health Foods Ltd* [1997]1 BCLC 131; *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, of Apr. 29, 2004, para. 54 ICSID Case No. ARB/02/18, 2005 (quoting *Barcelona Traction* at para. 56); *Barcelona Traction, Light and Power Co. Ltd*. (Second Phase) (*Belgium v. Spain*), 1970 I.C.J. 3 (Feb. 5).

[39] Janet Dine, p.26.

human operators may wish to hijack the entity according to their own ends, to the detriment of creditors or in many cases foreign investors.

2.4 Whether a State can be a party to the arbitration agreement of its entity?

As discussed above the rationale behind the incorporation of a state-entity separate from the State itself is basically to limit the involvement and liability of the State in case of any probable foreign debt incurred mostly out of investment agreement. Often it has been argued whether a State can be a party to the arbitration agreement with private corporations or a foreign investor in the first place, before dealing with the matter whether sovereign State can be a party to the arbitration agreement of its entity. The following discussion of this chapter will investigate the principle of state privity in the arbitration agreement of a State entity.

Most of the States have incorporated State entities for the purpose of serving governmental service or activates, often dealing with foreign investors in matter relating to the operation of national interest.[40] Consequently, policy issues and operational matters concerning foreign investments or investments in general are not handled by the relevant state departments or ministries but independent state corporations or sometimes they are known as sovereign wealth fund. However, these entities are most of the time substantially controlled by the relevant state departments or ministries. The position within the hierarchy of the government and the degree of legal independence of these entities varies. The reasons for the establishment of these separate legal entities by the government are primarily specialisation and efficiency.[41] Thus, when a State needs to coordinating and giving a unified direction to any particular scheme, e.g. the development of schemes in Water and

[40] *See* creation of *EPIDC* and *WAPDA* by the Government of Pakistan, *Société* des *Grands Travaux de Marseille* (SGTM) *v*. *Bangladesh* 5 Y.B Com. Arb (1980) 217*;* ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan,* Decision on jurisdiction, 22 April 2005, para. 199.

[41] *See* Rudolf Dolzer and Schreuer, Chap. 8 at 195*; See also*, in general, Organisation for Economic Cooperation and Development (OECD), *Public Sector Modernisation: Changing* Organisational Structures, OECD Policy Brief (2004).

Power Sectors by the respective Electricity and Irrigation Department of the Provinces,[42] the States establish such para-statal entities. For example, WAPDA, the Pakistan Water and Power Development Authority, was created in 1958 as a semi-autonomous body for the purpose of coordinating and giving a unified direction to the development of schemes in water and power sectors, which were previously being dealt with, by the respective electricity and irrigation department of the provinces.

The existence of these State entities in relation to the foreign investment must be reconciled with the international principle of the unity of the State. This has raised the issue of attribution of acts of these entities to the State which are not restricted to the field of foreign investment. Domestic classification may not be decisive in this context. This question form part of general international law, and they play a significant role in matter relating to state responsibility. In relation to foreign investment, matters of attributions have most often come up on the side of the respondent state when a State argues that acts by State entities cannot be attributed to the State. However, the issue may also be relevant for a claimant when a respondent state considers a State entity single economic unit rather than a national of another State.[43] Therefore, conduct of a State entity to be attributed to the State needs further scrutiny about the negotiations and the directing mind of the State entity in its functional process.

2.5 Negotiation and Directing mind of Contract for the State entity

Negotiations feature is essentially the brining process between two or more parties seeking to secure predetermined objectives, usually with clear sense of purpose where two or more parties need to reach agreement on a business deal. The results of negotiation govern business relationships in all situations and determine the extent of business achievements in

[42] *See* WAPDA, available at http://www.wapda.gov.pk/htmls/auth-index.html; ICSID Case No. ARB/03/3, *Impregilo S.p.A.*, para. 199.

[43] *CSOB v. Slovakia, Decision on Jurisdiction, 24 May 1999, 14 ICSID Review Foreign Investment Law Journal 251,* 268-271 (1999).

the market place.[44] The reasonable questions that need to be answered are who negotiates the investment agreement of State entities? Who has the *de facto* and *de jure* authority and directing mind to sign the agreement, in certain cases approval of financial securities? To illustrate, a businessman might actively negotiate a purchase agreement containing an arbitration clause, but at the last minute arrange for it to be signed by a company incorporated, owned and controlled by him. An application to extend the arbitration clause to the businessman could find support in the notion that buyer and seller intended the businessman to be a party to the agreement.[45] Similarly, investment agreements of most State entities are negotiated by the members of the government, often relevant ministers. Sometimes they are also signed by the members of government who is also head of the State entity.[46]

In *Wintershall A.G., et al. v Government of Qatar*[47] the claimant and the respondent entered into thirty years Exploration and Production Sharing Agreement (EPSA) in the offshore of Qatar on 1976, effective from the date of prior concession agreement of 18th June 1973 between the parties. Under the agreement government of Qatar granted exclusive right to explore, drill and produce petroleum in the defined offshore area. The agreement provided for progressive relinquishment of the contract area at specified intervals. It further provided that non-associated natural gas may be produced subject to the terms of the agreement or to further negotiated contractual agreements.

Due to the boundary dispute between Qatar and Bahrain, the claimant was not permitted to drill in the area where they considered most likely to contain crude oil instead they discovered commercial quantities of non-associated natural gas. At the request of the respondent, the claimant handed over the strategic plan relating to the economic feasibility

[44] Rachel Burnett and Paul Klinger, *'Drafting and Negotiating Computer Contracts'* (2nd edn., Tottel Publishing 2005) 12.

[45] William W. Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' (2009) Multiple Parties in International Arbitration' (L. Mistelis & J. Lew, eds. 2006) at. p. 141.

[46] *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994); *See also Wintershall A.G; Dallah Real Estate, Southern Pacific Properties Ltd* v Egypt.

[47] *Wintershall A.G., et al. v Government of Qatar*, Partial Award on liability of 5ht February 1988, 28 ILM 795 (1989).

of exploiting the natural gas and the proposed method of so doing. Parties entered renegotiations relating to the utilisation of non-associated natural gas in the said contract area or an adjacent area where petroleum rights were held under the authority of Qatar General petroleum Corporation (QGPC). QGPC was a corporation incorporated and wholly owned by the respondent and the Minister of Finance and Petroleum is the Chairman of its Board of Directors.

The negotiations for the future dealing were unsuccessful. The claimants referred the dispute to arbitration, alleging the respondent breached the agreement in violation of law of Qatar and customary international law by denying claimants permission to explore in contractual area and by failing to agree on further contractual arrangements for exploring natural gas. The tribunal held that QGPC was acting as an agent of the Government of Qatar and, therefore, all actions attributed to the QGPC in this case shall be attributed to the Government. The tribunal did not in any respect deny that QGPC was created as a separate independent legal personality under national law of Qatar. However, in the event at issue in this arbitration, QGPC acted as an agent or an arm of the Government in all proceedings relevant to the tribunal's jurisdiction. The tribunal in this case had taken into consideration the functional control of the Government over its entity to be attributed to the State for the responsibility of its entity.

Perhaps the most striking facts supporting the identity of the QGPC and the Government in the event at issue in this arbitration, are summarised at paragraph 10 of chapter XI of the claimants' final submission where it is pointed out that "The Board of Directors of QGPC are appointed by the Emir and consists of 7 to 11 members, the majority of whom are officials of the Department of Petroleum Affairs of the Government. They can be removed at any time by Emir at his will. The Minister of Finance and Petroleum is the Chairman of the Bard". Based on the submissions by claimants the arbitral tribunal is in agreement that as a matter of the domestic law of Qatar it is clear that QGPC is a separate legal entity but it operates as an arm or agent of the Government in respect of the concession areas held by it.[48]

[48] *Wintershall A.G.*, paragraph 13 Chapter XI.

A contrary decision can be seen in the case of In *Impregilo S.p.A. v. Islamic Republic of Pakistan*[49] on 19th December 1995 two contracts were concluded between Impregilo (acting on behalf of GBC) and Pakistan Water and Power Development Authority (WAPDA) to construct a barrage downstream of the *Tarbela Dam* to control to flow of Indus river and to construct 52 kilometre channel that would convey the water from the barrage to the powerhouse. The performance of the contract was to be controlled by an engineer selected by WAPDA acting as an agent for it. Constriction under the contract began in early 1996 to be completed in March 2000. Performance of the work was delayed due to obstacles created by the respondent and unforeseen conditions discovered over the course of the work demanded by engineer to increase amount of foundation work. Further negotiation for the GBC's request for extension of time has failed by the denial of the engineer and WAPDA. The construction of the main barrage was also delayed by the engineer's failure to give timely approvals and issue of proper instructions for the work.

The important issue before the ICSID tribunal was to determine the status of State entity WAPDA and its relation with the government. While examining the status of WAPDA, the involved independent State entity, the Tribunal, at the outset, noted that its examination would be conducted in accordance with the applicable internal law of Pakistan. The tribunal noted that status of State entity WAPDA as a party to the Contracts is a matter for the national legislation of Pakistan, being both the law by which WAPDA was established and exists, and also the law governing the Contracts.'[50] To establish this contention the Tribunal then proceeded to perform some jurisprudential tests in accordance with the applicable domestic law of Pakistan in order to determine the status of the State entity WAPDA.

The ICSID tribunal adopted the criteria of whether the State practiced any structural control over the State entity WAPDA which means, did the government of Pakistan have the power to appoint any of its officials or not. The Tribunal found that the entity consists of a Chairman, and not more than three Members appointed by the Government required by

[49] ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan,* Decision on jurisdiction, 22 April 2005, para. 199.
[50] *Impregilo S.p.A.*, 22 April 2005, para. 199.

Section 4 of the 1958 Act.[51] They "receive such salary and allowances" and are "subject to such conditions of service as may be prescribed by the Government" according to Section 5 of the said Act. Moreover, under Section 6 of the Act, the Government may remove the Chairman and any Member of the Board for various reasons, in particular if they become, in the opinion of the Government, incapable of discharging their responsibilities under the Act or if they have been declared to be disqualified for employment in, or have been dismissed from, the service of Pakistan.'[52]

Further, the arbitral tribunal examined the status of the service personnel of the State entity WAPDA in order to determine whether working for the entity would constitute as working for the government of Pakistan or not. Based on the service structure of the entity the tribunal reached to the conclusion that 'Service under the Authority is considered to be service of the government of Pakistan. And every person holding a post under the Authority, not being a person who is on delegation to the authority from any Province, shall be deemed to be a civil servant for the purposes of the Service Tribunals Act, 1973[53] and within the meaning of Section 21 of the Pakistan Penal Code (Section 19(1)).' The Tribunal also adopted the criterion of functional control over the entity whether Pakistan practiced any functional control in WAPDA or not. The tribunal found that 'The power and duties of the Authority are defined in Sections 8 to 16 of the Act. Under Section 8, the Authority "shall prepare, for the approval of the Government a comprehensive plan for the development and utilization of the Water and Power resources of Pakistan". It also may frame schemes for a province or any part thereof, subject here again to approval by the Government.'[54]

Having examining the above two criteria the tribunal finally examined whether Pakistan practiced any financial control over the entity or not. The tribunal found that 'the accounts of the Authority are audited by the Auditor General of state of Pakistan annually. The Auditor Reports with the comments of the Authority are sent to the Government and the Authority "shall carry out any directive issue d by the Government for rectification of an

[51] Section 4 of the 1958 Act of Pakistan.
[52] *Impregilo S.p.A.*, para. 202.
[53] Sec. 17 (1)(d) of the Service Tribunal Act, 1973 of Pakistan.
[54] *Impregilo S.p.A.*, para. 204.

audit objection". Each year, the Authority submits to the Government for approval a statement of the estimated receipts and expenditures in respect of the next financial year according to Section 27 of the Act.' After performing all the aforementioned tests the tribunal concluded that 'Although the Government of Pakistan exercises a strict control on its entity WAPDA, in light of the terms of the 1958 Act that established it, WAPDA is properly characterised as an autonomous corporate body, legally and financially distinct from the State of Pakistan.'[55] According to the tribunal's view much of Impregilo's argument on this issue rested upon international law principles of state responsibility and attribution.

However, in the event at issue the tribunal has drawn a distinction between the responsibility of a State for the conduct of an entity that violates international law in this case breach of Treaty, and the responsibility of a State for the conduct of an entity that breaches a municipal law contract that is Impregilo's Contract Claims. To support its view the tribunal borrowed the principle from *Compania de Aguas del Aconquija and Vivendi Universal v. Argentine Republic*, decided by *ad hoc* arbitration tribunal.[56] It seems the tribunal was reluctant to consider the matter of involvement of Government in the State-entity which consists of a chairman and three members appointed by the Government and may be removed by the government who are the civil servant of Pakistan. Moreover, the power and duties of the authority is subject to the approval of Government and the financial matter is strictly monitored by the Government of Pakistan. Therefore, in the event at issue in this arbitration it might be concluded that WAPDA was working as an agent or arm of the Government to extend the corporate veil, the point which the ICSID tribunal disregarded.

In relation to the above example of businessman, assume, however, that the businessman played no role in the contract negotiation and performance, but did misappropriated corporate assets for personal use. If the corporation becomes insolvent for misappropriation of corporate assets by the incorporator, an arbitrator might feel justified

[55] *Impregilo S.p.A.*, para. 209.

[56] *Compania de Aguas del Aconquija SA and Vivendi Universal* (formerly *Compagnie Générale des Eaux*) v. *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, *6 ICSID Reports 340*, para.96.

in looking beyond the corporation to its owner, irrespective of what the parties had originally intended. For jurisdictional purposes, the corporation would simply cease to exist, leaving the businessman to inherit the arbitration clause.[57] To its further extent, the businessman actively negotiated the contract and the agreement was signed by the corporation wholly-owned and controlled by him, utilised the assets of the corporation for distinct purposes or responsible for any unusual circumstances which caused the corporation to go bankrupt. An arbitrator might also feel justified to extend the scope of arbitration agreement beyond the corporate veil. Likewise, sate entities those are incorporated and wholly-owned and controlled by the State and utilises its dividends and assets to public sectors according to the will of the government or responsible for any unforeseen circumstances for loss of its entity arbitrators will not be reluctant to lift the corporate veil.[58]

2.6 In fact the State is a party to the arbitration agreement of State entity

To consider whether agreements of State entities to be attributed to the State, it is necessary to discuss the capability of a sovereign State to be a party to the arbitration agreement of private in nature. It exist under certain national laws that a sovereign State cannot validly submit to arbitration with private parties, such restriction sometimes extend to state controlled corporation and even entities govern by public law.[59] This is a controversial principle and it has been criticised by many scholars in private international law. This jurisprudence has been considered by some legal scholars in private international law as a limitation to the capacity of a sovereign State and its public entities to enter into arbitration agreement[60] where as others disregard this limitation and ponder that a sovereign State by its very nature has full juridical capacity to enter into arbitration agreement based on subjective arbitrability.[61]

[57] William W. Park (2009)at. 4.

[58] *See Wintershell; Dallah Real Estate; Impregilo S.p.A.*

[59] Jean F.P. & Sébastien Besson, *Comparative Law of International Arbitration*, (2007, Sweet & Maxwell) p, 182.

[60] Mustil and Boyd, *Commercial Arbitration: 2001 Companion Volume* (2001 Butterworths Law), p. 72; See Lalive, Poudert and Reymond, p. 311 Para. 10 *ad* PILS, Art. 177, and Reymond, OP. Cit., p. 529.

[61] Fouchard, Gaillard and Goldman *on International Commercial Arbitration* (Kluwer Law International 1999) at. 533-539.

State as a party to the international commercial arbitration has been frequent since the economic recovery after Second World War. Reconstruction of certain economic and commercial projects could only be carried out with the direct participation or guarantee of the State. Therefore, contractual agreements containing commitments to submit disputes to international arbitration were signed frequently. Despite their contractual agreements to dispute settlement, the sovereign aversion to submitting the State to international arbitration was defended through arguments of jurisdictional immunity. With regard to the question of validity of arbitration agreement and the capacity of a state-entity, including a sovereign State to bind itself by an arbitration agreement is a question governed by its domestic law, i.e., by its own legislation.[62] This principle has been adopted under the Art. V (1) (a) of the New York Convention, which provides that recognition and enforcement of an award may be refused if the parties or one of the parties "where under the law applicable to them, under some incapacity."[63] Moreover, the majority of national laws recognise the capacity of a State to submit to arbitration, such capacity is recognised under Swiss, English, Italian, Swedish, Singapore and German laws.[64]

In France a new Article was introduced in The Civil Procedure Code, Art. 2060 (2) of which provides that "some categories of public entities of an industrial and commercial character can be authorised to arbitrate by decree." [65] In Belgium international conventions are reserved and may authorise the State to bind itself validly by an arbitration agreement notwithstanding the existence of a provision to the contrary in domestic law. The New York Convention says nothing about this matter but, Art. (2)(1) of the European Convention of

[62] Schlosser, p. 248 and 344; *See also Impregilo S.p.A.; S. P. Prop. (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, (April 14, 1988).

[63] *See* Fouchard, Gaillard and Goldman, para. 1695; Poudert (Discripancies), p. 242.

[64] Position in Switzerland, *see* PILS. Art. 177 (2); Jolidon, p.119 para 332; In England, see Sec. 106 of English Arbitration Act 1996; Mustil and Boyd, p. 151; In Italy, see Italy-Bernardina, Ch. II. 2.b; In Sweden, Sweden-Framke, Ch. II.2.b; see Jarvin, p. 76; Sec. 64 of Arbitration Act of Singapore 2001; In Germany, Germaney-Bockstiegel, Chh. II.2.b; Raeschke-Kessler and berger, pp.52-53 paras 213-216.

[65] On the numerous authorisations to arbitrate granted by recent laws, *see* Jean-Louis Delvolve, Jean Rouche, Gerald H. Pointon , 'French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration'(2009) Kluwer Law International, London, pp. 42-43.

1961 provides that legal person of public law can validly conclude arbitration agreements.[66] The Washington Convention 1965 also implies the recognition by the contracting states of their full capacity to participate in arbitration involving investment matters.[67] In state contracts, the objective inarbitrability of disputes, particularly due to their connection with administrative laws, has often been pleaded along with the incapacity of the State, in order to resist arbitration.[68]

In 1986 French parliament passed a law authorising State to be party to arbitration which states "in derogation of Art. 2060 of civil code, the State, territorial collectivises and public entities are authorised in contract which they conclude with foreign corporation for operation of national interest, to agree to arbitration for the resolution, possibly final, of any disputes related to the application and interpretation of such contracts."[69] This provision clearly authorises the sovereign State to bind itself by an arbitration agreement. The provision implies a proviso stating that the capacity of a State only applies to the application and interpretation of the contract, which seems to exclude dispute concerning its validity as well as dispute based on tort. In addition the State can only bind itself with regard to agreements which foreign corporation and which has relation with the operations of national interest. The argument of Sate immunity shouldn't be confused as a bar for a State to be party to arbitration agreement. State immunity does not render the State's agreement to be party to arbitration invalid, but only non-binding. This has been an established principle in international business that states apply restrictive approach of immunity in matter relating to its commercial transaction.[70]

[66] According to this provision, the qualification of "legal persons of public law" is subject to "the law which is applicable to them", that is to say their personal law.

[67] Art. 25 of the Convention on the Settlement of Investment Disputes between States and National of Other States 1965; Racine, p. 207 papra. 361; *See* Fouchard, Gaillard and Goldman, papra. 548.

[68] *Walt Disney Case*.

[69] French Legislation authorising State to be party to arbitration, Law No. 86-972 of 19 August 1986.

[70] Gaukrodger, D. (2010).

2.7 Extension of Arbitration Agreement from State-entity to the State

Breach of agreement by a State entity to be attributed to the State, the corporate veil must be pierced in between state and its entity. In that context, piercing the corporate veil involves bringing in the State in arbitral proceedings that has not signed an arbitration agreement, but its entity. This issue may arise among the parent companies, subsidiaries, private individuals, governmental and quasigovernmental entities, and states. To decide about the status of the State entity or a corporation in a particular dispute, arbitral tribunals usually rely upon the domestic law. It is to be noted that there is no uniformity regarding the principle of piercing the corporate veil across national legal systems. It is not unusual that the approaches of tribunals in investment arbitration also vary.

The key case on this issue is *S.P.P. (Middle East) Ltd. v Arab Republic of Egypt*[71] known as *the Pyramids case*, arbitration under ICC Rules in Paris. SPP, a company incorporated in Hong Kong, signed Heads of Agreement with EGOTH, an Egyptian state-owned company, and the Egyptian government, for the construction of two tourist centres in Egypt. SPP and EGOTH then entered into a contract which contained an ICC arbitration clause with its seat in Paris. The contract was signed, among others, by the Minister of Tourism of Egypt, his signature appearing underneath the words "approved, agreed and ratified". When the construction project was cancelled, SPP commenced the arbitration against both EGOTH and the State of Egypt. The State contested the jurisdiction of the arbitral tribunal on the basis that it had not agreed to be bound by the arbitration agreement. However, the arbitral tribunal held that the signing of the Heads of Agreement and of the actual contract by a government official was clear evidence of the intention by the Egyptian Government to be bound by the arbitration agreement.

The Egyptian government appealed to the Paris Court of Appeals under Article 1502 of the French New Code of Civil Procedure, claiming lack of an arbitration agreement. The Court allowed the appeal, holding that the words "approved, agreed and ratified" did not imply the Egyptian government's intention to be bound by the arbitration agreement, as under

[71] *S.P.P. (Middle East) Ltd. v Arab Republic of Egypt* (Case *No. 3493 (1983)).*

Egyptian law the Minister, by virtue of his office, was supposed to grant approvals to the contracts entered into by state-owned entities. SPP appealed to the French *Cour de Cassation*, which supported the interpretation of the Court of Appeals.

An important factor which may lead a tribunal to decide that an arbitration clause is binding on a non-signatory state is the existence of common obligations and interests between the parties and the non-signatory. An ICC case, with its seat in Switzerland, was *Westland Helicopters Ltd. v Arab Organisation for Industrialization* [72] between an English company, Westland, and an entity created by four states, AOI. Westland joined the four states as respondents, even though they did not sign the agreement under which the dispute arose. In its partial award the Tribunal held that if the obligations arising out of the agreement are also obligations of the States, then the States are bound by the arbitration clause. The award was successfully challenged by one of the States at the Swiss Federal Tribunal which concluded that, no matter how obvious it was that the States intended to be bound by the agreement, they could not be forced to be bound if they had not signed. However, the final award was subsequently rendered against both AOI and the three remaining states. The Swiss Federal Tribunal supported the tribunal's reasoning, holding that an arbitration agreement could be extended to the non-party States if the economic interdependence interdepend between the States and the company is evident, and if the actions of the States led the claimant to believe that the States intended to be bound by the contract, including the arbitration agreement contained in it.

Piercing corporate veil may be invoked to rationalise either jurisdiction over a corporate affiliates or one company's liability for the substantive debts of another.[73] Even with respect to subsidiaries of foreign entities, American principles can apply to jurisdictional determinations. In *Taca International Airlines v. Rolls Royce of England*, a New York court took jurisdiction over a British company on the basis that its Delaware subsidiary was "a

[72] *Westland Helicopters Ltd. v Arab Organisation for Industrialization* (AOI) (Case *No. 3879 (1984))*

[73] *See* Phillip Blumberg, Kurt Strasser, Nicholas Georgakopoulos, & Eric Gouvin, *Blumberg on Corporate Groups* ch. 6 (2d ed. 2005); Phillip I. Blumberg, *The Multinational Challenge to Corporation Law* Oxf. U. Pres. 1993) pp. 78-96.

mere department" of its ultimate parent.[74] It can also be extended to sovereign State for the liability of its entity or to the State entity for the debts of its parent state. This does not mean, however, that arbitrators who join a non-signatory parent must or should find the shareholder liable for the subsidiary's obligations. On occasion, joinder might be justified on the basis of consent, as when a parent agrees to be bound in an arbitration based on contracts signed by its subsidiary.[75] Even though both entities have agreed to subject themselves to the same arbitral proceeding, the arbitrator might determine that neither company is liable for the other's obligations. Conversely, one company might be liable for another's obligations, without necessarily subjecting itself to the same dispute resolution mechanism as contained in the primary obligation.

However in the matter relating to the State entity, in *Svenska Petroleum Exploration AB v Government of Republic of Lithuania*,[76] the dispute related to the joint venture agreement entered into by *Svenska* and *Geonafta*, which contained terms dealing expressly with rights and obligations of the Lithuanian government. The agreement was signed by government officials and contained a statement above their signatures specifying that the government approved the agreement and "acknowledges itself to be legally and contractually bound as if the Government were a signatory to the Agreement". The tribunal in its interim award held that the government agreed to be bound by the agreement. The issue of the tribunal's jurisdiction was subsequently challenged in the context of enforcement proceedings brought by *Svenska* Petroleum before the English courts. The Court of Appeal on 13 November 2006 held that the existence of the Statement provided strong evidence that the parties did intend that the government should be bound by the terms of the agreement. These decisions show that it is not sufficient to hold a non-signatory State to be a party to the arbitration agreement signed by its entity, but the intention of the parties and the non-signatory State or States to be bound by the arbitration agreement must be established.

[74] *See, Taca International Airlines v. Rolls Royce of England*, 15 N.Y. 2d 97, 102 (1965).

[75] *See Fluor Daniel v. General Electric*, where estoppel permitted a non-signatory respondent to benefit from an arbitration clause signed by a subsidiary.

[76] *Svenska Petroleum Exploration AB v Government of Republic of Lithuania and another [2006] EWCA Civ 1529.*

In the matter relating to piercing the corporate veil, usually, arbitral tribunal differentiate between "consenting non-signatories" to arbitration agreements that seek to arbitrate the dispute, and "non-consenting non-signatories" that challenge the jurisdiction of arbitral tribunal.[77] Arbitral tribunals that pierce the corporate veil of non-signatories resort either to implied consent or intention of the parties.[78] There is no clear line between these two justifications, however, as tribunals often pierce the corporate veil as a means to enforce the parties' original intention. Well-known case as regard to piercing the corporate veil is the *Dow Chemical Award* decided by International Chamber of Commerce in which consenting non-signatories were allowed to participate in the arbitration proceedings. In this case, applying group of companies' doctrine, the tribunal allowed parent companies to bring claim on behalf of its subsidiary.[79]

In *Dow Chemical* the tribunal relied on the common intention of the parties which appears from the surrounding circumstances that leads to the conclusion of arbitral tribunal's reasoning to pierce the corporate veil. The tribunal also followed trade usages conforming to the needs of international trade, particularly in relation to the group of companies' doctrine.[80] According to the single entity theory applied by the tribunal, a group of companies, despite the legal status of each of the companies, represents a single economic reality which the arbitral tribunal must take into account when ruling on its jurisdiction.[81] However, application of the "group of companies" doctrine remains uncommon. Some authorities suggest only one out of probably every four cases that purport to apply the "group of companies" doctrine did actually extend jurisdiction over non-signatories.[82] In a contract of State entity the doctrine can be extended to the non-signatory state to make it a

[77] *See* William W. Park, *Non-Signatories and the New York Convention*, 2 J. Disp. Resol. Int'l 84, 105 (2008).
[78] William W. Park, (2008) at 107.
[79] William W. Park, (2008) at 103 (citing *Dow Chemical v. Isover St. Gobain*, ICC Case No. 4131, 1983 J. Dr. Int'l 899 (1932)).
[80] William W. Park, (2008) p. 103.
[81] Interim Award of September 23, 1982 in No.4131 (original in French), reprinted in IX ICCA Yearbook of Commercial Arbitration 131, 134 (1984).
[82] W. Park, at 106-07 (citing jean-francois poudret & sebastien besson, droit compare de l'arbitrage international pp. 253-54 (2d ed. 2007)).

party to the arbitration agreement of its entity if it can be circumstantiated that the entity was working as an agent or arm of the government.[83]

When it comes to the matter relating to arbitration between foreign investors and host state under bilateral investment treaties, the legal scholars stand in different opinion. It has been suggested that the rules relevant to shareholder claims under investment protection treaties need to be regarded as *lex specialis* as established by specific treaties.[84] This is so despite the fact that, under the national law of most jurisdictions, shareholders are not allowed to bring claims on behalf of the company in which they own shares.[85] Therefore, shareholders are deprived of their legal rights to bring claim under domestic law as they are not party to the arbitration agreement. As a result, the insertion of shareholdings into the definition of investment in a bilateral investment treaty would generally result in piercing the corporate veil for the benefit of the shareholder in investment arbitration. For instance, Article 1(6) of the Energy Treaty Charter provides that "Investment" protected by the Charter includes "a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise." [86]

A typical case of piercing corporate veil could be where an incorporator sets up an undercapitalised corporation to incur liabilities to a third party. In most cases this happens when the corporation does not have enough assets to repay its debt, and the controlling incorporator relies on the concept of limited liability to avoid personal liability. Consequently, third party ends up bearing the risk of the non-payment of the debt.[87] In such situations, the court or arbitration tribunal may intervene to prevent such injustice and pierce the corporate veil by holding the controlling incorporator, majority shareholder-incorporator or wholly-owned state liable for its entities.[88] Piercing the corporate veil in

[83] *See Wintershall A.G., et al.*

[84] Abbey Cohen Smutny, *Claims of Shareholders in International Investment Law*, *in* International Investment Law For The 21st Century: Essays In Honour Of Christoph Schreuer 363 (Christina Binder et al. eds., 2009).

[85] *See* OECD report 2009.

[86] Art. 1(6) of the Energy Charter Treaty, Dec. 17, 1994, 34 I.L.M. 360 (1995).

[87] *Lee Buchheit et al*., *The Dilemma of Odious Debts*, 56 Duke l. J. 1201, 1248 (2007).

[88] *Lee Buchheit*, at 1248.

case of State entities as discussed earlier depend on the involvement of Government in the entities' structure and function and control. If it is found *prima facie* that the State-entity is working as an arm or agent of the Government to serve public and commercial activities the tribunal may find it justified to extend the corporate veil beyond the structure of the corporation.

In the United State question relating to piercing corporate the veil was first raised in the case of *First National City Bank v. Banco Para El Comercio Exterior de Cuba*[89] whether a foreign state can be held responsible for the actions or obligations of its subsidiary, or *vice versa*. The issue arises in this case with respect to execution or attachment, where the plaintiff seeks to enforce a judgment against a foreign state by executing against the assets of the State's subsidiary. The issue would also exist where a plaintiff seeks to impute the commercial activity of a State entity to the parent government for the purposes of establishing an exception to sovereign immunity. This case established a rebuttable presumption that "State entities or instrumentalities incorporated as juridical entities distinct and independent from their sovereign State should normally be treated as such."

In explaining this general rule, the Court referred the legislative history of the 1976 Act which states "Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary."[90] The Court then stated that the presumption of separate legal personality can be rebutted upon showing either that the "corporate entity is so extensively controlled by its owner government that a relationship of principal and agent is created" i.e., the parent is an alter ego of the corporation; or recognition of the separate corporate status "would work as fraud or injustice" on the other

[89] *First National City Bank v. Banco Para El Comercio Exterior de Cuba* US Supreme Court Decision, (1983)462 U.S. 611.

[90] Sec. 1610 (b) Sovereign Sovereign Immunities Act 1976 (quoting H.R. REP. NO. 94-1487, at 29-30 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6628-29).

party.[91] Under the principal-agent exception, a court will typically "pierce the corporate veil" only where it is established that the parent exercises day-to-day operational control over the subsidiary. This was decided in the case of *McKesson Corp. v. Islamic Republic of Iran* and *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co, t*hese two cases were companion actions decided the same day. The government exercised direct control over the company; such as all checks over $25,000 needed approval by a government-appointed director; all invoices for shipments exceeding $13,000 needed approval by a government agency. [92]

Meanwhile, the kind of control that any sole shareholder would normally exercise over its subsidiary is insufficient to justify piercing the veil.[93] Under the fraud or injustice exception, courts apply a fact specific analysis to determine whether recognition of separate legal status would be unfair. Typically such cases involve the foreign state's manipulation of the corporate form for its own benefit, to the detriment of the plaintiff. In relation to the function of a State entity if such situation arises the arbitral tribunals or domestic court may extend the corporate veil for the attribution of state for the conduct of its entity. It should be noted that, following amendments to the FSIA in January 2008, *Bancec* does not apply to execution or attachment in terrorism cases. Rather, in cases falling under Section 1605A of the FSIA, "the property of an agency or instrumentality of a foreign State that is a judgment debtor for a claim based upon acts of terrorism, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution."

[91] Sovereign Immunities Act 1976 (quoting H.R. REP. NO. 94-1487, at 29-30 (1976), at 629, National Defence Authorisation Act for Fiscal Year 2008, Pub. L. No. 110-181, ss. 1083, 122 Stat. 337, 341 (2008) (at 28 U.S.C. ss. 1610(g)(1)).

[92] *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995); *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97 CIV. 6124 (JGK), (1999). WL 307666, at 9 (S.D.N.Y. May 17, 1999); *U.S. Fid. & Guar. Co. v. Petroleo Brasieiro S.A.- Petrobras*, No. 98 CIV. 3099(JGK), 1999 WL 307642 (S.D.N.Y. May 17, 1999).

[93] *Flatow v. Islamic Republic of Iran*, 308 F.3d 1065, 1073 (9th Cir. 2002); *Minpeco, S.A. v. Hunt*, 686 F. Supp. 427, 435-36 (S.D.N.Y. 1988).

2.8 Binding Characteristics of Arbitration Agreement

It is generally agreed that once a State has assented to submission to arbitration and then refuses to participate in the proceedings, arbitration can proceed unilaterally. As a practical matter, however, it is clear that enforcing an arbitration agreement against a State may not be free from difficulties, unless the parties have submitted to institutional arbitration or have provided an effective mechanism for the appointment of the arbitrators, given the arbitrators authority to pass judgment on the validity of the agreement, and determined the rules of procedure to be followed. Thus, international courts and arbitral tribunals have consistently held that a state's attempted unilateral rescission of an agreement to submit disputes for resolution by such a court or arbitral tribunal does not impair the jurisdiction of the forum in question.[94]

2.8.1 Agreement Barred by Domestic Law

National legislation of some countries in relation to certain matters prohibit agreement to arbitrate the disputes. Besides public policy relevant to the merits of a case can sometimes have the emphatic consequence that the agreement to arbitrate is invalid or will not be enforced. The force of a public policy which bars an arbitration agreement would equally invalidate any award made under such an agreement, leaving it susceptible to being set aside under arbitration laws as either made by a tribunal without 'substantive jurisdiction',[95] or because the award is 'contrary to public policy'.[96] In the case of *ELF Aquitaine v National*

[94] *Losinger & Co*., [1936] PCIJ, ser. C, No. 78, at 105; Lena Goldfields award, Sept. 3, 1930, 36 CORNELL L.Q. 42, 44 (1950); *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co*. award, March 15, 1963,35 ILR 136,170 (1967); *BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic* award, Oct. 10, 1973, 53 ILR 297, 311, and 356 (1979); *Texaco Overseas Petroleum Co./California Asiatic Oil Co. and the Government of the Libyan Arab Republic award*, Jan. 19, 1977, 17 ILM 3 (1978), 53 ILR 389 (1979), para. 10; *Libyan American Oil Co. [LIAMCO] v. Government of the Libyan Arab Republic award*, 20 ILM 1 (1981), *translated into French in* [1980] Rev. Arb. 132.

[95] Arbitration Act 1996 UK, s. 67 and *see* s. 30(1)(a): there is a lack of 'substantive jurisdiction' when there is not a valid arbitration agreement.

[96] Arbitration Act 1996 UK. s. 68(2)(g).

Iranian Oil Co[97] the representatives of NIOC they cannot, as Iranian companies are bound by Iranian law, take part in an arbitration requested by ELF.

NIOC is a corporation established under the Iranian Law of Corporations. All shares are owned by the Government of Iran and the Minister of Petroleum hold the position as Chairman of the Board of NIOC. All Iranian petroleum resources and the petroleum industries are nationalised under two legislations [98] and held that the exercise of the right of the people of Iran in respect of petroleum resources lies exclusively under the responsibility of NIOC. This case raises the question whether the principle of international law that provides that states are bound by arbitration agreement entered into not just by the Stateitself but a company established as a separate legal entity but controlled by the State. In this case the Board of directing of NIOC are part of the Government of Iran. A contract with a foreign oil company for the exploration of petroleum in Iran entered into by NIOC cannot be treated differently from a contract signed by the State itself as a party with respect to the obligation under the international law to respect agreement on arbitration.

It is a recognised principle of international law that a State is bound by an arbitration clause contained in an agreement entered into by the State itself or by a wholly-owned company which is structurally and functionally controlled by the State.[99] Therefore, it is unreasonable for a State to unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of dispute through arbitration.

This principle was recognised as part of international law even before the ICSID Convention come into the picture by Prosper Weil who wrote "The mechanism established by the parties with view of settling their disputes should be capable of being put into motion precisely in order to judge the legality and the consequence of a measure which the State may have been led to take in the exercise of its sovereign power; to permit the State to free itself from the obligations it freely undertook for the settlement of disputes, which may

[97] *Elf Aquitaine Iran* (France) *v*. *National Iranian Oil Company*, YCA 1986, at 97.
[98] The Nationalisation Act of 1951 and The Iranian petroleum Act of 1974.
[99] *S.P.P. (Middle East) Ltd. v Arab Republic of Egypt; Wintershall A.G., et al.; Dallah Real Estate (ICC Award).*

arise between it and its contracting party would be tantamount to depriving this essential clause of the contract of any effectiveness. Consequently, the State cannot modify unilaterally the mechanisms established for the settlement of disputes in a direct way by directing through its authority a change in the arbitration clauses, or in an indirect way through refusing to accept the arbitral procedure as it is provided in the contract, or by putting obstacles in the way of its operation; by such actions the State would be committing an unlawful act. Furthermore, it would be less acceptable for a State to revoke the contract in its entirety in order to claim that the arbitration clause has become inoperative and thus to evade its effect by such a device."[100]

This principle is now clearly stated in Article 25 of the ICSID Convention, which states that when the parties have given their consent, no party may withdraw its consent unilaterally. Ahmed Sadek El Kosheri states, "The State, which concludes an agreement under its own name or through a specialised agency after having received homologation by the proper state authorities, is bound to respect all the contractual commitments, especially the arbitration clause, the clause settling the choice of the applicable law as well as he intangibility and stabilisation clauses. According to the *Armco award* 'states are bound to fulfil their obligations to the same extent as private person'. The arbitral court rightly underline thereafter that 'no one may derogate from his own grant' is a legal maxim which is universally accepted and it applies to all legal relationships, whether in private law or public law."[101]

2.8.2 Rescission of Agreement by Change of Legislative Authority

Professor Jimennez de Arechaga, former president of International Court of Justice, wrote in his article on Arbitration between States and Foreign Private Companies, in *Melanges en l'Honneur de Gilbert Gidel* "The precedent demonstrate, on the contrary, that a government bound by an arbitration clause cannot validly free itself of this obligation by an act of its own

[100] Prosper Weil, 'Problem Related to Contracts Concluded between a State and an Individual' 128 RCAI 1969, III, p.222.

[101] Ahmed Sadek El Kosheri, ''Le regime juridique cree par les accords de participation dans le domaine petrolier" (1975) p. 335.

will such as, for example, by changing its internal law, or by a unilateral cancellation of the contract of the concession."[102] The arbitral award rendered in the case of *Societe des Grands Travaux de Marseille v. Republique Populaire du Bangladesh*[103], an entity wholly owned by the Government of Pakistan, reaffirms that it is not possible for a State to prevent or hinder the application of an arbitration clause in an international agreement by an internal legal measure.

In 1965, the East Pakistan Industrial Development Corporation (EPIDC), an entity wholly owned by the Pakistani Government, and a French company (SGTM) concluded a contract for the construction of a gas pipeline in Eastern Pakistan, which in December 1971 emerged as new independent state called the People's Republic of Bangladesh. The contract, which was governed by the law of Pakistan, provided for arbitration in Geneva, Switzerland, under the Rules of the International Chamber of Commerce (ICC). In 1969, SGTM made a claim of 12 million francs and both parties designated a sole arbitrator to settle the dispute. The terms of reference of the arbitrators were agreed by the Government of Pakistan and SGTM on May 7, 1972, in the meantime property of EPIDC fell under the authority of Bangladesh.

Having knowledge of SGTM's claim against EPIDC two days after the agreement between SGTM and Pakistan appointing a sole arbitrator to settle the dispute, the President of Bangladesh issued a decree, retrospective to March 26, 1971, providing for the creation of the Bangladesh Industrial Development Corporation (BIDC), as successor to EPIDC. EPIDC's assets were transferred to BIDC and so were EPIDC's debts and liabilities "unless the Bangladesh Government otherwise directed." The order stated:

"All arbitration proceedings to which, immediately before the commencement of the Order, the East Pakistan Development Corporation was a party, shall be deemed to have abated and no award or decision made or given in such proceedings shall have any effect or be binding on, or enforceable against, the East Pakistan Development Corporation or the Bangladesh Industrial Development Corporation, and all power or authority to act on behalf

[102] *Melanges en l'Honneur de Gilbert Gidel (1961)* pp. 367-375.
[103] *Translated into English in* Yearbook on Commercial Arbitration, Vol. V, (1980), p.177.

of the East Pakistan Development Corporation in any such proceedings shall be deemed to be revoked and cancelled with effect from the 26th of March, 1971, and any provision in the contract or agreement providing for the settlement by arbitration of the disputes in respect of which such proceedings were instituted, shall be deemed of no legal effect."[104]

In September 1972, SGTM asked the arbitrator to substitute BIDC as respondent for EPIDC, and the arbitrator fixed November 20, 1972, as the date for a hearing. Thereupon, the President of Bangladesh decreed that any debt or obligation incurred or undertaken by EPIDC should be deemed not to have been assumed by BIDC if such debt or liability "is or was the subject matter of an, dispute." For good measure, a subsequent decree was issued 4 days later (5 days before the date of the hearing), which dissolved BIDC and transferred its "assets" to the Government.[105] As to BIDC's liabilities, the Government reserved for itself the power to make *ex gratia* payment in respect of any, claim "if and to the extent that the same shall to it appear to be just."

On December 15, 1972, the arbitrator Mr Andrew Martin, refused to recognise the validity of discriminatory "Presidential Order" and therefore, in accordance with the considerations of equity and generally recognised principles of international law reached the conclusion that the arbitration clause of the agreement cannot be set aside by the Government of Pakistan and ordered that BIDC be substituted for EPIDC and that the Bangladesh Government be joined as a second respondent. On May 31, 1973, the arbitrator rendered a final award holding BIDC and the Government jointly and severally liable to SGTM.[106]

According to Mr Martin, as a matter of Public International Law, the Bangladeshi Legislators cannot validly interfere with arbitral proceedings which are pending in a foreign country to which his territorial jurisdiction does not extend. He further characterised these orders as what is by any expectable standard of international law and state practice a most

[104] Paragraph 4 (e) the Bangladesh Industrial Development Corporation Order, 9th May 1972 (President's order no. 39 of 1972).
[105] Paragraph 3, President's order no. 140 of 1972.
[106] Parts of the award are reproduced in 5 Y.B. Com. Arb. (1980) at. 179.

reprehensive interference with the functioning of the judicial machinery including arbitration of a foreign country.

Bangladesh responded by petitioning in the Swiss courts to annul the award, challenging the arbitration agreement that the BIDC and Government of Bangladesh were not party to the arbitration agreement. The arguments forwarded by the counsel of Bangladesh were that the terms of reference for arbitration on 7th May 1972 was agreed not by the authority of Bangladesh but West Pakistan. The contract was between EPIDC of Pakistan under the direct control and supervision of Pakistani Government and SGTM. Therefore, the new emerging independent state of Bangladesh and its newly incorporated entity is not a party to the relevant arbitration. Being a party to the ICSID Convention the earliest surprising decision, as regard to the principle of succession of arbitration agreement, was given by Swiss Federal Tribunal in this case.

Acknowledging the discriminatory character of the Bangladeshi Presidential orders, the Swiss Federal Tribunal held,[107] nevertheless, that the petition should be granted on the grounds that first, matters of succession to the assets and liabilities of the entities involved were governed by the law of Bangladesh, which was not the question in issue, since the real question was whether the Government of Bangladesh could nullify an arbitration clause by unilaterally withdrawing from it; second, there did not exist in Swiss law any mandatory rule compelling anyone to submit against his will to arbitration, which was the real question, since all that the arbitrators had done was to give effect to an existing arbitration agreement; and third, the Bangladesh order, though discriminatory and depriving SGTM of an agreed contractual forum, did not offend Swiss public policy because it did not affect the rights of Swiss creditors. This can be compared with the attempt by the Greek Government retrospectively to exempt Greek entities from obligations undertaken as obligors and guarantors of bonds issued but in England, which met with defeat in the English courts. [108]

[107] Decision of May 5, 1976, 102 ATF Ia 574 (1976), *commented on* by P. Lalive in 34 annuaire suisse de droi" Int'l 387 (1978), *translated into English in* 5 Y.B. Com. Arb. (1980) 217.

[108] *Adams v. National Bank of Greece & Athens*, [1960] All E.R. 421. *See also* G. Delaume, para. 4.05.

This precedent constituted a new kind of discrimination against non-Swiss nationals and seriously raises the question of the advisability of providing for investment arbitration in Switzerland. Under the circumstances, one can only agree with a leading Swiss commentator that this decision was one of the most objectionable that the Swiss courts have rendered in a long time.[109] In fact, it was truly a "horror" case according to many commentators. Long after *Societe des Grands Travaux de Marseille v. Republique Populaire du Bangladesh* another surprising decision has been recently delivered by the Supreme court of United Kingdom in the case of *Dallah Real Estate and Tourism Holding Company* v *The Ministry of Religious Affairs, Government of* Pakistan[110]

2.8.3 Recent trend on rescission of Arbitration Agreement

In 1996 *Dallah Real Estate and Tourism Holding Company* signed an agreement with the Awami Hajj Trust, a trust set up by ordinances of the Government of Pakistan, for the provision of housing to pilgrims making the *hajj* to Mecca. The agreement contained an arbitration clause, which referred any disputes between Trust and Dallah arising out of or in connection with this agreement shall be settled by ICC arbitration in Paris, but which did not specify the applicable governing law. The agreement also provided in its clause 27 that the trust may assign or transfer its rights and obligations under this agreement to the Government of Pakistan. The ordinances establishing the Trust lapsed shortly after the agreement was signed, and the Trust ceased to exist as a legal entity because the new political regime refrains from renewing the ordinances. A dispute arose as to the scope of the project, and Dallah brought ICC arbitration proceedings in 1998 against the Government of Pakistan, claiming that the Government was a true party to the underlying agreement. In a first partial award on jurisdiction, the tribunal, chaired by Lord Mustill, upheld this contention, and subsequently in 23 June, 2006 Government of Pakistan was held liable for USD 20 million.

[109] Lalive, para. 23, at 400.

[110] *Dallah Real Estate and Tourism Holding Company v Pakistan, at p. 763.*

Since there was no specific applicable law, looking at the international character of the arbitration agreement, the tribunal applied the transnational general principles to govern the arbitration agreement to meet the fundamental requirements of justice in international trade. The tribunal noted that a non-signatory may be bound by an arbitration agreement, by virtue of any one of a number of legal theories such as representation, assignment, succession, alter ego or the theory of group of companies. Dallah's primary case was that the trust was an alter ego of the Government. Based on the factual circumstances the tribunal considered the conduct of the parties before, during and after implementation of the main agreement in order to determine whether Government of Pakistan can be, through its role in the negotiation, performance and termination of such agreement, a party to the arbitration agreement.

Dallah then sought to enforce the ICC award in England. The Government objected to enforcement under section 103(2)(b) of the Arbitration Act 1996, on the ground that "the arbitration agreement was not valid [...] under the law of the country where the award was made" because the Government was not a party to it. The Supreme Court of the United Kingdom delivered the following reasoning:

Dallah's primary submission was that only a supervisory court (here, the French court) has standing to undertake a full examination of the tribunal's jurisdiction and that it does so on an application to set aside the award for lack of jurisdiction. In contrast, Dallah submitted, a mere enforcing court must do no more than undertake a limited review of the tribunal's jurisdiction and the precedent question of whether there is a valid arbitration agreement which binds the relevant parties. Lord Mance studied meticulously the language of both section 103(2)(b) of the 1996 Act and Article V of the New York Convention, concluding that there is nothing in their language which indicates only a limited review by the enforcing court. Neither Article VI nor section 103(5) contain any suggestion that a person resisting recognition or enforcement in one country has any obligation first to seek to set aside the award in the country where it was made.

Lord Collins acknowledged the trend, both national and international, to limit reconsideration of the findings of tribunals, both in fact and in law. He also acknowledged that the New York Convention had introduced a "pro-enforcement" policy for the recognition and enforcement of awards. But he defended the decision to allow a full investigation of the issue of jurisdiction, in terms which in fact seek to give due weight to one of the cornerstones of arbitration that is, its consensual nature. He highlighted that such intervention by the court under section 103(2) was limited to those circumstances where the "fundamental structural integrity of the arbitration proceedings" was in issue[111]. The structural integrity of arbitration proceedings is never more in issue than where one party alleges that it was not a party to the purported arbitration proceedings.

2.9 Approach of ICSID Tribunal in Piercing Corporate Veil

The parties in investment arbitration under ICSID jurisdiction are always a private investor and a sovereign State. The International Centre for Settlement of Investment Disputes (ICSID) is a leading international arbitration institution in the field of investor-State dispute settlement. It was established in 1966 as a part of the World Bank pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The most popular achievement that the ICSID Convention laid down is the empowerment of private parties to submit claims against sovereign States in investment arbitration.[112] This Convention helps to develop an unpopular principle in private international law through ICSID jurisprudence is the increasing willingness of arbitral tribunals to pierce the corporate veil.

Piercing corporate veil has been practiced by the arbitral tribunals to bring claim by non-signatories in international commercial arbitration for some times which have been enforced under New York Convention. Unlike arbitral awards of other *ad hoc* and institutional arbitration, enforcement of ICSID awards do not require to comply with the

[111] *Kanoria & Others v Guinness* [2006] EWCA Civ 222.

[112] *See* Yaraslau Kryvoi, *International Centre For Settlement Of Investment Disputes* (Kluwer Law International, 2010).

New York Convention 1958. The ICSID awards are subject to recognition among the contracting States to the Convention as if they are final judgment by a highest domestic court in that State.[113] This principle is established by the Article 53(1) of the ICSID Convention which states that the awards are binding on the parties immediately upon rendering.

Principle of customary international law entails that ICSID awards should be recognised and enforced by contracting and non-contracting states as a public international law obligation. It is a generally recognised principle of customary international law that a State may not excuse or cure a breach of its obligations by pleading provisions of its own national legislation.[114] Therefore, even though parties to the ICSID Convention may take a very watchful view towards piercing the corporate veil in their domestic courts, ICSID awards nevertheless will obligate them to enforce, even if they are inconsistent with the domestic law of the enforcing country. When it comes to piercing the corporate veil, ICSID tribunals permit foreign investors in ICSID proceedings to submit claims on behalf of non-signatories to the proceedings.[115] These non-signatories are frequently either the investor's shareholders or subsidiaries. Arbitral tribunals in investment arbitration usually do not exclude non-signatories or third parties to bring claim, such claims amount to piercing the corporate veil.

Moreover, it shall be taken into consideration that the parties to the investment arbitration may agree to allow a non-signatory corporation to join as a party to ICSID proceedings at any time.[116] Dissenting opinion in *S. Pac. Prop. (Middle East) Limited v. Arab Republic of Egypt*, decision on Jurisdiction, made the ruling that joining the local company was permissible even despite subsequent objections of the State, because the parties voluntarily

[113] Art. 53(1) ICSID Convention.

[114] *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331; Ian Brownlie, *Principles of Public International Law* (2008) at. 34-35.

[115] *see* Nigel Blackaby, Constantine Partasides, Alan Redfern, & Martin Hunter, *International Commercial Arbitration* 117-21 (2009); uncitral.org, convention on the recognition and enforcement of foreign arbitral Awards of 1958 (the New York Convention),

[116] *See, e.g.*, *S. Pac. Prop. (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3 (Apr. 14, 1988) Decision on Jurisdiction and Dissenting Opinion (Apr. 14, 1988).

agreed to join a local company and it did not have any claims different from those of the parent company. However, difficulties arise when one of the parties disagree to allow a non-signatory to be a party to the arbitration in respect of piercing the corporate veil disregarding the objections of opposing party.

The issues associated with piercing corporate veil in jurisdiction of ICSID tribunals are determined in accordance with principle of customary international law, and not national legislation.[117] This is a settled principle in International law that when there is a contradiction between domestic law and International law, principle of International law prevails.[118] In investment arbitration, tribunals rely on the ICSID Convention and applicable Bilateral Investment Treaties, usage, as well as on their own jurisprudence, to decide on the feasibility of piercing the corporate veil.[119] According to Article 25(2)(b) of the ICSID Convention "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

Based on Article 25(2) (b) of the ICSID Convention there are two criteria apparent for the determination of personal jurisdiction over corporate entities. Nationality of the entity or corporation is a formal legal requirement, while determination of foreign control over the entity's administrative affairs is an objective criterion, which seeks to reach the real control over a juridical person. Arbitration tribunals under ICSID jurisdiction, *ad* hoc or institutional arbitration in various occasions have applied the principle of foreign control over the corporation to determine the nationality of corporation in piercing corporate veil. To its further extent of lifting the corporate veil, arbitral tribunals also allowed the parent company to be party to the arbitration on behalf of its subsidiary applying group of

[117] *See, e.g.*, *S.P.P v. Arab Republic of Egypt*, Decision on Jurisdiction, (April 14, 1988).
[118] Art. 27 of Vienna Convention on the Law of Treaties 1969.
[119] *SPP v Egypt Limited,* Decision on Jurisdiction.

company's doctrine. During the negotiation of ICSID convention delegates heavily debated on the matter of foreign control over the entity.[120] Drafters of the Convention were unable to establish a precise definition of foreign control over the entity instead they left it on the discretion of the arbitral tribunals to decide the question of foreign control.[121] Following approaches have been taken by the ICSID tribunals in settling various investment disputes.

2.9.1 Traditional Approach of Piercing Corporate Veil in International Arbitration

The issue of piercing the corporate veil was for the first time brought before the International Court of Justice in the *Barcelona Traction* Case, in which the court declined to "*lift the corporate veil*" disallowing sovereign State of Belgium to defend the rights of its citizens who were shareholders in a Canadian company against certain measure taken by Spain. In this case sovereign State of Belgium was not a party to the agreement of Canadian company in which majority shareholders were Belgian nationals. This decision has been referred by many ICSID tribunals in their traditional approach of piercing corporate veil. Rule 2 of ICSID Institution provides that the parties to the arbitration shall be precisely designated, and the parties to the dispute should consent in writing to submit their dispute to ICSID arbitration.[122] In many occasions ICSID tribunals have refused to extend arbitration clause over non-signatories to ICSID arbitration as discussed below. Their legal reasoning in relation to Rule 2 of the ICSID Institution and other similar provisions are interpreted narrowly, therefore, unwilling to extend their jurisdiction over non-signatories. In the case of *Tshinvali v. Georgia*, an ICSID tribunal refused to pierce the corporate veil where investors brought claims on behalf of itself together with its three shareholders against Georgia.[123] The reasoning of the ICSID tribunal was that three shareholders were not registered as claimants and consequently the investor was unable to claim on behalf of its shareholders.

[120] *See* C.F. Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1974 BRIT. Y.B. INT'L L. 227, 264.
[121] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge 2001) 361.
[122] Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings R. 2 (Jan. 1, 1968).
[123] *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/84/3, pp. 392-405 (Jan. 24, 2003).

In deciding the case *Tshinvali v. Georgia* the ICSID tribunal distinguished the facts of the case from previous cases decided by the tribunal pointing out that in the previous cases there was parent company where the ICSID clause is designed to work for its assistance. The tribunal pointed out that Rule 2 of the ICSID requires that the request of arbitration precisely designate each party to the dispute, and that Rule 47 of the ICSID Arbitration Rules provides that the award should contain "a precise designation of each party." The tribunal explained that neither the ICSID Convention nor the ICSID Arbitration Rules contain any express provision permitting parties to assert claims on behalf of non-parties any such right to a complaining party requires the agreement or "consent" of the respondent Contracting State. In the case of *Tshinvali v. Georgia* the ICSID tribunal stated that it had no knowledge about any of its previous decisions where "one single party asserted claims not only on its own behalf but also on behalf of other non-party entities which were not implicated with a specific written agreement that constituted the 'consent' of the host Contracting State to such an assertion on their behalf." [124] Thus, the tribunal declined to pierce the corporate veil in *Tshinvali v. Georgia* and refused to permit the investors to join them as claimants.

The traditional approach can be seen in other cases where ICSID tribunals were reluctant from going beyond the nationality of the claimant corporation to examine the status of the corporation whether it is foreign-controlled. In *Rumeli Telecom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Kazakhstan*,[125] the respondent claimed that the claimant's corporate veil should be pierced but the ICSID tribunal declined to pierce the corporate veil and stated that nowhere in the ICSID Convention there is a basis for piercing the corporate veil of a designated claimant as such.[126] In this case the arbitrators rejected the application of the effective nationality test[127] to pierce the corporate veil and reach the real controllers of the corporate group.[128] Similarly in a latest case of *Micula et al. v. Romania*,[129] where the

[124] *Zhinvali Development* Ltd., para 400.

[125] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Turkey-Kazakhstan BIT), Award, 29 July 2008.

[126] *Zhinvali Development Ltd*., para 186.

[127] The essence of effective nationality is that "nationality must correspond with the factual situation", i.e. by examining the genuine connection with the State. I. Brownlie, at 413-17.

[128] *Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (July 29, 2008).

ICSID tribunal rejected the application of the test of effective nationality in order to determine, for purposes of establishing jurisdiction pursuant to article 25 ICSID, whether the claimants holding valid Swedish passports were effectively Romanian nationals. Therefore, it must be noted, that in former case by piercing the corporate veil, the tribunal understood disregarding the separateness of legal entities and looked into the issue of objective foreign control.

The issue of determination of foreign control seems to be so controversial that it forced a prominent arbitrator to resign from ICSID panel in *Tokios Tokeles v. Ukraine*, because he disagreed with the approach of other arbitrators, who extended jurisdiction over a company incorporated in a foreign state, and 99% of which was controlled by nationals of the Respondent State.[130] The arbitrator argued that such a traditional approach was against the objectives of the ICSID Convention which is detrimental to the settlement of investment dispute. The arbitrator also refer the principle laid down by ICJ in *Barcelona Traction case*, in relation to piercing the corporate veil and the fact that no fraud was involved beside the point, given the clear object and purpose of the ICSID Convention.[131] The case *Barcelona Traction* concerned the issue of piercing the corporate veil for purposes of diplomatic protection of shareholders. The Government of Belgium brought a claim against Spain on behalf of its nationals, who owned shares in the Canadian corporation Barcelona Traction. In its Judgment, the ICJ provided that "an act infringing only the company's rights did not involve responsibility towards the shareholders, even if their interests were affected."[132]

The majority in the ICSID tribunals followed traditional approach in declining to pierce the corporate veil in all the above cases on the ground that the corporation is not a party to the arbitration agreement. But how far this traditional approach establishes justice and promotes the international trade and investment? This is the fundamental question left unanswered in the above case. Traditional approach suggests that the arbitral tribunals can

[129] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20 (Sweden-Romania BIT), Decision on Jurisdiction and Admissibility, 24 September 2008.
[130] *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion, (Apr. 29, 2004).
[131] *Tokios Tokelés*, p. 21 (dissenting opinion).
[132] *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5).

only pierce the corporate veil in case of fraud or injustice. But arbitration tribunals are not bound by the precedent of previous decisions, they are free to proceed with new development of law in establishing justice by piercing corporate veil when it is justified that the corporation is an *alter ego* or working as an agent or arm of the parent company in one side it is a parent company of its subsidiary on the other side.

