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Enforcement of Commercial Judgements against Foreign Sovereign Assets in International Law

Dissertation submitted to preliminary debate

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Contents

Abbreviation

ECOWAS: Economic Community of West African States

ECtHR: The European Court of Human Rights

ECSI: European Convention on State Immunity (1972)

EU: European Union

FOB: Free on Board

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

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

GDP: Gross Domestic Product

ICJ: International Court of Justice

ICSID: International Centre for Settlement of Investment Disputes

ILC: International Law Commission

ILA: International Lawyers Association

IMF: International Monetary Fund

ISDS: Investor-State Dispute Settlement

MoA: Margin of Appreciation

MoCs: Measures of Constraints

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

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

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

SOEs: State Owned Enterprises

UN: The United Nations

UNESCO: The United Nations Education, Scientific and Cultural Organization

UNCITRAL: The United Nations Commission for International Trade Law

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

UNGA: The United Nations General Assembly

USSC: The United States Supreme Court.

VCCR: The Vienna Convention on Consular Relations (1963)

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

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

WB: The World Bank.

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Abstract

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

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

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

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

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

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

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

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

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

Chapter 1: Introduction

1.1.Background of the research

1.1.1. Problem statement

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

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

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

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

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

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

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

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

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

[5] Hazel Fox, *The Law of State Immunity* (Oxford University Press 2002).
[6] The measures of constraints are the forms of execution of judgments against the judgment debtor. It includes attachment, garnishment, injunction, etc. Discussed in detail in chapter 3.6 of this Dissertation.
[7] Ferdous Rahman, 'Questioning Chinese Government's Stand for Sovereign Immunity' (2017) 9(1) Transnational Corporations Review 41.

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

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

[8] The Yukos case, Court actions: Attempted asset seizures, https://www.yukoscase.com/court-actions/attempted-asset-seizures/ accessed 12 October 2022.
[9] The Yukos case, 'Dutch Supreme Court quashes the Yukos Case judgment of the Hague Court of Appeal' (5th November 2021) https://www.yukoscase.com/news/press-release/dutch-supreme-court-quashes-yukos-case-judgments-hague-court-appeal/ accessed 12 October 2022.
[10] *Yukos v. the Russian Federation and others* [2018] Brussels Court of Appeal Brussels, (20 February 2018); [2021] High Court of Justice of England and Wales, EWHC 894; *Quasar de Valores (Spain) et al v Russian Federation* [2016] The Supreme Court, Sweden (15 December 2016); *RosInvestCo UK Ltd (UK) v Russian Federation* (2013) Svea Court of Appeals, Sweden (September 2013).
[11] *Hulley Enterprises Ltd et al v. the Russian Federation* [2022] District Court for the District of Columbia (13 April 2013) Civil Action no. 14-1996 (BAH).
[12] Ibid. 'Denied as moot' means that the order is denied as the order becomes irrelevant due to the continuance of the proceeding.
[13] *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* [2011] HKEC 747 (CFA); Chien-Huei Wu, 'One Country, Two state immunity doctrines: A pluralistic depiction of the Congo case' (2014) 9 National Taiwan University Law Review 197.

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

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

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

[14] Helene Ruiz Fabri, 'Regulating Trade, Investment and Money' in James Crawford, and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 352-372.
[15] *Holland v. Lampen-Wolfe* [2000] UKHL 40.
[16] Fox (n 5); Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits against Sovereign States in Domestic Courts* (Springer 2005).
[17] Ferenc Madl and Lajos Vekes, *The Law of Conflicts and of International Economic Relations* (Mihaly Kocsis tr, Academic K 1998).
[18] Alix Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the international constitutional ordering of Private Law*, (Cambridge University Press 2009) 226.

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

1.1.2. Literature review

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

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

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

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

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

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

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

[21] CL Lim, 'Worldwide Litigation over Foreign Sovereign Assets' (2016) 10 Dispute Resolution International 145.
[22] *A Company Ltd v. Republic X* [1990] the Queen's Bench Division (the UK) 2 Loyed's Rep. 520.
[23] For illustration, in the case of *Maldives Airport Co. Ltd. v. GMR Male International Airport Pte Ltd.* [2013] SLR 449, before Singapore court, the contractual clause in question stated, "*to the extent that any of the Parties may in any jurisdiction claim for itself […] immunity from service of process, suit, jurisdiction, arbitration […] or other legal or judicial process or other remedy […] such Party hereby irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws such jurisdiction*."
[24] *Behring Int'l v. Imperial Iranian Air Force* [1979] 475 F Supp. 383 (DC NJ)
[25] *Sabah Shipyard (Pakistan) Ltd. V. Islamic Republic of Pakistan* [2003] 2Loyed's Rep. 571 (CA)
[26] Lim (n 21), opined, "*only the consent of the foreign sovereign to submit itself to legal process after a dispute has arisen as an act of grace, would suffice*." while analyzing the judgment of Hong Cong Court in the case of *FG Hemisphere Associates LLC v. Democratic Republic of the Congo* [2010] 2HKLRD 66, granting absolute sovereign immunity to Congo, regardless of existence of all pre-requisites of restrictive sovereign immunity.
[27] *Libra Bank Ltd v. Banco National de Costa Rica* [1982] 676 F 2d 47 (2nd Cir).

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

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

[28] August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', (2006) 17(4) the European journal of International Law 803, 829.
[29] ibid 829.
[30] Fox (n 5) 390-393.
[31] ibid 401.
[32] Reinisch (n 28) 829.
[33] Michael Byers, 'State Immunity article 18 of the International Law Commission Draft', (1995) 44(4) International and Comparative Law Quarterly, 882.

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

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

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

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[34] Ibid 888; *First National City Bank v. Cuba* [1983] US Supreme Court 462 US 611; 103 S Ct 2591; 77 L.Ed.2d 46.
[35] *FG Hemisphere Associates LLC* (n 26).
[36] Lim (n 21) 153.
[37] Foreign Sovereign Immunity Act (FSIA) 1976 (the US) s 1611; the State Immunity Act (SIA) 1978 (the UK) s 16 (2); Fox and Webb (n 21) 373.
[38] Malcom N. Shaw, *International Law*, (6th Edn, Cambridge University Press, 2008) 747.
[39] Yang (n 20) 363.
[40] Ibid 343.
[41] The European Convention on State Immunity [1972] ETS 74- State Immunity 16.V.1972 (the ECSI) art 26, implicitly states that a judgment may be enforced against the assets of the State, when the assets are "*exclusively in connection with such an activity*", here the term activity indicates to "*an industrial or commercial activity*". On the other hand, the UN Convention on Immunity of Foreign State, and their Properties 2004 (the UN Convention) art 19 (c) mentioned that "*the property is specifically in use*

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

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

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

[42] [1985] 3d Cir 773 F.2d 31.

[43] [2004] 5th Cir Court 383 F.3d 361.

[44] Yang (n 20) 343.

[45] ibid 344.

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

[47] Fox (n 5) 403.

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

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

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

1.1.3. Contribution to the literature

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

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

This dissertation scrutinizes the interpretation of purposes of sovereign assets in the enforcement litigations: based on the types of targeted assets. The comprehensive mapping of legal framework [discussed in the second chapter] results at identifying the list of the immune assets and characteristics of non-immune assets. The

investigation into the substantive and procedural questions [discussed in the third chapter] spots the commonly targeted sovereign assets in enforcement litigations. This dissertation demonstrates the inconsistencies in interpreting the purpose of sovereign asset which is the core determining issue to decide its immunity. It explores the convergence of laws of foreign sovereign immunity and the other related laws to the particular asset in question to bring consistency, coherence, and predictability [discussed in the fourth chapter].

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

1.2. Research design

1.2.2. Research questions

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

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

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

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

After examining the provisions of legal framework of sovereign asset's immunity from execution, the related substantive and procedural questions are analyzed to grasp the comprehensive view of an enforcement litigation. The findings of this research question show the open-ended issues of challenges in determining sovereign ownership, unsettled nexus requirement and application of various tests for scrutinizing the purpose of sovereign assets in different jurisdictions without any consistent rule of thumb.

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

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

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

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

1.2.3. Objectives of the research

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

1.2.4. Rationale of the research

This dissertation entitled with "*Enforcement of commercial judgements against foreign sovereign assets in international law*." is supported from both academic and pragmatic perspectives. Due to lack of any uniform practices in international law regarding sovereign immunity, inconsistencies accrue in the courts' judgments as well as the academic literature and the precedents.[50] The enforcement litigations need to be analyzed to identify the inconsistencies and the underlying reasons behind such inconsistency. The literature gap identified above justifies the academic rationale.

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

Most of the academic work concentrates on sovereign immunity from jurisdictions before foreign courts and application of restrictive sovereign immunity for *jure gestionis*. Therefore, the academic research on sovereign assets from an enforcement point of view is a pressing need.

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

In addition to these immediate impacts, the dissertation also contains long term impact. The long-term impact will be on the sovereign, its citizens (taxpayers), the creditors and the global market connecting the sovereign and the private. The pattern of judicial interpretation toward sovereign assets and the strategic argumentation

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

protects the citizens of the defendant State from getting over-burdened from lengthy and multiple legal proceedings. Inappropriate litigations (including the execution ones) also violate the right to development of the citizens thereof. As the literature and published cases show, the judgement holder or awardee, files several enforcement litigations in different jurisdictions for attachment of sovereign assets to pressurize the sovereign to come forward for an out-of-court settlement. Study of the common judicial practice in interpreting sovereign assets may stop such multiplicity of proceeding and achieve efficiency in enforcement proceeding.

1.2.5. Significance of the research

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

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

1.2.6. Scope of the research

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

As the background of the study shows, State usually enjoys sovereign immunity from jurisdiction as well as from execution in international law. Nevertheless, this dissertation is limited to the sovereign immunity from execution. Thus, the dispute settlement cases against the State and the questions of restrictive sovereign immunity from jurisdiction are out of the scope of this work. As a matter of practice of forum States, international organizations also enjoy limited immunity similar to foreign sovereigns. This research excludes the questions of immunity for international organizations from jurisdiction and enforcement. Moreover, the question of immunity of *inter se* provinces [or states] in federal States are also out of its scope.

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

1.2.7. Limitations of the research

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

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

sovereign assets available for execution. Availability of literature would have been a great support to the research.

Moreover, because of the nature of the research question and the applied methodologies, this research extensively relies on the judgments of domestic courts of forum States in order to distinguish or assimilate the judicial approaches to the sovereign assets in question of execution. Nevertheless, the judgments from many forum States remain beyond the reach of this study. This limitation is mitigated to a certain extent as the majority of the private judgment creditors file the execution cases pre-dominantly in the US and the UK courts.[54] Hence, the major jurisdictions are brought into consideration. Finally, the confidentiality maintained by the debtor State and the judgment creditors as to the compliance of the decree of the court makes the data on follow up questions after the judgment publicly unavailable. Data on non-compliance of the State from extra-legal sources are available but not the compliant ones. On the other hand, the court not only relies on the legal sources but also the non-legal materials for their *ratio decidendi*. The interpretation in light of these non-legal materials demands the application of socio-legal methodology and the law in context analysis to grasp the full view of the pattern.

1.3. Research methodology

The research question of this dissertation demands application of multiple methodologies including the doctrinal, functional, and analytical comparative, and finally law-in-context.

1.3.2. The doctrinal methodology

The doctrinal methodology is applied to find a normative position for the field of study which starts with the understanding of current legal framework and continues with its development process and interrelationship with their origin, source of validity and implementing authority[55] It relies on the philosophy behind the law, the theories

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

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

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

1.3.3. Functional and analytical comparative methodology

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

[56] Thomas F. Gordon, 'Artificial Intelligence and Legal Theory at Law School', (2006) <https://pdfs.semanticscholar.org/7328/d3b3796b17cc1d6ea6fdd811a653de303535.pdf> accessed on 18 December 2019.
[57] Fox (n 5) 1.
[58] Mark Van Hoecke, *Methodology of Comparative Legal Research*, (2015), DOI: 10.5553/REM/.000010

illustration of the analysis of the term 'right' by the American law professor Wesley Newcomb to define the analytical comparison. Applying this methodology, this dissertation aims at exploring the relevant concepts *inter alia* the private and public act of the State, its ownership of assets, the use and the purpose, the question of commercial nature in different jurisdictions. The academic literature and the judicial interpretations of the concerned statutes are the consulted sources.

1.3.4. The socio-legal research

As the private acts of State are the conjuncture of economic and legal in nature, the proper interpretation of the relevant laws needs some interdisciplinary approaches which gets even intense in the cases of execution. Moreover, the doctrinal and the comparative methodologies leave some room for the assistance from other branches of literature. For instance, the property rights of sovereign are not only a subject matter of property law but also its economic attribution plays a significant role therein. Another instance can be the cost efficiency of the proceeding where the concept of transaction cost is inevitable. Besides the economic analysis of property rights and the study of political economy in order to assess the impact of inconsistent interpretations of assets are other prerequisites for this dissertation. Several academic scholars found the US judgment against Argentina inconsistent with the existing international comity[59] which again justifies the application of socio-legal research method. The negative impact of inconsistent interpretation of sovereign assets for its immunity are analyzed by using this law-in context method. These negative impacts justify the attempt of applying various interpretative tools from different areas of laws with a view to bringing coherence and predictability.

1.4. Teleological and working definitions

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

1.4.2. Recognition and execution or enforcement

[59] Barr (n 51); Tomas M Arya, 'A Decade of Sovereign Debt Litigation: Lessons from the NML vs Argentina Case and the Road Ahead', (May 2016) 17(2) Business Law International 83.

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

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

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

[60] Jan Paulsson, Nigel Rawding and Lucy Reed, *Guide to ICSID Arbitration*, (Kluwer International, 2010) 179.
[61] Carolyn B. Lamm and Eckhard R. Hellbeck, 'The Enforcement of Awards', in Chiara Giorgetti (ed) *Litigating International Investment Disputes* (Brill: Nijhoff, 2014) 462.
[62] Black's Law Dictionary (8th Edn, West Thomson Reuters 2004) 'Execution'.
[63] ibid, 'Enforcement'.
[64] Christoph H. Schreuer and others, *The ICSID Convention: A Commentary*, (2nd ed Cambridge University Press, 2009) 1128.
[65] Marta Requejo Isidro, 'Exequatur', *Max Planck Encyclopedias of International Law*, (Oxford Public International Law, May 2019).
[66] Lamm and Hellbeck (n 61) 463.

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

1.4.3. Private litigation and private judgment creditors

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

Duhaime's Law Dictionary defined '*judgment creditors*' as a person whether plaintiff or defendant who has recovered a judgment against another and also any person entitled to enforce a judgment and includes a corporation, foreign or domestic.[70] Therefore, the judgment creditor of the private adjudication can be called as private

[67] Schreuer (n 64) 1135.
[68] Gus Van Harten, 'The Private-Public Distinction in the International Arbitration of Individual Claims against the State' (April 2007) 56(2) *The International and Comparative Law Quarterly* 371, 372.
[69] Ibid.
[70] Duhaime, Lloyd, Legal Definition of Judgment Creditor, <http://www.duhaime.org/LegalDictionary.aspx> accessed 29 April 2021.

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

1.4.4. Defendant State or debtor State

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

1.4.5. Efficiency in enforcement cases

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

1.4.6. Attribution

[71] International Law Commission, 'Draft articles on Jurisdictional Immunities of States and their Property with commentary 1991' (Yearbook of the International Law Commission 1991 II (2)) Part IV paragraph 1 <https://legal.un.org/ilc/texts/instruments/english/commentaries/4_1_1991.pdf> accessed 3 April 2021 (the ILC Draft 1991).
[72] Adam Gearey, Wayne Morrison and Robbert Jago, *The Politics of the Common Law: Perspectives, Rights, Process Institutions* (Routledge-Cavendish, 2009) 311.
[73] Fabricio Fortese and Lotta Hemmi, 'Procedural Fairness and Efficiency in International Arbitration' (2015) 3(1) Groningen Journal of International Law 110, 119.

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

1.4.7. The Forum States

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

[74] James Crawford, 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) 25(1) ICSID Review 127, 134.
[75] For example, the draft provisions in the United Nations Convention on Responsibility of States for Internationally Wrongful Acts 2001, chapter II titled with 'Attribution of Conduct to a State'. The United Nations General Assembly, 'Responsibility of States for Internationally Wrongful Acts 2001' (Resolution 56/83 of 12 December 2001. A/56/49(Vol. I)/Corr.4).
[76] The Vienna Convention on Law of the Treaties 1969 (the VCLT) art 7-8, 46-47 and 50-51.
[77] Peter Tomka, 'Are States Liable for the Conduct of their Instrumentalities? Introductory Remarks' in E. Gailard, J. Younan (eds), *State Entities in International Arbitration*, *IAI Series on International Arbitration*, (11(4), Juris Publishing 2008); Csaba Kovacs, *Attribution in International Investment Law* (Kluwer Law International, 2018) 25, fn 133.
[78] Ibid 26.
[79] ABA Working Group, 'Reforming the Foreign Sovereign Immunities Act', (2002) 40 Columbia Journal of Transnational Law 489, 584.
[80] Nadia de Araujo, Marcelo De Nardi, Inez Lopes and Fabricio Polido, 'Private International Law Chronicles', (2019) 16 Brazil Journal of International Law 19.

court and/or any arbitration award is the forum State for the purpose of this dissertation. This jurisdiction is also called territorial State as the asset attempted for execution is located within the territory of this State and the execution suit is also initiated there. For maintaining consistency, forum State is used in this dissertation.

1.5. Research structure

1.5.2. Chapter 2

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

1.5.3. Chapter 3

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

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

chapter scrutinizes the sovereign assets in terms of its enforceability considering the ownership *vis-à-vis* the holding and the attribution for the purpose of execution from both legal and economic perspective.

The second part of the chapter puts light on the procedural issues including applicable law, the burden of proof, standard of proof, presumption of use, diversity of MoC etc. Attachability of a sovereign asset largely depends on the complexity of the procedural matters and thereby the inconsistent interpretations. Such as the diplomatic account having mixed purposes of both commercial and public has been a burning issue in many cases. The procedural issue of standard of proof also results on different interpretations of waiver clauses. The findings of this chapter act as the foundation for the next chapter where specific sovereign assets targeted for execution have been scrutinized from the interpretive analysis of purpose of sovereign assets.

1.5.4. Chapter 4

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

This chapter looks for the coherent understanding of these targeted assets based on their legal definitions. After the legal definition of usually targeted assets in enforcement litigations, this part of the dissertation concentrates on the practical nature of the issues concerning immunity of sovereign assets. It examines the enforcement litigations decided by courts from various jurisdictions regarding the question of immunity from execution against sovereign assets. The findings of this

chapter show the inconsistent interpretations of sovereign assets and MoCs granted against the assets despite listed as immune in laws. It concludes with proposals for interpreting specific sovereign assets in light of the laws related to that asset in question such as corporate law for assets of SOEs, banking law for balance in bank accounts, financial law for sovereign wealth funds etc. and the laws on foreign sovereign immunity from execution. Despite, the fragmented approach for each category of assets, this dissertation aims at bringing a comprehensive solution for interpreting the purpose of sovereign assets. Therefore, the next chapter focuses on the possible alternative approaches borrowed from other areas of laws related to State acts.

1.5.5. Chapter 5

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

1.5.6. Chapter 6

The international law in foreign sovereign immunity demands consistency, coherence, and predictability to ensure time and cost efficiency in enforcement of commercial judgments. Such consistency also urges for legitimacy from the States which stand at the core of this mechanism. This chapter concludes the dissertation with its stand on interpreting the sovereign assets for the question of immunity from MoCs. This

chapter re-analyses the findings from the cases discussed in the previous chapters to identify the factors leading the courts to decide the cases. The analysis is based on several issues *inter alia* the jurisdictions, the defendant State, the assets in questions, the underlying legal and non-legal considerations of the courts. Finally, it proposes the key points on interpreting sovereign assets [distinct from asset specific suggestions given in the fourth chapter] for future development of laws on foreign sovereign immunity from execution.

1.6. Conclusion

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

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

2.1 Conceptual development of foreign sovereign immunity

2.1.1. Sovereignty and State responsibility

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

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

> "*The state's immunity from suit is fundamental aspect of the sovereign which the state enjoyed before the ratification of the constitution and which they*

[81] Erwin Chemerinsky, 'Against Sovereign Immunity', (May 2001) 53 Stanford Law Review 1201.
[82] James Crawford, *State Responsibility: The General Part*, (Cambridge University Press 2013) 3.
[83] Hans Kelsen, 'The Principle of Sovereign Equality of State as a Basis for International Organization' (March 1944) 52(2) The Yale Law Journal 207, 207.
[84] John Austin, *The Province of Jurisprudence* (John Murray, 1832) 226.
[85] Kelsen (n 83) 208.
[86] The ILC Draft 1991 (n 71) commentary on art 18, para 2.

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

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

On the other hand, States sign and ratify the international agreements undertaking duties and obligations. Violation of those obligations makes States liable to the counterparts.[90] At the same time, international law grants the immunities and privileges to States from jurisdiction of other States and execution. There is the question of State responsibility for the violation of a commitment.[91] The Permanent Court of International Justice (PCIJ) defined State responsibility as a general principle of international law making the State pay for its violation of engagement.[92] The ILC attempted to codify the international law on State responsibility.[93] The rules causing State responsibility are dominantly derived from the violation of international law[94] and its breach of its commercial commitments.

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

[87] *Alden v. Maine*, [1999] the US Supreme Court 527 US 706 [713].
[88] The United Nations Charter 1945 art 2.
[89] Sevrine Knuchel, 'State Immunity and the Promise of Jus Cogen' (Spring 2011) 9(2) Northwestern University Journal of International Human Rights 149, 150.
[90] The UN Convention (Draft) 2001 (n 75).
[91] Danwood Mzikenge Chirwa, 'the Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights' (2004) 5 Melbourne Journal of International Law 1, 4.
[92] *Chorzow Factory (Germany v. Poland)* (Claim for Indemnity) [1927] PCIJ (ser A) No. 8, 21.
[93] The United Nations, 'Concept note on the (draft) Convention on the Responsibility of States for Internationally Wrongful Acts' (2015), <https://www.un.org/en/ga/sixth/70/docs/concept_note_state_responsibility_4_nov_2015.pdf> accessed 2 May 2020.
[94] The UN Convention (Draft) 2001 (n 75).

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

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

2.1.2. Principles of foreign sovereign immunity

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

[95] Ibid 8.
[96] Ibid 13.
[97] The ECSI 1972 (n 41) art 20 (3) (b); the UN Convention 2004 (n 41) art 10.

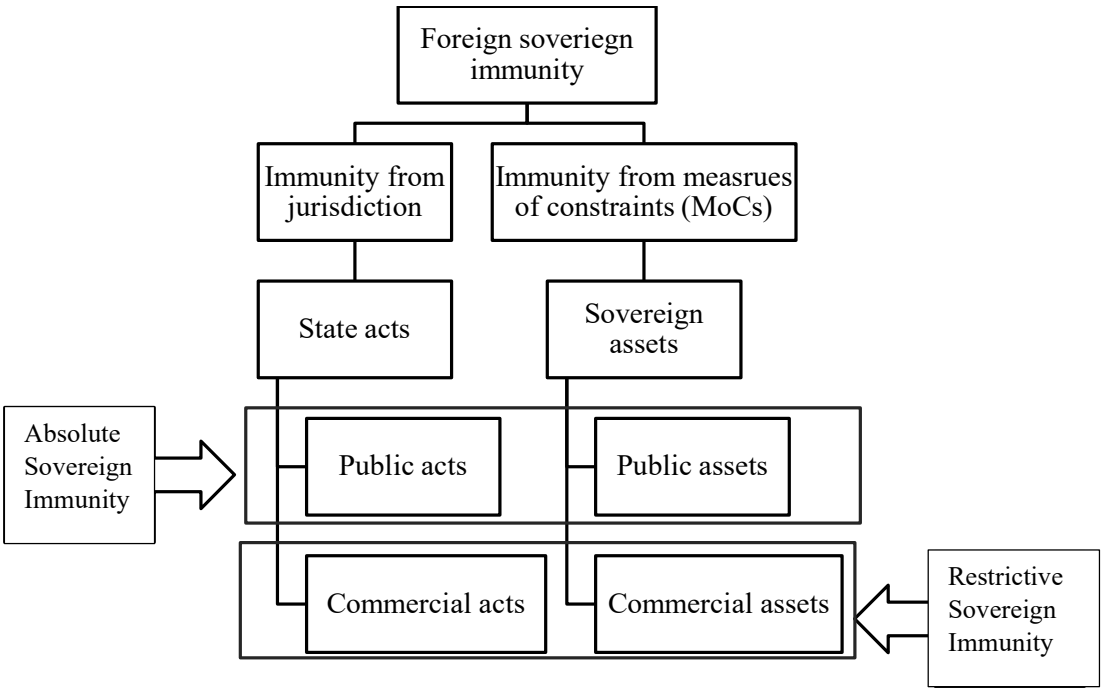

Figure 1: Types of foreign sovereign immunity

2.1.2.1.Absolute sovereign immunity

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

[98] Aaron X. Fellmeth and Maurice Horwitz, *Guide to Latin in International Law*, (Oxford University Press 2011).
[99] Rahman (n 7) 41.
[100] Ibid 8; *The Schooner Exchange v. McFaddon*, [1812] the US Supreme Court 11 US (7 Cranch) 116; This case has been discussed in detail in 4.4.2 of this Dissertation.
[101] *French case, Lambège et Pujol* [1849] (French Court of Cassation) Sirey I, 81.

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

2.1.2.2. Restrictive sovereign immunity

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

[102] Yang (n 20) 11.
[103] *The Cristina* [1938] I All E.R. 719, para 720.
[104] Yang (n 20) 7.
[105] Ibid 8.
[106] Ibid, 7.
[107] Ibid.
[108] *Victory Transport v. Comisaria General* [1964] 2nd Cir court 336 F.2d 354.

commercial contracts, availing debts *etc.* are started being considered as the same of a private party[109] and thereby are subjected to restrictive sovereign immunity.

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

Development of foreign sovereign immunity principles significantly rely on the laws and practices of the dominant jurisdictions such as the US, the UK. These dominant jurisdictions formulated national laws in the last century introducing restrictive sovereign immunity. Restrictive immunity is granted to the defendant State in any private commercial dispute despite its sovereign nature. Though restrictive sovereign

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[109] Shaw (n 38) 495.
[110] Crawford (n 20) 851.
[111] Rahman (n 53).
[112] Lee Buchheit, *Sovereign debt restructuring: the legal context*, (BIS paper no. 72, July 2013).
[113] *The Philippines Embassy Bank Account Case* [1977] the German Constitutional Court, 65 ILR 146, [150]. Observed that "*forced execution of judgment by the state of the forum under a writ of execution against a foreign state which has been issued in respect of non-sovereign acts […] of the state, or property of that state which is present or situated in the territory of the state of the forum is inadmissible without the consent of the foreign state if […] such property serves sovereign purposes of the foreign state*."
[114] *Condor and Filvem vs Minister of Justice (Governmental body)* [1992] the Italian Court of Cassation 101 ILR 394, [401]- [2].
[115] Discussed in 3.5.3 of this Dissertation.
[116] Shaw (n 38) 520; discussed in 3.5.4 of this Dissertation.

immunity is applied for judicial proceedings, the State still enjoys a higher level of immunity for execution issues. Because as the scholars observed, the MoCs against sovereign assets even in the forum State's jurisdiction may result at diplomatic tension between the States.[117]

2.1.3. Types of foreign sovereign immunity

Peters duly commented "*Immunities are a messy affair*"[118] Fox defined immunity as a defense "*to the adjudicative and enforcement jurisdiction of national courts which bars the municipal courts of one state from adjudicating the disputes of another state*".[119] According to the UN Convention (2004) and the ECSI (1972), sovereign immunity is distinguished into two types in: immunity from the jurisdiction of a foreign State [when a State is a defendant in a civil action pending in another State], and immunity from execution.[120] This dissertation deals only with the latter one with the immunity from execution.

2.1.3.1.Immunity from the jurisdiction of the forum State

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

States enjoy immunity from the jurisdiction of another State's court on the ground of non-justiciability and State act. International law grants such immunity based on the principle that a sovereign State should not be brought before a court against its own will.[122] However, immunity from jurisdiction does not mean exemption from domestic legal proceeding. The immunity from jurisdiction prevents the sovereign from the jurisdiction of another State [*i.e.*, the forum State] as a matter of international

[117] Sir Ian Sinclair, *the Law of Sovereign Immunity: Recent Development* (Hague Recueil, 1980), 218-220; Ian Brownlie, *Principles of Public International Law*, (4th edn Oxford University Press 1990), 338.
[118] Anne Peters, 'Immune against Constitutionalization?' in A. Peters, E. Lagrange, S. Oeter and C. Tomuschat, (eds) *Immunities in the Age of Global Constitutionalism*, (Maritnus Nijhoff, 2014) 1.
[119] Fox (n 5) 1.
[120] The UN Convention 2004 (n 41) a 5 and a 18; the ECSI 1972 (n 41) a 1 and 23.
[121] The ILC Draft 1991 (n 71) commentary on art 18, para 2.
[122] *The Schooner Exchange* (n 100), [144].

law, whereas the exemption from jurisdiction protects the State from its domestic legal proceeding under its national constitutional safeguards.[123] The jurisdictional immunity has two exceptions: sovereign's immunity waiver and the commercial activity of the sovereign.

The restrictive sovereign immunity[124] from jurisdiction in case of the commercial act has been accepted as a rule of international law.[125] While comparing the commercial contract exception between the FSIA (1976) of US and the ILC draft (1991) Lowe opined that ILC took a rigid approach in granting immunity to the States whereas it adopted liberal definition of commercial contract. The given definition of commercial contract in ILC covered all situations as mentioned in the FSIA (1976) of the US, but it did not require any direct effect on the forum State. The FSIA (1976) of the US applies restrictive immunity to the commercial contract when such contract has some direct link with the US.[126] However, the ILC draft (1991),[127] as well as the UN Convention (2004),[128] have made the commercial contract exception for the immunity from jurisdiction as a subject matter of private international law, thus subjected it to the law of the forum State.

In commercial contract exception, the US courts distinguish between the activity and the purpose. A contract or an act is deemed as commercial regardless of its governmental purpose when its core aim is profitability.[129] Notwithstanding permitting to argue the purpose in favor of the State, the US court relied on 'commercial activity' test to decide the claims of immunity for contracts *albeit* the public purpose of the contract such as procurement contract for military equipment,

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[123] *International Association of Machinists & Aerospace Workers vs OPEC* [1981] 9th Cir Court 649 F.2d 1354, [1359].
[124] Discussed in 2.1.2.2 of this dissertation.
[125] Singer (n 46).
[126] L. Weatherly Lowe, 'the International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property, the Commercial Contract Exception' (1989) 27 Columbia Journal of Transnational Law 657.
[127] The ILC Draft 1991 (n 71) art 10. It states, "*article 10 (1): Commercial transaction. If a State engages in a commercial transaction with a foreign natural or juridical person and by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot involve immunity from that jurisdiction in a proceeding arising out of that commercial transaction*."
[128] The UN Convention 2004 (n 41) art 10.
[129] *De Sanchez v. Banco Central de Nicaragua* [1985] 5th Cir court 770 F2d 1385. In this case, sale of foreign currency reserve by the Nicaraguan Central Bank was questioned whether commercial or governmental.

construction contract for government building.[130] In the case of *MOL Inc. v. Bangladesh* (1984),[131] the termination of contract of licensing to capture and export money was held as sovereign act because this termination was made in exercise of the regulatory power of the state under its sovereign prerogatives. In another dispute under an employment contract where the claimant was a US citizen and appointed by the army of the defendant State for his services, the US court refused to consider the contract as commercial activity exception because only the State could recruit the army.[132] However, in a similar contract for service of rural development, the US court rejected immunity stating the essence of the contract was to receive advice in the exchange of money.[133] In order to determine the connection with the activity, the court observed whether the act in question has a link with the chain of transaction.[134] The line between nature and purpose is often blurry and its boundaries cannot be provided with certainty.[135]

In a debate between nature and purpose test for commercial contract exception, some commentators emphasized the purpose, stating that the governmental purpose of a commercial contract needs to be immune such as relief during famine, emergency health services. The ILC report (1984) proposed a compromise between the nature test and the purpose test. It suggested the nature test at the first, and if the nature test goes in favor of the commercial contract, the State can still claim the purpose test.[136] Nevertheless, the challenge remains as under the principle of private international law the courts of the forum State decide which test is to be applied. Although the immunity from jurisdiction is outside the scope of this dissertation, these tests applied for the immunity from jurisdiction play vital role while determining the nature or

[130] *Environmental Tectonics v. W.S. Kirkpatrick Inc.* [1988] 3rd Cir 847 F2d 1052 [1059].
[131] [1984] 9th Cir 736 F.2d 1326.
[132] *Friedar v. Government of Israel*, [1985] SDNY 614 F. Supp. 395.
[133] *Practical Concept Inc. v. Republic of Bolivia* [1987] DC Cir 811 F2d 1543.
[134] Dan T Carter, 'NLRB Jurisdiction over Foreign Government' (Summer 1978) 11(3) Vanderbilt Journal of Transnational Law 483.
[135] Lowe (n 126) 674-675.
[136] The United Nations, 'Jurisdictional Immunities of States and their Property' (1984) Yearbook of International Law Commission (Document A/CN.4/376 and Add 1 and 2) 5, 8 fn 10. The proposed article 3 (paragraph 2) stated, "*In determining whether a contract for sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken in to account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract*."

purpose of the sovereign assets for immunity from execution [discussed in next chapter of this dissertation].[137]

2.1.3.2.Immunity from execution

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

There are two forms of MoCs: the pre-judgment and the post-judgement MoCs.[143] The common forms of pre-judgement MoCs against a foreign sovereign are the temporary injunction over the sovereign assets pending the execution suit (also known as the *Mareva order* in common law jurisdictions),[144] conservatory order (*saisie-*

[137] Discussed in 3.4.1 of this dissertation.
[138] Fox (n 5) 6.
[139] The UN Convention 2004 (n 41); the ECSI 1972 (n 41).
[140] The ILC Draft 1991 (n 71) art 18 (1).
[141] Ibid. commentary on the ILC Draft 1991 art 18 (1) para 4.
[142] The International Law Association, Conference at Montreal (ILA/2/38, 1982) (the ILA Draft 1982); see also International Law Association, 'Draft Articles for a Convention on State Immunity' (March 1983) 22 (2) International Legal Materials 287, art V (A).
[143] Discussed in 3.6.1 and 3.6.2 of this Dissertation.
[144] Mareva order, also known as a freezing order or asset protection order, is a special type of interlocutory injunction which restrains a defendant from dealing with the whole or part of their assets pending the outcome of legal proceedings.

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

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

Besides, following the similar trend of jurisdictional immunity, restrictive sovereign immunity is practiced for the assets in limited cases, especially for the assets used or intended to be used for commercial purpose.[150] These exceptions act as motivation to the private parties to enter commercial ventures with the sovereign. Assets of a foreign State can be subjected to MoCs if used for commercial activity in the forum State or for commercial purpose. Here, the purpose and/or the activity of the asset should be the core of the judgement to be enforced. The major challenge for the judgment creditors is to find the non-immune assets of the debtor State. Usually,

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[145] The *Saisie conservatoire* or the conservatory order is granted as an interim measure to preserve the assets involved in the dispute. This measure of constrain is limited to the assets that have nexus with the dispute itself.
[146] The *saisie-arret* means the attachment order against the assets held by third party for the benefit of the claimant.
[147] Fox (n 5) 372.
[148] Discussed in 3.6.2. of this Dissertation.
[149] *SPP (Middle East) Ltd. v. the Arab Republic of Egypt* [1994] CA, transcript 122, 19 March 1994.
[150] *The Philippine Embassy Account* Case, (n 113) [150], the German Constitutional Court observed that "*forced execution of judgment by the state of the forum under a writ of execution against a foreign state which has been issued in respect of non-sovereign acts […] of the state, or property of that state which is present or situated in the territory of the state of the forum is inadmissible without the consent of the foreign state if […] such property serves sovereign purposes of the foreign state*."

when the debtor is private entity unlike a State, the creditors are aware of the debtor's assets, whereas in case of a sovereign judgment debtor, the creditors may not know where the sovereign's assets are located. Hence, the enforcement becomes a challenging one.[151] Furthermore, there is no customary international law supporting the absolute immunity from execution and hence the sovereign assets are also not absolutely protected.[152]

2.2. Historical development of laws on foreign sovereign immunity

Historical development of laws on foreign sovereign immunity can be discussed from the perspectives of international regulations and national legislations. The question of foreign sovereign immunity attracted the global attention in 1812 when the US court granted immunity to France based on comity and grace for a military vessel.[153] The first attempt in codification of international law on sovereign immunity was initiated by the Institute de Droit International in 1891.[154] The gradual development of the codification process described the entrance of absolute sovereign immunity to the regime of restrictive sovereign immunity.

The Hamburg Resolution was proposed by the Institute de Droit International in 1891. It recognized the absolute sovereign immunity to the State for its acts and brought the idea of restrictive sovereign immunity for its non-sovereign act in a limited manner *albeit* the foreign State still enjoyed absolute sovereign immunity from execution unless waived its immunity. The first restrictive sovereign immunity for execution was adopted for the State-owned ships used for commercial voyage in 1926 by the Brussels Convention. Although this was the first legally effective international instrument granting restrictive immunity to the foreign State from execution, it did not receive many ratifications.[155] Subsequently, the Harvard Project in International Law (1932) brought forward the concept of restrictive sovereign immunity from execution for certain sovereign assets.[156] The next draft came in 1954, named as the Aix-en-

[151] Barr (n 51).
[152] *Condor* (n 114).
[153] *The Schooner Exchange* (n 100) [116]-[147].
[154] Gerhard Hafner, 'Historical Background to the Convention', in ed. Roger O'Keefe, Christian J. Tams, and Antonios Tzanakopoulos, *the United Nations Convention on Jurisdictional Immunities of State and their Properties* (Oxford University Press, March 21, 2013), 1-12.
[155] Fox (n 5) 396.
[156] PC Jessup, 'Competence Courts in Regard to Foreign States' (1932) 26 American Journal of International Law (Supplement Research in International Law) 451, 527.

Provence Resolution, published by the Institute de Droit International. Its contribution to the development of law on foreign sovereign immunity was that it permitted MoCs to be taken against the foreign sovereign assets used for other than a governmental purposes.[157] The first codified international convention on sovereign immunity is the European Convention of State Immunity, which came into force in 1972. It granted restrictive sovereign immunity from jurisdiction for the commercial activities of the foreign State whereas the absolute sovereign immunity was adopted for execution unless the foreign State consented to it.[158]

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

On the other hand, in the absence of any effective and well accepted international regulation in this regard, States attempted to fill up the gap with national legislations and hence, the national laws played a vital role in developing the current legal framework of laws on foreign sovereign immunity. In 1950, the Supreme Court of Austria put light on the commercial activities of the defendant State and concluded to limit the application of absolute sovereign immunity in cases of non-sovereign

[157] The Immunity from Jurisdiction and Enforcement from Foreign State (Aix-en Provence Resolution 1954) art 5.
[158] The ECSI 1972 (n 41) a 23.
[159] Discussed in 4.2 and 4.3 of this dissertation.
[160] United Nations Treaty Collection, 'United Nations Convention on Jurisdictional Immunities of States and Their Property' (New York, 2 December 2004) < https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en> accessed 05 October 2022.

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

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

[161] *Dralle vs Republic of Czechoslovakia* [1950] 17 ILR 155.
[162] Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-985 (1952).
[163] Madl and Vekes (n 17) 143.
[164] *Midland Inv. Co. v. Bank of Commc'ns* [1956] 40 HKLR 42, [49].
[165] *The Philippines Admiral* Case [1977] AC 373, [376].
[166] The Foreign Sovereign Immunity Act 1985 (Australia) (the FSIA).
[167] The State Immunity Act (SIA) 1982 (Canada).
[168] The State Immunity Ordinance 1981 (Pakistan).
[169] The State Immunity Act 1979 (Singapore).
[170] Fox (n 5) 395.

2.3. Legal framework of foreign sovereign immunity

Law on foreign sovereign immunity receives the validity from international law. State is entitled to sovereign immunity under customary international law.[171] The customary international law regarding the foreign sovereign immunity is vividly found in State practices "*by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States […]*"[172] International law has gone through changes in its subject matters, from core inter States relation to global governance where the private parties are engaged in cross-frontier functions. This new inclusive approach of international law towards non-State actors challenged the existing State-made framework consisting of treaties and customs. Oddenino and Bonetto argued that because of the development of cross-border trade, investment and environmental issues, confrontation of the non-State actors in framing international law made the international law softer than before. [173] While determining the legal framework of the newly shaped international law, two ways are presented: firstly, effect theory where the norms should be determine based on their effect on the actors such as international environmental law and secondly the norms should be the one that the actors accept and make for themselves such as *lex mercatoria,* the procedural law of the international commercial arbitration *etc*. Such an inclusive approach causes horizontal extension of international law as it expands its lawmakers from pure sovereign authority to non-State actors.