2.9.2 Piercing Corporate Veil for Non-Signatory Corporations as "Investors"

Foreign control in the corporation has been an issue in investment arbitration relating to piercing the corporate veil. Some ICSID tribunals do pierce the corporate veil to see whether the corporation is indeed controlled by foreign investors under the definition of the ICSID Convention.[133] A decade early in the case *Vacuum Salt Products Ltd. v. Republic of Ghana*, the tribunal focused on the objective existence of foreign control required by the Convention.[134] To decide the issue whether the company was under foreign control, or under the control of Ghana nationals, the tribunal relied upon the decision of the government of Ghana which treated the corporation as a foreign national required by Article 25 of the Convention.[135] Recent decision in *Rompetrol v. Romania*[136] respondent alleged that the corporation was owned and controlled by its nationals, disregarding *respondent's allegations; the tribunal upheld its jurisdiction to hear the claim brought by* Dutch-incorporated Corporation. Similarly the tribunal refused to pierce the corporate veil in *Rumeli Telekom A.S. and Telsim Mobile Telekomikasyon Hizmetleri A.S. v. Kazakhstan* and upheld it jurisdiction despite the respondent's claim that the claimant's corporate veil should be pierced. Tribunal noted that nowhere in the ICSID Convention is there a basis for piercing the corporate veil of a designated claimant.[137] Likewise, in *Micula et el. V. Romania,*

[133] Article 25 (2)(b) ICSID Convention 1965.

[134] *Vacuum Salt Products Ltd. v. Republic of Ghana*, ICSID Case No. ARB/92/1, p. 30 (Feb. 16, 1994) (Award), reprinted in 4 ICSID 329 (1997).

[135] *Vacuum Salt, P.* 38.

[136] *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Netherlands-Romania BIT), Decision on Jurisdiction and Admissibility, 18 April 2008.

[137] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16 (Turkey-Kazakhstan BIT), Award, 29 July 2008, para 205.

tribunal decline to pierce the corporate veil on the issue that the claimant holding a Swedish passport were Romanian national.[138]

In TSA *Spectrum de Argentina SA v. Argentina*[139] a split minority of ICSID tribunal held that the corporate veil must be pierced in order to determine whether a locally incorporated entity is truly controlled by a foreigner for purposes of article 25(2) (b) of the ICSID Convention. Despite the fact that TSA Spectrum de Argentina was wholly owned by the Dutch company TSI Spectrum International NV, the majority declined jurisdiction because it determined that a citizen of Argentina was the ultimate owner of the investment vehicle. The tribunal highlighted the importance of determining real foreign control stating that it would be against the spirit of article 25 of the Convention in establishing foreign control ignoring objective criteria of foreign control.

Several scholars in investment arbitration are in favour of extending jurisdiction of ICSID tribunals by piercing the corporate veil of foreign controlled corporations.[140] Christoph Schreuer suggests that multiple parties on the investor's side in one set of proceedings is acceptable because it is a consequence of one investment operation where corporations claimed jointly with their parent companies or their subsidiaries.[141] The criteria put forwarded by Schreuer in relation to jurisdiction over locally incorporated, but foreign controlled companies, are in accordance with the requirement of article 25 of the Convention. First, he argues that there need not be an explicit consent to permit claims, as was the case in *SPP v. Egypt*.[142] Second, the fact of foreign control must be established as a question of fact, determined not just by shareholding. Third, not only direct control, but also

[138] *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20 (Sweden-Romania BIT), Decision on Jurisdiction and Admissibility, 24 September 2008.

[139] *TSA Spectrum de Argentina S.A. v. Argentina Republic*, ICSID Case No. ARB/05/5 (Netherlands-Argentina BIT), Award, 19 December 2008.

[140] Yaraslau Kryvoi, p.181.

[141] Schreuer, at 162.

[142] Christoph Schreuer, Access to ICSID Dispute Settlement for Locally Incorporated Companies, in International Economic Law With A Human Face 497, 512 (Friedl Weiss, Erik Denters & Paul de Waart eds., 1997). *See* generally, Christoph Schreuer, *The Dynamic Evolution of the ICSID System, in The International Convention On The Settlement Of Investment Disputes (Icsid): Taking Stock After 40 Years* 15, 15 (Rainer Hofmann, Christian Tams eds., 2007).

indirect control over a locally incorporated company might suffice to establish such control. Schreuer further noted that where companies other than those named in the consent agreement are not necessary parties but are merely economically associated with the investment of the investor, they will not be given standing in ICSID proceedings. But the parties before the tribunal may be given the right to represent their interests and to claim on their behalf.[143]

C.F. Amerasinghe also indicated that an ICSID tribunal, unlike the decision of International Court of Justice (ICJ) in *Barcelona Traction case*,[144] may consider any other criteria, such as management, voting rights, shareholding, or any other reasonable theory in determining jurisdiction over non-signatories.[145] According to him one of such theories appears to be treating locally incorporated companies as a foreign national, as a part of the investment protected by the ICSID Convention or the BIT. Corporate veil may be extended to the non-signatories by the arbitral tribunal on the basis of percentage of shares or control in the corporation. It can also be extended to a non-signatory who has the mastermind of the investment in the corporation.

2.9.3 Piercing Corporate Veil for Non-Signatory Corporations as "Investment"

Corporate veil may be extended to the non-signatories in case of locally incorporated companies based on investment or shares or other forms of participations. According to Article 25 of the ICSID Convention, ICSID tribunals have jurisdiction over "any legal dispute arising directly out of an investment." The drafters of the ICSID Convention deliberately decided not to provide a definition for the term "investment."[146] They assumed that this aspect of ICSID jurisdiction could be more appropriately controlled by the requirement of consent. It has been noted that "the requirement that the dispute must have arisen out of an 'investment' may be merged into the requirement of consent to jurisdiction." Several

[143] Christoph H. Schreuer, (Cambridge, 2001) 361.

[144] *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5).

[145] Amerasinghe, at 264.

[146] *See* Aron Broches, *The Convention on Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 Colum. J. Transnat'l l. 263, 268 (1966).

decisions of ICSID tribunals regard the use of domestically incorporated corporations to define investments activities as "investment" for purposes of ICSID Convention. Based on this principle, if the investor incorporates local investment structures, his investment as shares and other forms of participation in them constitute investment.

ICSID tribunal held in the case of *CMS Gas Transmission Co. v. Argentina*, that there is no obstacle in international law for allowing claims by shareholders independently from those of the corporation concerned.[147] In this case the tribunal referred to the definition of "investment" and stated that according to the Argentina-United States BIT, shares were taken as an example of investment during the negotiation of the Treaty. ICSID tribunal ruled that there is "no requirement that an investment, in order to qualify, must necessarily be made by shareholders controlling a company or owning the majority of shares."[148] The tribunal further noted that the principle of separation of legal entities was not directly relevant to protection of shareholders in the case of *Barcelona Traction*.[149] According to the tribunal the case was only concerned with diplomatic immunity and "did not consider the possibility of extending protection to shareholders in a corporation in different contexts." In the present case the tribunal stated that there is no obstacle in law applicable to investment arbitration to permit claims by independent shareholders besides the concerned corporation including minority or non-controlling shareholders.

The interpretation of term "investment" was also focused by ICSID tribunal in *Holliday Inns v. Morocco* and treated non-signatories on the basis of the "unity of investment doctrine."[150] In this case the tribunal examined the common expectations of the parties and ruled that the non-signatory U.S. parent companies were proper parties to the arbitration according to the "unity of investment doctrine," to fulfil the common expectations of the parties.[151]

[147] *CMS Gas Transmission Co. v. Argentina,* ICSID Case No. ARB/01/8, p. 48 (July 17, 2003) (Decision of the Tribunal on Objections to Jurisdiction).
[148] *CMS Gas Transmission Co*., para 51.
[149] *CMS Gas Transmission Co*., paras 43-44.
[150] Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco) Some Legal Problems*, 1980 BRIT. Y.B. INT'L L. 123, 159.
[151] Pierre Lalive, para 147.

Further in the case, *IBM v. Ecuador*,[152] the issue was whether US Parent Corporation can bring claim together with its wholly-owned Ecuadorian subsidiary based on the United States- Ecuador BIT. Ecuador challenged the jurisdiction of tribunal because there was no agreement to treat domestic companies as foreign nationals as required by Rule 2 of the Institution Rules. Referring to the definition of "investment" under the BIT the tribunal held that dispute arose from 100 % investment made by US Parent Corporation in its Ecuadorian subsidiary. The tribunal extended corporate veil disregarding Ecuador's objection that the Ecuadorian nationality of the locally incorporated entity precluded its parent company from initiating ICSID arbitration.[153]

Similarly, in *AES Corp. v. Argentina*, the ICSID tribunal concluded that it was proper for the parent company to submit claims on behalf of locally incorporated entities it controls. The tribunal referred the definition of "investment" in the Argentina-United States BIT which includes "every kind of investment in the territory of one party owned or controlled directly or indirectly by nationals or companies of the other Party," it encompassed local companies and satisfied the requirement of recognising an international investment.[154] In *Enron v. Argentina* the issue was whether the tribunal had jurisdiction over the locally incorporated company. The ICSID tribunal considered a claim of a foreign investor alleged on behalf of a company incorporated in the host State.[155] The tribunal interpreted the definition of investment under the Argentina-US BIT, which provided that the term "investment" included, *inter alia*, "a company or shares of stock or other interests in a company or interests in the assets thereof."[156]

Aaron Broches, one of the architects of the ICSID Convention also emphasized the importance of the purpose of the ICSID Convention. He noted in relation to determination

[152] *IBM World Trade Corp. v. Republic of Ecuador*, ICSID Case No. ARB/02/10 (Dec. 22, 2002) (Decision on Jurisdiction and Competence), reprinted in 13 ICSID REP. 102 (2008).
[153] *IBM World Trade Corp*, para 112.
[154] *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17 (Apr. 26, 2005) (Decision on Jurisdiction), reprinted in 12 ICSID 308, 328(2007).
[155] *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3 (Aug. 2, 2004) (Decision on Jurisdiction), reprinted in 11 ICSID 268 (2007).
[156] *IBM World Trade Corp*, para 300.

of foreign control under the ICSID Convention, that any stipulation based on a reasonable criterion should be accepted, and jurisdiction should be declined only if to do so would permit parties to use the Convention for purposes for which it was clearly not intended.[157] Indeed, the purpose of the treaty is one of the methods for treaty interpretation under the Vienna Convention on the Law of the Treaties.[158] Purpose of Bilateral Investment Treaties is usually to facilitate foreign investments in the contracting states, piercing the corporate veil may legitimately serve that purpose. The approach of ICSID tribunals that treat corporations as "investment" rather than as "investors" complies with the theory of corporate law, which considers corporations as merely legal fictitious entities, not real persons. Under this approach, ICSID tribunals focus more on subject matter jurisdiction over corporations as part of an investment protected by the BIT to establish personal jurisdiction. ICSID tribunals relied upon both the term "investor" and "investment" to extend corporate veil over Parent Corporation or its subsidiaries to have jurisdiction.

2.10 Conclusion

The striking question that was raised in this chapter was whether a State shall be a party to the arbitration agreement entered into by its separate legal entities? To answer this question the discussion based on critical analogy and judicial precedent was extended to find out the motive of incorporation of a State entity and the rationale behind the principle of limited liability. It has been discussed in this chapter that the corporate veil can be extended where the State entities are serving the commercial interest of the owner-government. To this end the examination was extended to establish the relation between the State and the State entities and the conclusion has been drawn here that extension of arbitration agreement from State entity to the State is possible if is found that the entity is structurally and functionally controlled by the owner-government.

It has also been discussed in this chapter that the important outcome is that most nations incorporated separate legal entities under the domestic law to put a veil between the State

[157] Aron Broches, 136 Recueil Des Cours (1972) 360-61.

[158] Vienna Convention on the Law of Treaties art. 31, May 3, 1969, 1155 U.N.T.S. 331.

entity and the property of the State. In most of the investment arbitration where the State incurs liability for the agreement of its entities to foreign investors and the arbitral tribunal awards damages for the favour of foreign investors, Stated argues based on the separate legal personality of its entities that it is not a party to the arbitration agreement of its entity. Based on the above discussions in this chapter it is pretty obvious that the negotiators and the directing mind of the most State entities in their agreement with foreign investors are the members of the government itself. From the above discussion, State practice suggests that the government, specifically the relevant ministry, has structural and functional control over most of the State entities and sometimes the member of the government is the head of the entities which serves the governmental functions and interest by the name of separate legal personality.

The above discussion in this chapter has also been extended to examine whether the State and the State entity forms single economic reality while entering into commercial non-governmental agreement with foreign investors. The discussion has shown that an arbitration agreement could be extended to the non-party States if the economic interdependence interdepend between the States and the State entities is evident, and if the actions of the States led the claimant to believe that the States intended to be impliedly bound by the arbitration agreement between the foreign investors and the State entity, the State shall be a party in it.

At the end of this incursion it is obvious that the ultimate goal behind the incorporation of a State entity by the State is to conduct commercial non-governmental activities on behalf of the owner-State under the banner of separate legal personality to limit the State liabilities for any foreign debt. This chapter suggests that if it is to be found that the nature of the conduct of a State entity is as such that would have been otherwise performed by the State in the absence of the entity in question, therefore, the corporate veil shall be disregarded and the incorporator-State is to be considered party to the arbitration agreement of its entities.

CHAPTER 3 State Consent and its Limitation to Investment Arbitration in the Agreement of State-entities

3.1 Introduction

In the earlier chapter I have established the most important connecting factor for bringing a claim against the State in the agreement of its entity with foreign investors, which is the State is also a party to the arbitration agreement of its entity. In this chapter the examination is to be extended towards finding the State consent and its limitation under investment legislation and conventions. The basis for arbitration is the agreement between the parties to the dispute. Party consent plays an important role in any form of arbitration including the arbitration of investment disputes.[1] When a State entity is in breach of a contract with a foreign investor, the customary practice in investment arbitration is that the foreign investor initiates arbitration against the State. But in most occasions States raise objection to the jurisdiction of ICSID tribunals that it does not have consent to arbitration in the agreement of its entities. It has been discussed in details in chapter two that a State is in reality a party to the investment agreement of its separate legal entity; therefore, it shall be a party to the investment arbitration initiated by foreign investors.

In investment arbitration under ICSID Convention, parties to the dispute must be a contracting State or any constituent subdivision or agency of contracting States designated to the Centre by that State and the national of another contracting State.[2] What constitutes state consent in the agreement of independent State entity is a major debatable issue in investment arbitration. This debate has been significant in arbitrations involving sovereigns under investment treaties and national laws. There are two different ways of establishing sovereign consent to investment arbitration under the International Convention on the

[1] V.V. Veeder, 'Whose Arbitration Is It Anyway: the parties or the arbitration tribunal-an interesting question?' [2004] The Leading Arbitrators' Guide to International Arbitration 347.

[2] Art. 25 (1) of the Convention on the Settlement of Investment Disputes between States and National of other States 1965; Redfern & Hunter, 'Law and Practice of International Commercial Arbitration' (4th edn, Sweet & Maxwell).

Settlement of Investment Disputes (ICSID), namely contractual consent and non-contractual consent. Contractual consent consists of direct agreement between the parties to submit to the jurisdiction of the Centre. On the other hand, non-contractual consent is through national legislations, bilateral and multilateral investment treaties. It has been a concern that the role of consent in relation to jurisdiction of arbitral tribunal must be given a special attention in the context of an investment treaty or national legislation.

Contractual consent of a State entity through direct agreements is not always clear and unequivocal. Sometimes it comes with separate instruments or reference to another instrument which is not an integral part of the main contract. In such a situation arbitration tribunals have always had difficulties to determine the validity of State consent to arbitration. Article 25 of the ICSID Convention grants jurisdiction over a dispute between a State and a foreign investor, a State must have agreed, in addition to signing the ICSID Convention, to submit the specific dispute or a class of disputes.[3] The instrument of consent may be a bilateral investment treaty (BIT) or a multilateral treaty.[4] Nothing in the ICSID Convention prevents the parties from delimiting their consent to a subset of disputes, and parties often do limit their consent in this way. Many investment treaties limit consent to arbitration to disputes arising after the treaty's entry into force,[5] or even more restrictively to disputes based on factual circumstances arising after the treaty's entry into force.[6]

Discussion in this chapter will focus on the jurisprudence of state consent in investment arbitration. After this it will examine the obligation owed by the State as regard to the revocability of offer in the instrument containing the jurisdictional provision. It will also

[3] Art. 25(1) (The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre).

[4] U.N. Conference on Trade and Development, Dispute Settlement: International Centre for the Settlement of Investment Disputes: 2.3 Consent To Arbitration 11-24, Unctad/Edm/Misc.232/Add.2 (2003).

[5] *See*, e.g., "Agreement between the Government of the Republic of Chile and the Government of the Republic of Peru for the Promotion and Reciprocal Protection of Investments", art. 2, Feb. 2, 2000, available at http://www.sice.oas.org/ BITS/chiper_s.asp [hereinafter Peru-Chile BIT] (This Treaty shall apply to investments made before or after its entry into force . . . . It shall not, however, apply to differences or disputes that arose prior to its entry into force).

[6] *See Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, p. 94 (Sept. 5, 2007) (discussing single versus double exclusion clauses).

consider the extent of consent without *privity* and an offer of arbitration. Further discussion will be extended to agreed limitation in the investment treaties whether a tribunal should seek to ascertain and apply the shared intention of the parties to the relevant agreement regarding what disputes are within the tribunal‘s jurisdiction? Finally, it will explore the consequence of sovereign consent to investment arbitration.

3. 2 Jurisprudence on sovereign consent

In the contemporary international trade and investment, it may well seem to constitute an extraordinary progress, of the Rule of Law and of international relations in general, that so many modern States have been willing to enter into binding commitments of course without total disregard of the exercise of their sovereignty, with foreign investors. It is remarkable that numbers of States are or seem ready to accept, under certain conditions, to submit disputes with a foreign private investor to international investment arbitration.[7] This traditional reluctance of sovereign States to undertake binding arbitration commitments is perfectly understandable and indeed sometimes quite justified, on the part of responsible State authorities. Be that as it may, in spite of the remarkable progress accomplished by some pioneers like the late Aron Broches, it is unlikely that the tendency of States or governments to object to jurisdiction of arbitral tribunal will diminish.

The progress of state consent to international investment arbitration is undisputable, as is proved for instance by increasing number of investment disputes submitted to the jurisdiction of ICSID or *ad hoc* and institutional arbitrational tribunals. The overall picture is perhaps less straightforward than it appears at first sight, and a more realistic approach should also be taken into account towards traditional manifestations of State reluctance to accept binding adjudication by third parties. After all, this phenomenon has long been observed in Public International Law, e.g. with regard to the acceptance by States of the “optional clause” of the ICJ, and in the number of objections to the jurisdiction of the International Court of Justice. In relation to the sovereign consent the question remains

[7] Pierre Lalive, “Some Objections to Jurisdiction in Investor-State Arbitration” Transcript of presentation to the 16th ICCA Congress (London, May 2002).

whether governments will favour the increasing role and authority of private adjudicators and institutions in the regulation of trade and investment disputes?

The issue of sovereign consent to investment arbitration entails concern about the question of sovereign immunity. State consent to arbitration in direct agreement and express waiver of sovereign immunity in the investment treaties and national legislation are equally important in the investor-State dispute settlement.[8] J. C. Tomas states that a cornerstone of the law of arbitration is the requirement that the parties consent to the arbitration of their differences and this is no less the case in regards to the jurisdiction of ICSID. Consent by state parties is expressly require by ICSID Convention Article 25, and has been described as the "cornerstone of the jurisdiction of the centre".[9] Whereas under traditional State to State dispute settlement a host State consents to the jurisdiction of a forum after a dispute has arisen, under investment treaties arbitration provisions constitute a waiver of sovereign immunity and invitation to binding arbitration extended by the host state to all investors who satisfy the treaty's standing requirements. They represent a standing offer of arbitration by the host state to make foreign investors eligible who can accept the offer by instituting arbitration in the prescribed manner. When this is done, an informal arbitration agreement between the foreign investor and host state is perfected.[10]

This unilateral nature of a State's consent to arbitration contained in investment treaties does not diminish the fundamental importance of that consent. It remains the key to the legitimacy of all procedures that follow and is not made without limitations. Waiver of sovereign immunity is a potentially costly political act that is not undertaken lightly.[11] It is a

[8] *See* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of Other States, 1 ICSID REP. 23 (1965).

[9] J.C. Thomas, Investor-State Arbitration under NAFTA Chapter 11, 37 Can.Y.B. Int'l l. 99, 112 (1939).

[10] J. Paulsson, "Arbitration Without Privity", 10 ICSID Rev. FILJ (1995) at 232.

[11] Noah Rubins, 'The Arbitral Innovations of Recent U.S. Free Trade Agreements: Two Steps Forward, One Step Back', (2003) 8 INT'L BUS. L. J. 865 (2003); *See also* Barton Legum, Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions, 19 ICSID REV. F.I.L.J. 344 (2004); James McIlroy, Canada's New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back, 5 J.W.I.T. 621 (2004). *See* also Stephen Schwebel, The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law, in Global Reflections On International Law, Commerce And Dispute Resolution, Liber Amicorum In Honour Of Robert Briner (Icc) 815 (2005).

conscious and strategic decision made in the attempt to attract constructive assets flows intended to advance national economic interests. It is to certain extent a loss of liberty and an acceptance of constraints from which the State is otherwise free. There is nothing today and never has been any general method of compulsory adjudication at the international level. A State which makes the undertaking to enter into arbitration knows that nothing but good faith and the general principle, *pacta sunt servanda*, holds it to the arbitration. There is generally no external authority which can make an order compelling the State to submit to the arbitration.[12]

Furthermore, it is an inherently public act that can only be undertaken by a sovereign State rather than any ordinary private entity to an arbitration agreement.[13] As such, waiver of immunity must be approached with the scrutiny normally accorded to State consent to binding dispute resolution. The interpretation of state consent to arbitration should involve consideration of the historic reluctance of states to waive sovereign immunity. [14] Waiver of immunity and state consent to arbitration must be considered the foundational starting point from which tribunals interpret and apply investment treaties to settle disputes. Most importantly, as is customary in international arbitration proceedings, waiver of immunity and state consent to arbitration must be concretely established with a high standard of certainty before an investor-State tribunal accepts jurisdiction over an investment dispute.[15]

Therefore, to establish state consent based on agreement between a State entity and a foreign investor higher level of scrutiny is required for the jurisdiction of the arbitral tribunal. The degree of independence of the State entity and the intent of state governing authority

[12] Hazel Fox, States and Undertakings to Arbitrate, (1988) 37 Int'l & Comp. L. Q. 1, 4 (1988).

[13] *See* Gus van Harten, 'Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?' (2005) 21 Arb. Int'l 493, 500 (2005).

[14] For different treatments of this general proposition, *see* Celine Levesque, 'Investor-State Arbitration Under NAFTA Chapter 11: What Lies Beneath Jurisdictional Challenges', 17 ICSID REV.F.I.L.J. 320 (2002); Andrea K. Bjorklund, 'Contract Without Privity: Sovereign Offer and Investor Acceptance', 2 Chi. J. Int'l L. (2001). at 184, at 183, Variations of this argument have also been advanced by several respondent host states in investor-State proceedings, including *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 393 and *Holiday Inns v Morocco* (Jurisdiction), 12 May 1974, 1 ICSID Reports 645. *See also,* Eduardo Savarese, 'Investment Treaties and the Investor's Right to Arbitration-Between Broadening and Limiting ICSID Jurisdiction', 7 J.W.I.T. 407 (2006).

[15] Jan Paulsson, 'Arbitration Without Privity', [1995] 10 ICSID REV. F.I.L.J. 232.

is to be considered in conferring jurisdiction of the tribunal over the State in relation to the agreement between a State entity and a foreign investor. So, what are the procedures to be followed by the arbitral tribunal to establish jurisdiction over the home State of contracting State entity. And what is the legal basis for the tribunal to extent jurisdictional instrument in investment arbitration.

Although there are many ways to treat jurisdictional instruments in international investment law, perhaps the simplest way is to treat them as offers similar to offers to enter into a contract. As offers, instruments of state consent are inchoate and forward looking.[16] They operate as an invitation to third parties to accept. Consent to arbitrate thus becomes a multi-stepped process, beginning with an offer of arbitration by the State which is perfected by means of an acceptance by an investor.[17] It imports the basic legal background of this multilateral action oriented consideration of obligations. It imports the need for action on the part of a counter party to become legally meaningful.[18] As such, the host State retains an option to revoke a consent offer made by it.[19] This theory of consent, in short, is action-oriented; it focuses on the actions of the host state and the actions of the investor.

Similarly, it is also possible to consider the instrument of consent in and of itself as a standing, independent commitment. This conception of consent looks not to the dynamic relationship a statement of unilateral consent invites. Rather, it focuses on the utterance itself and appreciates it as a completed act entailing a perfected obligation to submit to the jurisdiction of a specified arbitral tribunal.[20] So conceived, consent does not require action by a counterparty to be fully operative. As such, it does not bring with it the natural corollary of unilateral revocability by the State prior to the point of third-party acceptance.[21]

[16] Christoph H. Schreuer, Consent to Arbitration (updated 02/ 2007), Transnational-Dispute Management (2007), at p. 5.
[17] Christoph H. Schreuer, Consent to Arbitration, at p. 5.
[18] See Nolan/ Sourgens, at pp. 17-22.
[19] See Christoph H. Schreuer, Loretta Milintoppi, August Reinisch and Athony Sinclair, *The ICSID Convention: A Commentary* (2d ed. Cambridge University Press 2009), at p. 1280.
[20] Nolan/ Sourgens, at pp. 23-39.
[21] Nolan/ Sourgens, at p. 37.

This theory of consent is action-oriented; it focuses on what the Statement of state consent has already achieved.

3.2.1 Contractual consent to arbitration

The request for arbitration will be denied by ICSID arbitration tribunal if it comes to the conclusion that there is no *prima facie* agreement between the parties to arbitrate.[22] The Convention requires that there must be some written documents confirming the consent to arbitration in the investment agreement. Investors can only consent to arbitrate disputes under a particular investment agreement. The basic premise of this approach is essentially contract-based or more precisely, is analogous to a common law approach to contract formation.[23] As the master of its offer, the host State remains free to alter or revoke its terms until such time as an act of acceptance has been communicated to it.[24] This revocability of the offer prevails in principle as a matter of common law even in circumstances in which the offer itself states the contrary. Stating "but the ordinary offer is revocable even though it expressly states the contrary, because of the doctrine that an informal agreement is binding as a bargain only if supported by consideration".[25]

One exception to the common law rule of revocability is the instance in which there is detrimental reliance by the investor on an offer before a formal acceptance is made.[26] In the case of offers of arbitration, such detrimental reliance may present issues of proof. Yet, it appears theoretically possible as an extension of the power of the investors' ability to accept an offer of arbitration on account of an estoppel. Stating "it appears, from the discussion of this principle in the last two mentioned cases, that it precludes person A from averring a particular state of things against person B if A had previously, by words or conduct, unambiguously represented to B the existence of a different state of things, and if,

[22] Art.25 (1) of the Convention.

[23] *See*, *e.g*., Mikio Yamagushi, The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law, [2004] 37 Cornell Int'l L. J. 357, 363.

[24] *See* US Restatement (Second) of Contracts S. 42 (1981).

[25] *See* US Restatement (Second) of Contracts S. 42, comment (a) (1981).

[26] *See* Allan Farnsworth, Contracts (Aspen: 1999 (3d ed)), at pp. 190-194.

on the faith of that representation, B had so altered his position that the establishment of the truth would injure him".[27] The application of a jurisdictional estoppel has been admitted as possible in the context of the ICSID Convention.[28] Its extension could make available arbitration as form of dispute resolution despite an otherwise timely revocation of the offer to arbitrate. In case of a treaty or investment legislation, its arbitration provision would serve as an offer to the foreign investor of international arbitration.[29] This offer remains revocable until such time as an acceptance has been communicated.

A different manner to conceive of the same principle is to deem an acceptance to have been made by conduct. An invitation to invest, including an offer to arbitrate, is issued by a host State in domestic legislation. Conceiving of an investment treaty or legislation as an invitation to invest would arguably mean that "the offer requires acceptance by performance and does not invite a return promise". [30] This led to the investor's investment or other action.[31] That act itself could be deemed acceptance, if reliance on the offer would be sufficiently well established for the investment to be considered performance on the invitation to invest. The obvious problem for this mode of formation of an arbitration agreement is the requirement that the agreement formed in writing.[32] Yet, as a matter of theory, at least, in the right circumstances, a jurisdictional estoppel or deemed acceptance by conduct should be permitted to operate in conjunction with a writing that by the terms of the basic offer and acceptance model would no longer be in time on account of an intervening revocation of the offer to arbitrate.

The most common method of giving consent can be seen in an agreement recorded in a single instrument between the parties. However, it is also found in many investment agreements that there is no arbitration clause in it, but the consent to the jurisdiction of the

[27] *See* Bin Cheng, *'General Principles of Law as Applied by International Courts and Tribunals'* (Cambridge University Press: 2006 (reprint)), at pp. 143-144.
[28] See Schreuer, at p. 222.
[29] Schreuer, at p. 1280; *see also* Sébastien Manciaux, Informations: La Bolivie se retire du CIRDI, pp. 4-5 available on Transnational Dispute Management.
[30] *See* US Restatement (Second) of Contracts S. 50, comment (b) (1981).
[31] *See* US Restatement (Second) of Contracts S. 50, 54 (1981).
[32] *See* ICSID Convention, Art. 25; New York Convention, Art. II(1).

Centre is given through separate instrument. This principle was recognised by ICSID tribunal in the case of *AMCO V. Indonesia*[33] that the approval by the BKPM Indonesia's Foreign Investment Board is considered to be given consent to the jurisdiction of the Centre. State of Indonesia requires approval of Foreign Investment Board, BKPM, for carrying out any investment operation in its territory. The investors had submitted an application for approval to BKPM Indonesia's Foreign Investment Board for the above purpose and the board approved it. The application carried an arbitration clause giving consent to the jurisdiction of the Centre in terms of any disagreements between the parties.

3.2.2 Obligations owed by State through offer of consent

An alternative contractual model conceives of a unilateral arbitral undertaking as an irrevocable offer for a stated period of time, or for a reasonable period of time if no relevant expiry period is stated on the face of the instrument containing the jurisdictional provision.[34] This conception appears to underlie Emmanuel Gaillard's approach to consent in analysing the effects of denunciation of the ICSID Convention.[35] Professor Gaillard looks to the terms of the consent to determine whether a firm offer has been made, stating that "where an unqualified consent exists, as opposed to an agreement to consent, the rights and obligations attached to this consent should not be affected" by later extrinsic action.[36] Professor Gaillard's approach leaves investors with a certain amount of indeterminacy, as the construction of consent instruments frequently is a matter of debate.[37]

Offers to arbitration could also be construed as firm by default. Such an approach is typical of the German law tradition and has also found its way into certain commercial contracts in the United States.[38] Germany is a model of firm offer jurisdiction. According to S. 145 of the

[33] *AMCO v. Indonesia*, Decision on Jurisdiction May 10, 1988 (ICSID Case No.ARB/81/1), Available on the ICSID Website.
[34] Nolan/ Sourgens, at pp. 20-22.
[35] Gaillard, at p. 6.
[36] Gaillard, at p. 4.
[37] *See* Gaillard, at p. 3 (referring to the "more difficult situation where ICSID arbitration is the only international alternative" provided in the underlying treaty).
[38] German Bürgerliches Gesetzbuch Ss. 145; U.S. Uniform Commercial Code, Ss. 2-205.

German civil code, "whoever offers another to conclude a contract is bound by its offer unless the binding nature of the offer is expressly excluded".[39] This provision serves as a protection of the offeree while the offer is pending.[40] It arises dogmatically out of a relationship of trust between the parties created by the offer.[41] German law permits offers to be made either to a specific person, or generally *ad incertas personas*. Stating that "there are cases in which a person may not wish to select a specific counterparty and in which an individual communication to a single recipient is not possible. In such circumstances, a declaration to the public at large must be considered as a contractual offer (i.e., offer *ad incertas personas*)"[42] Given the broad application of offers to arbitrate in treaties or investment legislation, these offers likely would have to be construed *ad incertas personas*.

Of course, even under a firm offer model, offers do not remain outstanding forever. Rather, unless the document on its face provides for its expiry, the offer remains firm for a reasonable period of time.[43] In the context of international investment agreements, it may be reasonable to view the denunciation period as the period of expiry of the offer to arbitrate. Providing for a denunciation at a year's diplomatic notice and a survival period of obligations with regard to past conduct for an additional twenty years thereafter this is not expressly addressed by Professor Gaillard, but this position appears implicit in his analysis.[44] With regard to treaties or laws that contain an offer to arbitrate without stating an expiry period, it may be reasonable to look to such treaties for context, given that the specific factual exigencies of the case are also duly considered.[45] The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade.

[39] German Bürgerliches Gesetzbuch Ss. 145.
[40] Hans Brox, Allgemeiner Teil des BGB 29th ed. (Carl Heymanns Verlag: 2005), at p. 96.
[41] Palandt, Bürgerliches Gesetzbuch 62nd ed. (Beck: 2003), at S. 145 no. 3.
[42] Hans Brox, Allgemeiner Teil des BGB 29th ed. (Carl Heymanns Verlag: 2005), at p. 95.
[43] Hans Brox, at p. 97.
[44] *See*, e.g., Art. 12 of Bolivia-France BIT; *See* Gaillard, at p. 4.
[45] Compare U.S. Uniform Commercial Code, Ss. 2-208 (2).

In light of the competing theories of offer and acceptance as a matter of the law of contract or obligations, a comparative legal solution may suggest itself that would combine the benefits of both offer and acceptance models.[46] The 2004 UNIDROIT Principles offer a possible hybrid approach, stating that offers ordinarily are not considered firm, unless it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.[47] This approach, or one akin to it, may be suited to the question at hand, if an offer and acceptance model is chosen, as it allows a reasonable flexibility in approach while also protecting the reasonable expectations of investors in the stability of jurisdictional undertakings of the State. As a matter of international law, it also may well be a close approximation of a general principle of law although such a claim would have to be tested in each specific circumstance against the specific facts of the case in question. As it stands, this approach could be reconciled with a common law approach on account of theories of promissory or equitable estoppel. It is consistent with the approach taken by German law, if focus is placed on the reasonableness of the expectation for how long an offer would remain open if no period is expressly stated. [48]

3.2.3 A binding international commitment to jurisdiction

A different approach to consent looks to what the act of consent itself has done what its consequence is as such? [49] This difference in perspective takes the pragmatic position that an act has occurred. This act in and of itself has legal consequence, which must be considered in its own right. As will be discussed below, it is on account of this switch of perspective that it is possible to resolve the readily apparent inconsistency of treating a consent mechanism that is deemed without *privity* in the terms of an offer and acceptance between the investor and the host state.

[46] Prof. Gaillard and Hans Brox.

[47] UNIDROIT Principles, Art. 2.1.4 (2) (b).

[48] Similarly, it is consistent with the French approach. *See* Francois Terre et al, Precis Droit Civil, Les Obligations (Dalloz: 2005), at. 123. It is broadly consistent with the Civil Code of the Russian Federation. *See* Civil Code of the Russian Federation, Art. 436. It may be consistent with Middle Eastern legal principles, although the facts of each specific case would have to be carefully evaluated. *See* C. *'Mallat, Introduction to Middle Eastern Law'* (Oxford University Press: 2007), at p. 274.

[49] Nolan/ Sourgens, passim.

In the case of private action, unilateral statements of consent to arbitration are assessed against the law of obligations and the arbitration laws of the relevant municipal jurisdiction. This would include an offer and acceptance approach as outlined above, or may include other quasi-contractual legal theories that may give a different meaning to such statements depending on the specific factual circumstances in which they were made. In the context of state action, however, the law applicable to assessing the significance of such statements is public international law.[50] Two regimes most typically applicable to international obligations arising from a declaration of a State are the law of treaties and the law of unilateral declarations.[51] Applied to statements of consent to arbitration, both legal regimes attach a specific legal significance and consequence to the underlying declaration by the host state.

Many arbitration consents are included in international investment agreements between states.[52] On account of the principle of *pacta sunt servanda* codified in the Vienna Convention on the Law of Treaties, such arbitration consents in an investment agreement constitute an independent international obligation in and of themselves.[53] Although these obligations of course operate only according to their terms, they do not require any further action as a matter of the legal framework of which they form part to become operative.[54] Consent to arbitration in a typical bilateral investment agreement constitutes an obligation of the signatory State to arbitrate whether or not it is ever perfected through acceptance.[55] The Lanco tribunal to be sure discusses consent in terms of an offer and acceptance, but did so figuratively and did not use the analogy strictly to state that the later agreement between the parties to the dispute on resolution of disputes before the local court somehow revoked

[50] This principle was confirmed in the context of ICSID arbitration for example in the *CSOB v. Slovakia* arbitration. *See Ceskoslovenska Obchodni Banka AS v Slovakia*, Decision on Objections to Jurisdiction, ICSID Case No ARB/97/4, dated May 24, 1999, at p. 35.

[51] *See* Nuclear Tests Case (*New Zealand v. France*), Judgment, 1974 I.C.J. Reports, pp. 457-472.

[52] *See*, e.g., Campbell McLachlan, Laurence Shore, Matthew Weiniger, *'International Investment Arbitration, Substantive Principles'* (Oxford University Press: 2007), at p. 54.

[53] Vienna Convention on the Law of Treaties, Art. 26; *see also* Richard Gardiner, '*Treaty Interpretation*' (Oxford University Press: 2008), at pp. 147-161 (discussing good faith in the law of treaties more generally).

[54] On treaty interpretation, *see* generally Vienna Convention on the Law of Treaties, Art. 31.

[55] *See Lanco International Inc v Argentina*, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at sec. 43; *See* Bernardo M. Cremades, The Resurgence of the Calvo Doctrine in Latin America, 2(5) Transnational Dispute Management, Nov. 2005, at p. 9.

the underlying offer. The approach inherent in *Lanco* thus saw something quite broader and more significant than a simple contractual offer to arbitrate namely an obligation to abide by the election of an arbitral remedy with regard to treaty claims by the protected investor. The fact that the obligation may never be acted upon by an investor does not change its fundamental nature as a legally binding international commitment of a State included in a treaty.

Arbitration consents not included in the law of treaties have legal significance as unilateral declarations of States. Despite the fact that there is a growing trend of inclusion of arbitral undertakings in international investment agreements, a customary rule of arbitral jurisdiction is not something that has been seriously considered, not the least because of the writing requirement of arbitral consent. It is nonetheless interesting that state practice supporting international arbitration had been growing throughout the 1990s.[56] The legal significance of unilateral declarations is based dogmatically in the principle of good faith and that is derived from the same source as the principle of *pacta sunt servanda* in the law of treaties.[57] In comparison with ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations with commentaries thereto, International Law Commission (in 2006, Principle 1 "ILC Guiding Principles") provieds "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected."[58]

Unilateral declarations are binding as a matter of international law, if, viewed in the relevant circumstances of their pronouncement and reception, they evidence a will of the State to be

[56] *See*, e.g., Campbell McLachlan, Laurence Shore, Matthew Weiniger, International Investment Arbitration, Substantive Principles (Oxford University Press: 2007), at p. 54.

[57] *See Nuclear Tests* (*Australia v. France; New Zealand v. France*), Judgments dated 20 December 1974, I.C.J. Reports 1974, pp. 267-8, 472-3.

[58] *See* also Mark Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff: 2009), at p. 366.

bound.[59] Three legal bases can be distinguished: the first is contractual and can be found in the particular treaty which the parties have concluded. The second legal basis, equally contractual, is the Convention itself which in Article 26 obliges all States parties to comply with their treaty obligations. The third legal basis is the customary rule underlying *pacta sunt servanda* (Incidentally, *consuetudo est servanda* applies also to all those treaties addressed by Article 26 containing norms declaratory of customary international law."[60]Although the reception of a unilateral declaration may be a factor in determining whether a unilateral declaration has an internationally binding character,[61] once it has been determined that an obligation exists, it exists without need for action by any third parties. Thus, an arbitral consent forming part of a unilateral declaration has legal significance in and of itself. One of the most important corollaries of a consent forming part of an international obligation is that it may not be revoked arbitrarily.[62]

The international obligation approach differs in ascribing immediate meaning to a jurisdictional undertaking. Yet, its practical consequence in many instances goes hand in hand with the firm offer approach. Both approaches do not allow a revocation of arbitral consents while these consents by their terms continue to invite disputes to be resolved in arbitration. Both approaches do so, on account of an obligation that is fundamentally beyond the scope of the Statement itself. That, however, is where both models part ways. The firm offer approach is still based on a notional understanding of consent as requiring some form of *privity*. It is exactly to understand how consent without *privity* operates that a different, international obligation model is required.

[59] *See*, e.g., Case concerning the Frontier Dispute (*Burkina Faso v. Republic of Mali*), Judgment of 22 December 1986, I.C.J. Reports 1986, p. 573 (discussing the importance of state intent); *see also* ILC Guiding Principles, Principle 2, comment 2.

[60] Gerald Fitzmaurice, Symbolae Vorzijl (1958), pp. 158.

[61] See ILC Guiding Principles, Principle 3, comment (3) (discussing reception as an indicator of the scope of the declaration in question).

[62] See ILC Guiding Principles, Principle 10.

3.3 Consent without *privity* and an offer of arbitration

Jurisdictional undertakings in investor-state arbitration through direct agreement, national legislation or investment treaties are international legal instruments. Offer of consent in a contract between a state-entity and a foreign investor is an international obligation by the State when it is proven that the entity is controlled by the Stateauthority. As the passage from the decision of *Lanco International Inc v Argentina* on jurisdiction from which this inquiry took its start noted, they, too, are international law declarations of consent.[63] As the *Lanco* decision also made clear, they, too, create international legal obligations at the time of their making.[64] As the *Lanco* decision further elaborated, such consent is not withdrawn if the investor and the host state later enter into a contract calling for the resolution of disputes before local courts.[65] The consent they entail, too, therefore should be treated in a manner similar to international legal undertakings lodged with the International Court of Justice.

Jurisdictional undertakings create a consensual bond.[66] As the International Court of Justice explained, this bond "comes into being between the States concerned."[67] In the investor-state context, this consensual bond can be created in different ways. It can be created in bilateral investment treaties between the two contracting parties.[68] It can be created in multilateral investment treaties between all contracting parties, meaning that the consent theoretically creates a jurisdictional bond even with regard to states that are not immediately affected by a measure.[69] It can be created in investment legislation to the

[63] *Lanco International Inc v Argentina*, ICSID Case No ARB/97/6, Preliminary Decision on Jurisdiction, dated December 8, 1998, at Ss. 43.

[64] *Lanco International Inc v Argentina*, at S. 43.

[65] Bernardo M. Cremades, The Resurgence of the Calvo Doctrine in Latin America, 2(5) Transnational Dispute Management, Nov. 2005, at p. 9.

[66] Case Concerning Right of Passage over Indian Territory (Preliminary Objection)(*Portugal v. India*), Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146.

[67] *Portugal v. India*, Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 146.

[68] *See*, e.g., France-Bolivia BIT, Art. 8.

[69] Typically, the consent itself limits the scope of the dispute that can be submitted to international arbitration; *See* NAFTA, Art. 1120. Notably, NAFTA does extend the consent to allow submissions on legal questions by other NAFTA Parties not involved in the dispute. NAFTA, Art. 1128 ("On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement").

international community at large, or any defined sub-set thereof *e.g.*, ICSID Member States.[70] It can also be created by special agreement as stated above. The discussion below is less relevant to the creation of jurisdiction by special undertaking. This jurisdiction by means of a contractual agreement is fundamentally contractual in nature and has been recognized as such in public international law. [71]

The initial jurisdictional bond obligating the host state to submit disputes to international arbitration may be viewed as having been created when the undertaking is made, as opposed to when it is invoked.[72] In the treaty context, the clause submitting to the jurisdiction of a specific forum of itself creates the State consent.[73] The same is true in the context of unilateral acts.[74] The International Court of Justice expressed that it is the time when the consent is made that creates the consent, stating "for it is on that very day that the consensual bond, which is the basis of the optional clause, comes into being between the States concerned." It may be argued that the nature of the consent to investor-state arbitration is different from consent in the context of state-to-state disputes. In one important respect, this distinction holds true as a matter of definition in the State-to-state context the consent operates to the extent that the dispute is directly between the consenting parties.[75]

Holding that a dispute was within the jurisdiction of the Court where the Respondent was the factually primary party in interest in a dispute. The obligation to consent as matter of international law operates analogously to a state-to-state consent, be it for a third party beneficiary. To the extent that much were made of the distinction between a direct consent obligation and one found in a BIT made for a third party, this distinction would arguably cut in favour of viewing it as a substantive protection rather than a true jurisdictional provision,

[70] Venezuelan Investment Law, Art. 22.

[71] *See* Aegean Sea Continental Shelf (*Greece v. Turkey*), Judgment of December 19, 1978, I.C.J. Reports 1978, pp. 3, 41-44.

[72] *See Lanco International Inc v Argentina*, Decision on Jurisdiction, December 8, 1998, at s 40.

[73] *See* Benedetto Conforti, Diritto Internationazionale (Editoriale Scientifica: 2006 (7th ed)), at p. 388.

[74] *See Anglo-Iranian Oil Co. Case* (Jurisdiction) (*United Kingdom v. Iran*), Judgment of July 22, 1952, I.C.J. Reports 1952, pp. 93, 116 (separate opinion of McNair, J.)

[75] *Portugal v. India*, Judgment of November 26, 1957, I.C.J. Reports 1957, pp. 125, 146.

i.e., if it is not a public international law consent it operates similarly to the other provisions of the BIT dealing with investor rights. Such a substantive obligation could not be frustrated by other State acts just the same as the expropriation provisions of the treaty could not be frustrated, either, without amounting to an actionable breach of the treaty.[76]

In the context of ICSID arbitration treaty consent operates as a complete consent. In that context, a jurisdictional undertaking by a State does not operate as consent to an unspecified dispute resolution mechanism. Rather, it operates as a direct obligation to submit to a readily available dispute resolution body and permits the investor unilaterally to serve the consenting state.[77] Certainly, for the investor to benefit from the existing consent the investor will also have to consent to ICSID jurisdiction and in that sense accepts the offer of arbitration contained in a treaty.[78] That, however, does not affect the existing state of obligations as they exist on the international legal plane between the ICSID Member States.

The jurisdictional bond created by undertakings of consent contained in investment treaties and investment legislation in the investor-state context, dogmatically, is a bond between the host state of the investment and the home state of the investor. Treaty obligations are "binding upon the parties to it and must be performed by them in good faith".[79] Unilateral acts similarly are binding on the international legal plane, *i.e.*, are obligations that are owed to other states. Understanding state consent in investor State arbitration therefore must divorce itself from contemplating it from the investor's point of view. This point of view, important though it is in every practical regard, is not dogmatically relevant to the understanding of state consent, as such.[80]

---

[76] Case of *the Monetary Gold Removed from Rome* in 1943 (Preliminary Question) (*Italy v. France, United Kingdom, and US*), Judgment of June 15th, 1954, I.C.J. Reports, 1954, pp. 19, 21. Compare Certain Phosphate Lands in Nauru (Preliminary Objections) (*Nauru v. Australia*), Judgment of June 26, 1992, I.C.J. Reports 1992, p. 240.

[77] *See* Benedetto Conforti, Diritto Internationazionale (Editoriale Scientifica: 2006 (7th ed)), at p. 388.

[78] ICSID Convention, Art. 25(1).

[79] Vienna Convention on the Law of Treaties, Art. 26; *see also* Mark Villiger, *'Commentary on the 1969 Convention on the Law of Treaties*' (Kluwer: 2009), at pp. 361-368.

[80] It is of course relevant to establish whether an arbitral tribunal has jurisdiction; See ICSID Convention, Art. 25(1). It is further an important factor in establishing the proper context for understanding the jurisdictional declaration of the host state; *See SOABI v. Senegal*, ICSID Case No. ARB/82/1, Award, dated February 25, 1988,

If state consent does not operate immediately vis-à-vis the investor, the question is "how does it operate?" The problem of engagements without privity, which for a significant time created a near absolute bar to the creation of contractual rights for third parties,[81] has been instructively resolved by Grotius. As Reinhard Zimmermann explains "'A contract may stipulate performance for the benefit of a third party, so that the third party acquires the right directly to demand performance'. Roman law generally refused to acknowledge the validity of agreements in terms of which third parties intend to acquire rights. It is safe to assume that in early Roman law 'privity of contracts', in this sense, was so much a matter of course that it hardly needed to be emphasized: legal acts and their effects were seen as a unity".[82]

This description of privity underlies the instinctive appeal of the offer-and acceptance model of consent. It is, however, exactly inapposite to the legal situation that investor-state consent instruments pose. Grotius resolved this problem of privity, according to him "Disputes also frequently arise concerning the accepting of a Thing for another. In which Case we must distinguish between a Promise made to me of something to be given to another, and a Promise made directly to him to whom the Thing is to be given. If the Promise be made to myself, without considering whether I have any Interest in it, a Consideration that the Roman law has introduced, I look upon it, that by the Law of Nature I acquire a Right of accepting, that thereby the Right of demanding the Performance of the Promise may pass to another, if he also will accept it; so that the Promisor has no Right in the meantime to revoke it; but I, who received the Promise, may, if I please, remit it. For this Sense is not against the Law of Nature, and also very agreeable to the Words of such a Promise; nor is it a Matter of Indifference, whether another obtains a favour by my means or not."[83]

---

at p. 4.10. It is not, however, relevant to establishing the consent as such, and only to the question whether it has been triggered or invoked.

[81] Reinhard Zimmermann, *'The Law of Obligations Roman Foundations of the Civilian Tradition'* (Juta & Co. Ltd: 1990), at p. 34.

[82] Reinhard Zimmermann, at p. 34.

[83] Grotius, De Jure Belli Ac Pacis, II, XI, Sec. 18 in Hugo Grotius, The Rights of War and Peace (Liberty Fund: 2005), at p. 725.

Grotius solution provides "that the third party does not directly acquire a right under the contract between the other two, but that a declaration is required to accept the benefit".[84] As such, there is a relevant act of acceptance. This act of acceptance, however, is not forming a contract, but merely laying claim to the benefits bestowed on a party as a beneficiary under an existing contract. Applying Grotius' solution to the problem of privity in the investor-state context, state consent to arbitration is independent of the investor's consent to arbitration. The consent, as an obligation of international law, exists between the respective host and home states. It creates a jurisdictional bond as of the time of its making. The investor's declaration that it accepts the benefit is the invocation of the consent, the act of its perfection to allow the arbitral tribunal to resolve a specific dispute. The Stateconsent exists and operates irrespective of the acts of the investor. It is binding vis-à-vis the respective home state of the investor. It bestows benefits on investors but exists and operates independently of their actions.

Viewed in this light, the investor's consent to arbitration serves as the notification necessary to come within the benefit of the right obtained for it by its home state.[85] It serves to perfect the jurisdiction of the dispute resolution body before which the investor has the option to appear. Stating that "the consent of the investor, along with that of the Argentine Republic, expressed in Article VII(4), creates the consent needed to provide ICSID with jurisdiction over this dispute, pursuant to Article 25(1) of the ICSID Convention". [86] It serves to bind the investor to the conditions attached by the consent on its future action i.e., it limits the investor's available remedies. All these aspects of the investor's consenting are important from a practical point of view, as well as from a procedural stand point. They are not, however, acts that modify or affect the pre-existing state consent.

The offer and acceptance model has a figurative role to play to explain when the jurisdiction of an arbitral tribunal has been seized or invoked. In that sense, it might be used to describe

[84] Reinhard Zimmermann, at p. 34.

[85] Compare Grotius, De Jure Belli Ac Pacis, II, XI, S. 18 in Hugo Grotius, The Rights of War and Peace (Liberty Fund: 2005), at p. 725.

[86] *See*, e.g., *Lanco International Inc v Argentina*, Decision on Jurisdiction, dated December 8, 1998, at S. 33.

when the jurisdictional bond between the investor and the host state was created. It is typically in this figurative sense that an offer and acceptance approach is used.[87] But the risk is that this usage may obscure fundamental questions concerning the timing and substance of the State consent itself. It may be lost, for example, that state consent exists without *privity* and beyond *privity*. The implications of this understanding of consent, a consent that is without *privity* not only in an evocative phrase, but in actual substance, are set out in the following sections.

3.4 Limitation of State consent

The formal method of State consent as mentioned earlier is through national legislation, bilateral investment treaty, multilateral treaty or an agreement between a State and an individual investor.[88] Nothing in the ICSID Convention prevents parties from circumscribing their consent to a subset of disputes, and parties often do limit their consent in this way. Many investment treaties limit consent to arbitration to disputes arising after the treaty's entry into force,[89] or even more restrictively to disputes based on factual circumstances arising after the treaty's entry into force.[90] This Treaty shall apply to investments made before or after its entry into force. It shall not, however, apply to differences or disputes that arose prior to its entry into force. Under the principle of consent, a tribunal should seek to ascertain and apply the shared intention of the parties to the relevant agreement regarding what disputes are within the tribunal's jurisdiction. The tribunal in *SPP v. Egypt* similarly reasoned, jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if but only if the force of the arguments militating in favour of it is preponderant.[91] Objectivity

[87] *See*, e.g., Bernardo M. Cremades, Nov. 2005, at p. 9.

[88] U.N. Conference on Trade and Development, Dispute Settlement: International Centre for the Settlement of Investment Disputes: 2.3 consent to arbitration 11-24, unctad/edm/misc.232/add.2 (2003).

[89] *See*, e.g., Agreement between the Government of the Republic of Chile and the Government of the Republic of Peru for the Promotion and Reciprocal Protection of Investments art.2, Feb. 2, 2000, available at http://www.sice.oas.org/ BITS/chiper_s.asp [hereinafter Peru-Chile BIT].

[90] *See Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, p. 94 (Sept. 5, 2007) (discussing single versus double exclusion clauses).

[91] *SPP v. Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction p. 63, (Apr. 14, 1988), 3 ICSID REPORTS 131, 144.

and a good faith effort to determine the parties' intent are thus a tribunal's guiding principles for interpreting jurisdictional clauses.

Provisions in the national legislation of the host State may offer consent in a generic term. When the foreign investors accept the offer only with regard to certain disputes then the consent between the parties will be limited to those disputes only. But this limitation through acceptance shall not be beyond the ambit of the host state's offer of consent. e.g. if offer of consent in host state's legislation refers that any dispute in relation to this agreement to be submitted to the Centre, investor's acceptance should not be extended to any subsequent agreement between the foreign investors and other entity. Hence, any limitations contained in the host State's legislation would apply irrespective of the terms of the investor's acceptance. If the limitations prescribed in the investor's acceptance do not correspond with the terms of the offer there is no valid consent.

Likewise national legislation, offer of consent to the arbitration tribunal in the investment treaty clauses may limit the scope of consent in narrower terms. However, some BITs require that the investment to which the dispute relates must have been specifically approved in writing as a condition for consent. The scope for the jurisdiction of tribunals is even narrower where consent is limited to the amount of compensation for expropriation.[92] This is very specific way of delimiting consent to the jurisdiction of the Centre. When the foreign investors accept host states' offer of consent through writing under such a provision they are not allowed to submit dispute to the jurisdiction of the Centre other than the specific dispute stipulated by the provision.

There are two slightly contradictory decisions on jurisdiction regarding disputes arising after the treaty's entry into force. The first precedent was setup in the case of *Tradex v Albania* [93] where the claimants applied for arbitration proceedings under the Centre in 17 October 1994. The claimants submitted before the tribunal that Bilateral Investment Treaty between

[92] Art.10(1) of Bilateral Investment Treaty between China and Hungary 1991.

[93] *Tradex v Albania*, Decision on Jurisdiction, 24 December 1996, 14 ICSID Review, Foreign Investment Law Journal 161, (1999).

Albania and Greece would be the basis for the jurisdiction of the arbitral tribunal. But Albania argued that the Bilateral Investment Treaty between Albania and Greece was not applicable in this dispute because the Bilateral Investment Treaty between Albania-Greece came into force in 4th January 1995, after the dispute arose. The tribunal ruled that the jurisdiction must be established on the date of filing the claim and rejected the Bilateral Investment Treaty as the basis for jurisdiction.

The second precedent was laid down in the Case of *CSOB v Slovakia* [94] where the agreement entered into between the parties contained a consent clause, through reference to another instrument, to the jurisdiction of the Centre. The wording of the clause was as such *"this agreement shall be governed by the laws of the Czech Republic and the [BIT between the Czech and Slovak Republics]"*. The BIT between Czech and Slovak Republic contained provision referring to jurisdiction of the Centre in case of any dispute arising in relation to investment operation. The claimant contented that the host state has given consent to the jurisdiction of the Centre through reference to the BIT. But the Respondent argued that the clause in the agreement was merely a choice of law provision. Moreover, the BIT had never come into force. The tribunal decided on the jurisdiction in 1996 that BITs must come into force at that time of the proceedings. But that decision was reversed in 1999 and held that the tribunal has jurisdiction over the dispute. The tribunal decided based on the intention of the parties to submit to the jurisdiction of the Centre.

Although some may argue it to be in contrary to due process in international arbitration, but the spirit of the Convention is to protect the rights of foreign investors. The reversed decision taken by the ICSID tribunal in the above case was based on the spirit of the Convention and intention of the parties to the dispute. If it is found that the there is a clear provision in the BIT limiting jurisdiction of the tribunal in relation to disputes arising after the treaty's entry into force and the parties have cognizance in this regard, the tribunal may decide otherwise. Many times this question has been raised in international arbitration that whose arbitration is it? And the end answer lies on the principle of party autonomy to the

[94] *CSOB v. Slovakia*, Decision on jurisdiction, 24 May 1999, available on ICSID website.

arbitration which means it is parties' arbitration.[95] Therefore, if it is found that the parties have intent to arbitrate that matter, the tribunal may decide beyond the provision of the relevant BITs. In the above case since it was the intention of the parties to the agreement to submit the dispute to the jurisdiction of the Centre, the arbitral tribunal rightfully decided in conferring jurisdiction of the Centre.

3.4.1 The rule against retroactivity of treaties

Arbitration tribunals in investment arbitration frequently face disputes involving continuing acts, facts, and situations that appear to have begun before the relevant treaties entered into force and continued after that point. When addressing such matters, tribunals have borrowed analyses of similar issues from outside international investment law. Thus, the question arises whether this borrowing is appropriately used to determine jurisdiction of arbitral tribunal in investment arbitration based on a particular investment treaty with a specific jurisdictional consent clause. In this context whether it is ever possible for investment arbitrators to appropriately use such "precedent" in their jurisdictional analyses and whether they will be able to apply it correctly in deciding a particular award.

Limitation of consent regards whether the agreement entered into by the Stateentity which took place before entry into force of the treaty will confer jurisdiction to the tribunal? The obvious starting point for interpreting ambiguous temporal restrictions in an investment treaty is Article 28 of the Vienna Convention, which provides: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party.[96] The operative words from the Vienna Convention for the present discussion are, unless a different intention appears.[97] States can agree to grant or withhold jurisdiction over past actions, or over actions that

[95] See V.V. Veeder, p. 347.

[96] Vienna Convention on the Law of Treaties art. 28, May 23, 1969, 1155 U.N.T.S. 331.

[97] Vienna Convention on the Law of Treaties art.15, May 23, 1969, 1155 U.N.T.S. 331.

began in the past and continue to the present. For example, they can preclude jurisdiction over disputes based on acts that began before but continue after a BIT enters into force.

However, these rationales do not apply as cleanly to jurisdictional treaties. Rather than imposing a substantive obligation meant to guide states future conduct, a purely jurisdictional treaty might do nothing more than establish a mechanism for adjudicating disputes. It is easy to see how such a treaty with no express temporal limitations could reasonably be read to apply to all disputes that *exist* after the dispute adjudication mechanism is created even those that predate the treaty. The only obligation imposed is that states arbitrate their disputes an obligation which does not implicate past conduct. There is no noticeable problem because, when they sign the treaty, states know that their existing disputes will be subject to it.

Similarly, an agreement imposing substantive obligations may also create a dispute resolution mechanism that applies to *any* dispute between the parties, not just to disputes over the substantive obligations. In such cases, it is not clear that the default rule for arbitration provisions is that they apply only to disputes over future facts. If the dispute arose before the treaty and involved obligations that existed before the treaty entered into force, allowing a tribunal to hear the dispute is not a prima facie violation of the rule against retroactivity.

3.4.2 Analysis of the continuing circumstances

Arbitral tribunals may appropriately use continuing circumstances analysis drawn from international law sources outside the law relevant to investment arbitration. However, they must apply the doctrine carefully, in keeping with the jurisdictional consent clauses in the governing BIT. When looking at international precedent, arbitral tribunals must be mindful of the language of the treaty the prior decision was interpreting, and of how the relevant BIT might differ. Among investment treaties, NAFTA‘s jurisdictional limitation is the most similar to the limitations in the PCIJ, ICJ. This is because NAFTA contains a subject matter exclusion, which effectively limits jurisdiction to conduct occurring after entry into force,

with the possibility that conduct continuing after entry into force could become subject to jurisdiction.[98] Because of the fundamentally different language in unrestrictive and single exclusion BITs, tribunals interpreting them must be more cautious when extracting principles from these earlier decisions.

Impregilo v. Pakistan was brought under the Pakistan-Italy BIT. The BIT contains an unrestrictive jurisdictional provision covering any disputes arising between a Contracting Party and the investors of the other.[99] *Impregilo* complained of a series of acts occurring both before and after the BIT, alleging these claims constitute a single continuing dispute, —a systematic and continuous pattern of conduct that has resulted subsequent to the BIT's entry into force, in the current and continuing breach of the BIT.[100]

The tribunal declared a default rule opposite of that in the PCIJ *Mavrommatis* case, where the jurisdictional provision similarly covered any dispute . . . which may arise.[101] In *Mavrommatis*, the PCIJ presumed that if the treaty was silent about pre-existing disputes, jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. In *Impregilo*, the tribunal concluded that because the BIT was silent, jurisdiction did not extend to disputes that arose before entry into force. Pointing specifically to the treaty language that any dispute arising between a contracting Party and the investors of the other, the tribunal determined that such language and the absence of specific provision for retroactivity infers that pre-existing disputes are excluded.[102] Though the tribunal did not explain what about the language of this provision implies exclusion of pre-BIT disputes, the interpretation may have focused on the word arising. The tribunal may have reasoned that since a pre-existing dispute does not arise after entry into force, the parties must have meant to exclude such disputes from jurisdiction.

[98] North American Free Trade Agreement art. 1116-17, U.S.-Can.-Mex., Dec. 17, 1992, 132 I.L.M. 289 (1993) [hereinafter NAFTA].

[99] Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments [hereinafter Italy-Pakistan BIT] art. 9, 1, July 19, 1997.

[100] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 297 (Dec. 22, 2003).

[101] *Mavrommatis*, Judgment No. 2 at 35.

[102] *Impregilo,* Decision on Jurisdiction at pp. 299-300.

Looking to the PCIJ and the ICJ, the arbitral tribunal found that a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between the Parties.[103] On the basis of this definition, it concluded that *Impregilo's* claims appeared on their face to fall within the tribunal's jurisdiction, since the dispute arose after entry into force. Up to this point, the tribunal had no cause to consider *Impregilo's* argument that Pakistan's alleged violations were continuing, since it was only concerned with when the dispute arose, not when the facts giving rise to the dispute arose.

However, the tribunal further considered that all of *Impregilo's* claims were of BIT violations even though the BIT did not limit jurisdiction to treaty claims. It thus engaged in an additional analysis *ratione temporis* as though the BIT contained a subject matter exclusion. On this basis, it reasoned that even though the dispute arose after entry into force, Pakistan could not be responsible for breaches of the substantive obligations of the BIT occurring before it was in force. In this analysis the tribunal turned to and rejected *Impregilo's* claim that the acts were continuing and thus were brought under the treaty's substantive obligations once the treaty entered into force. Distinguishing between continuing acts and acts with continuing effects, the tribunal found that the pre-BIT acts complained of were not of a continuing character. The tribunal cited Article 14 of the Draft Articles on State Responsibility, but its analysis falls directly along the line of cases beginning with *Phosphates in Morocco* and continuing through ECHR cases distinguishing between acts and effects.[104]

3.5 On-going violations and the period of limitation in investment arbitration

Allegations of continuing violations raised before ICSID tribunals to overcome periods of limitation have had mixed success. Several ICSID cases under NAFTA have involved arguments about whether the conduct in question occurred within NAFTA's three-year period of limitation. Articles 1116 and 1117 of NAFTA impose a strict limitation period,

[103] Mavrommatis Palestine Concessions (*Greece v. U.K*), Judgment No. 2, 1924 P.C.I.J. (ser. A) No. 2, at 11 (Aug. 30).
[104] *See* ILC Draft Articles, art. 14; *McDaid v. United Kingdom*,; *Odabaşi v. Turkey*,.

stating that an investor cannot bring a claim on its own behalf or on behalf of an enterprise if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor or the enterprise has incurred loss or damage. Thus there are three points in time a tribunal must pinpoint to determine whether a claim has been brought within the period of limitation. First, the tribunal must determine the date on which the investor first acquired knowledge of the alleged breach. Second, even if the date of actual knowledge is found to be within the period, the tribunal must determine whether there was a different point at which the investor should have first acquired this knowledge. Third, the tribunal must determine when the claimant acquired, or should have acquired, knowledge that it incurred a loss as a result of the breach.

The tribunal in *Feldman v. Mexico* considered the meaning of Articles 1116 and 1117 in its Interim Decision on Preliminary Jurisdictional Issues and in its Final Award.[105] The discussion in the Interim Decision focused on the definition of making a claim for the purpose of determining the cut-off date for the limitation period.[106] The tribunal's analysis on this issue fully supports the applicability of the three-year limitations period and does not touch on continuing acts. Though *UPS v. Canada* cited *Feldman* for the proposition that continuing acts can overcome NAFTA's three-year limitations period,[107] *Feldman* in no way supports this contention.

The *UPS* tribunal confused *Feldman's* holding on jurisdiction over acts beginning before but continuing after NAFTA's entry into force for a decision about jurisdiction over acts outside the three-year time limitation. Section IV of the *Feldman* Interim Decision covers Time Limitation and does not discuss continuing acts.[108] Later, in Section VI, the tribunal addressed the Relevance of Claims Pre-dating NAFTA's Entry into Force. In this discussion the tribunal addressed how continuing acts interact with NAFTA's subject matter exclusion *ratione temporis*: Since NAFTA delivers the only normative framework within which the

[105] Feldman, Award, pp. 53-65; id., Interim Decision on Preliminary Jurisdictional Issues, pp. 39-49.
[106] Feldman, Interim Decision, pp.40-47.
[107] *See United Parcel Service of America v. Canada*, Award, pp. 27-29 (June 11, 2007).
[108] *See* Feldman, Interim Decision, pp. 39-49.

Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis.* Given that NAFTA came into force on 1 January, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date.[109] The tribunal then reasoned that continuing actions may become breaches of NAFTA after the treaty's entry into force.[110] This discussion is completely separate from the application of NAFTA's period of limitation, which acts as a further bar to jurisdiction *ratione temporis*.

The *Feldman* tribunal added two questions to the merits: (1) whether the limitations period should be suspended for the period in which the parties had allegedly temporarily reached an agreement remedying the situation, and (2) whether the respondent should be equitably estopped from invoking any limitation period because it assured the claimant that the situation would be resolved and remedied.[111] In the Final Award, it found that no suspension of the period of limitation was warranted and that the respondent was not estopped from invoking the three-year limitation period.[112]

Though, the investor in *Merrill & Ring Forestry v. Canada* cited the *Feldman* Final Award in support of its contention that continuing acts overcome the limitation period,[113] the decision says no such thing. To the contrary, *Feldman* states unequivocally that NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defence which, as such, is not subject to any suspension, prolongation or other qualification. [114] In the *Merrill & Ring* investor ignored this language and *Feldman*'s entire discussion of the limitation period and turned to the decision on the merits of Feldman's discriminatory treatment claim.[115] In the paragraph quoted by Merrill, *Feldman* finds the claimant has been effectively denied tax

[109] *M.C.I Power Group L.C. v. Ecuador*, ICSID Case No. ARB/03/6, Award, pp.12-13 (July 31, 2007).

[110] *See M.C.I Power Group L.C. v. Ecuador*. The tribunal reiterated its holding in the Final Award, where it also separated the discussion of Relevance of Claims Pre-Dating NAFTA's Entry into Force from other jurisdictional issues, including the period of limitation; See Feldman, Final Award, pp. 51-65.

[111] *Feldman*, Interim Decision, pp.48–49.

[112] *Feldman*, Final Award, pp. 58, 63.

[113] Merrill & Ring v. Canada, Investor Submission, p. 468 (Feb. 13, 2008).

[114] *Feldman*, Final Award, p. 63.

[115] Merrill & Ring, Investor Submission, p. 468 n.526 (citing and quoting *Feldman*, Final Award, p. 187).

rebates for the April 1996 through November 1997 period, while domestic export trading companies have been given rebates .[116]

The period of limitation cut-off in *Feldman* was April 30, 1996, while the rebates were effectively denied over a period beginning before April 30.[117] The apparent contradiction of these dates is the basis for Merrill's argument that the *Feldman* tribunal accepted jurisdiction over a continuing act beginning before the period of limitation.[118] However, this interpretation is incorrect. The measure through which Feldman was effectively denied these rebates occurred in 1998, after the Mexican tax authority audited Feldman's company and demanded that it repay the rebates received during this period. The measure at issue thus occurred well within the period of limitation and does not support an expansion of the period of limitation through continuing acts.

In *Mondev v. United States*, the United States invoked the NAFTA period of limitation, arguing that Mondev was aware of the alleged breaches more than three years before it filed its claim, and thus had sat on its rights. The United States' contention was that *Mondev* knew or should have been aware of the breaches when the City of Boston's actions that formed the basis of the complaint occurred.[119] These actions included allegedly obstructing Mondev's execution of its option to purchase a parcel of land and threatening to take measures that would render previously agreed-upon development of the land unviable.[120]

Mondev, in turn, put forth a continuing acts argument, alleging that the breaches did not occur until the decisions of the United States courts which finally failed to give Mondev any redress; alternatively, until those decisions, Mondev was not in a position to be sure whether it had suffered loss. Thus it was not until those decisions that Mondev first acquired, or should have first acquired knowledge that the investor has incurred loss or

[116] *Feldman*, Final Award, p. 187.

[117] *See Industria Nacional de Alimentos, S.A. v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, p.49, 59, 187-188 (Sept. 5, 2007) (discussing single versus double exclusion clauses).

[118] *See* Merrill & Ring v. Canada, Opinion of W. Michael Reisman with Respect to the Effect of NAFTA Article 1116(2) on Merrill & Ring's Claim, p. 468 (Apr. 22, 2008).

[119] *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award p. 51 (Oct. 11, 2002).

[120] *Mondev,* pp. 37-39.

damage.[121] Though the tribunal found the claims barred on other grounds, it asserted that it would not have accepted Mondev's argument that it could not have knowledge of loss or damage' arising from the other claims until the court decisions.[122] It reasoned that a claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.

3.6 Consent subject to conditions

Contracting parties are free in drafting provisions in the direct agreement, national legislation or Bilateral Investment Treaties any conditions, provided that they are not contrary to the mandatory provisions of the ICSID Convention and are in compliance with the Centre's Rules and Regulations. Even if a dispute is clearly covered by the parties' consent to resort to arbitration under the jurisdiction of the ICSID tribunal, access to the Centre's jurisdiction may be subject to conditions. In practice, such conditions always concern certain procedural steps that must be exhausted before proceedings can be instituted to the Centre.[123] For example, many national legislation and Bilateral Investment Treaties subject state consent to the conditions of exhaustion of local remedy or prior conciliation process in good faith.

3.6.1 Exhaustion of local remedies

A State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention.[124] Provisions giving consent to jurisdiction of the Centre do not, in general, require the exhaustion of local remedies before instituting proceedings to the Centre. One of the purposes of investor/State arbitration is to avoid the vagaries of proceedings in the national courts. Article 26 of the Convention specifically excludes the requirement to exhaust local remedies "unless otherwise

[121] *Mondev,* p.52 (quoting NAFTA art. 1116).
[122] *Mondev*, p.87.
[123] Schreuer, 'Consent to Arbitration, published on the website of UNCTAD' 2005, (*www.unctad.org).*
[124] Art. 26 of the Convention

stated".[125] In the absence of such a provision there is no requirement to exhaust local remedies. Tribunal formed under jurisdiction of the Centre and Tribunals of ad hoc arbitration have confirmed that the claimants were entitled to institute arbitration proceedings directly without prior submission to the national courts.

Only a few States have conditioned their consent to jurisdiction of the Centre on the prior exhaustion of local remedies.[126] However, under some national legislation foreign investors are at liberty either to resort to local courts or national or international arbitration or other means of dispute settlement.[127] A relatively small number of bilateral investment treaties[128] and a few investment agreements with investors contain such a condition. The condition that the local remedies must be exhausted before proceeding with ICSID arbitration can be instituted, may be expressed by a State party to the Convention only up to the time when consent to arbitration is perfected but not later. This is a consequence of the principle that once consent to jurisdiction has been given, it may not be unilaterally withdrawn or restricted or repealed.[129]

Some Bilateral Investment Treaties provide for a mandatory attempt at settling the dispute in the host State's domestic courts for a certain period of time.[130] This is not a requirement to exhaust local remedies. The investors may proceed to institute arbitration proceedings if the domestic proceedings do not result in the dispute settlement within a certain period of time or if the dispute persists after the decision of local court. For Example, the Argentina-Germany BIT provides that any investment dispute shall first be submitted to the host State's competent tribunals. The provision continues:

[125] Article 26 of the Convention reads: "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 remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

[126] Republic of Albania in its Foreign Investment law of 1993; Israel and Guatemala, have given notifications to the Centre that they will require local remedies to be exhausted. But Israel subsequently had withdrawn that notification.

[127] Art.3(e) of the Turkish Foreign Direct Investment Law, Law No.4875, 2003.

[128] Japan-Vietnam BIT 2003; Japan-Bangladesh BIT 1999; Slovakia-Czech Republic BIT.

[129] Art.25 of the Convention.

[130] Art.10(2) of Argentina-Germany BIT.

> *"(3) The dispute may be submitted to an international arbitration tribunal in any of the following circumstances:*
>
> *(a) at the request of one of the parties to the dispute if no decision on the merits of the claim has been rendered after the expiration of a period of eighteen months from the date in which the court proceedings referred to in Para. 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties persist;"* [131]

According to above provisions of BIT the party must submit to the competent court or tribunals of the host state. If the dispute is not settled by the national court or tribunal or after a decision rendered but the dispute between parties continues then it must be submitted to jurisdiction of the Centre.

Under BITs a requirement of this kind as a condition for consent to jurisdiction of the Centre creates obstacle to the party seeking arbitration to the Centre. Moreover, decision by the domestic courts in a complex investment dispute takes considerable time even in the first instance courts or tribunals, most of the time it proceeds with appeal which will jeopardise the sprite of the Convention. Even if such a decision should have been rendered, the dispute is likely to persist if the investor is dissatisfied with the decision's outcome. Therefore, arbitration remains an option after the expiry of stipulated time in the National legislation or BITs.[132] It follows that most likely effect of a clause of this kind is procedural delay and additional cost to be incurred by the parties. Host state raised objection based on such clauses in the case of *Maffezini v. Spain* And *Siemens v. Argentina* the claimants were able to avoid their effect by relying on most-favoured-nation (MFN) clauses in the BITs.[133]

[131] Argentina-Germany BIT.

[132] Art.14(3) of the Agreement between Japan and Socialist Republic of Vietnam for the Liberalisation, Promotion and Protection of Investment 2003.

[133] *Siemens v. Argentina, Decision on Jurisdiction*, 3 August 2004 at paras. 32-110; *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000, 5 ICSID Reports 396 at paras. 38-46.

On the other hand, in *Amco v. Indonesia*, Indonesia argued "that the Tribunal manifestly exceeded its powers by holding that *AMCO* could bring its claim for compensation of damages based on the acts of the army and police personnel involvement to the local court. Claimant directly instituted arbitration proceedings to the Centre without previously seeking redress before the Indonesian courts in conformity with the general international law rule on exhaustion of local remedies. The *ad hoc* Committee in the annulment proceedings held that "acceptance of jurisdiction of the Centre without reserving under Article 26 of the Convention a right to require prior exhaustion of local remedies as a condition for obtaining access to an ICSID tribunal, Indonesia must be deemed to have waived such right ..."[134]

However, this must be taken into consideration whether insistence by a host State on the exhaustion of local remedies prior to arbitration under jurisdiction of the Centre serves any useful purpose. Resort to local remedies before the institution of arbitration under jurisdiction of the Centre certainly takes time and incur cost. The public proceedings in the national court of the host State may further exacerbate the dispute between the parties and may affect the host State's investment environment. If the tribunal established under jurisdiction of the Centre overrules a decision by the national court of the host State, this may be a source of acute embarrassment to the reputation of the host state's judiciary. Therefore, it seems wisest to leave the Convention's basic rule of non-exhaustion in place and to follow the example of vast majority of consent agreements in not requiring the exhaustion of local remedies.

3.6.2 Attempt of amicable settlement and conciliation before arbitration

Usually most of the national legislation and the BITs provide conditions that before instituting arbitration proceedings under jurisdiction of the Centre foreign investors shall attempt for amicable settlement through consultations or negotiations in good faith. For instance, the relevant section of the 1993 Law on Foreign Investment of the Republic of Albania provides that "if a foreign investment dispute arises between a foreign investor and the Republic of Albania and it cannot be settled amicably, then the foreign investor may

[134] *AMCO v. Indonesia*, Annulment Proceedings, 1 ICSID Reports 526, Available on the ICSID Website.

chose to submit the dispute for resolution to a competent court or administrative tribunal of the Republic of Albania in accordance with its laws…then the foreign investors may submit the dispute for resolution and the republic of Albania consent to the submission thereof to the Centre…"[135]

In *Tradex v. Albania* the issue of amicable settlement was raised by the Republic of Albania under Art.8 of Foreign Investment Law of the Republic of Albania 1993. The tribunal taken into consideration Tradex's attempt of sending five letters within four months to the competent authority (Albanian Ministry) but there was no correspondence or any relevant action from the Albanian Government. The tribunal held that those letters constitutes sufficient good faith attempt to reach an amicable settlement.[136]

Consent clauses in BITs provide common condition for the institution of arbitration proceedings that is an amicable settlement has been attempted through consultations or negotiations. This requirement is subject to certain time limits prescribed in the BITs. If no settlement is reached within that period the claimant may proceed to arbitration under jurisdiction of the Centre. For instance, Bilateral Investment Treaties between the Czech Republic and the United States of America provided as follows:

> *"At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration…"*[137]

Similar provisions can also be found in German Model BIT in its *Article 11* which provides conditions such as:

[135] Art.8(2) of Albanian Investment Law No. 7764 of November 2, 1993.
[136] *Tradex v. Albania*, Decision on Jurisdiction, December 24, 1996, ICSID Case No. ARB/94/2, Available on the ICSID website.
[137] Czech Republic-U.S.A. BIT.

> *"(1) Divergencies concerning investments between a Contracting State and an investor of the other Contracting State should as far as possible be settled amicably between the parties in dispute.*
> *(2) If the divergency cannot be settled within six months of the date when it has been raised by one of the parties in dispute, it shall, at the request of the investor of the other Contracting State, be submitted for arbitration..."*

The above provisions indicates amicable settlement before proceed with arbitration. This attempt of amicable settlement could be either under the ambit of the Centre or through independent settlement process. Some of the provisions come with time limit as a condition some other imposes only amicable settlement process as condition precedent to arbitration. There are contradictory decisions by the tribunals to these provisions requiring an attempt at amicable settlement before the institution of arbitration proceedings.[138] In the majority of cases the tribunals found that the claimants had complied with these waiting periods before proceeding to arbitration.[139] In other cases the tribunals found that non-compliance with the waiting periods did not affect their jurisdiction.[140]

Preamble of the Convention indicates that mutual consent by the parties to submit disputes to conciliation through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators.[141] Conciliation is one of the two procedures under the Convention, but it is not strictly a condition for the institution of arbitration proceedings under jurisdiction of the Centre.

[138] *See* For more detailed treatment see C. Schreuer, Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road, 5 Journal of World Investment & Trade 231, 232 (2004).

[139] *Tradex v. Albania*, Decision on Jurisdiction, 24 December 1996, 5 ICSID Reports 47, 60-61 applying a provision on waiting periods in national legislation; *Tokios Tokel_s v. Ukraine*, Decision on Jurisdiction, 29 April 2004, paras. 101-107; *Salini Costruttori SpA et Italstrade SpA c/ Royaume du Maroc*, Decision on Jurisdiction, 23 July 2001, Journal de Droit International 196 (2002), 6 ICSID Reports 400, at paras. 15-23.

[140] *See Wena Hotels v. Egypt*, Decision on Jurisdiction, 29 June 1999, 6 ICSID Reports 74, 87 where the Tribunal noted approvingly that the Respondent had withdrawn its objection to jurisdiction based on the waiting period; such case was not decided under a BIT but under 1120 of the NAFTA: *Ethyl Corp. v. Canada*, Decision on Jurisdiction, 24 June 1998, Decision on Jurisdiction, 7 ICSID Reports 12 at paras. 76-88 where the Tribunal dismissed the objection based on the six-month provision since further negotiations would have been pointless.

[141] Preamble of the ICSID Convention 1965.

Foreign investor may institute arbitration proceedings under jurisdiction of the Centre upon prior successful conciliation under the Convention.[142] 1993 Model Clauses, *Clause 1 and Clause 2,* provide guidelines for the procedure of conciliation under jurisdiction of the Centre.

Consent will be considered to be valid for conciliation followed, if the dispute remains unsolved within a certain period of time, by arbitration. Therefore, party to the dispute are not strictly obliged to exhaustion of prior conciliation but a method offered under the ambit of the Convention. Model Clause 1 refers to conciliation for future dispute and Model Clause 2 refers to conciliation for the existing disputes. Again party autonomy should be given priority whether to go for conciliation process before instituting arbitration to the Centre. If the foreign investors institute arbitration proceedings to the Centre and the host state participate to the proceedings that waive the condition of prior conciliation and constitute consent to jurisdiction of the Centre.

3.7 Approval of consent of constituent subdivision or agency

Art.25 (3) of the ICSID Convention requires state approval for the consent of constituent subdivision or agency to the jurisdiction of the Centre unless that particular state notifies the Centre that no such approval is required. There is no particular forms of approval by the host state is required to the jurisdiction of the Centre for the consent of the constituent subdivision or agency. This approval could be by way of an application to the foreign investment board of the host state or in the case of local government a bill to be passed by the central government or the approval may be contained in an instrument of designation communicated to the Centre.[143] Unlike designation of the constituent subdivision or agency, the approvals need not to be communicated to the Centre in writing. But it is necessary for the foreign investors and the constituent subdivision or agency in the agreement to have knowledge of the State approval. If approval of consent is an unilateral approval by the host state of any constituent, subdivision or agency for any particular investment agreement it is

[142] Christoph Schreuer; Model Clause, 4 ICSID Reports 359-360.
[143] *Attorney General v. Mobil Oil NZ Ltd*., (ICSID Case No.ARB/87/2), available on the ICSID Website.

necessary for the foreign investors to have a written document of the approval for the validity of consent to the jurisdiction of the Centre by constituent subdivision or agency.

Revocation of the approval of consent by the constituent subdivision or agency to the jurisdiction of the Centre is prohibited under the Convention once the host state approved it[144] in other word, when it is perfected through offer and acceptance by the parties. This provision safeguards the foreign investors from being victimised by the host state in case of any disagreement with the State governing authority. This also includes any legislative amendment or repeal in the host state legislation giving approval to the consent of constituent subdivision or agency of the host state. If an approval is given by the host state to the consent of its constituent subdivision or agency and later the State pass any ordinance overruling the approval the validity of the consent will not be affected. Illustration of this situation can be seen in the following case.

Eastern Duty Free (EDF), a UK-based duty free operator entered into two agreement in 1992 with the State of Romania to operate duty free sales at Bucharest *Otopeni airport* and on *Tarom* Romania's national airline. The officials of prime minister's office approached the management authority of EDF $2.5 million bribe. The company refused to pay the bribe consequently, the Romanian government passed an emergency ordinance over riding the contract.[145] EDF is bringing its claim to the Centre for arbitration based on the arbitration clause in the agreement. The above mentioned emergency ordinance will not affect the validity of the consent to the jurisdiction of the Centre under Art.25 (1) of the Convention because consent, once given under this provision, is irrevocable.[146]

Approval may not be needed if the constituent subdivision or agency has exclusive competence to enter into agreement with foreign investors of corporations under the constitution or the domestic law of the contracting state. Constitutions of some contracting

[144] ICSID Convention Art.25 (1), its last sentence reads "when the parties have given their consent, no party may withdraw its consent unilaterally."

[145] Reported in the Financial Times Friday, May 2, 2008.

[146] *Societe Ouest Africaine de Betons Industriels (SOABI) v State of Senegal*, ICSID No. ARB/82/1, Decision on jurisdiction 1984, 2 ICSID Reports 175.

states disallow the constituent subdivision or agency to enter into agreement with foreign investors. If constituent subdivision or agency of those contracting states enters into an agreement with foreign investors without approval of central government the act of giving consent would be unconstitutional and invalid.[147] In such circumstances foreign investors are well-advised to make inquiry about the restrictive nature of the parent law of the host state before entering into an agreement with state organs or entities.

Approval of consent of the constituent subdivision or agency of a host state to the jurisdiction of the Centre does not make the host state responsible for any legal consequence or award neither amount to consent to the jurisdiction by the host state itself. When consent is given by the constituent subdivision or agency of the host state it is independent consent to the jurisdiction and the host state will not be a party to the arbitration. In terms of any liability or award given against the constituent subdivision or agency it must be borne by them independently. In case of semi-governmental entity distinct from the State the liability would be according to the proportionate of the share in the entity.

3.8 Consequence of sovereign consent to investment arbitration

State consent to arbitration authorises foreign investors to bring claims against sovereign States in disputes arising from the government's exercise of public authority through commercial conduct of State entities in investment contract, and without any requirement for claims to be monitored by the investor's home State or by an international trade regulatory authority.[148] Under investment treaties, States give a prospective general consent to the arbitration of future investment disputes.[149] The State's consent is general because it is not limited to a specific investor, investment project, or dispute or series of

[147] Article 76 Federal Constitution of Malaysia; Federal Law of St. Kitts and Nevis cited in *Cable TV v. St. Kitts and Nevis*, 13 January 1997, ICSID Review Foreign Investment Law Journal 324 (1998); *See also LETCO v. Liberia*, June 21 1983, ICSID Case No. ARB/83/2, available on ICSID website.

[148] Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' The European Journal of International Law (2006) Vol. 17 no.1, p.121.

[149] Paulsson, (1995) at 232-233.

disputes arising from a defined historical event. Instead, the consent authorises the initiation of compulsory arbitration by any member of an indeterminate class of potential claimants in relation to a very wide range of disputes. Consequently, this allows foreign investors to bring action against the owner-State in the investment agreement of its entity with foreign investors. This in effect also provides international investment arbitration tribunals with general jurisdiction over disputes that may arise in the future from the State's exercise of commercial activities through State entities.

State consent to ICSID arbitration commonly entails a broad waiver of the State's customary immunity from suit before an international investment arbitration tribunal or before a domestic court in the process of enforcing an international award. Customary international law adopts the presumption that the resolution of a regulatory dispute involving a foreign national is, in the first place, a matter of domestic law of the State in whose territory the dispute arose.[150] States are not subject to the compulsory adjudication of disputes within their territory, whether by international tribunals or foreign courts.[151] A dispute arising from one State's treatment of an investor of another State could conventionally trigger a claim of diplomatic protection by the investor's home State, but the investor could not make an independent claim under international law.[152]

Moreover, a claim of diplomatic protection by the home State could only be made after the investor had exhausted local remedies, giving the host State the opportunity to address the investor's complaint before any resort to international law.[153] Even then, the dispute could only be referred to international tribunal with the consent of the host State. With one exception, no international tribunal, including the ICJ, has been given general jurisdiction

[150] Case Concerning the Payment of Various Serbian Loans Issued In France (*France v Serbia*) (1921), PCIJ Ser A, No. 20, para. 41. W. Peter, Arbitration and Renegotiation of International Investment Agreements (1995), at 167-169.

[151] E.g. Status of Eastern Carelia, Advisory Opinion (1923), PCIJ Ser B, No. 5, 27; Ambatielos Claim (*Greece v United Kingdom*) (1956), 12 RIAA 83, at 103.

[152] Mavrommattis Palestine Concessions (*Greece v Great Britain*) (1924), PCIJ Ser A, No 2, 12; M.O. Hudson, International Tribunals (1944), at 67-69 and 198.

[153] Ambatielos, at 118-119; Interhandel Case (*Switzerland v United States*) [1959] ICJ Rep 6, at 26-27; C. Eagleton, The Responsibility of States in International Law (1928), at 70; Okowa, 'Admissibility and the Law on International Responsibility' in M.D. Evans (ed.), International Law (2004), at 493-494.

over disputes between States and foreign nationals.[154] Also, the reluctance of many States to refer investment disputes to the ICJ has meant that few cases involving the regulatory relationship between States and foreign investors have come before that court.[155] Before the recent proliferation of general consents by States to investment arbitration, investment treaties usually made provision for the resolution of international disputes that engaged the regulatory relationship between the State and investors through inter-state adjudication and diplomacy.

Present form of investment treaties authorise individual claims and, in doing so, they go beyond conventional international adjudication involving a claim by one State against another. Moreover, because investment treaties authorise individual claims in relation to future disputes based on the general consent of the State, they go beyond historical claims tribunals which allowed individuals to make international claims. Historically, individuals were occasionally authorised to bring claims against States before tribunals created in the aftermath of war or revolution. E.g., the Alabama Claims Arbitration established after the American Civil War, the Mixed Tribunals and Claims Commissions after World War I, the Iran-United States Claims Commission after the Islamic revolution in Iran, and the UN Compensation Commission after the Gulf War of 1990-1991.[156] For example, the Iran-US Claims Tribunal, [157] States have authorised international tribunals to resolve disputes arising from one State's treatment of the nationals of another and, in some cases, claims could be brought directly by foreign investors.

Individual claim was established by the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the settlement of claims by the government of the United States of America and the Government of the Islamic Republic of Iran (Claims

[154] The exception is the Central American Court of Justice of 1907-1918: see Hill, 'Central American Court of Justice' in R. Dolzer et al. (eds), Encyclopedia of Public International Law (1987), i, 41-42.

[155] M. Sornarajah, The Settlement of Foreign Investment Disputes (2001), at 19-20; See *Barcelona Traction, Light and Power Co (Belgium v Spain)* [1970] ICJ Rep 3, 9 ILM (1970) 227; *Elettronica Sicula SpA (United States v Italy)* [1989] ICJ Rep 14; and *Anglo-Iranian Oil Company (United Kingdom v Iran)* [1952] ICJ Rep 93.

[156] J. Collier and V. Lowe, 'The Settlement of Disputes in International Law' (1999), chaps 1 and 3.

[157] R.B. Lillich and D.B. Magraw, The Iran-United States Tribunal: Its Contribution to the Law of State Responsibility (1998).

Settlement Declaration), 19 January 1981.[158] Nevertheless, historical claims tribunals did not involve generalised prospective international adjudication because the authority of such tribunals was retrospective. Adjudicative authority was granted to an international tribunal only after the fact, and that authority was limited to disputes arising from a distinct period, series of events, or subject matter. The Iran-US Claims Tribunal In 1981, after the Islamic Revolution of 1979, Iran and the United States consented to the compulsory arbitration of claims by each other's nationals arising out of 'debts, contracts. . . , expropriations or other measures affecting property rights', allowing foreign nationals to make direct claims before the Tribunal if they each amounted to US$250,000 or more, and if they were 'outstanding' on 19 January 1981. Thus, the Tribunal had compulsory jurisdiction over a certain body of individual claims, limited to a roughly two-year period following the revolution. [159]

This retrospective consent differs from an advance State consent to investment arbitration as discussed in this chapter. Since the former is given after the events in question have taken place, a State is more able to anticipate the significance of its acceptance of compulsory investment arbitration. By giving a general prospective consent in a national legislation or investment treaty, the State exposes itself to claims by any foreign natural person or multinational enterprise in an investment contract not only with the State but also with its entities that may be detrimentally affected by the State's exercise of public authority. As a result, investment arbitration encompasses future disputes that involve an indeterminate class of potential claimants known as foreign investors in relation to a broad range of governmental activity.

Consent to investment arbitration under ICSID is not only prospective; it also features the lodging of individual claims made in a uniquely far-reaching form. Investment treaties define the scope of the State's consent and the jurisdiction of international tribunals in broad terms, generally apply international standards of investor protection to virtually any

[158] Art. II of Algiers accords January 19, 1981 Declaration of the Government of the Democratic and Popular Republic of Algeria.
[159] Algiers Declaration.

sovereign act of the State, and define 'investment' to include a very wide range of assets.[160] Furthermore, the standards by which governmental acts are evaluated are drafted sometimes in broad and ambiguous terms. The definition of the standards generally settles, in favour of investor protection, historical controversies about whether and how international law protects international trade from discriminatory treatment, denials of justice, expropriation, and other forms of interference or regulation by the State.[161] As a result, some scholars in investment arbitration claims that a wide range of regulatory disputes between investors and the States has become subject to control through international arbitration at the instance of investors.[162]

3.9 Conclusion

The initial challenge to bring a sovereign State to investment arbitration in the agreement between the State entity and the foreign state is to establish the rational that the State is a party to the arbitration agreement of its entity. This has been proven in the earlier chapter that a State is in fact a party to the investment agreement of its entity. Having done that, the examinations have been extended in this chapter in relation to the State consent offered by national legislation, bilateral and multilateral investment treaties and whether there is any limitation in it. The discussion was also linked with the main issue in this thesis is whether the Sate consent through this instruments extend to the agreement of State entity with foreign investors, therefore State is responsible?

Clearly State consent to investment arbitration is proven to be willingness of sovereign States to waive their rights to immunity under the long established principle of public international law. However, this waiver is not a total disregard of the exercise of their sovereignty, with foreign investors in certain circumstances but a reluctance of sovereign States to invite foreign investment in the home State. This unilateral State consent to

[160] Wälde, 'Investment Arbitration Under the Energy Charter Treaty-From Dispute Settlement to Treaty Implementation', 12 Arb Int'l (1996) 429, at 434-436.

[161] P.T. Muchlinski, *'Multinational Enterprises and the Law'* (2nd edn.Oxford Uni. Prss 2007), at 173.

[162] Gus Van Harten and Martin Loughlin,' Investment Treaty Arbitration as a Species of Global Administrative Law' *Eur J Int Law (February 2006) 17 (1): 121-150. doi:10.1093/ejil/chi159.*

arbitration in national legislation and investment treaties is not bar to immunity and it is unlikely that the tendency of States or Governments to object to jurisdiction of arbitral tribunal will totally diminish if it is necessary for the State.

Having considered the nature of consent as a matter of international law, it becomes clear that State consent to investor-state arbitration is an independent legal obligation. It follows that the operation of the State's consent must be irrespective and independent of actions of the investor, and that the State's consent embodied in investment treaties may not be withdrawn simply because there has not been "acceptance" by a particular investor of an "offer" to arbitrate. Rather, the consent to arbitration by a host State in the context of investment-treaties and laws has more definite legal consequence. It creates a legal bond and one strong enough to create a reliance interest in foreign investors making an investment decision. It is also inconsistence with the principle of *pecta sunt servenda* to withdraw consent while the agreement was entered into by a State entity which was approved by the State.

This fundamental understanding of instruments of State consent is consistent with their basic and express purpose. Such consents by their nature are an indemnity policy for foreign investors, providing an international forum should their investments be subjected to unfair treatment or expropriation after a change in the political inclinations of a host State. As such, instruments of consent have to be sufficiently robust to endure a political change in the host State, even fundamental or cataclysmic change, given that exactly such worst-case scenarios may be among those intended to be protected against. But this does not mean that the instruments of State consent cannot include a limitation clause towards certain disputes or matters. It can also include a provision requiring consent subject to any condition as long as they are not inconsistence with the mandatory provision of ICSID Convention.

This page is intentionally left blank

CHAPTER 4 Jurisdictional Immunity of State entities in Investment Arbitration

4.1 Introduction

The doctrine of Sovereign Immunity is a principle of customary international law which is based on the equality of sovereign States. The doctrine consists of two stages of immunity, immunity from jurisdiction and immunity from execution. At the first stage the doctrine precludes the institution of any legal proceedings against a sovereign or State, in the competent courts of another country as well as arbitration proceedings, unless it consents to the jurisdiction of the forum State. Even if a State consented to the jurisdiction at the first stage it can still raise immunity from execution in the second stage. Under the new UN Convention on Jurisdictional immunities of States and Their Property the term 'State' is broadly defined to include its various organs, instrumentalities, as well as the constituent units of a federal state or the political sub-divisions. [1]

The principle that has been established in the second chapter that the State is a party to the investment agreement of its entity with foreign investors and therefore the arbitration tribunal has jurisdiction over the State. Third chapter has established the principle of State consent and its limitation through national legislation, bilateral and multilateral treaties to be a party to the agreement of its entities. Now the vital question in this chapter is whether State entities are entitled to claim immunity both in relation to jurisdiction and execution? In essence, this means that a Sovereign State and its other affiliates cannot be compelled to submit to the jurisdiction of foreign national courts, and international arbitration tribunals including its own competent national courts. This chapter will explore particularly whether State entity will be entitled to jurisdictional immunity? The main purpose of sovereign or State immunity is to promote the smooth functioning process of all governments by protecting States from the burden of having to defend litigation in a foreign country.

[1] The General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property on December 2, 2004; *See* General Assembly Resolution 59/38, annex, *Official Records of the General Assembly, Fifty-ninth Session, Supplement* No. 49 (A/59/49).

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 and its affiliates were only engaged in activities that were restricted to the public or governmental functions then. In The twentieth century, however, with increased state participation in the international trade and commerce mostly with the incorporation of State entities, instrumentalities or sovereign wealth funds (SWFs) which had embarked on bilateral and multilateral treatises on investment protection that incorporated an option for the private parties mostly foreign investors involved to arbitrate matters relating to 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 and absolute sovereign immunity has been gradually limited and in the course of time, a doctrine of restrictive immunity has been emerged.

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 in the matter relating to state participation to the commercial activities. The prevailing practice of state immunity now relates only to those activities of foreign States that fit into certain carefully restricted areas of public activity and not any commercial activities. Under this new doctrine, the forum state has no obligation to grant immunity to the *acta jure gestionis* (commercial activities) of the foreign State; thus, limiting the latter's privilege to *acta jure imperii* (governmental activities public in nature).

Restrictive immunity on its own part operates to grant the State immunity from legal suit where legal action arises out of the pure governmental acts of the foreign state but this immunity may not be obtained where the dispute is purely commercial in nature.[2] A State could be involved in commercial contracts in a various different ways. Its standing as a contracting party and, hence, its commitment to an arbitration clause could lead to

[2] Sornarajah, M., The pursuit of Nationalised Property (Dordrecht-Boston-Lancaster: Martinus Nijhoff, 1986) p.253.

protracted disputes before either arbitral tribunals or subsequently to the national courts. Various national legislations have adopted this restrictive immunity approach which is also reflected in the European Convention on State Immunity of 1972. [3] However, as parties to these disputes often lack confidence in the domestic courts of the forum State, international commercial and investment arbitration has emerged as the favoured means of resolving these contentious issues.

Yet, investment arbitration is restrained with its own segment of problems since 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."[4] The problem further extends when one of the parties is state organ, entity, instrumentality or sovereign wealth fund (SWF) as to whether they will enjoy sovereign immunity? The problem of state immunity is compounded in contracts of its entities where the State has structural and functional control over them. The present chapter discusses the distinctions between the public and private activities of state and its various affiliates and representatives to that extent whether they are entitled to immunity. It also examines 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. Further it explores another relatively new concept of sovereign wealth funds (SWFs) and the nature of their investment activities in relation to the jurisdictional immunity.

4.2 Rationale for Sovereign Immunity

What is the justification for state immunity from jurisdiction of foreign national courts and arbitral tribunal? According to Hazel Fox, one can treat this question as one of the theory of legal considerations which support the institutional structure of the international community. The theory has not played a great part in the development of the law of immunity. However, the current doctrine of restrictive immunity has theoretical

[3] 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.

[4] Georges R Delaume, 'Sovereign Immunity and Transnational Arbitration', 3 Arb. Int'l 28 (1987).

underpinnings.[5] Hohfeld defines it as one's freedom from the legal power or control of another as regards some legal relation.[6] Power nears the same general contrast to immunity as a right does to a privilege. A right is one's affirmative claim against another and a privilege is one's freedom from the right or claim of another. Similarly a power is one's affirmative control over a given legal relation as against another; whereas immunity is one's freedom from the legal power or control of another as regards to legal relation.[7]

State immunity has been justified on a variety of grounds. First, the regulatory power of the State, coupled with an ability to make and enforce laws effectively within its territory. The maintenance of an army and a police force are aspects of this enforcement power. Second, by reason of the regulatory power, free from external intervention, control over the economy and natural resources also centred in the State; the economic health of the country is largely dependent on the decisions and activity of the State and its government. Third, these regulatory powers are exercised for the public good, and not for personal profit. Democratic accountability ensures that the causes which the State espouses are truly in the public interests; unlike the self-serving nature of the private sector, government acts altruistically solely to achieve within the constitutional power conferred upon the greater public benefit.[8]

Freedom from the legal power or control of another is the status of equality attaching to the independent sovereign, which is said to preclude one State from exercising jurisdiction over another under the principle of *par in parem non habet jurisdictionem* which means one sovereign State is not subject to the jurisdiction of another State.[9] This is often referred to invoke as the basis for absolute immunity, which was held in the French case, *Lambège et Pujol* that mutual independence of States is one of the most universally recognised principles of the law of nations. The consequence of this principle is that a government may

[5] Hazel Fox, *The Law of State Immunity* (2nd edn. Oxford 2008) p. 45.
[6] W. Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning (1913) 23 YALE L.J. 16, 28-59.
[7] Hohfeld, *Jural Opposites* (ed. Campbell and Thomas 2001) P.28.
[8] Oliver, 'The Frontiers of the State: public Authorities and public Functions under the Human Rights Act', PL (2000) p. 466.
[9] Jean Bodin, *Six Books of the Commonwealth* (1976), Trans, Tooley, Methodus, p. 174-5.

not be made subject to the jurisdiction of a foreign State for the engagements, e.g. responsibilities it takes by way of agreements etc., it makes.[10] Although this rationale is primarily associated with the absolute theory, it has also been framed in some cases in a manner consistent with the restrictive approach to sovereign immunity, by limiting its effective scope to the sovereign acts of the foreign State, saying that the sovereign or governmental acts of one State are not matters on which the courts of other States will adjudicate.[11]

A second ground in support of jurisdictional immunity is that of non-intervention in the internal affairs of other States. As noted by Professor Brownlie, "the rationale rests equally on the dignity of the foreign nation, its organs and representatives and on the functional need to leave them unencumbered in the pursuit of their mission".[12] There is also no doubt that court proceedings against foreign states may generate tensions and interfere with the conduct of international relations. A number of commentators have pointed to another aspect that may be relevant in the current context with regard to Sovereign Wealth Funds.[13] It is that the economic interests of States may affect their interpretation of state immunity principles. Professor Paul Lagarde comments considerations specific to States significantly influence the supposed interpretation of international law in the development of their own national law of immunity. To a substantial degree it is the interests of States and businesses in those States that determine the national rules applicable to the immunity of foreign States.[14]

[10] Cass. January 22, 1849, *Gouvernement espagnol c Lambège et Pujol*., Sirey 1849, I, 81.

[11] *I Congreso del Partido*, [1983] 1 AC 244, 64 ILR 307; see also P. Mayer & V. Heuzé, Droit international privé (9th ed. 2007) p. 324.

[12] I. Brownlie, '*Principles of Public International Law*' (7th ed. 2008) p. 326.

[13] *see*, M. Sornarajah, 'Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments', Asian Journal of International Law, 2011, vol. 1, iss 1, 267, 273; L.Catà Backer, 'Sovereign Wealth Funds as Regulatory Chameleons: the Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investing', Georgetown Journal of International Law, vol. 41, iss. 2, 425, 428-429; Andrew Rozanov, 'Definitional Challenges of Dealing with Sovereign Wealth Funds', in Asian Journal of International Law, 2011, vol.1, no.2, p.249; Edwin M. Truman, '*Sovereign Wealth Funds: Threat or Salvation?*',

[14] Paul Lagarde, Conclusions générales, in I. Pingel, ed., Droit des immunités et exigences du procès équitable, (2004), p. 152 (citing note by L. Collins on the UK SIA in *Revue critique de droit international privé*, p. 171 (1980)).

In this regard, in the current context in which States are recipients of investment by foreign State entities or Sovereign Wealth Funds and have been actively seeking to attract particularly Sovereign Wealth Fund capital to their domestic business sectors, it is important to note that the international law of state immunity generally requires that States provide each other with certain protections from the intervention of national courts. It does not preclude States from offering additional immunities. In other words, the law creates a floor of minimum protection, but does not create a ceiling. As a matter of the law of state immunity, States are free to adopt laws, treaties or policies that extend immunities, as a matter of discretion, beyond those required by international law.[15] For example, bilateral tax treaties may grant immunity to specified entities that go beyond those required under international law. In the current context, competitive pressures may express themselves through broader discretionary grants of immunity to important potential investors such as Sovereign Wealth Funds. There have been a number of attempts to find other legal grounds to limit immunity. One notable example is the argument that excessive immunity denies the right of private parties to access to justice protected by, for example, Article 6 of the European Convention on Human Rights.

Various issues may come to play in the rationale for sate immunity. The uncertainty about the boundaries of state immunity frequently makes it difficult to determine whether a particular extension of immunity is mandated by international law, is discretionary or is in a middle ground where it reflects the State's view of what is mandatory under international law is an uncertain area. Where the law is uncertain, there can be good reasons to clarify the applicable policy beforehand. In some cases, however, it is possible that framing a policy as one related to state immunity, without clarifying whether it is a discretionary grant or a mandatory one, may unduly limit the debate on the merits of the policy as such. Therefore, international community needs to establish a uniform practice in relation to both absolute and restrictive immunity based on the past trend and development of the doctrine.

[15] *See* generally I. Pingel, ed., Droit des immunités et exigences du procès équitable (2004).

4.3 Development and the Journey of the Doctrine of Sovereign Immunity

Sovereign immunity is a doctrine that precludes the institution of a legal suit against the sovereign or state 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. 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 back to the period of imposed personal sovereignty when the Monarchy used to practice the theory known as 'the King could do no wrong' and where the exercise of authority by one sovereign over another, in any form, indicated hostility or superiority.[16] 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.

Governmental practice of many states supports the view that personal immunities of diplomats and foreign sovereigns are granted not for the benefit of the individuals concerned, but for the benefit of the State they represent, for instance, paragraph 3 of an earlier report on diplomatic immunity states the practice of foreign office is based on the principle that diplomatic immunity is accorded not for the benefit of the individual in question, but for the benefit of the State in whose service he is, in order that he may fulfil his diplomatic duties with the necessary independence.[17] Lord Hewart C.J. said that the privilege of immunity attaching to a person having diplomatic status is the privilege not of himself, but of the sovereign by whom he is accredited, and the right of waiver of such privilege belongs to such sovereign. The claiming and waiver of the privilege was not a matter within the violation of the defendant, who being forbidden by his superior to claim immunity could not do so.[18]

[16] Guy Seidman, "The Origins of Accountability:Everything I know about sovereign immunity, I learned from King Henry III"(2005) 49 St. Louis U. L.J. 393.

[17] Michael Brandon, "Report on Diplomatic Immunity", I.C.L.Q. (1952), p. 358; Art. 19 of the Pan American convention of February 20, 1928 signed at Havana.

[18] *Dickinson v. Del Solar* [1930]1 KB 376, at p. 380.

It is of the greatest significance that in the very limited field of present inquiry, namely commercial acts of state or State entities, there have been judicial dicta to the effect that final decisions on immunity in relation to commercial activities as well as in other circumstances should be based on the analogy with that of diplomatic agents or personal sovereigns. A pertinent illustration is given in the case of *The Parlement Belge* by Lord Justice Brett where the question was whether a vessel belonging to Belgium and used by that government in carrying the mail and in transporting passengers and freight for hire could be subjected to a libel in rem in the admiralty court of Great Britain. The court held that it has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on private trading adventure. It was further explained that an ambassador cannot be personally, sued, although he has carried out commercial activities; and in both cases because such a suit would be inconsistence with the independence and equality of the sate which he represents.[19] Based on this discussion it seems clear that attempts have been made on the part of national courts to draw such a broad and general comparison and analogy from existing principle of international law relating to ambassadors and personal sovereigns.

Classical writers in international law, during its formative stages, largely dealt with only the personal immunities of sovereigns and ambassadors. Gamal Moursi Badr[20] mentions a distinction that was already drawn between a foreign sovereign's or an ambassador's 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.[21] The same author also states that the property of a sovereign, private or public is subject to the authority of the Judge of the local jurisdiction. 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

[19] *The Parlement Belge* (1880) 5 P.D. 197.

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

[21] 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)].

sovereign immunity chiefly to avoid possible embarrassment to those responsible for the conduct of a nation's foreign relations.

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 consequence of the rise of nation States based upon the Cult of Political Sovereignty articulated by Jean Bodin and others.[22] It has been suggested [23] that historical records show that Jean Bodin, a French political scientist and jurist, was the first among writers to develop the concept of sovereignty in the sixteenth century.[24] 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.[25]

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.[26] 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.[27] 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.[28] 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

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

[23] Ernest K Bankas, The StateImmunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts, Berlin (2005) at p. 2.

[24] 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.

[25] Appadurai, A. *The Substance of Politics*, (New Delhi Oxford University Press) at p. 48.

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

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

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

independence, dignity of States, the need for comity among States, the legal nature of the sovereign property and their diplomatic functions in relation to their international personality. In fact, the view that sovereignty is unlimited, indivisible, 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.[29] 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. Therefore, 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.

During the twentieth century, as instances of governments getting involved in commercial transactions of an international nature became evermore common, courts and international tribunals became increasingly cautious of granting States immunity for all of their activities, whether governmental or commercial. To this end, the courts and international tribunals began to draw a distinction between those activities of a State that were public and those that were private in nature. Highest national courts in United Kingdom and United States 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

[29] George Sabine, '*A History of Political* Theory'(3rd Holt Rinehart and Winston 1961, New York)at p. 348-385.

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.[30] 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.[31] Following the extensive involvement of States in international trade through incorporation of State entities leads to States' withdrawal from a range of absolute governmental functions as well as transfer of those functions to non-State authority poses a challenge to legal conceptions of the boundary between the public and private conduct of the States. Therefore, it is important to determine the nature of state activities to be considered for sovereign immunity.

4.4 Nature of Sovereign Activities

Fundamental question lies on the definition of the sovereign and the nature of conduct to be considered for immunity. Capping more than a quarter of a century of intense international negotiation, the UN treaty on state immunity 2004 is the first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity.[32] It defines the term "state" broadly to include the State itself and its various organs of government, as well as the constituent units of a federal state or the political sub-divisions of the State if "entitled to perform acts in the exercise of sovereign authority, and ... acting in that capacity".[33] It also includes the "agencies and 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

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

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

[32] The General Assembly adopted the UN State Immunity Convention on December 2, 2004.

[33] Art. 2(1) (b) (i), (ii) According to the 1991 ILC Commentary, "The term 'State' should be understood in light of its object and purpose... as comprehending all types or categories of entities and individuals so identified which may benefit from the protection of State immunity." For background on the inclusion of "constituent units of a federal State" and "political subdivisions," see 1999 ILC Report.

State".[34] The definition of "state" also explicitly embraces "representatives of the State acting in that capacity."[35] By including individuals who represent the State in addition to heads of state, whose immunity, *ratione personae*, is specifically dealt with in Article 3(2), the convention clearly endorses the broader principle of "foreign official immunity." A growing number of U.S. courts have held that the FSIA applies to individual officials of foreign governments to the extent their actions were performed in their official capacities.[36]

As noted in the Santiago Principles developed by the International Working Group, Sovereign Wealth Funds (SWFs), discussed in detail at the end of this chapter, can take a variety of forms such as separate legal entities (e.g., Khazanah Nasional of Malaysia, Oil Stabilisation Fund of Iran, Public Investment Fund of Saudi Arabia, Kuwait Investment Authority, QGPC of Qatar, UAE (ADIA), Australia, and Temasek and GIC of Singapore) or pools of assets without separate legal personality (e.g., Chile, Canada (Alberta), Mexico, Norway, Russia, Timor-Leste, and Trinidad and Tobago).[37] For the latter type, the owner may exercise the functions of the governing bodies through one or more of its organisational units (e.g., a ministry, a parliamentary committee, etc.). In some cases, operational management may be delegated to an independent entity, such as the central bank (e.g., Chile, Norway, Timor-Leste, and Trinidad and Tobago) or a separate statutory agency (e.g., Canada, Alberta). The Principles further divide separate legal entities into separate legal "identities" (legal entities under public law with full capacity to act and governed by a specific constitutive law) and state-owned corporations.

Some general observations can be made with regard to two important types of structures, one is a separate State-owned legal entity such as a State-owned corporation; and the other

[34] Art. 2(1)(b)(iii). The terms "organs," "agencies," and "instrumentalities" as used in the convention thus do not have precisely the same meaning as they do under the FSIA.

[35] Art. 2(1)(b)(iv). The relevant ILC commentary confirms that a broad reading was intended because "actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the Statethey represent." 1991 ILC Commentary.

[36] See, e.g., *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990); *Jungquist v. Al Nahyan*, 115 F.3d 1020 (D.C. Cir. 1997); *Velasco v. Gov't of Indonesia*, 370 F.3d 392 (4th Cir. 2004).

[37] See International Working Group of Sovereign Wealth Funds, Sovereign Wealth Funds; Generally Accepted Principles and Practices (Santiago Principles) (October 2008) at p. 15, available at http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf.

is a structure that is part of the State without separate legal personality. A substantial number of SWFs are linked with in some manner to their national central bank. They may be created as part of the central bank or managed by the central bank. The Santiago Principles allow management of an SWF being delegated to an independent entity such as central bank as one way to achieve the desired operational independence. The foreign central banks are generally not subject to special rules with regard to immunity from jurisdiction. Generally if a central bank is part of the State, it benefits from immunity in the same manner as the State. If it is separate entity, it will enjoy immunity if it is engaging in sovereign acts but not if the nature of the acts is commercial.

In broad terms, two principal approaches are taken to the relationship between state-owned entities and the foreign State.[38] Under the European Convention on State Immunity (often referred as ECSI) and in the State Immunity Act of UK, Australia and most civil law States, activities of such companies are placed outside the State providing they operate independently from the State. The ECSI uses separate legal personality and the capacity to sue and be sued as the factors to determine whether the activities of an entity or company are independent of the State.[39] In general, activities of separate State entities are not entitled to immunity from adjudication or execution. Activities of such entities are immune only if they are carried out in the exercise of sovereign authority. In contrast to the ECSI-type approach, the US FSIA defines the activities of overall foreign State more broadly. It includes the activities of certain majority State-owned companies under its definition of "agencies and instrumentalities" of the foreign State.[40] Definition of state in the new UN Convention on Jurisdictional Immunities of States and Their Property 2004 is similarly broad as US FSIA. Thus, under the broader definition of state activities in relation to immunity

[38] Such enterprises are addressed under national laws and treaties under various rubrics, including "separate entities" (UK, Australia), "agencies and instrumentalities" (US) and "legal entities" (ECSI).

[39] The ECSI (art. 27) distinguishes agencies of the State from its organs by excluding from the expression "Contracting State" any legal entity of a Contracting State which is distinct therefrom and is capable or suing and being sued. Such distinct entities are not part of the State even if they have been entrusted with public functions. Under Article 27(2), proceedings may be brought against such entities "in the same manner as a private person" except in respect of sovereign acts.

[40] The US uses its broader definition of the State for purposes of determining when to plead immunity for a US agency in a foreign court. As noted above, the decision on immunity rests with the foreign court.

includes activities of State entities and instrumentalities, the principle will be applicable on the entities if it is applicable to the State.

Activities of the States and their entities to be considered for sovereign immunity must be purely public in nature. If the activities of State and state-entities are private or commercial in nature forum state may not grant immunity. This is determined in investment arbitration based on the nature and purpose of the State conduct. Therefore, it is important to distinguish the nature of the activities of state and state-entities whether they reflects pure public purpose or private commercial conduct.

4.5 Waiver of Immunity

Waiver of immunity by States in international investment arbitration is an issue both in jurisdiction and enforcement of an arbitration award. The issue of waiver in enforcement measure is discussed in the following chapter. An express waiver of immunity is required by the State for the jurisdiction of arbitral tribunal against a State. This waiver can take place by inclusion of an arbitration clause in the direct contract or enacting a provision in the national legislation or relevant treaty.[41] In the absence of an express waiver of immunity, the question arises whether submission to arbitration should be regarded as an implicit waiver of immunity. The overwhelming weight of authority calls for an affirmative answer. Decisions of arbitral tribunals,[42] treaty and statutory provisions found in the UN Convention on State Immunity and European State Immunity Convention, the US FSIA, and the UK SIA and the precedents of national courts,[43] all correspond that a State or its entity to an

[41] Christoph H. Schreuer, *'The ICSID Convention A Commentary'* (2nd Edition, Cambridge University Press, 2009) Ch. 2, Art. 25 on Jurisdiction.