The legal framework of law on foreign sovereign immunity starts with international conventions. Due to the absence of any effective and comprehensive international convention, the national legislations fill up the vacuum in the legal framework. Given the convergence of diplomatic relations and international affairs with the application of law on foreign sovereign immunity, the executive body of the forum State plays a vital role in the enforcement litigation by sending executive brief to the deciding court from time to time.

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[171] Edward Chukwnemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (Oxford University Press, 2018) 41-42.
[172] *The Jurisdictional Immunities of the State* (Germany v. Italy: Greece Intervening) [2012] ICJ Report, 99, [56].
[173] Alberto Oddenino and Diego Bonetto, 'the Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law' [February 25, 2020] AperTO- Archivio Instituzionale Open Access dell'Universeta di Torino, 3-4.

2.4 International conventions on foreign sovereign immunity

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

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

Despite the non-effective status, the UN convention holds persuasive value to both national and international courts regarding the immunity issues.[174] The UN Convention (2004) deals with both the jurisdictional immunity and the immunity from execution. The UN Convention has a distinctive feature for pre-judgment and post-judgment enforcement. For instance, the pre-judgment attachment against sovereign assets is permitted only with prior written consent of the defendant State and/or allocation of asset for satisfaction of the claim in question (called as 'earmarked' asset).[175] The post-judgment measure can be taken against a sovereign asset when the asset in question is used for non-governmental or commercial purpose, located in the forum State and has a direct connection with the 'sovereign entity' involved in the proceeding.[176] Qualifying the interpretation of the direct relation with the 'sovereign entity', the UN convention (2004) defines the State including any organ of the government, constitute units of federal States or political subdivision, instrumentalities or other entities or representative of the state, exercising the sovereign authority.[177] This Convention lacks the definition of 'non-governmental' use of assets in questions which leaves the interpretative discretion at the hand of the court. In addition, the UN convention (2004) has more mature provisions than the ECSI (1972), such as it includes a specific article for the protection of certain sovereign assets. Notwithstanding the non-governmental use, the assets of military

[174] Martin Smolek, 'The International Legal Framework on State Immunity, State Immunity under International Law and Current Challenges' (CAHDI Proceedings 2017).
[175] The UN Convention 2004 (n 41) art 18.
[176] Ibid art 19.
[177] Ibid art 2 (1) (b).

character, diplomatic mission, central bank, cultural heritage having the purpose of exhibition of scientific, cultural, or historical interest are immune.[178]

2.4.2. The European Convention on State Immunity (1972)

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

It also gives restrictive interpretation to the 'preventive measures' limiting with the actions 'taken with a view to eventual execution' thereby excluding the immunity for pre-judgment attachment orders or the 'conservatory measures'.[182] Although the literal interpretation of the ECSI (1972) does not permit execution against the sovereign asset except State's consent and enforcement of arbitral award, the explanatory report to the convention gives a liberal interpretation to article 14 mentioning that it provides a limited scope of execution against sovereign assets in the case of judicial administration of assets regardless f the sovereign interest therein.[183] Similarly, the explanatory report puts the broader construction to article 26 permitting the execution against the foreign sovereign assets used exclusively for

[178] Ibid art 21.
[179] Jorg Polakiewicz, 'the Contribution of Europe to State Immunity through its Conventions and the Case Law of the European Court of Human Rights, State Immunity under International Law and Current Challenges' (CAHDI Proceedings 2017).
[180] The ECSI 1972 (n 41) a 23.
[181] The Explanatory Report to the European Convention on State Immunity (Basel, 16.V.1972), European Treaty Series No. 74. para 76, 92. (the Explanatory Report to the ECSI).
[182] Ibid para 106; The ECSI 1972 (n 41) art 26.
[183] Ibid para 55.

industrial or commercial activities.[184] While defining its relationship with the prior conventions, in this matter, the explanatory report claims overriding effect on them relying on the principle of *lex specialis derogate generali*.[185]

2.4.3. Asset specific conventions

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

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

The Brussels Convention (1926) deals with the State-owned ships and the cargos therein.[186] The convention puts the State-owned ships, irrespective of their charter status and the cargos therein to the same rights and liabilities as applicable to the privately-owned ships, cargos and equipment.[187] The exception to this rule is the "*ships of war, state-owned yacht, petrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels used for governmental and non-commercial purposes*."[188] The ships that are immune under this Convention, can still be subjected to execution pursuant to proceeding brought by private parties, in case of collision, accident of navigation, claim of salvage, general average, claim for repairs, supplies or other contract relating to ship.[189] However, this Convention did not receive wide acceptance until the 1970s when the restrictive immunity is granted for jurisdiction.[190]

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[184] Ibid, para 104.
[185] Ibid para 108; The ECSI 1972 (n 41) a 33.
[186] The International Convention for Unification of Certain Rules Concerning the Immunity of State-Owned Ships 1926 (the Brussels Convention).
[187] Ibid art 1.
[188] Ibid art 3.
[189] Ibid.
[190] Fox (n 5) 396.

2.4.3.2. The Vienna Conventions on Diplomatic Relations (1961)

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

2.4.3.3.The Vienna Convention on Consular Relations (1963)

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

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

The Hague Convention (1954) declares the immunity of the cultural assets of the defendant State subject to some exceptions such as use of the asset or its surroundings for military purpose.[198] The Convention defines the cultural assets as the moveable or immoveable assets having cultural, historical, or archaeological values,.[199] The

[191] The Vienna Convention on Diplomatic Relations 1961, the United Nations (the VCDR) art 22 (3).
[192] Ibid art 31.
[193] The Vienna Convention on Consular Relations 1963, the United Nations (the VCCR) a 43 (1).
[194] Ibid art 31 (1).
[195] Ibid art 31 (3).
[196] Ibid art 31 (4).
[197] Ibid art 45 (4).
[198] The Hague Convention on for the Protection of Cultural Property in the Event of Armed Conflict 1954 art 9.
[199] Ibid art 1. The cultural property has been discussed in detail in 4.2.4. of this Dissertation.

Convention prevents the cultural assets from being subjected to any form of seizure, capture or prize, except the right to visit and search.[200] The immunity continues even during the transportation of assets from one contracting State to another.[201] However, the State party may withdraw its immunity from any of its protected cultural assets by informing the commissioner-general for cultural assets, an office created under this Convention.[202]

2.5. Drafts by non-governmental international organizations

The sovereign assets with public purposes receive absolute immunity under international conventions discussed above. The criteria for determining the public purpose or the nature of the assets have been stricter day by day. This chapter intends to examine the criteria mentioned in legal instruments whereas the fourth chapter exclusively scrutinizes the case laws for determining the purpose of sovereign assets. Different drafts illustrated various restrictions. Such as, the Institute de Droit's draft allowed execution of only earmarked assets whereas the Harvard drafts made the immoveable assets except the diplomatic assets and the assets in connection with the conduct of business enterprises having the connection with the disputes, available for execution.[203] Hence, these drafts imply the development of law on sovereign immunity to date.

2.5.1. The Harvard drafts

The Harvard Law School developed a draft on foreign sovereign immunity in 1932 (the Harvard Draft 1932).[204] The arguments of independence and sovereign equality justify the entitlement of sovereign immunity. On the other hand, the persisting non-immune activities and assets act exceptions to the general rule of absolute immunity.[205] The draft granted absolute immunity to the foreign State from jurisdiction except waiver of immunity with express consent, dispute regarding immovable assets located in the forum State,[206] and engagement in any industrial,

[200] Ibid art 14.
[201] Ibid art 12, 13.
[202] Ibid art 11.
[203] Fox (n 5) 395.
[204] Harvard Law School, 'Competence Courts in Regard to Foreign States: Part I Use of Terms' (1932) 26 (1) *the American Journal of International Law* (Supplement: Research in International Law) 455, 527 (the Harvard Draft 1932).
[205] Jessup (n 156).
[206] The Harvard Draft 1932 (n 204) comment on art 7-9.

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

2.5.2. The ILA drafts[212]

The ILA drafted a convention on foreign sovereign immunity with the objective of harmonizing State practices in this regard and submitted the draft to the UNGA as a recommendation to the ILC in Montreal conference (1982).[213] This draft recognized absolute immunity from adjudication for *jure imperii* with the exceptions of commercial activity and express waiver.[214] The language for immunity from execution was clear as it declared immunity from attachment, arrest, and execution.[215] Simultaneously, it declared the immunity to the assets of diplomatic and consular purpose, military activity, central bank and any other State monetary authority.[216] The exception to the immunity from execution was the waiver of immunity, against the assets used in commercial activity, and the assets taken in violation of international law.[217]

The unique features of this draft were that it accepted implied waiver as sufficient to deny the immunity defense to the State.[218] Moreover, it added the new provisions of

[207] Ibid art 11.
[208] Ibid art 12.
[209] Ibid art 22 and 23.
[210] Ibid art 24.
[211] PC Jessup 'Diplomatic Privileges and Immunities' Harvard Law School, (1932) 26 the American Journal of International Law (Supplement Research in International Law) 15, 99.
[212] The ILA Draft 1982 (n 142).
[213] Ibid.
[214] Ibid art II and III.
[215] Ibid art VII.
[216] Ibid art VIII (C).
[217] Ibid art VIII.
[218] Ibid art VIII (A) (1).

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

2.5.3. The ILC drafts and the ILC report

With the recognition of the overriding effects of the VCDR (1961), the VCCR (1963) and existing international law,[223] the ILC draft convention on sovereign immunity granted the immunity in clear terms with a list of incidents as exceptions to the general rule of absolute immunity.[224] It published the first draft in 1986 and the final one in 1991. The ILC draft (1991) did not make the immunity subject to international law in fear of open interpretation by the forum States and resulting inconsistent judgments.[225] Sovereign assets were further protected in the enforcement litigations where foreign State was not a party. In such litigations, the affecting State was deemed to be a party to the proceeding and thereby the court had to respect the immunity under article 5.[226] The commentary took an inclusive approach to this provision covering the assets owned by the State agencies and also for pre-judgment attachments.[227]

More express provisions were available at Part IV of the ILC Draft which stated the cases where the immunity from execution could not be invoked.[228] The common ones were the express waiver of immunity from execution by consent, earmarked assets for the discharge of debt and the assets used for "*other than governmental non-*

[219] Ibid art VIII (A) (3).
[220] Ibid art VIII (B).
[221] The ILA Draft 1982 (n 142) art VIII (D).
[222] Hafner (n 154) 2.
[223] The ILC Draft 1991 (n 71) art 3.
[224] Ibid art 5.
[225] Ibid commentary on art 5, para 3.
[226] Ibid art 6 (2) (b).
[227] Ibid commentary on art 6 (2) (b), para 11.
[228] Ibid art 18.

commercial purposes".[229] For the latter exception, the nexus between the asset and the claim, or the asset and the judgment debtor of the substantive proceeding was stated as a prerequisite.[230] This draft categorically protected certain assets from the threat of attachment by listing them as immune such as the assets of diplomatic mission, military agency, central bank, cultural heritage, scientific, cultural and historical objects for exhibition, not intended for sale.[231]

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

2.5.4. Institute de Droit International drafts

The Institute de Droit International published several non-binding drafts on different aspects of sovereign immunity including the Hamburg Resolution on the Jurisdictions of Courts in proceeding against foreign State, sovereign and head of States (1891), the Aix-en Provence Resolution on the Immunity of Foreign State from Jurisdiction and Measures of Execution (1954) and the Basel Resolution on Contemporary Problems Concerning Immunities of States in Relation to Question of Jurisdiction and Enforcement (1991) and the Vancouver Resolution on Immunity from Jurisdiction

[229] Ibid.
[230] Ibid art 18 (1) (c), commentary on the ILC Draft 1991, art 18, para 7.
[231] Ibid art 19.
[232] The United Nations, 'International Law Commission Report 1999' (Yearbook of the International Law Commission 1999 A/CN.4/SER.A/1999, I) (the ILC Report I 1999), para 80.
[233]ibid.
[234] Ibid, para 82; The United Nations, Report to the Working Group on Jurisdictional Immunities of States and their Property (the Yearbook of the International Law Commission, United Nations, II 2 1999) A/CN.4/SER.A/1999/Add.1 (the ILC Report 1999 II), para 128.
[235] Ibid, para 120; discussed in 3.4.1 of this dissertation.

and Execution of Head of States and of Government in International Law (2001),[236] In addition, it also had drafts on immunity in specific cases such as for international crimes, the Resolution on the immunity from the jurisdiction of States and of persons who act on behalf of the State in case of international crimes (2010). Among the available drafts, the drafts in 1954, 1991 and 2001 hold significance for the purpose of this dissertation. These drafts (although named as resolutions) are not any binding instruments. These were attempts of the Institute de Droit International to codify the State practices in foreign sovereign immunity trending from time to time.[237]

The first attempt at codification of the laws on sovereign immunity was the Hamburg Resolution (1891) giving a hint of the future of restrictive sovereign immunity. It accepted restrictive sovereign immunity from jurisdiction in case of the limited number of non-sovereign acts of the State. This resolution required a territorial nexus between the action in dispute and the forum State. For the execution against sovereign assets, absolute sovereign immunity was granted except for the assets earmarked for the satisfaction of the debt.[238] The Aix-en Provence Resolution (1954) followed the similar approach to the question of immunity from jurisdiction and execution with an additional exception thereto. It allowed execution in case of waiver of immunity either expressly or impliedly,[239] and the exercise of authority other than public ones *i.e.*, commercial or non-sovereign authority.[240] The forcible measures were permitted for the assets other than used in exercise of governmental activity "*which does not relate to any economic exploitation*".[241] The significance of this resolution was the answer to the procedural questions of whether the act in question was public or not.[242]

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

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

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

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

[240] Ibid art 3.

[241] Ibid art 5.

[242] Ibid art 3.

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

The latest resolution of the Institute de Droit International on the immunity of the head of the State and the government from jurisdiction and execution was the Vancouver Resolution published in 2001. It granted immunity to the personal assets of the head of the State and the head of the government from pre-judgment attachment but declared them non-immune for the execution of final judgment pronounced against them.[247] The significance of the Vancouver Resolution was that it recognized the power of the forum State to enquire into the origin, lawfulness and the appropriation of the assets including funds in the name of the head(s) of the defendant State.[248] It also empowered the court to order preventive measures against the assets in question and combat illegal practices.[249]

2.6. Regulations of foreign sovereign immunity in national legislations

In absence of an effective international framework, State practices vary in respect of the foreign sovereign immunities. The national practices are not uniform except the way of certain deciding factors. States have either codified the rule on foreign sovereign immunity such as the US, the UK, France, Belgium, Russia or left it with

[243] The Basel Resolution 1991 (n 237) art 4 (2).
[244] Ibid art 4 (3).
[245] Ibid art 4 (4).
[246] Ibid art 5.
[247] The Immunities from Jurisdiction and Execution of Head of State and of Government in International Law, Session of Vancouver 2001, (13th Commission Vancouver) (The Vancouver Resolution) art (4) (1).
[248] Ibid art 4 (2)-(3).
[249] Ibid art 4 (3).

judicial determination guided by international law such as Germany, Netherlands, Switzerland.[250] Another practice is to rely on the notes from the executive branch of the forum State guiding the court in determining immunity of the foreign sovereign assets, such as China. All the jurisdictions consider the legal personality of the State actor and the nature of the power exercised by them.

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

In terms of execution immunity, the US has incorporated restrictive sovereign immunity from execution in the FSIA.[253] Under the FSIA (1976) of the US, assets of the sovereign debtors can be attached when firstly, these assets are in the US jurisdiction and secondly these are used for commercial activity.[254] The FSIA (1976) of the US section 1602 states that "*their commercial property may be levied upon the satisfaction of judgment rendered against them in connection with their commercial activities*."[255] The additional requirement of the FSIA (1976) of the US under section 1610 (2) is the asset is located in US and used for the activity upon which the claim was based on. The US court requires the express waiver of sovereign immunity from attachment to issue a pre-judgment attachment order against a sovereign debtor. In a case against the Republic of Panama,[256] the plaintiff obtained not only judgment in its favor pursuant to the application of restrictive sovereign immunity, but also an attachment order against the assets of Panama's national telecommunication company

[250] Daniel J. Michalchuk, 'Filling a Legal Vacuum: The Form and Content of Russia's Future State Immunity Law Suggestions for Legislative Reform' (Spring 2001) 32 Law and Policy in International Business 487, 488.
[251] Schumacher, Trebesch and Enderlein (n 19).
[252] Fox (n 5) 396.
[253] Jonathan I Blackman and Rahul Mukhi, 'The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos and Other Legal Fauna' (Fall 2010) 73(4) Law and Contemporary Problems (A Modern Legal History of Sovereign Debt) 47.
[254] The FSIA 1976 (n 37) s 1610.
[255] Ibid.
[256] *Elliot Associate v. Republic of Panama* [1977] 975 F Supp 332 (SDNY).

located in the US territory, in contrary to the absolute immunity from attachment and execution.

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

On the other hand, the FSIA (1985) of Australia recognizes the foreign sovereign immunity from execution,[258] except the waiver in relation to asset in question,[259] and execution against commercial assets[260] or immovable properties located in the territory of Australia.[261] It makes a compromise between liberal presumption in favor of sovereign purpose or negative presumption of commercial purpose.[262] The FSIA (1985) of Australia also adopts a list of immune and non-immune assets. The immune assets list includes the diplomatic and the military assets and the non-immune asset list includes the cargo and the ship when either of them is commercial.[263]

In 2016, France enacted its national legislation for foreign sovereign immunity. Before 2016, the immunity from execution was dealt in accordance with the case laws.[264] The French court held the absolute immunity from execution till 1984. In the leading case, the French court of appeal observed the immunity from execution as

[257] *McLean Watson vs Department of Trade and Industry* [1988] 3 WLR 1033 [1103].
[258] The FSIA 1985 (n 166) sect 30.
[259] Ibid sec 31. It states the defendant State may waive its immunity from execution in relation to property except the diplomatic and military properties unless the waiver specifically mentions these properties for the waiver.
[260] Ibid sec 32.
[261] Ibid sec 33.
[262] Ibid sec 32 (1). It clearly excludes the submissions made by the plaintiff to convince the court for assumption of jurisdiction under section 10, for the purpose of defining commercial properties. Therefore, the properties involved in the commercial transaction are not held as commercial property for the purpose of execution.
[263] Ibid sec 32 (2)-(3).
[264] Clement Dupoirier, Andrew Cannon and Laurence Frac-Menget, 'A law on immunity from enforcement in France', 1 December 2016, Herbert Smith Freehills, <https://hsfnotes.com/publicinternationallaw/2016/12/01/a-law-on-immunity-from-enforcement-in-france/> accessed 19 July 2022.

separate and distinct from immunity from jurisdiction.[265] Subsequently, when this case went before the French Court of Cassation, the Court affirmed the ruling but added the requirements of origin and destination of the asset to be proved from different outcome *i.e.*, non-immune.[266] The French court gradually opened in applying restrictive immunity from execution. In 1984, the court attached two conditions for permitting attachments against foreign sovereign asset.[267] These conditions were the asset to be attached was used for commercial purpose and the debt to be discharged out of this asset was also arisen from '*non-immune commercial transaction*'.

In 2016, France enacted the *Sapin II* law with provisions dealing with the execution measures against foreign sovereign assets.[268] The *Sapin II* law permits MoCs with the express consent of the defendant State, in relation to the earmarked assets, assets with non-governmental or commercial purposes and the assets having nexus with the claim.[269] The distinction of the French practice from the FSIA (1976) of the US is that the French court requires the assets to be in use for the same commercial activity from which the claim has arisen.[270]

Belgium's Judicial Code has a similar provision like in France. It allows seizure of foreign sovereign assets located in Belgium territory provided, the defendant State has consented thereto, waived its immunity from execution and/or earmarked the asset for the claim in question.[271] The provision is also subjected to the "*Supranational imperative provisions and international*" which gives the precedence to the customary

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[265] *Clerget v. Banque commerciale Pour'l Europe de Nord*, [7 June 1969] Court of Appeal, Paris 52 ILR 310 [315].
[266] [1971] Court of Cassation, [2 November 1971] 65 ILR 54 [56].
[267] *Islamic Republic of Iran v. Eurodif* [1982] Court of Appeal of Paris [21 April 1982] 65 ILR 93.
[268] The Law on Transparency, Anti-corruption Measures and the Modernization of the Economy (known as the Sapin II law a 59), approved by the French National Assembly on 8 November 2016.
[269] The Code of Civil Enforcement Procedures 1889 (France), a L.111-1-1, 2-3. "*Article L.111-1-1. Provisional or enforcement measures cannot be applied to the property of a foreign State unless there is prior authorization by a judge in an order issued upon request. Article L.111-1-2. Provisional or enforcement measures concerning a property belonging to a foreign State cannot be authorized by a judge unless one of the following conditions is satisfied: 1. The State concerned has expressly consented to the application of such measure; 2. The State concerned has reserved or affected this property to the satisfaction of the claim which is the purpose of the proceedings; 3. When a judgment or an arbitral award has been rendered against the State concerned and the property at issue is specifically in use or intended to be used by the State concerned for other than government non-commercial purposes and is linked to the entity against which the proceedings are initiated*."
[270] Fox (n 5) 399.
[271] The Judicial Code 1967 (modified in 2016) (Belgium) art 1412 *quinquies*.

international law.[272] Belgium ordered attachment of funds in a bank account, maintained in the name of Greece, for payment of judgment debt.[273]

Russia has its statutory provisions on foreign sovereign immunity allowing execution against the foreign sovereign assets subject to prior waiver or commercial use of the asset in question.[274] Restrictive immunity may be applied where permitted under any bilateral agreements between the States or comprehensive waiver of State immunity by the foreign State.[275] Precedents also exist as to the application of restrictive sovereign immunity in the Russian courts.[276] For the question of immunity from execution, the Russian legislation permits MoCs against sovereign assets when the immunity has been waived. It also lists certain assets as immune, including, diplomatic, and military assets, assets of the central bank of the defendant State, objects with cultural values *etc.* On the other hand, Russia as defendant State may consent to the execution of a valid debt against its assets which are not required for the exercise of its political and diplomatic rights in conformity with international law.[277]

Another kind of State practice regarding foreign sovereign immunity from execution is that there are States having no codified law on sovereign immunity. These States follow the international laws as prevailing from time to time such as, the ECSI (1972) [if ratified], the UN Convention (2004) [even though it is not effective yet]. The practices are different in Civil law jurisdictions. Germany follows the general principles of public international law regarding the question of foreign sovereign immunity unless the ECSI (1972) applies.[278] The Basic Law of Germany (1949) states in its article 25, "*the general rules of international law shall form part of federal law*." This provision acts as the foundation of the sovereign immunity law in

[272] Jonathan Toro, 'Article 1412 *quinquies* of the Judicial Code: Immunity from Seizure of the Property of the Foreign State and of the International Organization' 31 October 2021 <https://s-team.law/insights/article-1412quinquies-of-the-judicial-code-immunity-from-seizure-of-the-property-of-the-foreign-state-and-of-the-international-organization/> accessed 20 July 2022.
[273] *Socobelge v. the Hellenic State* [1951] 15 ILR 3.
[274] The Federal Law on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State (2015), (The Federal Law No. 297-FZ) (Russia)
[275] Michalchuk (n 250), 498.
[276] Anthony Cioni, 'the First Pancake Always Has Lumps: Alberta Petroleum Companies, Arbitration and Arbitral Award Enforcement in the Russian Federation' (1997) 35 Alberta Law Review 726, 752.
[277] Fox (n 5) 395.
[278] The Basic Law 1949 (Germany) art 25. It accepts the general principles of international law as a part of its legal system.

Germany. As it does not define the content of the general principles, the system enjoys the flexibility to accommodate the change in immunity principles from time to time. For the German practice, two cases hold the higher persuasive precedential value. These are *the Empire of Iran* case (1964)[279] and *Non-Resident Petitioner v. Central Bank of Nigeria* (1977).[280] The German Constitutional court observed:

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

The Dutch legal framework of foreign sovereign immunity follows the same practice as in Germany. The legal basis of Dutch law on foreign sovereign immunity is based on the General Provisions Act (1829) instructing the deciding court to be guided by international law.[282] The detail legal precedents have been developed based on its case laws.[283] Netherlands ratified the ECSI (1972) but not the UN Convention (2004) and but still, its case laws are found in alignment with the UN Convention provisions. Dutch courts have precedents of granting valid attachment orders against the foreign sovereigns. The Dutch court granted attachment against SOE which had separate legal entity.[284] The Dutch Supreme Court denied granting attachment order for both conservatory and final judgment unless the judgment creditors prove the non-

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

[280] *Non-resident Petitioner v. Central Bank of Nigeria* [1976] Dist. Ct. Frankfurt Neue Juristische Wochenschrift [N.J.W.] 1004, 16 ILM 501 (1977); See also, the United Nations Documents on the Development and Codification of International Law: (October 1947) 47(4) *Supplement to American Journal of International Law* 292
<https://legal.un.org/ilc/documentation/english/ASIL_1947_study.pdf> accessed 31 March 2021.

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

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

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

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

sovereign purpose of the assets.[285] Italy has no specific statutory law regarding sovereign immunity, instead requires its courts to follow the international law.[286] state Similar to Germany and Netherlands, Switzerland does not have any specific law on State immunity rather it follows the ECSI (1972) as binding and the UN Convention as the guiding principles.[287] It ratified the UN Convention (2004) in 2010. The case laws from the Swiss court stand on single regime for both jurisdiction and execution against assets. The Swiss court allowed MoCs against assets that were not allocated for any specific purpose. The past or future use for sovereign purpose was irrelevant.[288]

China has its distinctive practice regarding foreign sovereign immunity. It does not have any comprehensive statutory law thereon. In 2005, China enacted a law recognizing immunity of assets of central bank.[289] This law grants immunity to the central bank's assets of any defendant State unless the defendant State waives its immunity or has earmarked the asset for the debt.[290] Nevertheless, this law also keeps the principle of reciprocity in action when it comes to the question of immunity to the assets of China's central bank before the courts of the defendant State.[291] For the other areas of law on foreign sovereign immunity, the Chinese courts rely on the executive notes provided by the central government from time to time when any case involving this issue comes before the court.[292] It has reportedly followed the absolute sovereign immunity with exception of either explicit consent of the foreign State to jurisdiction or waiver of immunity.[293] Although not as exclusively as China, the executive organs

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

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

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

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

[289] The State Council, Law of The People's Republic of China on Immunity of the Property of Foreign Central Bank from Compulsory Judicial Measures, adopted at the 18th session of the Standing Committee of the Tenth National People's Congress of the People's Republic of China (25 October 2005) <http://english.www.gov.cn/services/investment/202102/24/content_WS6035ab7bc6d0719374af960d.html> accessed 05 October 2022.

[290] Ibid., art 1.

[291] Ibid., art 3.

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

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

of other States send notes or brief to the deciding courts from time to time regardless of having specific national legislation. Therefore, the role of the executives in relation to foreign sovereign immunity demands further analysis.

2.7. Role of forum States' executive bodies

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

The MoCs from the courts of the forum States are regarded as an interference to the exercise of sovereign power of the defendant State.[296] The interference from the forum State raises the apprehension in the mind of the States as to the protection of their assets in foreign territory. There are incidents where the States hesitate to send their cultural objects even on loan in other State's territory due to poor immunity protection to the assets such as Austria,[297] Taiwan.[298] States' lack of confidence on the interpretation of public purpose of its assets by the judges in the forum States deteriorates the inter-State relationships and act as an impediment to the mobility of sovereign assets. Besides, the forum State also fears its future receipt of foreign reserve from other States.[299] Such loss of business to other jurisdictions affects the forum State's relationship with the interested parties. This apprehension is not

[294] *Connecticut Bank of Commerce v. Republic of Congo* [2002] 5th Cir court 309 F 3d 240 [256] .
[295] Sinclair (n 117); Brownlie (n 117) 338.
[296] Fox (n 5).
[297] *Altmann v. Republic of Austria*, [2001] US District Court for the Central District of California 142 F Supp 2d. In 1998 when its two paintings of Austria got confiscated for prejudgment attachment in New York due to refusal of the New York Court in granting immunity to the cultural objects of Austria.
[298] Linda Chang, 'Paris to Exhibit Chinese Art Treasures' (Taiwan Aujourd' hui., 12 June 1998); After the denial of immunity to the cultural objects of Austria in New York pursuant to the *Altman case* (2001), Taiwan refused to lend their cultural objects in France and also in Germany in fear of litigations from China for confiscation of these objects in the territory of borrowing State. It had less or no confidence in the domestic jurisdictions of the borrowing States in interpreting the public purpose of these cultural objects and thereby losing the immunity.
[299]Bernd Krauskopf and Christine Steven, 'Immunity of Foreign Central Banks under German Law' (2000) 2(4) Journal of International Financial Markets 138, 141.

necessarily limited to the monetary reserve but also the exchange of assets with cultural, historical, and/or scientific values, brought to the forum State for exhibition for the purpose of educational and cultural exchange. These negative effects bring the executive body of the forum State to guide the deciding court by sending notes in the cases involving foreign sovereign immunity.

In the case of *Prefecture of Voiotia v. Federal Republic of Germany* (2000),[300] before the Greek court, the petitioner attempted to execute a compensation judgment against the cultural institutions of the defendant State located in the forum State, for a war crime committed during the Second World War by the army of the defendant State. The Greek Supreme Court confirmed the decision for enforcement which was subsequently stopped upon the refusal of the Greek Minister of Justice.[301] The same judgment failed to be enforced in the ECtHR,[302] and Germany.[303] Finally, the execution suit was brought before Italy which permitted the enforcement against the *Vila Vigoni*, the German State-owned cultural exchange center in Italy where the Italian court ordered the mortgaged upon the *Vila Vigony* for reimbursement of the judgment debt.[304] This execution by way of mortgage was also suspended afterward pursuant to an executive order pending the litigation filed by Germany before the ICJ.[305] Here, the intervention from the executives in determining the question of immunity against a foreign State may prevent such consequences. Hence, the governmental practice in form of the role of its executives is another valid source in the evolution of international law on State immunity.[306]

Sucharitkul focused on the effect of the executive orders, "*the views of the executive appear to be final if not decisive on the question…*"[307] He identified the role of executives in two ways for the development and practice regarding State immunity.

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[300] *Prefecture of Voiotia v. Federal Republic of Germany* [4 May 2000] reported in (2001) 95 American Journal of International Law 198.
[301] Andre Gattini, 'The Dispute on jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?' (2011) 24 Leiden Journal of International Law 173, 176.
[302] *Kalogeropoulou and others v. Greece and Germany* [2002] Application no. 59021/00 sec 1 ECHR, (12 December 2002) 417.
[303] *Greek Citizens v. Federal Republic of Germany* [2005] 129 ILR 556.
[304] *The Distomo Case*, [2008] 133 *Foro italiano* I, 1308.
[305] *The Jurisdictional Immunities of the State* (n 172).
[306] Mr. Sompong Sucharitkul, 'Preliminary Report on Jurisdictional Immunities of State and their Properties, United Nations' (18 June 1979) II (1) *Yearbook of the International Law Commission*, Agenda 10, Document A/CN.4/323, 234; Knuchel (n 89) 149, 150.
[307] Ibid para 34.

Firstly, consultation with the legislators while formulating national statutes on State immunity confirming the foreign policy and international political standing of the State; Secondly, advising the judicial authorities in form of note, certifications, or amicus brief on the existence of the defendant State such as whether the forum State recognizes the Statehood of the defendant State, or the contemporary relevant international law and the footing of the forum State in this regard. Such practice can further be either at the request of the court or *suo motto* submission by the executives. In the former instance, pursuant to the request of the Hong Kong court under the Basic Law of Hong Kong, the Chinese government issued interpretative order to the court informing about its stands favoring the absolute sovereign immunity,[308] *albeit* the shift was globally visible. On the other hand, despite having the statutory law on State immunity, the US executives continuously sent amicus brief to the court in the NML Capital case (2011) against Argentina while interpreting the law.[309]

Some States consider the order of the executives as conclusive on judicial authority in deciding the issue of foreign State immunity. For instances, the executive orders given by the Chinese government in relation to the act of State for defense of State immunity are conclusive and binding on the Hong Kong court.[310] Argentina also relies on its executive branch before accepting jurisdiction over a foreign State in order to investigate the reciprocity. In absence of reciprocal grant of immunity, the foreign State is subjected to the Argentine jurisdiction.[311] In Italy and Greece, attachment of commercial assets is granted with the prior approval of the concerned minister of the government to such forcible measures against a foreign State. They maintain the executive control over the political economy of the cases.[312] Fox expressed her concern as to the risks of engaging the executives in the matter of determining State immunity. She commented, "*Execution may be misused by the private parties to settle old political scores*"[313]

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[308] The Basic Law of Hong Kong 1990 art 13. It confers the power of the government of China to determine the foreign affairs of Hong Kong.
[309] Arya (n 59).
[310] The Basic Law 1990 (n 308) art 19.
[311] The National Code of Civil and Criminal Procedure 1977 art 24 (Argentina).
[312] *Romania Court v. Trutta*, Italy [14 February 1926]; L. Condorelli and L. Sbolci, 'Measures of Execution against the Property of Foreign Sovereign: the Law and Practice in Italy' (1979) 10 Netherlands Yearbook of International Law 197.
[313] Fox (n 5) 412

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

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

2.8. Conclusion

The State practices on law of foreign sovereign immunity from execution in form of legislative, judicial, and executive are diverse. Fox summarized the law on State immunity from execution in three principles *i.e.*, assets in use of public purposes are immune, and assets in commercial use are non-immune and finally, assets of the State agencies having separate legal entity are subjected to the same provisions as the private persons.[318] There have been international attempts to uniform the laws relating to sovereign immunity, it is yet to achieve the desired success. Thus, the legal framework on laws on foreign sovereign immunity consists of national laws as well as customary international law. Such as, the UK and the US have their national

[314] *Condor* (n 114).
[315] Ibid.
[316] *Mexico v. Hoffman* [1945] (324 Washington DC, US Government Printing Office 1946) [35].
[317] Sucharitkul (n 306) affirmed "*the exercise or non-exercise of such administrative power is tantamount to the recognition or explicit allowance of various types of immunity […] to the denial or refusal of such immunity*."
[318] Fox (n 5) 399.

legislations on foreign sovereign immunity; German Civil law requires its court to apply the international law in this regard.[319]

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

The international conventions are expected to provide a set of minimum standards for 'common commercial justice'.[320] From the plain reading of these instruments mentioned above, the common understanding is that the immunity is granted to the sovereign assets for their governmental or non-commercial use. In other words, the non-governmental or commercial use put the sovereign assets at the same standard as used for private persons. This stand may vary in pre-judgment and post-judgment measures such as the UN convention (2004) takes a restricted approach for pre-judgment attachment with the exception of earmarked property and/or, express consent to the MoCs, [321] whereas the ECSI (1972) prohibits pre-judgment MoCs unless State has expressly consented thereto.[322] The common features of these conventions on State immunity from execution infer that upon the express waiver of the sovereign immunity from execution, the court may order the post-judgment attachment of any sovereign assets, used or set to be used for any commercial

[319] The Basic Law 1949 (n 278) art 25. It accepts the general principles of international law as a part of its legal system.
[320] Lim (n 21).
[321] The UN Convention 2004 (n 41) art 18.
[322] The ECSI 1972 (n 41) art 23.

purpose. However, none of the conventions mention the determination of commercial purpose leaving the room for case laws from national jurisdictions.

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

Chapter 3: Sovereign assets in enforcement litigations

3.1. Enforcement litigations

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

3.2.Sovereign assets

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

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

[323] Black's Law Dictionary (n 62) 'Asset'.
[324] Ibid, 'Property'.
[325] O. Lee Reed, 'What is Property' (Summer 2004) 41(4) American Business Law Journal 459, 468.
[326] Wex definitions Cornell Law School 'Proprietary rights' (July 2021) <https://www.law.cornell.edu/wex/proprietary_rights#:~:text=Proprietary%20rights%2C%20also%20termed%20property,or%20in%20respect%20of%20property.> accessed 23 August 2022.

which are *in rem* in nature,[328] including right to possession, uninterrupted enjoyment, right to assign or transfer the rights, *etc.* Sovereign assets can be defined as asset or property owned by State. Chechi defined, "*the term public property also refers to the state-owned assets and originates from the virtually unlimited and exclusive state's power to legislate on the distribution and management of resources that are situation on the national territory.*".[329] The ILC Report (1985) described the concept of 'State property' as '*property in which a State has interest*.'[330] While explaining the term 'interest', it accepted the State interest in an asset without ownership of it. Therefore, the interest in an asset as beneficiary or holder thereof is also included in the definition of sovereign asset.[331]

On the other hand, the term 'asset' denotes to thing, tangible, or intangible,[332] having a monetary value for the rights associated with the things. Thus, the asset is more suitable and well defined from the perspective of the rights associated thereto, instead of the object or material itself. Therefore, the term 'asset' instead of 'property' is used in this dissertation. Sovereign asset means the asset of which State is entitled to the proprietary rights. Like private entities State owns assets of various kinds, such as, industrial, intellectual,[333] moveable, immoveable *etc.*[334]

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

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[327] AM Honore, 'Ownership', in AG Guest (Ed) *Oxford Essays in Jurisprudence*, (OUP 1961) 107-47; WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916-1917) 26 Yale Law Journal 710, stated, property rights as "multilateral rights"; HE Smith, 'Property as the Law of Things' (2012) 125 Harvard Law Review 1691, 1691, stated property rights as "*modules connected by interfaces*".
[328] Reed (n 325) 462.
[329] Alessandro Chechi, 'State Immunity, Property Rights and Cultural Objects on Loan' (2015) 22 (2/3) International Journal of Cultural Property 279, 281.
[330] United Nations, 'Jurisdictional Immunities of States and their Property' (1985) II (2) Yearbook of International Law Commission 51, 55 para 231 (the ILC Report 1985).
[331] Discussed in 3.3.2 and 3.3.4. of this dissertation.
[332] Eveline Ramekers, 'What is Property Law?' (2017) 37(3) Oxford Journal of Legal Studies 588, 591.
[333] The ILC Draft 1991 (n 71) art 14.
[334] Ibid art 13.

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

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

3.3.**Ownership of sovereign assets**

State owns assets by way of succession, gift, administration, or insolvency, purchase.[338] While determining the question of immunity, the ownership of the

[335] Ramekers (n 332) 590.
[336] *Permanent Mission of India v. City of New York*, [2007] Supreme Court of the US, 46 ILM 737.
[337] *Sedelmayer v. Russia* [1998] SCC Case No 106/1998, IIC 106.
[338] The Council of Europe (2005) Pilot Project of the Council of Europe on State Practice Regarding State Immunities-Analytical Report, Committee of Legal Advisers on Public International Law, 30th Meeting, Strasbourg 04/08/05, prepared by the Directorate General of Legal Affairs, 19-20 September 2005.

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

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

3.3.1. *Literatures on proprietary rights*

There are two significant approaches in defining ownership of assets.[340] The older approach defines ownership from the question of who owns the assets whereas the new approach questions why ownership matters meaning the rights coming under the

[339] Discussed in 4.2.4 of this Dissertation.

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

scope of ownership.[341] From the aspect of 'bundle rights', Demsetz emphasized exclusivity and alienability as two core rights in the bundle of property rights.[342] Umbeck defined ownership to property rights as the exclusively enforceable through legal and non-legal institutions.[343] Coase examined the economic implication of allocation of liability rights as a part of property rights along with the other external factors having implication on value of the asset.[344] He defined asset not as physical object, but as a bundle of rights. By private ownership, he meant the entitlement to exercise these rights including right to make profit from the asset, right to enjoyment, right to assignment subject to the legal restrictions and ability of the owner to exclude others. The challenge in this theorem was the assumption of zero transaction cost. Coase relaxed the assumption on transaction cost to see the correlation of allocation of use rights, although the extent of such relaxation was left in vacuum.[345]

On the other hand, the new approach to ownership interprets the specific right to control obtained through contractual arrangement and the residual right to control as achieved by legal ownership.[346] This approach focuses on the rights coming under the umbrella of ownership instead of person on whom the ownership bestowed upon. Therefore, under the new approach, there can be several owners to an asset who are entitled to various proprietary rights of the asset. This notion of ownership includes both the contractually and legally derived rights as subject matter of ownership. This approach is taken into account in this dissertation. Private entity may qualify as owner of the asset with the extent of its exclusive enjoyment of any proprietary right over the asset. Therefore, the dynamics between the owner and the holder of sovereign assets are relevant.

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

Ownership of foreign State to an asset is the first question before the court while determining the question of immunity. The primary proof of legal ownership for an

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[341] Ibid.
[342] Harnold Demsetz, *Toward a Theory of Property Rights, Ownership, Control and Firm* (Basil Blackwell 1988).
[343] John Umbeck, 'Might Makes Rights: A Theory of the Formation and Initial Distribution of Property Rights' [1981] Economic Inquiry 38.
[344] Ronald Coase, The Problem of Social Cost, (October 1960) 3 the Journal of Law and Economics 1.
[345] Kirsten Foss and Nicolai Foss, 'Assets, Attributes and Ownership (2001) 8 (1) International Journal of the Economics of Business 19.
[346] Oliver Hart, 'An Economist's View of Authority' (1996) 8(4) Rationality and Society 371, 371.

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

Question of ownership of sovereign asset does not solely depend on legal registration. Such as, a registered merchant ship can be subjected to mortgage or lien, like any other assets. In such cases, the dynamics between the holder and the owner play a significant role. The matter gets complicated for the merchant ship when it is operated under a '*bareboat*' charter.[350] The sovereign merchant ship can be leased out for bareboat charterparty contract where the charterer becomes the holder the ship whereas the ship yet remains registered in the name of the State. The German Constitutional Court used an analogy of 'no name' bank account while discussing the similar situation with the bank account of the defendant State. The entity in whose name the account was maintained with the bank was the creditor of the bank. Nevertheless, the bank also acknowledged in certain cases (such as trusteeship) third party as the beneficiary of the account.[351] This beneficiary could be argued as the actual or *de facto* owner of the account. Forum States' practices vary in term of dealing with the question of MoCs against such bareboat chartered ships or 'no name' accounts.[352]

The typology of owner and holder is also relevant for granting MoCs. Such as, the garnishment order is granted against third party who is not the owner but the holder

[347] For example, the Merchant Shipping (Registration of Indian Ships) Rules 1960 (India).
[348] For example, the Companies Act 2006 (the UK), sec. 113.
[349] Rainer Lagoni, 'Merchant Ships' *Max Planck Encyclopedias of International Law*, (Oxford Public International Law 2011) para 9.
[350] The 'bareboat' charter is the contract between the charter or the ship owner where the ship owner gives the full control of ship and complete responsibilities of its operation to the charterer for the contracted period of time.
[351] Decision of the Second Division [of the Federal Constitutional Court] of April 12, 1983, Docket nos. 2 BvR 678-683/81., para. 1293.
[352] Lagoni (n 349) para 20. "No name" accounts designate those accounts where the account holder is not the actual owner of the account rather hold the account in benefits of someone else who does not hold the documentary title.

for time being. The third-party holder is contractually bound to provide the fund to the beneficiary [*i.e.*, the defendant State] but pursuant to the court order of garnishment, is being bound to give the fund to the judgment debtor. Therefore, in the execution cases, the determination of holder and owner is significant.

3.3.3. *Control test*

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

The ILC Report (1985) emphasized on the physical control over the asset to identify the sovereign ownership especially when the ownership was claimed by *de facto or* a de jure government.[353] Nevertheless, the new approach to ownership emphasizes on the rights to control over the asset, especially the specific right of control and the residual rights of control.[354] The specific right of control denotes the physical control over the asset whereas the residual rights of control consist of the rights to make decisions as to the use of the assets.[355]

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[353] The ILC Report 1985 (n 330), 55 para 231.
[354] Foss and Foss (n 345) 25.
[355] Kirsten Foss and Nicolai J Foss, 'Understanding Ownership: Residual Rights of Control and Appropriable Control Rights,' Danish Research Unit for Industrial Dynamics (DRUID Working paper no. 99-4, March 1999).

The specific right of control is allocated by contractual arrangement whereas the residual rights of control derive from the legal ownership.[356] State may obtain control over an asset by way of contractual arrangement. Such contract would make the asset entitled to jurisdictional immunity provided that the purpose of the asset had been public in nature. Similarly, State may own an asset but put it at the control of an entity distinct from its sovereign authority. Here, the control test determines the owner of the asset. The German constitutional court in the *National Iranian Oil Company* case (1983) observed, "*it is true, a duty to grant immunity in rem may be applicable as regards objects in the possession of a private business enterprise that are property of a foreign state and serve sovereign purposes*."[357] Nevertheless, the same is not applicable for immunity from execution. For the immunity from execution, the residual rights of control are examined. Because the use of the asset decides its entitlement of immunity from execution. If State decides the asset to be used in public purposes even at the hand of non-sovereign entity, the State remains the owner and the asset is entitled to immunity.

The same 'control' test is applied to determine whether the assets should be treated as sovereign for the purpose of immunity. The control over the asset and authority to decide its make the holder as the owner. In the case of *Dole v. Patrickson*, (2003)[358] even though the assets were in the control of the institution, but the governance of the institution was in control of the State, thus, the US court held assets as sovereign. However, there are some dissenting opinions from the same forum where governance was not considered as triggering point for deciding the ownership. For illustrations, in *Bank of China vs. Chan* (1992),[359] the US court rejected the argument of claiming immunity for the asset of Bank of China because of the separate legal entity of the bank. In *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co. Ltd.* (2001)[360], *Re China Oil and Gas Pipeline Bureau* (2002)[361], and *BP Chemicals Ltd. v. Jiangsu Sopo Corp.* (2002)[362] the entities were held by the US courts as separate from the sovereign

[356] Hart (n 346) 371.
[357] *The National Iranian Oil Company* Federal Republic of Germany: Federal Constitutional Court Decision (Decision of the second division of the Federal Constitutional Court, 12 April 1983) 2 BvR 678/81, [1983] 64 BVerfGE 1 [1283].
[358] [2003] 538 US 468.
[359] [1992] WL 298002 (SDNY).
[360] [2001] 241 F3d 135, 2001 AMC 2080 (2d Cir).
[361] [2002] (Tex App Houston 14th Dist) 94 SW3d 50.
[362] [2002] (8th Cir) 285 F3d 677, 62 USPQ 2d (BNA) 1514.

and entitled to hold their assets distinct from sovereign entity disregarding the State's control over the governance.

In the case of *Republic of Mexico v. Hoffman*, (1945)[363] the ship was owned by the Mexican government whereas it was operated and controlled by a private corporation. The US Supreme Court considered the control of the ship at the hand of private corporation, thereby was denied immunity to the ship. Hence, the control of the asset played a significant role in this case while identifying its sovereign nature. In terms of the asset targeted by the judgment creditors, the control of the defendant State draws the attention of court before granting any MoC.[364] The anticipated control can be administrative, technical, or social.[365] The control can be determined based on the nature of the officers. For example, the definition of warship, given in the United Nations Convention on Law of the Sea (1982) (the UNCLOS) clarifies the distinction between a warship and a merchant ship, based on the nature of the officers who control the ship. The officers must be commissioned by the government, having their names in the service list and the crew of the ship being under the discipline of the regular armed forces.[366] Although the concerned conventions relating to aircrafts do not define the State aircrafts from the perspective of its control, Wouters and Verhoeven advocated to revisit the legal definition of State aircrafts and to concentrate on the physical control over the aircrafts, in coherence with the definition of State ship given in the UNCLOS (1982).[367]

3.3.4. *Beneficiary's interest test*

The Black Law Dictionary defined legal owner as "*one recognized by law as the owner of something; esp., one who holds legal title to property for the benefit of another*."[368] On the other hand, beneficiary owner is defined as "*one recognized in equity as the owner of something because use and title belong to that person even though legal title may belong to someone else; esp., one for whom property is held in*

[363] [1945] 324 US 30.
[364] The ILC Draft 1991 (n 71) commentary on art 6 (2) (b), para 12.
[365] The Convention on the High Seas 1958 art 5 (1) emphasized on the control of the State over the Ship while examining the genuine link between them. In order to establish the control, it states the exercise of exclusive jurisdiction of the State, as well as control over the administrative, technical and social matters of the Ship.
[366] The United Nations Convention on Law of the Sea (the UNCLOS) 1982 art 29.
[367] Jan Wouters and Sten Verhoeven, 'State Aircraft' *Max Planck Encyclopedias of International Law* (Oxford Public International Law, July 2008), para 9.
[368] The Black's Law Dictionary (n 62) 'legal owner'

trust."[369] Beneficiary interest test assists to identify the *de facto* control over the assets, especially for the liquid assets. Because control over the liquid asset is comparatively difficult to be established. For instances, the direct control of the liquid assets of the sovereign wealth funds, the funds in accounts or the receivables from third parties are at the hand of the bank or the monetary authority primarily holding it as the agent of the account owner. The *de jure* control over these assets can be traced to their sovereign owner following the line of agency contract, trusteeship, or beneficiary assignments. Similarly, the *de facto* control can be proved based on the decision-making authority of managing the asset such as risk and investment.[370]

Nevertheless, the residual rights of control are not always identifiable or divisible,[371] such as in case of co-ownership for intangible assets. This can be a challenge for the sovereign ownership, in case of Public-Private-Partnership, concession agreements with private parties or the long-term lease which outreach the economic lifetime of the asset. Here, residual income rights come forward to distinguish the State's part of ownership. This residual income rights can be judged based on contractual arrangement via profit sharing agreement where the profit is verifiable. Establishment of control becomes difficult when the asset in question is intangible in nature such as intellectual property rights.[372] The asset may have been registered in the name of the autonomous research institutes or universities, but the residual rights of control may be at the hand of some other sovereign authority. In such cases, the residual income rights are considered as to the proportion of income at the disposal of the State.

The beneficiary's interest test becomes helpful for the liquid assets. In the beneficiary's interest test, the court evaluates whether the defendant State is the actual beneficiary of the asset in question although it is not the owner, or holder *per se* and does not even have the control over the asset. For instance, *AIG v. Kazakhstan* (2005)[373] the sovereign wealth fund was managed pursuant to a trust agreement where the Kazakh government was the beneficiary of the fund and received profit from the proceeds and the central bank of Kazakhstan was the trustee of the fund and entitled

[369] Ibid. 'Beneficiary owner'.
[370] Hans J. Blommestein and Fatos Koc Kalkan, 'Sovereign Asset and Liability Management: Practical Steps towards Integrated Risk Management' (2008) 6-7 Financial Forum/Bank-En Financiewezen 360, 366.
[371] Foss and Foss (n 345) 27.
[372] Discussed in 4.4.5 of this dissertation.
[373] *AIG Capital v. Kazakhstan* [2005] EWHC (Comm) 2239, [90]-[95].

to control the fund. In this case, the interest of Kazakhstan is the beneficial interest which may be subjected to MoCs for enforcement if the benefits or proceeds are used for commercial purpose. Hence, the second question in the execution suit is the use of the assets. Thus, attribution of asset plays major role in enforcement of sovereign asset instead of the asset itself. However, Hart criticized residual income test because of the risk of unverifiability in some cases.[374] In this case, the voting rights of sovereign owner in the day-to-day management, the secondary market value of the government stake in the assets might be the alternative approaches.

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

3.4. Attribution of the assets[375]

The legal analysis of assets concentrates on the rights associated with asset, recognized in law and thereby enforceable. On the other hand, the economic analysis of ownership refers the alternative uses of the same assets, controlled by the holder. Attribution of an asset means the possible uses of the asset.[376] An asset itself cannot be public or private rather its use or purpose determines its kind as public or private[377] and thereby its immunity from execution. In the cases of execution against the sovereign asset, the deciding court not only relies on the legal definition of ownership and control of the asset but also its use. The forum State's court applies several tests in deciding the status of the sovereign asset as immune or non-immune.

3.4.1. *The tests of attribution of the asset*

[374] Oliver Hart, *First, Contracts and Financial Structure* (Clarendon Press 1995), 63-64.
[375] 3.3 of this dissertations has been published as a part of the conference proceeding. Ferdous Rahman, 'Economic Analysis of Sovereign Assets: Application by Courts in Determining Sovereign Immunity' (22 November 2019), the 10th Edition of the International Conference of Doctoral Students and Young Researchers, organized by the University of Oradea, Romania, University of Miskolc, Hungary, and International Business School from Botevgrad, Bulgaria.
[376] Foss and Foss (n 345).
[377] Yoram Barzel, 'the Capture of Wealth by Monopolists and the Protection of Property Rights' (1994) 14 International Review of Law and Economics 393.

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

The ILC draft (1991)and ILA Draft (1982) both accepted the nature test instead of purpose test although the ILC Draft (1991) gave opportunity to the defendant State to present the purpose test after failing the nature test in its favor[380] unlike the ILA Draft (1982).[381] The UN Convention (2004) puts the nature test ahead of the purpose test but the purpose test is made to be relevant when the parties agree thereto.[382] National legislations have various practices also. Such as the SIA (1978) of the UK emphasizes on the purpose of the assets,[383] whereas The FSIA (1976) of the US asks for the commercial activity test.[384]

The ILC Drafts (1991) used the negative expression for the commercial purpose exception such as "other than government non-commercial" purposes.[385] The commentary thereon explained the reason for doing so. It was to prevent the State from avoiding the MoCs by way of changing the status of the assets.[386] The Basel Resolution of Institute de Droit International (1991) termed the exception to non-immune assets as used in commercial purpose.[387] Although it did not define "commercial purpose", the non-exhaustive list was included stating the similar

[378] Dmitri Zdobnoh and Rene Vark, 'State immunity from Execution: In Search of a Remedy' (2010) 4 Acta Societatis Martensis 161, 171.
[379] Oddenino and Bonetto (n 173) 20; 26126/07 *Naku v. Lithuania and Sweden* [2016], EctHR (8 November 2016). The nature test was applied in this case of by the EctHR; *The Argentine Bond case* [2005] all civil sections, decision no 11225 of 27 May 2005, RDIPP, 2005, p. 1091 ff. the purpose test was applied in the *Argentine bond* case by the Italian court of Cassation.
[380] The ILC Draft 1991 (n 71) art 2 (2).
[381] The ILA Draft 1982 (n 142) art I.
[382] The UN Convention 2004 (n 41) art 2 (2).
[383] The SIA 1978 (n 37) sec 13 (4).
[384] The FSIA 1976 (n 37), sec 1610 (a) states, "*the property in the United States of a foreign state…used for commercial activity in the United States shall not be immune*…"
[385] The ILC Draft 1991 (n 71) art 18 (1) I (c).
[386] ibid, commentary art 18 (1) (c), para 11.
[387] The Basel Resolution 1991 (n 237) art 4 (3).

commercial transactions. These were the commercial contract, supply of services, loans, guarantees, indemnities, industrial and intellectual properties etc.[388] The national legislations have taken a more structured approach. For illustration, the FSIA (1985) of Australia states that the immunity is not granted to the 'commercial property' and defines the same as any sovereign assets excluding the diplomatic and military ones.[389] The SIA (1978) of the UK applies the standard of 'commercial purpose' for the characterization of non-immune assets whereas the FSIA (1976) of the US applies the nature test.[390] The nature test starts with the authority holding and/or using the asset. The immunity may be granted in the case of exercise of governmental authority. On the other hand, the commercial activity test is defined as a State act of commercial nature similarly to private entities without involving any sovereign function or authority.[391] If the asset is involved in any 'commercial activity', it loses its immunity even though listed as immune asset.[392] Courts use these tests to determine the *acta jure imperii* and *acta jure gestionis*. In the battle between nature test and purpose test, diverse opinions exist. Such as Oddenino and Bonetto stood for nature test as the nature evidently establish the sovereign authority behind it to entitle immunity.[393] Lord Diplock outlined the 'purpose in context' as the right approach to decide the immunity of the sovereign assets.[394] In support of Lord Diplock, Wittich also termed the context as the catalyst of nature test.[395]

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[388] Ibid, art 2 (2) (b).

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

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

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

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

[393] Oddenino and Bonetto (n 173), 20

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

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

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

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

The ILA Draft (1982) declared the asset used in commercial activity as available for attachment.[397] In defining the 'commercial activity' it gave a definition broader by mentioning as "*regular commercial conduct or particular commercial transaction or act*"[398] than the ILC Draft (1991). On the other hand, the ILC Draft (1991) adopted an exhaustive definition of commercial transaction as including and limited to sale of goods and services, contract for loan, guarantee, indemnity, and any other contract of commercial, industrial, trading or professional nature.[399] The ILC definition of commercial activity corresponded with the definition given by the SIA (1978) of the UK. Besides, the FSIA (1976) of the US asks for the commercial activity test for the non-immune assets.[400]

While there are no specific tests in international law, there are some references to tests in prominent national laws such as the FSIA (1976) of the US requires the asset to be 'used for commercial activity',[401] whereas the SIA (1978) of the UK applies the 'use for commercial purpose' test.[402] The convergence between 'commercial activity' and 'commercial purpose' plays a vital role in distinguishing the character of the asset in question. It determines the scope of facts to be considered for judging the nature of use. The activity can be commercial, but the purpose of the act can be public in nature. For instance, investing in financial market is a commercial activity. Hence, investment of sovereign wealth funds is a commercial activity whereas from the

[396] *AIC Ltd.* [2003] EWHC 1357 (QB), [2003] ALL ER (D) 190 [57].
[397] The ILA Draft 1982 (n 142) art III.
[398] ibid, I 1 (C).
[399] The ILC Draft 1991 (n 71) art 12 (1) (c).
[400] The FSIA 1976 (n 37) sec 1610 (a) states, "*the property in the United States of a foreign state…used for commercial activity in the United States shall not be immune […]*"
[401] The FSIA 1976 (n 37) sec 1610 (a).
[402] The SIA 1978 (n 37) sec 13 (4).

analysis of purpose, the proceeds from sovereign wealth funds can be a public fund. The common purposes of sovereign wealth funds are macro-economic development and promotion of national economic interests etc.[403]

The use for commercial activity denotes to a regular use of the asset in commercial activity whereas the use for commercial purpose indicates to the use of the asset in a particular point of time such as the time of cause of action. The terms 'military aircrafts' and the 'aircrafts used for military purposes' should not be used interchangeably. For instance, the Convention on International Civil Aviation of 1944 (the Chicago Convention) adopts a functional approach in case of any State aircraft. State aircraft usually serves public purposes, but it can be used for commercial or non-governmental purposes at a certain point of time. The purpose of the particular voyage is taken into account in order to determine its purpose for the applicability of the Chicago Convention.[404] For the sake of jurisdictional immunity, the Convention for the Unification of Certain Rules for International Carriage by Air (1999) (the Unification Convention) also takes the same approach for State owned and operated aircraft and the cargos therein under art. 3 (1). The nature of the use at the time when the cause of action arises is considered.[405]

In 'commercial activity' test, the transaction in issue where the asset is used is examined. The primary question is whether the key transaction is accomplished on the basis of a private law relationship and secondarily whether the action can be made by an individual.[406] In determining the nature of the commercial transaction, the features of contracts and its purposes are to be taken into account.[407] Even if the contract is commercial in nature, the sovereign is given to explain its purpose to, if the transaction is truly sovereign or not.[408] Test for commercial activity limits the scope

[403] Sovereign Wealth Fund Institute, 'What is a Sovereign Wealth Fund?' <https://www.swfinstitute.org/research/sovereign-wealth-fund> accessed 15 November 2021.
[404] The Convention on International Civil Aviation Convention 1944 (the Chicago Convention) art 3 (b).
[405] The Unification Convention 1999 art 3 (1).
[406] Brownlie (n 117) 328.
[407] The ILC Draft 1991 (n 71) art 2 (2).
[408] The FSIA 1976 (n 37) sec 1603 (d). It defines commercial activity "a regular course of commercial conduct or a particular commercial transaction or act." The SIA (n 37) defines commercial transaction "*(a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages*

of fact examination to the present use whereas the commercial purpose test includes the potential commercial use in future as well although such use is difficult to be proved.[409] On the other hand, the narrow interpretation of commercial activity excludes any activities "*which are incidental or auxiliary not denoting the essential character of the use of the funds in question*."[410] Finally, the commercial activity test scrutinizes the characteristics of transaction where the asset is used instead of the purpose of the transaction. Hence, the purpose test allows to investigate the motive of the State for any commercial activity whereas the activity test reduces the burden of proof for the judgment creditor. For the attribution of the assets, the purpose test corresponds better than the mere activity test.

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

3.5.**Procedural issues in enforcement litigations**

Heß clarified the relation of international law and national procedural law when it comes to foreign sovereign immunity. He commented, "*It is the special feature of state immunity that it is at the point of intersection of international law and national procedural law*".[411] The determination of immunity is a complex question of law and fact. This dissertation is focusing only on the questions of procedural law limited to the sovereign assets in an enforcement litigation. The procedural part in a complex enforcement litigation starts with questions of applicable law and the role of international law. The complex web starts with the determination of the applicable law and its convergence with other relevant legal frameworks. After the applicable law being decided, it comes to interpretation of clauses *e.g.*, waiver clause to scrutinize whether the immunity from execution is waived. The next question comes regarding the evidence proving the commercial use/purpose of the asset in question.

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otherwise than in exercise of sovereign authority." The ILC draft 1991 (n 71) art 10 accepts the same definition of commercial transaction from the SIA 1978 (n 37).

[409] Zdobnoh and Vark (n 378), 169.

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

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

Here, presumption of use, proof of use, standard of evidence, burden of proof etc. play a vital role. The applicable law determines the existence of presumption of use. Thereby, the existence of presumption results at shifting the burden of proof. Furthermore, the applicable law also determines which standard of proof is to apply, therefore, the dilemma among various tests to decide the attribution comes along. The interplay becomes more complicated when the targeted assets have been used for both commercial and public purposes. This part of the study concentrates the procedural questions that the parties to the proceedings and the adjudicatory body investigate concentrating only on the sovereign asset. Finally, it examines the diversity of MoCs as a judgment creditor expects the enforcement litigation to end with.

3.5.1. *Applicable laws*

As the above discussion infers, the use of asset in question is the prime concern for both parties as well as the court. The applicable law governs the determination of ownership and the attribution of the assets. According to the principles of procedural laws, the *lex fori* is applied in quest of the answers to these questions. The *lex fori* may require applying the internal municipal law or the rules of private international law of the forum State. The discussion in the previous chapter shows, the diverse approaches in national legislations when comes to law of foreign sovereign immunity. Nevertheless, the defendant State may have its own regulation governing the transfer or use of the asset and the exhibition of the object etc.[412]

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

[412] Fox (n 5) 373.

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

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

After deciding the applicable law, the court reviews the waiver clause in the concerned contract. A waiver clause to the satisfaction of the court can avoid the further argument on use or purpose of assets for immunity. If the court finds a satisfactory waiver provision sufficient for the targeted asset, the judgment creditor does not need to proceed for the attribution tests. The similar practice is visible in France,[413] Germany,[414] the US[415], the UK[416] *etc.*

The restrictive immunity from execution for the commercial use of the asset and/or waiver from immunity does not bring fruitful results all the time. The outcome of the execution attempts by a petitioner against Russia illustrated the challenges for three different forms of assets, such as, State-owned ships and fighter jets, balance in bank accounts, cultural exhibitions etc.[417] The petitioner, *Noga*, a Swiss company, had a loan agreement with Russia under which Russia defaulted. Pursuant to the waiver of immunity in the loan agreement, the petitioner received an arbitral award in its favor and initiated the execution proceedings in France for a State-owed ship, used for research purpose by the Murmanks State Technical University (MSTU), and the funds

[413] See *Procureur v. SA Ipitrade, France* [1978] 65 ILR 75; *Procureur v. LIAMCO, France* [1979] 65 ILR 78. *Societe Air v. Guathier, France* [1984] 77 ILR 510.
[414] *The Philippines Embassy Bank Account Case,* (n 113) [167], [181], Ground C.1.5 and 6, 185, Ground C.II.3.
[415] The FSIA 1976 (n 37) sec 1610
[416] The SIA 1978 (n 37) sec 13.
[417] *NOGA v. State of Russia*, [10 August 2000], Court of Appeal, Paris; *NOGA v. Murmansk State Technical University and Association Brest* [24 July 2000]; *Noga SA v. The Russian federation* [enforcement of a French award in Switzerland and art. 1506 of the French code of civil procedure] bge/atf 135 iii 136, no. 4a_403/2008 – Swiss international arbitration law reports (sialr) – 2009 VOL. 3 NOS. 1 & 2

in the bank account in the name of the Russian embassy in France and the Russian permanent delegation to the UNESCO and the funds in the name of the Central Bank of Russia.[418] The court denied execution against all the assets. The execution against funds in embassy accounts was rejected because of lack of specific waiver as the court refused to accept the general waiver for the diplomatic ones. The funds in the name of the central bank and the ship were rejected because of the separate legal entities of the Central Bank and the MSTU. The court held that the assets of the State agencies having separate legal entities are liable for the debt of itself not of any third party, and the State hereby was held as third party for this case.[419] Hence, the valid debt of the petitioner remained unpaid due to the immunity of the State from execution although the arbitration proceeding was completed with the general waiver from immunity. Nevertheless, the express waiver of immunity from the foreign State also opens the door for execution to the creditors.

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

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

In 2013, the same judgment creditor filed another enforcement case requesting MoCs against a bundle of Argentine assets such as "*taxes owed by Air France's Argentinian branch to Argentina, oil royalties owed by Total Austral to Argentina, and taxes and*

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

social contributions owed by BNP Paribas's local branch to Argentina"[421] The French Court of Cassation required the same standard of "express and specific" waiver in treaty provisions for granting MoCs. It stated:

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

Such precedents raise the bar of standard of proof for the judgment creditors in enforcement litigation. It also puts the diplomatic assets and the other cross-border assets in the same bucket, although the diplomatic assets enjoy higher level protections. Nevertheless, in 2016, France modified its Code of Civil Enforcement Procedures in 2016. The modified provisions require the waiver clause to be express and special for the diplomatic assets.[423] Similarly, the FSIA (Australia) requires both "express and specific" waiver for the diplomatic and military assets,[424] but not for other assets. In the case of *Commisimpex*.[425] the French Court of Cassation took a creditor friendly approach in interpreting the standard of waiver clause for a successful enforcement case. Instead of being the clause "express" and "specific", mere express waiver of immunity from execution was held sufficient. Such inconsistent interpretation even before the same forum State makes the jurisprudence fragile and unpredictable. The Swiss Supreme Court allowed the attachment of BNP Paribas and the accounts of Central Bank of Russia relying on express waiver clause without any requirement of "specificity."[426]

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[421] *NML Capital v. Republique Argentine et autre* [2013] France, Court of Cassation Civil Division 28 March 2013, (3 decisions) Nos. 10-25.938, 11-13.323, 11-10.450 (NML Capital 2013).
[422] Ibid. translated taken from Jaroslav Kudrna, 'Fall of State Immunity from Execution in France: Let the States Beware' (2016) 19(5) International Arbitration Law Review 133, 136.
[423] The Code of Civil Enforcement Procedures, France (n 269), a L.111-1-3.- Provisional or enforcement measures cannot be taken on the property including bank accounts, used, or intended to be used for the exercise of functions of diplomatic missions of the foreign States or their consular posts, special missions or their missions to international organizations unless there is an express and special waiver [of immunity] by the States concerned."
[424] The FSIA 1985 (n 166), art 31 (4).
[425] [2015] Court of Cassation [Cass] [Supreme Court for Judicial Matters] 13 May 2015,
[426] *Compagnie Noga d'Importation et d'Exportation v. Federation de Russie 5A* [2008] Tribunal Federal [TF] [Federal Supreme Court] 10 January 2008, 618/2007

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

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

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

On the other hand, in some cases, mere acceptance of jurisdiction or agreement to arbitration had been interpreted as implied waiver of immunity from execution. In the case of *Creighton v. Qatar* (2000), the agreement to arbitration was deemed as implied waiver of immunity. The Regional Court of Appeal, Paris interpreted:

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

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[427] *A Co Ltd. v. Republic of X* [1990] High Court, Queen's Bench Division, 2 Lloyd's Rep. 520; 87 ILR 412.
[428] Ibid.
[429] *Orascom Telecom Holding SAE* [2008] EWHC 1841 (Comm)' [2009] 1 AII ER (Comm) 315; [2008] 7 WLUK 862 (QBD (Comm).
[430] The ICC Arbitration Rules 1998 art 28 (6) states, "*Every award shall be binding on the parties. By referring their dispute to arbitration under these Rules the parties undertake to execute forthwith any award. The parties shall be deemed to have waived any remedy capable of being waived*."
[431] *Societe Creighton v Ministre de Finances de l'Etat du Qatar et autre*, [2003] Cour d'appel de Paris [CA], France, Court d'Appel, Paris, 12 Dec 2001 Reveue de l'arbitrage 417, [417] and [418], translation taken from Kudrna (n 422), 138.

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

The third approach acts as an unconvincing stretch and eventually leaves the interpretation at the discretion of the national courts. The tools of interpretation are thereby undoubtedly essential for coherent and predictable precedents. A waiver clause under an international convention may not be sufficient under the domestic law of the forum State in granting MoCs.[433] The forum States' court exercises a vast discretion in interpreting the waiver clauses.[434]

The third approach is the presumption of waiver of immunity from execution if the waiver from jurisdiction is already established. Where the relatively restrictive sovereign immunity is granted for jurisdiction, few forum States interpret the acceptance of jurisdiction as an implied waiver of immunity from execution.[435] They argued that such interpretation ensures the compliance of the judgments given pursuant to the acceptance of jurisdiction. The international conventions are still

[432] James Crawford, 'Sovereignty as a legal value' in James Crawford and Martti Koskenniemi (eds) The Cambridge Companion to International Law, (Cambridge University Press 2012), 117.
[433] Such as the judgment creditor relies on the waiver of the defendant State in an agreement pursuant to art. 53 of the ICSID Convention 1966. The domestic court may interpret the waiver clause not sufficient for the execution. Art. 54 (3) of the ICSID Convention 1966 does not exclude the possibility of domestic Court's interpretation of such waiver while hearing an enforcement proceeding against sovereign assets for the purpose of enforcement of an ICSID arbitral award. See more, Gerlich (n 20) 70.
[434] Discussed critically in 3.5.2 of this Dissertation.
[435] *The Distomo Case*, (n 304).

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

However, the International Court of Justice (ICJ) denied this type of interpretation of forum States.[440] The Chairman of the ILC Working Group observed "*if such power is recognized, there are also different views as to which property may be subject to measures of constraint*."[441] Therefore, States and their assets still enjoy comparatively higher immunity [*albeit* not absolute] from execution than immunity from jurisdiction. The ILC (1999) reported the forum States being inclined to apply restrictive immunity from execution.[442] Besides, the ratification of international instruments forming judicial authorities is interpreted as an express waiver from immunity from execution such as the ICSID Convention,[443] the ECOWAS treaty.[444]

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[436] Australian Law Reform Commission Report no 24, Foreign State Immunity [1984] para 137.
[437] *United Arab Republic* (n 288); *Banque Centrale de la République de Turquie v. Weston Compagnie de Finance e' d'Investissement SA and Another* [1978] Federal Tribunal of Switzerland 65 ILR 417, [424-425], Ground 4d.
[438] *Republique Arabe d'Egypte v. Cinetel*, [1979] Tribunal Federal Suisse, 20 July 1979, 65 ILR 425 at 430, "*A foreign state which in a particular case does not enjoy jurisdictional immunity is not entitled to immunity from execution either unless the measures of execution concern assets allocated for the performance of acts of sovereignty*."
[439] *Condor* (n 114) [401], cited from *Libya v. Rossbeton SRL, Italy* [1989] Italy, Court of Cassation (plenary session) Case no. 2502, 25 May 1989, 87 ILR 63, [67].
[440] *The Jurisdictional Immunities of the State* (n 172) [113].
[441] A/C.6/48/L.4, para 11.
[442] The ILC Report 1999 II (n 234), para 122.
[443] The ICSID Convention 1966, art 53.

In the case of *Government of Zimbabwe v. Louis Karel Fick and Others*,[445] the defendant State was bound by the Protocol of the ECOWAS treaty. The South African Constitutional Court interpreted the ratification of the ECOWAS treaty and its Protocol as an express waiver from the jurisdiction of the court of the forum State and enforcement as well. Therefore, such presumption can reduce the prolong debate on the interpretation of waiver clause for immunity from execution.

3.5.3. *Presumption of use*

There are two types of presumption of use: the presumption in law and the presumption in fact. In case of presumption in law, also known as statutory presumption, the court presumes the use of the asset either as commercial or as sovereign pursuant to the statute in effect. On the other hand, the presumption in fact applies where the court presumes the use of assets by virtue of establishing a *prima facie* case, either by the plaintiff or by the defendant State. In both cases, the opposite party has the option to rebut the presumption by submitting contrary evidence. For instance, the court presumes the sovereign use of a certain funds in diplomatic bank account by virtue of a certificate from the head of the diplomatic mission; or hypothetically, the court may presume the commercial use of certain funds when the plaintiff primarily submits evidence of previous commercial use of those funds. In absence of the statutory presumption, the risk of losing immunity lies on the State[446] unless it proves the *prima facie* case in favor of the sovereign purpose of the asset to raise the presumption in fact.

The general prohibition on granting any MoC against certain sovereign assets having sovereign purpose, raises the presumption of use.[447] Walter commented that the absolute immunity principle was shifted to restrictive immunity by way of raising the presumption of use.[448] For instance, The SIA (1978) of the UK in section 13 (2) states, "*the property of a State shall not be subject to any process for the enforcement*

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[444] The ECOWAS Treaty 1975 and revised on 1993. Protocol A/P.I/7/91 on the Community Court of Justice, article 16, 19 and 22 (3).
[445] *Government of Zimbabwe v. Louis Karel Fick and Others* [2013] the Constitutional Court of South Africa, ZACC 22.
[446] Dr. Peter Fritz Walter, 'Evidence and Burden of Proof in Foreign Sovereign Immunity Litigation: A Procedural Guide for international lawyers and Government Counsel' (Doctoral thesis, Sirius-C Media Galaxy LLC Delaware, 2017) 583.
[447] Fox (n 5) 380.
[448] Walter (n 446), 576.

of a judgment or arbitration award or in an action in rem, for its arrest, detention or sale." Such language raises the presumption of public purpose of all sovereign assets. On the other hand, the FSIA (1985) of Australia in section 32 (1) states the attachability of the commercial asset of foreign State. Its section 32 (3) defined, "*Commercial property is a property other than diplomatic property and military property that is in use by the foreign State concerned substantially for commercial purposes*." From such text, the presumption goes in favor of the commercial use of all the assets and the presumption of sovereign use of diplomatic and military assets. The legal implication of such presumption is that the party relying on the benefit of presumption does not have the burden of proof to establish a *prima facie* case.[449]

3.5.4. *Burden of proof*

The presumption can be rebutted with evidence of the contrary use. With the presumption, the burden of proof lies on the party who intends to rebut the presumption. Cases against the bank accounts of the diplomatic mission, assets of the central bank are the examples. Hence, the burden of proof depends on the nature of the presumption. For the presumption in fact, the burden lies on the party who intends to establish the prima facie case. For the presumption in law, the burden of prove falls on the party who intends to rebut the presumption. Therefore, the party intending to rebut, relies on the contrary use of the asset. Such as, for the enforcement proceeding before an Australian court, the State must prove the public purpose of the assets as the presumption is in favor of commercial use. On the contrary, in a British court, the claimant has to rebut the presumption of sovereign use by proving the commercial use of the assets.[450] The Spanish Constitutional Court commented on the standard of burden of proof for the immunity or non-immunity of assets:

> The degree to which property held by foreign state in the state of forum […] is treated as not immune from execution varies from refusal to recognize even the slightest exception to immunity on the one hand to notably

[449] Ibid

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

> advanced position which requires that such property be unequivocally allocated to activities *jure imperii* on the other hand.[451]

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

Given the undetermined burden of proof, the defendant State may complicate the situation by changing its use or allocating it for some public purpose. Such attempt causes the judgment creditor severe difficulties to prove the commercial use or purpose. The challenge is higher with the mixed use of the assets *e.g.*, the bank account of the diplomatic mission.[454] Therefore, Schreuer advocated for shifting the burden of proof on the defendant State to present evidence that the MoCs would result at interference to its sovereign functions.[455] In the case of *Abbott v. South Africa*, (1992),[456] the dissenting judge also suggested the same shift of burden of proof. Belgian court shifted the burden of proof on the sovereign as the purpose of account although the decision was subsequently reversed by the Brussels Court of Appeal in 2002. The Brussels court observed the existence of power of the receiving State under article 36 (2) of the VCDR to check the use of bank account. It was held:

> It not to be contrary to the letter and spirit of the Convention (VCDR) for the nature of the deposits of funds made to an embassy to be debated before the courts of the receiving state particularly where the state acting as an ordinary individual 'entered into a contract according to the form of private law […]

[451] *Abbot v. Republic of South Africa* [1992] ILR 113 (19) 413 [420].
[452] *The Alcom* case (n 394).
[453] Georges R. Delaume, 'the Foreign Sovereign Immunities Act and Public Debt Litigation: Some Fifteen Years Later' (April 1994) 88(2) the American Journal of International Law 257, 266.
[454] Discussed in 4.2.1.4 of this dissertation.
[455] Schreuer (n 20) 155.
[456] [1992] Spain Constitutional Court (2nd Chamber), 1 July 1992, 113 ILR 412, [428].

> behaved as a private person […] and clearly and specifically intended to waive its prerogatives as sovereign power.[457]

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

3.5.5. *Standard of evidence*

For the commercial use, assets can be tangible or intangible. The proof of use for tangible assets are easier out of its ownership and possession. It can be difficult with the change of user *e.g.*, warship. Proving the purpose of intangible assets such as funds, security deposits in banks in the name of the foreign State is complex. The immune assets require minimum evidence as to their use or purpose. Such as the Brussels Convention (1926), amended by its additional protocol (1934), accepts a certificate signed by the diplomatic representative of the defendant State stating the non-commercial purpose of the ship or cargo as conclusive evidence unless proved otherwise.[459] Thereby the burden of proof is shifted upon the judgement creditor.[460] In case of failure to prove otherwise, the ship and its cargos are protected from any MoC.

The standard of evidence varies in terms of the applicable law and the presumption of use but has no impact on the burden of proof.[461] In some cases, absence of use of the asset acts as evidence in favor of the plaintiff. The FSIA (1985) of Australia states the attachability of vacant assets.[462] Therefore, the plaintiff may need to prove the asset not in use for the time being. In order to prevent the grant of any MoC, the defendant State needs to prove the allocation of assets for sovereign purpose. Similar practice

[457] *Iraq v. Dumez* [1995] 106 ILR 285.
[458] Charles T Kotuby and Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, (Oxford University Press, 2017) 157-202.
[459] The Brussels Convention 1926 (n 186) and the Additional Protocol to this Convention 1934 art 3, 5.
[460] Shaw (n 37) 747.
[461] Walter (n 446), 579.
[462] The FSIA 1985 (n 166) art 32 (3) (b).

has been shown in a Swiss case of *United Arab Republic v. Mrs. X*, (1960)[463] where the Swiss Federal Tribunal permitted MoC against the sovereign funds which were not earmarked for any specific purpose during the continuation of the proceeding. In this case, the defendant State claimed the previous use of the funds for weapon purchases. On the other hand, for the use of sovereign asset, laws from the UK, Singapore, Pakistan require a reduced standard of proof upon receiving the certificate of use form the head of the diplomatic mission, or the concerned ministry.[464] The US court relies on the affidavit or testimonies from the head of missions.[465]

The nature of the certification in question broadly depends on the discretion of the court. In *Harris v. Vao Intourist, Moscow* (1979), the US court accepted a letter from the Soviet Ambassador to raise the presumption of use.[466] In terms of the conclusiveness of the certificates States' practices also vary. The German Constitutional Court held the further investigation as to the public purpose/use of sovereign asset.[467] Nevertheless, the evidential value of the certificate varies based on the nature of the asset and the hierarchical position of the person certifying the use.[468] Such as, the certificate acts more as conclusive evidence for the military assets, central bank assets, where the statutes provide stricter immunity rules.[469]

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

[463] [1960] Switzerland, Federal Tribunal 10 February 1960, 65 ILR 384, [392].
[464] Walter (n 446), 576.
[465] Ibid., 579. Affidavit is the written form of declaration as to the statement of facts, declared as true, by the person signing thereof.
[466] [1979] EDNY 481 F Supp 1056; [1982] 63 ILR 318.
[467] *The Philippines Embassy Account Case* (n 113).
[468] Walter (n 446), 586, commented, "*the quality of proof offered in support of a foreign state's immunity claim notably depends on the position of the witness in the internal hierarchy of the foreign state*."
[469] Ibid, 578.
[470] The VCDR 1961 (n 191) art 31 (2).
[471] [1982] EDLa 515 F Supp 900, 63 ILR 584.

declaration of the witness of the plaintiff as evidence, although finally dismissed the claim whereas in *Mol Inc. v. Bangladesh* (1983),[472] the plaintiff deposited the affidavit in support of the motion before the US court.