[42] *Sapphire Int'l Petroleums Ltd. v. National Iranian Oil Co.* award, March 15, 1963, 35 ILR 136,170 (1967); *BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic* award, Oct. 10, 1973, 53 ILR 297, 311, and 356 (1979); *Texaco Overseas Petroleum Co./California Asiatic Oil Co. and the Government of the Libyan Arab Republic* award, Jan. 19, 1977, 17 ILM 3 (1978), 53 ILR 389 (1979), para. 10; *Libyan American Oil Co. [LIAMCO] v. Government of the Libyan Arab Republic* award, 20 ILM 1 (1981).

[43] *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied,* 381 U.S. 934, 85 S.Ct. 1763, 14 L.Ed.2d 698 (1965); *Petrol Shipping Co. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.), *cert. denied,* 385 U.S. 931, 87 S.Ct. 291 (1966); *Pan American Tankers Corp. v. Republic of Viet-Nam*, 296 F.Supp. 361 (S.D.N.Y. 1969); *Ipitrade Int'l, A.S. v. Federal Republic of Nigeria*, 465 F.Supp. 824

arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of the agreement.

Arbitral tribunals have no powers equivalent to domestic courts to enforce the awards; nor do they always have adequate powers to ensure the proper and efficient conduct of arbitration proceedings. For this reason, it has long been recognised that the effectiveness of the arbitration process is dependent upon a defined relationship between arbitration and the courts. The effectiveness of the arbitration process is guaranteed by the assistance of domestic courts.[44] A domestic court in a country that has ratified the ICSID convention is obliged to decline jurisdiction if a dispute is brought to it in contravention of an ICSID arbitration clause. This flows from the provisions of Art.26 of the ICSID Convention which provides "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 remedy".[45] The article only provides in the absence of any express stipulation to the contrary. Therefore, the issue as to whether or not consent to ICSID proceedings constitutes a waiver of jurisdictional immunity before domestic courts may not arise until the recognition and enforcement stage.

In *MINE v. Guinea*[46] the parties expressly agreed to submit any dispute arising between them to ICSID arbitration. Three years later MINE petitioned the U.S. court for the District of Columbia to compel arbitration under section 4 of the Federal Arbitration Act (FAA), asserting jurisdiction under both the FAA and the Foreign Sovereign Immunities Act (FSIA). Guinea declined to attend the proceedings and the court ordered arbitration before the American Arbitration Association (AAA). Guinea did not appear before the arbitrators who rendered an award in favour of MINE. On an application by MINE to the District court to confirm and enter judgment on the award, Guinea contended that the court's earlier order

(D.D.C. 1978); *Republique Socialiste Federale Yougoslave v. S.E.E.E., Decision of July* 8, 1970, Trib. Gr. Inst., Paris, 98J. Droit Int'l 131 (197 1). *See also Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F.Supp. 1175 (D.D.C. 1980).

[44] Okezie Chukwumerije, 'ICSID Arbitration and Sovereign Immunity' (1990) 19 Anglo-Am.L.Rev. 166.

[45] The Article further provides that a contracting state may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under the Convention.

[46] *MINE v. Guinea* (1982) 693 F. 2d 1094.

to compel arbitration rested on an incorrect premise because ICSID arbitration had indeed been available. The court confirmed the award and entered judgment on the ground, *inter alia,* that by agreeing to ICSID arbitration Guinea had impliedly agreed to submit to arbitration in the United States, since the ICSID headquarters are located in the U.S., and consent to arbitration in the United States constituted a waiver of Guinea's immunity from suit under section 1605(a)(1) of the FSIA.

The court ignored the fact that by virtue of section 1604 of the FSIA, the Act applies "subject to existing international agreements to which the United States is a party." One such agreement is the ICSID Convention under which consent to ICSID arbitration is exclusive of any other remedy.[47] The court ought to have relied on Art.26 of the Convention, not only to refuse to make an order for the initial AAA arbitration, but also to refuse to confirm the subsequent award. MINE breached the ICSID arbitration agreement by arbitrating under the auspices of the AAA. The District Court failed to recognise the fact that under the ICSID Convention, the issue of sovereign immunity before municipal courts does not arise until the recognition and enforcement stage, unless the parties have agreed otherwise.

The only stage at which the issue of sovereign immunity and ICSID arbitration may arise is at the recognition and enforcement stage, or in situations where, pursuant to Art.26, the parties agree that their consent to ICSID arbitration does not preclude them from remedies obtainable in the domestic courts. Where an issue relating to an ICSID arbitration is properly before a municipal court, can the State party plead jurisdictional immunity? Article 54 obligates states to recognise an award rendered pursuant to the Convention as binding and to enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. Each contracting State is thus obliged to assimilate

[47] This view was adopted in *LETCO v. Liberia,* (1988), XII *Y Comm. Arb.*35, where the agreement between the parties contained a clause referring future disputes to ICSID arbitration. The Tribunal found that the arbitration clause indicated a "clear evidence of the parties consent in writing to submit to ICSID."; See also *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (International Bank for Reconstruction and Development, 1965); A. Broches, "Bilateral Investment Protection Treaties and Arbitration of Investment Disputes" in J. Schultsz & A. Van Den Berg, *The Art of Arbitration (The* Netherlands, Kluwer Law and Taxation Publishers, 1982) 63 at 67; *K/ockner Industrie-Anlagen v. Cameroon* (1985), X *Y. Comm. Arb.* 71 at 74.

an ICSID award to the status of a final judgment of its local courts Thus; every state party to an ICSID arbitration must contemplate the involvement of fellow contracting States in enforcing any attendant award. Therefore, when such an award is sought to be enforced against a State party, it cannot fall back on the plea of jurisdictional immunity.

This issue arose in the case of *Liberia Eastern Timber Corp. v. Liberia* [48] in which, Liberia challenged the jurisdiction of U.S. Courts to enforce an ICSID award on the ground that the FSIA deprived the court of jurisdiction because Liberia had not waived its sovereign immunity by entering into an ICSID arbitration agreement. The court held that since Art. 54 requires contracting states to enforce ICSID awards, Liberia clearly contemplated the involvement of the courts of any contracting State, including the U.S. as a ratifying State, in enforcing the pecuniary obligations of the award. The court concluded that Liberia had waived its sovereign immunity before U.S. Courts with respect to the enforcement of the ICSID award.

Where the parties elect to pursue both ICSID and domestic remedies at the same time, the issue as to whether a State party can plead jurisdictional immunity with respect to domestic remedies has to be determined in accordance with the immunity rules in the State concerned. This is because such domestic remedies are outside the scope of the ICSID Convention. Provisions of the Convention are inapplicable in determining the validity of pleas of jurisdictional immunity in such circumstances.[49]

The ICSID framework is designed to reduce as much as possible, the dominance by national judicial institutions in the settlement of investment disputes and to afford parties a level playing ground where neither the investor nor the host State has undue influence. Sovereign Immunity is unique with which the State would ordinarily hold tenaciously unto its domestic adjudicatory institution of local courts or decline submission to another adjudicatory body. Submission to the ICSID is by consent whereas immunity is a privilege that can be waived by consent and so it is thought that by consenting to the ICSID a State

[48] *Liberia Eastern Timber Corp. v. Liberia* (1986) 650 F. Supp. 73.
[49] *Liberia Eastern Timber Corp. 650.*

waives its immunity. This contention was uphold by ICSID tribunal in the case of *AMCO v Indonesia* where the government of Indonesia argued that consent to ICSID arbitration constituted an extraordinary limitation on sovereignty by placing the foreign investor on the same level as the State. But the tribunal confronted with the argument that the consent given by a sovereign State to an arbitration convention amounting to a limitation of its sovereignty should be construed restrictively.[50]

The issue of immunity was also raised in the case of *Southern Pacific Properties Ltd and Southern Pacific Properties (Middle Est) Ltd v. Arab Republic of Eggypt*[51] where the Arab Republic of Egypt instituted proceedings before the court of appeal of Paris, pursuant to Article 1504 of the new France Code of Civil Procedure for the annulment of arbitration award rendered against it. Egypt maintained that it had never waived its immunity from the jurisdiction and asserted that arbitral tribunal had made its award without any arbitration agreement and that the award was in violation of customary international law and principle of sovereignty of states. The defendants argued that signature of Egyptian Minister of Tourism and signing the terms of reference of the tribunal by Egypt constituted arbitration agreement, therefore waived immunity. Setting aside the award the Court of Appeal of Paris held that the signature of terms of reference did not constitute an arbitration agreement. The arbitration clause could only be constituted by the arbitration clause inserted in the contract of 12 December 1974 and not by the terms of reference whose object was merely to define the questions subject to litigation. Throughout the arbitration proceedings Egypt denied the jurisdiction of the tribunal and its entitlement to immunity from jurisdiction. The entering of a defence on the merits, after the precaution had been taken of making a plea of lack of jurisdiction, could not imply waiver of immunity.

Therefore, it should be noted that a State party cannot plead jurisdictional immunity before an ICSID tribunal if it has given consent to the jurisdiction which constitutes waiver of

[50] *Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 393, 397.*

[51] France, Court of Cassation (First Civil Chamber). 6 January 1987, International Law Reports, (1991) Vol. 86 p.475.

immunity.[52] A fundamental principle of the Centre's jurisdiction is the consent of the parties. Indeed, without the parties consent the tribunal cannot assume jurisdiction.[53] Once given such consent cannot be unilaterally withdrawn, neither can a party stall the arbitration proceedings by refusal to participate. Thus, within the system of the ICSID Convention once a State party has given its consent to arbitration it has waived its immunity, the issue of immunity from suit does not arise. Indeed, reference to jurisdictional immunity is inappropriate in proceeding before ICSID arbitrators because the concept was designed for application before municipal courts. There was never a time when immunity was granted to, States in arbitral proceedings to which they had consented.

4.6 Distinction between Public and Private Conduct

It is sometimes said that the immunities enjoyed by the sovereign States, their affiliates and diplomats only cover their public and official acts (*acta jure imperii*), and that they are amenable to the local jurisdiction in respect of their private and non-official activities (*acta jure gestionis*).[54] This distinction has been based on the dual character of sovereign States, their affiliates and ambassadors; that is to say, states officials and their entities can perform public acts and also private commercial activities. Opinions regarding this principle have been divided into two. Those who have adopted an absolute view of immunity, called *"structuralist*", are of the opinion that this distinction cannot apply so as to limit immunity.[55] On the other hand, writers who have adopted a restrictive view of immunity, called *"functionalist*" are of the opinion that immunity only extends to sovereigns and diplomatic agents in so far as their public and official acts are concerned.[56] The practice of the Sates on this point is far from the uniform custom in international law.

[52] It is not unusual for states to plead jurisdictional immunity before arbitrators, *See*, for example, ICC case 2321 (1976), 1 Yearbook Comm. Arb.133; ICC case 1803 (1980), V Yearbook Comm. Arb. 179.

[53] Per the arbitrators in *SPP (Middle East Ltd. v. Arab Republic of Egypt* (1983) 22 I.L.M. 752. Although the Court of Cassation of France set aside the award [see (1987), 26 I.L.M. 1004], that decision does not affect the rule illustrated.

[54] Sompong Sucharitkul, '*State Immunities and Trading Activities in international Law'* (Stevens & Sons Ltd. 1959) pp. 23-34.

[55] Hurst, Hague Recueil, 12 (1926-II), 179-180, Collected Papers, 232-233; Oppenheim-Lautherpacht, ss 391.

[56] Rousseau et laisney, Vol. Ministres Publics, No.4 and 5 ; Laurent, Droit Civil International, Vol. III, p.770 ; Fiore, International Law Codified, Art. 343-347.

Legal scholars, those who support the functionalist approach to sovereign immunity they are of the opinion that sovereigns and diplomats or State enterprises can claim sovereign immunity only for *acta jure imperii* which are governmental or sovereign acts but not for *acta jure gestionis,* acts of a private or commercial in nature.[57] The juristic opinion as regard to what constitutes *acta jure imperii* or sovereign act public in nature and *acta jure gestionis* or sovereign act private in nature are not uniform in transnational legal systems.[58] Because decisions in the national courts of different countries are inconsistent in this matter, it is not always easy, especially in marginal or borderline cases, to distinguish between the two.[59] Professor Maniruzzaman resorted to the opinion of Ian Brownlie, to draw the distinction between public and private acts of the sovereign State that a satisfactory mode of application of the principle of restrictive immunity has yet to be developed.[60] For example, courts in Europe and the United States apparently are divided on whether the exploration and exploitation of natural gas or other natural resources are sovereign or commercial acts.[61]

[57] A.F.M. Maniruzzaman, 'State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends' (2005) Vol.60, No. 3 Dispute Resolution Journal p.91; G.R. Delaume, 'Sovereign Immunity and Transnational Arbitration,' in Contemporary Problems in International Arbitration 313 (J. Lew, ed. Kluwer/ CCLS 1986); H. Fox, 'Sovereign Immunity and Arbitration', at 323.

[58] Y. Osinbajo, 'Sovereign Immunity in International Commercial Arbitration: The Nigerian Experience and Emerging State Practice,' 4 RADIC [African J. of Int'l & Compar. L.] (1992); L. Marasinghe, 'The Modern Law of Sovereign Immunity,' 54 (5) Modern L. Rev. 664 (Sept. 1991); GJVI. Badar, 'State Immunity: An Analytical and Prognostic View,' ch. 4, 63 ft seq. (M. Nijhoff 1984); Jerome F. Birn, 'Sovereign Immunity: Enforcement of Arbitral Award Against *Foreign State-Maritime International Nominees Establishment v. Republic of Guinea*, 603 F.2d 1094,' 24 Harv. Int'l L.J. 236 (1983).

[59] Christoph H. Schreuer, State Immunity: Some Recent Developments (Grotius 1988) at 24-9; Brownlie, at 336.

[60] A.F.M. Maniruzzaman, at 323.

[61] *National Iranian Oil Co*. Pipeline Contracts, Oberlandesgericht Frankfurt, 1982, RIW 439 (1982), 65 I.L.R. 212 (1984); Germany: *National Iranian oil Co*. Legal Status, Oberlandesgericht Frankfort, 1980, 65 I.L.R. 199 (1984); *National Iranian Oil Co*. Revenues from oil Sales, Fed'l Constitutional Ct., 1983, Bverf GF. 64, 1, 65 I.L.R. 215 (1984); *N.V. Cabolent v. National Iranian Oil Co*., Ct. of Appeal, The Hague, 1968, 47 I.L.R. 138 (1974).

4.6.1 Public and Private Character of Disputes

According to Gus Van Harten,[62] it is both possible and useful to distinguish between the public and private character of disputes that are resolved by adjudication. Of course, there is always grey when differentiating black from white, and so it is with the public-private distinction. But the presence of grey does not mean that black and white do not exist. When a legislature expropriates property, leading to a dispute with its private owner, the passage of the legislation is characteristically a sovereign act and the resulting dispute quite clearly a matter of public law. Alternatively, when the Government contracts with a company to tend the law in front of Parliament, the Government's conclusion of the contract are a commercial act of the State, one that a private party could carry out and its resolution by arbitration can credibly be positioned within the private domain. For instance, government contract for the purchase of military equipment, the operation of State railways, the promotional activities of State tourism industries, etc.

To resolve this conflicting opinion of public-private distinction which is the most important exception to immunity concerns commercial transactions and in support of multinational capital export and foreign investment, the International Law Commission adopted the UN Convention on Jurisdictional Immunities of States and Their Property[63] in December 2004 which, established a different test, known as combined nature-purpose approach. In determining whether a particular contract or transaction is a "commercial transaction" for these purposes, Its Article 2(2) provides that 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 Stateof

[62] Gus Van Harten, *'Investment Treaty Arbitration and Public Law'* Oxford, 2008, P. 46

[63] GA Res. 59/38 (Dec. 2, 2004) (adopted without a vote). Resolutions of the General Assembly are available at <http://www.un.org/documents/resga.htm>. The convention is annexed to the resolution. The Sixth Committee's report to the General Assembly, UN Doc. A/59/508 (Nov. 30,2004), recommending adoption of the convention, also contains the convention's full text as an annex. The report is available at <http://www.un.org/law/cod/sixth/ 59/docs.htm>. An annex to the convention, which forms an integral part of the convention, sets forth under-standings with respect to certain articles.

the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.[64]

These two issues the definition of "commercial transaction" and the criteria to be applied in determining the commercial character of a given transaction or activity of the State were major points of debate both during the deliberations of the International Law Commission and in the subsequent negotiation of the convention, because of the differing approaches reflected in various domestic legal systems. The formulations ultimately adopted in the convention represent a compromise. No adverse inference may be drawn from that fact, however, because Article 2(3) states that 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."[65] Therefore, the rules adopted do not strictly follow either the definition of "commercial activity" or the "nature not purpose" test provided in section 1605(a) (2) of the US FSIA 1976.

Therefore, the distinction between *acta jure imperii* and *acta jure gestionis* seems to revolve around the "nature" and "purpose or motive" of the act concerned. The nature test has been increasingly endorsed in both case law and recent legislation. That test seems to turn on whether the act is taken pursuant to a public law or private law contract. If the contract can be characterised as a public law one, immunity will be granted. Thus, in a situation where the court finds that the agreement contained so many provisions that were not typical of private contracts, such as tax exemptions, immigration privileges and diplomatic immunities, that it could not be classified as commercial. Hence, the State party to such an agreement is to be immune.[66] On the other hand if the act falls under the ambit of private

[64] Draft Articles on Jurisdictional Immunities of States and their Property Art. 2(2), (27 Feb. 2003, A/AC.262/L.4/ Add.l); see Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property (24-28 Feb. 2003), UNGA Official Records 58th Sess. Supp. No.22 (A/58/22), available at http://www.un.org/law/jurisdictionalimmunities/.

[65] This principle was articulated further by the U.S. Supreme Court in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), and in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). See generally, 1991 ILC Commentary, at 27-32, 75-93; 1999 ILC Report, paras. 31-60.

[66] *Practical Concepts Inc. v. Republic of Bolivia*, 615 F. Supp. 92 (D.D.C. 1985).

or commercial law the restrictive approach will be applied. For instance, State run business corporations such as Air India, National Iranian Oil Co., SingTel, Temasek Holdings, and Kuwait Airways.

As with any system of classification, it may be difficult to pinpoint the difference between public and private in specific cases. But the distinction is nevertheless drawn in all modern legal systems, including public international law, because the recognition of any unique subject here, 'the State' necessitates a description of that subject.[67] The distinction is present, for example, in the principle of sovereign immunity which, in absolute terms, posits that one State's authority is not subject to adjudication in another State's courts.[68] In particular, many States recognise an exception to the general principle of sovereign immunity with respect to commercial acts of the State which operates to remove the shield of sovereign immunity from the private business conduct of the State and its entities.[69] To apply this restrictive doctrine, courts and arbitrators adopt various tests to distinguish sovereign acts or *acta jure imperii* from commercial *acta jure gestionis* but in all cases a distinction is made in order to determine the scope of sovereign immunity.[70]

4.6.2 Public-Private Distinction based on Nature-Purpose Test

There is yet another test, which is whether the act "is one that may be performed by anyone, or only by a State official or sovereign."[71] In other words, the question is "whether the act

[67] E.g International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' *Report of the International Law Commission on the Work of Its Fifty-Third Session,* UN GAOR, 56th Sess, UN Doc A/56/10 (2001) 43, Arts 4 and 5.

[68] R Von Hennigs, 'European Convention on State Immunity and Other International Aspects of Sovereignty Immunity' (2001) 9 Willamette J Intl L & Disp Resolution 185, 186-7.

[69] *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, 557-8 (CA). GR Delaume, 'Sovereign Immunity and Transnational Arbitration' (1987) 3 Arbitration Intl 28, 28-9.

[70] eg European Convention on State Immunity, 16 May 1972, 74 Euro TS, 11 ILM 470, Art 7(1) (entered into force 11 June 1976); Foreign Sovereign Immunities Act, 28 USC, 847 F. Supp 61, s 1605(a) (1976) (US); State Immunity Act 1978, c 33, s 3 (UK).

[71] Rosalyn Higgins, Problems and Process: International Law and How We Use It 78-86 (Clarendon Press 1994) at 83. *See also Claims Against the Empire of Iran BverfGE* 16 (1963), 45 I.L.R. 57. 1 Degree *Congreso del Partido* [1981]; 2 All Eng. Rep. 1064; *Mol. Int. v. People's Republic of Bangladesh*, 736 F. 2d 1326 (9th Cir. 1984).

could be also performed by private persons."[72] This test, which may be circuitous, seems to be derived from the combined nature-purpose tests. There are situations when nature and purpose tests are not helpful. In support of that a recent ILC report noted that many of the cases examined took the approach that the purpose of the activity is not relevant to determining the character of a contract or transaction and that it is the nature of the activity itself which is the decisive factor. Nevertheless, some cases under different national legal orders have emphasised that it is not always possible to determine whether a State was entitled to sovereign immunity by assessing the nature of the relevant act. This is because, it is said, the nature of the act may not easily be separated from the purpose of the act. In such circumstances, it has sometimes been held to be necessary to examine the motive of the act. Sometimes, even where motive and purpose are judged irrelevant to determining the commercial character of an activity, reference has been made to the context in which the activity took place.[73]

In examining the character of relevant acts of the State and asking whether they are acts that the State alone, as the juridical sovereign, can carry out Lord Wilberforce, Thus, in *I Congreso del Partido,* relied on an assessment of the nature of State acts rather than their purpose as a basis for defining the scope of sovereign immunity supported by this statement from the German Federal Constitutional Court in the *Claim against the Empire of Iran* Case.[74] "As a means for determining the distinction between *acta jure imperii* and *acta jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends upon whether the foreign State has acted in exercise of its sovereign authority, which is in public law, or like a private person, that is in private law."

[72] Ignaz Seidl-Hohenveldern, Corporations in and under International Law (Hersch Lauterpacht Memorial Lectures 61 (Cambridge Univ. 1987); Schreuer, stipra n. 1, at 29.

[73] *See* Report of the Working Group of the U.N. International Law Commission (1999)-ch. VII (Annex) "Jurisdictional Immunities of States and their Property" (hereafter ILC Rep. 1999), p. 49. See Web site cited.

[74] *I Congreso del Partido* [1983] 1 AC 244, 267 (HL), citing *Claim against the Empire of Iran* (1963), 45 ILR 57, 80 (Ger Fed Const Ct). *See also Republic of Argentina v Weltover,* 504 US 607, 613-14 (1992).

This method of distinguishing public from private is admittedly formalistic in that it makes it imperative to define the uniqueness of the State as an entity. By adopting it here, the aim is not to downplay the various critiques of the distinction between public and private power, or to deny that sovereign acts benefit some individuals and groups more than others, or to suggest that the private acts of State and non-State actors cannot hold great significance for the public at large.[75] Nor is it suggested that every dispute can be credibly classified as public or private or that the formalised distinction drawn here is appropriate in all instances as a method of inquiry.[76] The aim here is more modest and practical in relation to investment arbitration. It is to show as clearly as possible that the establishment of investment arbitration as an effective mechanism to resolve investment disputes between States, State entities and private parties is a significant departure from the conventional use of international commercial arbitration. As Feldthusen has commented, the value of categories is 'less in their logic than their utility'.[77]

4.6.3 Public-Private Distinction Based on Investment Contracts

In particular, the public-private distinction is applied to differentiate the use of international arbitration to resolve investor-State disputes under investment treaties from its use to resolve investor-State disputes pursuant to investment contracts. The former, it is argued, is a form of public law adjudication; the latter, a reciprocally consensual method of dispute resolution that can be approached generally as private law. Distinction between these two forms of arbitration is done by examining, in particular, two types of acts that are carried out by the State in any arbitration involving a claim by a private investor against the State. One of which is state consent to the jurisdiction of arbitral tribunal as an alternative to the courts; and the other is the State's arbitrary conduct that triggers a dispute with the private investor. Most of the scholars argue that, where both of these acts are uniquely sovereign in

[75] *See* Freeman (n 2) 547-9; A Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 Rev of Int'l Studies 133, 138; D Mullan and A Ceddia, 'The Impact on Public Law of Privatisation, Deregulation, Outsourcing, and Downsising: A Canadian Perspective' (2003) 10 Indiana J Global Fegal Studies 199, 245.

[76] C Harlow, 'Public and Private Law: Definition Without Distinction' (1980) 43 MFR 241.

[77] B Feldthusen, 'The Recovery of Pure Economic Foss in Canada: Proximity, Justice, Rationality and Chaos' (1996) 24 Manitoba LJ 1, 2.

nature in investment agreement, the arbitration is best approached as public law. In contrast, where both of these acts of the State could be carried out by a private party, the arbitration is appropriately classified as private law.

This analytical framework is used in this chapter to demonstrate that the advent of investment arbitration is a major development in both public and private international law, and that its importance would be underestimated were it collapsed into a wider debate about the emergence of transnational law or the commonalities in public and private values.[78] Indeed, the tendency of some commentators to overlook the uniqueness of the sovereign as a juridical entity[79] tends to mask the importance of this emerging system as a rare expression of public law on the customary international legal practice.[80] Of course, with black and white there is always grey. When it comes to the matter relating to adjudication, distinction between the State conduct whether public or private is crucial in investment arbitration.

Therefore, after presenting the argument that investment arbitration is a form of public law adjudication, the discussion turns into two cases in which the public-private distinction becomes blurred. The first is where a 'stabilisation clause' in a contract allows an arbitration tribunal to find that a modification of a State's regulatory regime is a breach of contract; the second, where an 'umbrella clause' in an investment treaty permits a tribunal to characterise a breach of contract by the State as a violation of the treaty. In the case of a stabilisation clause, the State consents in a contract to resolve investment disputes arising from activity that is clearly sovereign in character; in the case of an umbrella clause, the State consent may be read to authorise the arbitration of disputes arising from an alleged breach of contract by the State.

[78] Teubner (1997) at. 7; D Oliver, *Common Values and the Public-Private Divide* (Butterworths, London, 1999) 1-2.

[79] *See,* e.g. CN Brower, CH Brower II, and JK Sharpe, 'The Coming Crisis in the Global Adjudicative System' (2003) 19 Arbitration Intl 415, (characterising all investment disputes as commercial disputes).

[80] G Van Harten and M Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121-122.

In each case, therefore, both of the relevant acts of the State the act of consent and the act triggering the dispute do not fall within either the sovereign or the commercial realm of State activity. This illustrates the complexity of the issue of sovereign immunity in certain circumstances. Where the nature and the purpose tests are not helpful, other tests may have to be used to reach a satisfactory result in determining jurisdiction of the tribunal based on sovereign or commercial activities of States. In this instance, the court or arbitral tribunal needs to be innovative and case-sensitive to all relevant elements in order to arrive at a satisfactory outcome. If it is found that the nature of the State activities is sovereign acts, the next question is whether they will enjoy absolute immunity or is there any difference between sovereign immunity and sovereign act? Following discussions in this chapter will illustrate the difference between doctrine of sovereign immunity and sovereign act in determining the application of absolute or restrictive immunity on state and their entities.

4.7 Distinction between Sovereign Immunity and Sovereign act

The doctrine of sovereign immunity as it stands now does not grant absolute immunity either in jurisdiction or execution, unless an exception applies and the conduct of foreign sovereign is governmental or public in nature. The doctrine of sovereign act and the doctrine of sovereign immunity have some degrees of overlapping. Both are rooted in the respect for independent authorities, State equality and limitations for domestic court and arbitral tribunal to sit in judgement on the actions of another State. It can also be seen that both of these doctrines stem from the seventeenth century European practice of affording personal immunity from suit to foreign nations.[81] The function of the doctrine of sovereign immunity was to protect States from suits while, on the other hand, the doctrine of sovereign act was designed to avoid any judicial review of a foreign sovereign's official acts. This was clearly illustrated in *Braka v Bancomer*,[82] where the court held that the effect of sovereign immunity is to shield the person of the foreign sovereign, and by extension, his agents from the jurisdiction, doctrine of sovereign act shields the foreign sovereign's

[81] Michael J Bazyler, *Abolishing the Act of State Doctrine*, 134 U Pa. L Rev. 325 (1986) at p. 331.
[82] *Braka v Bancomer* 762 F.2d 222(1984).

internal law from intrusive scrutiny. Unlike foreign sovereign immunity, the doctrine of sovereign act 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 doctrine of sovereign immunity and the doctrine of sovereign act 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 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 sovereign act addresses the question of whether a court with proper jurisdiction over a State should review sovereign acts within its own territory.[83] Despite the clear differences between the two doctrines, the doctrine of sovereign act 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 sovereign act 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 sovereign act. That is, cases could now exist where sovereign immunity did not bar adjudication, but the sovereign act 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.[84]

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

[84] 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).

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 necessarily limited to activities carried out in or related to that country. The sovereign act, 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*,[85] it was held that the sovereign act 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 doctrine of sovereign act 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 doctrine of sovereign act 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 US FSIA will not be undermined by the improper assertion of the defence of sovereign act."[86] Although this decision seems to be a well-reasoned one, the argument only addresses those cases where the government, which committed the purported sovereign act, is also a party to the action. However, as discussed above, the doctrine of sovereign act is not limited to 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 doctrine of sovereign act than under foreign sovereign immunity when governments themselves are directly involved in controversies with a foreign investor.

[85] *WS Kirkpatrick & Co v Environmental Tectronics Corp Int'l* 493 US 400 (1990) at p. 409.

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

4.8 Absolute Immunity

The concept of "an equal has no power over an equal" is popularly believed to be the origin of the absolute theory of sovereign immunity. The *maxim*, known to have come from the fourteenth century Italian jurist, Bartolus,[87] which sets up the precedent making it impossible for one State to assume jurisdiction over another. The doctrine conceptualises the fundamental principle of international law that the government of a foreign nation, 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 quite difficult 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.[88] Not surprisingly, therefore, Michael Singer points out in one of his articles that absolute immunity offers a State, its organs, as well as the constituent subdivisions, agencies and instrumentalities or other entities, 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.[89] Under this theory a legal suit against a sovereign State can only be successful where both parties particularly the State agrees to submit to the jurisdiction of the courts or international tribunals. Therefore, based on his supporting theory of absolute immunity, in investment arbitration an express waiver of immunity is

[87] Bartolus, who wrote "*Non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium"*, Brian A. Garner, *Black's Law Dictionary,* West Group, St. Paul 1999, p. 1673.

[88] *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility; ICC Case No. 7472, *European Company v. Ministry of Industry of State X,* Ministry of Defence of State X and State X establishment, Jan. 15, 1998 Final Award, unpublished, at 10-15.

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

required by the State to bring a legal suit against a State. Such waiver can occur either in advance, such as in a contract or including a provision in the national legislation or relevant treaty, or after a dispute arises.[90]

According to Gamal Moursi Badr, United States 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.[91] The traditional rule concerning the immunity of a foreign sovereign to civil suit was stated by Chief Justice Marshall at the beginning of the nineteenth century in *The Schoonere Ex*change v. *McFadden*[92] 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 brought an action 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, 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.[93]

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*[94] 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

[90] Christoph H. Schreuer, Ch.2, Art.25.

[91] Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (Martinus Nijhoff Publishers, The Hague 1984) at p. 9.

[92] *The Schooner Exchange v McFadden* 11 US (7 Cranch) 116 (1812).

[93] *Dexter & Carpenter, Inc v Kunglig Jarnasvagsstyrelesen*, 43 F.2d 705 (2d Cir. 1930).

[94] *The Prins Frederik* 2 Dod. (1820) 451.

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 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 commercium*. It has been suggested that this distinction although subtle is real and relevant for the better understanding for the Doctrine of Absolute Immunity.[95]

In another case, *The Charkieh*,[96] 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 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, 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. At this point, courts begun to differentiate between disputes arising out of pure governmental conduct that allows the exercise of immunity and disputes arising from a private commercial conduct in which immunity was not been granted.

Justice Phillimore made his views clearer in the case of *The Parlement Belge*[97] 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

[95] Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* at p. 15.
[96] *The Charkieh* LR 4A and E59 (1873).
[97] *The Parlement Belge* (1879) 4 P.D. 129.

suffered a setback when the Court of Appeal reversed 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…"[98] The courts of other common law and civil law countries also, presumably, followed this position, for e.g., the doctrine was observed in Germany until 1945.[99]

4.8.1 The Doctrine of Absolute Immunity in Twentieth Century

The doctrine was at its peak during the 1920s with several prominent cases, such as *The Porto Alexandre*[100] and *The Pesaro*.[101] *The Porto Alexandre* was considered the high-water mark in the acceptance of the Doctrine of Absolute Immunity by the English courts[102] and the climax[103] of this doctrine in English case law. In *The Porto Alexandre*, the Court of Appeal established the new precedent against the long standing precedent in the case of *The Charkieh* granting immunity to a State-owned vessel used exclusively for trading purposes. This was the case a century after the decision in *The Schooner Exchange* in US court which applied only to warships of a foreign sovereign; however, in this case the court extended the rule of immunity to other vessels owned by a foreign sovereign, and eventually, by implication, to other kinds of property as well.

Following the decision of *Porto Alexandre,* House of Lords in the case of *Rahimtoola v Nizam of Hyderabad* [104] 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 at the present time sovereign

[98] *The Parlement Belge* (1880) 5 P.D. 197 at p. 217, 219 and 220.

[99] 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).

[100] *The Porto Alexandre* (1918-1919) All ER 615.

[101] *The Pesaro* 271 US 562 (1926).

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

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

[104] *Rahimtoola v Nizam of Hyderabad* [1957] 1 All E.R. 257.

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.

It appears that there was general consensus at that 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.[105] 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.[106]

It is also pertinent to note the view expressed by Lakshman Marasinghe [107] 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*.[108] Here, Lord Denning states that the courts had, from ancient times, maintained a distinction between *acta jure imperii* and *acta jure gestionis*, thereby restricting any claims of immunity from jurisdiction to the former and excluding it from the latter. Reviews of

[105] Brohmer Jurgen, *State Immunity and the Violation of Human Rights* (Martinus Nijhoff Publishers in The Hague) at p. 16.
[106] 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).
[107] Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, MLR, Vol. 54 (1991) 664 at p. 674.
[108] *Rahimtoola case* (1958) AC 379.

state practice prior to adoption of the UN Convention on State Immunity generally concluded that the restrictive doctrine is not universally recognised. For example, a major Council of Europe project to review state practice on state immunity involved the collection of materials from 28 members or observer States of the Council of Europe demonstrates a fairly consistent preference for the application of a restrictive rule.[109] A continued application of the absolute rule relating to commercial acts, however, appeared in court decisions in Bulgaria, the Czech Republic, Poland, Romania and Russia. Overall, the conclusion was that the theory of absolute immunity continues to play a role, albeit a marginal one, in the practice of European States.[110]

Uncertainty remains, as demonstrated by the position taken by Republic of China in a recent case.[111] The case involved an attempt by a private creditor to register an arbitral award in Hong Kong and execute against property of the Democratic Republic of Congo (DRC). The property in question was amounts owing to the DRC by Chinese State-owned companies as "Entry Fees" under contracts for, *inter alia*, the right to exploit the DRC's mineral resources. The Hong Kong Secretary for Justice intervened on the issue of state immunity to argue for absolute immunity and submitted a letter from the Chinese Ministry of Foreign Affairs Office in Hong Kong. The letter states that China has always taken the stance that sovereign States enjoy absolute immunity before foreign courts the long standing position of China is that a State and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and it has never applied the so-called principle or theory of "restrictive immunity".[112]

Therefore, universal acceptance of restrictive immunity does not exist at present. Current trend in relation to the foreign state's views on absolute as opposed to restrictive immunity

[109] Hazel Fox, *The Law of State Immunity*, (2d ed. Oxford 2008) at p. 232.

[110] The situation in Russia is uncertain. Article 127 of the Civil Code of Procedure adopted in 1994 made provision for reform of the absolute rule of state immunity, but as of March 2009 no such law had been enacted. See national contribution of Russia to Council of Europe database on State practice on State immunity dated March 2009.

[111] *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, High Court of the Hong Kong SAR (12 December 2008).

[112] *FG Hemisphere Associates LLC.*

are not foreign investment friendly as witnessed in the above case by Chinese position.[113] The foreign state's views on immunity could be an important factor, investment agreement with a State or its entities which practice absolute immunity poses risk on the foreign investors and the foreign state's views on absolute immunity may affect the investors claim in terms of any dispute. Based on the above discussion on absolute theory of immunity it can be seen that absolute immunity had never been absolute. Precedent of the courts suggests that if the relevant conduct in question was not purely for public purpose courts exercised discretion to refuse it. In this present international trade and business world it would be highly unlikely accepted approach by international community if any state claims absolute immunity for the commercial activities of state or its entities.

4.9 Restrictive Immunity

Until the early to mid-twentieth century, there was virtual unanimity in international law and practice that sovereigns, both states and state representatives, were absolutely immune from the jurisdiction of foreign courts under the doctrinal maxim *par in paremn on habeti mperium*. Complications in commercial transactions became rather common phenomenon in last decades, as cross-border trade and foreign investment grew, together with states' participation in the international trade and foreign investment. As concepts of state liability evolved, legislators and courts increasingly sought to treat states and their trading entities like ordinary commercial enterprises when they participated in the commercial activities of the forum state as ordinary business corporation would. Under the "restrictive theory of immunity," states maintain their immunity when engaged in official or sovereign activities, *acta jure imperii* but are treated as private entities when claims arise from their commercial transactions or "private law" activities, *acta jure gestionis*.[114]

[113] Freedom of Investment Process: Foreign State Immunity and Foreign Government Controlled Investors, (*This document was finalised and approved for derestriction at Freedom of Investment (FOI) Roundtable 12 held on 26 March 2010. It is also published on the "Freedom of Investment" webpage)*, p. 10.

[114] See, e.g., *I' Congresso del Partido* [1981] 2 All ER 1062, 64 ILR 307; *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (reprinting the so-called Tate Letter of May 19, 1952); see also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480,488 (1983); *Alcom Ltd. v. Republic of Columbia*, [1984] 2 All ER 6, 74 ILR 179. As Hazel Fox has noted, 'This distinction between *acta dejure imperii*, acts in exercise of the public or sovereign powers of a State, and *acta dejure gestionis*, acts performed as a private person or trader, is crucial to the

Since the number of cases appearing before national courts and arbitration tribunals involving States and their entities in commercial activities, adjudicators become cautious of granting immunity to the States for conducts whether governmental or commercial.[115] 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.[116] This change in legal opinion sprang from the belief that people involved in business with governments engaged in commercial activities ought not to be wholly without remedy and, conversely, that governments who are acting not in a sovereign capacity but rather as private commercial entities, should be treated accordingly. Therefore, the commercial exception that forms the core of the restrictive approach generally applies both to immunity from jurisdiction and to immunity from execution.

The modern theory of restrictive approach of immunity and state practice has developed primarily to address litigation and arbitration by private parties against foreign states. 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*. As it has been discussed earlier in this chapter,[117] *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.[118] 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.[119]

---

present law of State immunity.' Hazel Fox, '*The Law Of State Immunity*' (Oxford 2008). In practice the distinction is generally made on a functional basis in a particular context.

[115] Dicey & Morris, '*The Conflict of Laws'*, (12th edn) London (1993) at p. 241.

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

[117] Sompong Sucharitkul, (Stevens & Sons Ltd. 1959) pp. 23-34.

[118] *I Congreso del Partido*, (1983) 1 App. Cas. 244.

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

4.9.1 The Approach under English Law

The English courts began developing a doctrine for restrictive immunity at common law following this greater involvement of States in commercial activities even before the UK State Immunity Act 1978 came into force. In 1978, the United Kingdom enacted the State Immunity Act which was designed with the FSIA in mind.[120] Section 1 of the Act expresses the general principle of immunity from jurisdiction. The general principle is subject to several exceptions laid out in ss. 2-17 of the Act. One of the exceptions is that a foreign state is not immune from proceedings relating to commercial transactions entered into by the State or a contractual obligation to be performed wholly or in part in the United Kingdom.[121] Section 9 of the Act provides that where a State has agreed in writing to submit a dispute, which has arisen or may arise, to arbitration, the foreign state is not immune as respects proceedings in English courts that relate to the arbitration. This provision is subject to any contrary provision in the arbitration or submission agreement and does not apply to arbitration between states. This proposition is supported by section 106 of the English Arbitration Act 1996 which waives the rights immunity in relation to arbitration agreement of United Kingdom.

This move to modify the absolute immunity approach was basically to impose the strict application of immunity to government acts only. In support to that certain judges expressed opposition to the immunity in the context of commercial activities.[122] In *Rachimotoola v. Nizam of Hyderabad,*[123] Lord Denning challenged the absolute immunity doctrine and suggested that immunity should depend essentially on the nature of the dispute. In his words, "If the dispute brings into question, for instance, the legislation or international transactions of a foreign government, or the policy of its executive, the court

[120] See The *Foreign Sovereign Immunities Act* (FSIA) of *1976. Also see* the Statement of the Solicitor General, 949 Part. Deb. (5th ser.) 406 (1978).

[121] Section 3(3) of the Act defines a commercial transaction as a contract for the supply of goods; a loan or other transaction for the provision of finance and connected guarantees or indemnities; or any other commercial, industrial, financial, professional or similar transaction or activity which is not an exercise of sovereign authority.

[122] *See Baccus S.A.L. v. Servicio del Trigo* [1958] 1 Q.B. 438 (per Singleton LJ.); *Rachimtoola v. Nizam of Hyderabad* [1958] A.C. 379 at 415-24.

[123] *Rachimotoola v. Nizam of Hyderabad* [1958] A.C. 379.

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 state; but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own government 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." This was one of the earliest twenty century case on state immunity decided by Lord Denning making a strong move towards restrictive immunity.

An opportunity was afforded to the Privy Council to deal with the issue in *The Philippine Admiral case.*[124] The Privy Council adopted the restrictive immunity doctrine by registering its opposition to the application of sovereign immunity to "ordinary trading transactions". Many scholars regard the case of *The Philippine Admiral* as the turning point in England's approach towards state immunity.[125] The English Court of Appeal in *Trendtex Corporation Ltd. v. The Central Bank of Nigeria*[126] held, by a majority decision that sovereign immunity was no longer applicable to ordinary trading transactions, and that the restrictive doctrine of immunity should be applied to both actions *in personam* as well as those *in rem*.

English courts established the new trend that the restrictive theory of immunity grants immunity to public acts of states i.e., *acta jure imperii,* but denies immunity to their private commercial acts i.e., *acta jure gestionis.* Under this theory, a State loses its immunity whenever it engages in commercial activities with private parties and foreign State entities. In *I Cong reso del Partido,* Goff J. stated the reason why the restrictive theory requires the restriction of sovereign immunity in situations where a foreign state engages in trade was more fundamentally, certainty in commercial transactions is not in his judgment the true reason why in certain circumstances the doctrine of sovereign immunity is restricted. The

[124] *The Philippine Admiral case* [1976] 2 W.L.R 214.

[125] Ress, *Entwicklungstendenzen der Immunitat auslandischer Staaten*, 40 ZaoRV (1980) 217 at p. 236 (Translated by Brohmer Jurgen).

[126] *Trendtex Corporation Ltd. v. The Central Bank of Nigeria* [1977] Q.B. 529.

true reason is that it is restricted where the foreign sovereign does not act as such, i.e., where he acts as any private citizen may act."[127]

The development of restrictive approach and the rationale behind this shift was supported by Lord Mustill in the case *the Kuwait Airways Corporation v Iraqi Airways Co* [128] 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 fulfil. 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 and more involved in commercial activities through incorporation of State entities 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.[129]

Although courts have retained sovereign immunity largely, to avoid potential embarrassment to those in charge of conducting a nation's foreign affairs[130] 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 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

[127] *I Congreso del Partido,* p. 1192 at 1193.

[128] *The Kuwait Airways Corporation v Iraqi Airways Co.* (1995) WLR 1147 at p. 1171.

[129] Ernest K Bankas, The StateImmunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts at p. 10.

[130] The Jurisdictional Immunity of Foreign Sovereigns, The Comment, 63 YLJ 1148 (1954).

to undergo the embarrassment or hindrance of defending the propriety of such acts before a foreign court.[131] 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.

4.9.2 The Approach under US Law

In the United States, there has been a decline in adherence to the absolute immunity doctrine after Second World War. This shift was taken 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. In order to mitigate the severity of the doctrine in commercial activities, the U.S. has used treaties of friendship, commerce and navigation as a means of regulating the application of the immunity doctrine. Article XVIII of the treaty states "no enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."[132]

In 1952 the *Tate Letter*[133] officially declared the State Department's abandonment of the absolute immunity theory and its adoption of the restrictive theory. Immunity was now to be granted only where the sovereign State engaged in non-commercial activities. therefore, US courts decided not to afford immunity to foreign government-owned corporations, except when they had been performing public functions, after the widely publicised 'Tate

[131] 4th Report on Jurisdictional Immunities of States and their Property, prepared for the ILC by Special Rapporteur, YBILC (1982) II-1, at p. 161.

[132] Art. XVIII of the Treaty of Friendship, Commerce and Navigation between the U.S. and Denmark, 421 U.N.T.S. 105.

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

Letter' from Jack B Tate, who was the Acting Legal Adviser of the Department of State to the Acting Attorney General. This letter states "the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in consideration of requests of foreign governments for grant of immunity." The letter made it clear that the policy of the StateDepartment was to decline immunity to foreign sovereigns in suits arising from their private or commercial activities.

The restrictive theory of immunity has been accepted by a majority of countries[134] and has been accorded legislative approval in most cases. The U.S. Foreign Sovereign Immunities Act of 1976[135] was designed to codify the restrictive immunity theory.[136] It realises this object by setting out the general principle recognising state immunity, and then qualifying the rule with a list of exceptions.[137] Among other things, foreign states are not immune from the jurisdiction of U.S. courts where they carry out commercial activity in the U.S., or where they perform an act in the U.S. in connexion with a commercial activity of that state elsewhere, or where a commercial activity performed elsewhere has caused a direct effect in the U.S.

Socialist legal theory rejects the application of the restrictive theory to acts of a socialist state, on the basis that a distinction cannot be made between acts of a socialist state which are of a public nature and acts which are of a private nature. The prevailing Soviet political theory insisted that a State does not cease to be a sovereign merely because it performs functions that are traditionally reserved for private persons in a non-socialist legal system.

[134] On Italian law, see *Borga v. Russian Trade Delegation* 22 I.LR. (1955) 235; for Egypt, see *F.P.R. of Yugoslavia v. Kafr EI-Zayat Cotton Ltd.* 18 I.L.R. (1951) 54; for Canada, *see Venne v. D.R aof Congo* [196915 D.LR. (3d) 128.

[135] 28 U.S.C. *S.* 1330; S*.* 1602 *et seq.*

[136] *Behring International Inc. v. Imperial Iranian Air Force* 475 F. Supp. 383.

[137] Sec. 1604 & 1605 FSIA.

Notwithstanding the various criticisms made against this theory,[138] it remains the dominant one in international law. It shall be seen that this restriction on state immunity from jurisdiction to the public acts of states only, does not entirely translate into a removal of immunity from execution in all cases where states engage in commercial activities. This is due to the distinction drawn between immunity from jurisdiction and immunity from execution.

The practice of common law countries indicates that the courts gradually moved towards the restrictive doctrine. A report prepared by Sucharitkul[139] indicates that majority of States where the immunity aspect has been considered at some point or other favour the Doctrine of Restrictive Immunity. Harris[140] 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 including China 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.[141] 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 individuals while at the same time encouraging growth of international trade and foreign investment."[142] Domestic legislations of a number of States are reflective of the fact that a majority of States

[138] *See*, for example, E. Morgan, 'Foreign State Debtors in Domestic Courts: A Theory of Soviet Immunity' (1989), 3 *B.F.L.R* 287; See C. Osakwe, 'A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice' (1983), 23 *Virginia J. Int'l L.* 13.

[139] 4th Report on Jurisdictional Immunities of States and their Property, prepared for the ILC by Special Rapporteur, YBILC (1982) II-1, at p. 199.

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

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

[142] 4th Report on Jurisdictional Immunities of States and their Property, prepared for the ILC by Special Rapporteur, YBILC (1982) II-1, at p. 161.

has accepted the doctrine.[143] 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 defence of sovereign immunity would be denied. This was indicative of the Convention's desire to obliterate the Doctrine of Sovereign Immunity towards promoting cross-border investment and trade.[144]

It is worthwhile here to note the significant efforts of the International Law Commission (ILC) on the United Nations Convention on State Immunity. The ILC Draft Article on State Immunity 1991 was the first document for international community as a guiding principle for State immunity. The latter culminated in the adoption of the United Nations Convention on Jurisdictional Immunities of States and Their Property.[145] 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 Convention is supposed to enhance the role of law and legal certainty, particularly in the dealings of States with natural or juridical personality. It also aims to contribute to the codification and development of international law along with the harmonisation of practice in this area, taking into account developments in state practices.

The UN State Immunity Convention applies 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.[146] A detailed study of the Convention and its implications on the

[143] 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.

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

[145] The General Assembly adopted the UN State Immunity Convention on December 2, 2004.

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

execution of awards in international arbitral process, especially in investment arbitration 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.[147] The restrictive theory of sovereign immunity, thus, demands that when a State and its entities enters into a market place or concludes agreement in a private capacity with a private parties or foreign investors engaging in commercial activities, it should not benefit from any immunity defence which the other parties, similarly situated, do not enjoy.

4.10 Whether State entities are entitled to Sovereign Immunity?

As discussed above, the issue of separate legal personality of a state-controlled entity was upheld by Paris Court of Appeal in the *Pyramids Case*[148] in 1984, establishing the precedent that state's intention not to surrender its immunity for the agreement of its entity. Almost a quarter century later ICSID tribunal in *AES Summit Generation Limited and AES-Tisza Erömü Kft.* v. *Republic of* Hungary, established in many respects the same precedent as Paris Court of Appeal did so in *Pyramids Case.* In this case AES Summit entered into a purchase and sale agreement with two Hungarian state-owned entities. The claimants initiated two arbitrations against the Hungarian state-owned entities and Hungary itself for alleged breach of agreement. Both of the arbitrations were settled by a settlement agreement in which Hungary was a party to it. The settlement agreement contained a waiver of sovereign immunity clause which states that the State entities irrevocably waives any right of immunity which it or any of its assets now has or may acquire in the future in any jurisdiction in connection with proceedings arising out of this agreement. The inclusion of the sovereign immunity clause indicates that the parties agreed that the execution and

[147] *Halsbury's Laws of England*, (4th edn) Vol. 18, para 1548-1557.
[148] *SPP (Middle East Ltd. v. Arab Republic of Egypt* (1983) 22 I.L.M. 752.

performance of settlement agreement constitutes waiver of immunity from jurisdiction. Arbitral tribunals in both the cases in their final awards held the States liable for the agreement of their State entities. In both the cases there was no disagreement that they were state controlled entities but the States retained their immunity from the jurisdiction of the arbitral tribunal based on distinct legal personality of these entities.

A contrary intention of the State can be seen in *The Sarrió proceedings against the Kuwait Investment Office and Kuwait Investment Authority*[149] where sovereign State of Kuwait argued that the assets belong to Kuwait's Future Generation Fund, managed by its two entities (KIA & KIO) were immune. These two entities are the investment arm of the government headed by the Minister of Finance with separate legal personality. In rejecting Kuwait's argument that KIA & KIO formed part from the State, the court noted that the 1982 law creating KIA provided that KIA had separate legal personality and that Kuwait had recognised that it was an independent public authority. In this case the Swiss Federal Tribunal ignored the functional approach of State entity, holding them liable for the compensation, thus immunity was not granted.

In *Wintershall A.G., et al. v Government of Qatar,*[150] Qatar General petroleum Corporation (QGPC) was wholly owned and controlled by Qatar and the Minister of Finance and Petroleum is the Chairman of its Board of Directors. The tribunal did not deny that QGPC was created as a separate independent legal personality under national law of Qatar. However, in the event at issue in this arbitration, the tribunal held applying the functional approach, that QGPC acted as an agent or an arm of the Government. And consent to arbitration by QGPC constituted waiver of immunity. Therefore, sovereign State of Qatar was responsible and immunity was not considered. Based on the practice of the sates as regard to the issue of immunity it can be seen that states argue for and against of the separate legal personality of state controlled entities to defend their national interest. If a State is liable for its entities foreign debt it argues that the entity is a separate legal

[149] *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced at [1995] Rev. Suisse D. Int. Eur., Vol. 5, at p. 593.

[150] *Wintershall A.G., et al. v Government of Qatar*, Partial Award on liability of 5ht February 1988, 28 ILM 795 (1989).

personality, while its entities' assets are claimed by foreign investors' state argues that the State and its entities are single economic unit. If it is so, the question lies whether the State entities are entitled to immunity?

The recent trend is towards the restrictive immunity although it is not correct to say that the approach of absolute immunity has been completely eradicated,[151] it is the case that restrictive sovereign immunity has gained ground globally over the last few decades.[152] The approach associated with absolute sovereign immunity is known as "structural view"; on the other hand restrictive immunity is known to be the "functional view".[153] The former is concerned with the status of the party claiming sovereign immunity, while the latter is concerned with the relevant conduct forming the basis for the claim of sovereign immunity. The structural approach can be still found in some jurisdictions those are adhering to absolute sovereign immunity,[154] but the recent trend seems to be towards favouring the functional approach, which has little or no regard for the status of the State entity. Therefore, the functional approach embodies the restrictive doctrine of sovereign immunity.

4.10.1 Structural Approach

In contradiction to the spirit of recent Convention on Jurisdictional Immunities of States and their Property,[155] the structural approach to the creation of a separate State entity gives rise to a presumption that the entity is effectively separate from the State.[156] Consequently, the

[151] Professor Brownlie notes that quite a few States, such as Brazil, Bulgaria, China, Czechoslovakia, Ecuador, Hungary, Japan, Poland, Portugal, Sudan, Syria, Thailand and Tobago, the former USSR and Venezuela still accept the principle of absolute immunity. Ian Brownlie, *Principles of Public International Law* (5th ed. OUP 1998) p.331 n.31.

[152] See Report of the Working Group of the U.N. International Law Commission (1999) ch. VII (Annex) "Jurisdictional Immunities of States and their Property" (hereafter ILC Rep. 1999); also Brownlie, at 330-32.

[153] Christoph H. Schreuer, State Immunity: Some Recent Developments (Grotius 1988); Ian Brownlie, Principles of Public International Law 331 n.31 (5th ed. OUP 1998) pp. 330-32.

[154] *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, High Court of the Hong Kong SAR (12 December 2008).

[155] 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.

[156] B. Audit, Transnational Arbitration and State Contracts: Findings and Prospects 89 (1987 The Hague Acad. Centre for Studies & Research in Int'l Law & Int'l Rel.). *See First Nat'l City Batik v. Banco Para El Comercio*

fact that a State entity has a distinct legal personality would defeat any claim to immunity.[157] Thus, to determine whether a State enterprise is entitled to immunity from jurisdiction, the domestic courts resort to structural approach to investigate such factors as whether the enterprise is a public entity or a company formed under private law;[158] the enterprise's capacity to sue or be sued; the extent of government control over the enterprise; and the enterprise's ability to incorporate and hold property. A strict structural approach will lead to absolute immunity if the entity is established as a public entity that is inseparable from the State and serving only public purposes.

In *First National City Batik v. Banco Para El Comercio Exterior de Cuba*,[159] the court held that "due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude as the courts of Great Britain have concluded in other circumstances that government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such". Lord Wilberforce in *C. Czarinkoic v. Rolimpex*,[160] said that State-controlled enterprises, with legal personality, ability to trade and to enter into contract of private law, though wholly subject to the control of their state, are a well-known feature of the modern commercial scene. This distinction between them, and their governing State, may appear artificial, but it is an accepted distinction in the law of England and other states. Thus, in the *Westhighouse case*,[161] the ICC Tribunal concluded that the logical and practical foundation of the *Banco* Para decision, which established a presumption that the foreign public corporation is to be given separate legal status, is so strong, and rests on such a thorough analysis of relevant

---

Exterior de Cuba, 462 U.S. 611, 624, 626-27 (1983); *C. Czarinkoic v. Rolimpex*, [1979] AC. 351, 364; *Westhighouse case*, ICC Case No. 6401 (1991); Mealey's Int'l Arb. Rep. 34 (Doc. B-1 at B-53 (pp. 97-9) (Jan. 1992).

[157] Germany: BGHZ 18, 1 (9, 10) (Fed'l Sup. Ct., 7 June 1955); B VerfGE 64, 1, 65 I.L.R. (1984) 215 (Fed'l Constitutional Ct. 1983); *Holland, Cabotent v. National Iranian Oil Co.* (28 Nov. 1968 Ct. of Appeal, The Hague), 47 I.L.R. 138, 9 I.L.M. 152 (1970). See also Karl-Heinz Böckstiegel, Arbitration and State Enterprise 39-40 (Kluwer 1984).

[158] See In *Re Prejudgment Garnishment Against National Iranian Oil Co*., 1981, 77 Amer. J. Int'l L. 159 (1983); *see also* generally, Moses A. Kimuli, "The Application of the Doctrine of Foreign Sovereign/State Immunity to Public Corporations," LAWASIA [Law Ass'n for Asia & the Pacific] J. 31, 33-37 (1986).

[159] *First Nat'l City Batik v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624, 626-27 (1983).

[160] *C. Czarinkoic v. Rolimpex*, [1979] AC. 351, 364.

[161] *Westhighouse case*, ICC Case No. 6401 (1991).

American, English and international precedents and commentary, that we have little doubt that the aforementioned presumption is a generally accepted principle of international law that would be recognised by the courts of the Philippines.

Based on the decisions of national courts and arbitral tribunals if an independent State entity or instrumentality is structurally separate and independent from the Sate the immunity shall not be granted. On the other hand, the supporter of absolute immunity, known to be 'structuralist', claims that a State entity or instrumentality is structurally affiliated to the State and serving the public purposes that would have been served by the State in the absence of this entity immunity shall be granted. But if the State entities or their affiliates are structurally forms single economic unit and participate in commercial activities immunity shall not be granted from the jurisdiction of courts or arbitral tribunals.

4.10.2 Functional Approach

Under the 'functional' approach, when a State entity has a distinct legal personality and performs acts of a private or commercial in nature, it cannot claim sovereign immunity.[162] According to functional approach, the status of the State entity is irrelevant; only the nature of its acts really matters for purposes of jurisdictional immunity.[163] Some national courts have taken a mixed approach in which structural approach was initially taken into account, but the nature of the act usually was decisive for the purpose of deciding the immunity issue.[164] This suggests that mixed approaches would likely tilt in favour of the functionalist way. Recent legislation follows this pattern, seeming to do away with the structural approach and shifting markedly to purely functional considerations.[165]

[162] *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced at [1995] Rev. Suisse D. int. eur., Vol. 5, at p. 593.

[163] *Wintershall A.G., et al. v Government of Qatar*, Partial Award on liability of 5ht February 1988, 28 ILM 795 (1989).