3.5.6. *Proof of use of the assets*

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

For both tangible and intangible assets, past, present, and future uses are judged. The FSIA (1976) of the US asks for past use as "*property used for commercial activity*." The SIA (1978) of the UK goes for both past and future use as it says, "*used or intended to use for commercial purpose*" However, the French Court emphasized on origin and destination of the asset. The advocate general in the case of *Eurodif* (1984) mentioned the intended use is difficult to be proved without specific allocation by the State.[474] It was stated:

> The absence of any specific allocation of the funds in disputes makes it necessary to have recourse to the test of ownership and at the same time to their designation as public funds whose use will depend on a decision at the discretion of the owner. the necessarily voluntarist nature of the notion of the intended use of funds thus becomes a matter of pure discretion wherever as here the foreign government has not made its intentions known explicitly […] in practical terms, the result will be tantamount to a return to the absolute nature of immunity from execution. The absolute nature of

[472] [1983] D Or 572 F Supp 79, [82].
[473] Discussed in 3.3.1 of this dissertation.
[474] Fox (n 5) 402.

> immunity in such circumstances would constitute a retreat to the time when governmental activity was confined to acts of public authority […] it would seriously endanger the security of international economic relations if states could merely by remaining silent, protect themselves from any measure of execution aimed at securing compliance with their obligations.[475]

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

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

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

3.5.7. *Nexus*

The judgment creditors can get paid only when they find some assets in the forum State, available for attachment. Nexus requirement prevents the arbitrary judicial decisions against the sovereign assets which may have no connection with the forum State and/or the dispute in question. Conventions and case laws identified several factors for the nexus. The ILA Draft (1982) required the nexus between the asset and the claim in questions.[478] However, unlike the ILA Draft (1982), the Basel Resolution (1991) made the assets of any State instrumentalities available for the debt of the State

[475] *Islamic Republic of Iran v. Eurodif, Court of Cassation* [14 March 1984], 77 ILR 513, [520], [521]. 598 UN legal materials 1062. Submission made to the court by advocate general Gulphe, JDO (1984).
[476] The FSIA 1985 (n 166) art 32 (3) (a), (b).
[477] *Non-Resident Petitioner v. Central Bank of Nigeria* [1977], UN Legal material 290 at 292, translated in Fox (n 5) 397.
[478] The ILA Draft 1982 (n 142) art VIII A 2.

irrespective of its legal personality[479] whereas the legal identification of the liable entity would be a relevant factor to attach the sovereign assets for execution. The ILC draft (1991) also attached some linking conditions under article 18.[480] Another commonly required nexus was between the asset in question and the liable entity.[481] Finally, the UN Convention (2004) asks for the connection of the targeted asset with the defendant entity and the territorial nexus with the forum State.[482]

According to the *lex fori* of some jurisdictions, assets are required to have nexus with the claim and/or the forum State. Among the national jurisdictions, the FSIA (1976) of the US requires the nexus between the claim and the asset in question for execution. For instance, in the execution of sovereign debt litigations, the lender needs to prove the connection of his claim with the asset subjected to execution.[483] The territorial connection is essential to succeed in an enforcement litigation in the US. The possible territorial nexus between the asset and the US as forum State can be proved when the asset has an *in-situs* position in the forum State.[484] For the intangible assets having no physical situs, the nexus is determined by legal fiction, accepted by the court. Such as, for the garnishment order, the US court considered the location of tangible asset for nexus, precisely at the point when it decided the question of immunity from execution, not when the litigation was filed or the garnishment order was sought.[485] On the other hand, for the intangible asset, the situs was the location of the garnishee when the question of immunity was being determined.[486]

Similar court practices in relation to the nexus requirement are visible in other forum States. In the *Julius Bar* case (1956), the place of payment in Switzerland was regarded as the origin of dispute, thereby the connection with the forum State.[487] In the case of *Libya Oil Concession* (1981) case, the Swiss court refused the execution because of lack of the nexus of the dispute with Switzerland.[488] The French court

[479] The Basel Resolution 1991 (n 237) art 4 (4) (b)
[480] The ILC Draft 1991 (n 71) commentaries to art 18 (1), para 7.
[481] Ibid, art 8 (1) (c).
[482] The UN Convention 2004 (n 41) art 19 (c).
[483] The FISA 1976 (n 37) s 1610 (a) (2); *Republic of Argentina v. Weltover Inc.* [1992] 2nd Cir Court 112 S. Ct. 2160.
[484] Yang (n 20) 403
[485] *FG v. Congo* [2006] 5th Cir 455 F 3d 575, [590].
[486] Ibid, [589-590].
[487] *Royaume de Grece v. Banque Julius Bar & Cie*, [1956] Tribunal 107 suisse suissesse, 6 June 1956, ATF 82 1 75; 18 ILR 195.
[488] *Liamco v. Libya,* [1981] Ad hoc Arbitration Arbitral award 12 April 1977, 20 ILM 1.

followed the same requirement of nexus in the *Eurodif* case (1979). It required the nexus between the commercial activity which was the origin of the assets and the underlying claim.[489] However, such nexus was not essential when a waiver of immunity from execution was there.[490]

Among the other dominant jurisdictions, the UK does not require nexus between the asset and the claim as it permits attachment of any assets available in its territory.[491] The German court[492] as well as the Dutch court did not require the territorial requirement or any connection between the cause of action and the forum State.[493]

This dissertation stands in favor of nexus requirement among the asset in issue, the defendant State, the claim in question and the forum State to prevent the multiplicity of proceeding and the arbitrary enforcement decisions from the dominant forum States. However, the burden of proof of the required nexus is undetermined.[494] The challenge also arises the direct link should be either between the asset and the claim in question, the dispute and the forum State, the claim, and the holder of the assets. The last one opens the question of State instrumentalities. In addition, the court has the authority to grant attachment order against the asset specifically allocated for the debt [known as earmarked assets].[495]

3.6. Diversity in MoCs

An enforcement litigation starts with the expectation of MoCs against the asset and ends with the grant or refusal of the order against the sovereign asset. It is deemed as a success for the judgment creditor when MoC is granted. The defendant State succeeds if the court denies it. Two determining factors that control the nature of the MoC to be granted are the specific measure that the judgment creditor asks for

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[489] *Republique democratique du Congo v. Syndicat des coproprietaires de l'immeuble Residence antony CHatenay* [2005] France, Court of Cassation, 25 January 2005 No. 03-18.176.
[490] *Creighton* (n 431) [418]. The court observed, "*Considering that assets assigned by the state to the satisfaction of the claim at stake or allocated by it for that purpose can be seized failing which any other foreign state's property situated in the territory of the forum and used for commercial purpose can be seized*." Translation taken from Kudrna (n 422) fn 17.
[491] The SIA 1978 (n 37) sec 13 (3) and (4).
[492] *Non-resident Petitioner* (n 280).
[493] *Société Européenne d'Etudes et d'Enterprises v. Socialist Federal Republic of Yugoslavia*, [1975] Supreme Court, Netherlands Judgment of Oct 26, 1973, 65 ILR 356, 14 ILM 71 (1975),
[494] Delaume (n 453), 266.
[495] Discussed in 4.3.3 of this dissertation.

depending on the asset in question, and the legal system of the forum State. Hence, diversity is visible from forum State to forum State and the kind of assets.

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

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

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[496] Fox (n 5) 372.
[497] Such as, Belgium referred as safeguarding measures, attachment in execution; the FSIA 1976 (n 37) term as attachment in aid of execution, execution, the UK jurisdiction name in the SIA 1978 (n 37) as enforcement of judgment etc.
[498] The ILC Report 1985 (n 330), 55 para 230.
[499] The ILC Draft 1991 (n 71) commentary to part IV, para 2.
[500] Yang (n 20) 378.

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

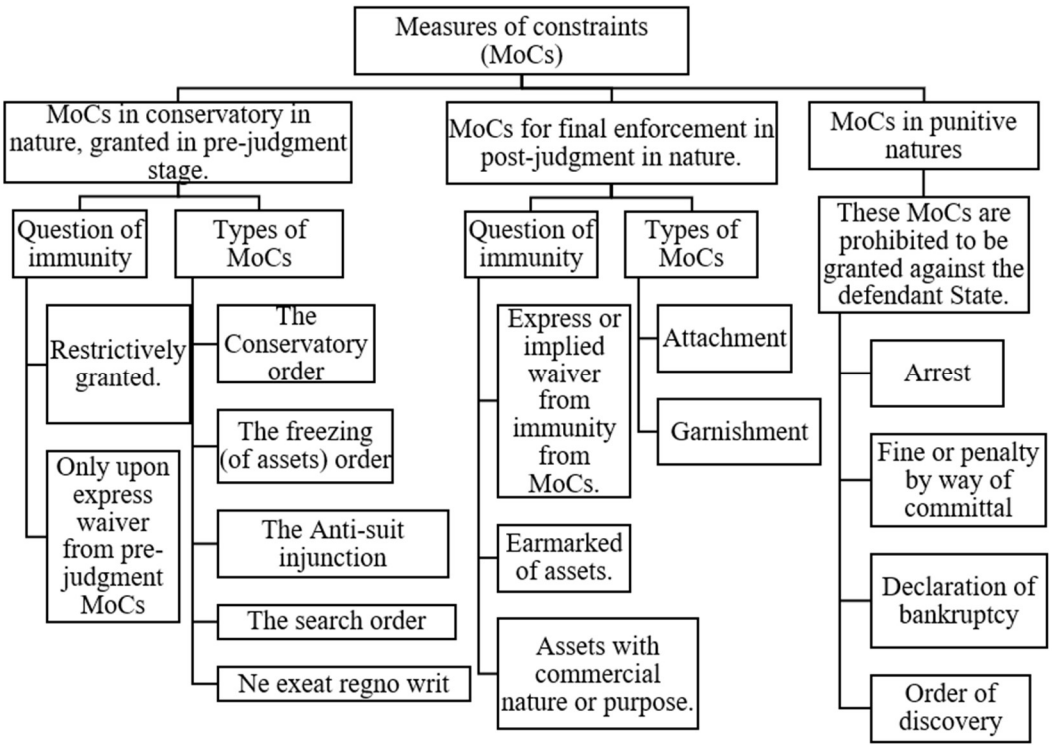

Figure 2: Types of measures of constraints

Certain common forms of the MoC are not applicable for the States without disrupting the State relations or interfering the internal sovereignty of the foreign State. To avoid such any adverse impacts, the courts are reluctant to order specific performance upon the defendant State, or order of arrest of the concerned officials in civil prison etc. for the execution proceedings.[503] In the case of *Democratic Republic of Congo v. Belgium* (2000), the ICJ reaffirmed the prohibition on issuance of arrest warrant against the officials of the foreign sovereign. In this case, the domestic court

[501] The *in rem* MoCs are passed to be bound by any persons (over whom the court giving the order has jurisdictions) regardless of the relationship with the dispute and/or the assets, such as the *Mareva* Injunction. On the other hand, the *in personem* MoCs are passed against the persons involved in the dispute and/or the assets in question, such as the Garnishment order, the Anton Piller order.
[502] Yang (n 20) 374.
[503] *The Radiation Contamination Claim* [1988] Australian Supreme Court 14 April 1988, 86 ILR 571. The court denied granting injunction order against the foreign sovereign from building a nuclear reactor in the defendant state's territory.

of Belgium issued an arrest warrant against the minister of foreign affairs of Congo and circulated it internationally for execution. The ICJ held such measures in violation of international obligation of the forum State, "*in that it failed to respect the immunity of that Minister and more particularly infringed the immunity from criminal jurisdiction and the inviolability then enjoyed by him under international law*."[504] Following the same line of argument, the SIA (1978) of the UK prohibits the imposition of fines for failure of the State to disclose any information,[505] injunction and specific performance or recovery of land or other assets.[506] The Dutch courts also refused to declare a foreign State bankrupt, stating "*this (declaring the foreign state bankrupt and appointing trustee for administration of the bankruptcy proceeding) would constitute an acceptable infringement under international law of the sovereignty of the foreign state concerned*."[507] As the punitive MoCs are not granted against sovereign assets in an enforcement litigation for commercial judgment debt, rather against its officials, no further discussion has been made in this regard. For the purpose of this dissertation, the pre-judgment and the post-judgment MoCs are discussed in detail.

3.6.1. *Prejudgment MoCs*

As the name suggests, prejudgment attachment means the attachment made before the entry of judgment and/or recognition of the arbitral award, against the assets irrespective of their use or intended use.[508] Yang distinguished between the post judgment MoCs from the prejudgment attachments as the latter is granted *in rem* whereas the formers are *in-personem*.[509] The law of foreign sovereign immunity is still under development when it comes to prejudgment MoC. The international conventions and national legislations take stringent position for prejudgment MoC whereas few case laws show the grant of prejudgment. The ILC draft (1991) had no express provision in this regard but its commentary implied a bar on prejudgment

[504] *The Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)* [2002] Judgment of 14 February 2002 para 70; Antonio Cassese, When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case (2002) 13 European Journal of International Law 853.
[505] The SIA 1978 (n 37) sec 13 (1).
[506] Ibid, sec 13 (2).
[507] *WL Oltmans v. The Republic of Surinam* [1992] the Dutch Supreme Court, 28 September 1990, NYBIL 442 [447].
[508] Delaume (n 453), 270
[509] Yang (n 20) 385.

attachment.[510] On the other hand, the ILC Report (1999) elaborated the pre-judgment attachment available in case of advance or *ad-hoc* consent thereto, as and when the international law permitted or against the earmarked assets for the debt, the assets owned by the respondent State agency having separate legal entity.[511] Some jurisdictions allow prejudgment attachment only because the assets in question are in control of the forum State. This kind of jurisdiction is called *'jurisdictio ad fundandum*' which is considered as exorbitant by some States. The Constitutional Court of South Africa granted prejudgment attachment on the ground that the court jurisdiction based on the presence of the assets within its territory. It relied on the commercial nature of the transport contract as the source of the dispute.[512]

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

The courts are found hesitant in granting prejudgment attachments than the final execution ones. The domestic courts are open to deny the defense on immunity from execution for final execution orders in case of commercial activities, waiver from immunity, consent to the proceedings *etc.* For the pre-judgement attachment orders, the courts take more stringent position than in final execution, such as for prejudgment attachment, express waiver is needed whereas for the final execution, waiver can be explicit or implied.[514] The prejudgment attachments are permitted only

[510] The ILC Draft 1991 (n 71) commentary to art 18 (1), para 4.
[511] The ILC Report 1999 I (n 232) para 80.
[512] *Forth Tugs v. Wilmington Trust* [1987] 3 SLT 153. *Kaffraria Property Co (PTY) v. Govt. of Zambia* [1980] SALR No. 2.
[513] Yang (n 20) 387; discussed in 3.5.2 of this dissertation.
[514] Ibid.

with the written consent of the State.[515] Again, different practices are available at the different jurisdictions, for instances, the French court did not distinguish its power to grant pre and post execution orders.[516]

In *Libra Bank Ltd. V. Banco Nacional de Costa Rica*, the US Court of Appeals for the Second Circuit granted a prejudgment order relying on a promissory note issued by Costa Rica, waiving all claims of immunity in all legal proceedings.[517] Subsequently, pending the litigation before the Courts of Appeal, Costa Rica closed the accounts in New York and the Court denied to order Costa Rica to return the fund in the US.[518] The US courts also allowed a mandatory injunction against foreign State agency to extend a letter of credit in favor of the private judgment creditor as a preventive MoC.[519]

The UK courts reasoned the prejudgment attachments stating that such orders were not in contrary to international law given the commercial assets.[520] The French and the Italian courts also granted prejudgment attachment to the extent of preventing the transfer from the territory of forum State. The French requirement of link between the assets and the claim makes the jurisdiction of interlocutory orders limited. The German court limited such orders against the State agency with separate legal entity only not the State itself.[521] The New Zealand court denied distinguishing between the question of immunity from execution and the immunity from adjudication, therefore, granted the measures of restrains against the foreign sovereign.[522] With the increasing number of execution litigations, the courts are being innovative in grating the MoCs against the foreign sovereign assets,[523] and thereby resulted as inconsistency and

[515] The UN Convention 2004 (n 41) art 18; the ECSI 1972 (n 41) art 23; the SIA 1978 (n 37) sec 13 (2) (a); the FSIA 1976 (n 37) sec 1610 (b).
[516] *Islamic Republic of Iran* (n 475); *Caisse v. Societe Midland*, France [1983] 77 ILR 524.
[517] *Libra Bank Ltd. v. Banco Nacional de Costa Rica* [1982] 2nd Cir, 676 F 2d 47.
[518] [1983] SDNY 570 F Supp 870, [885].
[519] *Attwood Turkey Drilling v. Petroleum Brasileiro* [1989] 5th Cir 875 F 2d 1174.
[520] *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] UK Court of Appeal 64 ILR 111; *Hispano Mercantil SA v. Central Bank of Nigeria* [1979] UK Court of Appeal, Civil Division 25 April 1979 64 ILR 221, 2 Loyd's Rep. 277.
[521] *Re Prejudgment Garnishment against National Iranian Oil Co*. [1984] German Federal Constitutional Court judgment on 12 April 1983 ILM 22, 1279.
[522] *The New Zealand Wine Box Case, Controller and Auditor General v. Sir Ronald Davidson* [1996] the New Zealand Court of Appeal, NZLR 517 and 319.
[523] For instance, although the order of discovery is not granted against the foreign sovereign, the US Supreme Court upheld the order of discovery against the Republic of Argentina in the case of *Republic of Argentina v. NML Capital Ltd*. [2014] the US Supreme Court 134 S.Ct. 2250 and [2014] 134 S.Ct 2819 (2014).

uncertainties. Despite the restricted position of international conventions, national legislations and the case-laws, this dissertation argues in favor of the pre-judgment MoC with possible safeguards protecting the converse interests of the parties.

*3.6.1.1.*The search or discovery order and the conservatory orders

Because of confidentiality between the sovereign owner and the holder of sovereign issues, judgment creditor faces challenges in locating sovereign assets within the territory of the forum State. In some cases, search order or discovery order is requested to the court. Such as According to the banker-client confidentiality, banks usually deny providing any information on its clients including the sovereign ones. With order, the judgment creditor becomes able to collect information of the sovereign bank accounts, their balance, and past uses. Such order is known as *Anton Piller* order in common law jurisdictions.[524] According to this order, the plaintiff receives an order from the court to discover the assets of the defendant State as evident for litigation and/or the subject matter of the freezing injunction without prior notice given to the defendant. This is also an *in-personem* order, the violation of which constitutes the contempt of court.

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

The ECSI (1972) duly recognized the purpose of the conservatory seizure *i.e.*, to ensure the final execution of the judgment.[525] Therefore, this kind of order is granted only for the asset which is involved in dispute. The judgment creditor seeking a conservatory order needs to prove an arguable case along with an irreparable loss if the order is not granted.[526] In the enforcement litigation against the foreign sovereign, the judgement creditor is required to show an imminent risk of removal of the asset

[524] *Anton Piller v. Manufacturing* [1976] EWCA Civ 12, Ch 55.
[525] The Explanatory Report on the ECSI 2006 (n 181) para 106, commentary on art 26.
[526] *Coalition for Reform and Democracy (CORD) v. Kenya National Commission on Human Rights,* Kenya [2014] petition on 628 and 630 of 2014, para 60.

from the jurisdiction of the court before the settlement of the case.[527] On the other hand, in order to prevent the court from granting such order, the foreign State needs to show the serious interference with its sovereign functions pursuant to the seizure order.[528]

There is another order called the *saisie- arrêt*. It means the attachment order against the asset held by a third party for the benefit of the claimant. The major difference between these two is that the first order is given even when the asset is in possession of the State, therefore it is an *in personem* order. On the other hand, the latter is granted against the third party holding the assets as an *in-rem* order. Nevertheless, in both cases, authority of the State reduces over the asset to a certain extent such as, disposal or removal of the asset from the territory of the forum State or creating new encumbrances thereover.[529]

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

The difference between the freezing injunction and the conservatory seizure is that the scope of the former covers all the assets within the territorial control of the jurisdiction whereas the later has restricted scope of only the asset in connection with

[527] Fox (n 5) 372.
[528] Hans Van Houtte, 'Towards an Attachment of Embassy Bank Accounts' (1986) 19 *Revue belge de droit International* 70.
[529] Stefaan Voet and Pieter Gillaerts, 'Cross Border Enforcement of Monetary Claims- interplay of Brussels 1, A Regulation and National Rules' (National Report University of Maribor Faculty of Law, August 2018), 2.
[530] *R v. Consolidated Fastfrate Transport Inc*. [1995] 40 CPC 3d 160.

the dispute and/or the claim. In the case of *Aetna Financial Services Ltd. v. Feigelman*, the Canadian Supreme Court granted the freezing order in limited cases where "*there is a genuine risk of disappearance of assets, either inside or outside the jurisdiction*."[531] Because of the broader scope of the freezing order is granted in exceptional cases. It becomes rarer in cases involving sovereign interests. It was briefly granted against the Central Bank of Nigeria in multiple cases.[532] Two layers of safeguards were practiced in this regard. At first, while deciding whether the freezing order should be passed against sovereign assets, Justice Saville emphasized on the prior determination of the question of immunity instead of discharging the petition for freezing order as an interlocutory matter.[533] Even after the determination of immunity questions, the standard of proof was higher for the cases against the sovereign debtor. Donaldson MR refused the judgment creditor's prayer for a freezing order against the Egyptian government. He reasoned his judgment relying on the absence of "*solid evidence that a major friendly foreign state with funds in this country was intending to remove them simply to avoid paying an arbitration award, albeit one for a quiet for large amount*."[534]

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

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

[531] *Aetna Financial Services Ltd. v. Feigelman,* [1985] 1 SCR 2.
[532] *Trendtex v. Central Bank* [1977] QB 529, [572]; *Hispano* (n 552), [279-280].
[533] *A Company Ltd.* (n 22), [524-525].
[534] *SPP (Middle East) Ltd.* (n 149).
[535] F.M. Auburn, 'Ne exeat Regno' (Nov. 1970) 28(2) The Cambridge Law Journal, 183.
[536] Yang (n 20) 385.

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

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

Such orders are inconsistent with the international comity followed by the US courts.[540] The US Supreme Court defined comity in *Hilton v. Guyot*:

> Comity […] is the recognition which one nation allows which its territory to the legislative, executive or judicial acts of another nation, having due regard

[537] George A. Bermann, 'the Use of Anti-Suit Injunctions in International Litigation' (1990) 28 Columbia Journal of Transnational Law 589, 589.
[538] [1994] 43 F 3d 65 (3rd Cir).
[539] *The Republic of the Philippines v. Westinghouse Elctro. Corp*. [1994] 43 F 3d 65 (3rd Cir) [71].
[540] William S. Dodge, 'International Comity in American Law' (December 2015) 115(8) Columbia Law Review 2071.

> both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[541]

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

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

The prejudgment MoCs interfere to the public functions of the defendant State. Nevertheless, the findings of this dissertation suggest that the interference can be

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[541] [1895] 159 US 113 [163-64].
[542] Tariq Mundiya, 'Extraterritorial Injunctions against Sovereign Litigants in US Courts: The Need for a Per Se Rule' (1995) 44(4) International & Comparative Law Quarterly 893, 895.
[543] [1876] 3 Ch D 62 [69].
[544] *Republic of Costa Rica v. Erlanger* [1876], 3 Ch D 62 [68].
[545] *Connop v. Varena Pty Ltd* [1984] 1 NSWLR, 71.
[546] *Ministry of Foreign Affairs of the Republic of Italy v. Paula Simeone*, [2016] Docket number: D 4356/2011 District Court of Queensland, (13 April 2016, 24 June 2016) p 25.
[547] *Re Independent State of Papua New Guinea* [1999] 2 Qd R 365

reduced with the establishment of prima facie case of commercial use of the asset in question. Instead of granting an umbrella injunction covering all the possible assets of the defendant State, the prejudgment MoC can be limited to the targeted asset only. Furthermore, interests of the parties to the enforcement litigation can be balance with the application of appropriate interpretative tools which has been discussed in detail in the fifth chapter.

3.6.2. *Post-judgment MoCs*

The post-judgment MoCs are granted against the sovereign assets in question for the final execution of the judgment. The above chart illustrates the common post-judgment MoCs. Notwithstanding the narrow approach of the court in granting the MoC against foreign States, there are usually two types of post-judgment MoCs granted by the courts depending on the control of the asset and the rights of third party. If the defendant State has the control over the asset, the attachment order is given. Alternatively, if the asset is at the control of a third party and/or encumbered with any third party's right, the garnishment order is ordinarily granted.

3.6.2.1.Attachment

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

The second issue could be discussed in light of the case of *Crystallex International Corporation v. PDV Holdings*.[550] In this case, the private judgement creditor targeted the assets of State-owned oil and gas company including the oils to be sold by PDV Holdings to a private buyer. Despite the other legal issues involved in this case, such as, attachability of the assets of SOE (discussed later), the claimant expects to attach

[548] Voet and Gillaerts (n 529), 2.
[549] [2010] 627 F. 3d 1117, 1131-32 (9th Cir).
[550] [2017] Case No. 16-CV-1007 (D.Del.) (the US).

the oil and sell them otherwise (privately or publicly) to recover their judgment value. It was hypothetically argued that if the oil in question was sold under the FOB (free on board) Venezuela shipping terms, the oil would have not been subjected to attachment order,[551] as in FOB contracts, the title to the property was shifted upon the loading of the oil in ship at the port of origin. In case of refusal of the attachment order, the claimant also requested for the garnishment order for final enforcement of the judgment.

3.6.2.2.Garnishment

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

The questions of assets owned by the SOE and the territorial location thereof play vital role before granting garnishment order. The French court ignored the separate entity of the SOE in law and upheld the garnishment order against the assets of the

[551] Kenneth Reisenfeld, Mark Cymrot and Joshua Robbins, 'Suits Against Foreign Sovereigns: Mixed Bag for Energy' Cos. Law360, (17 January 2017 New York)
<https://www.bakerlaw.com/webfiles/SuitsAgainstForeign.pdf> accessed 4 April 2021.
[552] *Alcom* (n 394); *Phillip Brothers v. Sierra Leone*, England, 1993/1994 [1994] 1 Lloyd's Rep. 111.
[553] [2002] 313 F.3D 83.
[554] *Connecticut* (n 294) [247], [251].
[555] Ibid.; *AF-CAP* (n 52), [364]; *FG Hemisphere v. Congo* [2006] 5th Cir 455 F3d 575.

SOE in the cases filed against the Soviet Trade Delegation.[556] In the *FG Hemisphere* case, the US court required the assets to be in US for the garnishment order,[557] whereas in the case of *Neustein v. Indonesia*, the Austrian court granted the garnishment order in cases when the assets was outside its jurisdiction.[558] Hence, the contradictory practices are available regarding garnishment order, as to the ownership of the property, territorial nexus of the property and the forum State etc. Therefore, nexus is a pre-requisite for the post-judgment MoC.

3.7. **Conclusion**

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

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

[556] *NIOC Revenues Case*, Germany [1983] 65 ILR 215 [221]; Ground AI, NIOC Legal State Case, Germany [1980] 65 ILR 199.
[557] *FG Hemisphere* (n 555) [586].
[558] *Neustein v. Indonesia* [1958] Oberster Gerichtshof, 6 Aug 1958, 65 ILR 3 [9].
[559] The ILC Draft 1991 (n 71) art 22 (1).
[560] Ibid art 22 (2).

physical control as well as control over its income should be taken as a trait of ownership.

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

The validity of the immunity in question lies in international (customary) law and/or the national law of the forum State. However, procedural matters are determined according to the law of the forum (*lex fori*) such as forum non-convenience, applicable law, burden of proof, presumption of use *etc.* The varieties in the procedural standard results at the inconsistent practice of domestic courts because of the underlying differences in their *lex fori* regarding the law on foreign sovereign immunity.[561] Therefore, cases regarding each specific asset would give a detail view of the judicial approach. Where this chapter has taken an overall analysis of substantive and procedural issues of enforcement litigation, the next chapter scrutinizes the case laws under the heads of immune and non-immune assets followed by the commonly targeted sovereign assets.

[561] Bankas (n 16) 341.

Chapter 4: Sovereign assets under scrutiny

4.1. Categories of sovereign assets and their interpretation

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

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

[562] Badr (n 20) 108.
[563] The ILA Draft 1982 (n 142) art VIII.
[564] The ILC Draft 1991 (n 71) art 19 (1).
[565] The ILA Draft 1982 (n 142) art VIII (A).
[566] Fox (n 5) 401.
[567] Zdobnoh and Vark (n 378), 166.

agency, the separate legal standing and control of the defendant State in the management of the State agency matter the most.

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

4.2.Immune assets

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

In relation to the adherence of immune assets in some national legislations, three approaches are available. The first approach is to restate some of the assets from the list in the national legislations and in some cases, add new assets to the list. Australia, Russia, France, Belgium etc. follow this approach. For instances, the FSIA, 1985

[568] The ILA Draft 1982 (n 142) art VI (c).
[569] The ILC Draft 1991 (n 71) art 19.
[570] The UN Convention 2004 (n 41) art 21 (1), stating "*The following categories, in particular, of property of a State shall not be considered as property specifically in use or intended for use by the State for other than government non-commercial purposes under article 19, subparagraph (c)*."

(Australia) recognizes diplomatic property and military property as immune.[571] The Law on Jurisdictional Immunity, 2015 of Russia also includes all the five categories of assets, mentioned above as enjoying immunity by virtue of statutory presumption of their sovereign purpose.[572] The Judicial Code of Belgium also declares the immunity of cultural objects of foreign State and the properties of the central bank of foreign States.[573] The Code of Civil Enforcement Procedure of France includes one additional type of sovereign assets as immune, i.e., tax or social debt of the State.[574]

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

[571] The FSIA 1985 (n 166) art 31 (4), "*A waiver does not apply in relation to property that is diplomatic property or military property unless a provision in the agreement expressly designates the property to which the waiver applies*."
[572] The Federal Law on Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation (n 274), art 17 (3). The list includes "*the properties use for diplomatic or military purposes, items of cultural heritage or achieves that are not intended for sale, property that forms part of various scientific, cultural, or historical exhibitions not intended for sale and property of the central bank or another supervisory body of a foreign state that is responsible for bank supervision*."
[573] The Judicial Code 1967 (n 286) art 1412 *ter* and *quarter.*
[574] The Code of Civil Enforcement Procedures 1889 (n 284) art L.111-1-2 (incorporated by the *Sapin II* Law of 2016) (n 269). "Article L.111-1-2 (3): the following property is in particular considered as property specifically used or intended to be *used by the State for government non-commercial purposes: (a) property, including any bank account which is used or intended to be used in performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or its delegations to organs of international organizations or to international conferences; (b) property of a military character or properties used or intended to be used in the performance of military functions; (c) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale; (d) property forming part of an exhibition of objects of scientific, cultural or historical interests and not placed or intended to be placed for sale (e) tax or social debts of the State*."
[575] The Basic Law 1949 (n 278) art 25, except the cases where the ECSI 1972 (n 41) applies.
[576] The SIA 1978 (n 37) sec 14.
[577] Ibid. sec 13.
[578] Law of the People's Republic of China on Immunity of the Property of Central Bank from Compulsory Judicial Measures (n 289).
[579] Discussed in 2.6 of this dissertation; also see Dahai Qi, 'State Immunity, China and its Shifting Position' (2008) 7 (2) Chinese Journal of International Law 307.

listed as immune, there are judicial decisions from different jurisdictions declaring them as non-immune.

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

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

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

Despite the immunity in international conventions and national legislations, diplomatic assets may be held as non-immune subject to certain conditions. Such as firstly, whether there is any waiver of immunity from execution as to the diplomatic assets and secondly, in absence of any waiver clause to the satisfaction of the court,

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[580] Discussed in 2.4.3.2 and 2.4.3.3. of this Dissertation.
[581] According to the UN Treaty Collection, 193 States have ratified the VCDR 1961 (n 191). <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-3&chapter=3&clang=_en> accessed 13 November 2021.
[582] Rosalyn Higgins, *The Abuse of Diplomatic Privileges, and Immunities: Recent United Kingdom experience, Themes and Theories* (Oxford University Press 2009) 383.
[583] Ibid. fn 1; see also the Convention on Special Missions, Annex to the UN General Assembly Resolution, 2530 (XXIV) (08 December 1969).
[584] Fox (n 5) 405.

whether the diplomatic asset is used for commercial purpose. The first issue raises the concern of scope of waiver clause and its drafting. The second issue has challenges of the extent of court's investigation to the use of diplomatic assets, especially in case of the mixed use of diplomatic asset, and the interference cause to the diplomatic functions due to the investigation and/or MoC.

4.2.1.1. Waiver clause for diplomatic assets

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

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

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

[585] [1990] 2 Lloyds Rep. 520; 87 ILR 412.
[586] *Federation de Russie v. Compagnie NOGA* [2000] Cour d'appel de Paris [CA] [Regional Court of Appeal] JurisData No. 2000-120182. 10 August 2000.
[587] *NML Capital* (n 420); *NML Capital* (n 421).
[588] Ibid, translation taken from Kudrna (n 422), 135.
[589] Ibid.

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

4.2.1.2. Investigation of use of diplomatic asset

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

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

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

> Considering Articles 22, 23 and 24 of the Vienna Convention on Diplomatic Relations, enforcement cannot be enforced in respect of a proceeding against a current general bank account of a foreign embassy or consulate which is

[590] The *Alcom case* (n 394).
[591] The *Philippines Embassy Bank Account Case* (n 113); [1984] BVerfGE 46, 343 [399].
[592] Fox (n 5) 408.

> held for the sole purpose of meeting the expenses and operating costs of the embassy or consulate. While the court should investigate whether the money in the bank account subject to the complaint has this purpose or not, and decide according to the result to be obtained, it is not correct to remove the lien on these moneys with an incomplete examination, and the request for the removal of the lien protection application and the letters regarding the suspension from the voyage regarding the aircraft operating in the commercial field is rejected. While it is necessary to decide, it is wrong to accept the complaint about this by misinterpreting Article 22 of the Vienna Convention.[593]

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

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

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

4.2.1.3. Interference to the diplomatic functions

[593] [2004] The Court of Cassation of Turkey, 12th Civil Chamber, 2004/6469 E., 2004/13007 K. 25.05.2004.
[594] [1984] 2 WLR 750.
[595] *The Alcom* case (n 394), [588-589].

While assessing the use of diplomatic assets, consideration is given for its role in diplomatic function. Any interference to the diplomatic duties entitles the asset to be immune. Three practices are visible in this case: no necessity to investigate the possible interference, the presumption of overall interference resulting from MoC without requiring any specific risk or threat and finally, the assessment of State's specific condition to identify the apprehended interference.

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

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

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[596] *The Philippine Embassy Bank Account Case* (n 113).
[597] *L-W Verwaltungsgesellschaft mb H & Co. KG v. DVA* [1986] Oberster Gerichtshos 30 April 1086, 77 ILR 489.
[598] [1992] SDNY, 99 ILR 138.

4.2.1.4.Mixed use of diplomatic assets

The mixed uses of tangible asset such as diplomatic premises, tangible assets of the diplomatic mission are divisible. However, it is a challenge for intangible asset. The common example of intangible assets are the liquid funds in bank accounts, receivables from third party etc. The House of Lords of the UK reversed the decision of the Court of Appeal, London construing the use of money in the bank account in a narrower scope.[599] They considered the mixed use of the bank account and decided the uses as indivisible. Lord Diplock reasoned the decision by relying on the certificate of use given by the ambassador. He observed:

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

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

In *Benamar v. Embassy of the Democratic and Popular Republic of Algeria* (1989)[602] the judgment creditor obtained a garnishment order against the letter of credit payment in favor of the Algerian embassy in Rome which was subsequently vacated by the Italian Supreme Court. It held that the funds in favor of the embassy were

[599] UK, House of Lords, [1984] 2 A11 ER 6, 7411.11, [182].
[600] *The Alcom* case (n 394), [604].
[601] Ibid.
[602] [1989] 72 Rivista de Diritto Internazionale 416.

immune even when it had mixed purposes. It emphasized that unless the sole non-sovereign use was proved, the funds enjoyed immunity. The Austrian court also held the same requiring the judgment creditor to prove that the embassy account, "*has been used exclusively for private purposes and hence […] is not immune from execution*."[603] This ruling may not necessarily be followed in other [non-diplomatic] State accounts such as procurement, granting loans or other general purpose.

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

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

Fox summarized the current practice regarding mixed use of diplomatic bank account as 'flux' and courts are inclined to the diplomatic protection.[609] Thus, the mixed use of diplomatic assets receives a less protection when it comes to immunity than the

[603] *L-W Verwaltungsgesellschaft mb H & Co. KG* (n 597).
[604] [1979] 63 ILR 524 (decided in 1980).
[605] *Birch Shipping Co. v. United Republic of Tanzania* [1980] D.C. of Columbia 507 F. Supp. 311.
[606] Ibid.
[607] The LETCO case (n 410).
[608] Ibid.
[609] Fox (n 5) 409.

diplomatic assets fully used for public purpose. But this asset with mixed use still receives higher protection than other categories of sovereign assets.

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

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

MoCs against diplomatic asset is challenging because of direct interference to the sovereign function of the defendant State and the apprehension of adverse impact on the mutual diplomatic relation. Therefore, courts are reluctant to grant enforcement against diplomatic assets. To receive execution order, the petitioner carries a higher burden of proof to show the sole commercial use of the diplomatic asset. Such approach leaves the petitioner without remedy despite the right to execution. A unique decision was given by the Constitutional court of the Republic of Columbia in *Garcia de Borissow and Others v. Supreme Court of Justice, Labor Chamber, Embassy of the Lebanese Republic in Colombia, and Embassy of the USA*.[611] The court held the immunity of the concerned embassies and acknowledged the constitutional rights of the petitioners to enforce their judgements. The constitutional court ordered the executive branch of the State to pursue diplomatic channel to recover the judgment value. However, this type of initiative via judicial order is rare.. Such judicial approach takes a reverse journey to the dispute settlement mechanism in international law. The legal protection for recovery of debt from a sovereign has a long way from the gun-boat diplomacy. Therefore, when the judgment creditors targets for a

[610] [2002] Oberlandesgericht [Court of Appeal] Frankfurt am Main, 26 September 2002, No. 26 W 101/02, [7]. The debtor was Russian Federation, and the appellant was Franz Sedelmayer (Germany). Translation taken from Albert J. Van den Berg, *Yearbook Commercial Arbitration* (Kluwer Law International 2004) 508.

[611] [2016] Constitutional Court of the Republic of Colombia, Judgement SU-44316, 18 August 2016.

diplomatic asset, s/he needs to act cautiously when targeting the diplomatic assets for execution.

4.2.2. Assets of military forces

The commentary to the ILC draft (1991) stated the military assets as immune but it hardly provided any scope of this type of assets. It only mentioned that the military assets included the same of the navy, air force and army.[612] The assets owned by the military forces of the defendant State are presumed to be used for sovereign purposes even when the assets are not in use at the relevant time. Thus, these assets are protected from any MoCs. A broader definition of military assets is found in the FSIA 1985 (Australia). It includes any State-owned ships or assets used for military activity or under control of the military for military or defense purpose.[613] The Working Group VI of UNCITRAL (2019-ongoing) regarding the judicial sale of ships, drafted a Convention on Judicial Sale of Ships (the Beijing Draft).[614] Article 3 (2) of the Beijing Draft expressly excluded the warships, naval auxiliaries, and other State-owned ships unless used for commercial purposes from the scope of this draft instruments.

In the case of *Wijsmuller Salvage BV v. ADM Naval Services* (1989),[615] Peru delivered a warship to a Dutch company for servicing. The Dutch company applied to the Dutch court for an interlocutory injunction against the warship for payment of its salvage claim. However, the Dutch court denied ordering the injunction on the ground of State immunity to the warship, even during the sea trial of the ship. The absence of commercial use supported the immunity claim of the defendant State. Similar immunity is granted to the military aircrafts. In another case of the British military aircraft,[616] the military aircraft landed on a Spanish merchant container ship without

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[612] The ILC Draft 1991 (n 71) art 19 (1) (e); commentaries on art 19 (1) (e), para 7.
[613] The FSIA 1985 (n 166) art 3, "*Military property means (a) a ship of war, a government yacht, a patrol vessel, a police or customs vessel, a hospital ship, a defense force supply ship or an auxiliary vessel, being a ship or vessel that at the relevant time, is operated by the foreign State concerned (whether pursuant to requisition or under a charter by demise or otherwise.) or (b) property (not being a ship or vessel) that is: (i) being used in connection with a military activity; or under the control of a military authority or defense agency for military or defense purposes*."
[614] UNCITRAL, Draft Instrument on the Judicial Sale of Ships: Annotated Third Revision of the Beijing Draft. <https://uncitral.un.org/sites/uncitral.un.org/files/wp.90_advance_copy.pdf> accessed 3 April 2021.
[615] [1989] District Court of Amsterdam (19 November 1987), NYIL (1989) 294.
[616] Geoffrey Marston, 'United Kingdom Materials on International Law' (1985) 56 British Yearbook of International Law 363, 462-7; Fox and Webb (n 20) 521.

prior permission of the master and/or the crew of the ship. The ship's crewmen applied to the Spanish Permanent Maritime Court to seize the aircraft of the British Royal Navy for their salvage payment. However, the Spanish court refused to order any salvage payment on the ground of foreign sovereign immunity to the military aircraft.