[164] See, as endorsed in, e.g., the European Convention on State Immunity (1972), art.27; Section 14 of the Sovereign Immunity Act 1978 (U.K.); ILA Draft Articles for a Convention on State Immunity (Revised 1994), art. I.B.

[165] *See,* e.g., Section 1603 of Foreign Sovereign Immunity Act 1976 (U.S.); Section 3 of Foreign State Immunities Acts 1985 (Aus.); ILC Rep. 1999, at 6, re art. 2, para 1(b) reformulated and suggested provision to the U.N. General Assembly.

The issue of sovereign immunity in relation to the State entity is addressed in the UN Convention on Jurisdictional Immunities of States and their Property.[166] The Convention 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."[167] Under this definition, the State and its wholly owned or controlled entities are considered to be functionally the same, so that the activities of State entities are considered to be carried out by the State in its exercise of sovereign authority.[168] Therefore, a legal action or arbitration commenced against a State agency, enterprise, or instrumentality would be considered against the State itself.

The US FSIA applies a broader approach than the ECSI and UK SIA in defining the overall foreign State which includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State. Generally, a state-owned corporation will be an agency or instrumentality under the US FSIA if it has separate legal personality, the foreign State directly holds a majority interest, and the corporation is incorporated in the foreign State.[169] Whereas under UK SIA, similar to ECSI, scope of foreign State does not include any entity which is distinct from the executive organs of the government of the State and capable of suing or being sued.[170] Where a State entity is engaged in commercial activities restrictive approach applies and it is treated in many aspects like a private entity. However, due to the status of the entity as an agency and instrumentality of the State, the US FSIA provides for some important privileges to be retained by it even when it is not immune. For example,

[166] 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.

[167] ILC Draft Articles on Jurisdictional Immunities of States and their Property [ILC Draft Articles], art. 2(1)(b)(iii), 27 Feb. 2003, A/AC.262/ L.4/Add.1); See also ILC Rep. 1999, at 6, art. 2, para. 1(b), reformulated and suggested provision to the U.N. General Assembly. See also Prof. Dr. Burkhard Hess, "The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property," 4 Eur. J. Int'l L. 269, 280 (1993); G.S. Varges, "Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention," 26 Harv. J. Int'l L. 103 (1985).

[168] Christoph H. Schreuer, State Immunity: Some Recent Developments (Grotius 1988) pp. 137-39.

[169] Section 1603 (a) (b) US Foreign Sovereign Immunities Act 1976; *Dole Food Co. v. Patrickson*, 538 US 468 (2003).

[170] Section 14(1) of UK SIA 1998 and Art.27(1)ECSI 1972.

pre-judgment attachment of property is excluded unless immunity from such attachment has been specifically waived.[171]

US Supreme Court in the case of *Dole Food Co.* has clarified the number of state-owned corporations considered to be agencies and instrumentalities of the foreign State under US law.[172] The Supreme Court found in *Dole* that the requirements, for an entity to be an agency or instrumentality, that a "majority of the shares be owned by a foreign state" was satisfied neither by indirectly held entities nor by entities privatised as of the date of the complaint. Entities held by the State indirectly or that have been privatised as of the date of the complaint are now more likely to be treated like private corporations.[173] In the absence of direct majority ownership, an entity can still be an agency or instrumentality if it is "an organ of a foreign State or a political subdivision thereof".

In general, it appears that for an independent State entity with the power to sue and be sued, immunity from jurisdiction in civil cases would likely depend primarily on whether its investment activities at issue are considered to be commercial or sovereign acts. If they are considered to be commercial, the State owned entities would generally be treated similarly to a private corporation in most jurisdictions that apply the restrictive theory. In the US, it would be treated largely like a private corporation and restrictive approach will be applied, but, if directly owned by the State, would benefit from certain additional protections. If the activities at issue are considered to be sovereign acts, the enterprise would generally benefit from immunity from adjudication in all jurisdictions unless immunity is waived.

However, this does not dispose of the issue of sovereign immunity when a State entity is a party to an international arbitration. The definition appears to be functional rather than structural. Thus, no matter what the status of the State agency, instrumentality, or

[171] *See* Section 1610(d) of US FSIA.

[172] *Dole Food Co. v. Patrickson*, 538 US 468 (2003).

[173] US FSIA Section 1603(b)(2); The Supreme Court granted certiorari (leave to appeal) in 2007 on whether a Canadian power company indirectly held by a province was an "organ," *See Powerex Corp. v. Reliant Energy Services.*, 127 S.Ct. 1144 (2007), but the majority decision dismissed the case on jurisdictional grounds. *Powerex Corp. v. Reliant Energy Servs*.,127 S.Ct. 2411 (2007).

enterprise is vis-à-vis the State, so long as the entity "is entitled to perform and is actually performing acts in the exercise of sovereign authority of the State," it can invoke sovereign immunity as the State. This is supported by State immunity Act of United Kingdom which provides that a separate entity is immune from jurisdiction if, and only if anything done by it in the exercise of sovereign authority.[174] Thus, current practice and the provisions of national legislations and international conventions suggest that State entities are entitled to both absolute and restrictive immunity based on their function. If State entities perform commercial activities restrictive immunity applies, while State entities perform sovereign act absolute immunity applies.

4.11 Whether Investment Activities of Sovereign Wealth Funds are Entitled to Immunity?

Sovereign Wealth Funds are relatively new concept of State entity wholly owned and controlled by the State. The concern in relation to the true nature of the SWFs whether they are to be treated same as to other forms of State entities or they have a distinct character response their status of immunity. The character of SWFs is not universally treated as either public or private entities in the field of present international trade and investment. The private/public distinction of SWFs investment in international level, specifically in the field of International Investment Law, has important implications in terms of applicable substantive law and in the choice of forum where a dispute involving SWFs can be brought. In substantive terms, their nature as public or private will impact on accountability rules and immunity issue. From a procedural point of view, clarifying the nature of SWFs will determine the international courts and/or arbitral tribunals in which SWFs have *locus standi*.

The common element proposed by academic, practitioners, state officials and regional and international organisations exists in the definition of SWF is that it is a special investment authority owned and fully controlled by the government.[175] The Santiago Principles do not

[174] Section 14(2) (a) of the StateImmunity Act 1978 of United Kingdom.

[175] For an overview of the most authoritative definitions advanced for SWFs *See*, Andrew Rozanov, 'Definitional Challenges of Dealing with Sovereign Wealth Funds', in *Asian Journal of International Law*, 2011, vol.1, no.2, p.249; Edwin M. Truman, *Sovereign Wealth Funds: Threat or Salvation?*, Peterson Institute for International Economics, Washington DC, September 2010, pp. 9-33; Stephen Jen, 'Currencies the Definition of a Sovereign

explicitly deal with the issue of whether SWFs are private or public in nature. It defines SWFs as:

> "…special purpose investment funds or arrangements, owned by the general government. Created by the general government for macroeconomic purposes, SWFs hold, manage, or administer assets to achieve financial objectives, and employ a set of investment strategies which include investing in foreign financial assets. The SWFs are commonly established out of balance of payments surpluses, official foreign currency operations, the proceeds of privatisations, fiscal surpluses, and/or receipts resulting from commodity exports." [176]

The definition is not clear as to whether the purpose of investment are purely public in nature or the creation of the fund is to engage in commercial activities. As discussed earlier in this chapter, for the purpose of immunity it is necessary to clarify the structure and function of SWFs similar to the State entity whether they are functioning purely to serve the public purposes. Serving public purposes through engaging in commercial conduct with foreign investors may lead to the application of restrictive immunity similar to other State entities. This view is supported by some distinguished legal scholars in investment laws regardless of their structure.[177]

To treat SWFs Professor Sornarajah went beyond the status of State entity; he is of the opinion that despite their sovereign nature, SWFs must be treated like multinational

---

Wealth Fund', available at http://www.morganstanley.com; Anne Gelpern, 'Sovereignty, Accountability, and the Wealth Fund Governance Conundrum', in Asian Journal of International Law, 2011, vol.1, no.2, pp. 289-294; International Monetary Fund, "Balance of Payments and International Investment Positions Manual, 6th ed. (BPM6)", 2009, available at: http://www.imf.org; Commission of the European Communities, Communication from the Commission to the European Parliament, the Council and the Economic and Social Committee and the Committee of the Regions, 'A Common European Approach to Sovereign Wealth Funds', COM (2008) 115 provisional, available at: http://ec.europa.eu.

[176] International Working Group of Sovereign Wealth Funds, *Generally Accepted Principles and Practices, 'Santiago Principles'*, Appendix I. Defining Sovereign Wealth Funds, available at: http://www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf.

[177] M. Sornarajah, *Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments*, Asian Journal of International Law, 2011, vol. 1, iss.1, 267, 273; L.Catà Backer, Sovereign Wealth Funds as Regulatory Chameleons: the Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investing, *Georgetown Journal of International Law*, vol. 41, is. 2, 425, 428-429.

corporations (MNCs) as concerns their international status and legal personality. He claims that SWFs are akin to State entities operating as monopolies and performing a commercial function. Despite their affiliation with the SWFs holder government, their purpose is to invest funds rendering thus their actions are commercial in nature. Therefore, SWFs cannot benefit from sovereign immunity and should a dispute involving SWFs arise; their liability would be judged on the basis of private actor considerations. [178] If SWFs are akin to State entities operating as monopolies and conducting commercial actions and since it has been accepted that such State entities should not be treated any differently from MNCs, then SWFs should also receive the same treatment as MNCs. Sornarajah thus does not employ an ownership or control criterion, yet he looks at the purpose of SWF investments and the nature of their actions as *iure gestionis* rather than *iure imperii*.[179]

The phrase 'formally or structurally public but functionally private' accurately summarises Catà Backer's understanding of SWFs. The argument he makes is that a balance has been struck in relation to portray of SWFs as private actors although they have been set up as public entities. SWFs are functionally public, as they are funds held and controlled by a SWFs holder country. They are functionally private, as they seek to participate in private commercial activities by behaving just like other private corporations. They pursue financial objectives, which should not necessarily be equated with commercial objectives. [180] Hence, SWFs seek profit maximisation of the SWF holder country's wealth. In order to achieve this balance of being structurally public yet functionally private at the same time, SWFs need to disentangle their ownership and control from the SWF holder government.

Catà Backer supports that this balance is evinced by the Santiago Principles. He criticises it however as it fails to take into consideration a number of realities regarding traditional private and public actors. As concerns traditional private actors, such as MNCs, they are not restricted to a merely participatory role in the market and oftentimes have been considered to advance their own regulatory agenda. Furthermore, private actors pursuing a corporate

[178] M. Sornaraja, p.272; *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994).
[179] Anne Gelpern also accepts SWFs as 'private market actors'. *See*, A. Galpern, Sovereignty, Accountability, and the Wealth Fund Governance Conundrum, *Asian Journal of International Law*, 2011, vol. 1, is. 1, 289, 290.
[180] L.Catà Backer.

social responsibility agenda can also be seen as transgressing the lines of mere market participation and as attempting to influence the behaviours of other market participants and of the entities in which they invest. The construction of 'formally public yet functionally private' additionally fails to restrict the ability of state investment entities to regulate or to project state power abroad. Catà Backer thus deconstructs the presumption that private actors are merely participating in markets, whereas public actors are simply regulating them. He supports that the strict dichotomy between public and private is no longer sustainable. He proposes that a distinction of entities based on their participatory or regulatory nature is better equipped to deal with contemporary changes in the role of the State.

Unlike Professor Sornarajah, Catà Backer seems to consider ownership and control as well as the nature of their actions. He accepts, however, that although SWFs pursue profit maximisation they do so in order to increase the wealth of the SWF holder country. In rejecting the relevance of the public and private dichotomy, he does not attach a commercial character to the actions of SWFs.[181] According to him activities SWFs are distinct from the activities of State entities engaged in commercial activities based on ownership and control of the SWFs. However, Sornarajah disregards the ownership and control criterion and deems only the nature of the actions of SWFs as relevant in determining the nature of SWFs. Since SWFs pursue commercial activities they are to be treated as private entities. In his determination he does not consider structure and functional control of the SWFs rather the purposes pursued by SWFs investments and regards the conduct of SWFs as to the conduct of State entity or instrumentality, therefore, restrictive approach of immunity to be applied.[182]

The decision of Swiss Federal Tribunal in *The Sarrió proceedings against the Kuwait Investment Office and Kuwait Investment Authority*[183] suggests that the tribunal has taken

[181] L.Catà Backer, Sovereign Wealth Funds as Regulatory Chameleons: the Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investing, *Georgetown Journal of International Law*, vol. 41, is. 2, 425, 428-429.

[182] Sornarajah, at.267.

[183] *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced at [1995] Rev. Suisse D. Int. Eur., Vol. 5, at p. 593.

structural approach and rejected Kuwait's argument that the assets belong to the State, thus, immunity was not granted. Functionally these two entities were the investment arm of the government headed by the Minister of Finance, but the court observed that under the 1982 law creation of KIA had separate legal personality and that Kuwait had recognised that it was an independent public authority. Therefore, Swiss Federal Tribunal ignored the functional approach, similar to the opinion of Professor Sornarajah, the tribunal applied purposive approach of State entity, to disapprove the application of immunity by Kuwait.

AIG Capital Partners Inc And Another v. Republic Of Kazakhstan And Others[184] concern the claims for state immunity by the Republic of Kazakhstan and its central bank in the High Court of Justice Queens bench Division in England during enforcement of ICSID award. In this case the property of National Fund of Kazakhstan in London was under the custody of an affiliate of the national bank of Kazakhstan. The national bank raised immunity on the ground that the properties held by its affiliates were the property of the bank, pursuant to ss 13(2)(b) and 14(4) of the UK State Immunity Act 1978. This was not raised in the arbitration proceedings of ICSID arbitration rather Kazakhstan objected to the jurisdiction of the tribunal based on its impossibility to participate in the formation of the tribunal. Kazakhstan submitted that by virtue of Art. 33 of the ICSID Administrative and Financial Regulations, all communications related to the ICSID Convention should be sent to the respondent's representative on the administrative Council, and that this had not been done with respect to the request for arbitration. The tribunal dismissed this argument and concluded that the cited provision referred only to communications specifically required by the Administrative and Financial Regulations, such as notice of meetings; therefore, the tribunal affirmed its jurisdiction.

In deciding the issue of immunity at the stage of enforcement of arbitral award in relation to the property of Kazakhstani SWFs the High Court of England found that the management of the State SWFs by the central bank, as a "trust manager" under Kazakhstan law, was sufficient to give the bank a "property" interest in the fund within the meaning of the UK SIA provision. The existence of this central bank interest in the assets made them absolutely immune regardless of whether the SWFs held the entire economic interest in the property.

[184] *See AIG Capital Partners Inc. and Another v. Kazakhstan*, [2005] EWHC 2239.

This decision does not expressly indicate that SWFs are immune while engaging in commercial non-governmental activities. The rational of the court's decision in this case was mostly based on the attachment or custody of the property of SWFs by the national bank of Kazakhstan. It is a universally accepted principle that the property of central bank is immune. But if it is found that the assets of SWFs are involved in commercial non-governmental activities there should be no immunity either at the stage of jurisdiction or execution.

4.12 Conclusion

The central argument of this chapter was that whether State entities are entitled to sovereign immunity which can be identified through analysis of two tests known as 'structural' and 'functional' antinomies explored above. It has been substantially established in this chapter that the State entities are not entitled to sovereign immunity if their investment agreement with foreign investors constitutes commercial non-governmental purpose. However, it has also been established in this chapter that State entities are in fact entitled to sovereign immunity in a situation where the State and State entity form single economic unit and their agreement with foreign investors constitutes non-commercial government activities. To establish this principle the discussion has been substantially extended to examine the development of the doctrine of sovereign immunity, rational of waiver of sovereign immunity, nature of sovereign act and distinction between the public and private conduct. Further, it has drawn a clear picture about the application of absolute and restrictive immunity in relation to the commercial conduct of State and State entity.

There is the question of public or private character of international investment law as a whole, whether or to what extent the focus of international investment law should be on the development of a harmonious global legal order, or concerned with particular quasi-governmental agreement between a State entity and a foreign private corporation. The discussion in this chapter has exposed to the extent in a deeper analysis to public and private nature of the activities of State and their affiliates towards establishing the stronger link with grant of immunity. It has been suggested that the State entity will be entitled to immunity which has substantial structural and functional government control over the

entity and the entity is performing the non-commercial governmental public functions. Even if the State entities are performing public functions through commercial activities the absolute immunity will not apply.

The abovementioned discussion in this chapter has also examined the application of sovereign immunity of State and their affiliates in accordance with recent developments in national legislation and international Conventions on Sate immunity. The definition of State and their entities as discussed in relation to immunity are not uniform in the national legislation, regional and international conventions. It was expected that the 2004 Convention on Jurisdictional Immunities of States and Their Property is a solution to the differences in the national legislation as regards to the definition of State, its affiliates and their sovereign conducts. However, there could still have some problems ahead involving interpretations of the Convention by national courts and arbitral tribunals of few countries upholding rigid view of sovereign immunity.[185] However, current legal practice suggests that restrictive approach of immunity as opposed to absolute immunity is getting popularity day-by-day in relation to the State participation to commercial activities through incorporation of State entities, instrumentalities and other affiliates of the State.

In a remarkably short period of time, international investment arbitration has grown to become one of the most important dynamic fields of both public and private international law. One of the new emerging issues in relation to investment arbitration that has been discussed in this chapter is the investment activities of Sovereign Wealth Funds (SWFs). Although restrictive approach of immunity is now widely recognised, but the important issues in relation to whether the investment activities which reflects the commercial activities of a sovereign wealth funds are to be considered for immunity is not uniform worldwide. In this regard, based on the argument of legal scholars and the decision of tribunals and national courts as discussed above, I would conclude that the issue of immunity in relation to sovereign wealth fund to be the same as other State entities and affiliates of the State.

[185] *See FG Hemisphere Associates LLC v. Democratic Republic of the Congo.*

CHAPTER 5 Immunity from the Enforcement of Arbitral Award against the Property of State entity

5.1 Introduction

As discussed in the earlier chapter on "jurisdictional immunity of State entities" that the UN Convention on State Immunity 2004 defines 'State' broadly which includes State entity to be considered as 'State'. This has also been established in the earlier chapter in "State *Privity* to the agreement of its entity" under the theory of "legal fiction" which treats the State and State entity the same. It has been established in the chapter on jurisdictional immunity that the restrictive immunity will be applied on both the State and the State entity if they are involved in commercial noon-governmental activities. Having established that the critical question lies in this chapter on whether the State entity will be entitled to the immunity from enforcement measure?

Enforcement of an arbitral award is an outcome to the assumption of jurisdiction by the courts of forum States over a foreign sovereign State and a State entity. As expressed by James 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 awards in international investment arbitration complied with the requirement of New York Convention besides ICSID awards, irrespective of whether they are against private parties or States, there are cases where the awards are not complied with voluntarily. In most cases execution of arbitral awards are refused by States against the property of States or State entities. Unlike the judgements entered in most litigation cases, the arbitrators who render the arbitral awards are private judges and cannot enforce them.[2] In such circumstances, successful parties have to seek assistance from the court of forum States outside the process of arbitration to enforce the award.

[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.

State practice suggests 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 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 involvement of a foreign State in the award makes the enforcement proceedings difficult because of the doctrine of immunity with the forum State's legal system. The reason for this being that the execution of an award against the State property 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 and enforcement procedures of the arbitral awards should only be viewed as issues of immunity from jurisdiction.[6]

[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.

[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).

[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' (M. Nijhoff, 1987) at p. 359.

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 and purpose 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 made. 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.

This chapter will examine the situations that arise when a State claims immunity at the time of execution of the award arising from State contracts or contracts of State entities and the various codifications and conventions under which an award may be sought to be enforced against the property of States and State entities. This will also inspect the issues whether waiver of immunity by an agreement to arbitration can be extended to a waiver of immunity from execution; and the rationale for having the principle of state immunity from enforcement measures and its requirements. Then it will go on to discuss whether the property against which execution is being sought is used for sovereign purpose or otherwise. Further, it will discuss the categories of State properties against which enforcement can be sought. Finally it will analyse the relatively new issue of immunity from execution of award against the property of Sovereign Wealth Funds (SWFs).

5.2 Rationale for Immunity from the Enforcement Measures

Although State participations in international trade and investment through establishment of State entity have been for several decades but when it comes to the matter relating to immunity of State entity it is still relatively new a phenomenon compare to the principle of State immunity. As we have seen the application of the principle of sovereign immunity was extended to the State entity, likewise, the principle of sovereign immunity in enforcement measure can be extended to the application of immunity from enforcement measure over

State entity. Therefore, findings will be prolonged substantially in this chapter on the principle of sovereign immunity on enforcement measure to establish the bridge to extend the application of the principle of immunity from enforcement measure on State entities.

The early twentieth century witnessed the courts' concern for international comity for cases regarding sovereign acts, which is evident from the decision in the case of *Oetgen v Central Leather Company*,[7] wherein the court held that allowing the validity of the acts of one sovereign State to be examined and perhaps condemned by the courts of another would very certainly jeopardise the amicable relations between governments and vex the peace of nations. This decision clearly articulates the courts' rationale for the doctrine of sovereign immunity as territoriality and concern for the issues of international amity and harmony. This principle was upheld in the leading case of *Banco Nacional de Cuba v Sabbatino*[8] where the court stated that the judicial branch would not examine the validity of a taking of property within its own territory by a foreign sovereign government in the absence of a treaty unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking of property violates customary international law.[9]

According to Hazel Fox, 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.[10] The US Congress after the decision in *The Sabbatino* Case introduced an exception, which had the effect of reversing the Supreme Court's decision in so far as taking of the property in violation of international law, was concerned.[11] The decision confined the doctrine of sovereign act to an act of a foreign State within its own territory and the courts in subsequent decisions emphasised this requirement.[12] Since then the US approach in relation to the attachment or execution of award against the property of sovereign States and State entities has changed and property

[7] *Oetgen v Central Leather Company* 246 US 297 (1918).
[8] *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964).
[9] *Banco Nacional de Cuba,* 376 US 398 (1964) at p. 428.
[10] Hazel Fox, *The Law of State Immunity* at p. 483.
[11] Section 1605(a)(3) of FSIA.
[12] *Braka v Bancomer*, 762 F.2d 222.

that is used for non-commercial government activities is not subject to attachment or execution.[13]

In the United Kingdom, the principle articulated in *Underhill v Hernandez* [14] has been adopted into the English law as a defence of sovereign act, the scope of which has been stated in Dicey & Morris "as a governmental act affecting any private property right in any movable and immovable property will be recognised as valid and effective in England if the act was valid and effective by the law of the country where the property was situated (*lex situs*) at the time when the act takes effect and not otherwise."[15] The difference between the US and English approach of sovereign acts is that in the UK, the defence is available to acts committed outside the territory of UK against the person or property of an alien. In *Buttes Gas and Oil Co. v. Hammer*,[16] 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 it would be preferable to avoid argument on terminology, it 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 law, which recognised that acts done by virtue of sovereign authority are not justifiable before English courts.[17]

The inroads on immunity from jurisdiction of a foreign State made by the restrictive doctrine in the first half of the twentieth century had little immediate effect on the absolute immunity of State property from execution. State practice reveals much greater caution in restricting the immunity from execution of a State's property. There are a number of reasons for this caution; first, where property is located beyond the forum State's jurisdiction, there is no general international law of insolvency to resolve a State's general inability to meet its financial commitments; rescheduling of State debts remains largely a political process. Short of resort to war, there is therefore little alternative where property

[13] *Ministry of Defence and Support v. Cubic Defence,* p.385 F. 3rd 1206 (9th Cir. 2004).
[14] *Underhill v Hernandez* 168 U.S. 250 (1897).
[15] Dicey & Morris, *The Conflict of Laws*, (14th edn. Sweet & Maxwell Ltd 2010) at. 122.
[16] *Buttes Gas and Oil Co. v. Hammer* (1982) AC 888 at p. 938.
[17] Hazel Fox, '*The Law of State Immunity*' at p. 489.

in the control of the debtor State is concerned but to make settlement of judgement debts with its co-operation and by diplomatic means.

Even where the property of the foreign State is located within the forum State, certain constraint of enforcement operates. Enforcements against State property constitutes a greater interference with a State's freedom to manage its own affairs and to pursue its public purposes than does the pronouncement of judgement or order by a national court of another State. States increasingly maintain some of their national wealth in foreign reserves, and discretion as to their disposal is seen as element in the exercise of sovereign authority. Indeed, a forum State anxious to attract foreign capital may be slow to permit execution against a foreign State's assets under its domestic law. Even where attachment of State assets located in the forum State is generally possible, the political consequences to the friendly relations of the forum State with foreign States may discourage the forum State's support for such enforcement.[18]

Again certain unsatisfied judgements particularly those relating to dealings in foreign investment or development, often relate to disputes which arise from some political differences between States. These obstacles based on political expediency have become the justification for a legal plea of immunity from execution of that avoids placing national courts in conflict with the foreign State; and leaves to diplomatic means the satisfaction of judgements obtained in the national courts. In addition, in some countries the execution of judgements is supervised by the executive and not the domestic courts and this has permitted retention, as in the case of the unexecuted judgement of the Greek court in the *Voiotial Distomo case*[19] by the government control over the manner in which enforcement against a foreign State takes place.[20] Even where control is left with the courts, immunity from execution has been treated as a separate regime from immunity from jurisdiction with its own autonomy. The rules relating to waiver support such separate treatment.

[18] Sinclair, 'Law of Sovereign Immunity: Recent Developments' R de C 167 (1980) 133 at 219-20.

[19] *Voiotia v. Federal Republic of Germany*, ECHR Case No 11/2000, Judgment of 4 May 2000.

[20] Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures, (2006)17 European Journal of International Law 803.

5.3 Waiver of Immunity from the Enforcement Measures

Immunity from attachment or enforcement measures against the property of a defendant State may be viewed in accordance with Art. 19(a) of the UN Convention,[21]Art.23 of the European Convention on State Immunity,[22] Art. VIII (a) of the International Law Association's Draft Articles on a Convention of State Immunity[23] and Art.5 of the Resolution of l'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdictional and Enforcement.[24] Apart from those international instruments, national laws on state immunity also allow for a possibility to waive immunity from jurisdiction and execution.[25]

A State or a State entity that is legally part of the State itself can waive immunity either expressly or implicitly by a contractual provision or an arbitration clause in a contract with a private party or a foreign investor.[26] Consent by a State entity to arbitration under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID)[27] constitutes, on its part or that of the State involved an irrevocable waiver of immunity from any legal suit.[28] Nonetheless, in ICSID arbitration[29] and international arbitration generally,

[21] Art. 19(a) of United Nations Convention of State Immunity 2004.

[22] Art.23, European Convention on State Immunity 1972.

[23] Art. VIII(a) of Revised Draft Articles for a Convention on State Immunity, ILA Report of the 66th Conference (Buenos Aires 14-20 August 1994).

[24] Art. 5 of l' Institut de Droit International on Contemporaty Problems Concerning the Immunity of States in Relation to Questions of Jurisdictional and Enforcement, 2nd September 1991.

[25] Sec. 1610 (a)(1), US FSIA 1976; Sec. 13(3), UK SIA 1978, Sec. 31 of Australian Foreign Sovereign Immunity Act 1985; Art. 12(a)(1) Canadian State Immunity Act 1982; Sec. 14(3) Pakistani State Immunity Ordinance 1981; Sec. 15(3) Singaporean State Immunity Act 1985; Sec. 14 (2) South African State Immunity Act 1981.

[26] Delaume, "Sovereign Immunity and Transnational Arbitration", at 314-15; see also Delaume, "Contractual Waivers of Sovereign Immunity: Some Practical Considerations," 5 ICSID Rev. 232 (1990); Tatiana de Maekelt, "Sovereign Immunity and Its Waiver", in International Contracts 215 (H. Smit et al., eds., Mathew Bender 1981); G.B. Sullivan, "Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits", 18 Tex. Int'l L.J. 329 (1983); P.M. McGowan, "Arbitration Clauses as Waivers of Immunity from Jurisdiction and Execution under Foreign Sovereign Immunities Act of 1976," 5 N.Y.L Sch. J. Int'l & Comp. L. 409 (1984); *see also* Hazel Fox, at 326, 331.

[27] See art. 25(3) of the ICSID Convention, 1 ICSID Reports (RCIL, Cambridge).

[28] Delaume, at 316. See S.M. Schwebel, International Arbitration: Three Salient Problems 122-25 (Grotius 1987).

[29] *Cf. Liberian Eastern Timber Corp. v. Government of the Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986). See A. Giardiana, "The International Centre for Settlement of Investment Disputes between States and Nationals of Other States (ICSID)," in Essays on International Commercial Arbitration 214, 220-21 (P. Sarcevic,

an undertaking by a State or a State entity to arbitrate is not itself a consent to the national court for enforcement of the resultant award of an arbitration.[30] It means that the consent to jurisdiction is not an automatic consent to enforcement or waiver of immunity from jurisdiction is not an automatic waiver of immunity to the execution. The International Law Commission has adopted this position in its 1991Draft Articles.[31] Commentators have noted this dichotomy and state that "certainly, international law does not at present support the principle sometimes advanced, that the agreement of a State to submit to arbitration entails a waiver of its immunity in respect of all subsequent proceedings arising out of the arbitration, including proceedings for the enforcement of the award."[32] The new UN Convention on State Immunity 2004 provides that in absence of express waiver State and their entities may raise immunity in execution of an arbitral award.[33]

Under the ICSID Convention 1965, the enforcement of an award is not automatic. Article 55 of the Convention clearly states that the provisions relating to the recognition and enforcement of an arbitral award in Article 54 shall not be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign state from execution.[34] Thus, participation by a State or a State entity in an ICSID arbitration should not be interpreted as an implicit waiver of immunity from execution i.e., from enforcement of the award, since Article 55 preserves such immunity in no uncertain term. In any event, Article 55 prevails over Article 54 at least on the enforcement matter.

---

ed. Graham & Trotman, 1989); R.P. Buckley, "Now We Have Come to the ICSID Party: Are Its Awards Final and Enforceable?," 14 (No. 3) Sydney. L. Rev. 358-72 (Sept. 1992).

[30] A. Giardiana, p. 214; Hazel Fox, "States and the Undertaking to Arbitrate," 37 Int'l & Camp. L.Q. 1, 29 (1988); I. Brownlie, supra n. 5, at 347. See M. Sornarajah, Pursuit of Nationalized Property 253-311 (Martinus Nijhoff 1986), and International Commercial Arbitration 207-13 (Longman 1990); A.A. Asouzu, International Commercial Arbitration and African States 381-84 (CUP 2001).

[31] See the ILC Draft art. 18(2) Y.B. I.L. Comm'n 56 (1991); also the ILC Rep. 1999 p. 108.

[32] John Collier & Vaughan Lowe, "The Settlement of Disputes in International Law: Institutions and Procedures" p. 272 (OUP 1999).

[33] Art. 19 (a) of the UN Convention on Jurisdiction Immunities of State and Their Property 2004.

[34] ICSID Basic Documents: International Settlement of Investment Disputes (1985); 1 ICSID Reports.

Whether a State or State enterprise expressly waives the claim of immunity from execution of an ICSID award in a contractual arbitration clause? [35] In the case of ICSID, as in any other cases, it may thus become necessary to provide in an express waiver of immunity that the State waives "any" immunity from execution in connection with the enforcement of an award and to widen the scope of the waiver so as to make it applicable to "any property" or to "all properties" of the State, with the hope that the waiver may be construed as encompassing both sovereign and diplomatic immunity. A general waiver clause suggested by ICSID Model Clauses sounds instructive. It states the host State hereby waives any right of sovereign immunity in respect of the enforcement and execution of any award rendered by an agreed arbitral tribunal. [36] This would depend on whether the law in force in the country where execution is sought permits such a waiver.[37] Shouldn't the State parties to the ICSID Convention act to ensure enforcement of Convention awards in their respective jurisdictions? Hazel Fox QC wisely suggests that they should. She says that States should ensure that "their law on state immunity relating to enforcement of arbitral awards conforms to the minimum international standard."[38] Conformation to this standard can be expected from States that act in good faith by taking legislative action to enforce it.

In 1988 the U.S. Congress amended the 1976 Foreign Sovereign Immunities Act to provide "that an agreement to arbitrate constitutes a waiver of immunity in an action to enforce that agreement or the resultant award."[39] A State's agreement to arbitrate in the United States is considered to be an implied waiver of immunity to suit in a U.S. court. However, U.S. courts might not consider an agreement to arbitrate in another country to constitute a

[35] See Böckstiegel, at 40; Delaume, 'Contractual Waivers of Sovereignty,' G.R. Delaume, 'Recognition and Enforcement of State Contract Awards in the United States: A Restatement,' 91 Amer. J. Int'l L. 476, 487 (1997).
[36] Clause 15 of ICSID's Model Clauses of 1993.
[37] C. Schreuer, 'Commentary on the ICSID Convention: Article 55,' 14 (1) ICSID Rev. 117, 143-44 (Spring 1999); *See*, Jan Paulsson, 'Review and Enforcement of Awards,' 6 (No. 1) Arbitration & Law 77 (June 2001). *See also*, e.g., Article 23 of Russian Federal Law on Production Sharing Agreements (Dec. 30, 1995), 35 I.L.M. 1251, 1272 (1996), which came into force on Jan. 11, 1996.
[38] Hazel Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model LawMark II for Execution Against State Property?,' 12 (1) Arb. Int'l 89, 93 (1996).
[39] *See* Sec. 1605 (a)(6). See Dickinson et al., at 249-50; G. Kahale, 'New Legislation in U.S. Facilitates Enforcement of Arbitral Agreements against Foreign States', 6 J. Int'l Arb. 57 (1989).

waiver.[40] But they might find that a waiver exists when the cause of action is closely related to the enforcement of an arbitral award and the State is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the New York Convention.[41] It is also possible that in this type of situation, U.S. courts might grant interim relief in an action for a preliminary injunction in aid of arbitration.[42]

Generally a waiver of immunity from jurisdiction does not encompass a waiver of immunity from enforcement measures; rather a separate waiver is required for that purpose.[43] Additionally, such a waiver of immunity from enforcement measures has to be made expressly, which means that an international agreement, a written contract, a declaration before the court, or a written communication after a dispute between the parties has arisen, is indispensable.[44] Although only the United States Foreign Sovereign Immunities Act, the Canadian State Immunity Act 1982 and the ILA's Draft Articles of 1991 allow for an implied waiver, however, under French law waiver is not presumed, it must be "certain and valid", "specific" and "result from actions unequivocally showing the intent to waive".[45] In *Republique Islamique d'Iran v. Eurodif*, the Paris Court of Appeals was asked to declare that the parties' agreement to carry out the award in accordance with Art.24, now after amendment Art. 28 of ICC Arbitration Rules amounted to a waiver by the State of its immunity from execution. Rejecting the claim the court held that this agreement was merely a commitment to submit oneself voluntarily to the award to recognise its binding power, but it contains no reference to the immunity from execution which a party may

[40] *See*, e.g., *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F 2d 1012, 1017 (2d Cir. 1993); *Frolova v. Union of Soviet Socialist Republics*, 761 F. 2d at 377; *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 500 F. Supp. 320, 323 (S.D.N.Y. 1980); *Obntrup v. Firearms Center Inc*., 516 F. Supp. 1281, 1285 (E.D. Pa. 1981); *Zernicek v. Petroleos Mexicanos*, 614 F. Supp. 407, 411 (S.D. Tex. 1b 985), aff'd, 826 F 2d 415 (5th Cir. 1987), cert. denied, 484 U.S. 1043 (1988).

[41] See *Ipitrade International SA v Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978), 63 I.L.R. 196. *Cf. Creighton Ltd. v. Government of State of Qatar*, 161 F 3d 118 (D.D.C. 1999), I.L.M. 39 (2000) 149 (no implicit waiver from jurisdiction of U.S. courts as Qatar was not a party to New York Convention).

[42] *Cf. American Int'l Group v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980).

[43] Art.20 of the UN Convention on Jurisdictional Immunities of States and Their Property; Art. 5 of l' Institut de Droit International on Contemporaty Problems Concerning the Immunity of States in Relation to Questions of Jurisdictional and Enforcement; Sec. 13(3), UK SIA 1978.

[44] Crawford, *Execution of Judgements and Foreign Sovereign Immunity,*75 American Journal of International Law 820 (1981).

[45] CA Aix, Dec.30 1929, Laurans, Sirey, Pt.II, at 153 (1930).

potentially enjoy.[46] The court further stated that agreement to an arbitration clause by itself does not imply a waiver of immunity from execution.

In July 2000 in the case of *Creighton v. Qatar* where Creighton obtained two separate final awards against Qatar and in order to enforce the awards Creighton applied to seizure of funds of Qatari bank held by Bank de France as well as shareholder rights and securities belonging to the State. The French Cour de cassation held that the promise made by the State signing the arbitration clause to carry out the award in accordance with Art. 24 of the ICC Rules of Arbitration constitute an implied waiver by the State of its immunity from execution of the arbitral award.[47] However, A month later In *Embassy of the Russian Federation in France v. Compagine NOGA d'Exportation* the Paris Court of Appeal held that the mere mentioning in the contract at issue that "the loan later waives its right to immunity as concerns the enforcement of an arbitral award rendered against it with respect to the present contract" is not sufficient to provide the unambiguous intention of the State to waive its right to rely on diplomatic immunity from enforcement measures.[48] Therefore, based on the case law and recent codifications it is obvious that waiver of immunity from attachment and enforcement measure must be expressed by the State or its affiliates.

5.4 Requirement for the Enforcement of an Award

Obviously, if a decision against a foreign State is rendered under the local jurisdiction of the same State where enforcement is sought, the State must not be entitled to immunity from jurisdiction. If the foreign State already enjoys immunity from jurisdiction, it cannot be a party to the lawsuit before a national court for execution of an arbitral award. Therefore, no judgement can be rendered against that particular State and no enforcement measures be taken against such a State. Consequently the problem of admissibility of enforcement

[46] *Republique Islamique d'Iran v. Eurodif,* (1982) Rev. Arb. 2004, 213.

[47] *Creightton Ltd v. Minister of Finance of Qatar and Others,* French Court Court of Cassation, 6th July 2000, 127 ILR 154, 155; *Libyan American Oil Company v. Libya,* Seva Court of Appeal, 18 June 1980, Case No. O 261/79, 20 ILM 893, 895 (1981).

[48] *Embassy of the Russian Federation in France v. Compagine NOGA d'Exportation* Paris Court of Appeal, 10 August 2000, 127 ILR 156,160.

measures in such cases can only appear where a State participated in commercial activities and is therefore, deprived of its immunity from jurisdiction.[49]

Moreover in international law a State is barred from taking measures of constraint against the property of a foreign State on a decision violating the rules of state immunity from jurisdiction.[50] In this context it is also essential to note that a decision rendered in third country violating international law on state immunity from jurisdiction must not be considered a valid basis for enforcement by the State where enforcement is sought against the property of a State. Consequently, the courts of the State where the enforcement is sought are entitled to examine, firstly the conditions for immunity from jurisdiction and second, the purpose of the object of execution. It is also required for the attachment and execution against the property of a State or State entity they are engaged in commercial activities and State expressly consented to it.

Another problem in that respect which is not included in the UN Convention on state immunity is the judgements rendered in a foreign State and against that State, those are sought to be enforced abroad. In *AIC Ltd v Nigeria,*[51] AIC obtained a Nigerian judgement against Nigeria, on the ground of a commercial activity, was sought to be registered and enforced in the United Kingdom. In this case AIC applied for third party debt orders in relation to bank accounts of the Federal Government of Nigeria and the Central Bank of Nigeria, including accounts with the Bank of England and HSBC Bank Plc. On 13 January 2003, Master Yoxall made interim third party debt orders that prohibited the third party banks from making any payment out of those accounts apart from any credit balance exceeding the sum of US $8,194,300 the order made by Nigerian court. Those orders remain in force in relation to the accounts with the Bank of England and HSBC.

[49] *Socobelge v. The Hellenic State, Belgium, Civil Tribunal of Brussels*, 30 April 1951, 18 ILR 3, 7-8.; *Philippine Embassy Bank Account Case,* Federal Republic of Germany, Federal Constitutional Court, 13 December 1977, 65 ILR 146, 164.

[50] Art.18 of UNCSI 2004; Schaumann, *Die Immunitat auslandischer Staaten nach Volkerrecht und deutschem Zivilprozessrecht*, 8 Berichte der Deutschen Gesellschaft fur Volkerrrecht, 138 (1968); H. Damin, *Staatenimmunitat und Gerichtszwang*, 170 (1985).

[51] *AIC Ltd v. Federal Government of Nigeria and Attorney General of Federation of Nigeria*, [2003] EWHC 1357 (QB).

Finally the High Court of Justice Queen Bench Division came to the conclusion that the judgement could not be registered under section 9 of the Administration of Justice Act 1920, since the proceedings before the English court was related to the registration of a judgement and not a commercial activity. Thus, no exception to immunity from jurisdiction was applicable. Moreover, the Nigerian judgement related to a purely domestic matter, a situation in which immunity from jurisdiction cannot be lifted. This is ambiguous because the purpose of the State immunity Act is to enable English courts to enforce commercial liabilities engaged in by States, irrespective of the place the liability was engaged in. on the other hand, this judgement relating to a purely internal affairs, not having any jurisdictional links to England which would permit English courts to exercise jurisdiction. In this important area of state immunity there is still room for development of the concept of state immunity. Furthermore the enforcement was refused by the court on the ground that the moneys in a bank account of a central bank that is a separate legal entity, belonging beneficially to the government of its state, are not liable to execution even if those moneys are used or intended for use for commercial purposes.

However, in cases of a state's waiver of immunity and express submission to the enforcement measures in the State where enforcement is sought, no decision by a court or tribunal is needed, since the sate thereby demonstrates its willingness to subject itself to enforcement measures.[52] Moreover, no enforcement measures must be taken against a foreign State being the legal successor of the debtor of the decision, if the foreign State would have been immune from jurisdiction in a proceeding against itself.

5.5 Distinction between Public and Private Property for Execution

For execution measure there are certain State properties against which no measure of constraint can be taken without written consent of the State. 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 UN Convention on

[52] H. Damin, *Staatenimmunitat und Gerichtszwang*, 170 (1985).

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 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.[53]

In construing the words 'property of the State' in Art.18 and 19 of the UNCSI cross-reference must be made to the other provisions of the Convention. The last sentence of Art.19 (c) provides the words 'property that has a connection with the entity' is to be understood as broader than ownership interest or possession. This would seem to suggest that the word 'property' used on its own is restricted to the State having a title, proprietary interest or possessory interest in the property.[54] Provisions in the UK SIA included the same term 'property of the State' in its provisions relating to immunity from execution.[55] In a case relating to the immunity of execution of state property held by a private corporation in the name of state's Central Bank, the English court had to address the application of these provisions where both the State and its Central Bank had equally interest in the assets. Applying the principle from the previous decided case law Aikens J held that 'the property' will include all real and personal property and will embrace 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 comes within sections 13 and 14 of the Act.[56]

It seems the distinction between State property involved in commercial activities, which is not immune, and non-commercial public property, which is immune, is adopted widely for execution against state property. The criteria deployed for execution against State property are different from those used in jurisdictional issues. The 'purpose test', which was

[53] Art. 21 of the UNCSI
[54] Hazel Fox, p.626.
[55] Sec 13, 14 of UK SIA.
[56] *AIG Capital Partners Inc. v. Kazakhstan* [2005] EWHC p. 2239.

discarded in favour of the determination of the nature of transaction for the purpose of establishing immunity from jurisdiction,[57] 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.

Duff Development Company Ltd v Kelantan Government,[58] was one of the early cases came from English colony then, now it is a province of Malaysia. In this case the Government of Kelantan granted Duff Development Company certain mining and other rights to be exercised in that State, and the deed contained an arbitration clause stating that any dispute between the government and the company will be settled by arbitration under the Arbitration Act 1889. Disputes having been arisen as to the effect of this deed, they were referred to an arbitrator, who made an award in favour of the company. The Government of Kelantan applied to set aside the enforcement of an arbitration award on the ground that Kelantan was an independent Sovereign State. House of Lords 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.

The UN Convention specifically addressed certain kinds of State properties that are designated for public use and hence, immune from execution.[59] These include diplomatic and consular premises, military equipment, 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 sometimes called Sovereign Wealth Funds. 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[60] without written consent of the State.

[57] Christoph H Schreuer, *State Immunity: Some Recent Developments* at p. 15.
[58] *Duff Development Company Ltd v Kelantan Government* (1924) AC 797.
[59] Art. 21 of the UNCSI 2004.
[60] Section 13(2)(b) of UK SIA.

State property which has been allocated or earmarked by the State for the satisfaction of the claim, is the subject to enforcement measures by the forum State.[61] According to the ILC, the reason for the restriction of attachment of the earmarked property to the object of the proceeding is to prevent extraneous claimants from impeding the State's intention to satisfy specific claims or to pay admitted liabilities.[62] The term "earmarks" means that the State creates and identifies a fund to meet its liability. In *Alcom Ltd v. Republic of Colombia* the English House of Lords when addressing a claim of immunity regarding an Embassy's bank account, held that there is an exception under English law if the Embassy had opened the bank account for the sole purpose of dealing with liabilities engaged in commercial activities.[63] Similarly in the case of *Islamic Republic of Iran v. Societe Eurodif and Others*, French court found that immunity from enforcement measures can be lifted exceptionally where the State intended to allocate certain assets for the performance of purely commercial operation.[64]

However, in *Parkin v. Government of the Republique Democratique du Congo*, a former mercenary who had served in the Congolese army, tried in vain to attach an account which had been specifically created for the purpose of paying Congolese mercenaries in South Africa. The court held that the funds were designated for sovereign purposes and, therefore, immune from attachment or execution.[65] In *The Philippine Embassy Bank Account case*, the dispute was regarding the unpaid payment of rent by the Philippine Embassy. The plaintiff as a landlord had sought before the Federal Constitutional Court of Germany to attach balances of the Philippines held on its account at Deutsche Bank in Bonn. The Court, after a thorough examination of treaty practice and court decisions, found that the bank account could not be attached as its purpose was to cover the embassy's costs and expenses, which is a sovereign non-commercial purpose. Likewise, in England Lord Diplock adopted the

[61] Art. 18(b), Art. 19 (b), UNCSI 2004.

[62] ILC Draft Articles on Jurisdictional Immunities of States and Their Property, 2 (2) YBILC 58 (1991) UNDoc.A/46/10.

[63] *Alcom Ltd v. Republic of Colombia* [1984]2 All ER 6.

[64] *Islamic Republic of Iran v. Societe Eurodif and Others*, 77 ILR 513 (1988).

[65] *Parkin v. Government of the Republique of Democratique du Congo and Another* (Witwatersrand Local Division), 28 October 1970, 64 ILR 668.

same reasoning in the *ALCOM case*, holding that a bank account used to cover the day-to-day expenses of an Embassy, clearly served sovereign purposes and therefore was immune from enforcement measures.[66] Thus, based on the recent codification and the decision of the courts it is now accepted that non-commercial public property which is not specifically agreed by the State is immune from attachment or execution.

5.6 Immunity from execution and commercial exception

A commercial or private law exception to immunity is the hallmark of the restrictive approach. When a sovereign State or any one of its entity is engaged in commercial activities, the activities are considered to be similar to the conducts of an ordinary business corporation, not as public act of an independent sovereign State or State entity. This is because a sovereign State or its entity has ceased to act in a public capacity, thus sovereign immunity is not available for the ordinary commercial activities of a State or their entity. It has been discussed in the earlier chapter on immunity from jurisdiction that the distinction between the two types of activities is frequently addressed, especially in civil law jurisdictions, using the Latin terms, acts *jure imperii* and acts *jure gestionis.*[67] This is now generally accepted business practice in adjudication of disputes in international trade and commerce that if a sovereign engaged in commercial activities the restrictive approach shall be applied.

Execution against State property in relation to sovereign immunity generally raises more difficulties than jurisdiction. As noted by Carreau, to adjudicate a foreign state is one thing, to subject it to coercive measures of execution is another.[68] At the same time, strong considerations of principle militate in favour of aligning jurisdiction and execution so that where a national legal system has jurisdiction to render a judgment, it can also enforce that judgment. Different countries have adopted different approaches, but most limit execution

[66] *The Phillipine Embassy bank account case* (1977) 65 ILR 146 (1984); *Alcom ltd v. Republic of Columbia & Another* [1984] ac 580 or [1984] 2 All ER, 6 (hl).

[67] Sompong Sucharitkul, *State Immunities and Trading Activities in international Law* (Stevens & Sons Ltd. 1959) pp. 23-34.

[68] D. Carreau, droit International Public (9th ed. 2007).

against foreign States more than adjudication. In particular, immunity from execution must generally be specifically waived as such; a waiver of immunity from jurisdiction does not affect immunity from execution.[69]

A number of civil law jurisdictions have adopted the principle that a State enjoys immunity from execution against the property in use for sovereign purposes, but not for property in use for commercial purposes. This approach was adopted in 1977 by the German Constitutional Court's decision in the *Philippine Embassy* case, and in subsequent cases in Italy and Spain.[70] The Australian, Canadian and UK statutes generally allow for execution against foreign state property in use or intended for use in commercial purposes.[71]French and US law also distinguish between properties used for sovereign as opposed to private purposes. However, for execution against State property, they generally require a link between the property and the original claim.[72] Both France and the US eliminate this special requirement of a link between the property and the underlying claim in cases involving property of a State entity rather than the foreign State itself. Thus, in *Sonatrach*, the Cour de Cassation expressly distinguished between foreign State and State agencies, finding that "the assets of public entities, distinct from the foreign State, whether or not enjoying legal personality, which are part of a group of assets (*patrimoine*) which been dedicated to activities in the private law sector, may be seized by all creditors of the public entity".[73]

[69] Maniruzzaman, State Enterprise Arbitration and Sovereign Immunity Issues : A look at Recent Trands, (2005) Disp. Reso. Journal, Vol. 60 no 3; Hazel fox, "State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model law Mark II for Execution Against State property?" (1996) 12(1) Arb. Int'l 89-93.

[70] *The Philippine Embassy case*, 65 ILR 146 (1977); *Condor and Filvem v. Minister of Justice*, Italian Constitutional Court, 101 ILR 394 (1992); *Abbott v. South Africa*, Spanish Constitutional Court, 113 ILR 411 (1992).

[71] See s. 32(1) of Australian FSIA (immunity generally excluded for commercial property); Canadian SIA s. 11 (execution against foreign State property allowed where the property is used or is intended for commercial activity); UK SIA s. 13(4) (property in use or intended for use in commercial purposes is subject to attachment).

[72] See US FSIA s. 1610(a)(2); see *République démocratique du Congo*, French Cour de Cassation, (Civ. 25 January 2005) (immunity can only be excluded "*lorsque le bien saisi se rattache … à une opération économique, commerciale ou civile relevant du droit privé qui donne lieu à la demande en justice*) ; *Eurodif*, French Cour de cassation, (1re Ch. 14 March 1984), JCP II, 2205.

[73] *Société Sonatrach v. Migeon*, French Court of Cassation (1 October 1985), 77 ILR 525; see US FSIA Sec. 1610(b)(2).

Immunity from execution was the most difficult problem encountered during the lengthy process leading to adoption of UNCSI 2004. In 2002, agreement was achieved on a restrictive theory for post-judgment execution. However, there was still uncertainty about whether the assets would be required to have a link with the claim. Ultimately, the requirement of a link with the claim was waived. Article 19 (a) (b) of UNCSI, thus, allows post judgment execution against property used for commercial purposes located in the territory of the forum State provided that the State has expressly consented to the taking of such measures. But Art. 19(c) of the Convention still stresses that the property must have "a connection with the State entity issue against which the proceedings were directed". However, the Convention deals separately with pre-judgement and post-judgment execution, and Art. 18 strictly limits pre-judgment attachment.

In the recent case *AIG v. Republic of Kazakhstan* English court appeared to consider that a Sovereign Wealth Fund that invests in securities is engaged in immune sovereign activity by virtue of its general purpose of accumulating assets in the public interest; the invested assets were accordingly immune from execution. In addition to its finding with regard to the non-commercial nature of the investments discussed here, the court also based its decision on the second alternative ground that the National Fund assets benefited from absolute immunity because they constituted "property" of the Kazakhstan Central Bank.[74] The case arose after an AIG affiliate had obtained an ICSID arbitration award against the sovereign wealth fund of Republic of Kazakhstan and registered it as a judgment in England. AIG then sought to execute against cash and securities located in a London bank. The National Bank of Kazakhstan (the central bank) intervened in the case and claimed that the assets were immune from enforcement under the UK SIA.

The assets were cash and securities that formed part of the National Fund of Kazakhstan (the "National Fund"), a sovereign wealth fund created in 2000 by a presidential decree. Kazakhstan conceded that, but for state immunity, the National Fund had an attachable interest in the accounts. Under an agreement of "trust management" between the Republic of Kazakhstan and the central bank, the National Fund was managed by the central bank.

[74] *AIG Capital Partners Inc. and Another v. Kazakhstan*, [2005] EWHC 2239 (Comm.), 129 ILR 589.

The central bank was given the right to invest the National Fund assets. The fee arrangement between the government of Kazakhstan and the central bank provided for the central bank earning a commission if the Fund profited, but paying compensation to Kazakhstan if the Fund incurred losses. The Government was identified as the beneficiary under the agreement. When it come in relation to the terms of a global custody agreement (GCA) between the central bank and the London bank, the London bank agreed to hold, in the name of the Central Bank, cash and securities of the National Fund as banker and custodian. The GCA appeared to be an ordinary contract for banking and custody services including holding cash deposits and securities. Sixteen accounts were established under the GCA. The securities in the accounts included UK government bonds, shares in UK listed companies and non-UK securities.

The court considered that the cash and securities were not in use or intended for use for commercial purposes. The judge relied principally on the fact that the "overall aim of the exercise was to enhance the National Fund". In this context, the judge found that the active trading of the securities accounts, the goal of obtaining high profits at reasonable risk levels and the results-based remuneration of central bank as manager of the Fund were not determinative. The judge relied on the purpose of the securities accounts being to assist the running of the National Fund and found that "the dealings were all part of the overall exercise of sovereign authority by the Republic of Kazakhstan".[75] The court also relied on a letter to the court from the Kazakhstan Ambassador to the UK. The letter recognised that the assets formed part of the Fund and beneficially belonged to Kazakhstan. However, it stated that the Fund "was designed to ensure economic stability of Kazakhstan and to accumulate funds for future generations by way of investment in securities" and that the London assets "had never been used for commercial purposes and were not intended to be used for such purposes". The judge noted that under Sec.13 such certificates are to be accepted as sufficient evidence of non-commercial use unless the contrary is proved.[76] The judge found that the only contrary evidence was the trading of the accounts and that it did not establish commercial use.

[75] *AIG v. Republic of Kazakhstan*, at 589.
[76] Sec. 13 (5) of the UK SIA.

The claimants also argued based on the commercial exception that because the trading activities of the securities accounts were clearly financial transactions, they fell within the definition of commercial transactions under section 3(3) of the UK SIA. The provision notably provides that "any loan or other transaction for the provision of finance" constitutes a commercial transaction. The judge rejected the argument again on the basis of the broader purpose that the dealings of the securities accounts must be set against the background of the purpose of the GCA. That was established to assist in running the National Fund. The securities accounts contain assets which are part of the National Fund. The dealings are all part of the overall exercise of sovereign authority by the Republic of Kazakhstan. Although the transactions were clearly of a nature that could be carried out by private parties, the decision does not use that approach.

The National Fund appears to be similar to a number of other Sovereign Wealth Funds established by the governments around the world. The decree creating it and subsequent applicable rules provided in general terms that the fund's purpose was to ensure stable social and economic development, accumulation of financial resources for future generations and reduction of the vulnerability of the economy to the influence of unfavourable external factors. The principal source of funds was earnings and taxes from the oil sector. The matters on which the funds could be spent included deficits between planned and actual revenues from raw materials, specific projects as determined by the President and set out in the State budget, and the costs of managing the Fund.

AIG analysed the transactions based on their broad purpose. The nature of the activity as financial transactions was irrelevant in light of the overall purpose of earning money for the State. If the reasoning in AIG were to be adopted by other courts, Sovereign Wealth Funds would likely to be benefited from very broad scope of immunity regardless of their structure. Potential claimants against a Sovereign Wealth Fund would have great difficulty establishing that its activities are not for the purpose of seeking to increase the value of the fund. In contrast, as discussed in the earlier chapter, in the case of *Sarrió proceedings against the*

Kuwait Investment Office and Kuwait Investment Authority,[77] where sovereign State of Kuwait argued that the assets belong to Kuwait's Future Generation Fund, managed by its two entities (KIA & KIO) were immune, the Swiss court expressly noted that the nature, and not the purpose, of the acts was determinative before the tribunal noting that Kuwait had conceded that the underlying transactions were commercial.

The approach in *AIG v. Republic of Kazakhstan* would also make the treatment of sovereign debtors and creditors markedly different. A State that raises funds in the sovereign debt market is now generally considered to engage in private activity even if the funds are destined for immediate public purposes.[78] In contrast, under the reasoning in *AIG v. Republic of Kazakhstan*, investment activity by a Sovereign Wealth Fund would benefit from immunity. Therefore, successfully executing against foreign state property remains difficult for private parties. As an evidentiary matter, it can be difficult to obtain information to demonstrate that property is in commercial use. Where property can be located that is in commercial use, it frequently belongs to a State entity that is a different entity than the debtor and execution is rejected on the basis that it is an independent entity.

While a uniform approach to jurisdiction and execution would seem logical, the reality is that while jurisdiction has been substantially expanded, immunity from execution remains as "the last bastion of state immunity" in private law cases. There are a number of well-known cases where judgment creditors have spent many years in largely fruitless efforts in multiple jurisdictions to obtain satisfaction for judgments or arbitration awards.[79] At the same time, factual data is lacking about the degree to which states evade their obligations; although states may take longer to honour their obligations, it may be the case that all but a few sates do so.

[77] *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced at [1995] Rev. Suisse D. Int. Eur., Vol. 5, at p. 593.

[78] See UK SIA s. 3(3) (the same statute that was at issue in the *case of AIG*); *Republic of Argentina v. Weltover*, 505 US 607 (1992); Art. 2(1)(c)(ii) of UNCSI 2004.

[79] *See*, for example, the discussion of the *NOGA v. State of Russia* case in H. Fox, p. 653-655.

5.7 Sovereign Immunity from Execution of Award

In investment dispute between a foreign state or State entity and private investor immunity from jurisdiction is distinct from immunity from execution which comprises measures of constraint directed against property of the foreign state or State entity either for the purpose of enforcing judgments or for the purpose of pre-judgment attachment. It is still not a uniform practice as regard to the commercial exception of state immunity from execution. Although immunity from jurisdiction is now widely accepted principle in transnational jurisdiction, but it is still generally more narrowly applied with regard to immunity from execution against the property of state and State entities.