In *Ministry of Defense v. Cubic Defense* (2004),[617] the Ministry of Defense (MoD) of Iran won an arbitral award against an US military equipment supplier, named the Cubic Defense. The disputed contract was related to the purchase of military equipment. The Cubic defense owned the award to the MoD of Iran. A private judgment creditor of Iran (from another unrelated case) requested the US court for a garnishment order against the Cubic Defense to pay him instead of the MoD in order to satisfy his judgment value. The judgement creditor relied on the determination of *Joseph v. Office of the Consulate Gen. of Nigeria* (1987)[618] and *McDonnell Douglas Corp. v. Islamic Republic of Iran* (1985)[619] in his favor. In the *Joseph* (1987) case, the US court held, "*a contract to purchase military supplies, although clearly undertaken for public use, is commercial in nature and therefore subject to the commercial activity exception*." Similar finding was reached in *McDonnell Douglas Corp.* case (1985) against Iran. The US court stated, "*the intent of the sovereign to purchase the goods for military purposes does not take the transaction outside of the commercial exception to sovereign immunity*."[620] Thus, the act of the MoD in relation with the *Cubic* was held as commercial. In response to the claim of the MoD as to the military ownership over the arbitral award, the US court relied on the FSIA House Report defining the scope of military assets under the FSIA (1976) of the US. It defined the military assets consisting of equipment such as weapon, ammunition, military transports, warships, tanks, communication.[621] The definition also includes the assets not of military character but used or essential for military operations, such as, food, clothing, fuel, office equipment etc.[622] Finally, the US court concluded, "*even if MOD had argued that the proceeds from the Cubic judgment were destined to fund military*

[617] *Ministry of Defense, Iran v. Cubic Defense* [2004] (9th Cir) 385 F.3d 1206.
[618] [1987] (9th Cir) 830 F.2d 1018.
[619] [1985] (8th Cir) 758 F.2d 341, [349].
[620] Ibid.
[621] The FSIA House Report No. 94-1487 (1976), 31.
[622] Eleanor C. McDowell (ed), *Digest of United States Practice in International Law 1975* (Department of State Publication September 1976) 367.

activities such as indirect relation between the property at issue and military activities may not be sufficient to make te exemption applicable."[623]

In *Republic v. High Court Accra, Ex parte Attorney General* (2013)[624] the Supreme Court of Ghana quashed the injunction order given by the Commercial Division of the High Court of Accra (CDHCA) over the Argentine warship. The CDHCA granted injunction order pursuant to the execution proceeding of the judgment in favor of NML Capital. The CDHCA passed the order considering the waiver clause in the bond agreement between Argentina and the judgment creditor.[625] The CDHCA relied on the interpretation of the same waiver clause given by the UK Supreme Court in a related case. The UK Supreme Court allowed MoCs against Argentina based on the same waiver clause.[626] In order to ensure the release of the warship, Argentina pursued to the International Tribunal for the Law of the Sea (ITLOS) and won the order in favor.[627] Argentina confirmed the use of the warship as a training vessel (unlike commercial use) and thereby entitled the warship to immunity under the UNCLOS (1982).[628]

Therefore, the military assets in tangible nature such as weapons, ships, aircrafts are presumed to serve public purposes, hence, granting immunity to these military assets even when the liabilities accrued directly from the assets, is inevitable. Nevertheless, liquid and/or intangible assets may not receive the same level of protection in an execution suit as there is no presumption of public use of such funds or assets. Proof of their use or purpose requires evidence of direct use.

4.2.3. *Assets of the central bank or other monetary authority of the State*

The assets of the central bank of the defendant State receives protection from MoCs under two heads: firstly, the central bank stands as a separate legal entity and maintains its functions distinct from the State; secondly, the public functions of the central bank and public purpose of the funds owned by the central bank. The absolute

[623] *Ministry of Defense, Iran* (n 617), [19].
[624] [2013] The Supreme Court of Ghana (June 2, 2013), Civil motion no. J5/10/2013.
[625] *NML Capital Ltd. Republic of Arg*. [2012], (High Ct. Accra Oct. 11, 2012) No. RPC/343/12 [12].
[626] *NML Capital Ltd. v. Republic of Arg*. [2011] UKSC 31 [2011] 2 AC 495 (on appeal from Eng.).
[627] *ARA Libertad (Argentina v. Ghana)* [2012] (ITLOS, December 15, 2012) Case no. 20, provisional measures reported by James Kraska 'The "ARA Libertad" (2013) 107 (2) American Journal of International Law 404.
[628] Ibid, [40].

immunity to the asset of central bank is justified by its supervisory functions over the other banks. The central bank is responsible to keep the deposits from the other banks of the defendant State as liquidity reserves and maintain the foreign currency reserves on behalf of the State. The purpose of these reserves is to maintain the liquidity in the financial sectors which is regarded as a sovereign purpose.

The ILA Drafts (1981),[629] the ILC Draft (1991),[630] the UN Convention (2004)[631] expressly listed central bank assets as immune. The ECSI (1972) does not expressly declare immunity to the central bank's assets. Nevertheless, its grant of absolute immunity from execution to all sovereign assets unless waived, applies to the central bank's assets as well.[632] Several national legislations also list the central bank's assets as immune from execution. For instance, the SIA (1978) of the UK expressly provides immunity for the assets of the central bank or monetary authority of the defendant State.[633] The FSIA (1976) of the US provides the same status to the central bank like foreign State as an agency or State instrumentality.[634] It also lists the assets of central bank as immune.[635] The legislation of Canada ensures the same immune status to the properties of the central bank unless waived.[636] Hence, under these legislations, the

[629] The ILA Draft 1982 (n 142) art VIII: "*C. Attachment or execution shall not be permitted if: 3. The property is that of a State central bank held by it for central banking purposes; or 4. The property is that of a State monetary authority held by it for monetary purposes*."
[630] The ILC Draft 1991 (n 71) art 19: "*Specific categories of property: 1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial purposes under paragraph 1 (c) of article 18 […]: (c) property of the central bank or other monetary authority of the State which is in the territory of another State […]*"
[631] The UN Convention 2004 (n 41) art 21 (c).
[632] The ECSI 1972 (n 41) art 23.
[633] The SIA 1978 (n 37) sec 14 (4): "*Property of a State's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity sub-sections (1) to (3) of that section shall apply to it as if references to a State were references to the bank or authority*."
[634] The FSIA 1976 (n 37) sec 1603 (b): "*Agency or instrumentality of a foreign state means any entity (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country*."
[635] The FSIA 1976 (n 37) sec 1611 (b): "*Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immunity from attachment and from execution if: (1) the property is that of a foreign central bank or monetary authority held for its own account unless such bank or authority or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution or from execution, notwithstanding any withdrawal of the waiver which the bank, authority, or government may purport to effect except in accordance with the terms of the waiver…*"
[636] The SIA 1982 (n 167) sec 12 (4): "*Subject to subsection (5), property of a foreign central bank or monetary authority that is held for its own account and is not used or intended for a commercial*

assts of the central bank held in its own name cannot be subjected to MoCs unless waiver is given. Nevertheless, the interpretation of waiver clause is still under a gray area of the laws on immunity from execution.[637]

The question arises as to the scope of the assets of the central bank. The British High Court defined the assets of the central bank as asset having any legal, equitable, contractual or any other forms of interests therein regardless of its capacity of holding the assets which include real or personal assets.[638] The Chinese legislation on State immunity defines the central bank's assets under two heads: the 'foreign central bank' and the 'assets of foreign central bank'. It states:

> The term "foreign central banks" as mentioned in these Measures (compulsory judicial measures) refers to the central banks of foreign countries and regional economic integration organizations, or those financial administrative organs performing the functions of central banks. The term "properties of foreign central banks" as mentioned in these Measures refers to the cash, bills, bank deposits, securities, foreign exchange reserves and gold reserves, as well as real estates and other properties of foreign central banks.[639]

For the FSIA (1976) of the US, the provision is formulated slightly different. It states, "*property of a foreign central bank or monetary authority held for its own account*."[640] The legal implication of such wording is the absolute immunity to the central bank's funds even used for commercial purpose.[641]

In the case laws, the immunity of central bank is permitted and/or denied immunity in light of three questions: its separate entity from the defendant State, its supervisory functions distinct from other commercial banks and finally, its commercial functions or commercial purpose of the specific asset in question.

4.2.3.1.Separate legal status of the central bank

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activity is immune from attachment and execution." Section 12 (5) is same as the FSIA 1976 (n 37) for the waiver clause.

[637] Discussed in 3.5.2 of this dissertation.

[638] *AIG Capital* (n 373), [90]-[95].

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

[640] The FSIA 1976 (n 37) s 1611 (b) (1).

[641] Andrew Dickinson and Rae Lindsay and James P. Loonam, *State Immunity: Selected Materials and Commentary* (1st edn, Oxford University Press 2004), 326.

In enforcement cases against the assets of the central bank, the central bank claims its distinct and separate legal entity from the defendant State. This issue works both as sword and shield for the central bank. For instance, when the judgement debt is against the central bank (not the State), the central bank claims immunity arguing its status as State agency or instrumentality. On the other hand, when the claim is against the defendant State, the central bank argues its separate legal entity distinct from the defendant State. Hence, the burden of proof lies on the petitioner to establish a compelling case before the court to pierce the veil of the central bank.

In *Banque Nationale v. Alcay GmbH* (1931)[642] the Swiss Federal Court denied immunity to the Belgian central bank because of its corporate legal entity as a stock corporation. Hence, the central bank was held separate personality from the sovereign State. Nevertheless, subsequently in *Banque Centrale de la Republique de Turquie v. Weston Compagnie de Finance d'Investissement SA* (1978),[643] the Swiss Federal Court did not consider the legal status of the central bank but its activity while deciding the question of its immunity. The German court refused to grant immunity to the Central Bank of Turkey because of its independent legal standing.[644] The Frankfurt Court of Appeal followed the same line of argument when it came to the Central Bank of Yemen by stating:

> Only legally dependent monetary authorities of a foreign state could claim personal immunity and immunity from attachment in assets located in Germany whereas the defendant (the central bank of Yemen) is not entitled to immunity as a legally separate entity.[645]

In *Amdassade de la federation de Russie en Frnace v. Societe NOGA* (2000)[646] the Court of Appeal in Paris, refused attachment of central bank's funds considering it as a separate legal entity, therefore not liable for the debt of third party. When deciding the separate legal status, the US courts apply the *Bancec* test [discussed in details for the assets of SOE].[647] the US Supreme Court introduced this test in *First National*

[642] Decision on 6 November 1931 published in [1931] NZZ no. 2183
[643] *Banque Centrale de la République de Turquie* (n 437).
[644] [1997] OLG Frankfurt am Main OLG Rep. 227.
[645] [2000] Frankfurt Court of Appeal, 3 August 2000, 26 W 82/2000.
[646] [2001] Cour d'Appel Paris, 1st Chamber section A, 10 Aug. 2000 128 JDI 116.
[647] Discussed in 4.4.5 of this dissertation.

City Bank v. Banco Para El Comercio Exterior de Cuba (*Bancec*) (1983).[648] It prevailed the separate legal entity of the SOE unless the judgment creditor puts forward compelling case of extensive sovereign control over the SOE resulting at the abuse of corporate form by the defendant State causing fraud and/or injustice.[649] In *LNC Invs., Inc. v. Republic of Nicaragua* (2000)[650] the petitioner targeted certain funds in the accounts of the central bank of Nicaragua maintained with Federal Reserve Bank of New York. The US court applied the *Bancec* test and denied piercing the corporate veil of the central bank as the petitioner failed to prove the abuse of the corporate form by Nicaragua and its extensive control over the assets of the central bank. In *EM Capital v. Republic of Argentina* (2007)[651] the petitioner targeted two funds held by the central bank of Argentina after the decrees passed by the Argentine government to appropriate the funds for settling the debt of International Monetary Fund (IMF). The US court denied the execution as the petitioner failed to satisfy the *Bancec* test[652] as to the rebuttal of presumption in favor of separate legal entity of the central bank. The US court further refused to construe the repayment of debt to IMF from the fund as commercial because of Argentina's borrowing relationship with IMF as a sovereign.[653] Furthermore, the court required "actual use or designation for use" for the attachment order not some hypothetical use. Mere publication of the decree was not sufficient to pass an attachment order.[654] In *EM Capital v. Banco Central de la Republica Argentina* (2015),[655] the assets of the central bank of Argentina were held as immune for the debt of Argentina as sovereign State, because of the presumption of legally separate and distinct status of the central bank. The US court commented that the presumption would have been rebutted: firstly, if the agent-principal relationship between Argentina and the central bank was proved and secondly, such separate legal status of the central bank would result at fraud or injustice. These requirements act as the litmus test for determining the immunity of the central bank on the ground of separate legal entity.

4.2.3.2.Regulatory functions of the central bank

[648] *First National City Bank* (n 34).
[649] Ibid.
[650] [2000] (SDNY June 8, 2000)) No. 96 Civ. 6360 (JFK), 2000 WL 745550, [*5].
[651] [2007] (2nd Cir) 473 F 3d 463.
[652] *First National City Bank* (n 34).
[653] [2007] (2nd Cir) 473 F 3d 463 [483].
[654] Ibid.
[655] [2015] (2nd Cir) Nos 13-3819-cv (L), 13-3821-cv (CON), August 31, 2015

While considering the mandate of a central bank in any sovereign State, the German court viewed the acts of holding and managing foreign reserve assets as a sovereign task of the central bank.[656] The regulatory functions of a central bank also include the controlling the State reserve of gold, foreign, exchangeable foreign currencies, special drawing rights (SDR), permission to use foreign reserve for emergency import of essential goods, settlement of payments with other States.[657] In the *National Iranian Oil Company* (1983), the assets targeted for attachment were the bank accounts in the name of a SOE of Iran. Nevertheless, part of the fund in the targeted bank accounts was earmarked for transferring to the Central Bank of Iran. The German Federal Constitutional Court stated in its *obiter dictum* that the assets of the entities serving the monetary policies (which was sovereign in nature) were immune from execution.[658] It stated:

> [With respect of the foreign reserve of the central bank] In this case, no decision is needed regarding the qualification of deposits held for monetary purposes by the foreign state in bank accounts in the forum state; under such circumstances it would be directly assumed that a sovereign purpose was intended.[659]

Similar approach was taken by the US court in *Josefina Najarro De Sanchez v. Banco Central de Nicaragua* (1985).[660] The US court of appeal reviewed the power of the central bank to issue cheque in foreign currency and held that such authority was regarded as sovereign activity and thereby enjoyed immunity.

In *AIG Capital v. Republic of Kazakhstan* (2005)[661] the British Hight Court held the fund created by Kazakhstan as immune from MoC as the fund was established by government decree and put under the management of the National Bank of Kazakhstan. While deciding the immunity of the assets held in the name of the central bank, the court reviewed the function of the central bank as the guardian or regulator of the monetary system, distinct from commercial purposes. The decision was subsequently criticized as to the lack of scrutinization of the function of the central

[656] *The National Iranian Oil Company* (n 357) [45].
[657] Krauskopf and Steven (n 299).
[658] *The National Iranian Oil Company* (n 357).
[659] Ibid.
[660] *De Sanchez* (n 129).
[661] *AIG Capital* (n 373), [90]-[95].

bank in this case. Here, the central bank acted as trustee of the fund for the government and received fee and commission in discharge of the service which could have been performed by any private fund manager as well.

The funds in the Argentine central bank was targeted again for execution in the case of *NML Capital and EM Ltd*. (2011).[662] The funds were previously appropriated in repaying the debt of IMF. The judgment creditor argued such appropriation of the funds of the central bank as the control of Argentina over the assets of its central bank and the disposal of the same without any obstruction from the management of the central bank. The US court held the assets of the central bank as immune with a broader interpretation of "held for its own account" as inclusive of any assets either for commercial or non-commercial purposes.[663] The decision of the US court relied on the presumption in favor of the public purpose of the central bank's assets and the central bank's function test The court reviewed the other uses of the funds by the central bank such as to buy US dollar to manage foreign reserve, transfer the US dollar to different Argentine banks to control its currency, replenish the reserve pursuant to the regulatory exchange.[664] All these uses of the funds were the functions of a central bank. Hence, while determining the central bank's function test, the US court emphasized on the use of the funds "*to pay Argentine banks that sought to reduce the amount of their US dollar reserves*" distinct from the functions as an intermediary bank like any private banks. Therefore, the funds were established to be assets of the central bank held for its own account and thereby immune from execution, although previously used to repay the IMF's debt upon the instruction of the government,

4.2.3.3. Commercial purpose of the funds and/or the commercial activity of the central bank

The question of immunity of the central bank is vitiated with commercial use of the funds and/or engagement of the central bank in commercial activity. Such as, in *Libya v. Actimon SA* (1985), the Swiss tribunal refused to grant immunity to the central bank

[662] *NML Capital and EM Ltd. v. Banco Central De La Republica Argentina and the Republic of Argentina* [2011] (2nd Cir) 652 F 3d 172.
[663] Ibid, [193]-[194].
[664] Ibid, [196].

merely relying on its legal status. The tribunal asked for the specific purpose of the bank deposit targeted for execution.[665]

In the case of *Englander v. State Bank of Czechoslovakia* (1969),[666] the Court of Cassation, France decided in favor of execution of a monetary judgment against the funds of the State Bank of Czechoslovakia (the central bank for previous Czechoslovakia). The court relied on the fact that, the account was operated in the Bankque commerciale pour l'Europe du Nord. A part of the balance was applied for repayment of commercial debts of some SOEs as well as the participation cost of the Czech State in international organizations. Mixed use of the account balance could not sustain to its immunity. The court held that the impossibility of differentiating the private use of the funds from the public use did not entitle it to immunity.

In *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria* (1977),[667] a letter of credit (L/C) was opened in London at the request of the Central Bank of Nigeria for purchasing cement from an English company by the Ministry of Defense of Nigeria. Before the processing the payment of the L/C, military intervention occurred in Nigeria and Nigeria stopped the payment. Lord Denning MR acknowledged the status of the central bank as a government department but emphasized on the nature of the contract based on which the execution suit was filed. In this case, the L/C was the basis for claim which was nothing but a pure commercial transaction. Hence, the immunity was not entitled.[668] Similar facts as in the *Trendtex* case, was found in the case of *YMN Establishment v. Central Bank of Nigeria* (1975) before the Frankfurt court.[669] In this case, the German court allowed the attachment of central bank's assets to levy the distress of the judgment creditor.[670]

Immunity was denied in the case of *Hispano Americana Mercantil Case* (1979)[671] focusing on the use of funds in commercial purpose,[672] although this case was decided after the enactment of the SIA, 1978 (the UK) and this Act grants immunity to the

[665] *Libya v. Actimon SA,* [1985] Swiss Federal Tribunal (24 April 1985) 82 ILR 30.
[666] [1970] The Court of Cassation, France, (1970, REV. CRIT. 101' 1969 Journal Du Droit International 923.
[667] [1977] 2 WLR 356 CA.
[668] Ibid, [369].
[669] [1975] The Provincial Court of Frankfurt, 8th Chamber for Commercial Matters, (2 December 1975).
[670] Ibid.
[671] [1979] EWCA Civ J0425-1.
[672] Higgins (n 582) 406.

funds of the central bank.[673] Higgins posed a divergence between the assets of the central bank and the funds held in the central bank.[674] In the former, the assets are owned by the central bank and thereby immune under the SIA, 1978 (the UK) whereas in the latter case, the assets may not be owned by the central bank but received as trustee or in form of deposit from the beneficiaries and therefore, may not be immune. In *the Central Bank of Nigeria Case* (1975)[675] while commenting on which kind of use might substantiate the designated use of cash and securities held by the central bank, the German court reviewed only the present or past use of the funds. It eliminated the possible future use of funds to finance state business from its consideration while deciding immunity of the assets of the central bank.

In *Weston Compagnie de Finance et D'Investissement SA v. La Republica del Ecuador* (1993)[676] the Southern District Court of New York held the funds of central bank as attachable relying on the facts that the central bank was holding the funds on behalf of the private parties. Therefore, the court did not hesitate to go behind the veil of the account owner and examine the de facto owner of the fund.

Similarly, in *Banco Central de Reserva del Peru v. Riggs National Bank* (1994)[677] the US court allowed attachment of funds in the accounts of the central bank of Peru. The US court relied on the previous use of funds in financing certain commercial entities. Following the same line of argument, in *Banca Carige SpA Cassa di Risparmio Geneva e Imperia v. Banco Nacional de Cuba and another, Ch.D* (2001),[678] the British Companies Court denied to grant immunity to the shares held by the central bank. The court reasoned its decision by stating that although the assets of the central bank enjoyed immunity, the transfer of shares was held as purely commercial act.

In the case of *Olympic Chartering SA v. Ministry of Indus. & Trade of Jordan* (2001)[679] the US court distinguished between the funds both held in the name of the central bank but for "*used or held for central banking purposes rather than funds used solely to finance the commercial transactions of other entities or foreign States*."

[673] The SIA 1978 (n 37) s 14 (4).
[674] Higgins (n 582) 406.
[675] [1976] Landgericht, Frankfurt, 2 Dec. 1975 Neue Juristische Wochenschrift 1044 65 ILR 131.
[676] [1993] SDNY 823 F Supp 1106 [1114].
[677] [1994] DDC, 919 F Supp 13 17.
[678] [2001] (Companies Court, the UK), 11 Apr 2001 3 AII ER 923.
[679] [2001] SDNY 134 F Supp 2d 528.

Nevertheless, contrary precedent was found in the UK jurisdictions. In *AIC Ltd. v. Federal Government of Nigeria* (2003)[680] the UK court observed, "*moneys in a bank account of a central bank with another bank are immunity from execution irrespective of the source of the funds in the account or the use of the account or the purpose for which the account is maintained*." In *Banque Central de la Repubique de Turquie*, (1984), the central bank of Turkey acted as the intermediary between the English bank and the Turkish bank. The Swiss court refused immunity relying on the nature of the legal relationship.[681]

Therefore, although the international instruments as well as the national legislations state the central bank's assets as immune, there is no automatic immunity to the funds. Instead, the burden of proof lies on the judgment creditor. The commercial nature of the transactions, the previous commercial use of funds, the functions of the central bank like any other commercial banks vacate the immunity to its assets.

4.2.4. Assets forming cultural heritage and/or having scientific, cultural, and historical interests for exhibition, not intended for sale

The ILC draft (1991) added the assets forming cultural heritage and the scientific, cultural, and historical objects in two separate provisions subjected to the same condition that the assets in question should be for the purpose of exhibition and not for sale.[682] However, no clear distinction was made between these two provisions in the explanatory notes. However, the scholars also used both provisions indicating the same class of assets.[683] The relevant international conventions discussed below did not attempt to separate them either.

The Hague Convention (1954) defines the cultural assets for the purpose of its immunity. *Albeit* the Convention is formulated for the exceptional circumstances i.e., the event of armed conflict, the definition of cultural asset may serve the purpose for this Dissertation. The Convention provides a broader definition including the scientific and historical objects. The definition in article 1 of the Hague Convention (1954) characterizes the cultural asset (including the scientific collections and

[680] *AIC Ltd* (n 396).
[681] *Banque Centrale de la République de Turquie* (n 437).
[682] The ILC draft 1991 (n 71) art 19 (d) and I.
[683] Riccardo Pavoni, 'Cultural Heritage and State Immunity' in Francesco Francioni and Ana Filipa Vrdoljak (eds), *The Oxford Handbook of International Cultural Heritage Law* (Oxford University Press October 2020); Chechi (n 329).

historical and artistic interests) as moveable or immoveable asset having 'great importance to the cultural heritage of every people' whether 'religious, secular, archaeological'.[684] The definition includes the monuments of architecture, manuscripts, books or other objects of artistic or historical interests, scientific collections, archives of these properties. This Convention also protects the buildings and cultural centers whose purpose is to exhibit these assets.[685]

On the other hand, the UNESCO Convention (1970), although does not deal with the question of immunity, also provides a definition of cultural asset. It defines the cultural asset as the asset, whether religious or secular, being specifically designated by the State as cultural asset because of its importance for "archaeological, prehistory, literature, art or science."[686] Another convention defining cultural asset is the UNIDROIT Convention (1995)[687]although it also contains no provision related to the question of immunity. It relies on the same definition as found in the UNESCO Convention (1970), but instead of giving the exhaustive list of assets in the definition, it has attached the list in the annex.

The case laws give an insight of the immunity of cultural objects. The commonly targeted cultural assets are the arts, assets of information centers, cultural exchange centers etc. There are attempts of the judgment creditors targeting the cultural centers,[688] information offices,[689] of the defendant State to receive MoCs. The famous case in this regard is the *Jurisdictional Immunities Case*, (2012)[690] decided by the ICJ. In this case, the Italian court granted the MoCs ordered against the cultural exchange center of Germany, in the territory of Italy, for the enforcement of a tort case against Germany.[691] Germany brought a case before the ICJ which held the MoCs, granted by

[684] The Hague Convention 1954 (n 198) art 1 (a).
[685] Ibid, art 1 (b) and (c).
[686] The Convention on the Means of Prohibiting and Preventing the Illicit, Export and Transfer of Ownership of Cultural Property 1970 art 1. This Convention provided a long exhaustive list of cultural properties which includes both cultural, historical, and scientific collections.
[687] The UNIDROIT Convention on Stollen or Illegally Exported Cultural Objects 1995 art 2.
[688] *Espagne v. X SA*, *Office des poursuites du canton de Berne et President tu Tribunal d'arrondissement 4 du canton de Berne* [1986] Tribunal federal Suisse 30 Apr 1986, ATF 112 la 148; Annuaire Suisse de droit international 158; 82 ILR 38 [41].
[689] *Republique Arabe d'Egypte* (n 438).
[690] *The Jurisdictional Immunities of the State* (n 172).
[691] *Ferrini v. Germany*, [2004] Court of Cassation, No. 5044, March 11, 2004.

the Italian court against the cultural exchange center as a violation of international law on State immunity.[692]

For the cultural centers, the States' practices are found homogenous. The Spanish Institute in Switzerland had been held as having public purposes by the Swiss court.[693] In qualifying the public purposes, it commented, "*immunity from forced execution extends to assets which a foreign State possesses in Switzerland and which it has designated for its diplomatic service or other task incumbent upon it in the exercise of its sovereign powers*."[694] Similarly, the Goethe Institute and the German Archaeological Institute in Athens were targeted for enforcement of a claim against Germany.[695] The executives denied giving permission for bringing a formal execution suits against this cultural center following the same line of argument. In *Republique Arabe d'Egypte v. Cinetel* (1979)[696] the Swiss Federal Court commented, "*only the patrimonial assets of these authorities* [the information centers of the foreign State] *and not their administrative assets, may be seized, because the latter are assets of the local authority directly allocated for the performance of its tasks under public law*."[697] The "patrimonial assets" are defined as the assets which do not increase the national wealth or no longer intended for public purpose.[698]

The major determining point is the objective of profit earning from the targeted assets and serving the public purposes. In *Magness v. Russia Federation* (2000)[699] the US court denied executing a judgment against the cultural objects of Russia which were brought to the US for exhibition. The court received statement from the executive body of the US stating:

> [the paintings] imported from abroad for the temporary exhibition without profit within the United States are of cultural significance […]. These objects

[692] *The Jurisdictional Immunities of the State* (n 172).
[693] *Kingdom of Spain v. Company XSA* [1986] Switzerland Federal Tribunal 30 April 1986, 82 ILR 38 [41].
[694] Ibid.
[695] *Prefecture of Boeteia v. Germany* [2002] Full Court judgment Nos. 36 and 37/2002, 28 June 2002.
[696] *Republique Arabe d'Egypte* (n 438).
[697] Ibid., [435].
[698] *Francisco I. Chazez v. Public Estates Authority and Amari Coastal Bay Development Corporation* [2002] the Supreme Court of the Republic of the Philippines GR No. 133250, July 9, 2002.
[699] [2000] SD Ala 84 F Supp 2d 1357.

are imported pursuant to a loan agreement with a foreign lender […] and their exhibition is in the national interest."[700]

Relying on this statement of the execution body, the US court held these objects as immune. In the cases of *Campuzano v. Iran* (2003),[701] a district court of the US refused to enforce a judgment against the cultural object of Iran that had been lent to American institutions for scientific study. In the same year, in *Rubin v. Iran* (2003)[702] the judgment creditor asked for an attachment order based on the commercial use of the historical objects under section 1610 (a) (7) of the FSIA (1976) of the US whereas the museum countered the claim relying on the objects were being held under trustee process. In the trustee process, the museum was the trustee whereas Iran held the beneficiary interest, therefore the commercial use of the object did not belong to Iran. The US court accepted the counter argument of the museum and did not investigate the museum's commercial use in this case.[703] The same plaintiff brought several execution cases targeting different cultural and historical objects of Iran and in all these cases, the US court concluded in favor of immunity to the cultural objects relying on the inconveniences and impairment of rights of the museums, borrowing the objects.[704] In the case of *Rubin v. Islamic State of Iran* (2016)[705], certain US institutions received cultural and historical objects from Iran under a loan agreement. The institutions returned few of the items and committed to return the others. The contractual arrangement between the US institutions and Iran as to the objects, was in the form of agency contract unlike the previous case [the trustee contract]. Therefore, the commercial use of the cultural objects by Iran, as the sovereign owner of the objects, would result at MoCs against the cultural objects in question.

In *General Consulate of Peru in Milan v. Tabibnia* (2015)[706] Peru obtained possession of the artefacts pursuant to a criminal proceeding against the plaintiff, which was subsequently annulled, but Peru refused to return the objects to the plaintiff. The

[700] [1998] 63 Fed Regis 30567.
[701] [2003] DDC 281 F Supp 2d 258.
[702] *Rubin v. Islamic Republic of Iran* [2013] 1st Cir 709 F 3d 49 [50]-[51]; *Rubin v. Islamic Republic of Iran* [2003] D Mass 456 F Supp 2d 228 [230].
[703] Ibid, [234].
[704] *Rubin v. Islamic Republic of Iran* [2004] ND III 349 F Supp 2d 1108; [2010] DDC 270 FRD; [2016] 7th Cir F 3d 470; [2018] 138 S Ct 816.
[705] Ibid., [481].
[706] [2015] Italian Court of Cassation, 5 October 2015, No. 19784, ILDC 2458 (IT 2015), commented by Pierfrancesco Rossi, 'Immunities' in Benedetto Conforti, Luigi Ferrari Bravo and Francesco Francioni eds., *The Italian Yearbook of International Law volume XXV* (1st edn, BRILL NIJHOSS, 2016), 511.

Italian court refused immunity to the artefacts allegedly claimed by Peru. In view of the court, Peru failed to establish its ownership to the objects. Nevertheless, the immunity to the cultural objects may be pierced if the holders received the assets in violation of international law, therefore, not being the rightful owner of the assets.[707] Similar decision was held in *the Nixes Seizures of Iranian Art Objects* (2018)[708], the US Supreme Court refused to grant MoCs against the cultural object loaned by Iran to an US institution on the ground of non-commercial use of the object.

The US amended its FSIA 1976 in 2016 to incorporate the cultural property exception.[709] The amended provision states that, subject to some exceptions, any property brought in the US for the purpose of temporary exhibition is not deemed as having commercial purpose for the question of immunity thereto.[710] The US law attached three conditions for the protection of cultural and historical objects: the objects having cultural significance, brough to the US for exhibition on non-profit basis and the exhibit serving national interest. Similar laws have been passed in European jurisdictions, such as France,[711] Germany,[712] Austria,[713] etc. protecting the lending of cultural objects for exhibitions.[714] Hence, quashing the immunity of this type of assets is difficult, unless the judgment creditor can show certain profitability or commercial use of the assets by the defendant State. Protection of cultural, historical, and scientific assets are essential for maintaining the international cultural diplomacy and international comity among States.

4.3.**Non-immune assets**

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[707] Nout Van Woudenberg, 'State Immunity and Cultural Objects on Loan' [2011] University of Amsterdam Digital Academic Repository, 306 commented "*the object cannot be considered as war trophy*." Discussed in 4.3.4. of this Dissertation.
[708] [2018] 19 IFAR J. nos. 1 & 2., [2]. [3].
[709] The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act 2016 (the US). Public Law 114-319. This Act amended the chapter 97, of title 28, United States Code to clarify the exception to the foreign sovereign immunity set forth in section 1605 (a) (3) of the FSIA 1976 (n 37).
[710] Ibid., sec 2.
[711] Act No 94-679 dated 8 August 1994. Published in Journal Officieal de la Republique Francaise, 11888.
[712] Law on the Implementation of the European Community Directive on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State and on the Alteration of the Act to Prevent the Exodus of German Cultural Property Law of 15 October 1998, *Budesgesetzblatt [Federal Law Gazetter]* 1998 I No 70, 3126.
[713] The Federal Act on the Temporary Immunity of Cultural Property Loans for the Purpose of Public Exhibition 30 December 2003, *Bundesgesetzblatt (BGBI) [Federal Gazetter]* I No. 133/2003 as amended by BGBI I No. 65/2006.
[714] Woudenberg (n 707), 427.

The ILC Report (1999)[715] stated the States' demand to revisit the categorization of the list of immune assets in the ILC Draft (1991).[716] Two dominant views were visible. One group opined to make a clear list of immune assets to "*avoid unnecessary limitations on the cases in which property might legitimately be subject to "measures of constraints*" and the other group preferred to establish the principles that would govern the question of immunity of the sovereign assets.[717] Consensus had been achieved by incorporating two articles (article 19 and 21) in the UN Convention (2004): a list the specific categories of immune assets whose sovereign purpose is presumed;[718] and the characteristics of the non-immune assets.[719]

A similar approach is followed in some national legislations. For instances, the FSIA 1985 (Australia) states that the immunity is not granted to the 'commercial property'.[720] The French Court of cassation also recognized that the attachability of the commercial assets for the enforcement of commercial arbitral awards.[721] The SIA 1978 (the UK) adopts the standard of 'commercial purpose' for the characterization of non-immune assets. The popular terms to express the non-immune assets are either the commercial purpose and/or activity used [discussed in 4.3.1] or non-governmental purpose [discussed in 4.3.2].[722] Arguably, these two approaches are not interchangeable, however, analysis of the case laws below bring a more comprehensive view. This part of the fourth chapter of the dissertation aims at examining the terms used in explaining non-immune assets and their interpretation in case laws. This discussion furthers the interpretation of commercial/public purpose of commonly targeted sovereign assets [discussed in 4.4].

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[715] The ILC Report 1999 II (n 234), para 114.
[716] The ILC Draft 1991 (n 71) art 19.
[717] The ILC Report 1999 II (n 234) para. 168.
[718] The UN Convention 2004 (n 41) art 19 (c) and art 21 (1).
[719] Ibid art 19 (c).
[720] The FSIA 1985 (n 166) art 32 (2) stated that the commercial cargo and the ships carrying commercial cargo are not immune. Art 32 (3) defined, "*Commercial property is property other than diplomatic property or military property, that is in use by the foreign State concerned substantially for commercial purpose; and property that is apparently vacant or apparently not in use shall be taken to be being use for commercial purposes unless the court is satisfied that it has been set aside otherwise than for commercial purposes*."
[721] *Creighton Ltd. v. Gouvernement de l'Etat du Qatar* [2000] Court of Cassation 1st Civil 6 July 2000, translated in (October 2000) 15 Mealey's International Arbitration Report A-1.
[722] Thomas (n 392) 13.

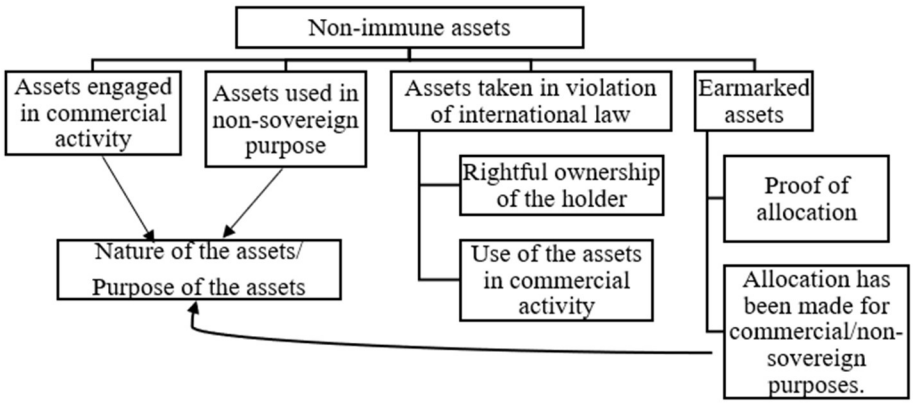

Figure 3: non-immune assets

4.3.1. *Assets having commercial purpose or used in commercial activity.*

In an enforcement case against Republic of Nauru (2004), the US court qualified "commercial" as:

> The term commercial is used in distinction from "non-commercial" and must be given content. The group of defining qualities in the generality […] significantly omit criteria such as 'political', 'diplomatic', 'governmental' 'intelligence', 'foreign policy', or 'domestic'. No doubt other significant fields of human activity are omitted.[723]

On the other hand, the same court attempted to illustrate the commercial purposes as:

> The incorporation of only subsidiary or minor 'commercial, trading, business, professional, industrial or loke' elements in a transaction which is predominantly on of a political, diplomatic, governmental or intelligence character or an admixture of those elements, in my view will not render it as a commercial […][724]

Like the above definitions, the term commercial purpose has only received illustrations rather than an exhaustive definition. The identification of the commercial purpose is also left unresolved.[725] The practice exists as to the acceptance of certificate from the diplomatic representative or competent authority confirming the

[723] *Well Fargo Bank Northwest National Association v. Victoria Aircraft Leasing Limited and Others* [2004] VSC 262, 185 FLR 48, [107].
[724] Ibid, [109].
[725] Reinisch (n 28) 836.

non-commercial purpose of the property as a conclusive proof of the purpose.[726] The purpose of a property not only depends on the use itself but also on the nature of the property and its owner. Thereby the parameters of scrutinizing the commercial purpose of the property varies according to the nature of the property.

While explaining the industrial and commercial use, the explanatory report on the ECSI referred to the same standard as used for private person under article 7. Notwithstanding the creditor friendly conventions, the case laws favor the debtor State as taking a rebuttable presumption of sovereign purpose of the asset[727] and shifting the burden of proof to the claimant of the commercial purpose of the asset.[728] Another challenge arises in case of mixed purpose of the property where both the parties bring their favorable evidence before the court. The Austrian Supreme Court permitted attachment of embassy account for execution relying on its mixed purpose[729] till 1986 where the same court denied enforcement unless the plaintiff could prove the sole commercial purpose of the account.[730]

When the discussion comes to commercial activity, the 'commercial activity' denotes that any sovereign asset even when falls within a category specifically designated as immune, can be subjected to MoCs if the asset has been put in commercial activity.[731] The determination of the activity of the asset vastly depends on the context of the case. The UK court in the case of *SerVaas Inc. v. Rafidain Bank* (2012)[732] emphasized on taking the expression of 'in use for commercial purposes' in its ordinary and natural meaning in view of the context of the case. In the *Sonatrach* case (1985), the French Court of Cassation commented that assets allocation for "economic or commercial activity of a private law nature" can be subjected to MoCs.[733] In *Eurodif* case (1984), it commented: "*the assets of public entities, distinct from the foreign State whether or not enjoying legal personality, which are part of a group of assets*

[726] The UN Convention 2004 (n 41) art 16 (6).
[727] *Societe Eurodif v. Iran* [1984] Court of Cassation (1st Civil Chamber 14 March 1984) Revue critique de droit international prive 644; *Islamic Republic of Iran* (n 475).
[728] Reinisch (n 28); *the Philippines Embassy Bank Account Case* (n 113).
[729] *Neustein* (n 590).
[730] *L-W Verwaltungsgellschaft mbH & Co. KG v. DVA* [1986] Oberster Gerichtshof, 30 Apr 1986; 77 ILR 494.
[731] Thomas (n 392), 6.
[732] *SerVaas Inc* [2012] UKSC 40; [2013] 1 AC 595.
[733] *Societe Sonatrach v. Migeon* [1985], Court of Cassation (1st Civil Chamber) 1 October 1985, 77 ILR 525. Translation taken from Reinisch (n 28) 821, fn 117.

(patrimoine) which been dedicated to activities in the private law sector, may be seized by all creditors of the public entity."[734]

Not all jurisdictions investigate the 'commercial' purpose in the issue of immunity of sovereign asset. Some jurisdictions focus on the 'public purpose' while deciding the same question of immunity. These two approaches are interchangeable to each other. The approach determines the scope of court's consideration of facts. The convergence is more visible when the same judgment creditor knocks the door of several domestic jurisdictions for the enforcement of the judgment against foreign sovereign's assets. The series *of NML Capital* cases are one of them. While deciding the *NML Capital v. Argentina* (2013), the US court decided the commercial nature of the funds,[735] whereas the French court considered the public nature of the assets.[736] Therefore, the following discussion concentrates as to how the domestic courts may determine the non-governmental purposes of the assets for the question of immunity from enforcement. Here the term non-governmental purposes have been interchangeably used with 'not in public purposes', or 'non-sovereign use' of the sovereign assets.