Immunity from execution against the property of a State or a State entity can be invoked when the State or State entity expressly consent in the agreement or allocate property for execution.[80] Express consent by the State or State entity is not exhaustive in relation to five categories of state property provided in Art.21 (1) of the UNCSI 2004. Clause 2 of the same provision makes it further clear that the restriction against execution in this paragraph is not prejudicial to the content of Art. 18 and Art.19, subparagraph (a) (b), because these categories of state properties are fundamental to the administration of a sovereign State. Notwithstanding, the provision of paragraph 1, the State may waive immunity in respect of any property belonging to one of the specific categories listed, or any part of such a category, by either allocating or earmarking the property within the meaning of article 18 (b), paragraph 1, or by specifically consenting to the taking of measures of constraint in respect of that category of its property, or that part thereof, under Art.18(1), paragraph1. A general waiver or a waiver in respect of all property in the territory of the State of the forum State without mention of any of the specific categories, would not be sufficient to allow measures of constraint against property in the categories listed in paragraph 1.[81]

The effect of immune status conferred on the five categories of state property listed in art. 21(1) is to avoid the operation of the third exception in art.19(c) in respect of post-

[80] *See* art. 18 and 19 of the UNCSI.
[81] Hazel Fox, p. 651.

judgement coercive measures. Art. 21(2) indicates that execution may be possible against the five categories of state properties listed in paragraph 1 where the State has either given express consent to execution against such property in pre-judgement or post-judgement or to both types of proceedings, or specifically allocated such property the satisfaction of a claim. Execution against such types of state properties under sec. 31(4) of the Australian FSIA 1985 expressed more specific requirement that a waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates that property as property to which the waiver applies.

Based on the above analogy in relation to certain specific categories of state properties it is arguable that the principle of state immunity from execution is not a mandatory rule hence, sovereign States are free to waive it. Courts have therefore been tempted to find that an arbitration agreement implicitly contains a waiver of such immunity so that a State cannot refuse to enforce an award rendered against it on such grounds.[82] Unfortunately this approach assumes that the division by the State of activities under its control into separate legal entities is intangible, does not always have the desired effect. In practice we see that domestic courts are extremely reluctant to enforce an award, and more generally any judicial decision, against assets designated for activities that only a State can pursue. To rationalise it national courts look at the nature and purpose of the State assets whether they are operated and controlled by the government officials and they are construed for the pure sovereign purpose.

5.7.1 The Nature and intended purpose of use of state property

The availability of immunity from enforcement measure depends on the nature and intended purpose of State property in the forum state. The nature and purpose of state asset whether they are for public of commercial purpose can be classified based on the nature of ownership and possession by the State or State entity. For instance, a warship by

[82] Commentary by Nathalie 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*, at 48.

both its nature and the function for which it is construed, as well as its operation and control by the executive force of the State establishes its use for a recognised sovereign purpose. But it is not as straight as physical property to specify the nature and purpose of states' liquidated funds, assets or securities deposited in the banks in the forum state. The question was raised before the supreme court of Canada as regard to the nature and purpose of the use of ship in *Flota maritime Browning de Cuba SA v. SS Canadian Conqueror and the Republic of Cuba.* The court held that ships which are at the disposal of a foreign state and are being supervised for the account of a department of a government of that state are to be regarded as public ship of a sovereign State at least until such time as some decision is made by the sovereign State as to the use to which they are to be put. [83]

The Swiss courts are prepared to keep their approach of immunity from jurisdiction and execution as one regime, and permit attachment of general fund where at the time of the attachment having a jurisdictional connection with Switzerland the fund in question were not allocated for any specific purpose, even if they had originally been intended but not subsequently used for a sovereign purpose. In the case of *United Arab Republic v. Mrs X*[84] Swiss Federal tribunal upheld an order requesting further particulars from a consular officer, where funds were deposited in his personal account by the Republic of Chad both for his own personal use and for the consular expenses. In a relatively recent case where the funds which derived from oil dues paid by US companies held by offshore companies for the president of Kazakhstan and his family members for the discharge of public commitments of the State, the Swiss Federal court rejected the immunity from execution. The Court held that where the State acting as the holder of private rights in assets in the name of companies, had deployed them in ordinary private law transactions, such assets were subject not only to claims but to measures of execution.[85]

[83] *Flota maritime Browning de Cuba SA v. SS Canadian Conqueror and the Republic of Cuba* (1962) DLR 598; 42 ILR 125; Sec. 32 (3)(b) of the Australian FSIA 1985 provides that property that is apparently vacant or apparently not in use shall be taken to be being used for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes.

[84] *United Arab Republic v. Mrs X, Swiss Federal Tribunal,* 10 Feb. (1960) 65 ILR 384.

[85] *Republic of Kazakhstan,* Federal Swiss Court, 8 December 2000, cited at p. 628 of '*The Law of State Immunity'* by Hazel Fox.

Funds that have been allocated to a commercial purpose remain a highly controversial issue and mostly arises particularly in relation to liquidated assets held in bank account of sovereign agent or diplomatic mission of foreign state in the jurisdiction of forum state. The burden of proof that the property of a State is in use or intended use for a commercial purpose rests with the claimant. Hazel Fox Q C states that art. 41 of the Vienna Convention on Diplomatic Relations 1961 imposes no duty on the foreign state or the mission to produce accounts or any explanation as to their intended uses by the meaning of respect the laws of the receiving state.[86] Because of the difficulties of determination of use and potential for abuse if inquiry is allowed international law makes the area of protection enjoyed by the foreign state in respect of its property very wide. Under English law of state immunity a certificate of the ambassador of foreign state that any state property is not in use or intended use for commercial purposes is not conclusive, but only constitutes sufficient evidence of that fact unless the contrary is provided.[87] Therefore, the presumption is that the property of the foreign state is in use or intended use for sovereign purposes, unless there is a proof of a specific allocation for a commercial purpose.[88]

In *Noga* and *Republic of Cameroon v. Winslow Bank & Trust*, the Soviet Union subsequently succeeded by the Russian Federation and NOGA had entered into an arbitration agreement with respect to two loans which provided for disputes to be settled through arbitration under the aegis of the Arbitration Institute of the Stockholm Chamber of Commerce. The Russian Federation had also waived "all right to immunity relative to the execution of the arbitral award rendered against it in connection with the present contract" and agreed not to rely "on any immunity from suit, from enforcement, from seizure or from any other judicial proceedings in connection with its duties arising from the present contract." Following this agreement, an arbitral tribunal ordered, in two separate awards, against the Russian Federation to pay Noga an amount in excess of 27 million US dollars.

[86] Hazel Fox, '*The Law of State Immunity',* p.628.
[87] Sec. 13 (5) of the UK SIA 1978.
[88] *Alcom Ltd v. Republic of Colombia and Others* [1984]2 Lloyd's Rep. 31.

On the basis of these two awards, granted exequatur in France,[89] NOGA proceeded to seize several bank accounts held by the Embassy of the Russian Federation in France, the Permanent Delegation of the Russian Federation at UNESCO, and the Commercial Bureau of the Russian Federation in France. Contrary to the Paris Court of First Instance, the Court of Appeals held that the terms used by the parties in relation to waiver of immunity from execution did not show the unequivocal intention of the borrowing State to waive its right to raise diplomatic immunity from execution in favour of the other contracting party, a private law entity, and to accept that this commercial company could, should the case arise, impede the functioning and activity of the State's embassies and missions abroad.[90]

The specificity of the assets seized here may explain the need for an express exclusion in order to find that the immunity no longer applies. Here again, from a strict legal perspective, the reasoning is far from convincing. Just as it can waive other immunities, a State has the right to waive its diplomatic immunity. Furthermore, the terms used in the agreement by Russian Federation in relation to waiver at issue in the *NOGA* case appear to be sufficiently broad to include this type of immunity. The agreement precisely included two stages of waiver of immunity from jurisdiction and execution by the Russian Federation. The waiver included all immunities that "the borrower in this case, the Republic of Cameroon would be entitled . . . to invoke for itself or for its assets . . . or any other immunity it may have." The clause specified that "the borrower consents . . . to . . . the execution against any assets (no matter what they are used for or designated to be used for)." Therefore, Professor Emmanuel Gaillard is of the opinion that in this case there was no need to construe the State's intent in order to find such a waiver to be recognised.[91]

Nevertheless, the Court decided that even though the State had, in the agreement at issue, consented to the execution of any award against it, "this consent is presumed not to apply

[89] TGI Paris, Mar. 15, 2000, confirmed by CA Paris, Mar. 22, 2001, *Gouvernement de la Fédération de Russie v. Compagnie Noga d'importation et d'exportation*, 2002 REV. ARB. 723 (3rd case).

[90] CA Paris, Aug. 10, 2000, *Ambassade de la Fédération de Russie en France v. Compagnie Noga d'importation et d'exportation,* 128 J.D.I. 116, 121-22 (2001) (note by I. Pingel-Lenuzza); JCP, Ed. G., Pt. II, No. 10512, at 765 (2001) (note by C. Kaplan and G. Cuniberti); 2001 RTD COM. 410, 412 (note by E. Loquin); 2001 Dalloz, Jur. 2157, 2158 (note by E. Fongaro).

[91] Emmanuel Gailard and Jennifer Y, '*State entities in International Arbitration'* (JP Inc. 2008) p.185.

to assets and holdings of the State's diplomatic missions, or to those designated for the use of its missions." It added that "the ordinary clause in international loan agreements, according to which a State agrees to waive its immunity from execution on all its assets, whatever they might be designated for, does not constitute a waiver of its immunity from execution" and the fact that the clause quoted above "does not expressly mention the assets used by the Republic of Cameroon's diplomatic missions, does not imply that the State consents to waive its immunity from execution on such assets." The decision, which explicitly refers to the Vienna Convention on Diplomatic Relations of April 18, 1961, is even more restrictive as it seems to place the burden on the creditor to prove that the assets are not meant to be used for the activity of the diplomatic mission.[92] It remains no less true, however, that it is legally possible for a State to waive its immunity from execution with respect to assets designated for the operation of diplomatic missions. Furthermore, the terms of the disputed agreements seemed, in general, to include such immunity, even if, in this instance, the agreements were manifestly model clauses.

The issue of sovereign immunity in relation to execution of award becomes more complex when it comes in relation to mixed funds. Draft history of the Australian Law of State Immunity witnessed that the Law Commission discussed generally the problem of mixed funds and rejected any presumption either for or against commercial use where a State held in one account funds for both sovereign and commercial purposes. Hazel Fox is of the opinion that 'a presumption that all funds were in sovereign use would be too generous to a State acting in bad faith, while a presumption that all the funds were for commercial purposes could barely be justified on grounds of implied waiver on the part of the State operating the mixed account.' To its end the Law Commission in Australian FSIA defined commercial property as 'property, other than diplomatic of military property, that is in use by the foreign state concerned substantially for commercial purposes'; property 'apparently vacant or not in use' was to be taken as 'being used for commercial purposes unless the court was satisfied that it had been set aside otherwise than commercial purposes'.[93]

[92] CA Paris, Sept. 26, 2001, *République du Cameroun v. Winslow Bank & Trust, Dalloz*, I.R. 3017 (2001).
[93] Sec. 32(3)(a)(b) of Australian FSIA.

These decisions are not so much the result of a precise technical analysis but rather of a general reluctance of courts to allow the enforcement of outstanding private debts on assets designated for diplomatic activities, which are the core of the *jure imperii* activity of states.[94] The position of the courts would be *a fortiori* justified if the waiver resulted not from a provision expressly consenting to such waiver but from the existence of an arbitration agreement, regardless of whether it referred to arbitration rules requiring that the parties carry out the award without delay. Therefore, the French *Cour de cassation's* approach of recognising an implicit waiver of state immunity from execution in order to ensure the effectiveness of arbitral awards will not suffice in practice to bring an end to the situation in which an enforceable award remains ineffective until the State elects to honour it. This observation leads to consider whether the solution to the contradiction between the principles of effectiveness of arbitral awards, immunity from execution, and autonomy of state legal entities is to be found in the tempering of the latter principle in favour of the two former principles.

5.7.2 Categories of State Properties Immune from Execution

Immunity from execution is prevailingly the purpose of the property against which enforcement measures are sought that determines whether or not the immunity will be granted.[95] The availability for enforcement measures of property used for *jure gestionis* or non-public purposes, or, as it is somewhat inelegantly included in the UNSIC, for 'other than government non-commercial purposes',[96] is recognised in the judicial decisions of many

[94] *See*, for example, the opinion of the U.S. District Court for the Southern District of New York dated September 19, 2002, which refused to validate Noga's seizure by distinguishing, manifestly erroneously, the Russian Federation, the asset's holder, from its Government, the party to the arbitration in *Compagnie Noga d'Importation et d'Exportation S.A. v. The Russian Federation*, *Case* No. 00 Civ. 0632, 2002 U.S. Dist. LEXIS 17749; 17(10) INT'L ARB. REP. C-1 (2002). This decision was later overruled by the U.S. Court of Appeals for the Second Circuit: *Compagnie Noga d'Importation et d'Exportation S.A. v. The Russian Federation*, 361 F.3d 676 (2d Cir. 2004).

[95] *See* Hazel Fox, p. 634; Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution', 10 *NYIL* (1979) 3, at 17.

[96] Art. 19(c) UNSIC, based on Art. 18(1)(c) ILC Draft Articles.

States around the world.[97] The true difficulty lies in defining and identifying the scope of property not used for sovereign purposes and thus subject to enforcement jurisdiction.[98] Based on the principle established by the case law one can clearly recognise that the broad categories, identifying types of property generally considered serving sovereign or non-commercial purposes as they are found in the UNSIC and other immunity instruments, have been followed and refined. Five specific categories of State property provided in the UN Convention which shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purpose.[99]

5.7.2.1 Diplomatic Property

Diplomatic and consular premises as well as related property serving diplomatic or consular functions are the typical examples of property serving non-commercial purposes and thus being immune from execution. This immunity, derived from the inviolability of such premises under diplomatic and consular law,[100] is also expressly reaffirmed in a number of state immunity codifications.[101] Court practice is relatively uniform in respecting the

[97] *Philippine Embassy Case*, at 164 (ILR), confirmed in the *NIOC Revenues Case*, Bundesverfassungsgericht, 12 Apr. 1983, BVerfGE 64, 1, 65 ILR 215, at 242. See also *Spanish Consular Bank Accounts Case*, Landgericht, Stuttgart, 21 Sept. 1971, 65 ILR 114, at 117, where the court had held that 'there is
a rule of customary international law under which execution against the property of a foreign State which is devoted to sovereign purposes is not admissible'.

[98] See *Société de droit irakien Rafidain Bank et crts v. Consarc Corporation, société de droit américain et crts*, Cour d'Appel, Brussels, 10 Mar. 1993 [1994] JT 787, where the court reasoned that 'immunity from execution aims at removing certain assets of a foreign State from measures of execution of its creditors' but did not make it clear which assets might be available for execution.

[99] Art.21 of the UNCSI 2004.

[100] Art. 22(3) Vienna Convention on Diplomatic Relations 1961, 500 UNTS 108, provides: '[t]he premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution'; Art. 25(3) Vienna Convention on Consular Relations 1963, 596 UNTS 288, merely provides: '[t]he consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence and public utility'.

[101] Art. 21(1)(a) UNCSI 2004, based on Art. 19(1)(a) ILC Draft Articles on State Immunity; Art. VIII C 1 of International Law Association, Montreal Draft Articles for a Convention on State Immunity 1982 (ILA Draft Convention), 22 ILM (1983) 287; the Buenos Aires Revised Draft Articles for a Convention on State Immunity, ILA Report (1994) 21, did not change the provisions on enforcement immunity; See H. Fox, *The Law of State Immunity* (2002), p.390; C. Schreuer, *State Immunity: Some Recent Developments* (1988) p. 145.

immunity of embassy premises and buildings.[102] Courts have, however, clarified that the immunity from execution of embassies extends only so far as the performance of the duties of the mission requires. Thus, state-owned immovable property no longer used for diplomatic purposes ceases to be protected by immunity from enforcement measures.[103]

The diplomatic immunity from jurisdiction was well established by the beginning of eighteen century[104], on the other hand, the exception of Diplomatic property is a general principle of State immunity, widely accepted and observed both legislation and by the national courts.[105] US FSIA specifically mentioned diplomatic property which is not used for commercial purposes is immune from execution.[106] US courts apply this principle to refuse attachment of diplomatic premises to satisfy judgements for unpaid rent and commercial debts and also hold the premises to be within the prohibition of execution on diplomatic premises.[107] Even in the extreme situation where Congress has enacted legislation permitting attachment of diplomatic property relating to immunity from execution, the executive has intervened to prevent execution against diplomatic property. US President has exercised his discretionary waiver power to suspend the provision relation to attachment to diplomatic property for execution in the interest of national security stating that if the US permits attachment of diplomatic properties then other countries may retaliate, placing our embassies and citizens overseas at grave risk.[108]

Property listed in paragraph 1(a) of the UNCSI is intended to be limited to that which is in use or intended for use for the purposes of the State's diplomatic functions. This obviously excludes property, for example, bank accounts maintained by embassies for commercial

[102] See the *Legation Building Case*, Bundesgericht, 15 Mar. 1921, 1 Ann.Dig. (1919-1922) 291, in which the court held that 'embassy buildings of a foreign state are not an object for execution'; See also *Embassy Eviction Case*, Court of First Instance, Athens, 1965, 65 ILR 248; *Ambassade de la fédération de Russie en France v. Société NOGA*, Cour d'Appel, Paris, 1st Chamber, section A, 10 Aug. 2000 [2001] 128 JDI 116.

[103] *Hungarian Embassy Case*, Bundesgerichtshof, 26 Sept. 1969, 65 ILR 110.

[104] *Legation Building (Execution Case)*, Supreme Court, Australia, 15 March 1921; 1 ILR 219; *Immunity of Immovable Properties of Embassy of Hungary, 1929, 4 ILR 371; See,* Denza, *Diplomatic* Law (3rd.2008); Bynkershoek, *De Foro Legatorum* (1721) ch. Viii.

[105] Sec. 1610 (1)(4)(b) of US FSIA; Sec. 16(1) of UK SIA; Sec. 32 (3)(a) of Australian SIA; Art. 31(3) of the VCDR.

[106] Sec. 1610 (1)(4)(b) of US FSIA.

[107] *767 Third Avenue Associates v. Permanent Mission of the Republic of Zire,* 805 F Supp. 701 (2nd Cir. 1992).

[108] Statement of the White House Press Secretary, 21 October 1998.

purposes. Difficulties sometimes arise concerning a 'mixed account' which is maintained in the name of diplomatic mission, but occasionally used for payment, for instance, supply of goods or service to defray the running costs of the mission. The recent case law seems to suggest the trend that the balance of such a bank account to the credit of the foreign State should not be subject to an attachment order issued by the court of the forum State because of the non-commercial character of the account in general.[109] This was held in the *Philippine Embassy Case* where the attachment was sought of an account of diplomatic mission for unpaid rent that claims against a general current bank account of the embassy of a foreign State which exists in the forum State and the purpose if which is to cover the embassy's cost and expenses are not subject to execution. Property listed in paragraph 1(a) also excludes property which may have been, but is no longer, in use or intended for use for diplomatic or cognate purposes.

5.7.2.2 Property of a Military Character

The UNCSI provides that the property of military character or used or intended for use in the performance of military functions is not subject to execution. The word 'military' in the context of paragraph 1(b) in the UNCSI includes property of all navy, air and army.[110] USFSIA provides wide definition of property of military character which comprises all types of military equipment including basic commodities such as food, clothing, and fuel including their means of delivery.[111] US House Report lists military equipment such as weapons, animation, military transport, warship, tanks, communications equipment under first category but stressed that both the character and function of the property must be military. The second category includes equipment to protect food, clothing, fuel and office equipment.[112] Spanish Provincial Court in the case of *State Marine Corp. and Currence v. USA* held that goods being transported by ship for the military activities of US troops held immune from attachment in respect of unpaid freight on the character agreement; it made

[109] *The Philippine Embassy Case.*
[110] ILC Commentary to Art. 21(4) of the UNCSI 2004.
[111] Sec. 1611 (b)(2) of US FSIA.
[112] Hazel Fox, at 644, US House Report, 31 Cf.

no difference to the immunity that 'the consignment in question included food items since food was necessary for the victualing of troops'.[113]

The existence of such an immune category exposes sales of military equipment to a plea of immunity from jurisdiction. Such a possibility seems to be avoided under English law of State immunity where the only exclusion is for 'proceedings relating to anything done or in relation to the armed forces of a State while present in the United Kingdom'.[114] A sale of military equipment would come within the definition in Section 3 of the UK SIA of a commercial transaction, provided that the sale is in ordinary private law form and not pursuant to an agreement between States. It would seem that to avoid attachment under US law the burden of proof is upon the foreign State to show that the use or intended use as military property.[115]

Warships and other military equipment are generally regarded as not available for enforcement measures. This is clearly reflected in the UN Convention which expressly characterizes 'property of a military character or used or intended for use in the performance of military functions' as government non-commercial property.[116] Thus, in *Wijsmuller Salvage BV v. ADM Naval Services*, an interlocutory injunction attaching a cruiser in order to secure rights and obtain payment of the salvage money was not permitted by the court because a warship served non-commercial purposes, even when not 'on duty'.[117] In this case 'A warship delivered by a foreign State to Dutch companies for refitting not only has to spend a long time in dock but must also undergo sea trials, during which it sails under national command and is operated in part by a national crew, the court held that it should be regarded as a ship intended for use in the public service even during the execution of the work'. On the other hand, in *The Russian Federation v. Pied-Rich BV* the Dutch Supreme Court held that the provisional seizure of a state-owned ship was not precluded from

[113] *State Marine Corp. and Currence v. USA* 25th June 1999, 128 ILR 701.
[114] Sec. 16(2) of the UK SIA.
[115] *Behring International Inc. v. Imperial Iranian Air Force,* 475 F Supp 383 (DNJ 1979), 63 ILR 261.
[116] Art.21 (1)(b) of the UNCSI.
[117] *Wijsmuller Salvage BV v. ADM Naval Services*, Rechtbank Amsterdam (District Court), Amsterdam, 19 Nov. 1987 [1989] *NYIL* 294.

enforcement by immunity where the seized vessel was used by a commercial shipping company with which the plaintiff had entered into contractual relations for the sale of goods.[118]

The notion that state-owned ships in commercial service are subject to enforcement measures can already be found in the 1926 Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels.[119] The idea of denying any enforcement of immunity against commercial ships is also upheld in the case law of various states.[120] Sometimes courts expressly invoke the commercial versus public use rationale. For instance in *Société Paul Liegard v. Capitain Serdjuk and Mange* [121] a French court held that A ship belonging to a foreign State which carries freight by sea for a private person performs a private commercial act which has nothing in common with the performance of a public or governmental service. The rules concerning the immunity of State ships do not therefore apply to such a ship, which can be subjected to attachment if liability may have been incurred in the course of such carriage.

Flying objects and communication devices which includes space objects used for military operation by States certainly comes under the ambit of military property under UNCSI. The Convention is without prejudice to the immunities enjoyed by foreign State under international law with respect to flying objects and communication devises owned or operated by state. As it is not specifically mentioned in this provision regarding flying objects and communication devices used for military operation, it seems to exclude them from the categories of military property immune under art. 19(1)(c) of the Convention.[122] But the immunity of those objects and devises are clearly mentioned in Art. 3 of the UNCSI providing that 'the immunities enjoyed by a State under international law with respect to

[118] *The Russian Federation v. Pied-Rich BV*, Hooge Raad der Nederlanden (Netherlands Supreme Court), 28 May 1993 [1994] *NYIL* 512.

[119] International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, Brussels, 1926, and Additional Protocol, Brussels, 1934, 176 League of Nations Treaty Series (LNTS) 201.

[120] *Szczesniak v. Backer and Others*, Cour d'Appel, Brussels, 14 July 1955 [1957] II Pasicrisie 38; 65 ILR 23.

[121] *Société Paul Liegard v. Capitain Serdjuk and Mange*, Tribunal de commerce, La Rochelle, 14 Oct. 1964, 65 ILR 38, at 39.

[122] Hazel Fox, p.646.

aircraft or space objects owned or operated by a State' in relation to the exercise of the function of State.

5.7.2.3 Property of Central Bank as State entity

Funds of a central bank are typically non-commercial properties which are immune from enforcement measures. The UN Convention which exempts 'property of the central bank or other monetary authority of the State' from the types of property possibly subject to execution measures.[123] A similar, though more limited, exemption can be found in the ILA Draft Convention and in the IDI Resolution.[124] The UK SIA provides that 'property of a State's central bank or other monetary authority shall not be regarded ... as in use or intended for use for commercial purposes'.[125] In *Banca Carige SpA Cassa di Risparmio Geneva e Imperia v. Banco Nacional de Cuba and another* English court clearly recognised the resulting immunity of central bank funds from enforcement proceedings. The court held that the immunity from enforcement proceedings of a central bank is a relevant factor for a Court to consider when deciding whether to exercise a discretion allowing proceedings to be served outside the jurisdiction.[126]

One should note that this decision based on the UK SIA differs from the *Trendtex* case, decided on the basis of customary international law. In that case the Court of Appeal considered that the Central Bank of Nigeria was not an emanation of the State entitled to claim immunity and that, since the Bank was not immune, its funds were not immune from seizure or injunction.[127] In the French *NOGA* case, discussed above, the attachment of central bank funds was also in issue. However, the court did not refuse attachment because the funds served public purposes. Rather, it considered that the funds of the Russian central

[123] Art. 21(1)(c) UN CSI.

[124] Art. VII(C)3 of the ILA Draft Convention, prohibits attachment or execution if 'the property is that of a State central bank held by it for central banking purposes'; Art. 4(2)(c) IDI Resolution, accords immunity from measures of constraint to 'property of the central bank or monetary authority of the State in use or set aside for use for the purposes of the central bank or monetary authority'.

[125] S. 14(4) UK SIA 1978.

[126] *Banca Carige SpA Cassa di Risparmio Geneva e Imperia v. Banco Nacional de Cuba and another*, Ch.D (Companies Court), 11 Apr. 2001 [2001] 3 All ER 923.

[127] *Trendtex Trading Corporation v. Central Bank of Nigeria*, CA, 13 Jan. 1977 [1977] 2 WLR 356, 64 ILR 111.

bank, a separate legal entity, could not be used to satisfy the debt of a third party, the Russian Federation. A good example is provided by Swiss Federal Court in *République socialiste du peuple arabe de Lybie-Jamahiriya v. Actimon SA* where the court recognised in principle that foreign state property serving public purposes was exempted from enforcement measures in Switzerland. With regard to a foreign central bank's property held at the Swiss National Bank it refused, however, to exempt such property unless it was specifically demonstrated that the property in question served public purposes.[128]

The observation of the tribunal was that the immunity can therefore only be claimed by reason of the nature of the assets subjected to the attachment where those assets are allocated in an identifiable manner for the performance of a sovereign function. A plea of immunity is inadmissible, in respect of money and securities, unless the documents or specified sums have been designated for the performance of such tasks.[129] In fact, it refused to quash an attachment order of a lower Swiss court because the appellant state 'failed to give any details as to the designated purpose of the deposit which could equally well form part of the private fiscal assets of the Libyan Central Bank'. Earlier, the same Swiss court had also denied immunity from attachment to funds of the Turkish central bank held in various Swiss banks.[130]

Further it must be doubtful that English court would stand by in a situation where the insertion of a State entity such as central bank by the Stateis perceived to be a sham or façade, having been designed for sole purpose of avoiding liability of to perpetrate a fraud on the basis of State affiliate.[131] Similar situation was decided by House of Lords in *National Bank of Greece and Athens S.A v. Metliss* where the Greek government sought by legislation to suspend the payment of interest on bonds issued by a Greek bank which were guaranteed by the National Bank of Greece. English court became seized of the case when

[128] *République socialiste du peuple arabe de Lybie-Jamahiriya v. Actimon SA*, Tribunal fédéral suisse, 24 Apr. 1985, ATF 111 Ia 62; 82 ILR 30, at 35.
[129] *République socialiste du peuple arabe de Lybie-Jamahiriya v. Actimon SA*, at 35.
[130] *Banque centrale de la République de Turquie v. Weston Compagnie de Finance et d'Investissement SA*, Tribunal fédéral suisse, 15 Nov. 1978, ATF 104 Ia 367, 65 ILR 417.
[131] *Oriental Commercial and Shipping Co., Ltd. V. Rossel N.V.,* 609 F.Supp. 75 (S.D.N.Y 1985).

National Bank of Greece amalgamated with another Greek bank which had been doing business in England and the amalgamated entity continued to do so. House of Lords held that the applicable immunity on central bank is inapplicable in this case and applied the law of obligation. Although the relevant Greek legislation purported to go to the status or capacity of central bank, the House of Lords characterised the issue as contractual, and held that as the contractual obligations were governed by English law, Greek law on immunity in relation to central bank was inapplicable.[132]

In a later case in 2003 the High Court of England and Wales in *AIC Ltd v Nigeria,*[133] a Nigerian judgement against Nigeria, on the ground of a commercial activity, was sought to be registered and enforced in the United Kingdom. The court held that the judgement could not be registered under section 9 of the Administration of Justice Act 1920, since the proceedings before the English court was related to the registration of a judgement and not a commercial activity. Moreover the enforcement was refused by the court based on the reason that the moneys in a bank account of a central bank that is a separate legal entity, belonging beneficially to the government of its state, are not accountable to execution, court stressed that even if those moneys are used or intended for use for commercial purposes.

A restrictive approach was also adopted in the German *Central Bank of Nigeria Case*[134] where the court reaffirmed the basic premise that only assets dedicated to the public service were exempted from forcible attachment and execution and, with regard to the assets specifically affected, it held that the petitioner's attachment seeks to reach the respondent's cash and securities accounts, i.e., assets which are not "in the public service" of the respondent. A possible use of these assets in the future to finance state business cannot serve to establish their present immunity.

[132] *National Bank of Greece and Athens S.A. v. Metliss,* [1958] A.C. 255.

[133] *AIC Ltd v. Federal Government of Nigeria and Attorney General of Federation of Nigeria*, [2003] EWHC 1357.

[134] *Central Bank of Nigeria Case*, Landgericht, Frankfurt, 2 Dec. 1975 [1976] *Neue Juristische Wochenschrift* 1044, 65 ILR 131, at 137.

5.7.2.4 Property forming part of Cultural Heritage of the State

In the absence of express undertaking by a forum State in an international convention relating to the claim, title and the right of possession to cultural objects are determinable by the *rex situs*of the objects at the time of derivation of such title.[135] New Zealand legislation purporting to forfeit an historic object, a rare Maori carving which had been exported without a licence, was held ineffective by the English court to remove the title in the object from the private owner to the forfeiting authorities.[136] In a claim by Iran to ownership of possession of antiquities some 5000 years old the English court of appeal held that the claim by the Statepertained to its cultural heritage and was not render unenforceable as a panel or public foreign law. It was argued that as Iran had not taken possession, it was seeking to enforce the sovereign authority by means of a panel or public law. But the court of appeal held that Iran was not asserting a claim based on the taking possession by the Stateand its compulsory accusation from private owners, but a claim based upon title to antiques which form part of Iran's national heritage, title conferred by legislation that is nearly 30 years old.

This is a patrimonial claim, not a claim to enforce a public law or to assert sovereign rights. Referring to the 1970 UNESCO Convention, other international instruments,[137] and Regulation of the Institut de droit and the International Law Association on the subject, the court continued that there are positive reasons of policy why a claim by a State to recover antiques which form part of its national heritage and which otherwise complies with the requirements of private international law should not be shut out by the general principle invoked by Barakat… there is international recognition that States should assist one another to prevent the unlawful removal of cultural objects including antiques.[138]

[135] Kessedjian and Schreuer, 'Le Projet d´Articles de la Commission du Droit International des Nations Unies sur les immunités des Etats', 96 *Revue Générale de Droit International Public* (1992) at. 299.
[136] *Attorney General of New Zealand v. Ortiz* [1983]2 All ER 83.
[137] The UNESCO Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970; The Unidroit Convention on Stolen or Illegally Exported Cultural Objects was signed in June 1995.
[138] *Iran v. The Barakat Galleries Ltd.* [2007] EWAC Civ 1374.

In a case concerning the seizure of real property destined to serve as a cultural centre for a State which owned the premises and buildings, the Swiss Federal Court modified its earlier case law according to which it treated jurisdictional and enforcement immunity in a strictly parallel fashion. It held that, according to public international law, certain objects serving public purposes were generally exempted from enforcement measures. Immunity from forced execution extends, independently from the nature of the dispute, 'to assets which a foreign State possesses in Switzerland and which it has designated for its diplomatic service or other task incumbent upon it in the exercise of its sovereign powers'.[139] In the particular case, the Federal Court held that the Spanish Institute was to be regarded as having been allocated to tasks 'related to the exercise of sovereign powers', and thus not subject to attachment.

In a similar way, execution measures sought against the Goethe Institute in Athens in order to enforce the Greek Supreme Court's judgment in the *Distimo Massacre Case* were unsuccessful.[140] Though it was not the court which refused enforcement measures against the Goethe Institute and the German Archaeological Institute in Athens but the executive, which refused to give permission, the effect remained the same which is the real property which serves as a cultural centre is not available for enforcement measures.

5.7.2.5 State Property Forming part of an Exhibition and not for Sale

Property of a State or its entity forming part of exhibition of objects scientific, cultural or historical interest are immune from execution is been recognised by the domestic and international courts. In 1991 the municipality of Cologne obtained the painting as a temporary loan from the Brno Historical Monuments Office, a State entity in the Czech Republic. This was belonging to the family's art collection of Prince Hans Adam II of Liechtenstein. Former Czechoslovakia seized German and Hungarian property located on its

[139] *Espagne v. X SA*, Office des poursuites du canton de Berne et Président du Tribunal d'arrondissement 4 du canton de Berne, Tribunal fédéral suisse, 30 Apr. 1986, ATF 112 Ia 148; [1987] *Annuaire suisse de droit international* 158; 82 ILR 38, at 41.

[140] *Prefecture of Boeteia v. Germany*, Areiopagos, Full Court, Judgments Nos. 36 and 37/2002, 28 June 2002, reported under 'Facts' of the ECtHR's *Kalogeropoulou* case, App. No. 59021/00, 12 Dec. 2002 (Admissibility).

territory as reparations which is now in Czech Republic. The Prince submitted that the painting had not been subject to expropriation measures in the former Czechoslovakia and that in any event such measures were invalid. The Brno Historical Monuments Office argued that the applicant's father had lost his ownership of the painting as a result of the confiscation in 1946.

In 1996 the Cologne Court of Appeal held that under the Convention on the Settlement of Matters arising out of the War and the Occupation, signed at Bonn on 26 May 1952, Germany agreed that it would "in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the Stateof war". In the court's view, the Settlement Convention precluded German courts from taking jurisdiction over the case. Therefore, the property which was sent for exhibition now belongs to the Stateentity of Czech Republic and immune from any seizure. The Prince claimed that Liechtenstein was recognized as a neutral country by all belligerents in WWII and all Liechtenstein assets seized by Czechoslovakia after the war as reparations was unlawful. ICJ upheld the decision of German court of appeal and found no jurisdiction to decide the merit of the case.[141]

Earlier NOGA failed to execute the arbitral award of Stockholm Arbitration Institute under Paris Court of Appeal[142] and United States Court of Appeals, Second Circuits,[143] against the property of Russian Federation. In both instance courts held that 'the loan taker waves its right to immunity as concerns the enforcement of an arbitral award rendered against it with respect to the present contract' does not show the unambiguous intention of the Stateto waive its right to immunity from execution. In 2004 NOGA again applied to the Swiss court for seizure of paintings from Moscow's Pushkin Museum to Switzerland for the purpose of exhibition. The Ministry of External Affairs of Switzerland expressed a view similar to the

[141] Case concerning Certain Property (*Liechtenstein v. Germany*) ICJ Preliminary Objections, Judgment of 10 February 2005 ICJ; *Adam II of Liechtensteinv. Fed Republic of Germany,* 2 B v R 1981/97, Fed Const. Ct, 28 Jan. 1998.

[142] *Compagnie NOGA importation et exportation v. The Russian Federation*, Yearbook Comm. Arb.'n XXVI(2001).

[143] *Compagnie NOGA importation et exportation*, March 16, 2004, 361 F.3d 676.

provision of UNCSI that the cultural property of a State on exhibition was to be treated as immune therefore the court rejected the application of NOGA for seizure.[144]

The above specific categories of properties discussed are generally immune from execution, even though State expressly waives its immunity from jurisdiction and execution. These properties may belong to the State itself or most of the time under the authority of a State entity, the particular nature of immunity from execution of award against the property of State entities are discussed in detail in the following section of this chapter.

5.7.3 Immunity from Execution of Award against the Property of State entities

States usually raise the plea of immunity whenever possible at every stage of execution measure against their property or the property of their instrumentalities. As pointed out earlier, most legal systems differentiate between immunity from jurisdiction and immunity from execution, and in doing so adopt absolute immunity in execution. Acceptance of the theory of restrictive immunity, which gives away with immunity for the commercial acts of a foreign State and their instrumentalities, has made enforcement of an award against the State and their instrumentalities much easier. Yet, disparate standards adopted for immunity from execution has led to unpredictability with regard to enforcement of an arbitral award against State entity. 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."[145]

States are free to organise their economic activities into as many entities with independent assets as they wish in order to limit their responsibility. Most of the State entities are so closely derives from the State and it is structurally and functionally controlled by the government which means it is an instrumentality of that State. The assets of State entities are merged into the State's assets which are difficult to distinguish. When creditors try to enforce an award against a State through assets allocated to *jure imperii* activities, in most

[144] RSDIE 14 (2004) 674; *See* Hazel Fox, at 649.
[145] Commentary to ILC Draft Articles, Article 18, para 1, C/An.4/L/452/Add 3.

cases States raise immunity from execution. On the other hand, when creditors wish to enforce an award against the assets of State entities States raise immunity based on the nature of the assets that they are kept for public purpose of sometimes entities' assets are mixed with the fund of Central Bank of a foreign State.[146] In this part of the chapter the focus will be regarding the question whether these State entities enjoy immunity from execution if a foreign investor wishes to enforce an arbitral award rendered irrespective of against the State or the entity itself.

5.7.3.1 France Practice and Civil Law Practice

Relevance of immunity is not a new development in French law for a State's creditors to seek to seize assets and bank accounts belong to a State entity even where no link exists between the debt of the State and the activity of that particular entity. As early as 1960s, a natural person obtained a judgement against the commercial delegation of the Vietnam attempted to seize debt owing to the international trade bank of Vietnam, which it claimed was an instrumentality of Vietnamese State. The Paris Court of Appeals held that the seizure was illegal because the bank had a distinct legal personality and no judgement had been rendered against it.[147] In this case court recognised the commercial exception of immunity but refused to seize the debt based on separate legal personality. French execution law provides that execution measures do not apply to persons or entities which benefit from an immunity from execution.[148] Thus, an award against a State assets will not be enforced which has been allocated of a sovereign purpose.

The fundamental distinction for the purpose of immunity from execution in French case law was initially based on the nature of the property subject to the execution measures, e.g. public funds were immune from such measures, while private funds did not benefit

[146] *Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced [1995] Rev. Suisse D. Int. Eur., Vol. 5, at p. 593; *AIG v Kazakhstan* 8 December 2000, cited at p. 628 of '*The Law of State Immunity*' by Hazel Fox.

[147] *Clerget v. Representation Commerciale de la Republique Democratique du Viet-Nam,*JPC, Ed. G., Pt. II, No. 15954 (1969) (Note by Eric Teynier, in Emmanuel Gaillard's book on "State entities in International Arbitration" p.106).

[148] Art. 1(3) of French Civil Execution Procedures 1991.

from immunity.[149] Immunity from execution was therefore excluded when the assets targeted by the execution measure could be considered private in nature because of their origin or use. The limitation in using such a criterion lay in the difficulty for the seizing creditor to prove that the State intended to use the property subject to the execution measure for private purpose only. This is especially so since the burden of proof is on the creditor, as case law established the presumption that assets owned by a State have a public purpose. Indeed two decisions rendered by French courts ordering the cancellation measures taken against two foreign States because it appeared impossible to distinguish funds used for a sovereign activity or public purpose from those derived from the State's economic or commercial activities under private law.[150]

This was also held in the case of *Socialist Federal Republic of Yugoslavia v. Societe Europeenne d'Etudes et d'Entreprises* [151] in which the court observed that immunity from execution could be ruled out in exceptional cases where the assets attached had been allocated by the wish of the foreign state for the achievement of a purely commercial operation carried out by it or by a body created by it for that purpose. The above decisions were based on the earliest French decision in relation to immunity from enforcement measure in *Socifros v. USSR* where the French court had held that immunity from jurisdiction and immunity from execution are not interconnected, and the waiver of one has never, before the French courts, entailed the loss of the right to invoke the other'.[152]

Current judicial practice shows that independent State entities whose structure and function is separate from the government are increasingly subjected to the same treatment as private parties with regard to their conduct of commercial business in relation to

[149] *Englander v. Banque d'Etat tchecoslovaque,* 1970 Rev. Crit. Dip 98.

[150] *Procureur de la Republique v. LIAMCO,* 106 J.D.I. 857 (1979) ; *Benvenutti et Bonfant v. Government de la Republique du Congo*, 1982 Rev. Arb. 204.

[151] *Socialist Federal Republic of Yugoslavia v. Société Européenne d'Etudes et d'Entreprises*, Tribunal de grande instance, Paris, 6 July 1970, 98 Journal de Droit International (JDI) (1971) 131, 65 ILR 46, at 49.

[152] *Socifros v. USSR*, Cour d'Appel, Aix, 23 Nov. 1938, 9 Ann. Dig. (1938-40) 236, at 238.

immunity from execution of award.[153] Provided the commitment in respect of property independently owned or controlled by the State entities is treated the same as usual non-immune commercial business corporation. Property, as a rule money, transferred to and located in the forum state for the specific purpose of paying certain obligations is generally considered to be subject to execution measures and not to benefit from enforcement immunity. The availability of earmarked property or funds for enforcement measures, in line with the French case law, is acknowledged in the UN Convention[154] as well as in the IDI Resolution.[155]

The above principle of immunity from execution against the property of State entity was previously established by an earlier French decision in *Societe Sonatrach v. Midgeon,* in a claim for unpaid salary by French engineer against an Algerian State entity French Court of Cassation distinguished the conditions for execution in respect of property of a State entity from those applying to the State property. The court held that:

> "The assets of a foreign State in principle, not subject to seizure, subject to exceptions in particular where they have been allocated for an economic or commercial activity under private law which is the origin of the title of the attaching debtor. On the other hand, the assets of public entities, distinct from the foreign state, whether or not enjoying legal personality, which are part of a group of assets (*patrimoine*) which have been dedicated to activities in the private law sector, may be seized by all creditors of the public entity."[156]

As mentioned earlier the waiver of immunity from execution against the property of State entity has been in practice for decades. The above decision was based on an earlier

[153] *Societe Nationale Algerienne du Gaz v. Societe Pipeline Service,* French Ct of Cassation, 1 Civ, 2 May 1990, Rev. cirt.dr. int.pri. (1991) 140, note by Bourel.

[154] Arts 18(b) and 19 (b) UN Convention, provide for an exception from enforcement immunity 'to the extent that ... the Statehas allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding'.

[155] Art. 4(3) IDI Resolution, states that 'the following property of a State is not immune from measures of constraint: a) property allocated or earmarked by the Statefor the satisfaction of the claim in question'.

[156] *Society Sonatrach v. Migeon*, French Ct of Casstion, 1 October 1985, rev.cir.(1986) 526; ILM (1987) 26, 998.

reasoning given by a French court in *Eurodif v. République Islamique d'Iran* [157] where the Court of Appeals made the creditor's position less difficult by loosening the criterion regarding the purpose of the funds at issue. This important decision states that a foreign state's immunity from execution can be set aside in exceptional circumstances where the seized property was dedicated to the economic or commercial activities under private law. This criterion, combining the origin of the seized funds and the nature of the activity in dispute, requires a link between the seized funds and the claim giving raise to the seizure, such link resulting from the fact that the unpaid debt arose out of the activity for which the funds were used. The court found that this criterion was satisfied in that case, as claimants were victims of Iranian decision to stop purchasing enriched uranium from them produced in the Tricastin factory. The seized funds held by the CEA in its capacity as borrower from Iran to finance the construction of that factory were therefore, linked with the funds allocated to the implementation of the Franco-Iranian civil nuclear program. However the nexus required by the Court of Appeals between the debt and seized property limited the exceptions to the principle of immunity from execution.

In order to remedy that requirement the Paris Court of Appeals combined this nexus criterion in *Norbert Beyrard France v. Republique de Cote d'Ivorie* [158] with the distinction, refereed above, between assets allocated to the public or private activity. In this case, there was no connection between the assets seized by the private creditor and the activity giving rise to the debt. The court held that according the requirement used by the French case law as to the scope of application of the immunity from execution enjoyed by States, certain assets may not be covered by that immunity which prohibits any writ of execution or conservatory measure where it is established that they are not dedicated to a sovereign activity or a public purpose.

In *Société Creighton Ltd v. Ministère des Finances et le Ministère des Affaires Municipales et de l'Agriculture du Gouvernement de l'Etat du Qatar* French Court of Appeals deviated from its previous trend of nexus criterion laid down in *Norbert Beyrard France* almost ten years

[157] *Eurodif v. République Islamique d'Iran,* Dalloz, jur. 629 (1984) ; 1985 Rev. Arb. 69.
[158] *Norbert Beyrard France v. Republique de Cote d'Ivorie* 1994 Rev. Arb. 133.

later. In this case, the court extended seizability beyond solely those assets allocated by the State to the contested activity to include assets allocated in general. The court held that goods destined by a State for the satisfaction of the claim in question or reserved by it to this end may be seized, instead of all other goods of the foreign State situated in the forum State or intended to be used for commercial purposes, without it being necessary to establish that such goods were destined for the entity against which the proceedings had been brought'.[159]

5.7.3.2 Common Law Practice

In English common law practice in most cases it is difficult to distinguish the ownership of property between state and State entity. Often the ownership of state property or funds is mixed with the property or funds of State entities. In exercise of enforcement of an award by a private party against the property of a State entity is particularly difficult task in relation to mixed property.[160] State properties which are not for the use or intended for use of non-governmental purposes mixed with the property of State entity may be immune from enforcement of an award. But immunity from enforcement does not extend to property used or intended for use for commercial purposes, namely for transactions or activities other than in the exercise of sovereign authority. A claim for immunity from execution acknowledges that the assets in question relates to the exercise of sovereign authority. The mere fact that the entity is a separate legal personality does not preclude a claim of immunity, but it would be difficult to make such a claim without thereby accepting that the assets are to be treated as belonging to the State. [161]

The UK 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

[159] *Société Creighton Ltd v. Ministère des Finances et le Ministère des Affaires Municipales et de l'Agriculture du Gouvernement de l'Etat du Qatar*, Cour d'Appel, Paris, 12 Dec. 2001 [2003] *Revue de l'arbitrage* 417, 527.
[160] *First National City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 613 (1983); *See*, *AIG v Kazakhstan,* 8 December 2000, cited at p. 628 of '*The Law of State Immunity'* by Hazel Fox.
[161] Emmanuel Gailard and Jennifer Y, p. 136.

from execution.[162] The UK SIA treats immunities from jurisdiction and execution distinctly. As it stands now, the UK SIA provides that a State is not immune from proceedings relating to commercial activities[163] 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.

The inability to claim immunity on the basis that the assets in question constitute State property which is for the time being in use or intended to use for commercial purposes will assists foreign investors in the process of enforcement. However, one particular exception to this provision indicates attention as it creates a serious stumbling block for foreign investors seeking enforcement against state's mixed assets held for example by the central bank of the State.[164] This does not come under the commercial exception of immunity for execution but State assets controlled by the central bank which has been discussed above. Under the English law, the property of a central bank or other monetary authority shall not be regarded as the property in use or intended for use for commercial purposes.[165] UK SIA treats the property of any State's central bank separate from the 'commercial purposes' exception for immunity from execution and the English courts have interpreted it very broadly, affording strong protection to central banks from enforcement of any arbitral award or court's decision.

UK 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*,[166] 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

[162] 388 Parl. Deb. HL (5th Ser.) col. 67, 70-74, 1501-11 and 1520-30 (1978).
[163] Section 3(1) of UK SIA.
[164] Judith Gill, 'Can a Party Benefiting from an Award Rendered Against a State Enforce the Award Against an Instrumentality of Such State? English Law', Emmanuel Gailard and Jennifer Y, '*State entities in International* Arbitration' (Juris Publishing, Inc. 2008); *See, AIG v Kazakhsta,* 8 December 2000, cited at p. 628 of '*The Law of State Immunity'* by Hazel Fox.
[165] Sec. 14(4) of UK SIA 1978.
[166] *Alcom Ltd v Republic of Colombia,* (1984) 1 All ER 1.

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 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*.[167]

In a similar case, *AIG Capital Partners Inc and Another v Republic of Kazakhstan*,[168] 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 UK SIA. The 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 relied upon *the Alcom case*[169] and *AIC Ltd v Federal Government of Nigeria*,[170] to reach above decision. In *AIC* the question before the court was whether moneys in a bank account of a central bank that is a separate legal entity, belonging beneficially to the government of its state, are liable to execution if those moneys are used or intended for use for commercial purposes. Finally the court 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.

[167] *Philippine Embassy case* , 65 ILR 146 (1984).

[168] *AIG Capital Partners Inc and Another v Republic of Kazakhstan* (2005) EWHC 2239 (Comm.); (2006) 1 Lloyd's Rep. 45.

[169] *Alcom Ltd v. Republic of Colombia* [1984] 2 All ER 6, 74 ILR 170, at 187 (HL).

[170] *AIC Ltd v Federal Government of Nigeria*, (2003) EWHC 1357 (Q.B.).

Views have been expressed that as Section 9 of UK SIA provides that when a State agrees to arbitration, it is not immune to any proceedings that relate to arbitration in the courts of United Kingdom, it can be extended to enforcement of arbitral awards as well.[171] 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.[172]

The English law supports the ruling by making a firm distinction between the State and its organs and separate State entities of the State which are not departments of the State and have the capacity to sue and be sued. These separate entities are equated to private parties; their activities are not immune and property owned by them is subject to ordinary measures of execution if it is proven that they are engaged in purely commercial activities. However, it is pertinent to note that unlike US FSIA, the UK SIA does not make a distinction between execution of property as regards State and State entity and 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 UK SIA as the State.

Therefore, in such cases where a separate State entity performing an act in exercise of non-sovereign authority for which the State itself could not claim immunity may not invoke immunity from execution.[173] English law of immunity even encourages State entities, when acting in the exercise of sovereign authority, to obtain adjudication of their disputes by the local court. It expressly provides that in such cases, where State entities acts in exercise of sovereign authority and waves its right to invoke immunity, it shall enjoy the same

[171] Hazel Fox, *Sovereign Immunity and Arbitration*, in *Contemporary Problems in International Arbitration* at p. 323; Lord Wilberforce, 389 Hansard HL Comm. col. 1524.
[172] FA Mann, UK State Immunity Act 1978, 50 BYIL 43 (1979) at p. 58.
[173] Art.14(2) of UK SIA 1978.

protection from execution as is enjoyed by the State.[174] Statutes on state immunity in other jurisdictions based on the UK SIA do not require that the claim must arise out of the use of the property.[175]

However, art.19(c) of the UNCSI provides that measure of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed. This requirement of connection with the property of defendant state party to the proceedings is a less restrictive requirement than the one stated in sub clause (a) and (b) of art.19.[176] The provision constitutes a tentative and somewhat vague extension of the exception of immunity so as to render the property of a State entity engaged solely in commercial activities subject to the attachment and execution in respect of judgements rendered against it. But this exception "connection of property of State entity with the property of state" contradicts with the requirement of sub-clause (a) & (b) of art.19. In the same way the limitation of US FSIA's requirement to the connection with the commercial activity upon which the claimant was based will usually mean that only state property specifically allocated or earmarked for commercial use will satisfy it. Support for such an extension can be seen in the major judicial practice of both in civil and common law jurisdiction.[177]

5.7.3.3 US Practice

Under the definition of US FSIA, a 'foreign State' includes not only the 'sovereign government and its political subdivisions' but also its 'agencies' or 'instrumentalities'. An 'agency' or 'instrumentality' of a foreign State is an 'entity' that is i) a separate legal person, corporate or otherwise, ii) an organ of a foreign State or political subdivision, or a majority of whose shares or other ownership interest is owned by a foreign State, and iii) neither a

[174] Hazel Fox, p.653.
[175] 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.
[176] Art.19(c) of the UNCSI 2004.
[177] Hazel Fox, P. 652.

citizen of a State of United States nor of any third country.[178] This definition of 'foreign State' is broad enough to include what the Supreme Court has called "a typical government instrumentality", namely an entity created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a broad selected governmental officials and is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued.[179] It also includes ordinary business corporation or other non-governmental entities in which a foreign government has majority shares. The Supreme Court recently clarified the *lacuna* in relation to majority share of 'entity' that a corporation must be directly owned by a foreign State itself to be an 'agency' or 'instrumentality' under US FSIA.[180]

Prior to the enactment of US FSIA, properties of a foreign State and its instrumentality were immune from attachment and execution irrespective of their nature and purpose of use. At present Section 1609 of the Act generally preserves immunity from attachment and execution for the properties of foreign States and their instrumentalities. However, there are exceptions to this general rule, and immunity from attachment and execution will be denied if an award that has been confirmed, judicially against the foreign States and their instrumentality, if the property against which execution is sought is used for commercial purposes in the United States.[181] 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's property and execution against an instrumentality of a State. Unlike execution against State property, execution against a foreign State 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.[182]

[178] Section 1603 (a)(b) of US FSIA.
[179] *Bancec Case (First National City Bank),* p.624.
[180] *Dole Food Co. v. Patrickson,* 538 U.S. (2003) p. 468.
[181] Section 1602 of FSIA.
[182] Section 1610(a)(2) of FSIA.

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, 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 US FSIA, a foreign State's property that is being sought for attachment or execution should be linked with the commercial activity involved and it must be explicitly waived by the State. Meanwhile, attachment and execution against the property of an agency or instrumentality of a State is possible where the authority of relevant state agency or instrumentality waived its immunity implicitly.[183]

The definition of 'agency' or 'instrumentality' in US FSIA does not mean that a foreign State's liabilities can automatically be enforced against its instrumentalities. In 1983 US Supreme Court in First *National City Bank v. Banco Para El Commercio Exterior de CubaI* settled this uncertainty where it was agreed that the assets of Bancec was involved in commercial activities. Bancec, a Cuban state commercial bank sued First National City Bank on a letter of credit. Cuba distributed all of Bancec's capital and assets among other state enterprises right after the suit was filed. Cuba expropriated FNCB's assets in Cuba against which FNCB counterclaimed set off in the US court. Cuba argued based on separate legal personality of its entity which was rejected by Supreme Court and held that Sec. 1606 of US FSIA states that a foreign State shall be liable in the same manner and to the extent as a private individual under like circumstances.[184]

The court went on to conclude that the appropriate standards of substantive liability are furnished by the principles of international law by which governments throughout the world have established independent entities to a greater degree structurally and functionally independent from those government agencies. The court ruled that government instrumentalities incorporated as separate legal entities distinct and independent from the

[183] 1610(b)(1) of US FSIA.

[184] *Bancec Case (First National City Bank)*, p. 620.

government should normally be treated as such. However, based on equitable principle the court disregarded the separate legal personality in this case and stated where the home state dominate the instrumentality as to create a principal agent relationship or where separate legal personality would work for fraud or injustice corporate veil shall be pierced. The court referred ICJ decision in *Barcelona Traction Case* where it was held that the separate status of an incorporated entity may be disregarded in certain exceptional circumstances.[185] Based on the facts before it the court concluded that it would be inequitable to allow Cuba's claim through Bancec, a corporate shell, while denying its own liability to FNCB.

Despite the Bancec rule, the broader immunity from execution against State property has encouraged efforts to execute against property of instrumentalities to satisfy judgements against State provided that they are involved in *acta jure gestionis.* Where the foreign States or instrumentalities attempt to frustrate enforcement of awards by transferring assets or similar conduct, the separate legal personality will be disregarded. The draft history of US FSIA suggests that courts should be free to determine the actual ownership and control of the property in question held by the foreign States or instrumentalities.[186] In *Ministry of Defence and Support v. Cubic Defence*, where arbitration award against the Iranian Ministry of Defence was sought to be executed by the claimant. The Court of Appeals applying the principle of *Bancec* case disregarded the separateness of Ministry from the State for the purpose of execution. The court held that the Ministry was the State of Iran itself, for the purpose of an action under the US FSIA as it did not clearly justified the traits characteristic of a separate legal personality. The execution of arbitral award was refused on the basis that the property was used for non-commercial activities by the Ministry and therefore, it was not subject to attachment or execution.[187]

[185] *See, Barcelona Traction Case.*

[186] H.R. Rep. No.94-1487, at 28(1976).

[187] *Ministry of Defence and Support v. Cubic Defence,* 385 F. 3rd 1206 (9th Cir. 2004).

5.7.3.4 Other Laws

Under ECSI a contracting State or State entity shall give effect to the execution of an award or judgement rendered against that State or State entity by the court of another contracting State if it has engaged in the same manner as a private person, in an industrial, commercial or financial activity.[188] However, ECSI prohibits all measures of constraint or preventive measures against the State property of a contracting State, subject to an express waiver of immunity.[189] At the same time it provides for an obligation on the contracting States to abide by the judgement given against them.[190] Additional advice can be found in the explanatory notes to the ECSI which cites political subdivisions and national banks and railway administrations as example of State entities.[191] 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 generalised. 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.[192]

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.[193] The

[188] Article 20(1) and Article 7(1) of the ECSI 1972.

[189] 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."

[190] 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."

[191] Paragraph 109, Explanatory Report on the European Convention on State Immunity, reprinted in A. Dickinson et al. (eds.), *State Immunity*: *Selected Materials and Commentary,* 62 (2004).

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

[193] 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.

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.[194] 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 if it is satisfied that the property was involved in commercial activities.

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 except five categories of State properties laid down in UNCSI.[195] 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.

Where the law of sovereign immunity is not the same for jurisdiction and enforcement purposes, and the restrictive approach to sovereign immunity applies to actions to enforce an award, the "purposive" test will be applied to determine whether immunity can be invoked for State or State entity-owned property. The doctrine of restrictive immunity is not applied to immunity from execution by most States. In this field, most States continue to apply an absolute immunity.[196]The answer will be no if the property against which enforcement is sought is held for commercial purposes rather than for sovereign or public

[194] *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; *S.E.E.E. v. Republique Socialiste Federal de Yougoslavie*, (1971) Clunet 131.
[195] Art.21 of the UNCSI 2004.
[196] Cf. Bernini & Van den Berg, at 359.

purposes.[197] This seems to be so in ICSID[198] and non-ICSID cases alike. C.H. Schreuer sums up the position well stating, for purposes of immunity of foreign States from jurisdiction the overwhelming authority points towards a test that looks at the nature of the activity and not its purpose. But the test for immunity from execution is usually the purpose of the property that is to be seized although the origin of the property is also sometimes taken into account.[199]

5.7.4 Immunity from execution of award against the SWFs

There is no uniform agreement on the nature of the property of SWFs, although their complicated nature seems to be recognised and uncontested by scholars around the world.[200] The Santiago Principles do not assume a clear position and arguments that can be drawn both in favour of a public and a private nature of the property of SWFs.[201] An arbitral award against the assets of an SWF can only be executed as far as there is no immunity from enforcement measures. While immunity from adjudicative jurisdiction is clearly limited, there is almost absolute immunity from enforcement jurisdiction if it is proven that the property of SWFs constitute public non-commercial in nature.[202] Academic literature has advanced arguments in favour of a private, a sovereign and a hybrid nature of SWFs

[197] France: *Société Eurodif v Republique Islamique d'Iran*, J.C.P. II, No. 20205, 111 Clunet 598 (Cass. March 14, 1984); Germany; *In the Matter of the Republic of the Philippines*, 46 BVerfGE 342 (Fed'l Constitutional Ct. Dec. 13, 1977), 73 Amer. J. Int'l L. 305, 703 (1979); England: *Alcom Ltd. v Republic of Colombia* (H.L. April 12, 1984), Fin. Times, Business Law Brief, 9 (May 1984), reversing the English Ct. of Appeals Oct. 24, 1983), 78 Amer. J. Int'l L. 451 (1984). See also Cass., (Oct. 1, 1985), Clunet 1986, at 170-75, note Bruno Oppetit (in the Context of a State enterprise); see also Bernini & Van den Berg, at 360.

[198] *See*, e.g., *Liberian E. Timber Corp. v. Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986), 26 I.L.M. 695 (1987), 2 ICSID Rev. 188 (1987).

[199] C.H. Schreuer, The ICSID Convention: A Commentary 1160, p.50 (CUP 2001); *see also* Schreuer, at 143 et seq.

[200] *See*, Andrew Rozanov, "Definitional Challenges of Dealing with Sovereign Wealth Funds", in *Asian Journal of International Law*, 2011, vol.1, no.2, p.249; International Monetary Fund, "Balance of Payments and International Investment Positions Manual, 6th ed. (BPM6)", 2009, available at: http://www.imf.org.

[201] Edwin M. Truman, *Sovereign Wealth Funds: Threat or Salvation?*, Peterson Institute for International Economics, Washington DC, September 2010, pp. 9-33; Stephen Jen, "Currencies the Definition of a Sovereign Wealth Fund", available at http://www.morganstanley.com; Anne Gelpern, "Sovereignty, Accountability, and the Wealth Fund Governance Conundrum", in *Asian Journal of International Law*, 2011, vol.1, no.2, pp. 289-294.

[202] Hazel Fox, at 29.

deploying different criteria to support their arguments in relation to immunity from enforcement. It is difficult to determine execution measure against the property of an SWF due to their complex and heterogeneous nature. Sometimes the assets of SWFs are involved in commercial activities, sometimes they are for purely sovereign purposes and often they are mixed with the assets of Central Bank.[203]

The criteria of ownership and control over the nature of activities whether commercial or governmental and purposes need to be considered in the attempt to determine the nature of property of an SWF. To these criteria, the applicable legal framework could be added in the legal order whether the SWFs are constituted as well as in pursuit of governmental policies or public policy objectives. An SWF might be wholly or partially owned by a government, but it still might conduct commercial activities. Under international investment law, the property of a SWF will not be treated as the property of public entity and enjoy the full protection vested in the property of such entities if it is engaged partially in commercial activities.[204] If it is found that the assets of SWFs are associated partially with non-governmental conduct, the significance of purposes pursued by the SWFs becomes immediately apparent and suspends full protection. Therefore, only the property of a SWF performing sovereign or non-commercial activities will be considered for immunity from execution measures.

Some exceptions have been developed to this enforcement jurisdiction in the course of recent enactment of UN Convention that a State may have consented to measures of constraint or have identified specific property for satisfying the claim.[205] It is also possible that measures of constraint are executed on State property, even if the Statehas not consented to this including the property of SWFs. This would require that property of the Stateis present in the forum State and that it has a "connection with the entity against which the proceeding was directed." Furthermore, the property must be "specifically in use

[203] *See AIG Capital Partners Inc. and Another v. Kazakhstan*, [2005] EWHC at.2239.
[204] M. Sornarajah, *Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments*, Asian Journal of International Law, 2011, vol. 1, iss.1, 267, 273.
[205] Art. 19 (a)(b) of UNCSI 2004.

or intended for use by the Statefor other than government non-commercial purposes."[206] The Convention provides a non-exhaustive list of properties that are non-commercial and thus cannot be subject of measures of constraint without consent of the State, amongst others property of the central bank or other monetary authority of the State.[207]

There are currently two cases brought in relation to SWFs in international investment law requiring the examination of the nature of property of SWFs whether public or private.[208] In *The Sarrió proceedings against the Kuwait Investment Office and Kuwait Investment Authority,* the claim was brought by Sarrió, a Spanish company, against the Kuwait Investment Office (KIO) and Kuwait Investment Authority (KIA) involving an SWF. In May 1993, shortly after it commenced the Spanish proceeding, Sarrió attached KIA/KIO accounts at banks in Geneva and Zurich to secure the payment of the claim in Spain. Kuwait argued that the attached assets were immune because they were part of the Future Generations fund (SWF). This fund, created in 1976 by a decree of the Emir of Kuwait, was designed to provide for the future needs of the Kuwaiti people once the country's oil reserves are exhausted. It was managed by KIA/KIO. The Swiss Federal Tribunal rejected Kuwait's claim of immunity.

Kuwait conceded that the underlying Spanish contract giving rise to Sarrió's claim involved private rather than sovereign acts. The issue of whether KIA/KIO was part of the Statewas not relevant to immunity from jurisdiction because the conceded private law nature of the acts excluded immunity in any event. But it was relevant to immunity from execution: the accounts were in the name of KIA/KIO and the court found that Kuwait would only have standing to claim immunity for the accounts if KIA/KIO were part of the State. The court found that KIA/KIO were independent entities from the Stateand that Kuwait was not the proper party to invoke immunity for them.

[206] Art. 19 (c) of UNCSI 2004.
[207] Art. 21(1)(b).
[208] See *AIG Capital Partners Inc. and Another v. Kazakhstan*, [2005] EWHC 2239*; Kuwait v. X*, Swiss Federal Tribunal (24 January 1994). The case is unreported, but is partially reproduced at [1995] Rev. Suisse D. Int. Eur., Vol. 5, at p. 593.

In rejecting Kuwait's argument that KIA/KIO formed part from the State, the court further noted that the 1982 law creating KIA provided that KIA had an autonomous status and that Kuwait had recognised that it was an independent public authority. In addition, the court relied on various documents including KIA's articles (*statutes*), statements by KIA that it was independent, and letters from KIA and its representatives to government authorities and private parties. The court also underlined that KIA had brought suit in its own name in various proceedings in England and Spain. In the face of this evidence, the court was not persuaded by a contrary legal opinion provided by the Kuwaiti government. The government's economic dominance over KIA, including Kuwaiti ministers sitting on its council board, and that the fact that KIA's investments were made to benefit the Statewere found to be of no relevance.

However, a different standing was taken by English Court where the assets of an SWFs was managed by State Central Bank. High Court of England and Wales in *AIG Capital Partners Inc And Another V. Republic Of Kazakhstan And Others*[209] where the claimants sought to enforce the ICSID award in England by obtaining final third party debt and charging orders against cash and securities held in London by the third parties, 'AAMGS', a custodian of 'National Fund' (SWF), who held them on behalf of Kazakhstan. The national bank of Kazakhstan intervened in the proceedings and applied to discharge the orders on the ground that the cash and securities held by AAMGS were its property and were the subject of state immunity, pursuant to ss. 13(2)(b) and 14(4) of the UK State Immunity Act 1978. The court found that the management of the Kazakhstani SWF by the central bank, as a "trust manager" under Kazakhstan law, was sufficient to give the central bank a "property" interest in the fund within the meaning of the UK SIA provision. The existence of this central bank interest in the assets made them absolutely immune regardless of whether the SWF held the entire economic interest in the property.

The court referred to a "beneficial interest" of the central bank in the assets, but this was apparently a functional control interest rather than an economic interest. It was undisputed that under Kazakhstan law, the property held by the bank as the trust manager remained

[209] *See AIG Capital Partners Inc. and Another v. Kazakhstan*, [2005] EWHC 2239.

under the full ownership of the SWFs, the trust founder. The letter from the Kazakhstan Ambassador to the court stated that the assets formed "part of the SWFs and beneficially belonged to the Republic of Kazakhstan". The court did not disregard the claimants' argument in this case that the property of SWF at question was held for commercial purpose which belong to state but the immunity was granted based on the ownership interest of National Bank of Kazakhstan. Thus, the court established the precedent that if the properties of SWFs are for the commercial activities restrictive immunities will be applied.

Establishing jurisdiction over a SWF, however, would be only half of the battle for a litigant in a U.S. court. US FSIA permits U.S. courts to execute judgments only against sovereign property used for a commercial activity in the United States.[210] Even where a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria. Sec. 1609 of US FSIA provides that, generally, 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 the statute.[211]

> "The property 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 the property is, or is intended to be, used in connection with a military activity and 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

[210] *See, e.g., Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002) (quoting Sec.1610 (a)(1) of US FSIA).

[211] Sec. 1609 of US FSIA also notes that this immunity is subject to existing international agreements to which the United States is a party at the time of enactment of the FSIA. Research into this caveat's impact on the FSIA analysis in this case is on-going.

> the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or the property is, or is intended to be, used in connection with a military activity and is of a military character, or is under the control of a military authority or defence agency."[212]

In addition, courts have interpreted FSIA to require identification of specific property for attachment.[213] Thus, while a wide range of tangible and intangible property could theoretically be attached to satisfy a judgment, noting that bank accounts are not precluded from US FSIA attachment *per se*, but cannot be attached if they are being used to fund diplomatic or consular functions, [214] absent of waiver by the sovereign, only property used for commercial activity would be subject to attachment under the Act. However, that letter of credit obtained by state-owned company to do business with an American drilling company was used for a commercial activity and was thus attachable.[215] Therefore, for example, an embassy or consulate building, diplomatic vehicles, or central bank funds could not be seized to satisfy a judgment against an SWF. Because attachability hinges on the use of the property, plaintiffs would have to discover what assets located in the United States were being used for non-state, commercial purposes, a difficult and time-consuming task. Without assets to fund a judgment, victory against an SWF defendant would prove pyrrhic.

5.8 Conclusion

Immunity from jurisdiction is governed by the principle of restrictive immunity which is well accepted in transnational legal practice, but foreign States continue to claim immunity

[212] Sec. 1611(a)(b) and (c) of US FSIA concern categories of property that do not appear applicable in this case: the property of those organisations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organisations Immunities Act, and property sought to be attached or executed in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

[213] *Autotech Technologies*, 499 F.3d at 750 (citing *Af-Cap, Inc. v. Republic of Congo*, 383 F.3d 361, 367 (5th Cir. 2004)).

[214] *See, e.g., Connecticut Bank of Commerce*, 309 F.3d at 257; *Liberian Eastern Timber Corp. v. Republic of Liberia*, 659 F. Supp. 606 (D.D.C. 1987).

[215] *Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro*, S.A., 875 F.2d 1174 (5th Cir. 1989).

largely from attachment or execution measures against the property of a State and its entities. This is because general waiver of immunity from jurisdiction in an arbitration agreement by States or State entities does not encompass waiver of immunity from attachment or enforcement measure; rather a separate express waiver is required for that purpose.[216] The reason for State's reluctance to accept the restrictive concept of immunity in attachment or execution and also for measures of constraint is their more drastic effect on State sovereignty than the mere adjudication, which might lead to diplomatic disputes.[217] Enforcement measures against State properties poses threat to the States' freedom to manage its governmental affairs and to purse its public purposes than an arbitral award or a court decision. However, some exception with respect to immunity from enforcement measures evolved over the last decades in relation to commercial exception. Thus, immunity from attachment or execution can no longer be regarded as absolute.

Nevertheless, immunity from jurisdiction and immunity from enforcement measures are not entirely coherent, since the concept of jurisdictional immunity refers to the nature of the act as a decisive criterion, whereas immunity from enforcement measures is to be determined according to the purpose of the act. Current state practice suggests that a State's waiver of immunity from execution and its specification of assets for such purposes constitute exceptions from immunity from enforcement measures with respect to both pre-judgement and post-judgement attachment. Another decisive factor that plays an important role in enforcement measure is the nature of state property, property involved in commercial activities are not immune, whereas non-commercial public properties which are immune from execution. Also there are certain kinds of state properties that are designed for public purpose are immune from execution from any circumstances, these include diplomatic property, military equipment and the property of central bank. Yet, problems with regard to mixed bank accounts remain unsettled, since courts tend to grant immunity in cases of unclear designation.

[216] Art. 20 UNCSI 2004; Sec. 13(3) of UK SIA 1978; J. Crawford, *Execution of Judgements and foreign Sovereign Immunity*, 75 American Journal of International Law (1981) p. 820.
[217] Ian Brownlie, *Principle of Public International Law*, 338 (2003).

Delegates of the world during enactment of UNCSI agreed to allow execution without the consent of the foreign State and without requiring a connection between the subject-matter of the claim and the property, unlike the US FSIA[218] Which is seen as a great achievement of UNCSI. It only contains a connection-requirement with the entity, which constitute a much wider exception. In contrast to that, the ECSI completely lacks provisions allowing for enforcement measures, in principle relying on voluntary compliance of States with the judgements rendered against them. Moreover, the UN Convention introduces a new category of immune property in respect of cultural property on loan for exhibition purposes, which is to be worthwhile to encourage enjoyment of the cultural heritage of the world.

The burden of proof in chapter was Immunity in relation to the property of State entity. Based on the approach of State Immunity Convention 2004 and the theory of "legal fiction" the property of State entity and the property of State to be treated the same. In answering the question as to whether the Stateentities enjoy immunity from execution the reference has been made to different jurisdictional approaches. French practice suggests that properties of independent State entities separate from the government to be treated same as private corporations with regard to their conduct of commercial activities.[219] English practice are supportive of French practice under which independent State entities those are not organ or department of State are to be treated as private parties in relation to their use in commercial activities. However under English law state property mixed with the property of its entity which is not for the use of non-governmental commercial purposes may be immune from enforcement.[220] Current US practice are in line with English and French practice, under which immunity from attachment and execution will be denied if the property against which execution is sought is used for commercial purposes in the United States.[221] Therefore, it is now an established principle that the property of State entities are not entitled to immunity if they are allocated for commercial non-governmental purpose.

[218] Art. 19 of the UNCSI 2004.

[219] *Societe Nationale Algerienne du Gaz v. Societe Pipeline Service,* French Ct of Cassation, 1 Civ, 2 May 1990, Rev. cirt.dr. int.pri. (1991) 140, note by Bourel.

[220] Emmanuel Gailard and Jennifer Y, p. 136.

[221] Section 1602 of US FSIA 1976.

Finally, the examination was extended in this chapter in relation to the enforcement against the property of Sovereign Wealth Funds which is treated immune if it is proven that the property constitutes non-commercial public in nature.[222] However, it is difficult to determine the status of their property due to their complex heterogeneous nature. Legal academics argue for restrictive immunity for the attachment and execution of award against the property of Sovereign Wealth Funds based on the nature and purpose of their activities. They associate the assets of SWFs with the assets of multinational corporations on the ground of the nature and purpose of their conduct which is profit making.[223] Sometimes the property of SWFs are mixed with the assets of central bank, often they are managed and controlled by the central bank which give the central bank a property interest in the fund therefore, immune from execution. Although the nature and purpose of SWFs are not universally accepted still, based on Art.19 of UNCSI and opinion of legal scholars if the fund is involved in commercial non-governmental activities immunity from attachment and execution should be ceased.

[222] Hazel Fox, at 29.
[223] M. Sornarajah, at 267.

CHAPTER 6 State Liability for the Conduct of its Entities in International Investment Arbitration

6.1 Introduction

In the earlier chapters it has been established that the incorporating State can be a party to the investment agreement of its entities with foreign investors. Having established that the crucial point was whether State entities are entitled to immunity both from jurisdiction and execution. This question has been settled quite comprehensively in the earlier chapters that State entities are subject to restrictive immunity if they are engaged in commercial non-governmental activities. It has also been discussed under the legal jurisprudence known as the theory of 'legal fiction' and under the UNCSI 2004 that the Stateand State entities are to be treated the single economic unit. Now the final examination in relation to State responsibility for the conduct of its entities whether the Stateis directly or indirectly liable is the subject-matter of this chapter.

The critical question in investment arbitration in relation to a contract between foreign investors and state owned entities which are separate legal personality is that whether States can be indirectly or directly liable for the liquidated debt of its entities? In most of the investment agreement of State entities the incorporating State holds supervisory power, duty and obligation over the investment activities of foreign investors and the Stateentities. Most often it can be noticed that the government has substantial structural and functional control over the Stateentities. In this regard now the question is whether the Stateentity which has direct governmental influence over the entity is acting as an independent entity or as an agent of the government? It is quite straight forward to establish State liability for the conduct of its entities if the concerned entities are acting as an organ or agent of the State. But the question remains grey or unsettled in relation to State liability for the conduct of State entity.

Another crucial point needs to be answered as regard to the investment agreement between foreign investors and State entities is that whether the entities are agent of the Stateor instrumentality? Sometimes the investment activities between State entities and foreign investors require approval of the government.[1] If the government approves the investment activities it implies governmental duty to protect the investment activities. Often, governmental authorities or ministers act as a guarantor of its entity's investment agreement with foreign investors.[2] In such a situation if the Stateentity is in breach of investment agreement with foreign investors does it require the Stateto be considered as an *alter* ego or successor of the liquidated damages of its entity and makes the host State indirectly liable for the conduct of its entity? There is another important point needs to settle in this chapter is in a circumstance such as where the liquidated State entity fell in the territory of a successive State will it be liable for the liquidated damages of the contract of its former State?

The findings in this chapter is extended as to what makes a State to be directly liable for the conduct of its certain affiliates performing investment activities under the substantial governmental control to be attributed to the Stateeven if those entities are regarded in internal law as autonomous and independent State entities? As it has been traced in the earlier chapter that in many situations questions have been raised whether the activities of the Stateand State entities constitute single economic reality what would be the implication of any foreign debt incurred by the investment agreement of those State entities? If it is to be found that the Stateentity is acting as an organ or representative of a State is there any loophole for the Sate to deny the liability? The following discussion will answer all the above-mentioned questions in this chapter.

[1] ICSID Case No. ARB/81/1, *Amco Asia Corporation and others v. Republic of Indonesia* Decision on Merits November 21, 1984, p.167; http://icsid.worldbank.org/ICSID/FrontServlet?

[2] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

6.2 Status of State entities in the investment agreement

Many investment agreements are entered into by the State-owned entities, incorporated under the applicable law, organised and controlled by the government either functionally, structurally or through ownership interests.[3] These entities sometimes exercises public functions but they are legally distinct from the State, they may be called state controlled entities, para-statal entities, independent State entities or quasi-governmental institutions with substantial governmental control. Relating to the subject-matter of this contention, these entities are commercial in nature; they may sue and be sued, enter into contracts and such entities may become parties in ICSID arbitration proceedings instead of or in addition to the host state itself.[4] Article 25(3) of the ICSID Convention introduces a special requirement while determining the scope of ICSID jurisdiction for the Stateentities alongside with the Stateparty to the convention. It states consent of a constituent subdivision or agency of a contracting State shall require the approval of that state unless that State notifies the Centre that no such approval is required.[5] Article 25(1) (3) of the Convention uses the expression 'any constituent subdivision or agency of a contracting state' but it does not provide any accurate definition whether independent stat entities will fall under these categories.

The terminology 'constituent subdivision' clearly indicates indistinguishable parts of the contracting state which exercises governmental authority and functions.[6] On the other hand, there are some independent State entities that are entrusted with some governmental functions incorporated by the government as separate legal entities to conduct

[3] ICSID Case No. ARB/97/7*, Emilio Agustin Maffezini v. Kingdom of Spain,* Decision on Jurisdiction, 25 January 2000papra.78; ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on jurisdiction, 22 April 2005; ICSID Case No. ARB/98/4, *Wena Hotels Ltd. v. Egypt,* Final Award, 8 December 2000, Para 131; *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

[4] Convention on the Settlement of Investment Disputes between States and Nationals of other States, adopted on 18 March 1965, came into force in 14 October 1966; Christoph H Cheruer, *The ICSID Convention: A Commentary* (First Edition, Cambridge University Press 2001).

[5] Article 25(3) of the ICSID Convention.

[6] Amerasinghe, Jurisdiction Ratione Persone, pp.233/4; Amerasinghe, The Jurisdiction Ratione Persone of the International Centre, pp.185/6.

governmental activities.[7] The term 'agency' under the meaning of this Convention, is probably referring to a corporation functioning on behalf of the government of the contracting State. Again there is no clear indication whether independent State entities fall under the concept of 'agency' to extend the jurisdiction of the Centre when they enter into an investment agreement with foreign investors. Therefore, when it comes to the matter relating to state liability, current practice under the ICSID jurisdiction, *ad hoc* and institutional arbitration in relation to investment dispute under ICC, LCIA, AAA or SCC is that the term 'constituent subdivision' and 'agency' do not cover the independent State entity involved in commercial non-governmental activities.[8] However, if independent State entities, serving governmental interests are to be considered as State agent, State would be held liable for their entities.

Hence, it is not clear most importantly to the capital exporting community and host State whether independent State entities are considered to be 'agency' under the Convention. Preliminary draft of the Convention indicates no reference to entities of contracting State whether 'public' and 'political entities' should be included in the provision.[9] The architect of the Convention, Mr. Aron Broches was reluctant regarding the inclusion of 'public' and 'political entities' to extend the jurisdiction of the Centre.[10] He stated enormous difficulties, constitutional and otherwise, may be raised if 'public' and 'political entities' are to be included to confer jurisdiction of the Centre. But the world delegates were concerned about the Stateorgans that are capable of entering into investment agreements. One of the participating delegates indicated that many quasi-governmental institutions such as statutory corporations or public companies of sovereign States enter into investment agreement with private investors.[11] Based on this comment, after having extensive discussion regarding this contention, a new draft provision was circulated which was

[7] *See Impregilo S.p.A.*

[8] *See Impregilo S.p.A.; Dallah Real Estate.*

[9] The History of the ICSID Convention, ICSID Publication vol , Vol. I, pp. 110, 112.

[10] History, Vol. II, pp.65/6.

[11] History, Vol. II, pp. 258; See, *Dallah Real Estate; Pyramids Case; Impregilo S.P.A.*

designated to give 'political subdivision' and 'instrumentality' a standing before the Centre.[12]

This was positively viewed by most of the delegates, but a minority of the delegates were concerned and reserved their mandate regarding the term political subdivisions and instrumentalities.[13] A political subdivision is a term of art of geography defining the concept of a geographic region accepted to be in the jurisdiction of a particular government entity. The particular government entity varies as each organises its operations by further divisions to further its tasks and satisfy its responsibilities. On the large scale, a political subdivision is typically a country, while on a smaller scale political subdivisions, sometimes called administrative subdivisions, include: states, counties, or parishes, districts or provinces, cities and towns as well as smaller municipalities such as boros, towns, townships, districts, provinces, and other similar names which are also defined by the cognisant nation-state.

It was suggested that the first part did not adequately express the idea of a State's components and the second part might include mere government-owned entities only. Their concern was probably quasi-governmental entities and entities in which government has ownership interest but separate legal entity to be included under jurisdiction of the Centre. These are sometimes indistinguishable part of government but incorporated as separate legal entities entrusted with governmental functions. For this purpose, a working group was formed to clarify the definition of entities which will exercise the jurisdiction of the Centre. After an extensive discussion in the legal committee, which clarified a number of issues concerning the definition of the entities,[14] the entities' designation to the Centre[15] and the approval by the contracting States of their consent, finally the term 'instrumentality' was replaced by 'agency'.[16] The representatives of United States wanted reintroduction of 'instrumentalities' but British delegates thought that 'political subdivisions

[12] History, Vol. II, pp. 288/9, 396.
[13] History, Vol. II, pp.400/410.
[14] *Dallah Real Estate; Pyramids Case*; History, Vol. II, pp. 145-149.
[15] History, Vol. II, pp.150-152.
[16] ICC Case No. 9762, *Contractor A (Luxembourg) v. Ministry of Agriculture and Water Management of Republic Z,* State Fund for Development of Agriculture of Republic Z and Government of Republic Z, Dec. 22, 2001 History, Vol. II, pp. 507.

or agencies' really meant parts of a State and that these would be acting on behalf and in the name of State. Consequently, contention of British delegates prevailed. Therefore, it can be assume from the policy discussion of the draft committee that the term 'agency' was included to extend the jurisdiction of the Centre to a wide range of entities.

Draft history of the Convention suggests that the clause "or one of its political subdivisions or agency" was recommended[17] but it was criticised by number of delegates which led to opt out the term 'political subdivision'.[18] It was also suggested by the working group to refer 'anybody' but this raised question whether constituent subdivision of the Statewere still be included and whether the phrase "such as a State, Republic, or Province" should be added. Eventually, the phrase 'constituent subdivision' was adopted.[19] The clause as adopted was designed to cover a very wide range of State entities. It was intended to create maximum flexibility in order to take account of national peculiarities. Therefore, it may be concluded that 'constituent subdivision' covers any territorial entity below the level of a State itself. Constituent subdivisions can enter into investment agreement fulfilling the requirements of Article 25 (3) of the Convention. The question still remain unresolved regarding the status of independent State entities whether their status would be the same as 'constituent subdivision' or 'agency' while entering into investment agreement fulfilling the requirements of Article 25 (3) of the Convention.

As regard to the term 'agency' the precise domestic status of the entities in question was not clarified. But it was emphasised that agency would be acting on behalf of the contracting State though acting on its own name.[20] According to Amerasinghe the concept of 'agency' should be read not in its structural term but functionally.[21] The term 'structural' means that the structure of the independent entity includes any of the Stateofficials as board members of executive managers etc. and the term 'functionally' means that the

[17] History, Vol. I, p. 116.
[18] History, Vol. II, pp. 657,701,702,705,708,709,838/9.
[19] History, Vol. II, p. 879.
[20] Cheruer (n2) 150.
[21] ICSID Case No. ARB/97/7*, Emilio Agustin Maffezini v. Kingdom of Spain,* Decision on Jurisdiction, 25 January 2000, papras. 78-80; Amerasinghe, Jurisdiction Ratione Persone, pp.233/4.

functions carried out by the Stateentity are described, in accordance to the International Law of the State, to be governmental. This means that whether it is a corporation, whether or to what extent it is state-owned and whether it has separate legal personality are of secondary importance. What matters is that it performs public functions on behalf of the contracting State or one of its constituent subdivisions.[22] But the decision of ICSID tribunal seems contrary to the standing of Mr. Amerasinghe where the tribunal considered the status of the entity under the domestic law disregarding the functional aspects.[23]

Besides arbitration under ICSID jurisdiction, investment disputes have always been settled by various types of institutionally supported or *ad hoc* arbitration.[24] The specific nature of one of the parties as a State or State agency, instrumentality or other State-related entity is no obstacle to investment arbitration. Most of the world's major arbitration institutions, such as the London Court of International Arbitration (LCIA) which was the earliest one was founded in 1892, the International Court of arbitration of the International Chamber of Commerce (ICC) established in 1923 in Paris, or the American Arbitration Association (AAA) was setup in 1926, host investment arbitration but they do not arbitrate disputes themselves but support the arbitral processes conducted under their auspices by rendering various administrative services, such as providing lists of arbitrators or participating in the process of their appointment, calculating fees, etc.

Parties are also free, however, to submit investment disputes to these institutionally supported arbitration facilities. Before turning to ICSID arbitration to settle its investment dispute with Guinea, as originally stipulated, MINE had recourse to AAA arbitration. In the ensuing ICSID arbitration the AAA proceedings, including a 1980 award, were held to be in violation of the exclusivity provision of Art.26 of the ICSID Convention.[25] The foreign investor had already secured an ICC arbitral award before turning to ICSID arbitration. However, a tribunal constituted under the ICSID rules did not exercise jurisdiction until the

[22] Amerasinghe, The Jurisdiction Ratione Persone of the International Centre, pp.185/6.

[23] *Impregilo S.P.A.*

[24] ICSID Additional Facility Rules.

[25] *Maritime International Nominees Establishment (MINE) v. Guinea, ICSID Award, 6 January 1988,* 4 ICSID Reports 76.

previous ICC award had been annulled. The arbitral tribunal reasoned that when the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay proceedings the exercise of its jurisdiction pending a decision by the other tribunal.[26]

Case law of International Chamber of Commerce seems to establish that the conduct of an organ of the Statewill always engage the Stateliability.[27] The contract concluded by the Governor of the Central Bank could, in principle, be done in the name of the Presidency, the latter being, according to that State's constitution, an official organ of the Republic.[28] In other words, no distinction should be drawn between the Stateand its organs for the purpose of determining the Stateliability. On the other hand, the term 'instrumentality' is far more ambiguous as far as the determination of a State liability is concerned. The main difficulty is in determining the exact functionality of 'instrumentality'. Neither the Jurisdiction chapter of the ICSID convention determines the meaning of it, nor does major arbitration institutions such as International chamber of Commerce (ICC) tribunal have given any clear indication. There were many cases submitted before ICC tribunal through non-contractual contract based on Bilateral Investment Treaty between State and foreign investors for the liability of State entities.[29]

[26] *SPP v. Egypt, Decision on Jurisdiction I, 27 November 1985, 3 ICSID Reports 121, 129*.

[27] ICC Case No.3493, *The Government of Egypt, SPP (Middle East) Ltd. v. The Arab Republic of Egypt*, Feb. 16, 1983Award, 22 I.L.M. 752 (1983); ICC Case No. 6725, The Governor of a Central Bank, Feb. 14, 1991 Award; a Ministry (ICC Case No. 9762, Dec. 22, 2001 Award, *supra* note 4; ICC Case No. 7304, Mar. 31, 1994 Partial Award); a colonel acting as primary government official (ICC Case No. 8646, *French corporation v. Ministry of Defence of State X*, June 22, 1998 Award, 15(2) ICC BULL. 109 (2004) (excerpts)); ICC Case No. 6474, *A Prime Minister, Supplier [European company] v. Republic of Y*, Apr. 22, 1992 Final Award, XXV Y.B. COM. ARB. 279 (2000)).

[28] ICC Case No. 6725, Feb. 14, 1991 Award, unpublished, at 7-8; ICC Case No. 9762, *Contractor A (Luxembourg) v. Ministry of Agriculture and Water Management of Republic Z*, State Fund for Development of Agriculture of Republic Z and Government of Republic Z, Dec. 22, 2001 Award, XXIX Y.B. COM. ARB. 26, 51-52, at 40-41 (2004); ICC Case No. 7472, Jan. 16, 1995 Interim Award, at 10 (contracts concluded with a Ministry).

[29] ICC Case No. 7245, *European company v. Municipality of X*, Jan. 28, 1994 Interim Award, unpublished, at 24; ICC Case No. 6775, *Company B v. Département de commercialisation d'une matière première de la Présidence de l'Etat,* Jan. 28, 1998 Final Award, unpublished, at 25.

However, Case law of International Chamber of Commerce indicates that an "organ" of the Statecannot be characterized as an "instrumentality" of that State.[30] ICC tribunal held in the case of *European Company v. State X, Ministry of Industry of State X, Ministry of Defence of State X and State X establishment* that the existence of the legal personality of defendants prevents them from being considered as organs of the State. Thus, none of the ICC awards rendered on the basis of a Bilateral Investment Treaty address the treatment of instrumentalities. Now this is left as an unresolved question to the investment community whether State entities should be considered as 'instrumentality' or 'organ' of a state?

6.3 Difference between instrumentality and organ of a State

6.3.1 Organ of a State

The domestic law of a State may not classify, exhaustively or at all, which entities have the status of "organs". In such cases, while the powers of an entity and its relation to other bodies under internal law will be relevant to its classification as an "organ", domestic law will not itself perform the task of classification. Even if it does so, the term "organ" used in domestic law may have a special meaning, and not the very broad meaning it has under Article 4 of the Draft articles on Responsibility of States for Internationally Wrongful Acts[31] hereafter called 'Draft Articles'. For example, under some legal systems the term "government" refers only to bodies at the highest level such as the head of the Stateand the cabinet of ministers. In other States, the police have a special status, independent of the executive; this cannot mean that for international law purposes they are not organs of the State.[32] Accordingly, a State cannot avoid responsibility for the conduct of a body which

[30] ICC Case No. 7472, *European Company v. State X, Ministry of Industry of State X, Ministry of Defence of State X and State X establishment,* Jan. 16, 1995 Interim Award, unpublished, at 11.

[31] Draft articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in August 2001. Report of the ILC on the Work of its Fifty-third Session, UN GAOR, 56th Sess, p 43, UN Doc A/56/10 (2001).

[32] See, e.g., the *Church of Scientology* case, Germany, Federal Supreme Court, Judgment of 26 September 1978, case No. *VI ZR* 267/76, *Neue Juristische Wochenschrift*, No. 21 (May 1979), p. 1101; ILR, vol. 65, p. 193; and *Propend Finance Pty Ltd.* v. *Sing*, England, Court of Appeal, ILR, vol. 111, p. 611 (1997). These were State immunity cases, but the same principle applies in the field of State responsibility.

does in truth act as one of its organs merely by denying it that status under its own law. This result is achieved by the use of the word "includes" in paragraph 2 of the ILC Article 4.

However, it is difficult for the determination of state liability when it comes to the matter relating to 'instrumentality' under investment arbitration. This terminology is not defined nor even used, in the rules governing the attribution of internationally wrongful acts to States, as codified by the International Law Commission. In the International Law Commission's Commentaries on its Articles on Responsibility of States for Internationally Wrongful Acts, the term "instrumentality" is used only once. Commenting on what the term "State" has been accepted to mean under public international law, the Commission recalled the principle of indivisibility or unity of the Stateas a subject of international law and concluded that the Stateas a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials which form part of its organisation and act in that capacity, whether or not they have separate legal personality under its internal law.[33]

Nevertheless, the International Law Commission's Articles do make a fundamental distinction between State organs and "persons or entities exercising elements of governmental authority". It explains the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State. "An organ includes any person or entity which has that status in accordance with the internal law of the State." [34] It also provided that the conduct of a person or entity which is not an organ of the Stateunder article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the Stateunder international law, provided the person or entity is acting in that capacity in the particular instance.[35] This provisions indicate that there are some State entities that includes independent State entities exercising governmental function, which fall next to the organ of

[33] *See* Report of the International Law Commission, Fifty-third sessions, U.N. Doc. A/56/10 (2001), at 83.
[34] Article 4 (1) (2) of ILC.
[35] Article 5 of ILC.

state in priority, exercises governmental functions distinct from the Stateorgan with a provision that their conduct is not *ultra vires*.

Therefore, it appears that, under the principle of international law, mere "parenthood" of the Stateis not a sufficient basis for the act of state's instrumentalities to be attributed to the State. For the attribution to the Stateto establish organic link of a State entity which is in some extent more than a mere State entity must be proven. The organic link to be considered as state organ is only sufficient for *de jure* organs.[36] A de jure corporation is one that has completely fulfilled the statutory formalities imposed by state corporation law in order to be granted corporate existence. In comparison, a de facto corporation is one that has acted in good faith and would be an ordinary corporation but for failure to comply with some technical requirements. If the Stateinstrumentality is not a *de jure* organ, the act of the instrumentality can only be attributed to the Stateif it is shown that the entity in question exercises elements of governmental authority or is controlled and directed by the State.[37] Any other view would be inconsistent with the principles of international law and would necessarily be based on different rules. Consequently, a State cannot be held liable for the independent state-entities which do not exercise government authority, does not function for the benefit of the government and manage all of their affairs independently without any control of government.

Reasonably, organ of a State is considered to be constituent or component parts of States, such as states, provinces, cantons and municipalities. It also means that an organ is an entity not separate from the State, like a ministry, "whose acts are undoubtedly performed on behalf and in the interest of the Stateeven if the ministry is a legal person, as it certainly is" because it is in charge of carrying out the policy making of the government of the Statein question and is directed by the highest authorities of the State. Undoubtedly, the universal rule under the Public International Law is that ministries "represent the State, within its

[36] *See Noble Ventures, Inc. v. Romania* (ICSID Case No. ARB/01/11), Award, Oct. 12, 2005, p. 69 *et seq*.,(also available at http://ita.law.uvic.ca/ documents/ Noble.pdf).

[37] Noble Ventures, Inc.; A contradictory decision can be ICSID Case No. ARB/03/3, *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on jurisdiction, 22 April 2005, para. 202-209.

competence, and the Stateis bound by their acts". [38] Thus, act of independent State entities to be attributed to the Stateorganic association must be established.

In theory, the conduct of all human beings, corporations or collectivities linked to the Stateby nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the Government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the Stateas an organization, and also so as to recognise the autonomy of persons or corporations acting on their own account and not at the instigation of a public authority. Thus, the general rule is that the only conduct attributed to the Stateat the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the State.[39]

6.3.2 State entities or Instrumentality

In contrast with the concept of organ of a State, the term "person or entity" is used in ILC Article 4, paragraph 2, as well as in Articles 5 and 7. It is used in a broader sense to include any natural or legal person, including an individual office holder, a department, commission or other body exercising public authority, etc. The term "entity" is used in a similar sense[40] in the draft articles on jurisdictional immunities of States and their property, adopted in 1991. Under ICC jurisdiction, the term entity was referred as instrumentality which means mere government-owned companies or an agency that performs governmental functions for the benefit of public. These are normally part and indistinguishable from the

[38] ICC Case No. 9762, *Contractor A (Luxembourg) v. Ministry of Agriculture and Water Management of Republic Z,* State Fund for Development of Agriculture of Republic Z and Government of Republic Z, Dec. 22, 2001 Award, XXIX Y.B. COM. ARB. 26, 51-52, at 40-41 (2004).

[39] See, e.g., I. Brownlie, *System of the Law of Nations: State Responsibility*, Part I (Oxford, Clarendon Press, 1983), pp. 132-166; D. D. Caron, "The basis of responsibility: attribution and other trans-substantive rules", *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, R. B. Lillich and D. B. Magraw, eds. (Irvington-on-Hudson, N.Y., Transnational, 1998), p. 109; A. V. Freeman, "Responsibility of States for unlawful acts of their armed forces", *Recueil des cours…, 1955–II* (Leiden, Sijthoff, 1956), vol. 88, p. 261; F. Przetacznik, "The international responsibility of States for the unauthorized acts of their organs, *Sri Lanka Journal of International Law*, vol. 1 (June 1989), p. 151.

[40] *See* B. *Yearbook 1991*, vol. II (Part Two), pp. 14-18.

government. They are legally separate entities in some countries, although entrusted with government functions.[41] These entities are mostly controlled by the government in the matter relating to appointment of board members, framing the functional regulations and distribution of capital and profits.

The generic term "entity" refers to the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority. They may include public corporations, semi-governmental entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the domestic law of the Stateto exercise functions of a public character normally exercised by the Stateorgans, and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, in some countries private security firms may be contracted to act as prison guards and in that capacity may exercise public powers such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations. Private or state-owned airlines may have delegated to them certain powers in relation to immigration control or quarantine. In one case before the Iran-United States Claims Tribunal, an autonomous foundation established by the Stateheld property for charitable purposes under close governmental control; its powers included the identification of property for seizure. The tribunal held that it was a public and not a private entity, and therefore within the tribunal's jurisdiction; with respect to its administration of allegedly expropriated property, it would in any event have been covered by article 5.[42]

Under the jurisprudence of investment arbitration, the relations among these different entities such as state organs, state administrative entities and state-owned enterprises and the Stateitself was viewed as adequate to make each one liable for the others' contractual debts or breaches of contract.[43] French jurisprudence shows that in practice an

[41] *Impregilo S.p.A,* Decision on jurisdiction, 22 April 2005*; Pyramids Case.*

[42] *Hyatt International Corporation v*. *The Government of the Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 9, p. 72, at pp. 88–94 (1985).

[43] Paul Lagarde, *Une notion ambivalente : l' émanation de l'Etat nationalisant*, *in* Droits Et Libertés A La Fin Du Xxe Siècle Etudes Offertes A Claude Albert Colliard 539 (Pedone, 1984).

instrumentality is defined as an entity which is created by the Stateand which, while it may have its own legal personality, lacks real autonomy, such as financial, managerial, etc., in relation to the State. French tribunals have cited such a lack of autonomy in authorising the seizure of an instrumentality's property in order to satisfy a debt of its parent State.[44] Practice of international *ad hoc* tribunal is similar to the position of France arbitral tribunals.[45] Consequently, it can be seen that when the Stateneeds financial assistance to repay its foreign debts, it can without any formalities use entities' fund which proves that the Stateis the real owner of the entity and it is solely acting for the benefit of the State.

Various *ad hoc* arbitral tribunals attempt to define the term 'instrumentality', such as an entity of the Statewhich has its own legal personality; was incorporated by the Statewith a specific purpose such as regulating the water and power development for the State; and is controlled by the State.[46] It was decided In ICC Case No. 7245 where the fact that the fourth defendant was the property of the Stateand controlled by the Statewhich was not disputed, in no way implies that the establishment does not have legal personality.[47] A clear definition of a State "instrumentality" is included in an ICC Award, which states that "The Stateentity by its purpose and through its operations almost totally served as a vehicle to meet the needs and requirements of the X Government, in particular its military forces. The Stateentity was almost completely controlled by and dependent on the X Government's decisions, and the Government exercised its powers to such a degree that the Stateentity must be seen as an instrumentality of, or agent for, the X Government."[48]

When a State entity is substantially controlled and managed by the government it is significantly dependent on the government in any crucial decision making process which can be considered as an agent of the government. Arbitral tribunals in investment arbitration

[44] CA Paris, Jan. 22, 2004, *Winslow Bank & Trust Company Limited v. Société nationale des hydrocarbures,* Case No. 2002/20287, unpublished.

[45] *Hyatt International Corporation,* pp.88-94.

[46] *Impregilo S.p.A.*; ICC Case No. 6465, *Defence Industry of State X v. European Company*, Aug. 15, 1991 Interim Award, unpublished, at 6-7; ICC Case No. 7373, *European State company v. Middle-East State company*, Feb. 3, 1997 Final Award, unpublished, p. 14.

[47] ICC Case No. 7245, Jan. 28, 1994 Interim Award, p. 5, point 1.

[48] ICC Case No. 6465, Aug. 15, 1991 Interim Award, at 29; *see also* ICC Case No. 7472, Jan. 16, 1995 Interim Award, at 9 *et seq*.

have used the term State entities as "instrumentality" for three main purposes, First, to apply to a State an arbitration clause entered into by a State entity;[49] Second, to attribute the acts of a State entity to its parent State in cases of any debt liability to a foreign investor; and Finally, to reject claims by a State entity that its non-performance of a contract was caused by a government decision constituting *force majeure*. Therefore, the governmental decision or directive to discontinue the project agreed upon by the foreign contracting party and an instrumentality is not a circumstance beyond the control of the parties and thus State entity is estopped from claiming damages. [50]

Decision of arbitral tribunal under ICC, the issue of whether a State entity is an "organ" or an "instrumentality" seems to be determined in accordance with the principle of internal law of the State. ICC tribunal in the case no. 7245 held that the determination of the legal status of public law entities is a matter of the internal law of the Stateto which they are connected [51] Further in ICC Case No. 6465, the arbitral tribunal was satisfied that the Stateentity was established and is existing under applicable domestic law as a separate legal entity with its legal personality separate from the X Government.[52] ICC arbitral tribunals have not applied Article 4(2) of the ILC Draft articles on Responsibility of States for Internationally Wrongful Acts,[53] but rather have relied on the private international law notion of "*statut personnel*." French *"Statut Personnel"* which is 'personal status in English. For the continental lawyer, status (of persons) and *"personal law"* constitute quite distinct notions. The first refers to the condition of the individual, the second to the body of rules. The second is a concept of private international law designating that which is deemed to be the competent legal system among more than one by virtue of a personal connection.

[49] ICC Case No. 8035, *Party to an oil concession agreement v. State*, 1995 Award, 124 J.D.I. 1041 (1997) (note by D. Hascher) (because the State company was not a mere instrumentality, the Tribunal refused to extend the arbitration clause to the State). *See also* Philippe Leboulanger, *Some Issues in ICC Awards Relating to State Contracts*, 15(2) ICC BULL. 93, 96 (2004).

[50] ICC Case No. 3093/3100 of 1979, *in* Collection of ICC Arbitral Awards 1974-1985, at 365 (Y. Derains and S. Jarvin eds., 1990); ICC Case No. 6465, Aug. 15, 1991 Interim Award, at 29.

[51] ICC Case No. 7245, Jan. 28, 1994 Interim Award, at 24; ICC Case No. 7472, Jan. 16, 1995 Interim Award, at 10; ICC Case No. 6775, Jan. 28, 1998 Final Award, at 12.

[52] ICC Case No. 6465, Aug. 15, 1991 Interim Award, at 25.

[53] "An organ includes any person or entity which has that status in accordance with the internal law of the State."

The difference between these two approaches is set out in an ICC award concerning the standing of a State enterprise which replaced the original contracting party by another state enterprise following the creation of a newly independent State formed from two predecessor States.[54] The State argued that the transfer of rights, duties, property and assets from one State entity to another was an expression of its sovereignty. However, the arbitral tribunal held that the status of the State enterprise as a successor was "not a question of sovereignty of the State but simply a question of legality," namely the status of that entity under its domestic law.[55] This approach prevailed also in the awards given by ICSID tribunal in various cases when determining the status of State entities.[56]

The great majority of arbitration awards under ICC jurisdiction involving State parties were rendered in claim submitted on the basis of agreement entered into between foreign investor and State or State entity often called State contracts. State contract consists of Contract concluded between a sovereign State and a foreign investor or entity governed by private law.[57] Pierre Mayer distinguishes the "State contract *stricto sensu*" and the "State contract *lato sensu*" ("*contrat d'Etat* stricto sensu" and "*contrat d'Etat* au sens large"). The former relates to contracts concluded between a sovereign State and a foreign corporation, while the latter relates to contracts concluded between a State instrumentality ("*émanation de l'Etat*") and a foreign corporation. In the present chapter it references to State contracts that are contracts *lato sensu* in, investment agreement .[58]

In the case of *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co. v. Maharashtra Power Development Corp. Ltd.,* Maharashtra State Electricity Board and the State of Maharashtra, along with General Electric and Enron, Bechtel had partnered to

[54] ICC Case No. 6789, *State X Corporation v. European Company*, Aug. 16, 1999 Partial Award, unpublished, p. 44.

[55] ICC Case No. 6789.

[56] *See, Impregilo S.P. A.; Pyramids Case.*

[57] *See* internationalisation (3rd meaning)" ("*Contrat d'Etat. Contrat conclu entre un Etat souverain et une personne privée. V. internationalisation* (sens 3)") (Gérard Cornu, Vocabulaire Juridique Association Henri Capitant 223 (PUF (Collection Quadrige), 3rd ed. 2002)).

[58] *See* Pierre Mayer, '*La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat*', 113 J.D.I. 5 (1986).

develop Dabhol Power Corporation ("DPC"). DPC was to build two power plants which would supply electricity, under the terms of an exclusive Power Purchase Agreement ("PPA"), to a State electricity board set up in the Indian province of Maharashtra. At issue in this particular ICC arbitration were claims by Bechtel's subsidiary Energy Enterprises Mauritius Company ("EEMC") and General Electric's subsidiary Capital India Power Mauritius I that various Indian entities were liable under the DPC Shareholders Agreement for breach of contract and associated damages. It was argued that the cumulative breaches by the Indian Province and its instrumentalities operated as a total expropriation of the Claimant's investment in the Project for which the State to be liable.[59]

Many of the ICC awards addressed the issue of whether a State should be liable for the conduct of one of its entities.[60] It is difficult to demonstrate the liability of a State for the conduct of its entities. However, it can be said that State liability for the conduct of its entities is generally aimed at demonstrating either that the State is, by law or contractual agreement, indirectly liable for the conduct of its entities, or that the purported entity is actually an organ of the State and therefore, the State is directly liable. According to the very elegant formula embodied in Article 1382 of the French Civil Code for direct liability states "any act by a person which causes injury to another requires the person whose fault caused the injury to provide compensation". This principle is followed by Article 1384 of the same Code referring indirect liability states "Persons are responsible not only for the injuries they cause by their own acts, but also for those caused by the acts of persons for whom they are responsible, or by things in their care".[61] Thus, it would be crucial for the foreign investor to consider the status of the State entity whether it is functioning as organ of the State or mere independent entity.

[59] *See, e.g.,* ICC Case No. 12913, *Capital India Power Mauritius I and Energy Enterprises (Mauritius) Co. v. Maharashtra Power Development Corp. Ltd.,* Maharashtra State Electricity Board and the Stateof Maharashtra, Apr. 27, 2005 Final Award, 20(5) INT'L ARB. REP. C-1 (2005).

[60] *Dallah Real Estate; Pyramids Case.*

[61] Article 1382 and Article 1384 of the French Civil Code.

6.4 State Liability in the agreement of independent State entities

In the very recent case *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs*[62] the English Commercial Court declined to enforce an ICC award against the Government of Pakistan. The Supreme Court of United Kingdom upheld the decision of Commercial Court, the main question before the court was whether the Government of Pakistan was a party to the arbitration agreement entered into by 'Awami Hajj Trust', an independent State entity, created by Ordinance promulgated by the government of Pakistan. This Ordinance required renewal at regular intervals, however following a change in the government of Pakistan at the end of 1996, and the renewal did not take place. The Ordinance lapsed and the Trust therefore ceased to exist. The Secretary of the Trust, one Mr Lutfallah Mufti, was also the Secretary of the Government of Pakistan's Ministry of Religious Affairs ('MORA'). He signed the Agreement with Dallah, which contained the arbitration clause stating that 'Any dispute or difference of any kind whatsoever between the Trust and Dallah arising out of or in connection with this Agreement shall be settled by arbitration held under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, Paris, by three arbitrators appointed under such Rules.'

Within a month after the lapsing of the Ordinance in January 1997, and the cessation of the Trust, the Agreement was purportedly terminated for breach, by letter from Mr Mufti to Dallah, on MORA letterhead. Dallah had submitted claim under ICC tribunal and initiated arbitration pursuant to the Agreement but the government of Pakistan refused to submit to the jurisdiction of the Tribunal, on the ground that there was no contract or arbitration agreement between the Government of Pakistan and Dallah. The arbitral tribunal in its first partial award concluded that the government of Pakistan was a party to the arbitration agreement and subsequently in the final award State of Pakistan was held liable for the conduct of its entity called 'Awami Hajj Trust'.

[62] *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

The Supreme Court dismissed the claim brought by Dallah against the government of Pakistan and held that the Agreement was signed by the relevant Minister, the Minister of Religious Affairs, although he signed as chairman of the board of the Trust, not as Minister.[63] Like the Paris Court of Appeals in the *Pyramids Case*, Aikens J did not regard this signature as a factor indicating that the State was a party to the Agreement; the Minister, in his capacity as chairman of the board of trustee being the logical person to sign the Agreement. Likewise the reference to the guarantee of financing to be provided by the Government of Pakistan that was contained in the Agreement: 'Contracts frequently indicate that a third party is going to guarantee an obligation in the contract. That does not indicate that the third party and those to the contract all intended that the third party should be bound by the contract. 'Awami Hajj Trust' was a separate legal entity and all of its functions carried out independently. The Government of Pakistan had to the some extent structural control over the entity as having Minister of Religious Affairs as chairman of the board of the Trust. A State to be held liable for its independent State entity it must be proven that both 'structural' and 'functional' control over the entity by the government.

In the *Pyramids Case* the relevant entity, the Egyptian General Organisation for Tourism and Hotels, was a corporate body, established by law: 'It unequivocally had a corporate identity and legal capacity separate from that of the State; whereas consequently, it could act in its own name and maintain its own assets and liabilities.[64] The Paris Court of Appeals inferred from this that, 'in permitting this public establishment to enter into the Agreement in dispute by itself, the Arab Republic of Egypt (A.R.E.) intended thereby to demonstrate that it had no intention to submit to an I.C.C. Arbitration agreement.'[65] The government of Egypt refrained from being submitting under the jurisdiction of ICC as it was not a party to the agreement. In ICC arbitration, private parties have generally put forward three arguments that a State is indirectly liable for the conduct of its entities which are the State's culpa in vigilando, State as a guarantor and State as a successor to a liquidated State entity.

[63] *Dallah Real Estate*, (QBD) para 109.
[64] *Arab Republic of Egypt v Southern Pacific Properties (Middle East) Ltd* (1984) 23 I.L.M. 1048 (Paris Court of Appeals); (1987) 26 I.L.M. 1004 (Court of Cassation). P.1059.
[65] *Pyramids Case,* 1059.

6.4.1 The State's Culpa in Vigilando

Culpa in Vigilando is a principle codified in article 1903 of French Civil Code which confers duty and obligation on a State as it is in a position to exercise authority and supervision over the investment agreement entered into by its entities with foreign investors. On the basis of the above principle, private companies as foreign investors have argued that, because the State has an obligation to control or supervise its instrumentalities, the State should be liable for the commercial non-governmental conduct of its entity when the latter breaches an investment agreement with foreign investors and the foreign investors suffer damage as a result of the State's failure to adequately control or supervise the investment activities of foreign investors.[66]

This situation corresponds to the well-known principle of "*culpa in vigilando*" recognised in civil law legal systems. This principle was also upheld by ICSID tribunal in *Amco Asia Corporation and others v*. *Republic of Indonesia* where State of Indonesia was held liable for the failure to protect P.T. Amco's right to manage the Kartika Plaza Hotel under a contract with P.T. Wisma, a private corporation organized under Indonesian law and controlled by INKOPAD, a body connected with the Indonesian Army. P.T. Wisma had resorted to illegal self-help in its dispute with P.T. Amco and had taken over the management of the hotel with the help of Army and Police personnel on March 31 - April 1, 1980. The ICSID tribunal held that Indonesia's failure to protect P.T. Amco's rights in this regard was violative of a host State's duty under international law to protect foreign investors' rights and interests.[67]

This principle was also upheld by the ICC tribunal in the case of *X Gas company v. Société nationale des produits pétroliers*, the tribunal held that a State organ which was a Ministry of the State concerned, liable because of its omission to discharge its duty and obligation, by

[66] *Southern Pacific Properties (middle east) Limited v Arab Republic of Egypt,* ICSID case no. Arb/84/3 Award on the merits. Icsld Review-Foreign Investment Law Journa,L Page.328.

[67] ICSID Case No. ARB/81/1, *Amco Asia Corporation and others v. Republic of Indonesia* Decision on Merits November 21, 1984, p.167; http://icsid.worldbank.org/ICSID/FrontServlet? Request Type= Cases H&req From=Main&actionVal=OnlineAward; *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Republic of Hungary* (ICSID Case No. ARB/07/22) para. 13.3.2.

allowing interference by third parties, caused or contributed to delays by the contractor in the performance of its contractual obligations.[68] In ICC Case No. 8646 of 1998, the Arbitral Tribunal held that the actions of a State-owned company, the actions of recalcitrant farmers controlling areas where the private contractor had to deliver goods, and the unauthorized entry and movement of nomads were all "factors attributable to the Defendant the Ministry of Defence of State X." The prejudice caused to the foreign contractor, in the form of additional costs, was thereby attributed to the State's omissions. [69]

Based on the above principle and the precedent of the ICSID and institutional arbitration suggest that that State can be indirectly liable for the conduct of its entities when it can be proven that the Statefailed to protect and supervise the investment activities of foreign investors in its territorial boundary.

6.4.2 State as a guarantor of its entity

States guarantee by providing approval to many investment agreements between foreign investors and State entities. By doing so state is duty bound to allow the investment activities to go on without any interference. ICSID tribunal held the State is liable for the breach of its obligations by failing to accord the investment activities with its approval.[70] Parties have also argued that the State is liable for the conduct of one of its entities where that State has contractually agreed to guarantee the entity's obligations under a contract that the entity entered into with a private company. The tribunal concluded that 'Egypt breached its obligations under Article 2(2) of the IPPA by failing to accord Wena's investments in Egypt "fair and equitable treatment" and "full protection and security." Even if the Egyptian Government did not authorize or participate in the attacks, its failure to prevent the seizures and subsequent failure to protect Wena's investments give rise to liability. The Tribunal also finds that Egypt's actions amounted to an expropriation –

[68] ICC Case No. 6375, *X Gas company v. Société nationale des produits pétroliers [State X],* Feb. 8, 1992 Award, unpublished, at 43-50; *See Amco Asia Corporation.*

[69] ICC Case No. 8646, June 22, 1998 Award, p. 10.1.4.3.f, at 20-21.

[70]ICSID Case No. ARB/98/4, *Wena Hotels Ltd. v. Egypt,* Final Award, 8 December 2000, Para 131.

transferring control of the hotels from Wena to EHC without "prompt, adequate and effective compensation" in violation of Article 5 of the IPPA.'[71]

This principle also upheld by ICC Arbitral Tribunal and stated that the ratification of the contract by law has the only legal effect to assure full and stronger protection of the contractual rights of foreign entities, such as the rights of at least two of the three members of the Consortium. As the employer was a State legal entity when the contract was signed, the ratification of the contract by statute was aimed mainly at assuring the foreign contracting parties that the obligations arising out of the contract would be respected and duly performed by the State.[72] The concerned state was held liable for the breach of its entity with foreign investor. Therefore, practice of institutional arbitration suggests that liability of State entities to be attributed to the State while state provides guarantee to the foreign investors.

6.4.3 The Stateas successor to a liquidated State entity

When a State entity enters into an investment agreement with a foreign investor and the State approves the agreement the State has a duty to provide security to the investment activities. Similarly, when a State entity is liable for the liquidated damages whether the entity is a separate legal entity and to what extend state has ownership in the entity of secondary importance. What matters is whether it performs public functions on behalf of the contracting state. If it does ICSID tribunals are of the view that the State would be responsible for the liquidated damages for its entity.[73] Practice of the ICC tribunal shows where a State entity enters liquidation; the State is by law liable for the debts of the liquidated State entity. Conversely, a new State entity, created to replace the original party to a contract, is entitled to invoke the contracting partner's liability under the contract.[74]

[71] ICC Case No. 6262, *Two European companies v. African State*, June 24, 1992 Partial Award, unpublished, p. 92; *Amco Asia Corporation.*

[72] ICC Case No. 8357, *Consortium of two foreign companies and a national company v. Public corporation of State X,* June 14, 1997 Final Award, p. 1.3.

[73] Amerasinghe, pp.233/4; *Amco Asia Corporatio, p.167.*

[74] ICC Case No. 7237, *National company (State X) v. European company,* June 1, 1993 Partial Award, unpublished, at 8-9.