4.3.2. Assets having non-governmental purposes.

Various terms are visible to address the commercial or non-governmental purpose of the asset such as non-sovereign purpose,[737] non-public service assets,[738] 'not destined for public service functions',[739] not allocated for act of sovereignty.[740] The first draft of ILC also added "non-governmental" purposes, which were subsequently replaced with "commercial purposes."[741] Similar terminology was inserted in the UN Convention (2004). Nevertheless, the European jurisdictions (other than the UK) focus on the absence of sovereign purpose, instead of present of commercial purpose, while expressing the immunity to sovereign assets. The national courts of different EU member States use various terms to explain the commercial or non-governmental

[734] *Societe Eurodif* (n 727); *Islamic Republic of Iran* (n 475) [515].
[735] *NML Capital* (n 523).
[736] *NML Capital* (n 421).
[737] *The Philippines Embassy Bank Account Case* (n 113).
[738] *NV Cabolent* (n 284).
[739] *Condor and Filvem* (n 114).
[740] *Republique Arabe d'Egypte* (n 438) [430].
[741] The ILC Report 1999 II (n 234) para 167-168 and fn 111.

purpose of the asset such as non-sovereign purpose,[742] non-public service assets,[743] 'not destined for public service functions',[744] not allocated for act of sovereignty.[745]

The Swiss law grants immunity to the assets "allocated for the performance of acts of sovereignty."[746] The national legislation of Russia uses a reductionist approach in determining the immunity of sovereign assets. It states that immunity cannot be claimed if the asset in question is used or intended to be used for purpose "*unrelated to the exercise of sovereign power*".[747] The old private international law of Hungary stated, "*no enforcement measures can be effected on the state's property in Hungary that serves the fulfillment state's public function, the operations of its state organ*."[748] However, the new Hungarian Private International Law has shifted to '*other than non-commercial purpos*e' for the immunity from enforcement.[749]

The French court of Cassation defined the non-governmental use or non-immune assets as "*where they have been allocated for an economic or commercial activity under private law which is at the origin of the title to the attaching creditor* […]"[750] The German Constitutional Court considered "[…] *in so far, as those things serve sovereign purposes of the foreign state, at the time of the commencement of the enforcement measures*." while deciding the leading case on the diplomatic mission's bank account.[751] The Dutch court applied more positive wording that the sovereign assets enjoy immunity from MoCs as long as they serve the public purposes.[752] In the case of *Prefecture of Boeteia v. Germany* (2002),[753] the Greek Supreme Court held that enforcement proceeding was permitted against the sovereign assets unless the assets served *jure imperii*. It indicated that MoC could be grated against foreign sovereign assets when they were in non-governmental use.

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[742] *The Philippines Embassy Bank Account Case* (n 113).
[743] *NV Cabolent* (n 284).
[744] *Condor and Filvem* (n 114).
[745] *Republique Arabe d'Egypte* (n 438) [430].
[746] Ibid.
[747] The Federal Law on Jurisdictional Immunity of a Foreign State and a Foreign State's Property in the Russian Federation 2015 (n 274).
[748] The Act 13 of 1979 on Private International Law s 62/E/(2) (Hungary) (repealed).
[749] The Act XXVIII of 2017 on Private International Law s 85 (3) (Hungary).
[750] *Societe Sonatrach* (n 733); Translation taken from Reinisch (n 28) fn 117.
[751] *The Philippines Embassy Bank Account Case* (n 113).
[752] *NV Cabolent* (n 284), [148].
[753] [2002] Full Court judgment Nos. 36 and 37/2002, 28 June 2002; The ECtHR's Kalogeropoulou case (n 317); Reinisch (n 28) 816.

The Italian Constitutional Court[754] as well as its Court of Cassation, held the similar view that assets which were not in "*destined to accomplish the public functions of the foreign state*" were available for MoCs.[755] The French Court of cassation also recognized that the attachability of the assets (not serving public purpose) for the enforcement of commercial arbitral awards.[756] Reinisch concluded after observing the cases of sovereign immunity from enforcement measures before the European States' court, "*it is the exact determination of whether or not this requirement of public purpose is fulfilled which forms the core issue of the majority of enforcement immunity decisions*."[757]

The legal significance between the use of "commercial purpose" and the "non-sovereign purpose" of the asset, is that the scope of court's consideration becomes broader with the use of 'non-sovereign purpose'. Such as in the above stated case of *NML Capital* against Argentina, the French court considered the origin of the assets while scrutinizing the purpose of the assets instead of its current nature or purpose.[758] In order to determine the non-sovereign purpose of the assets, the origin and destination of the assets were taken into account,[759] while the same might not hold much significance when its engagement in commercial activity was to be judged. Besides, when the assets are judged based on the presence or absence of public purpose, many assets which would have fall on the categories of non-immune assets, become excluded, such as taxes and governmental fees for public services.[760] According to the fiscal laws, the purpose of tax is to undertake the governmental expenses which are public in nature,[761] whereas if the commercial use test had been applied, the current 'commercial' use of the fund derived from the taxes would have made it non-immune.

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[754] *Condor and Filvem* (n 114) [402].
[755] *Libya* (n 439), [66].
[756] *Creighton Ltd.* (n 721), translated in 15 Mealey's International Arbitration Report A-1, (October 2000).
[757] Reinisch (n 28) 808.
[758] *Republic of Argentina v. NMC Capital LTD* [2000] Belgium, the Supreme Court, Nr. C.11.0688.F, 22 November 2012. The same claimant initiated another enforcement proceeding before the Belgian courts and sought attachment order against the bank accounts of the Argentine diplomatic mission in Brussels. The Supreme Court of Belgium refused to grant the attachment order due to lack of 'explicit and specific waiver of immunity' in respect of the diplomatic asset.
[759] *Paul Clerget v. Banque Commerciale pour l'Europe de Nord and Banque de Commerce Ecterieure du Vietnam* [1971] France, Paris Court of Appeal 2 November 1971, 65 ILR 54, [56].
[760] Gerlich (n 20) fn 152.
[761] Geoffrey Brennan and James M. Buchanan, *The Power to Tax: Analytic Foundations of a Fiscal Constitution*, (Cambridge University Press, 1980).

The legal challenges in using two separate approaches are three folds: firstly, the States practices are inconsistent. Secondly, the diverse practices among States make it difficult for the defendant State in managing their cross border assets. Because the States do not know until an enforcement proceeding is initiated, which forum State, the judgment creditor would target. Finally, the preparation of litigation strategies for both the claimant and the defendant State become uncertain as to the inconsistent practices.

4.3.3. Earmarked asset

The earmarked asset[762] is commonly accepted as non-immune in international instruments.[763] The ILC Draft (1991) reasoned the insertion of the earmarked asset as an exception to immunity from MoCs as such provision would prevent the multiplicity of enforcement proceedings against the defendant States and the impediment to State's intention to set aside certain assets for any certain claims.[764] At the same time, it acknowledged the challenges in determining whether any particular assets had been earmarked or not. Therefore, the evidential determination of earmarked asset was left upon the courts for final decision.[765] While interpreting the earmarked property the French Court of Appeal in Paris held:

> Goods destined by a State for the satisfaction of the claim in question or reserved by it to this end may be seized, instead of all other goods of the foreign State situated in the forum State or intended to be used for commercial purposes without it being necessary to establish that such goods were destined for the entity against which the proceeding had been brought.[766]

Giving a broader interpretation of earmarked asset, the French court held that allocation of any asset for commercial purpose was sufficient for granting MoC.[767]

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[762] The term 'earmarking' is the allocation of asset or establishment of funds for the satisfaction of any specific debt of the State. Mag Eva Wiesinger, 'State Immunity from Enforcement Measures' (Research Monograph, University of Vienna July 2006) 8.
[763] The UN Convention 2004 (n 41) art 18 (b).
[764] The ILC Draft 1991 (n 71) commentary to art 18 (1) (b) para 10.
[765] Ibid.
[766] *Societe Creighton Ltd* (n 431) [527]; Translation taken from Reinisch (n 28) fn 116.
[767] *Socialist Federal Republic of Yugoslavia v. Societe Europeenne d'Etudes et d'Entreprises* [1971] Tribunal de grande instance Paris, 6 July 1970, 98 Journal de Droit International (1971) 131, 65 ILR 46 [49].

The French appellate court confirmed the same ruling regarding earmarked asset that the earmarked assets could be subjected to MoCs for satisfaction of judgment value against foreign Sovereign, instead of all other assets within the territory of the forum State or intended for commercial use.[768] Such broader interpretation of earmarked asset was also accepted by the House of Lords (the UK) in the *Alcom* Case for the embassy account designated for commercial expenses.[769] In the *Alcom Case* (1984), the House of Lords observed the asset which was otherwise immune might be subjected to MoCs if the judgment creditor had proved the earmarking of the asset solely for commercial purpose.[770] Lord Diplock stated:

> Unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that the bank account was earmarked by the foreign state solely (save for de minimis exceptions) for being drawn upon to settle liabilities incurred in commercial transaction as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot in my view be sensibly brought within the crucial words of the exception for which section 13 (4) provides.[771]

The limitation of this interpretation of earmarked asset is to identify the asset earmarked 'solely' for commercial purpose. As the previous discussion of the diplomatic asset used in mixed activities shows the difficulty in proving the mixed purposes of assets,[772] the defendant State may easily hide the earmarked asset behind the veil of some public uses.

Despite the procedural challenges in proving earmarking of assets, the earmarked assets are comparatively easier to be targeted for the MoCs. Not only the earmarked assets for the existing debt, but also earmarking of the same asset for any previous commercial use also act as favorable evidence for the judgment creditor. The court considers the past earmarking of the assets for commercial use as the evidence of commercial use of the assets and thereby non-immune from execution. Nevertheless, the defendant State may vitiate the evidential value of the past commercial use of earmarked the asset by showing other public purpose of the same asset.

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[768] *Societe Creighton Ltd.* (n 431); Translation taken from Reinisch (n 28) 820, fn 116.
[769] *The Alcom* case (n 394).
[770] Ibid [187].
[771] Ibid [605].
[772] Discussed in 4.2.1.4 of this Dissertation.

4.3.4. Asset received or exchanged in violation of international law

The ILA Draft (1982) added the assets received or exchanged in violation of international law as a non-immune asset.[773] However, this provision was not inserted in the UN Convention 2004. From national legislations, the FSIA (1976) of the US expressly states this category of assets as non-immune.[774] It states the assets taken or exchanged in violation of international law is not immune in the execution suits in relation to the judgment establishing rights in the asset in question.[775] This category of assets is also known as the expropriation exception to the immunity rules of sovereign assets. Although no exhaustive definition of assets, received or exchanged in violation of international law can be given, certain illustrations are available from the precedents from the international and domestic courts. The Hague Convention (1954) and the UNESCO Convention (1970) regarding the protection of cultural objects refuse to protect the assets which have been received pursuant to illicit import, export, and transfer of ownership of cultural objects.

During the Second World War, certain assets of the German and the Hungarian people including a painting of the Dutch artist Pieter van Laer were confiscated by Czechoslovakia pursuant to the decree on 12 of 21 June 1945.[776] The painting was owned by Prince Franz Josef II of Liechtenstein. This was the case where the convergence lied between the artistic assets lent for exhibition without any intention for sale and the same assets obtained in violation of International Law. In 1991, Czechoslovakia lent the painting to Germany for exhibition in museum. A successor of Prince Franz Josef brought a case before the German courts and subsequently before the ECtHR for the recovery of paintings. However, none of the court held the verdict for return of the painting. Liechtenstein took the case to the ICJ in 2005 and claimed that in 1995, Germany treated the assets of Liechtenstein as its external assets

[773] The ILA Draft 1982 (n 142) art VIII.
[774] The FSIA 1976 (n 37) sec 1610 (3). The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, 2016 (n 709) reinstated the properties received or exchanged in violation of international law as an exception to the immunity granted to the properties with cultural, scientific, and historical values.
[775] Ibid sec 1610 (a) (3)
[776] *The Case Concerning Certain Property, Liechtenstein v. Germany* [2005] International Court of Justice judgment of February 10, 2005.

for the purpose of Settlement Convention.[777] Although the claim of Liechtenstein failed, the ICJ investigated whether Germany violated its international obligations toward Liechtenstein in relation to its assets and if yes, what liability would be constituted out of such violation.

The precedents from national jurisdictions provide the lists of issues considered by the domestic courts. In the case of *Malewicz v. City of Amsterdam*,[778] before the final dismissal of the case, the US court considered the four issues: firstly, rightful ownership of the plaintiff to the assets; secondly,) the sovereign authority as the final possessor of the assets in question, to determine whether the asset was taken in violation of international law. In this case, the museum authority received the paintings from the safekeeper of the paintings, who was entrusted by the actual owner;[779] thirdly, the timing of filing the litigation which the court commented to be during the presence of the assets within its jurisdiction and the location of the cultural objects at the time of the litigation and finally, the nature of the activity in which the assets in question were involved. In this given case, the paintings were brought to the US for exhibition in the museum. The US court interpreted that lending of painting for exhibition qualified for commercial activity as both the public and private museums make the cross-border lending. As to the commercial use of the paintings in this case, the US court observed, "*there is nothing sovereign about the act of lending art pieces even though the pieces themselves might belong to a sovereign. Loans between and among museums (both public and private) occur around the world*."[780]

The first issue received clear view in the case of *Altmann v. Republic of Austria* (2001).[781] This case was concerning paintings looted during the *Nazi* era. The paintings were held by Austria and the Austrian Gallery in the US advertised for exhibition of the paintings. In US court observed three elements to be proved for a successful attachment of the paintings in favor of the plaintiff: property taken in violation of international law, owned by State agency or instrumentality and the

[777] The Settlement Convention was signed among the US, the UK, France, and Germany in 1995 in relation to the reparations of German external assets and other properties seized in connection with the Second World War.
[778] [2005] DDC 362 F Supp 2d 298.
[779] Ibid, [301]. Although the claimant raised objections as to the authenticity of the letter presented by the museum authority as evidence of the rightful lending to them by the safekeeper, such discussion was broadly based on the question of facts, and thereby out of the scope of this dissertation.
[780] Ibid, [314].
[781] [2001] CD Cal 142 S Supp 2d 1187.

agency engaged in commercial activity in the US. Finally, the US court interpreted as the actions of the Austrian Gallery as of using the paintings in advertising, lending them to the US museums as commercial in nature.[782] The US court held the holding of the paintings by the Austrian museum as non-rightful and therefore, in violation of international law.[783]

As to the second issue from the *Malewicz* case, of taking the object in violation of international law, the US court gave a broader interpretation including domestic taking in the case of *Philipp v. Germany* (2017).[784] Germany argued that the claim of the plaintiff as to the taking in violation of international law did not act when the State took objects from its own nationals whereas the US Supreme Court gave the broader interpretation of the phrase "rights in property taking in violation of international law" as inclusive of domestic takings.

In relation to the third issue of the *Malewicz* case, the court order becomes a mere paper judgment when the cultural object has already been removed from the jurisdiction of the forum State. The compliance remains at the sweet will of the defendant State. In *Agudas Chasdei Chabad v. Russia Federation* (2006)[785] the historical objects consisting of books and archives of pages were taken by Russia. The plaintiff filed the litigation before the US court for surrender of the objects, alleging the taking in violation of international law. The US Court held that Russia enjoyed no immunity regarding these objects and thereby bound to return the same to the plaintiff.

For the final issue of the *Malewicz* case, the plaintiff lost the case because of absence of commercial use of the asset in question in *Westfield v. Federal Republic of Germany* (2011).[786] Mere commercial activity was not enough to the US court. The petitioner also needed to establish the adverse impact on the US market if the remedy were not granted. The plaintiff attempted to recover certain paintings, seized by the *Nazis*. However, the US court granted immunity to Germany as the plaintiff failed to prove the commercial activity of Germany regarding the seized paintings. In *De*

[782] Ibid, [1204] and [1205].
[783] *Republic of Austria v. Altmann* [2004] 124 S.Ct 2240 (No. 03-13).
[784] [2017] DDC 248 F Supp 3d 59.
[785] [2006] DDC 466 F Supp 2d 6, [10], [12].
[786] [2011] 6th Cir 633 F 3d 409 [413].

Csepel v. Hungary (2011)[787] the cultural objects owned by a private collector were taken by Hungary during the World War II which were subsequently put under a bailment agreement between the plaintiff and Hungary. After failing to recover the assets upon several requests, the plaintiff filed the litigation in the US court. The plaintiff successfully argued the abovementioned prerequisites. The US court refused to apply the commercial exception in this case due to lack of direct effect of the repudiation of the bailment contract in the US market.[788]

In addition to issues mentioned in the *Malewicz* case, the petitioner needs to exhaust the other available remedies before suing the foreign sovereign. Such as in *Re Borrowed Gravestones* (1985),[789] the Swiss Federal Court refused to grant MoC because of lack of administrative action on behalf of the Swiss government to return the assets from Italy. Certain gravestones with historical and archeological value under the Italian Civil Code, were taken to Italy from Switzerland for some criminal investigation under the European Convention on Mutual Assistance in Criminal Matters 1959 but the Italian authorities did not return the gravestones to Switzerland. The Swiss appellate court observed that Italy should not be benefited from this conduct and thereby not entitled to immunity as they violated their obligation to return the gravestone in accordance with the European Convention (1959). However, the Swiss Federal Supreme Court held a contrary view, "*it should be observed at the outset that Italy has not arbitrarily procured possession of the stones; on the contrary, they were duly handed to it by the competent Swiss authorities after mutual assistance proceeding took place*."[790] It emphasized on the necessity of request from Switzerland to Italy to return the stones and in absence of this, Italy should not be held in violation of international law[791] and therefore it enjoyed immunity in relation to the gravestones.[792]

[787] [2011] DDC 808 F Supp 2 d 113; [2013] DC Cir 714 F 3d 591; [2016] DDC 169 F Supp 3d 143. [2017] DC Cir 869 F 3d 1094.
[788] [2016] DDC 169 F Supp 3d 143, [158-163].
[789] *Re Borrowed Gravestones* [1987] the Bundesgericht (Swiss Federal Supreme Court) 6 February 1985, ECC 36. 82 ILR 24.
[790] [1987] ECC 36, [18].
[791] Ibid, [20].
[792] Ibid, [21].

The US court followed similar approach of denying MoC without appropriating other course of actions for remedy. In *Cassirer v. Kingdom of Spain* (2006)[793] the issue in this case was the defendant State was not the one who took the objects in violation of international law. The US court reviewed the question as to whether the FSIA (1976) exception would apply or not. The court held in favor of application of the FSIA (1976) exception against Spain. However, the US court refused to the appeal on the ground of non-exhaustion of available remedies by the plaintiff.

4.4. **Commonly targeted sovereign assets**

The nature of the non-immune assets receives a comprehensive view when scrutinized from the aspects of specific asset in question. Zdobnoh and Vark duly observed, "(Sovereign immunity from execution) *depends…rather on the characteristics of the assets that the judgment creditor is trying to levy execution upon*."[794] Sovereign assets are located not only within its own territory but also in other States' territory. Given the defendant State enjoys full immunity in its territory, its national courts may be hesitant to apply restrictive sovereign immunity.[795] The judgment creditors target the sovereign assets beyond the territorial jurisdiction of the defendant State's courts and specially target the jurisdictions with more creditors-friendly legislations. Searching sovereign assets is a challenging task. This task is often conducted with either of the two objectives: to find an asset for the enforcement of judgment or arbitral award or to find any misappropriated assets by any deposed political leaders.[796] The first one is considered for this dissertation whereas the other one is exclusively kept outside the scope of this dissertation.

Among the main two types of assets: moveable and immoveable assets, the immoveable sovereign assets are not immune when it comes to the debt in relation to the particular asset. On the other hand, the immunity of moveable assets brings all the above discussed questions in place. The location of the liquid assets, the holder of the assets, control over the asset etc. are the catalyst for the question of immunity.

[793] [2006] CD Cal 461 F Supp 2d 1157; [2010] 9th Cir 616 F 3d 1019; [2010] 9th Cir 49 ILM 1492.
[794] Zdobnoh and Vark (n 378) 166.
[795] George K. Foster, 'Collecting from Sovereigns: The Current Legal Framework for Enforcement Arbitral Awards and Court Judgements against States and their Instrumentalities and Some Proposals for its Reform' (2008) 25 (3) Arizona Journal of International & Comparative Law 665, 670.
[796] Nicholas Peck, Martin Stone and Allison Everhardt, 'Sovereign Asset Tracing: A Whole New World' (June 2020), Nardello & Co. <https://www.nardelloandco.com/insights/sovereign-asset-tracing-a-whole-new-world/#> accessed 13 November 2021.

Sovereign ownership raises a preliminary presumption of immunity from MoCs. Besides, certain sovereign assets enjoy absolute immunity under international conventions.[797] Nevertheless, the proof of commercial use rebuts the presumption. As the above discussion shows, the courts of some forum States grant MoCs relying on the commercial purpose of the assets despite the protection granted under the international conventions.

On the other hand, States manage their assets through SOEs as the alter ego but having separate legal entity in law. In the case of assets held by SOEs, it is difficult to convince the court to pierce the corporate veil even in the most creditors' friendly jurisdictions such as the US or UK.[798] Therefore, despite the list of non-immune assets discussed above, specific types of cross-border assets which are commonly targeted for enforcement, demand deeper examination to determine the question of immunity.

4.4.1. Immoveable assets

Immoveable assets are defined as assets which are permanently attached to the earth.[799] States' immoveable asset does not enjoy immunity from execution in case of the disputes resulting out of the same asset situated in the forum State's territory.[800] The Swedish Supreme Court rightly observed:

> The expression [in use…by the State for other than government non-commercial purposes] should however, be considered to mean that there is immunity from enforcement in merely for the reason that the property in question is owned by the state and used by it for non-commercial purposes.[801]

Similarly, national legislations take immoveable property as the exception to the rule of absolute sovereign immunity.[802] The immoveable assets of the defendant States can

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[797] Discussed in 4.2. of this Dissertation.
[798] Discussed in 4.4.4. of this Dissertation.
[799] Black's Law Dictionary (n 62) 'Immoveable property'. It defined as "*property that cannot be moved; an object so firmly attached to the land that it is regarded as part of the land*."
[800] The UN Convention 2004 (n 41) art 13; The ECSI 1972 (n 41) art 9, 10.
[801] *Sedelmayer v Russian Federation* [2011] Supreme Court of Sweden No. O 170-10 (2011) Nytt Juridiskt Arkiv 475, [14]. Translation taken from Pal Wrange, 'Sedelmayer v. Russian Federation' (April 2012) 106 (2) the American Journal of International Law 347, 349.
[802] The FSIA 1976 (n 37) sec 1605 (a) (4); The SIA 1978 (n 37) sec 6; The SIA 1982 (n 167) sec 12 (1) (c).

be subjected to MoCs for the debt arisen out of the dispute from the same property. The ECSI (1972), article 9 states the immunity from jurisdiction does not apply in the proceedings related to rights, interests, use or possession of immovable assets as well as the obligations arising out of the immovable assets. Article 29 (c) excludes the application of this Convention in disputes related to customs duties, taxes, and penalties.[803] The combined effect of these two provisions is that the immunity of immoveable assets cannot be claimed under the ECSI (1972) in relation to the debts derived from this property. The UN Convention (2004) has the similar provisions in its article 13 as article 9 of the ECSI; however, it lacks the provisions as article 29 (c) of the ECSI (1972). In view the provisions of the ECSI (1972), the taxes arisen out of any immovable asset owned by the defendant State may be enforced against the particular asset. It was commented in the Explanatory Report (2006) to the ECSI (1972):

> The exclusion of these matters from the field of application of the present Convention does not by any means imply that […] judgments given in these fields can be enforced in the State of the forum against property of a foreign State. It means only that since the provisions of the Convention may not be invoked, recourse must be had to general rules of law.[804]

In the *Hungarian Embassy case* (1969)[805] while deciding the question of immunity of the lands of the embassy [not currently used for diplomatic purposes], the German court applied the test of "*whether the ability of diplomatic mission to function would be impaired*." Finally, the German Court held that the embassy's immoveable asset "no longer used for diplomatic purposes" could be subjected to MoCs.

The FSIA (1976) of the US, section 1610 (a) (4) puts the immoveable asset as an exception to the immunity from attachment and execution. It infers that the immoveable asset owned by any foreign State, situated in the US does not enjoy any immunity unless it is used for diplomatic or consular mission. In the case of *City of New York v. Permanent Mission of India*, (2010)[806] the twenty-six-floor building was

[803] Similar provisions are available in the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters 1971 art 1, para 2 (6) and (7) and para 3.
[804] The Explanatory Report to the ECSI 2006 (n 181) para 114.
[805] [1969] the Bundesgerichtshof, 26 Sept. 1969 65 ILR 110.
[806] [2010] 2nd Cir No. 08-1805.

owned by the Permanent Mission of India in the US where the first six floors were used for diplomatic mission and the other twenty floors were used for accommodation of low-level employees. According to the laws of the city of New York, tax exemption was given for the real estate assets of the foreign State, used exclusively for diplomatic purpose and accommodation of high-level officials. The local government kept taxing the twenty floors of the building whereas India claimed tax exemptions for the whole estate as a sovereign State. The City of New York proceeded to enforce the tax liability of the Permanent Mission of India against the building and succeeded in the circuit court. The Second Circuit Court of Appeal emphasized on three issues when it came to enforcement against immoveable asset of the defendant State: firstly, the asset was located in the forum State, secondly, the asset was owned or possessed by the defendant State and finally, debt was accrued from any obligation relating to the immoveable asset in question.[807] Such dispute could be tax liability, tortious liability arisen from the immoveable asset, insurance claim etc. India appealed to the US Supreme Court which was rejected subsequently.[808] This precedent of the US Supreme Court restricted the availability of immoveable asset from MoCs for the debts arisen from commercial contracts unrelated to the asset.

In the case of *Sedelmayer v. Russian Federation* (2011),[809] Sedelmayer received an investment arbitral award against Russia and attempted to enforce the same against the real asset of Russia in Sweden against the rent owed by the tenants to Russia. The real asset in question consisted of a multi-unit building which was used by Russian Embassy until 1970s but later, was not notified as official premises anymore. The building had mixed uses of commercial and diplomatic uses. Fifteen out of forty-eight apartments in the building were leased to the employees of the Russian Embassy, two were rented to the commercial companies, and others were used for the Swedish-Russia scientific exchange and other governmental purposes. The ground floor was jointly used by the Russian trade mission and the embassy. The garage was reserved for diplomatic vehicles. The Supreme Court of Sweden relied on article 19 of the UN Convention (2004) and article 18 of the VCDR (1961) and held the official use of the

[807] Ibid.
[808] *Permanent Mission of India to United Nations* (n 336).
[809] Sedelmayer (n 801); Translation taken from Wrange (n 801) 349.

garage, apartments leased to the embassy employees as public purpose and hence, immune from MoCs.[810] It applied the test of "*official purposes and purposes that were closely connected to official activities*" other than "*commercial or other private law activities*."[811] For the apartment opened for rent on non-profit basis as part of the bilateral agreement between Sweden and Russia as to the scientific exchange, the court found the rent agreement between the individual and Russia "*not so closely connected with the fulfilment of the [bilateral] agreement*".[812] Hence, the court decided the mixed uses of the building as official [*i.e.*, *jure imperii*] and as commercial [*i.e.*, *jure gestion*]. However, in response to the question of whether use of the whole real asset should be in specific purpose, the court replied, the limited use of the building for official purpose did not entitle the whole building to be immune, hence, the execution was allowed against the part of the building used for non-official purposes.[813]

Hence, when targeting immoveable asset for execution, the petitioner needs to prove the nexus of the asset with the claim in question and courts investigate the use of the immoveable assets and the impact of the MoCs upon the public functions of the defendant State. Nevertheless, a contrary precedent was the case of *Zimbabwe v. Louis Karel Fick, Etheredge, Campbell, and President of the Republic of South Africa* (2013).[814] In this case, the claimants received an arbitral award against Zimbabwe for expropriation of their land and attempted to enforce part of the award in South Africa. The High Court of South Africa enforced the award by confiscating and subsequently selling the immoveable assets of Zimbabwe located in South Africa. The decision of enforcement against immoveable asset of Zimbabwe was also confirmed by the Constitutional Court of South Africa. Nevertheless, the South African courts did not enquire into the use of the immovable asset in question while grating MoC.[815] This precedent went beyond the stand of international convention and practices of other jurisdictions. It allowed MoC against the immoveable asset for an unrelated judgment debt which was rare practice.

[810] Ibid, [21].
[811] Ibid, [8], [16].
[812] Ibid, [22].
[813] Ibid, [23].
[814] *Zimbabwe* (n 445).
[815] Tawanda Hondora, 'South Africa's Law on Foreign State Immunity: A Puzzle of Phantom Waivers in Red Herrings, and Dark Continents', (April 2, 2017) <https://ssrn.com/abstract=2945051> accessed 31 July 2022.

4.4.2. State owned ships and cargos therein

Ships are the moveable asset of States. When they are used in any purpose other than for military purposes and/or for public uses, they enjoy no immunity in international law.[816] Ships that are not used for warships or for any governmental purposes are called as merchant ships.[817] There are various kinds of merchant ships such as cargo ships, dry cargo ships, specialized cargo ships, coasters, passenger ships etc.[818] Irrespective of the kinds [except military ships], the merchant ships are available for enforcement of any judgment debt of the sovereign.[819] The flag raised in the ship indicates its place of registration and its nationality and thereby acts as the documentary proof of its ownership.[820] Determination of the ownership also acts as the catalyst for the jurisdiction of States,[821] and possibility of MoCs to be taken against the ship in question.

The Brussels Convention (1926) states the immunity to the State-owned ships intended for public purposes.[822] The UNCLOS (1982) states the immunity of warships and government ships when used for non-commercial purposes.[823] It means the use of the ship receives the sole consideration for the question of its immunity. Even before the Brussels Convention (1926), the State-owned ships enjoyed immunity for the sake of diplomatic relations. In *Schooner Exchange v. McFadden* (1812)[824] an armed vessel of France was attempted to be seized by an US plaintiff. Marshall CJ denied the enforcement action on the ground of public nature of the vessels. He found that allowing such action would impugn the dignity of defendant State and violate the 'mutual intercourse' and 'interchange of good offices' among the States.[825]

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[816] The UNCLOS 1982 (n 366), art 32, 95 and 96.
[817] Ibid, art 29-32.
[818] Lagoni (n 349) para 6. There are ships with special kind of propulsion such as fishing boats, considered as a separate category in international law. However, it does not fall within the discussion of this dissertation.
[819] ibid.
[820] The UNCLOS 1982 (n 366) art 91 (1). Nevertheless, in the case of *the Grand Prince (Belize v. France*) [2001] ITLOS, List of Cases no. 8 (20 April 2001). In this case, the International Tribunal for the Law of the Sea (ITLOS) refused to apply 'an element of friction' to establish the ownership based on mere rise of flag and/or any expired certificate of registration.
[821] *The 'Juno Trade' case Saint Vincent and the Grenadines v. Guinea-Bissau*, [2004] ITLOS Case. 13 (December 18, 2004), para 9.
[822] Discussed in 2.4.4.1 of this Dissertation.
[823] The UNCLOS 1982 (n 366) art 32.
[824] *The Schooner Exchange* (n 100).
[825] [1812] USSC 11 US 116, [119] and [137].

In the *Rigmore* (1942)[826] a month after the German invasion of Norway during the World War II, the Norwegian government requisitioned the *Charente* and nine other ships, registered in Norway. These ships were subsequently chartered (by demise) to the UK. The British government used the ships for carrying cargos of semi-finished and finished commercially purchased materials of its own. Application was made in the lower court of Gothenburg for the arrest of these ships where the UK's claim of immunity was upheld but later, the court of appeal denied immunity. Thus, the case went before the Swedish Supreme Court which allowed the immunity of the ships, relying on the evidence given by the UK as to the exclusive governmental use of the cargo for the promotion of the war efforts.[827] The Swedish Supreme Court deviated from the provision of the Brussel Convention (1926). Under the Brussels Convention, any carriage of supplies on behalf of the State for its population is deemed as commercial.[828] Nevertheless, the court allowed the immunity after concluding, "*A State involved in way may if it engages in carriage for purposes of this kind is regarded as engaged in a practice of a purely state character must be considered to have received a certain recognition by virtue of the provisions of Article 7 of the 1926 Brussels Convention*."[829]

The French jurisdiction applied the restrictive sovereign immunity in *Societe Laul Liegard v. Capitain Serdjuk and Mange* (1964).[830] The French court spelled out the private use and the public use of the State-owned ships by stating:

> A ship belonging to a foreign State which carries freight by sea for a private person performs a private commercial act which has nothing in common with the performance of a public or governmental service. The rules concerning the immunity of State ships do not therefore apply to such ships,

[826] [1942] Nytt Juridiskt Arkiv 1 (NJA) para. 69. For translations of the judgment: Erik Hagbergh, 'Supreme Court of Sweden: Judgment in the "Rigmor" Case' (1943) 37 (1) American Journal of International Law 141.
[827] Ibid, 150.
[828] The Brussels Convention 1926 (n 186) art 1.
[829] Ibid, art 7 states, "*In time of war each Contracting State reserves to itself the right of suspending the application of the present Convention […] to the effect that neither ships owned or operated by that State, nor cargoes owned by it shall be subject to any arrest, seizure, or detention by a foreign Court of Law […]*"
[830] *Societe Laul Liegard v. Capitain Serdjuk and Mange* [1964], Tribunal de commerce, La Rachelle, 14 Oct 1964, 65 ILR 38.

which can be subjected to attachment if liability may have been incurred in the court of such carriage.[831]

With increasing use of restrictive sovereign immunity, the Privy Council denied immunity to a commercial trading ship owned by the Philippines government due to its engagement in commercial voyage in the *Philippine Admiral* (1977).[832]

In the *I Congreso del Partido* (1978)[833] two Cuban ships were delivering sugar to a Chilian buyer. One of the ships, namely *the Playa Larga* was owned by a Cuban SOE and the another, namely *the Marble Islands*, was chartered by the same SOE from a Liechtenstein corporation. During the voyage of the ships, the Cuban government froze all Chilian assets, and diverted all its ships from the voyage due to deterioration of its relationship with Chili. Thus, the ships could not deliver the cargoes to the buyer. The Cuban government subsequently gifted the cargo in the *Marble Islands* to North Vietnam. Thus, the buyer applied to the British court, based on the bill of lading, for recovery of its costs for non-performance of contract. Justice Robert Goff recognized that mere breach of contract did not entitle the claim of immunity, but he also observed, "*the character of the contract cannot necessarily preclude a breach of being held to result from an actus jure imperii in which event sovereign immunity may be claimed in respect of such breach*."[834] Therefore, he decided in favor of Cuba as the diversion of both ships arose out of the exercise of sovereign act of foreign policy,[835] because the given instructions of diversion of the ships could not have been given by any private entity.[836] When the case was brought before the House of Lords [the UK], immunity for both ships was denied.[837] For the *Playa Larga*, the House of Lords decided unanimously against the claim of immunity stating, "*everything done by the Republic of Cuba in relation to the Playa Larga could have been done and so far as evidence goes, was done as owners of the ship: it had not exercised and hod no need to exercise sovereign powers*."[838] For the other ship namely, the *Marble Islands*, Lord Wilberforce and Lord Edmund had dissenting opinion. They commented on the

[831] Ibid, [39].
[832] [1977] A.C. 373 (Privy Council) 400.
[833] [1978] QB 500 (Robert Groff J).
[834] Ibid, [530].
[835] Ibid, [533].
[836] Ibid, [528]- [29].
[837] [1983] 1 AC 244.
[838] Ibid, [261] and [267].

lack of contractual relationship between Cuba and the plaintiff. They relied on the facts that confiscation of Chilian cargo, diversion of ship and gifting the same to another State were the public acts of Cuba.[839] The House of Lords in this case considered of the conduct in context whether acted under contractual or proprietary powers.[840]

In *Wijsmuller Salvage BV v. ADM Naval Services* (1989),[841] the Peruvian warship was delivered to a Dutch company for repairing. It faced some difficulties while going for a sea trail. The petitioner provided the assistance to the ship which entitled the petition to its salvage payment. In fear of losing the opportunity to get paid, the petitioner applied for attachment of the ship. The petitioner argued the ship was not serving any public purpose instead taken for refitting which was usual for any other private ships as well. The Dutch court held the ship as immune from MoCs as commenting:

> A warship delivered by a foreign State to Dutch companies for refitting not only has to spend a long time in dock but must also undergo sea trails, during which it sails under national command and is manned in part by a national crew, should also be regarded as a ship intended for use in the public service even during the execution of the work.[842]

In another case of *the Russian Federation v. Pied-Rich BV* (1994), the Dutch Supreme Court held that, the State-owned ships, used for commercial shipping company are not entitled to similar immunity. The Dutch Supreme Court held:

> There is no unwritten international law to the effect seizure (provisional or otherwise) of a vessel belonging to the State and intended for commercial shipping is permissible only if the seizure is levied for the purpose of insurance or to recover a (maritime) claim resulting from the operation of the vessel.[843]

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[839] Ibid, [277].
[840] Brownlie (n 117) 330-31; James Crawford, 'International Law, and Foreign Sovereigns: Distinguishing Immune Transactions' (1984) 54, British Yearbook of International Law 75, 91.
[841] [1989] NYIL 294-296.
[842] *Wijsmuller Salvage BV v. ADM Naval Services* [1989] District Court of Amsterdam, 19 November 1989, <http://www.cahdidatabases.coe.int/Contribution/Details/193> accessed 02 August 2022; translation taken from Reinisch (n 28) 825, fn 147.
[843] *The Russian Federation v. Pied-Rich BV*, [1994] Supreme Court of Netherlands, NJ 1994, no. 329.

While deciding the public or commercial purpose of the ship, the historical context also plays vital role. In *Odyssey Marine Exploration v. Spain* (2011)[844] the *Mercedes* was a Spanish warship which was sunk in international water in 1804. In 2007 the plaintiff discovered it along with its cargos and claimed over it as shipwrecked vessel. Spain filed a motion to dismiss the claim over the *Mercedes* as the US court lacked jurisdiction over the warship of Spain. Based on the magistrate judge's report, the US court confirmed the ownership of Spain over the *Mercedes* and its cargos. The sovereign ships carrying commercial activity did not enjoy immunity. The plaintiff claimed that 75% of the space in the *Mercedes* was commercially rented for carrying private cargos. Nevertheless, the US court reviewed the historical background of the *Mercedes.* It confirmed the immunity to the ship and its cargos and commented:

> Although the Mercedes did transport private cargo of Spanish citizens for a charge, the transport was of a sovereign nature. According to Spanish naval historians, providing protection and sage passage to property of Spanish citizens was a military function of the Spanish Navy, especially in times of war or threatened war.[845]

4.4.3. State-owned Aircrafts and cargoes therein

Similar to the State-owned ships, State owned aircrafts used for public purposes are immune from any enforcement.[846] State aircrafts are defined as owned and controlled by government and serving public purposes.[847] Besides the ownership of the aircrafts, purpose of the aircraft is the determining factor for immunity. The Convention on the Regulation of Aerial Navigation (the Paris Convention) of 1919 listed the police, customs, and postal services as the public services.[848] The Chicago Convention (1944) excludes the State aircrafts from this scope of application and therefore defined it as aircrafts used for military, customs or police services.[849] The purposes listed in the Chicago Convention (1944) are not exhaustive, therefore the other purposes such as, search and rescue, firefighting, scientific purposes, disaster relief distribution etc. remain open for interpretation. On the other hand, aircrafts serving civil purposes, are

[844] [2011] 11th Cir 657 F 3d 1159.
[845] Ibid, [1177].
[846] The Convention on the Regulation of Aerial Navigation (the Paris Convention) 1919 art XXXII.
[847] Wouters and Verhoeven (n 367), para 1.
[848] The Paris Convention 1919 (n 846) art XXX; The UN Convention 2004 (n 41) art 18.
[849] The Chicago Convention 1944 (n 404) art 3 (b).

known as civil aircrafts. When the civil aircrafts are owned and operated by the governmental agency for commercial purposes, they are deemed as any other privately owned civil aircrafts under the Chicago Convention.[850] Like the State-owned merchant ships and aircrafts, the cargos therein, are treated same as any cargos carried in private commercial vessels.[851]

In *Socialist People's Libyan Aram Jamahiriya v. Rossbeton* (1989),[852] the lower court in Italy allowed prejudgment attachment against two State-owned aircrafts of Libya upon application of the judgment creditor. While deciding this case, the Italian Supreme Court opined that except the sovereign assets "*used in the exercise of sovereign functions or devoted to public purposes*", others were available for execution. In light of this case, the court was convinced as to the commercial use of the State-owned aircrafts. Nevertheless, the judgment creditor did not get the MoC in his favor because the court denied the enforcement due to absence of ministerial authorization for the MoCs against Libyan State's assets.[853]

Nevertheless, execution is permitted when the judgment debt is accrued from the liability of the airline. Such as, in the case of *Air Zaire v. Guathier et al* (1984)[854] the compensation order for wrongful termination case of a group of Belgian pilots was enforced by the attachment of an aircraft of Air Zaire. The Court of Appeal held the use of the aircraft as "purely commercial" and disregarded its claim of immunity from execution. The challenge arises when the judgment creditor attempts to enforce the debt of the defendant State against State owned aircrafts or assets of State-owned airline. In *Hercaire Intern., Inc v. Argentina* (1987),[855] *Hercaire* successfully received attachment order from the trial court to enforce the judgment against the Boeing 727 of the national airline of Argentina relying on the fact that hundred percent shares of the airline were held by Argentina. The 11th Circuit Court of Appeal denied the attachment order by commenting, "*if Aerolineas lacks separate status, then the Boeing 727 seized by the Marshals certainly is Argentina's commercial property found the United States*." The court again applied the *Bancec* test and decided against

[850] Ibid, art 77-79.
[851] The Brussels Convention 1926 (n 186).
[852] [1989] SRL 72 Rivista di Diritto Internazionale 691.
[853] [1989] Decree dated March 29, 1989. 25 Rivista di Diritto Internazionale Privato E Processuale 477.
[854] [1984] Court of Appeal, Paris (January 31, 1984) 1984 RECUEIL DALLOZ SIREY (12 April) 160.
[855] *Hercaire Intern., Inc. v. Argentina* [1987] 11th Cir 821 F 2d 559.

the attachment order. It was found that the petitioner failed to prove the extensive control of Argentina over the airline company despite its full ownership over its stares and/or any fraud or injustice in form of abuse of corporate status.