Under ICC jurisdiction when a municipality was in question as regard to party to an investment agreement, the Government reorganised its municipalities and thereby terminated the existence of the municipality that was a party to the contract at issue.[75] When this was done the reasonable question was raised as to who will be the successor of the municipality and be responsible for any liquidated damages. The Arbitral Tribunal, however, held that by doing so the State had assumed the obligations of the municipality. According to the Tribunal, the State was the "universal successor" to the dissolved territorial and administrative entities, and therefore the arbitral clause was transferred since the State succeeded to the rights and obligations of the 'Comité Populaire' of Municipality [X], which it replaces as a party to the present arbitration automatically and without the need for any modification of the terms of reference, which bind the State based on the sole fact of the aforementioned succession. The tribunal explained that the State succeeded the rights and obligations of the Popular Committee of the Municipality of [X] which it replaces like part with the present arbitration and this of office and without need for modification for the act for mission which binds it only fact of the above mentioned succession. [76]

6.4.4 Liability of successive State for the agreement of its predecessor State

Being a party to the ICSID Convention the earliest surprising decision, as regard to the above principle, was given by Swiss Federal Tribunal in *Societe des Grands Travaux de Marseille v. Republique Populaire du Bangladesh.*[77] In 1965, the East Pakistan Industrial Development Corporation (EPIDC), an entity wholly owned by the Pakistani Government, and a French company (SGTM) concluded a contract for the construction of a gas pipeline in Eastern Pakistan, which in December 1971 emerged as new independent state called the People's Republic of Bangladesh. The contract, which was governed by the law of Pakistan, provided for arbitration in Geneva, Switzerland, under the Rules of the International Chamber of Commerce (ICC). In 1969, SGTM made a claim of 12 million francs and both parties

[75] ICC Case No. 7245, Jan. 28, 1994 Interim Award, at 43.

[76] ICC Case No. 7245, at p.43.

[77] Decision of May 5, 1976, 102 ATF Ia 574 (1976), *commented on* by P. Lalive in 34 Annuaire SuIssE DE DRoI" INT'L 387 (1978), *translated into English in* 5 Y.B. CoM. ARB. 217 (1980).

designated a sole arbitrator to settle the dispute. The terms of reference of the arbitrators were agreed by the parties on May 7, 1972.

Two days after that agreement, the President of Bangladesh issued a decree, retrospective to March 26, 1971, providing for the creation of the Bangladesh Industrial Development Corporation (BIDC), as successor to EPIDC. EPIDC's assets were transferred to BIDC and so were EPIDC's debts and liabilities "unless the Bangladesh Government otherwise directed." The order stated:

> "All arbitration proceedings to which, immediately before the commencement of the Order, the East Pakistan Development Corporation was a party, shall be deemed to have abated and no award or decision made or given in such proceedings shall have any effect or be binding on, or enforceable against, the East Pakistan Development Corporation or the Bangladesh Industrial Development Corporation, and all power or authority to act on behalf of the East Pakistan Development Corporation in any such proceedings shall be deemed to be revoked and cancelled with effect from the 26th of March, 1971, and any provision in the contract or agreement providing for the settlement by arbitration of the disputes in respect of which such proceedings were instituted, shall be deemed of no legal effect."[78]

In September 1972, SGTM asked the arbitrator to substitute BIDC as respondent for EPIDC, and the arbitrator fixed November 20, 1972, as the date for a hearing. Thereupon, the President of Bangladesh decreed that any debt or obligation incurred or undertaken by EPIDC should be deemed not to have been assumed by BIDC if such debt or liability "is or was the subject matter of an, dispute." For good measure, a subsequent decree was issued 4 days later (5 days before the date of the hearing), which dissolved BIDC and transferred its "assets" to the Government. As to BIDC's liabilities, the Government reserved for itself the power to make *ex gratia* payment in respect of any, claim "if and to the extent that the same shall to it appear to be just."

[78] Presidential Decree by the President of Bangladesh 10 May 1971.

On December 15, 1972, the arbitrator ordered that BIDC be substituted for EPIDC and that the Bangladesh Government be joined as a second respondent. On May 31, 1973, the arbitrator rendered a final award holding BIDC and the Government jointly and severally liable to SGTM.[79] Bangladesh responded by petitioning the Swiss courts to annul the award challenging the arbitration agreement. Acknowledging the discriminatory character of the Bangladesh orders, the Federal Tribunal held, nevertheless, that the petition should be granted on the grounds that (1) matters of succession to the assets and liabilities of the entities involved were governed by the law of Bangladesh (which was not the question in issue, since the real question was whether the Government of Bangladesh could nullify an arbitration clause by unilaterally withdrawing from it)[80]; (2) there did not exist in Swiss law any mandatory rule compelling anyone to submit against his will to arbitration (which was the real question, since all that the arbitrators had done was to give effect to an existing arbitration agreement); and (3) the Bangladesh order, though discriminatory and depriving SGTM of an agreed contractual forum, did not offend Swiss public policy because it did not affect the rights of Swiss creditors (a holding that constitutes a new kind of discrimination against non-Swiss nationals and seriously raises the question of the advisability of providing for arbitration in Switzerland).

Under the circumstances, one can only agree with a leading Swiss commentator that this decision is one of the most objectionable that the Swiss courts have rendered in a long time.[81] In fact, it is truly a "horror" case. Another surprising decision has been recently given by the Supreme court of United Kingdom in the case of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs* where the State entity was established by the government and structurally and functionally controlled by the government. The entity disappeared for not renewing the legislation by the government. The claimants brought arbitration agreement against the government of Pakistan as an *alter ego* of the entity and the arbitral tribunal found the State liable. In enforcement of the award in England the

[79] Parts of the award are *reproduced in* 5 Y.B. CoM. ARB. 179 (1980).

[80] *Adams v. National Bank of Greece & Athens*, [1960] All E.R. 421. *See also* G. DELAUME, para. 4.05.

[81] Lalive, para. 23, at 400.

Supreme Court held that the State was not a party to the arbitration agreement of its entity thus refused the enforcement.

6.5 State liability for the agreement of its entity as an organ

A State is directly responsible under the principle of customary international law for both the commercial non-governmental or governmental non-commercial conduct of a State organ. However, where a private company seeks to establish direct liability of a State for the conduct of its entity, that private company must ultimately prove that the entity is in fact an organ of the State. In determining what constitutes an organ of a State for the purposes of responsibility, the internal law and practice of each State are of major importance. The structure of the State and the functions of its organs are not, in general, governed by international law. It is a matter for each State to decide how its administration is to be structured and which functions are to be assumed by government.

But while the State remains free to determine its internal structure and functions through its own law and practice, international law has a distinct role. For example, the conduct of certain institutions performing public functions and exercising public powers is attributed to the State even if those institutions are regarded in internal law as autonomous and independent of the executive government. However, the matter relating to State entities, ICC case law shows that entities have principally used three legal arguments to persuade ICC arbitral tribunals that an entity of the State is actually one of its organs.

6.5.1 Application of the principle of customary international law

For a State to be directly responsible, the conduct in question must be attributed to it. The general rule is that only the conduct of a state's organ of government or its agent, including persons or entities acting under the direction, instigation or control of those organs can be attributable to the State. Organ includes those of national, regional or local government and persons or entities whatever their level, and any person or entity having that status under the internal law of the State. It also includes person or entity that acts in fact as organs,

even if they are not classified as such by internal law.[82] Private companies have relied on customary public international law as embodied in the Draft Articles[83] to argue that any entity of the State should be treated as an organ of that State under the international trade practice. In other words, these private companies base their position on the theory of the "indivisibility of the State."[84] In ICC Case No. 10623, the Arbitral Tribunal stated from the perspective of an international arbitral tribunal in this context, the State must be regarded as one entity. When the State seeks to renege upon an arbitration agreement or to frustrate its fulfilment by resorting to its own courts it is, in effect, unilaterally reneging upon or frustrating that agreement.

Although investment agreement of the State entities fall under the category of private international law, this contention is supported by reference to public international law, which treats the organs of a State as the State itself for the purposes of determining state responsibility, irrespective of whether or not those organs are independent or separate from the State for the purposes of a state's internal law. This principle is frequently declared in the context of determining state responsibility for wrongful acts in the general sense of tortious liability. The International Law Commission has recently adopted draft articles approving this principle in this context. See the draft articles regarding the 'Responsibility of States for Internationally Wrongful Acts', Article 4, 5 and 6.[85]

Treatment of State entities under customary international law approach, however, represents an exception in the ICC case law. In most ICC arbitration cases, the arbitral tribunal decides the dispute in accordance with the *lex contractus,* that is, in accordance with the national law chosen by the parties to govern their contract and, in a few cases, the

[82] Anthony Aust *Handbook of International Law* (second edition, Cambridge Publisher 2010) p. 379.

[83] *See* James Crawford, The International Law Commission's Articles on State Responsibility-Introduction, Text And Commentaries (Cambridge University Press, 2002).

[84] ICC Case No. 7640*, American corporation v. W (State-owned company), X (State-owned company), Y (State-owned company) and Z (State-owned company), Sept. 9*, 1999 Award, unpublished, p. 60.

[85] ICC Case No. 10623, *Salini Costruttori S.p.A. v. Federal Democratic Republic of Ethiopia*, Addis Ababa Water and Sewerage Authority, Sept. 7, 2001 Award Regarding the Suspension of the Proceedings and Jurisdiction, 21(1) ASA BULL. 59, pp. 168-70, at 96 (2003); *also published in* Anti-Suit Injunctions In International Arbitration, Iai Series On International Arbitration No. 3, at 227 (E. Gaillard ed., 2005).

arbitration agreement itself.[86] In ICC Case No. 6789 the tribunal stated that in this contention, it must also be borne in mind throughout that the contract in this dispute is governed by the law of the State of X and that it is accordingly the Tribunal's duty to decide the issues in the same way as they would be decided if they arose before the State X's courts".[87]

One ICC arbitral tribunal has even stated that customary public international law should not be applied to a dispute arising from the breach of a State contract since such a breach does not in principle constitute a "breach of an international obligation by the State"[88] and could not be characterized as an internationally wrongful act of that State. It further stated that the contracts concluded by a State and foreign private entities are not governed by public international law, even if they can be governed by the general principles of law referred to by Article 38 of the ICJ Statute. Basis of this argument is mostly focused on 'internationally wrongful act' which may not necessarily be the case on the State liability for the investment agreement of its organ. This principle may be detrimental to the capital exporting investment community around the world.

General approach of ICC arbitral tribunals therefore, seems to be in line with this respect to the traditional view in customary international trade law. In 1952, the International Court of Justice held without any hesitation that individuals, or groups without international personality, cannot be parties to an international instrument such as a treaty.[89] According to The principle of *'Pacta sunt servanda' w*ith reference to international agreements, "every contract entered into by the State or its entities shall be binding upon the parties to it and

[86] ICC Case No. 4629, *Contractor (European Country) and Contractor (Middle Eastern Country) v. Owner (Middle Eastern Country),* 1989 Final Award, *in* Collection of ICC Arbitral Awards 1991-1995, at 152 (J.-J. Arnaldez, Y. Derains, D. Hascher eds., 1997); ICC Case No. 6474, Apr. 22, 1992 Final Award, p. 134, at 306; ICC Case No. 8646, June 22, 1998 Award, p. 10.1.3.3; ICC Case No. 12913, Apr. 27, 2005 Final Award, at C-12.

[87] ICC Case No. 6789, Aug. 16, 1999 Partial Award, p. 45.

[88] ICC Case No. 7640, Sept. 9, 1999 Award, pp. 70-75. *See also* ICC Case No. 3327, *French company A v. African State B*, 1981 Award, *in* Collection of ICC Arbitral Awards 1974-1985, at 433-34 (Y. Derains and S. Jarvin eds., 1990).

[89] Anglo-Iranian Oil Co. (*United Kingdom v. Iran*), Jurisdiction, Judgment of July 22, 1952, 1952 I.C.J. Reports 93, at 111-12.

must be performed by them in good faith".[90] *Pacta sunt servanda* is based on good faith and this entitles states to require that obligations be respected and to rely upon the obligations being respected. This good faith basis of trade agreement implies that a party to the agreement cannot invoke provisions of its municipal domestic law as justification for a failure to perform.

However, this traditional view has been criticised as overly theoretical for various reasons,[91] including on the basis that State contracts is a category in which commercial contracts have an ambiguous position which are internationalised.[92] These contracts usually concern investment operations, but F.A. Mann, who coined the expression "State contracts" in 1944, used the term for certain types of loan agreements in which the parties chose international law as the governing law.[93] Nevertheless, the latest works of the ILC,[94] as well as recent ICSID awards, do not conclude that the mere breach of a State contract entails the international responsibility of the State. In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ('*puissance publique*'), and not as a contracting party, may breach the obligations assumed under the BIT.[95]

The ILC's commentary to Article 4 is crystal-clear it states of course the breach by a State of a contract does not as such entail a breach of international law. Something further is required before international law becomes relevant, such as a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act. A

[90] From the Vienna Convention on the Law of Treaties, signed at Vienna on May 23, 1969.

[91] *See* Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EURO. J. Int'l L. 287 (1998).

[92] Derek William Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRIT. Y.B. Int'l L. 49, 51-52 (1988).

[93] *See* F.A. Mann, studies in international law 179 *et seq.* (Clarendon Press, 1973) ("The Law Governing State Contracts").

[94] J. Crawford, at 96.

[95] *Impregilo S.p.A. v. Islamic Republic of Pakistan,* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, Apr. 22, 2005, 12 ICSID REP. 245, p. 260, at 297 (2007); ICSID website; reproduced in this volume as Annex 3.

non-commercial act of a State, *i.e.*, the use of its sovereign authority in an arbitrary way, is simply a violation of the rules governing the State's duties towards foreigners in its territory such as denial of justice, discriminatory measures, etc.,[96] rather than a breach of any international obligation.

In ICSID case law, it is recognised that a breach of a State investment contract may amount to a breach of an international obligation by virtue of the inclusion of a so-called "umbrella clause in a BIT."[97] However, there is no ICC arbitration case in which a State company has sought to apply customary public international law through an umbrella clause in a BIT. It has also been established that a State can be held liable for both breach of contract under the *lex contractus* and for an internationally wrongful act under customary public international law. This refers to the distinction between contract and treaty claims. In ICC Case No. 7472 in the actual fact, the issue was to know what impact the act of State X which the United Nations stated was unlawful and triggered X's international liability which may have had on the contracts. The Arbitral tribunal did not have jurisdiction to examine liability other than contractual.[98]

In most of the investment arbitration between State entities and foreign investors arbitral tribunals have followed private international law approach, applying the national law chosen by the parties and treating the dispute as a mere breach of contract. This is perhaps not surprising, given that the purpose of the ICC arbitration system is to resolve "business disputes,"[99] although the precise meaning of that term is not always clear. The practical difference between the two methods is that the public international law approach rests on the violation of an international obligation, while the private international law approach

[96] *See* Steven Schwebel, Justice In International Law 431–33 (Grotius/Cambridge University Press, 1994).

[97] *SGS Société Générale de Surveillance S.A. v. Pakistan* (ICSID Case No. ARB/01/13), Decision on Jurisdiction, Aug. 6, 2003, 8 ICSID REP. 406 (2005); 18 ICSID REV. 307 (2003); 42 I.L.M. 1290 (2003); 18(9) INT'L ARB. REP. A-1 (2003); excerpts in French in 131 J.D.I. 258 (2004); *SGS v. Philippines*; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/02/13), Decision on Jurisdiction, Nov. 29, 2004, 20 ICSID REV. 148 (2005); 44 I.L.M. 569 (2005); ICSID website; excerpts in French in 132 J.D.I. 182 (2005).

[98] *See mutatis mutandis*, ICC Case No. 7472, Feb. 6, 1996 Partial Award, *supra* note 28, at 28-29.

[99] *See* Article 1(1) of the ICC Rules of Arbitration.

rests on the notion of prejudice or damage. In general only two sets of circumstances would warrant recourse to the approach based on customary public international law.

First, relying upon customary international law principle and on the Articles of Draft articles on Responsibility of States for Internationally Wrongful Acts might be appropriate where the parties have chosen as their *lex contractus* in international law or the general principles of international trade practice. This was the practice in most of the series of well-known arbitrations which arose from various oil concessions in the 1970s and 1980s among the European oil companies and Arab States.[100] Second, it may be argued that the binding character of any international contract, including State contracts, arises from international law. A consequence of this view is that a national law chosen by the parties as the *lex contractus* has only a contractual value and should always be subordinated to mandatory provisions of international law. However, this approach has never been expressly followed by any institutional arbitral tribunals. Rather than running the risk of relying on abstract theories,[101] ICC arbitral tribunals are much more inclined to examine the economic reality behind the State contract.

6.5.2 The State and "state-entity" are the same in economic terms

Increasingly during these recent years, governments throughout the world have established separately constituted legal entities to perform a verity of governmental tasks. The organisation and control of these entities vary considerably but many possess a number of common features. A typical government entity, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the entity and specifies that it is to be managed by a board selected by the government in a manner consistent with the

[100] *B.P. Exploration Co. (Libya) v. The Government of the Libyan Arab Republic, Award on the Merits*, Oct. 10, 1973, 53 I.L.R. 297 (1979); V Y.B. COM. ARB. 143 (1980); excerpts in French in 1980 REV. ARB. 117; *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic,* Award on the Merits, Jan. 19, 1977, 17 I.L.M. 3 (1978); excerpts of French original text in 104 J.D.I. 350 (1977); *Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Republic*, *ad hoc* Award, Apr. 12, 1977, 20 I.L.M. 1 (1981); VI Y.B. COM. ARB. 89 (1981).

[101] The argument would be based on the notion of "*Grundlegung*" which has been extensively criticised by Pierre Mayer, *Le mythe de l' ordre juridique de base* (*ou* Grundlegung), *in* le droit des relations économiques-etudes offertes à berthold goldman 199 (litec, 1982).

governing law. The entity is typically established as a separate legal entity with the powers to hold and sell property and sue and be sued. These distinct features permit government entities to manage their operation on an enterprise basis while granting them a greater degree of flexibility and independence from the close political control.[102] But the objective and function of these entities are to assist the government in a different shape called separate legal entity. That's why under economic term state and State entities have no distinct meaning.

Precedent of ICC case law shows that private companies have tried to demonstrate that an entity of the State is actually one of its organs by pointing to the economic reality behind the State contract and showing that, in economic terms, the State and its purported "entity" are actually the same entity.[103] In ICC Award No. 12913 of 2005, for instance, the Arbitral Tribunal held that the State had 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 by MSEB in the PPA were, therefore, entirely dependent on the willingness of the State of Maharashtra. There is no doubt that in buying and holding the DPC stock, and in its actions as a shareholder of DPC, MPDCL has acted wholly as an entity of MSEB and State of Maharashtra. For one thing, all the references made by either SOM or MSEB to MPDCL make clear their absolute control of the entity as a holding company for the shares. All the individual holders of nominal interests in MPDCL gave powers of attorney to MSEB endowing it with "absolute discretion" to exercise their rights as directors and shareholders of MPDCL.[104]

[102] Gray B. Born, '*International Civil Litigation in United States Courts'* (third edition, Kluwer Law International 1996).

[103] ICC Case No. 9151, *Joint- Yashlar and Bridas SAPIC v. Government of Turkmenistan* (or Turkmenistan or the State of Turkmenistan and/or the Ministry of Oil of Turkmenistan), June 8, 1999 Interim Award, full text available at http://www.mealeys.com. ICC Case No. 6789, Aug. 16, 1999 Partial Award, p. 42; ICC Case No. 7071, *Ministry of Defence of [State A] v. XX [State corporation] and State B*, July 23, 1993 Award, unpublished, pp. 82, 83, 90-94; ICC Case No. 7640, Sept. 9, 1999 Award, at. 60.

[104] ICC Case No. 12913, Apr. 27, 2005 Final Award, at C- 8–C-10; *but see* ICC Case No. 7472, Jan. 16, 1995 Interim Award, at 17-18.

6.5.3 The "entity" as a representative of the State

To hold a State directly liable for the agreement of its entity, private companies in ICC jurisdiction have argued that its entity was representing the State when negotiating, executing and performing the contract at issue.[105] As one ICC arbitral tribunal noted as a matter of principle, it is accepted that what the claimant states is correct, namely that one corporate entity can act on behalf of another corporate entity. However, if this is correct, it is for the claimant to show that this in fact occurred.[106]

In ICC Case No. 6406, the respondent, a foreign corporation argued that the purported claimant, a State enterprise, could not initiate arbitral proceedings to recover a sum of money, as the relevant contracts were concluded, by their own terms, with "the Government of [State X] represented by the State enterprise." The Tribunal found that the proper party was not the State enterprise, but was in fact the State.[107] However, other arbitral awards have found that a contract was signed by an entity simultaneously acting "as both a public company and as an agent of the governmental authorities,"[108] thereby creating a dual responsibility.

It must be noted that, in some cases, it is difficult to determine whether the entity's representative was acting on behalf of the State or on behalf of the entity. In ICC Case No. 8035 of 1995, for instance, the Arbitral Tribunal held in accordance with the concept of dual functions, M.A. signed the contract in a double capacity: first in the name of respondent No. 2, second in the name of the State, in each case for different reasons. The first signature committed respondent No. 2 under the Interruption Agreement. The purpose of the second signature, which appeared under the notation "approved and endorsed", was to demonstrate that respondent No. 2 was acting within the framework of the Interruption

[105] ICC Case No. 7472, *European Company v. Ministry of Industry of State X,* Ministry of Defence of State X and State X establishment, Jan. 15, 1998 Final Award, unpublished, at 10-15.

[106] ICC Case No. 7472, Jan. 16, 1995 Interim Award, at 19.

[107] ICC Case No. 6406, *State X Helicopter Industries v. American company No. 1 and American company No. 2,* July 29, 1991 Interim Award, unpublished, at 7-8.

[108] Arbitration Chamber of Paris Case No. 9392, Jan. 16, 1998 Final Award, p. 3, available at http://www.arbitrage.org/fr/publications/sentences_us/ Failure_of_delivery.pdf.

Agreement, including the responsibility which respondent No. 2 could incur in this regard, such as the recognition of the finality of the results of arbitration. Therefore, the second signature, which appears under the mention "approved and endorsed", had proven to show that defendant 2 acted within the framework of Accorded interruption, including the responsibility that defendant 2 to particularly in this respect like the recognition of the final character of the resulted the arbitration".[109]

6.6 State liability under *alter ego* doctrine

Alter Ego is a doctrine in international trade practice under which a non-signatory may be bound by the agreement entered into by its organ, entities or agent.[110] Literally, an *alter ego* is a second self. Under the *alter ego* doctrine, a court or arbitral tribunal may look past a corporate status in order to get to the individual stockholders themselves, where the stockholders have wholly disregarded the corporate form and corporate formalities. This exposes the stockholders to personal liability beyond the amount of their investment.[111] In Dallah the arbitral tribunal's primary reasoning to hold the State of Pakistan liable was that the Trust was an alter ego of the Government.

When State incorporate an independent entity or a separate corporation, one of the obvious reasons behind this incorporation lays to limit the State liability from any economic activities engaged by the entity. The "corporate veil" is created between the State fund or assets and the entity's business liabilities. When properly managed, corporate veils provide significant State liability protection against investment claims brought for the liquidated damages of its independent State entities and other disputes.[112] However, to prevent piercing the corporate veil the incorporator must do more than merely form a business entity and register it under the State law. There are lots of on-going governance requirements and formalities for business owners under most of the applicable laws. If challenged in a lawsuit, the incorporator must be able to prove that they have a bona fide

[109] ICC Case No. 8035, 1995 Award.
[110] *Dallah Real Estate*, para 34.
[111] *Dallah Real Estate*, (QBD); legal-term.com, at http://www.legal-term.com/alteego-definition.htm.
[112] *See, Impregilo S.p.A.*

business entity. They will be challenged to show that they have a real business, not just a sham created to dodge their personal liability. In deciding this matter arbitral tribunal may scrutinise and examine the motive behind the incorporation of State entity, structural and functional control for the liability of state.[113]

Under the context of Piercing the Corporate Veil, the corporate form is used to perpetuate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the arbitral tribunal may decide not to observe the separation of the corporate entity from its stockholders, and it may deem the corporation's acts to be those of the departments of the State government actually controlling the corporation.

As shown above the doctrine of '*alter ego*' was originally created by the jurisprudence to test whether the acts of a legal personality or corporation can possibly be attributed to the founders of that corporation personally or not. If it is proven that the founder has substantial structural and functional control over the corporation and enjoys the outcome of the corporation as a whole he is to be considering as second self of the corporation and shall be liable for any liquidated debt of the corporation. Likewise, if a State entity functions on behalf of the government and the government has substantial structural and functional control over the entity and the State enjoys the outcome of it, any of its liability to be attributed to the State.

However, the application of this doctrine requires the absence of corporate formalities to be established in addition to evident intermingling of the finances and directorship of both the independent State entity and state itself. It is, on the surface, difficult to prove in light of the fact that the State is an external party that does not, by definition, have a contractual relationship with either the independent State entity or the foreign investor. But recent development in investment arbitration shows a shift from the rigid corporate court practice that if the State entities are substantially controlled by the government and functions for

[113] *See, Emilio Agustin; Impregilo S.p.A.*

the public it is deemed to be as an organ of the State and therefore, attributed to the State.[114]

In support of such holdings, some ICC arbitral tribunals[115] have relied on the theory of the *alter ego*. In their awards, these tribunals concluded that, although the signatory to the agreement was a legally separate entity distinct from the State, it had acted for the State, which was the signatory's disclosed or undisclosed principal. It must be stressed, however, that domestic judges have refused to enforce awards which merge a State enterprise and its parent State too liberally.[116] This doctrine was also refused in the *Case of Dallah Real Estate* by the supreme court of UK by looking at the strict principle of *privity to contract*. Thus, current practice in ICSID tribunals suggests that there is a shift to towards accepting the principle of alter ego under which conduct of State entities can be attributable to the State.

6.7 State liability under the doctrine of *estoppel*

The term *'estoppel'* means a bar, which precludes someone from denying the truth of a fact, which has been determined in an official proceeding or by an authoritative body. There are two different kinds of estoppel; one is collateral estoppel which prevents a party to a lawsuit from raising a fact or issue that was already decided against him in another lawsuit. And the other is equitable estoppel which prevents one party from taking a different position at trial than it did at an earlier time if the other party would be harmed by the change. In relation to the investment agreement between a State entity and a foreign investor, where the State is involved in authorising, negotiating and/or structurally and functionally controlling the said entity in the agreement, the question is whether this conduct can possibly be attributed to the State? Can the attitude of the State be deemed as 'equitable estoppel', which prevents it from taking a different position while conducting the arbitration proceedings?

[114] *Wintershell A.G. v Qatar; Arbitration award of Dallah Real Estate.*

[115] ICC Case No. 9151, June 8, 1999 Interim Award, pp. 564-69; *but see* ICC Case No. 7472, Jan. 16, 1995 Interim Award, at 18.

[116] *See, e.g.,* Bridas *S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347 (5th Cir. 2003); also available at http://caselaw.lp.findlaw.com/data2/circs/ 5th/0220929cv0p.pdf.

This was raised in an earlier decision in the *Pyramids case* [117] where a company incorporated in Hong Kong ("SPP") signed an agreement with an Egyptian state owned entity responsible for tourism ("EGOTH"). The contract referred to a pre-existing framework contract between the same parties and the Egyptian Government concerning the construction of two tourist centres, one of which was located near the Pyramids. The contract contained an ICC arbitration clause with Paris as the seat. The last page of the agreement contained the words "approved, agreed and ratified" followed by the signature of the Egyptian Minister for Tourism. After political opposition to the project, the Egyptian authorities cancelled it, and SPP initiated arbitration proceedings against both EGOTH and Egypt. The arbitral tribunal, ruled that it had jurisdiction, applying the principle of 'estoppel' because, although acceptance of an arbitration clause had to be clear and unequivocal, there was no ambiguity since the Government, in becoming a party to the agreement, could not reasonably have doubted that it would be bound by the arbitration clause contained in it.

However, the English position seems to deny the principle of 'estoppel' in the matter relating to the State liability in the agreement of its entity with foreign investor. In the case of *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [118] where the Court of Appeal, after a review of the principal arbitral decisions, confirmed that a government is not to be taken to be a party to an agreement or to have submitted to arbitration simply because it has put forward a State organisation to contract with a foreign investor. But on the facts the Government had agreed to ICC arbitration in Denmark. In this case the State was not estopped by the court of appeal from being denying the liability and to be a party in the agreement of its entity.

[117] *Southern Pacific Properties* (*Middle East*) *Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3).

[118] *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No2)* [2006] EWCA Civ 1529, [2007] QB 886.

In the case of *Duke v* Peru[119] the Peruvian Government signed binding contracts with foreign investors called Legal Stability Agreements (LSAs) which provided a series of guarantees to the foreign investor, including the right to resolve disputes arising out of or in connection with agreement by arbitration or other agreed methods of dispute resolution. Central to the dispute was a claim concerning the Peruvian tax authority's inconsistent interpretation of a corporate merger law. In this case the ICSID arbitral tribunal provided an alternative theory on Peru's liability that was based on the Peruvian doctrine of *actos propios* [120] which operates as a component of good faith whereby a State is prohibited from taking actions or making representations which are contrary with actions it had taken previously to the detriment of another.[121] In order to apply the doctrine of *actos propios* (a domestic legal doctrine), the tribunal had to access whether such a doctrine operated in the sphere of international law. Finding that the doctrine of *actos propios* also operates as a general principle of law known variously as *venire contra factum proprium non valet*, estoppel or the principle of consistency;[122] the tribunal held that it had jurisdiction under international law to determine if Peru was estopped from changing its interpretation of the tax laws where prior representations had reasonably induced Duke Energy's reliance.[123]

In its most basic terms, the doctrine of estoppel prevents a party from contravening its actions where prior representations gave the reasonable appearance that such actions could be relied upon by another.[124] That is an entity shall not be allowed blow hot and cold to affirm at one time and deny at another. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel,' or by any other name, it is one which courts in modern times have most usefully adopted. In international law, the doctrine

[119] *Duke Energy International Peru Investments No. 1, Ltd v. Republic of Peru (Duke v. Peru)*, Award and Partial Dissenting Opinions, ICSID Case No ARB/03/28, IIC 334 (2008), signed 25 July 2008, dispatched 18 August 2008, available at: http://www.investmentclaims.com/ViewPdf/ic/Awards/law-iic-334-2008.pdf.

[120] J. Brutau, "La Doctrina de los Actos Propios" in Estudios de Derecho Comparado (1951), 102.

[121] *Duke v. Peru,* para. 231; See also J. Brutau, "La Doctrina de los Actos Propios" in Estudios de Derecho Comparado (1951), 104.

[122] See *Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S. No. 993*; Article 38, s. 1(c) (Article 38 lists "general principles of laws recognized by civilized nations" as a primary source of international law).

[123] Duke v. Peru, at para. 231.

[124] C. Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. Miami L. Rev. 369, 374 (1996).

of estoppel has been invoked to prevent a State from changing course where its actions had the reasonable appearance that such actions would bind the State.[125]

This principle has been repeatedly discussed in International Court of Justice (ICJ) cases.[126] Most succinctly, the international principle of estoppel was described in the *Temple of Preah Vihea*r case, where the tribunal stated that the principle operates to prevent a State contesting before that Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation that other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that other State has been prejudiced or the State making it has secured some benefit or advantage for itself.[127]

In *Duke Energy v. Peru*, the tribunal discussed the principle of estoppel as a general principle of law that could be applied to find Peru liable.[128] Through its approval of the Egenor and Power North merger under the authority of the MRL, Peru had given Duke Energy the reasonable appearance that such a representation would bind the State. Estoppel in this context does not require illegal action by the State *per se*; it only prevents the State from changing its behaviour after making prior representations that have induced reliance by third parties.[129]

In the final arbitral award rendered in SCC Case No. 49/2002, the claimant contended that it was inconceivable that the independent State entity could have entered the municipal

[125] C. Brown, 50 U. Miami L. Rev. 370 (1996).

[126] See *Legal Status of Eastern Greenland (Denmark v. Norway)* [1933] P.C.I.J. (ser. A/B) No. 53 (Apr. 5); *Fisheries (Norway v. United Kingdom)* [1951] I.C.J. Rep. 116 (Dec. 18); *Temple of Preah Vihear (Cambodia v. Thailand)* [1962] I.C.J. Rep. 6 (June 15); *North Sea Continental Shelf (Germany v. Denmark, Germany v. Netherlands)* [1969] I.C.J. Rep. 3 (Feb. 20); *Barcelona Traction Light & Power Co. (Belgium v. Spain)* [1964] I.C.J. Rep. 6 (July 24); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. U.S.)* [1984] I.C.J. Rep. 246 (Oct. 12); *Elettronica Sicula S.p.A. (U.S. v. Italy)* [1989] I.C.J. Rep. 15 (July 29); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (Preliminary Objections)* [1998] I.C.J. Rep. 275 (June 11).

[127] *Temple of Preah Vihear (Cambodia v. Thailand)*, [1962] I.C.J. Rep. 6, 32-3 (June 15).

[128] *Duke v. Peru,* para. 231.

[129] *Duke v. Peru*. at para. 245.

agreement with him without reaching the approval of the government. In support of his contention, the claimant referred to various meetings with ministers and high officials who had encouraged his contacts with the independent State entity and been informed of how these contacts developed. Those officials had also been aware of and had been satisfied with the agreement, which was the result of these contacts.[130] However, the tribunal declined the claimant's contention to apply the principle of 'estoppel' and held that the arbitral tribunal does not find it necessary, for the purposes of this case, to go into details in this regard but finds it sufficient to note that, in any event, there is no convincing evidence of such concrete government involvement in connection with the conclusion of the Cooperation Agreement as would make the Republic responsible for the implementation of the Agreement.'[131] It implies that if the tribunal would have found proper evidence of governmental involvement in influencing the formation of contract the government would have been estopped from being denying the liability.

Therefore, in relation to the State liability in the investment agreement between foreign investors and State entities governmental involvement and influence shall be taken into consideration. In a situation where the State entity enter into an agreement with a foreign investor and the contract requires approval or ratification of the government and the government does approve it, the State may be held responsible for any contractual breach.[132] A State can also be held liable for the agreement of its entity with foreign investors in which it has substantial structural and functional control over the entity. Such a government cannot refuse to avoid the responsibility for the breach of its entity if it is liable for the disappearance of the entity.[133] In such a situation the State shall be estopped from being denying the liability by the arbitral tribunal in investment arbitration.

[130] SCC Case No. 49/2002, Stockholm Arbitration Report 2004:1, Juris Publishing, Inc., p. 162.
[131] SCC Case No. 49/2002, p. 163.
[132] *Pyramids case.*
[133] *Dallah Real Estate and Tourism Holding Co.*

6.8 Conclusion

Concept of State entity, para-statal entity, state-owned company, state enterprise, publicly-owned corporation is relatively new in the arena of international trade and investment. In the present world almost every sovereign State incorporates independent State entities for various reasons and most these entities enter into investment agreement with foreign investors. Increased numbers of investment agreement between State entities and foreign investors have appealed attention of dispute settlement bodies and institutional arbitration authority to develop unified international rules to regulate investment arbitration. Most of the investment dispute between foreign investors and State entities submitted to ICSID tribunal or under any institutional arbitration state seemed to circumvent the liability of its entity. Based on the discussion in this chapter it appears to be the strongest argument for the State is that the entity is a separate legal person distinct from the State organ.

Although, State owned entities are separate legal entities, as discussed in this chapter the States can be indirectly or directly liable for the liquidated debt of its entities based on the supervisory duty and obligation over the investment activities of foreign investors. Sometimes state act as a guarantor of its entity's investment agreement and therefore state is to be considered as successor of its liquidated State entity and indirectly liable for the conduct of its entity. State is to be directly liable for the conduct of certain institutions performing public functions under the substantial control of the government is attributed to the State even if those entities are regarded in internal law as autonomous and independent State entities.

Conduct of a State entity to be attributed to the State under international law lies on the given authority by the international law of the State to exercise certain elements of governmental authority. It has been discussed that the ICSID tribunals relied upon Draft Articles which deal with the attribution to the State of the conduct of State entities which are not State organs but are nonetheless authorised to exercise governmental authority. Article 5 is intended to take account of the increasingly common phenomenon of State-owned entities, which exercise elements of governmental authority in place of State organs,

as well as situations where former State corporations have been privatised but exercise certain public or regulatory functions. Conduct of these entities under international law as such to be attributable to the State.

Although applying all the possible tests by arbitral tribunals to find whether the acts of an independent State entity can possibly be attributed to states is an acceptable attitude, tribunals should pay special attention on the questions of intention in this respect. Adopting the approaches pertaining to the intention of the parties in respect of attribution the arbitral tribunals and nationals courts must look into beyond the strict requirement of *privity to contract* to find out the rational of applying the doctrine such as *alter ego*. The judicial analogy should go beyond the approach where the independent State entity is explicitly established as an independent entity under the applicable domestic law of the host State and unequivocally has right to enter into investment agreements on its own behalf, sue and be sued in its own capacity.

Under the institutional arbitration practice, the different bases of liability described above are by no means new since they also exist in cases arising between private parties where private law is applicable to the merits of the dispute. However, the analysis of ICC case law does, accommodate new light on the conflict of legal methods and theories available in private and public international law to determine a State's liability for a breach by one of its entities' investment contract. It would seem preferable to adopt one uniform method, that is, a method common to both public and private international law, perhaps even a new "international legal order" for arbitral tribunals to use in addressing issues relating to States' liability for their entities' breaches investment agreements.

CHAPTER 7 General Conclusion

In investment arbitration it is not that rare for the tribunal to face the issue of whether, and to what extent, a State may be held liable for the conduct of its entities on the basis of an investment agreement entered into by State entities. An entity of a State is not the State *per se*, but very often the foreign investors seek to treat it as the State and merge it with the State in order to hold the State liable for the conduct of its entities. The main question at the heart of this thesis was whether the State shall be liable for the commercial conduct of its entities and whether the State is a party to the investment agreement of its entity that includes an arbitration clause. It's been discussed in different dimensions that a State entity is distinct from the State based on the principle of separate legal personality, but this thin veneer cannot disguise the fact that the entity is a creature of the State. This definition of State entities clearly excludes the State organs and agencies that do not enjoy their separate legal personality; therefore the State is liable for any of their commercial conduct. But the principle is not the same in relation to the commercial conduct of State entities for State liability.

Legal personality is the condition underlying the emergence of the concept of State entity. In its absence, a State cannot be distinguished from its government, ministries, and its various agencies and organs such as political subdivisions, territories, including the central bank. A State is directly concerned and the conducts of such entities are attributable to the State, therefore, liable. However, if a State entity has separate legal personality, the question of true separation of entity may arise in relation to a broad range of state affiliates, with uncontrollable variations in terminology such as 'State entity', 'instrumentality', 'government-owned corporation', 'state enterprise', 'publicly owned corporation', 'commercial government agency', 'public sector undertaking' or 'parastatal entity' and 'alter ego'. Much of its discussion has been extended in relation to the true separation of a State entity whether the government has substantial structural and functional control over the entity.

To answer this question the relevance was established in this research that a State is a party to the agreement of its entity if the government has substantial structural and functional control over its entity. This has been lead to the discussion that the corporate veil shall be extended to the State when it is established that the functioning mechanism of the State entity cannot be separated from the government. If it is proven that the negotiation and the directing mind of the agreement of State entity is been done by the government authority the State shall be a party to the agreement of its entity and held responsible for the commercial conduct of its entity. On the other hand, a State is responsible for the conduct of its organs, agencies or political subdivision, provided that that conduct was performed in exercise of an element of governmental functions entrusted to the organ, agency or political subdivision.

In relation to the issue of sovereign immunity either in jurisdiction or in execution, 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 investment 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 through State entities, entitling States and State 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 either by States or State entities 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 the 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 foreign

investor 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 and State entities could be easily frustrated and rendered meaningless.

However, it is a fact that arbitral awards can be jeopardised in certain circumstances by the issue of immunity from execution invoked by States when the foreign investors 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 fairly uniform consensus 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 defence 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 in investment arbitration is still an open discussion. A classic example of this as discussed in this research is the French court's 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 and straight forward. Besides the authorities discussed in this research, there are overwhelming authorities that support the view that the State has a moral obligation to abide by an award rendered against it in relation to the agreement of its entity in which the State is an *alter ego* or it has structural and functional control over the entity. 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 defence. 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 investment arbitration and international commercial arbitration in general 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 and State entities. The defence 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 defence 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 a State entity 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 investment arbitration and international commercial arbitration in general is concerned.

From the above discussion, it can be safely concluded that the biggest hurdle in the success of international investment arbitration involving States and State entity, 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 laws that may need to be consulted depending on where the arbitration is taking place and what law governs the arbitration agreement and the contract 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 has 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. 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 investment arbitration involving States and State entities.

Finally, the issue in relation to investment arbitration in the field of Sovereign Wealth Funds (SWFs) whether their commercial activities shall be considered as sovereign or commercial was a unique discussion in this PhD research. Although restrictive approach of immunity is now widely recognised, but the important issues in relation to whether their investment activities which reflects the commercial activities are to be considered for immunity is not uniform worldwide. In this regards, based on the argument of legal scholars and the decision of tribunals and national courts discussed in this research, I would conclude that the issue of immunity in relation to SWFs to be treated the same as other State entities and affiliates of the State in relation to jurisdiction of the tribunal. But the current practice in relation to the enforcement against the property of Sovereign Wealth Funds is almost absolutely immune. Sometimes the property of SWFs are mixed with the assets of central bank, often they are managed and controlled by the central bank which give the central bank a property interest in the fund therefore, immune from execution. However, it is difficult to determine the status of their property due to their complex heterogeneous nature. Legal academics argue for restrictive immunity for the attachment and execution of award against the property of Sovereign Wealth Funds based on the nature and purpose of their activities. They associate the assets of SWFs with the assets of multinational corporations on the ground of the nature and purpose of their commercial conduct which is profit making. I fully agree with the opinion of legal scholars in this regards that if the fund is involved in commercial non-governmental activities immunity from attachment and execution shall be refused.

This page is intentionally left blank

Bibliography

I. Articles

A.A. Asouzu, International Commercial Arbitration and African States 381-84 (CUP 2001);

A.F.M. Maniruzzaman, 'State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends' (2005) Vol.60, No. 3 Dispute Resolution Journal;

Ahmed Sadek El Kosheri, ''Le regime juridique cree par les accords de participation dans le domaine petrolier" (1975) ;

Andrea K. Bjorklund, 'Contract Without Privity: Sovereign Offer and Investor Acceptance', 2 Chi. J. Int'l L. (2001);

Anne Gelpern also accepts SWFs as 'private market actors'. *See*, A. Galpern, Sovereignty, Accountability, and the Wealth Fund Governance Conundrum, *Asian Journal of International Law*, 2011, vol. 1;

Andrew Rozanov, 'Definitional Challenges of Dealing with Sovereign Wealth Funds', in Asian Journal of International Law, (2011), vol.1, no.2;

Aron Broches, *The Convention on Settlement of Investment Disputes: Some Observations on Jurisdiction*, 5 Colum. J. Transnat'l l. 263, 268 (1966);

A. Broches, "Bilateral Investment Protection Treaties and Arbitration of Investment Disputes" in J. Schultsz & A. Van Den Berg, *The Art of Arbitration (The* Netherlands, Kluwer Law and Taxation Publishers, 1982);

Barton Legum, Lessons Learned from the NAFTA: The New Generation of U.S. Investment Treaty Arbitration Provisions, 19 ICSID REV. F.I.L.J. 344 (2004);

Bernardo M. Cremades, The Resurgence of the Calvo Doctrine in Latin America, 2(5) Transnational Dispute Management, Nov. 2005;

B Feldthusen, 'The Recovery of Pure Economic Foss in Canada: Proximity, Justice, Rationality and Chaos' (1996);

Brohmer Jurgen, State Immunity and the Violation of Human Rights (Martinus Nijhoff Publishers in The Hague)*;*

Catà Backer, 'Sovereign Wealth Funds as Regulatory Chameleons: the Norwegian Sovereign Wealth Funds and Public Global Governance Through Private Global Investing', Georgetown Journal of International Law, vol. 41, iss. 2;

C. Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. Miami L. Rev. 369, 374 (1996);

C.F. Amerasinghe, *Jurisdiction Ratione Personae under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 1974 BRIT. Y.B. INT'L L.;

Christoph Schreuer, Access to ICSID Dispute Settlement for Locally Incorporated Companies, in International Economic Law With A Human Face 497, 512 (Friedl Weiss, Erik Denters & Paul de Waart eds., 1997);

Christoph Schreuer, *The Dynamic Evolution of the ICSID System, in The International Convention On The Settlement Of Investment Disputes (Icsid): Taking Stock After 40 Years* 15, 15 (Rainer Hofmann, Christian Tams eds., 2007);

Christoph H. Schreuer, Consent to Arbitration (updated 02/ 2007), Transnational-Dispute Management (2007);

C. Schreuer, 'Consent to Arbitration, published on the website of UNCTAD' 2005;

Christoph H. Schreuer, State Immunity: Some Recent Developments (Grotius 1988) at 24-9;
C Harlow, 'Public and Private Law: Definition Without Distinction' (1980);

CN Brower, CH Brower II, and JK Sharpe, 'The Coming Crisis in the Global Adjudicative System' (2003) 19 Arbitration Intl;

C. Osakwe, 'A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice' (1983), 23 *Virginia J. Int'l L.* 13;

D Mullan and A Ceddia, 'The Impact on Public Law of Privatisation, Deregulation, Outsourcing, and Downsising: A Canadian Perspective' (2003) 10 Indiana J Global Fegal Studies 199, 245;

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

Derek William Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 59 BRIT. Y.B. Int'l L. 49, 51-52 (1988);

Emmanuel Gailard and Jennifer Y, '*State entities in International Arbitration*' (JP Inc. 2008) p.185;

Ernest K Bankas, The StateImmunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts;

Eduardo Savarese, 'Investment Treaties and the Investor's Right to Arbitration-Between Broadening and Limiting ICSID Jurisdiction', 7 J.W.I.T. 407 (2006);

Ernest K Bankas, The StateImmunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts, Berlin (2005);

E. Morgan, 'Foreign State Debtors in Domestic Courts: A Theory of Soviet Immunity' (1989), 3 *B.F.L.R* 287;

G.S. Varges, "Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention," 26 Harv. J. Int'l L. 103 (1985);

Guy Seidman, "The Origins of Accountability: Everything I know about sovereign immunity, I learned from King Henry III"(2005) 49 St. Louis U. L.J.;

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

Gillis Wetter, 'A Multi-Party Arbitration Scheme for International Joint Ventures', (1987)3 ARB. INT'L;

Gunther Teubner, 'Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person', [1988]36 am. J. Comp. L.;

Gus van Harten, 'Judicial Supervision of NAFTA Chapter 11 Arbitration: Public or Private Law?' (2005) 21 Arb. Int'l 493, 500 (2005);

Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' The European Journal of International Law Vol. 17 (2006);

Gaukrodger, D. (2010), "Foreign State Immunity and Foreign Government Controlled Investors", OECD Working Papers on International Investment, 2010/2, OECD Publishing;

G.R. Delaume, 'Sovereign Immunity and Transnational Arbitration,' in Contemporary Problems in International Arbitration 313 (J. Lew, ed. Kluwer/ CCLS 1986);

GJVI. Badar, 'State Immunity: An Analytical and Prognostic View,' ch. 4, 63 ft seq. (M. Nijhoff 1984);

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' (M. Nijhoff, 1987);

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;*

Hazel Fox, *Sovereign Immunity and Arbitration*, in *Contemporary Problems in International Arbitration* (OUP 2004);

Hazel Fox, 'State Immunity and Enforcement of Arbitral Awards: Do We Need an UNCITRAL Model LawMark II for Execution Against State Property?,' 12 (1) Arb. Int'l 89, 93 (1996);

Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 YALE L.J. 387, 440 (2000);

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

John Collier & Vaughan Lowe, "The Settlement of Disputes in International Law: Institutions and Procedures" p. 272 (OUP 1999);

James McIlroy, Canada's New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back, 5 J.W.I.T. 621 (2004);

J.C. Thomas, Investor-State Arbitration under NAFTA Chapter 11, 37 Can.Y.B. Int'l l. 99, 112 (1939);

James Crawford, The International Law Commission's Articles on State Responsibility-Introduction, Text And Commentaries (Cambridge University Press, 2002);

J. Paulsson, "Arbitration Without Privity", 10 ICSID Rev. FILJ (1995);

Jean Rouche, Gerald H. Pointon , 'French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration'(2009) Kluwer Law International, London;

Judith Gill, 'Can a Party Benefiting from an Award Rendered Against a State Enforce the Award Against an Instrumentality of Such State? English Law', Emmanuel Gailard and Jennifer Y, '*State entities in International* Arbitration' (Juris Publishing, Inc. 2008);

Mark Hager, 'Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory', [1989] 50 u. Pitt. L. Rev.;

Michael J Bazyler, *Abolishing the Act of State Doctrine*, 134 U Pa. L Rev. 325 (1986);

Lauterpacht, '*The Problems of Jurisdictional Immunities of Foreign States'*, 28 BYIL (1951);

L. Marasinghe, 'The Modern Law of Sovereign Immunity,' 54 (5) Modern L. Rev. 664 (Sept. LJ Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution', 10 NYIL 3 (1979);

MC Del Bianco, 'Execution and Attachment under the Foreign Sovereign Immunities Act of 1976', 5 Yale Stud. World PO 109 (1978);

M. Sornarajah, , The pursuit of Nationalised Property (Dordrecht-Boston-Lancaster: Martinus Nijhoff, 1986);

M. Sornarajah, 'Sovereign Wealth Funds and the Existing Structure of the Regulation of Investments', Asian Journal of International Law, (2011), vol. 1, iss 1;

Michael Brandon, "Report on Diplomatic Immunity", I.C.L.Q. (1952);

Mikio Yamagushi, The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law, [2004] 37 Cornell Int'l L. J.;

Michael C. Jensen & William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. Fin. Econ. (1976);

Michael Singer, Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe, 26 Harv. Int'l LJ 1 (1985);

Moses A. Kimuli, "The Application of the Doctrine of Foreign Sovereign/State Immunity to Public Corporations," LAWASIA [Law Ass'n for Asia & the Pacific] J. 31, 33-37 (1986);

Noah Rubins, 'The Arbitral Innovations of Recent U.S. Free Trade Agreements: Two Steps Forward, One Step Back', (2003) 8 INT'L BUS. L. J. 865 (2003);

OECD, 'Responsibility of Parent Companies for Their Subsidiaries' pp. 6, 24 (1980);
Oliver, 'The Frontiers of the State: public Authorities and public Functions under the Human Rights Act', PL (2000);

Okezie Chukwumerije, 'ICSID Arbitration and Sovereign Immunity' (1990) 19 Anglo-Am.L.Rev.;

Prosper Weil, 'Problem Related to Contracts Concluded between a State and an Individual' 128 RCAI 1969, III,;

Pierre Lalive, "Some Objections to Jurisdiction in Investor-State Arbitration" Transcript of presentation to the 16th ICCA Congress (London, May 2002);

Reinhard Zimmermann, *'The Law of Obligations Roman Foundations of the Civilian Tradition'* (Juta & Co. Ltd: 1990);

Richard Rothman, A Veiled Threat: Minimizing Parental Liability for U.S. Subsidiaries, Practical Law Company, (August 23, 2007);

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);

Reinisch, ‘European Court Practice Concerning State Immunity from Enforcement Measures, (2006)17 European Journal of International Law;

R.P. Buckley, "Now We Have Come to the ICSID Party: Are Its Awards Final and Enforceable?," 14 (No. 3) Sydney. L. Rev. 358-72 (Sept. 1992);

Stephen Schwebel, The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law, in Global Reflections On International Law, Commerce And Dispute Resolution, Liber Amicorum In Honour Of Robert Briner (Icc) 815 (2005);

Sinclair, *The Law of Sovereign Immunity: Recent Developments*, The Hague (1980), R de C 167 (1980);

V.V. Veeder, ‘Whose Arbitration Is It Anyway: the parties or the arbitration tribunal-an interesting question?’ [2004] The Leading Arbitrators’ Guide to International Arbitration;

William W. Park, ‘Non-Signatories and International Contracts: An Arbitrator’s Dilemma’ (2009) Multiple Parties in International Arbitration;

W. Hohfeld, Some fundamental legal conceptions as applied in judicial reasoning (1913) 23 YALE L.J. 16;

William W. Park, *Non-Signatories and the New York Convention*, 2 J. Disp. Resol. Int’l 84, 105 (2008);

Wälde, ‘Investment Arbitration Under the Energy Charter Treaty-From Dispute Settlement to Treaty Implementation’, 12 Arb Int’l (1996);

Yaraslau Kryvoi, ‘Piercing the Corporate Veil in International Arbitration’ (2011) vol. 1. 1:169 Global Business Law Review;

Yaraslau Kryvoi, *International Centre For Settlement Of Investment Disputes* (Kluwer Law International, 2010);

Y. Osinbajo, ‘Sovereign Immunity in International Commercial Arbitration: The Nigerian Experience and Emerging State Practice,’ 4 RADIC [African J. of Int'l & Compar. L.] (1992);

II. Books

Abbey Cohen Smutny, *Claims of Shareholders in International Investment Law*, *in* International Investment Law For The 21st Century: Essays In Honour Of Christoph Schreuer 363 (Christina Binder et al. eds., 2009);

Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, (4th edn Sweet & Maxwell London (1991);

Appadorae, *The Substance of Politics*, New Delhi (1968);

Bhattacharyya, *A First Course of Political Science with Constitutions of Indian Republic and Pakistan*, Calcutta (1949);

Bertrand Russell, *A History of Western Philosophy*, (10th edn) London (1964);

Bin Cheng, *'General Principles of Law as Applied by International Courts and Tribunals'* (Cambridge University Press: 2006 (reprint));

Campbell McLachlan, Laurence Shore, Matthew Weiniger, *'International Investment Arbitration, Substantive Principles'* (Oxford University Press: 2007);

Christoph H. Schreuer, *The ICSID Convention: A Commentary* (Cambridge 2001);

Christoph H. Schreuer, Loretta Milintoppi, August Reinisch and Athony Sinclair, *The ICSID Convention: A Commentary* (2d ed. Cambridge University Press 2009);

C. Mallat, *'Introduction to Middle Eastern Law'* (Oxford University Press: 2007);

D Oliver, *Common Values and the Public-Private Divide* (Butterworths, London, 1999);

Dicey & Morris, *The Conflict of Laws*, (14th edn. Sweet & Maxwell Ltd 2010);

Fouchard, Gaillard and Goldman *on International Commercial Arbitration* (Kluwer Law International 1999);

Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View*, The Hague (1984);

Gower and Davies, *Modern Company Law* (8th edn., Eweet & Maxwell 2008);

George Sabine, *A History of Political Theory*, (4th edn, Rev. by Thomas Landon Thorson) Hinsdale (1973);

Gus Van Harten, *'Investment Treaty Arbitration and Public Law'* Oxford, 2008;
Hazel Fox, *The Law Of State Immunity* (Oxford 2008);

Halsbury's Laws of England, (4th edn) Vol. 18;

Ian Brownlie, *Principles of Public International Law* (7th edn. 2008);

Janet Dine, Company Law (3rd edn., Macmillan, 1998);

Jean F.P. & Sébastien Besson, Comparative Law of International Arbitration, (2007, Sweet & Maxwell);

Jean Bodin, *Six Books of the Commonwealth* (1976), Trans, Tooley, Methodus;

Kessedjian and Schreuer, 'Le Projet d´Articles de la Commission du Droit International des Nations Unies sur les immunités des Etats', 96 *Revue Générale de Droit International Public* (1992);

Lauterpacht, '*The Problem of Jurisdictional Immunities of Foreign States'*, 28 BYIL 220 (1951);

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

Len Sealy, Company Law and Commercial Reality (Sweet & Maxwell, 1984);

Mustil and Boyd, *Commercial Arbitration: 2001 Companion Volume* (2001 Butterworths Law);

M Sornarajah, *International Commercial Arbitration: The Problem of State Contracts,* (Longman Singapore 1990);

Martin Dixon, *Cases and Materials on International Law*, (4th edn) Oxford (2003);

MM Boguslavsky, *Foreign State Immunity: Soviet Doctrine and Practice*, 10 NYIL (1979);

Nigel Blackaby, Constantine Partasides, Alan Redfern, & Martin Hunter, *International Commercial Arbitration* 117-21 (2009);

Phillip Blumberg, *'The Law of Corporate groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations'* (Little, Brown and Co. 1987);

Phillip Blumberg, Kurt Strasser, Nicholas Georgakopoulos, & Eric Gouvin, *Blumberg on Corporate Groups* ch. 6 (2d ed. 2005);

Phillip I. Blumberg, *The Multinational Challenge to Corporation Law* (Oxf. U. Prs.1993);

P.T. Muchlinski, *'Multinational Enterprises and the Law'* (2nd edn.Oxford Uni. Prss 2007);

Richard Gardiner, *'Treaty Interpretation'* (Oxford University Press: 2008);

Rachel Burnett and Paul Klinger, *'Drafting and Negotiating Computer Contracts'* (2nd edn., Tottel Publishing 2005);

Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment law* (Oxford 2008);

Sompong Sucharitkul, '*State Immunities and Trading Activities in international Law*' (Stevens & Sons Ltd. 1959);

TO Elias, *Africa and Development of International Law*, Boston/ London (1988);

Victor Morawetz', *'A Treatise on the Law of Private Corporations 2'* (2d ed. Boston, Little, Brown and Co., 1886);

III. Conference Papers

Edwin M. Truman, Sovereign Wealth Funds: Threat or Salvation?, Peterson Institute for International Economics, Washington DC, September 2010;

Grotius, De Jure Belli Ac Pacis, II, XI, Sec. 18 in Hugo Grotius, The Rights of War and Peace (Liberty Fund: 2005);

A. Giardiana, "The International Centre for Settlement of Investment Disputes between States and Nationals of Other States (ICSID)," in Essays on International Commercial Arbitration (1989);

William W. Park, 'Non-Signatories and International Contracts: An Arbitrator's Dilemma' (2009) Multiple Parties in International Arbitration' by Prof. William W. Park (Cohasset, USA);

Emmanuel Gaillard, 'Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entites' iai Seminar on International Arbitration October, 2005.

IV. Commentary

Commentary by Nathalie 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*;

J Crawford, The International Law Commission's Articles on the StateResponsibility (2002);

DJ Harris, *Cases and Materials on International Law*, (5th edn) London (1998);

Organisation for Economic Cooperation and Development (OECD), Public Sector Modernisation: Changing Organisational Structures, OECD Policy Brief (2004);

Mark Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff: 2009);

R.B. Lillich and D.B. Magraw, The Iran-United States Tribunal: Its Contribution to the Law of State Responsibility (1998);

Commentary on Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001;

Commentary on Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries 1991;

l' Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdictional and Enforcement, 2nd September 1991;

V. Reports

Tina Rosenberg, The Perils of Petrocracy, N.Y. Times Magazine, Nov. 4, 2007;

Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and National of Other States, 1 ICSID REP. 23 (1965);

Hill, 'Central American Court of Justice' in R. Dolzer et al. (eds), Encyclopedia of Public International Law (1987);

Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (International Bank for Reconstruction and Development, 1965);

International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' *Report of the International Law Commission on the Work of Its Fifty-Third Session,* UN GAOR, 56th Sess, UN Doc A/56/10 (2001);

Report of the Working Group of the U.N. International Law Commission (1999) ch. VII (Annex) "Jurisdictional Immunities of States and their Property" (ILC Rep. 1999);

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

Revised Draft Articles for a Convention on State Immunity, ILA Report of the 66th Conference (Buenos Aires 14-20 August 1994);

Statement of the White House Press Secretary, 21 October 1998;

ICSID Basic Documents: International Settlement of Investment Disputes (1985) 1 ICSID Reports;

The End