In the *Thai Airplane* case (2011),[856] the Munich court ordered the attachment of the Boeing 737, landed in the Munich airport pursuant to an outstanding debt of $43.4 million owed by the Thai government to a German construction firm. The Thai foreign minister emphasized on the ownership of the aircraft in the name of the Thai Royal family instead of the Thai government. Nevertheless, the court refused to reverse the order unless €20 million was given as guarantee. The plane was subsequently released upon the payment of guarantee.[857]

One common question for both State-owned ships and State-owned aircrafts is the operation and management of these sovereign assets under the veil of corporate structure. State leaves to day-to-day operation of these assets by its SOEs. State owns the shares in the SOE and the SOE holds the documentary title over these assets. Not only ships and/or aircrafts, but State also uses the corporate form for its various other asset management activities, *e.g.*, sovereign wealth funds, State owned intellectual properties, certain subsidized industries etc.

4.4.4. Assets by State owned enterprises (SOEs)

State invests in SOEs to have controlling interests in the venture.[858] The objectives of investing in SOEs are predominantly commercial in nature as well as the income received therefrom is also used for commercial purposes. The legal distinctions between the sovereign wealth funds and the SOEs are that sovereign wealth funds are held by State instrumentalities whereas the same instrumentality may own the shares in SOEs.[859] The State instrumentalities and the SOEs hold legal distinctions. The State instrumentalities stand on the same footing as any sovereign entities whereas the

[856] Spiegel International, Diplomatic Dispute: Thai Prince's Private Jet to Remain Impounded in Munich, (26 July 2011) <https://www.spiegel.de/international/germany/diplomatic-dispute-thai-prince-s-private-jet-to-remain-impounded-in-munich-a-776718.html> accessed 01 March 2022.
[857] Charlotte Chelsom-Pill, German court to release Thai prince's plane for a fee, (20 July 2011) <https://www.dw.com/en/german-court-to-release-thai-princes-plane-for-a-fee/a-15253912> accessed 01 March 2022.
[858] Shu Shang and Wei Shen, 'When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era: is There still a Black Hole in International Law?' (2018) 21 (4) Leiden Journal of International Law 915, 917.
[859] Discussed in 4.4.7 of this dissertation.

SOEs possess the separate legal entities. The interest of State in SOE is limited to its shares and right to distribution whereas the SOE holds its assets in its own name and manages the same. With the SOE, sovereign ownership stays behind the corporate veil. Hence, piercing the corporate veil requires more compelling case while targeting the assets of the SOEs for enforcement of any judgement debt of the State or vice-versa.

The ILA Draft (1982) included the State agency within the given definition of foreign State for the purpose of State immunity where either the agency in question had no separate personality or notwithstanding the separate legal personality, it had performed any *jure imperii* in exercise of the sovereign authority.[860] The State instrumentalities are also relevant when the defendant State hides its assets behind the corporate veil of its SOEs. For illustration, in justifying the attachment of assets of one SOE for the debt of another, the US Supreme Court held, the foreign State abused the corporate structure, thus need to pierce the corporate veil for fraud.[861]Thus, the functions of State agencies or instrumentalities in law of State immunity can be discussed under two questions: firstly, whether their assets are immune from execution, either for their own debts or the debts of the State itself. Secondly, whether the State agencies are entitled to immunity for their functions in exercise of State authority delegated to them. Among these two issues, the first one is directly related to this Dissertation. The second one is relevant as to the determination of State agency's legal position as a separate legal entity or as a functional State instrumentality such as the status of the central bank and its assets.[862] The delegation of government power to the private entities brings the question of entitlement of immunities for the exercise of government powers by private entities. In a question of immunity, the court considers the legal personality of the private actor [here the SOE], the nature of the authority delegated and the legal relationship between the delegator [here the State] and the delegate [here the SOE]. Finally, the court concludes with an emphasize on the nature of the act and the legal relationship with the State to grant or reject immunity to non-State actors.[863] Such approach makes

[860] The ILA Draft 1982 (n 142) art 1 (b).
[861] *First National City Bank (*n 34).
[862] Discussed in 4.2.3 of this Dissertation.
[863] Oddenino and Bonetto (n 173) 23.

either no asset as immune, or all the assets are immune unless the commercial use test is satisfied.[864]

As to the first question, the position of the US is stringent under the FSIA (1976) of the US section 1610. The State agency's assets are subjected to attachment of their own debt regardless of the origin and destination of the assets. The restriction as to commercial use is also not applicable when the aim of the agency is generally doing business. The reason behind such strict position is to separate the application of corporate laws and related business laws from the laws on foreign sovereign immunity. However, the functions of SOEs are sometimes overlapping with the public functions of the State. Therefore, determination of the functions of SOE and the State is required to decide the question of immunity of the SOE's assets. The SIA (1978) of the UK confirms that assets of the State instrumentalities as not immune. However, when any separate entity acts in exercise of sovereign power is entitled to immunity as State.[865] This provision has two legal consequences: firstly, assets of SOE are not immune for its debt; secondly, if the SOE is involved in any public functions or exercises power, its assets are entitled to immunity for that function.

Question of non/immunity of a SOE's assets stands on both the laws of the foreign sovereign immunity and corporate law. The foreign sovereign immunity law does not extend the sovereign asset's immunity from execution to its SOEs. According to the corporate law, the assets of SOE cannot be subjected to MoC for the debt of the shareholders [here, the State]. However, the US Court of Appeal held the SOE of Venezuela as the State instrumentality and allowed to look beyond its corporate veil in order to attach its assets to enforce the judgement debt.[866]

The *CAVNOS* case (1977)[867] was brought before the Court of Cassation of France over the assets of the Algerian pension fund in France for attachment. The fund claimed immunity from execution as a public service entity whereas the Court rejected the claim as the existence of the pension fund entity was distinct from Algeria as sovereign State. "*If they (SOEs) have not acted in the name of the puissance*

[864] Byers (n 33) 887.
[865] The SIA 1978 (n 37) sec 14 (2).
[866] *Crystallex v. Venezuela and Petroleos De Venezuela SA* [2019], US Court of Appeals, 3rd Circuit, Nos. 18-2797, 18-3124.
[867] *Caisse algerienne d;assurance vieillesse des non-salaries (CAVNOS) v. Caisse nationale des barreaus francais,* [1977] The Court of Cassation, France, (December 7, 1977) 1978 REV. CRIT. 532.

publique, there is no sovereign immunity."[868] Mere nature of the public entity was not enough for CAVNOS to be entitled to immunity. The court in the *CAVNOS* case followed the precedent from the case of *Zavicha Blagojevic v. Bank of Japan* (1976). [869] In this case, the Bank of Japan was not held as acting "in the name and account of the State." The question of scope of delegation of public service by the State to the concerned SOE was a core question here.

4.4.4.1. Separate legal entity of SOE

Assets of SOE are not immune due to the separate legal entity. Corporate law distinguishes the ownership of shares *i.e.*, the shareholders from the ownership of company's assets. State as the shareholder of the SOE is not the owner of SOE's assets. The term corporate/separate legal entity in corporate law hold a different legal definition from the SOE's separate entity from the State in law. According to the corporate law, SOE as a corporate/separate legal entity is a legal person capable of owning and managing its own assets. It can sue and be sued for its own obligations. On other hand, for this dissertation, 'separate legal entity' denotes the separate of SOE as a legal entity from the State.

The UK High court, Queen's Bench division, defined, 'separate entity' as distinct from the executive organ of the government of the State and capable of suing or being sued.[870] SOEs' separate budget, management, and engagement in commercial or industrial purposes, despite the supervision from the State over the operation and management, put them on distinct footing. In another case, named, *Walter Fuller Aircraft Sales Inc. v. Republic of Philippines* (1992)[871] the US court stated five-point factors as to establish the control over the management of SOE [like the control test][872] in order to overcome the presumption of separate judicial authority:

> (1) the level of economic control by the government (2) whether the entity's profits go to the government (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs (4) whether the government is the real beneficiary of the entity's conduct and (5) whether

[868] Jan Paulsson 'Sovereign Immunity from Jurisdiction: French Caselaw Revisited' [Winter 1985] International Lawyer 277, Fn. 9.
[869] [1976] Court of Cassation (19 May 1976) 1977 REV. CRIT. 359.
[870] [2013] EWHC 3494 (Comm); [2014] 1 Lloyd's Rep. 432.
[871] [1992] 5th Cir 965 F 2d 1375, [1380], [n. 7].
[872] Discussed 'control test' in 3.3.3 of this dissertation.

adherence to separate identities would entitle the foreign state to benefits in United States court while avoiding its obligations.

In *SDN BHD v. China National Coal Group Corporation* (2017)[873] the Hong Kong court allowed the charging order against shares in a subsidiary company held by a Chinese SOE. The decision was based on three findings: the State office of the People's Republic of China confirmed that SOEs were not deemed as part of the State when acting in the commercial capacity; the SOE in question was not a part of the national register for assets supervision (namely State Asset Supervision and Administrative Commission) and finally, by applying the control test, the court found the SOE in question as an independently acting entity.

In the case of *Taurus Petroleum Ltd. v. State Oil Company of the Ministry of Oil of Iraq* (2017),[874] the UK Supreme Court denied investigating the SOE given its distinct legal entity and the absence of State's control in the day-to-day management of the SOE. Apart from the control over the assets of SOE, the intention of the defendant State regarding the corporate form of SOE is also considered. Creation of corporate form to commit fraud has been a compelling case in favor of the judgment creditor.

The US Supreme Court gave a leading judgment in the case of *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*) (1983).[875] The *Bancec* test was formulated in this judgment. According to this test, the court would presume the separate or independent entity of SOE from its State unless, firstly, the corporate shield was being used in fraud or causing injustice; secondly, there was extensive control of the State over the SOE that the SOE was a mere 'alter ego' of the State.[876] The judgment of the US Supreme Court held the *Bancec* was the alter ego of the Cuban government and held the assets of the *Bancec* non-immune for the claim of Citibank. The US Supreme Court relied more on the fact that after the liquidation of *Bancec*, the assets had been distributed in favor of the government of Cuba and the foreign trade enterprises of the Cuban ministry of Foreign Trade. Thus, the US Supreme Court held, it would result inequity if the assets had not been allowed for

[873] [2017] HKCFI 1016.
[874] [2017] UKSC 64.
[875] *First National City Bank* (n 34).
[876] Ibid [627], [629].

MoCs in satisfying the claim of Citibank.[877] The US Supreme Court commented, "*Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities*."[878] The US court applied the *Bancec* test in *Ministry of Defense v. Cubic Defense* (2004) and held:

> In sum to determine whether the property of a foreign state agency or instrumentality can be attached to enforce a judgment against a foreign state, we apply two-step analysis. First, we look at whether the judgment is one for which the agency is not immune for attachment under FSIA and second if so, we determine whether the foreign agency or instrumentality should be held liable for attachment under the *Bancec.*[879]

In *Kensington International Limited v. Republic of Congo* (2005)[880] the UK court allowed the attachment of assets in the name of the SOE when the creditors proved the sham creation of SOE by the defendant State to shield its assets from the reach of the creditors. The US court granted attachment orders against the assets of State agency for the defendant State's debt despite its independent legal status from the defendant State, on the justification of avoiding injustice and "internationally recognized equitable principles."[881]

Before applying the *Bancec* and control test, the court requires the judgment creditor to identify the specific assets of the SOE for execution instead of an umbrella claim. In *Debbie Walters v. Industrial and Commercial Bank of China and others* (2011)[882] the plaintiff attempted to enforce a default judgment against China from the assets owned by its SOEs, located in the US without mentioning any specific accounts of the SOE. Both the US court of first instance and the appellate court denied the execution upon two grounds: firstly, the petitioner failed to identify the specific accounts of the defendant Banks for scrutinizing their status under the FSIA (1976) of the US for immunity from execution and secondly, the petitioner also failed to provide evidence

[877] Ibid [632].
[878] *First National City Bank* (n 34) [2603].
[879] *Ministry of Defense, Iran* (n 617).
[880] [2005] EWHC (Comm) 2684, [193]-[202].
[881] *First National City Bank* (n 34).
[882] [2011] 2nd Cir 651 F 3d 280.

to rebut the presumption of separate legal entity of the State agency or instrumentalities in order to allow execution of China's debt against its SOEs.[883]

Therefore, the deciding courts of the forum State investigate the State's relation to its SOE applying the control test and pierce the corporate veil to investigate the possibility of fraud or causing injustice such as intention of the defendant State to deprive the judgment creditor.

4.4.4.2.Public nature of SOE's assets

In some jurisdictions, the assets of SOE are not judged based on the separate entity from the State. Instead, the assets are considered as public asset. The reason behind is the source of these assets is public funds. Thus, these assets are deemed as any other sovereign assets such as State-owned ships or aircraft. The French case laws do not give a clear answer to the assets of State instrumentalities. The delegation of power and use of assets play the vital role to determine whether the assets in question should be entitled to immunity. Nevertheless, the French courts do not require the nexus for the assets of SOEs.[884] In the case of *Dame Clerget v, People's Republic of Vietnam Trade Mission* (1971)[885] the French court gave the benefit of doubt to the funds in the name of SOEs until the determination of their origin and intended use. The court did not accept the plaintiff's argument of commercial origin and use of the funds. The same interpretation of the *Clerget* case was followed by the German Federal Constitutional Court in the case of *National Iranian Oil Company* (1984). The German court held that the immunity from execution should be determined by the national assets in question and its attribution to sovereign functions.[886] Therefore, assets of SOE can get immunity if their source and functions are public in nature.

In the case of the *LEAMCO* case (1979)[887] the French court vacated the earlier issued attachment order against the funds in the name of the Libyan Arab Republic and several Libyan SOEs, stating "*no distinction can be made at this time between funds allocated to sovereign or public-service activity and those derived from economic or*

[883] Ibid., [297] and [298].
[884] *Sonatrach* (n 733); 'Nexus' requirement discussed in 3.5.7 of this dissertation.
[885] [1971] Court of Cassation, France, November 2, 1971, Rev. crit. Dr. int. Pr. 1972, p. 310. JCP 1972 II, p. 16969
[886] *The National Iranian Oil Company* (n 357).
[887] *Procureur de la Republique v. LIAMCO* [1979] Trib. Gr. Inst. Of Paris (refere), 5 March 1979 Journal Du Droit International 859.

commercial activities governed by private law".[888] The novelty of this case was the investigation order of the court into the use of the funds. Nevertheless, the subsequent out of court settlement between the parties ended the investigation prematurely.[889]

The *National Iranian Oil Company case* (1983) raised the question of immunity of SOE.[890] The credit balance in the account was targeted for execution. The Iranian SOE was the owner of the account according to the Bank information. Nevertheless, the balance was earmarked by Iran to transfer to its central bank for its budgetary expenses. The German court emphasized on the nature of the particular transaction in question: whether it was public or commercial. It was not the corporate veil that could protect the assets of SOEs in German courts as the German Supreme Court did not take the formal classification of legal person distinct from its owner.[891] The case went before the German Constitutional Court (1983). It was held denying immunity to the credit balance on three grounds: firstly, Iran as a State was not in control of the assets, secondly, the future use of the earmarked property was not sufficient for immunity and finally, in the court's view, the MoCs granted against the credit balance would not interfere with the sovereign functions and public purposes of Iran.[892] The US court also followed the same principle in another case for the assets of State agency. The US court observed:

> The assets of foreign state are not subjected to seizure, subject to exception in particular where they have been allocated for an economic or commercial activity under private law which in the origin of the title of the attaching debtor. On the other hand, the assets of public entities distinct from the foreign state, whether or not enjoy legal personality which are part of a group of assets which have been dedicated to activities in the private law sector may be seized by all creditors of the public entity.[893]

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[888] Ibid, [861].
[889] Paulsson (n 868) fn 15.
[890] [1981] Lower instance OLG Frankfurt am Main 64 B. Verf G E 1 NJW 2650.
[891] [1984] RIW 577, [578]. Translation taken from Krauskopf and Steven (n 299), 140.
[892] *The National Iranian Oil Company* (n 357) para 1284, the German Constitutional Court observed, "*Action against the account of the state treasury does not entail corresponding dangers. Seizures of claims accounting to $200 million does not endanger the ability to function of a state of the size and financial resources of the Islamic Republic of Iran. Therefore, there is also no question of it being interference in the exclusive affairs of the Iranian state, its property, and its official activity*."
[893] *Sonatrach* (n 733).

As the above discussion show, the answer to the question of immunity of SOEs' assets is not so simple. States invest on SOEs with focus on certain industries. In some industries, SOEs enjoy market monopoly such as electricity, business to business internet service providing and in other cases, they compete with other private entities like in any open market industries. Therefore, cases where the SOE is the single provider of any essential services to the public, should its assets be considered as public? Similarly, sometimes, State provides subsidies to its SOEs in order to provide the goods or services to its people at lower cost. Whether the subsidized inventories of SOEs should be deemed as public in nature for the sake of its immunity from MoCs? Among the non-immune assets, the determination of immunity of the SOE's assets is one of the challenging ones. The State practice of creating more State instrumentalities to carry out the commercial or non-governmental function is expanding over the period. It opens the door to the private judgment creditors to bring more execution suits and eventually, better interpretations of the SOE's assets.

4.4.5. *Income from State-owned intellectual properties*

State owns intellectual properties such as patents, copyrights, trademarks etc. having economic values. In most cases, the patents are registered in the name of State instrumentalities e.g., State owned universities or research institutions.[894] Besides, any inventions coming out of the governmental contracts or assignments, made by governmental employees are considered as the State-owned intellectual properties.[895] State-owned intellectual property rights are entangled with its own challenges such as interference with private enterprises, unfair advantages in enforcement litigations, immunity from infringement, involvement of funds sourced from fiscal incomes etc. Another challenge is the involvement of public trust doctrine as a determinant factor for these properties while granting any MoC against these properties. Nevertheless, for the purpose of this dissertation, the income generated from the State-owned intellectual properties are concerned. State makes money from the sale and licencing of these properties such as royalties from copyrights, sale proceeds of the goods with State-owned trademarks or the licensing of the State-owned patents. In *Lloyd's*

[894] Tejas N. Narechania, 'An Offensive Weapon? An Empirical Analysis of the "Sword" of State Sovereign Immunity in State owned Patents' (October 2010) 110 (6) Columbia Law Review 1574, 1585.
[895] Sharon Sandeen, 'Preserving Public Trust in State-owned Intellectual Property: A Recommendation for Legislative Action' (2001) 32 McGeoge Law Review 385.

Underwriters v. AO Gazsnabtranzil (2000)[896] the license fee owed by the private company to Moldova for using the domain name suffix was held attachable as the nature of the transaction was commercial activity in the US.

The fundamental concept of intellectual property rights is based on the uninterrupted and exclusive rights of commercial exploitation to the owner vis-à-vis the right of recognition.[897] For the sake of enforcement of judgement debt, the income from the State-owned intellectual properties needs to go through the same test of proof of sovereign ownership as well as the commercial use of the same. The question remains open whether the fundamental purpose of the protecting intellectual properties should be sufficient to declare these assets as non-immune or the subsequent use of the proceeds should act as the catalyst. Sandeen argued the public trust doctrine in order to scrutinize the non-immune nature of State-owned intellectual property rights. She stated, "*because state-owned intellectual property rights are developed or purchased with the use of tax revenues, states arguably hold such rights in trust for the benefit of the public and should use those rights with the public's interests in mind*."[898] Intellectual properties of the defendant State are not directly targeted for the enforcement cases rather the income generated from these sources are subjected to the execution cases under different other heads such as funds in account, receivables from third party, income held by SOEs etc.

4.4.6. Receivables from third party

In the literature of accounting, the term 'receivables' means the payment due from the debtors in short term.[899] Given the commercial contracts executed by State, it has such receivables from its commercial counterparts. State has many receivables from its income sources from the third parties, such as royalties and taxes earned from the concession granted for the extraction of its mineral resources, internet licensing fees, use of its airspaces, maritime territory etc. These receivables are the common targets of the judgment creditors for several reasons: firstly, the receivables are governed by

[896] [2000] No. CIVA 1:00-MI-0242-CAP, 2000 WL 1719493, at n. 1-2. (ND Ga Nov. 2, 2000)
[897] The World Intellectual Property Organization (WIPO) defined intellectual properties as property protected by law to enable people to earn recognition and financial benefits from their invention or creation. <https://www.wipo.int/about-ip/en/> accessed 25 October 2021.
[898] Sandeen (n 895), 418.
[899] 'Receivables', Investopedia, <https://www.investopedia.com/terms/a/accountsreceivable.asp> accessed 13 November 2021.

the laws of the forum State due to the location of accrual of income and/or place of payment *i.e.*, the forum State; secondly, the payment is still due and at the hand of the third party. Thus, pursuant to a garnishment order of the court, the creditor can directly get the payment from the third party; finally, as the garnishee is bound by the law of the forum State, the defendant State cannot cause any future interference with the payment.

The challenge in this kind of asset is the proof of ownership and its attribution for commercial purpose. Usually, the payments received in form of taxes are considered as public in nature. In the case of *Af-Cap Inc. v. the Republic of the Congo*,[900] the judgment creditor asked for a garnishment order against the taxes and royalties owed to Congo. The US court reviewed the past use of 51% of the same taxes and royalties for direct payment to a creditor of Congo for settlement of its previous debt. This fact made the court decide the assets as commercial and thus subjected to execution by the subsequent creditor. Here the attribution of the taxes and royalty despite their public nature triggered the fund as commercial and hence subjected to MoC. The US court reasoned that although the exceptional and single commercial use did not turn the use of the asset into a commercial one, the continuity, extension and value of that one-time commercial transaction was material to determine the attribution. The debt settlement with a previous debtor was amounted to USD 26 million and continued for eleven years. The US court observed, "*Such a continuing, extended and monetarily significant use is neither exceptional nor de minimis.*" The proposed use of these taxes and royalties by Congo for another commercial debt even though did not use in actual, also supported the claim of judgment creditor. These taxes and royalties were not contemplated as sovereign assets to be used exclusively for its public acts but as available for any use as Congo found appropriate. The US court dismissed the claim of Congo as to the disruption of public acts because of MoC if granted.

In the *Eurodif* (1984) case,[901] the judgment creditor asked for a garnishment order against a debt owed by France and its State instrumentality to Iran under an agreement of production and distribution of enriched uranium. The Tribunal of Commerce of

[900] [2004] 5th Cir 383 F 3d 361.
[901] *Eurodif Corporation Et. Al. v. Islamic Republic of Iran* [1984], The Court of Cassation, First Chamber (March 14, 1984); Translation taken from International Legal Materials, (September 1984) 23 (5) 1062; *Islamic Republic of Iran* (n 475).

Paris ordered the garnishment whereas the Court of Appeal of Paris vacated the order. When the judgment creditor brought the case of Court of Cassation of France, the original garnishment order was reinstated. The Court of Cassation considered the nature of the agreement which was the source of the transaction and the basis of the fund.[902] The French court considered not only the destination of the fund *i.e.*, the future use but also the origin of the fund. This judgment contributed to the jurisprudence of sovereign immunity in three aspects: firstly, the judgement creditors may target for the funds not having direct connection with the claim itself and the French judicial practices carefully follow the jurisprudence of the US and the UK judgments in the matter of sovereign immunity from execution.[903] Finally, the French Court of Cassation commented that assets allocation for "*economic or commercial activity of a private law nature*" could be subjected to MoCs. However, the interpretation of private law keeps the ambiguity alive. The transaction in question is required to be subject of private law.

The *Connecticut Bank* (2002) case[904] was a leading case in this regard from the US jurisdiction. The judgment creditor sought garnishment order against the payment owed to the Congo by Texas oil companies in form of taxes and royalties. The petitioner argued the commercial nature of the services provided by these oil companies to Congo; hence, the receivables owed under the contracts were commercial. Nevertheless, the Fifth Circuit court in the US observed, "*what matters under the statute is not how the Congo made its money but how it spends it. The amenability of these royalties and taxes to garnishment depends on what they are 'used for' not on how they were raised*."[905] The US court remanded the case to the district court for revisiting the use of the taxes and royalties to decide the garnishment order.[906]

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[902] Ibid; The Court of Cassation, France held, "[…] *in so holding, even though its decisions makes clear that attached claim was one held by the State of Iran against CEA and the French State under the loan agreement of 23 February 1975, and it thus followed that the origins of said claim were the same funds that had been allocated to the accomplishment of the Franco-Iranian program of production and distribution of nuclear energy, the rapture of which by the Iranian party had given rise to the action, the Court of Appeal, on which it was incumbent to determine the nature of this activity in order to decide the issue of immunity of execution had not given a legal basis for its decision*."
[903] Paulsson (n 868) 284.
[904] *Connecticut* (n 294).
[905] Ibid [251].
[906] Ibid [260].

The same reasoning was followed in subsequent cases. In the case of *AF-CAP INC. v. the Republic of Congo* (2004),[907] the Republic of Congo defaulted on its debt payment secured with a hypothecation of its assets irrespective of the location based on its contractual waiver of sovereign immunity from jurisdiction and execution. Pursuant to a judgment from an English court in London, the judgement creditor received a garnishment order against five US companies who owed money to Congo in form of taxes and royalties for oil and gas exploration. The State court in Texas dismissed the suit, as the taxes and royalties asked for garnishment were public assets of Congo as its fiscal sovereignty. The US Federal Court remanded the case for determination of factual question of "*use of property*" instead of '*nature of property.*' As Congo used these assets once to pay its debt after default with a commercial entity, the creditor claimed the source of the property as commercial instead of its use. However, the court rejected the claim using the analogy of airplane obtained by the State through commercial transaction but using its for public purpose. It held, execution of judgment against this hypothetical airplane would be nothing but intervention in the public act of the State. The core legal question of this case was whether the past commercial use should be considered for determination of the commercial use of the assets for the question of immunity. The (US) Federal Court observed, "*determining the commercial (or non-commercial) status of a property's use requires a more holistic approach*" instead of taking a single use into account. While defining the holistic approach, it identified several factors to be considered: the complete circumstances surrounding the property, its uses including past uses and relevant facts to its present use. The court observed, "*under the FSIA, foreign property retains its immunity protection where its commercial uses, considered holistically and in context, are bona fide exceptions to its otherwise non-commercial use*." Thus, the *bonafide* commercial use of the assets could be immune under the FSIA (1976) of the US with the application of "holistic approach" to it. The court accepted that mere commercial use of the asset once did not make the use commercial for the purpose of the FSIA (1976) of the US. However, when such single time use was for extended period and the commercial transaction in question was significant in value, this single use asked for careful consideration while taking the holistic approach. In another case brought by the same petitioner against the same defendant State, the US appellate

[907] *Af-Cap Inc.* (n 52).

court allowed garnishment because the taxes and royalties was used once to settle a law suit with a third party.[908] The causal connection between the confiscation of the assets and the eventual interruption to the public acts of the State made the assets immune.[909] Thus absence of interruption to public act of the State makes the assets in question non-immune commercial assets.

In *Af-Cap Inc., v. Chevron Overseas (Congo) Limited, Republic of Congo and others* (2007)[910] the judgment creditor filed another enforcement litigation against four US companies for garnishment order to recover its judgment value against Congo. These four companies owed taxes and royalties to Congo for extraction of hydrocarbons, oil, and other of the Congo's natural resources. The Ninth Circuit court followed the test applied by the Fifth circuit court in the *Connecticut Ban*k (2002) case and observed, the payment of the money in the US pursuant to a commercial contract did not entitle the money to be used commercially in the US[911] and held the receivables as immune.[912]

In *Walker International Holdings Ltd. v. Republic of Congo* (2004)[913] the plaintiff targeted the similar type of asset and applied for a garnishment order against the third party who owed money to Republic of Congo in lieu of the oil exploration contract. Relying on the decisions of the *Connecticut Bank* (2002) case,[914] the US court refused to review as to how the money has been generated instead it focused on the current and past use of the money. In determining the commercial purpose of the funds owed to Congo, the US court considered the minor reimbursement of administrative and legal costs of the third party (whom the garnishment is claimed). It commented:

> There is no evidence that the reimbursement would be anywhere near fifty percent. Beyond assertions of litigation and administrative reimbursements, there is no evidence in record showing how the signing bonus and other payments were actually used or even how other bonuses were used in the past […] therefore no other inquiry into the use of the monies is necessary

[908] [2004] 5th Cir 389 F 3d 503.
[909] *Connecticut* (n 294).
[910] *Af-Cap Inc.,* [2007] 9th Cir January 25, 2007, Nos. 04-16387, 04-16388, 04-16788, 04-16810; [2007] 9th Cir 475 F 3d 1084.
[911] Ibid [1094].
[912] Ibid [1096].
[913] *Walker International Holdings Ltd* [2004] 5th Cir 395 F 3d 229.
[914] *Connecticut* (n 294).

and for our purpose, we hold the funds were not 'used for any commercial activity'.[915]

The *Connecticut* (2002) precedent was also followed in *Export-Import Bank of the Republic of China v. Granada* (2014).[916] The EXIM Bank of China requested for garnishment order to enforce a judgment of $21 million against certain funds owed by third parties to Granada. One of the funds was owed to Granada after an arbitral award in favor of Granada. As regarding this fund, the case became moot as the fund was transferred physically from the US to Granada. Another fund was owed in form of charges, fees, and taxes under a commercial contract for managing Granada's airport, seaports, and other facilities. The EXIM bank of China relied on the commercial nature of the contract between the third party and Granada. Part of the second fund was the receivables from the International Air Transport Agency (IATA) for using the facilities in Granada and subsequent investment of the same in bond in the US. The US court refused to investigate as the bond investment from the receivables from IATA because of lack of evidence from the end of the judgement creditor as to the location of issuance of bond, identities of the bondholders, manner, and location of trading of the bonds, methods of payments etc. Nevertheless, the court allowed a post-judgment discovery order against Granada for collecting further evidence. For the remaining funds, the US court commented, it was not how the money was raised but why the money was used for. Hence, the services for which the money was used, were public in nature, hence, the MoC was not granted against the public funds. In this case the US court vastly relied on the *Connecticut Bank* (2002) and the *AF-CAP v. Chevron (Congo)* case (2007).

Therefore, to receive execution order against the receivables from the third party, the popular nature of the assets stays immaterial if the petitioner can prove the use of the funds for commercial purposes. Nevertheless, there are other jurisdictions where the absolute immunity principle is followed. Such as China. In *FG Hemisphere Associates v. Democratic Republic of the Congo* (DRC), (2011)[917] the judgment creditor claimed against the "mining entry fee" payable by a company in Hong Kong,

[915] *Walker International Holdings Ltd* (n 913), [236].
[916] [2014] 768 F.3d 75 (2d Cir. 2014).
[917] *FG Hemisphere Associates v. Democratic Republic of the Congo* [2011] the Hong Kong Court of Final Appeal (8 June and 8 September 2011), 14 HKCFAR 395. Judgment Summary, FACV 5,6 & 7/2010.

owed to a DRC's State-owned mining company. This mining entry fee was accrued out of a concession agreement regarding the rights to mining project in the DRC. The Hong Kong Court and the Court of Appeal granted the injunction upon the payment to be made to the DRC. Nevertheless, the Court of Final Appeal of the Hong Kong Special Administrative Region quashed the injunction order relying on the stand of the People's Republic of China in favor of absolute sovereign immunity. Therefore, the Court of Final Appeal did not review the purpose or nature of the receivables from the Hong Kong's company. It limited its comments on its lack of jurisdiction due to the DRC's immunity as foreign sovereign.

4.4.7. Sovereign wealth fund

Both sovereign wealth funds and SOEs are concerned about the economic investment and market participation. Both have their distinctive purposes in State's commercial activities. Unlike SOEs, State's objective for its sovereign wealth funds is to accumulate profit without getting control over the venture. The foreign currency reserves maintained by the central bank of a State is protected by its immunity. It falls under the categories of central bank's assets.[918] Sovereign wealth fund is different from the foreign currency reserve of the central bank. Both the foreign currency reserve and the sovereign wealth fund are intended for accumulation of national wealth. For the purpose of this dissertation, the core distinction between these two are the different holders of these assets on behalf of the State. The foreign currency reserve is held and managed by the central bank whereas the sovereign wealth fund is held and managed by special agencies created for this purpose.[919]

The sovereign wealth fund is not immune from MoCs. Shang and Shen commented, "*there is an international law black hole in which sovereign wealth funds have come to engage in commercial activities as well as exercise the public functions traditionally associated with states [acts jure imeperii]*."[920] States invest their excess reserve funds (after maintaining the required liquidity for the economy) in equities, bonds, and other foreign assets. The popular forms of sovereign wealth fund are the

[918] Discussed in 4.2.3 of this dissertation.
[919] Ronald Beck and Michael Fidora, 'Foreign Exchange Reserves and Sovereign Wealth Funds: Will They Change the Global Financial Landscape?' in Arjan B. Berkelaar, Joachim Coche and Ken Nyholm (eds) *Central Bank Researves and Sovereign Wealth Management* (Palgrave Macmillan, 2010), 309-310.
[920] Shang and Shen (n 858), 915.

portfolio investments in form of shares and stocks, corporate bonds, real estates, private equities, made by States in foreign currency denominated assets, located in foreign territory.[921] IMF and the World Bank both defined sovereign wealth fund from the perspective of its ownership and purpose. IMF emphasized on the sovereign ownership i.e., fully owned, and managed by sovereign entities,[922] and the World Bank drew the attention on the purposes of income and intergenerational wealth transfer.[923]

The exclusive sovereign ownership makes the purpose of this fund as public and also commercially motivated.[924] The objective of sovereign wealth fund is to reduce the tax burden on the citizens by using the return from these assets for budgetary allocation, accumulation of assets for future generation, and public interest. States follow different approaches in managing their unused fund. It can be either an independent entity e.g., a SOE or the central bank to ensure operational independence. Depending on its way of management, the answer to the question of immunity varies in execution cases. Arguably, the central bank enjoys higher degree of protection. Nevertheless, as evident from the previous discussion as the assets of central bank, the nature of the functions of the central bank and the purpose of the particular fund in question play a vital role here.

From nature of such investment, it is commercial regardless of who is investing and the source of fund as any private person does the same investment with same objective of earning profit. On the other hand, the purpose of the return from investment is public i.e., to reduce the fiscal burden. When the question of immunity comes, more immediate use of the return of sovereign wealth fund is considered. Therefore, two inconsistent outcomes may be reached if forum State's court applies different tests between nature test or purpose test.

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[921] Stephen Jen, 'Sovereign Wealth Funds, What They are and What's Happening' (October-December 2007) 8 (4) World Economics 1.

[922] International Working Group of Sovereign Wealth Funds, Sovereign Wealth Funds Generally Accepted Principles and Practices "Santiago Principles" 2008 < https://www.ifswf.org/sites/default/files/santiagoprinciples_0_0.pdf> accessed 31 July 2022; D. Gaukrodger, 'Foreign State Immunity and Foreign Government Controlled Investors' (OECD Working Papers on International Investment 2010).

[923] Olivia S Mitchell, John Piggott, and Cagri Kumru, 'Managing Public Investment Funds: Best Practices and New Challenges' (Pension Research Council Working Paper PRC WP 2008-07, University of Pennsylvania 2008).

[924] Shang and Shen (n 858), 919.

In the case of *Sozialistische Lybische Volks-Jamahiriya v. Actimon SA* (1985),[925] the targeted funds were the assets in securities in the name of the Libyan government, but it failed to prove the public purpose of those securities. The Swiss court avoided any embedded analysis of the distinction between public and commercial acts. Nevertheless, it commented on the immunity of administrative assets serving public purposes and presumption of possible commercial use for the pecuniary assets.[926] It held:

> Immunity can therefore only be claimed by reason of nature of the assets subjected to the attachment where those assets are allocated in an identifiable manner for the performance of a sovereign function […] a plea of immunity is inadmissible in respect of money and securities unless the documents or specified sums have been designated for the performance of such tasks.[927]

The Swiss court also refused immunity not only to central bank's fund but also to any liquid sovereign asset such as monies or securities "*unless the documents or specified sums have been designated for the performance of such tasks* [the performance of the sovereign functions]" Hence, the attachment order was permitted as the foreign State "*failed to give any details as to the designated purpose of the deposit [which] could equally well form part of the private fiscal assets of the Libyan Central Bank*."[928]

Similarly, in *AIG Capital v. Republic of Kazakhstan* (2005)[929] the judgement creditor targeted the sovereign wealth fund, kept under the trust of the central bank of Kazakhstan, and managed with a London Bank. The sovereign wealth fund was created in 2000 by virtue of a presidential decree and put under the trust management of the central bank where the central bank was earning management fee and commission out of profit. The government was listed as beneficiary in the trust agreement. The judgment creditor claimed that the purpose of the fund was to earn money like any private persons. However, the UK court relied on the certificate issued by the Kazakhstan ambassador as to the public purpose of the sovereign wealth funds and found the fund as immune as the defendant State successfully connected the fund with the general purpose of accumulation of assets for public purpose.

[925] [1985] Federal Tribunal of Switzerland, 24 April 1985 111 la BGE 62.
[926] [1985] 108 III BGE 109 *et seq.,* 86 1 BGE 32.
[927] Ibid [35].
[928] Ibid [36].
[929] *AIG Capital* (n 373), [90]-[95].

While scrutinizing the use/purpose of the fund, the future or potential use is not sufficient. The petitioner needs to substantiate the existing or past use of the fund in commercial purpose. In *Aurelis Capital Partners LP v. the Republic of Argentina* (2009)[930] the distressed bondholder of Argentina attempted to enforce their claim against the pension funds of Argentina invested in the US for profits. Argentina enacted new law requiring the transfer of the funds, previously managed by private companies, to a newly formed government entity, called 'SGF'. The new law establishing the SGF confirmed the use of the funds exclusively for the social security benefits of the Argentine workers. The district court in the US allowed the execution despite the determination of the status of SGF as a political sub-division of Argentina. It relied on the commercial use of the funds which in the view of the court was to earn profits and the apprehended/future use of the funds to non-pension governmental purposes.[931] Nevertheless, the Second Circuit Court of Appeals vacated the district court's order as the future or possible use of the use of funds did not constitute the contemplated commercial use within the meaning of the FSIA (1976) of the US. Here, the attachment order was made within two days from the enactment of the law establishing the SGF. Thus, the appellate court observed:

> Because the order attaching the assets of the Administration [here the SGF] became effective immediately upon the passing of legislation transferring the assets from the private corporations to the Administration [the SGF], neither the Administration [the SGF] nor the Republic [Argentina] had the opportunity to use the funds for any commercial activity whatsoever.[932]

It also noted that mere transfer of the control of the funds to a governmental agency did not make the funds available for execution.[933] When deciding the question of immunity of the sovereign wealth funds, the entity responsible for managing the fund and its legal status plays a vital role. Such as in *Kuwait v. X* (1994)[934] Kuwait Investment Office (KIO) was the majority shareholder (96%) of Grupo Torras, a

[930] [2009] 2nd Cir 584 F.3d 120.
[931] Ibid [126], [127].
[932] Ibid [130].
[933] Ibid.
[934] [1995] Swiss Federal Tribunal (24 January 1994). The case was unreported but partially reproduced in (1995) 5 Rev. Suisse D. int. eur. 593. Gaukrodger (n 922) 16; the plaintiff brought the same case before the UK court simultaneously (*Sarrio SA v. Kuwait Investment Authority*, [1996] EWCA Civ. 575 rev'd, [1997] UKHL 49. Nevertheless, the UK court refused jurisdiction because of the earlier filed suit in Switzerland.

Spanish holding company. KIO was a separate entity from the Kuwait government, and it acted as the investment arm thereof. Grupo Torras failed to pay in the processing of acquiring part of the subsidiary company named Sarrio, another Spanish company. Sarrio successfully obtained the attachment order against the bank accounts of KIO in Zurich and Genva to secure the payment. The Kuwait government argued the immunity of the assets of KIO as for the protection of the future generations of the Kuwati people after the exhaustion of the oil reserve. It stated the position of KIO as the asset manager of the State and thereby entitled to immunity. However, the Spanish court denied the immunity on the ground of the separate entity of KIO in accordance with the Kuwaiti laws, the statement of operations of KIO and other relevant documents. The Spanish court also clearly stated the insufficiency of evidence to link the fund with the future generation failed to entitle the fund for immunity.[935]

Another ground for considering the sovereign wealth fund as immune is the fund being held in the name of the central bank.[936] States tend to maintain their sovereign wealth fund either with the central bank or under some corporate form. It is done not necessarily to hide the assets from the reach of the judgment creditor but to engage more professional management of the funds. Hence, although State holds the beneficial interest in the fund, it is difficult to prove the future purpose of any liquid asset such as sovereign wealth fund. It can be associated with the certificate from the concerned governmental body, the governing rules, or by-laws of managing the fund, the holding authority, relationship between the holding authority and the defendant State, past use of the proceeds etc. to establish the fund's use as commercial or public.

4.4.8. Funds in accounts

The funds available in the bank accounts are also easily targeted assets. All States have foreign bank accounts and many State-owned banks have branches in foreign territory. The accounts in foreign banks located in the forum States' territory enjoy immunity if kept in the name of the central bank of a State enjoys immunity from execution.[937] Similarly, funds available in the bank accounts registered in the name of the diplomatic missions or embassy are protected under the VCDR (1961) and the

[935] Gaukrodger (n 922), 17, fn 33.
[936] Discussed in 4.2.3. of this dissertation.
[937] Ibid.

VCCR (1963).[938] Nevertheless, there are some precedents passed by forum States' courts allowing enforcement against the funds in the diplomatic bank accounts based on its allocation for any particular debt i.e., the earmarked assets. Apart from these, the accounts held by the defendant States usually do not enjoy immunity unless earmarked for public purpose.[939] Alternatively, execution is granted when the court finds a satisfactory waiver clause in the related contract. Crawford observed:

> In the case of state funds, it is still uncertain whether execution will ever be permitted: though the weight of doctrine favors the possibility, the jurisprudence is by no means so clear. As any rate, attachment will only be possible against assets or a separate funds shows to be clearly devoted to non-immune purposes.[940]

In the case of *Procureur General v. Vestig* (1946),[941] the French Court of Cassation allowed the attachment of funds held by a French bank. The account was maintained in the name of the Norwegian government, although the fund belonged to a Norwegian citizen. The court pierced the veil of immediate customer of the bank and focused on the beneficiary of the same. In *Orascom Telecom Holding SAE v. Chad* (2008)[942] although the funds in the account was the proceeds from selling oil and earmarked for the repayment of the World Bank's debt, the British High Court held the use of the fund as commercial within section 13 (4) of the SIA (1978) of the UK. Contrary decision is found from the same jurisdiction. In *SerVaas Inc v. Rafidain Bank* (2012)[943] the British Supreme Court refused to consider the source of the State's fund in the account while determining the question of immunity and limited its scope of review to the use of the funds.

Following the *Connecticut* decision from the US regarding the receivables from third party, the Canadian court focused on the use of fund instead of its source or origin. In *Bombardier Inc. v. AS Estonian Air and the Republic of Estonia* (2013),[944] Republic of Estonia was the shareholder of the AS Estonian Air. The funds accrued from the

[938] Discussed in 4.2.1 of this dissertation.
[939] Discussed in 4.3.3 of this dissertation.
[940] Crawford (n 20) 843.
[941] [1946] The Court of Cassation, France, (February 5, 1946) 1947 SIREY (I) 1937; 1946-1949, Journal Du Droit International, 1.
[942] *Orascom Telecom Holding SAE* (n 429).
[943] *SerVaas Inc* (n 732).
[944] [2013] 115 OR (3d) 183

operation of the Estonian Air was targeted for enforcement of judgment against Estonia. The Canadian court held that the State act of holding share in an airlines company was commercial, nevertheless "*the fact that that object (the fund in question) is achieved by entering into commercial transaction [does not mean] that the funds are used for commercial purposes*."[945] and therefore held the funds as immune.

In rare occasion, the court considers the special circumstance of the defendant State when determining the purpose of the funds. Such as, in *Firebird Global Master Fund II Ltd. v. Republic of Nauru* (2015)[946] the judgement creditor filed an execution case before the Australian court targeting the funds in the accounts, in the name of Nauru, maintained with an Australian bank. The Ministry of Finance of Nauru issued the certificate of sovereign use of the accounts which was acceptable evidence under section 41 of the Australian FSIA (1985). The certificate showed that many of the targeted accounts were not in use for considerable amount of time. The Australian court denied the execution as the funds were held as immune in Australia under section 32 (3) of the FSIA (1985) of Australia. Chief Justice French, Justice Kiefel and Justice Gageler in this case confirmed:

> The words 'in use' do not refer to particular uses to which bank accounts may be put but serve to distinguish accounts in which money are idle as where foreign state sets funds aside. In such a case, the purpose of the account cannot be readily discerned from the use to which they are put and it would be a simple enough matter for a foreign State to assert that they were intended for future government purpose.[947]

According to section 32 (3) (b) of the FSIA (1985) of Australia, any vacant or not in use assets are deemed as commercial. Hence in view of the law and idle status of the accounts, they should have been held as non-immune. Nevertheless, the court observed, "*the words 'in use… for commercial purposes' and 'set aside otherwise than for commercial purposes' direct attention to the reason why, objectively the*

[945] Ibid [193] [49].
[946] *Firebird Global Master Fund II Ltd. v. Republic of Nauru* [2015] High Court of Australia 289 FLR 398.
[947] Ibid [107].

property is used or set aside."[948] The court held the accounts immune considering the geographical and demographic condition of Nauru. It justified the decision stating:

> Evidence of this kind (lack of commercially viable acts for private entities in Nauru) is relevant and necessary in order to understand that what might otherwise be thought to be a commercial enterprise is in fact no more than the provision of essential services to those residents in a foreign State by its government. It is to be expected that the circumstances of one foreign State may differ from another, especially when the foreign State in question has a small population and is remote.[949]

Attachment is also commonly allowed when the judgment creditor can satisfy the court with the waiver clause. The *Ipitrade* (1978)[950] was a successful enforcement case in France for the judgement creditor against the bank accounts of the Federal Republic of Nigeria relying on an unequivocal waiver of immunity from execution. Subsequently the parties negotiated for the voluntary compliance with the judgement and resulted the termination of the case on same issue in the US.[951] In *Creighton Ltd. v. Qatar* (2000),[952] the French Court of Cassation allowed the attachment of bank accounts in the name of the Qatar Government in France based on a waiver clause in the arbitration agreement. It stated, "*the commitment, taken by State signatory to the arbitration clause to enforce the award in the terms of article 24 of the ICC Rules implied a waiver of immunity from execution by the State*."[953] Nevertheless, how and what extent the waiver clause needs to be drafted are yet to be determined.[954]

In *Commisimpex v. Republic of Congo* (2015),[955] the judgment creditor attempted execution of an arbitral award against the bank accounts in the name of the Congo's embassy and its delegation of UNESCO in Paris. The French Court of Cassation limited its decision in favor of the execution by stating, "*by virtue of rules of customary international law on State immunity from execution… customary*

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[948] Ibid [115].
[949] Ibid [125].
[950] *Procureur* (n 413).
[951] *Ipitrade International v. Federal Republic of Nigeria* [1978] DDC 465 F Supp 824.
[952] *Creighton* (n 721) translation taken from Kudrna (n 422).
[953] Ibid; translation taken from Kudrna (n 422), 134.
[954] Discussed in 3.5.2 of this dissertation.
[955] No. 13-17.751, The Court of Cassation, France, 1st Chamber, May 13, 2015; Unreported 13 May 2015, Kudrna (n 422).

international law does not require a waiver of immunity from execution other than express."[956] The judgment has been criticized on the ground of failure to analysis the nature or use of the funds in the account.[957] After this decision, the French Civil Enforcement Proceeding Code was amended to make the provisions as to execution against foreign sovereign assets clearer and specific.[958]

Tracing of such (non-immune) bank accounts is difficult because of the banker-client confidentiality. The banks refuse to share any information regarding its clients with any third party unless ordered by courts. The dynamics between confidentiality and the question of transparency play the vital role here. For example, the strong maintenance of privacy by the Swiss banks attracted many States to put their assets in Switzerland and in some cases, the money launderer took the advantage of this strong confidentiality. Nevertheless, in October 2010, Switzerland passed the Restitution of Illicit Assets Act to identify terrorism funding and return the misappropriated sovereign assets. Hence, the interplay between these two principles of confidentiality and transparency is standing at two sides of a scale.

The common practice before the US court is to grant an order of discovery to bind the banks for extraction of information on sovereign bank accounts. The order of discovery is a pre-judgment order. The court is found hesitant to grant the same. In the case of *Argentina v. NML*,[959] Argentina appealed to the US Supreme Court against the discovery order against it issued by the Southern District Court of New York. The US Supreme Court rejected the appeal based on immunity from the pre-judgement order and upheld the discovery order. Similar order was granted against the Democratic Republic of the Congo (DRC),[960] which DRC failed to comply with resulting at civil contempt of court.[961] Therefore, the funds in bank account (other than diplomatic bank accounts) of the defendant State do not enjoy immunity unless the defendant State can substantiate the fund's use in public purpose.

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[956] Ibid [2], [4].
[957] *Eloise Gluchsmann, Commisimpex v Republic of Congo* [2011], No. 13-17.751; (April 2017) 111 (2) the American Journal of International Law 453, 455.
[958] The Code of Civil Enforcement Procedures 1889 (n 269), incorporated provisions titled, transparency, fight against corruption and the modernization of economic life, effective from 10 December 2016.
[959] [2014] USSC 573 US 134.
[960] *FG Hemisphere Assocs., LLC v. Democratic Republic of the Congo* [2009] DDC 603 F Supp 2d 1, [2].
[961] [2011] DC Cir 637 F 3d 373.

4.5.Conclusion

The possibility of getting paid from the available assets is again limited by interpretation of purposes of the sovereign assets. Given the absence of effective international convention and the limited number of international tribunal's judgment, the courts of the forum States sometimes consider the judgments from the other national jurisdictions with persuasive value [though not binding].[962] Peters rightly acknowledged the development of this discipline of international law *i.e.,* law on foreign sovereign immunity from execution, based on the interpretations of the case laws.[963] Oddenino and Bonetto had the similar opinion. They observed that it was the national court [of the forum State] playing the most vital role in developing the law of immunity apart from few cases from the ECtHR and the ICJ.[964] The judgments from the national courts of the forum States formulate the international law in relation to immunity from execution: as they form the State practice thereby, the *opino juris*[965] and set the precedents of interpretation of international law with persuasive value for subsequent cases of both the international and national courts.[966] Interpretations of sovereign assets in this chapter again proves that a treaty or national practice receives the *de facto* validity from the judicial practices or loses its contemporariness by the precedent.[967] Charney commented, "*Nations forge new law by breaking existing law, thereby leading the way for other national to follow*."[968] Therefore, this chapter focuses on the various kinds of the assets and the diverse approaches of the forum States in determining the questions regarding these assets for their immunity from enforcement.

For the diplomatic assets, it receives protection from both international conventions *e.g.,* the VCDR (1961) and the VCCR (1963) as well as national legislations. Still

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[962] Fox (n 5) 3.
[963] Peters (n 118) 6.
[964] Oddenino and Bonetto (n 173) 23.
[965] Yang E. Kadenes and EA Young, 'How Customary is Customary International Law' (2013) 54 (3) William & Mary Law Review 885.
[966] Oddenino and Bonetto (n 173) 24.
[967] Pierre-Hugues Verdier and Erik Voeten, 'Does Customary International Law Change? The Case of State Immunity' (2015) 59 International Studies Quarterly 209, 212. The authors commented "*this is not true of treaties or domestic statutes which derive their validity from formal ratification and remain legally binding despite violations. By contrast, if many states defect from a CIL (Customary International Law) rule, the rule can change or lose its status as CIL*."
[968] Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1985) 56 British Yearbook of International Law 1, 21.

MoCs were granted in some cases against the diplomatic assets. There are some challenges for both the judgment creditor and the defendant State when it comes to diplomatic assets. It is difficult for the judgment creditor to convince the court to investigate further into the use of diplomatic assets disregarding the certificate form head of the diplomatic mission. Because such investigation may act as an interference to the sovereign function of the defendant State. The major problem with the diplomatic asset is the use of the assets in mixed purposes.[969] Proposal was made to segregate the accounts for diplomatic purposes and for day-to-day operation of the diplomatic mission. However, such proposal may not work as the clear distinction of the commercial purposes from operation of a diplomatic mission is not possible. A diplomatic mission performs several acts on the behalf of its sending State or State instrumentality which are not directly diplomatic function *per se* but out of courtesy. This dissertation analyzes the scrutinization of purpose of diplomatic assets from the two aspects: firstly, when the diplomatic mission is the judgment debtor and secondly, when the diplomatic assets are targeted for the debt owed by the sending State.[970] For the first situation, where the diplomatic mission itself is the judgment debtor, the diplomatic asset should not be presumed to be used in public purpose with mere certificate from the head of the mission. Rather, the court should investigate further to honor the judgment creditor's right to execution. On the other hand, for the second case, [where the sending State is the defendant] the certificate should be taken as conclusive and further investigation should be deemed as interference to the diplomatic functions of the mission.

Military asset comes at the second in the list of immune assets. Its inherent nature raises the presumption of public purpose and thereby is immune. The challenge in the military asset for the question of its immunity is the scope of this kind of asset. Should it be only to the assets directly used in military purposes such as warship, or weapons? or should it include also the assets used for/by military forces? Such as foods, vehicles other than particularly designed for military purposes, money [intending to use for military purposes]. This dissertation would emphasize on the status of the non-military assets but in the process of use for military forces. For

[969] Discussed in 4.2.1.4 of this dissertation.
[970] The sending State is the State whose diplomatic mission is set up in the hosting State *i.e.*, the forum State for this dissertation.

example, a regular transport when used in sending rations to the military forces should not be taken as commercial activity. The action here is the delivery of ration is a commercial purpose in ordinary meaning whereas its destination to the military forces makes it public purpose. Impediment in sending the ration to the military forces due to the MoC may act as interference to the military function of the defendant State. On the other hand, the liquid asset such as money or fund intending to be used in military purposes may be interpretated as commercial based on the given context. Because liquid asset has no purpose until it is in use. This approach also receives support from the case laws related to receivables from third party and funds in accounts.[971]

Another kind of sovereign asset consistently found as immune in international conventions and national legislations is the assets of central bank. The discussion of the assets of SOEs is relevant while scrutinizing the central bank's assets. The central bank argues two defenses to protect its assets: its separate legal entity from the defendant State and the sovereign monetary purpose of its assets. This dissertation proposes to take the status of the central bank as the holder of the asset.[972] The assets held by a central bank in discharge of its functions as currency regulator, custodian of foreign reserve or the banker of last resort should enjoy immunity despite its status as State instrumentality. On the other hand, asset held by the central bank as trustee or agent of the State should be put through tests of attribution to determine its status as commercial.[973] The question of immunity for central bank leaves a question: should the foreign reserve of the defendant State in the central bank be taken for enforcement of its commercial [judgment] debt. This dissertation argues the public purpose and the commercial functions of the defendant State to be kept separate. The beneficiary of the foreign reserve is the citizens of the defendant States. Macroeconomic interest of a State should not be compromised for the sake of a private judgment creditor. Following the same line of argument, the next chapter of this dissertation focuses on the interpretative tools balancing the interests of the defendant State, its subjects as well as the judgment creditor.

[971] Discussed in 4.4.6 and 4.4.8 of this dissertation.
[972] The typology of owner and holder of the asset is discussed in 3.3.2 of this dissertation.
[973] Discussed in 3.4 of this dissertation.

The cultural objects with scientific, cultural, and historical significance enjoy immunity in the receiving State as a part of cultural diplomacy[974] *via* exchange of cultural objects. The case laws show a consistent practice with the emphasize on two issues: firstly, the legal arrangement of exchange, whether the exchange was made under agency contract, trustee contract, diplomatic memorandum of understanding (MoU) etc. and secondly the intention of earning profit from the exchange/exhibition. The defendant State needs to be careful while entering into the legal arrangement for this kind of exchange. Clear expression of no intention of earning profit may go further in protection of cultural object. This dissertation further argues that following the same line of argument like the assets of central bank, the cultural objects are priceless assets for the history and culture of the defendant State, therefore owing significantly to its subjects. Allowing enforcement against cultural objects at the hand of the private judgment creditor would be a '*slippery slope*' with no return. The private judgment creditor may sell the object to another State for value. This sale would cost not only monetary value to the defendant State but the emotional, cultural, and historical value to the subjects. Nevertheless, while deciding the immunity of cultural objects, objects taken in violation of international law should be considered.[975]

After the immune assets, there are connotations of non-immune assets. Despite the absence of any list of specific non-immune assets, the consensus shows the grant of MoC against earmarked assets. This dissertation proposes the mitigation of enforcement litigation challenges by way of creating lien or hypothecation over the asset to earmark it for certain debt. Such legal securitization gives the certainty to the creditor, reduce the transaction cost for the parties,[976] and prevent multiplicity of

[974] The term cultural diplomacy means "Cultural Diplomacy may best be described as a course of actions, which are based on and utilize the exchange of ideas, values, traditions and other aspects of culture or identity, whether to strengthen relationships, enhance socio-cultural cooperation, promote national interests and beyond; Cultural diplomacy can be practiced by either the public sector, private sector or civil society." Institute for Cultural Diplomacy <https://www.culturaldiplomacy.org/index.php?en_culturaldiplomacy> accessed 27 August 2022.

[975] Discussed in 4.3.4 of this dissertation.

[976] The enforcement litigations in various jurisdictions increase the cost of future borrowing for the defendant State, reduce the price of its sovereign bonds, and exclude it from international capital market. Schumacher, Trebesch and Enderlein (n 19) found that the probability of exclusion from global capital market increases by 16% when litigation was filed and by 23% if attachment attempt was made. State's attempt to hide and/or remove its assets from the jurisdiction of the forum State also cause additional cost. State also hesitates to take strict regulatory measures in fear of MoCs. It increases the cost of regulatory functions of the State as additional administrative cost of implementation, consistent

proceeding and forum shopping.[977] In case of failure to earmark any asset, or the mixed use of earmarked asset, the deciding court may apply the proportionality test[978] to interpret the purposes of the asset.

The other category of non-immune asset is the asset taken in violation of international law. The limitation of the enforcement proceeding against this kind of asset is that the proceeding is limited to the rights or ownership related to the asset. This kind of asset cannot be targeted for enforcement of any other commercial claim or debt. The question may be raised as to the asset taken by a host State in violation of international investment law pursuant to unlawful expropriation. In a hypothetical case of unlawful expropriation under international investment law, the host State cannot enjoy immunity from execution in a proceeding in relation to the [unlawfully] expropriated asset. The literature and case laws show that in unlawful expropriation cases under international investment law, the question of immunity to asset hardly comes. Rather the arbitration tribunal decides the magnitude of compensation for expropriation based on lawfulness and unlawfulness of the action.[979]

Although there is no list of specific categories of assets declared as non-immune, the characteristics of non-immune assets are mentioned in the concerned legal instruments. Such as, assets with 'commercial purpose' or used in 'commercial activity'. The divergence is visible as to the use of 'commercial purpose' or 'non-sovereign purpose'. This dissertation argues that use of mere 'commercial purpose' or 'non-sovereign purpose' can hardly balance the interests of the judgment creditor or

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cost of possible adjudication, cost of possible reduced control over extra-territorial assets etc. Similarly, the costs of investment increase for its commercial counterparts as they can no longer rely on mere waiver clause. See for more, Ugo Panizza, Federico Sturzenegger and Jeromin Zettelmeyer, 'The Economics and Law of Sovereign Debt and Default' (2009) 47 (3) Journal of Economic Literature, 651; Schumacher, Trebesch and Enderlein (n 19); Fox (n 5) 373; Weidemaier (n 49) fn 8; Blackman and Mukhi (n 253); Sadie Blanchard, 'Republic v. High Court Accra, *ex parte* Attorney General' (January 2014) 108 (1) The American Journal of International Law 73, 79.

[977] Parties to a commercial contract agree on the forum for dispute settlement before signing the contract. However, this provision does not include the forum for enforcement litigations. The judgement creditor shops for the forums to seek enforcement of the judgment/award depending on the availability of defendant State's assets or the creditor friendly nature of the forum States. Forum shopping not only results at multiplicity of proceeding but also increases the transaction costs for the parties. See for more, Kudrna (n 422), 137; Christopher Whytock, 'the Evolving Forum Shopping System', Legal Studies Research Paper Series no. 2011-25, University of California, Irvine, School of Law, 529; Russell J. Weintraub, 'Introduction to Symposium on International Forum Shopping' (2002) 37 Texas International Law Journal 463, 463-64.

[978] Discussed in 5.2.2 of this dissertation.

[979] David Khachvani, 'Compensation for Unlawful Expropriation: Targeting the Illegality' (2017) 32 (2) ICSID Review 385.

the defendant State. Instead, an appropriate interpretative tool may help to decide the purpose of sovereign assets given the context of the case. In order to illustrate the context, this chapter reviewed the case laws from certain commonly targeted sovereign assets, such as immoveable asset in the territory of the forum State, receivables from third party, funds in bank accounts, assets of SOEs, State-owned ships and aircrafts, intellectual properties, sovereign wealth funds *etc.*

Assets can be moveable or immoveable. The immoveable sovereign assets enjoy immunity in the forum State until the debt is accrued in relation to the asset. This kind of asset also faces less challenge as to the mixed uses because of their divisibility. Its tangible nature makes the commercial uses divisible from the public uses. Besides, the nexus requirement between the asset and the debt also protects the defendant State and its external sovereign functions in the forum State. State owned ships and aircrafts and the cargos therein are the common moveable sovereign assets targeted for enforcement. Both ships and aircrafts are governed by their respective international conventions such as the Brussels Convention (1926) and the UNCLOS (1982) for ships and the Chicago Convention (1944) for the aircrafts. These conventions state the non-immunity to the ships and aircrafts used in commercial purposes. In terms of the sovereign ownership, these assets are held and operated through the State agency or special legal entities like SOEs. Therefore, the control test and the beneficiary interest tests [discussed in the previous chapter] play a vital role here.[980]

Deciding immunity for SOEs' assets is a complex web of concerned laws such as laws on foreign sovereign immunity, corporate law, laws related to the asset in question, by-laws of the SOE owning the assets, any agreement with the State concerning the use or purpose of assets etc. This dissertation found two types of practices among States: firstly, the forum States following the corporate principles of separate legal entity of the SOE and secondly, the forum States taking the SOE's assets as public assets and thereby following the same line of commercial activity or purpose test. This dissertation argues in favor of separate legal entity of the SOE and its assets ownership and use from the defendant State. The corporate law principles permit investigation and piercing the corporate veil of the SOE for any compelling case of fraud, injustice, abuse of corporate personality. Therefore, denying the

[980] Discussed in 3.3.3 and 3.3.4 of this dissertation.

separation of corporate nature of SOE and the defendant State would result the conflicting position between the two canons of laws. On the other hand, in the second case of considering the SOEs' assets as public assets, the judgment creditor stands on a favorable footing when targeting the SOE's assets. Because the imminent objectives of SOE to engage in commercial ventures and earn profits make it non-immune. The SOE relies on its public nature to get immunity. Proving the public nature of the SOE and its assets would intervene with the confidentiality of the defendant State and SOE's management before the court of the forum States. Moreover, ignoring the separate legal entity of SOEs and letting its asset being non-immune for the debt of the defendant State would also cause hardship in the providing the services/goods to the subjects of the defendant State, especially in those where the SOE is the single provider of the commodity such as electricity.

Among the intangible sovereign assets, there are State owned intellectual properties, sovereign wealth funds, receivables from third party, funds in accounts. These assets enjoy no immunity when there is waiver of immunity from execution or earmarking of assets for commercial debt. However, even without any of these two, the liquid assets may not be immune. The core principle for liquid asset is that these assets have no certain purpose like the diplomatic purpose for diplomatic assets or national security purpose for military assets. Their purposes are derived from what they are used for. The deciding court reviews the nature of the transaction in which the liquid asset is being used *i.e.,* the commercial activity test. This dissertation argues that while examining the transaction as the source of liquid asset, the deciding court should review the context of the defendant State. The transaction may be deemed as commercial on its face but can be public in the context of the defendant State. The case of Nauru before the Australian court targeting the bank accounts can be a relevant example here.[981] The services, usually procured commercially may not be a case for the defendant State. Therefore, while interpreting the purpose of liquid assets, the defendant State may be given certain degree of deference like the margin of appreciation [discussed in next chapter].[982]

Mere the commercial activity test does not give a comprehensive view for the intangible assets. The purpose of the asset should be considered. There is hardly any

[981] *Firebird Global Master Fund II Ltd.* (n 946). Discussed in 4.4.8 of this dissertation.
[982] Discussed in 5.2.3 of this dissertation.

presumption of public purpose for liquid assets despite its form or nature. Such as the liquid assets levied in the forms of taxes and royalties apparently seem as public due to the fiscal source but were held as commercial. State collects taxes and royalties for bearing its public expenses.[983] However, the past use of taxes to pay off the commercial debt was held as sufficient to grant garnishment order. The common challenge for all these liquid assets is whether the prospective or future use of the asset should be considered. This dissertation supports reviewing only the past and/or present use of the liquid assets to decide its purpose. Taking the future uses/purposes would motivate the State to avoid its judgment debt. It would also bring the procedural ambiguities on the evidence to prove future use. However, single, or mere incidental uses in past should not be the sole ground for granting a MoC.

The parties argue in the enforcement cases targeting the sovereign wealth fund that the court should consider the immediate commercial purpose of the fund *i.e.*, the accumulation of wealth or the long-term purpose of fiscal burden reduction, budgetary allocation, intergenerational wealth transfer *etc.* The long-term purposes of the fund also include avoiding future default in debt payment. The cost of its default in payment ultimately falls on its subjects.[984] In one way or another, the defendant State needs to pay the debt or bear the cost. Therefore, this dissertation negates argument of immediate commercial purpose or long-term public purpose as in both cases, the sovereign wealth fund may not be immune.

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[983] William D. Popkin, *Introduction to Taxation* (6th ed. LexisNexis, 2013).

[984] The price of the MoC ultimately falls on the taxpayers of the defendant State. The prospective income from the asset in question used for payment of debt would other be used for welfare of the subjects. In the *CME v. Czech Republic* [2003] *ad hoc* arbitral tribunal under the UNCITRAL arbitration rules, the judgment debt of $355 million over a dispute regarding media license was equivalent to its domestic health care budget of Czech Republic. The debt of the *NML Capital* case (2012) amounting $1.33 billion exceeded the GDP of Argentina at that time. With the reduced access to future borrowing, increased transaction cost, cost of capital, attempts in hiding or removing assets from forum State affect the internal budgetary earning and expenditure. The defendant State is left with no option but to increase income from fiscal sources and reduce the development budget. These decisions increase eventually the financial burden on its citizens. See for more, Julie A. Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2014) 54 (2) Virginia Journal of International Law 367, 391; Mihir A. Desai and Alberto Model, 'Czech Mate: Expropriation and Investors Protection in a Converging World' (2008) 12 (1) Review of Finance, European Finance Association 221, 221-222; Robert Flood and Nancy Marion, 'Getting Shut Out of the International Capital Markets: It does not take much' (IMF Working Paper WP/06/144 2006), 3; UNCTAD, Argentina's 'vulture fund' crisis threatens profound consequences for international financial system (2014) <https://unctad.org/news/argentinas-vulture-fund-crisis-threatens-profound-consequences-international-financial-system> accessed on 16 April 2021.

Unequivocally, the court practices from different jurisdictions are diverse even regarding the same types of assets. Evidently, many assets which enjoy immunity under relevant international conventions, had been subjected to MoCs in different cases from various jurisdictions. For instance, in case of State instrumentalities, when the definition of State instrumentalities in national legislation does not fall within the narrow definition of States, the private judgment creditor may be succeeded in getting a MoC against the assets owned by the State instrumentalities.[985] On the other hand, when an expansionary definition of State [inclusive of State instrumentalities] is adopted to cover the myriad agencies and instrumentalities, the chances of granting MoC is minimal. Inconsistency and unpredictability are caused from the undetermined areas of laws of foreign sovereign immunity leaving the judgment creditor without remedy. the defendant State's public functions and its relationship with its subjects and other States are also affected. More consistent and predictable result might have been achieved with application of certain interpretative tools, discussed in the next chapter.

[985] Yang (n 20) 386.

Chapter 5: Alternative approaches for Interpretation

5.1. Interpretation of sovereign assets

The preceding chapters analyzed the substantive and procedural aspects of enforcement litigation against foreign sovereign assets from the relevant international conventions, and national legislations as well as case-laws from different jurisdictions. The fourth chapter concluded with the challenges for interpreting the purposes of various kinds of sovereign assets in deciding the question of immunity from execution. The adverse impact due to the unpredictable and inconsistent interpretations falls not only on the judgment creditors and the defendant State but also its subjects and its inter-States relations.[986] The diplomatic relation between the defendant State and the forum State also becomes vulnerable.[987] Taking piecemeal actions for each asset as suggested in the fourth chapter does not solve the overall challenges because it is uncertain which asset would be targeted by the judgment creditor; the approaches followed by different jurisdictions also vary according to their legal system and economic mandate. Therefore, this chapter scrutinizes different interpretative tool to reduce or eliminate these uncertainties and ensure coherence. The final research question of this dissertation is to examine whether and to what extent various interpretation techniques may be applied to decide the purpose/use of the sovereign assets. Where the previous chapter reviewed the practices of the forum

[986] The uncertainty causes the increase of transaction cost, reduced or expensive access to future borrowing [discussed in n 986 of this dissertation], increase of fiscal burden on the taxpayers of the defendant State [discussed in n 984 of this dissertation]. These affects its relations with its subjects. The subjects of the defendant State pay the ultimate price of the MoC. Despite the involvement of significant public interest issues, the defendant State prefers to keep the award confidential and, in some cases, makes out of court settlement at a higher price to avoid negative publicity in media and in fear of losing the subjects' confidence. Due to lack of available public data, these settlement deals stay out of public knowledge. It affects the transparency between the State and its subjects. See for more, Blackman and Mukhi (n 253); Prabhash Ranjan, 'The White Industries Arbitration: Implications for India's Investment Treaty Program' (Investment Treaty News, IISD 13 April 2012) <https://www.iisd.org/itn/en/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/> accessed 20 April 2021; Fox (n 5) 373.

[987] The forum State fears of losing future investment of foreign reserve from the defendant State. such loss of business would affect the economy of the forum State and its interested parties. It also puts the exchange of objects with cultural, historical, and/or scientific values, for exhibition, as a part of cultural diplomacy at risk. Austria faced a similar situation in 1998 when its two paintings got confiscated for prejudgment attachment in New York due to refusal of the New York Court in granting immunity to the cultural objects of Austria. After the denial of immunity to the cultural objects of Austria in New York, Taiwan refused to lend their cultural objects in France and also in Germany in fear of litigations from China for confiscation of these objects in the territory of borrowing State. It had less or no confidence in the domestic jurisdictions of the borrowing States in interpreting the public purpose of these cultural objects and thereby losing the immunity. See for more, Krauskopf and Steven (n 299) 145; *Altmann* (n 297), *Republic of Austria* (n 783); Chang (n 298); Woudenberg (n 707), 301.

States' courts, this chapter borrows the tests from other relevant areas of laws. Such as the MoA from the judgments of the ECtHR, the doctrine of proportionality from the administrative law, the debates between international rule of law or international law-based rule of law. These alternative interpretative approaches would bring the desired consistency, certainty and reduce the possible conflicting position among different areas of laws in the enforcement litigations. Finally, it ends with the possibility of having a model text in maintaining consistency and coherence.

5.2. Alternative interpretive approaches

Defining the purpose of the sovereign assets is a constant challenge for the courts in enforcement proceedings. The conjunction between the private interests of the judgement creditors and the public acts of the defendant State is present. The public purpose or use of sovereign assets is decided by the judges of the forum State who are non-national of the defendant State.[988] Although there are procedural safeguards in the *Lex fori* to prevent any conflict of interest, this is a substantive challenge in determining the purpose of the assets in question from the aspect of 'best-judge' principle. Arguably, each of the judges of the forum States emphasizes certain groups' interests. Such as, States having more free market economy promote the interests of judgement creditors,[989] whereas States with regulated economy (distinct from market economy) prioritize to honor the interest of the defendant State as sovereign.[990] This is one of the possible reasons why the judgement creditors select the jurisdictions having more creditors' friendly legislations *e.g.*, the US, the UK *etc.* This is also a reason of why defendant States have commercial assets in these jurisdictions.

While deciding the execution cases, the courts have been innovative while interpreting the purpose of sovereign assets and offered various alternatives. Such as the French Court of Cassation suggested to include a list of assets for which the State waives its right to immunity from execution.[991] This decision was criticized for suggesting an 'unreasonable' drafting of a waiver clause for a successful MoC. Such

[988] Ferdous Rahman, 'Determination of Public Purposes by Non-national Adjudicators in International Commercial Disputes' (IILLM thesis, Academy of European Public Law 2021).
[989] Schumacher, Trebesch and Enderlein (n 19).
[990] *FG Hemisphere Associates* (n 917) [62]. The Hong Kong Court of Final Appeal (Hong Kong's *de facto* supreme court) refused to enforce the judgement against Congo relying on China's strict position in favor of absolute immunity.
[991] *NML Capital* (n 420 and 421).

exhaustive drafting is not possible and even if added, may not bring the certain results. Blanchard observed:

> One should therefore expect future contractual waivers to be more specific about the categories of assets they include and exclude, so as to address both of those sources for uncertainty. Additionally, in light of the prospect that courts may decline to enforce even an express and specific waiver against sensitive categories of assets […].[992]

Hence, instead of incorporating an exhaustive list of assets waiving the immunity or the purposes of the assets, a uniform and coherent mechanism may be introduced to interpret the public purpose of assets. A process of interpreting the public purpose and/or the necessary content therein can ensure the desired consistency and predictability. It might bring the balance between the judgement creditor and the defendant State in future execution litigations and eventually, benefit the parties as well as the subjects of the defendant State.

5.2.1. Acceptance of the public purpose as forwarded by the defendant State

The judges from the forum States are not in the same position as the defendant State's authorities to state the public purposes of the assets.[993] Hence, they may accept the interpretation of the public purpose as provided by the defendant State. This proposal receives its support from the 'best judge' principle,[994] and the perspective of majoritarianism. Such as in the VCDR (1961) and the VCCR (1963) state The VCCR and the VCDR state the certificate from the diplomatic mission or the consular as to the purpose of the assets of the diplomatic mission as sufficient proof of their purposes.

The defendant State as the sovereign authority should be the judge of its own assets' attribution. Given the maximum impact of an adverse decision on its subjects,[995] the manifestation of the purpose of the assets should be taken from the representatives of

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[992] Blanchard (n 976), 79.
[993] *Handyside v. UK* [1976], ECtHR, 7 December 1976, p 48; the ECtHR observed, "*State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them*."
[994] Robert E. Goodin, 'Liberalism and the Best-judge Principle' (1 June 1990) 38(2) Political Studies 181. "*Each person must be taken to be the best judge of his own interest*."
[995] Discussed in n. 984 of this dissertation.

the subjects, known as the majoritarianism.[996] Majoritarianism entrusts a broad value judgment from the legislature where the budget allocations are decided and also in some cases, by the executives when the attribution of certain assets are decided to serve the public purpose. In case of any internal disputes, the national court examines the public purposes in question. Nevertheless, when the public purpose decisions are in issue on substance, it usually hesitates to review the content of the decisions.[997] Rather, it observes the authority being empowered by law to make the decision, considers the wider account of political and economic factors. Even when these considerations are regarded as subsidiary purposes, the main decision does not get invalidated because of the ancillary purposes and/or considerations.[998] In other words, the court is open to revisit the public purpose decisions based on procedural illegality and fairness instead of the substantive basis of the purpose or use of the assets.

The national court of the [defendant] State receives the legitimacy from the constitution (in case of Constitutional supremacy) or from the parliament (in case of parliamentary supremacy) to decide the public purpose of its sovereign assets. Despite such legitimacy, it is reluctant to question the purposes forwarded by the legislature or the executives. Hence, the legitimacy of the non-national court of the forum State to scrutinize the purposes even once sworn by the defendant State, can be subjected to argument. It arguably receives no legitimacy. Following the same line of proposition, the question of immunity from execution may be decided based on the interpretation of public purpose as adduced by the State. Receiving the support from majoritarianism and the *best judge* principle, letting the defendant State to decide its own public purpose would protect its subject from the adverse impact of inconsistent judgements. For example, the certificate from the head of the diplomatic mission as to the public use of the diplomatic account should be accepted as conclusive evidence. The court of forum State should refrain from making further scrutinization of the same.

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[996] Gordon Anthony, 'Public Interest, and the Three Dimensions of Judicial Review' (2013) 64(2) Northern Ireland Legal Quarterly 125, 129.
[997] *Associated Provisional Picture Houses Ltd. v. Wednesbury Corporation* [1948] Court of Appeal of England and Wales, 1 KB 223.
[998] *Regina v. Secretary of State for Foreign and Commonwealth Affairs*, *Ex parte*, *World Development Movement Ltd.*, [1995] the Queen's Bench Division 1 WLR 386 [401].

On the other hand, allowing of such unrestricted power to the defendant State to define the public purpose supporting its entitlement of immunity from execution, limits the rights of the judgement creditors to enforce their claim. This approach would put the settlement of any commercial dispute with States unenforceable and thereby increase the transaction cost of the commercial contract for States. Given the similar challenge in international investment law, Kingbury and Schill suggested to apply the public law concepts, such as proportionality to bring the desired equilibrium between the contesting interests of the defendant State and its commercial counterparts.[999] Alternatively, principle of proportionality provides a comparatively stricter framework for the unrestrained discretion of the defendant State and reduce the apprehended enforcement challenges.

5.2.2. *Doctrine of proportionality*

The proportionality test is used in public law to resolve the conflicting position of two rights.[1000] In this Dissertation, these two rights are the defendant State's right to immunity from execution and the right of the judgement creditors to enforce their judgement/award. The proportionality principle(s) "*do not work in an "all or nothing fashion" but allow for "a more or less."*"[1001] It measures the dimensions of weight of the two contesting rights.[1002] The German Constitutional Court emphasized on the balance by stating:

> When one seeks to maximize both (the individual's right to profession and the State's right to regulate for public purpose) […] demands in the most effective way, then the solution can only lie in a careful balancing of the meaning of the two opposed and perhaps conflicting interests.[1003]

In terms of the methodology of applying this test, the Supreme Court of Canada followed a three-step process. It starts with assessing the targeted objective, on a non-

[999] Benedict Kingsbury and Stephan W. Schill, 'Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest- the Concept of Proportionality', in Stephan W. Schill. (ed), *International Investment Law and Comparative Public Law*, (Oxford University Press, 2010), 77.
[1000] J Schwarze, 'The Principle of Proportionality and the Principle of Impartiality in European Administrative Law' (2003) 1 Rivista Trimestrale di Diritto Pubblico, 53.
[1001] Ronald Dworkin, *Taking rights seriously*, (Harvard University Press, 1978) 24.
[1002] Robert Alexy, *A theory of Constitutional Rights* tr Julian Rivers (Oxford University Press, 1986), 50.
[1003] *The Apothekenurteil* case [1958] Germany the Federal Constitutional Court, BVerfG 7, 377, [404]-[5].

arbitrary, fair, and rational basis, secondly, the cautious impairment of rights as less as possible and finally, the proportionality of the objectives and the effects of the measure.[1004] The test was also applied in the case of *Bank Mellat* (2013),[1005] where four questions were identified while using the proportionality test. These questions were:

> Whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective and (4) whether balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective to the extent that the measure will contribute to its achievement, the former outweighs the latter.[1006]

The principle of proportionality is popularly applied to "*manage tensions and conflicts between rights and freedoms on the one hand and the power of the EC/EU and of Member States on the other*."[1007] This is also used in the cases before the European Court of Justice,[1008] the ICJ, [1009] the World Trade Organization[1010] and other multilateral adjudicators. The methodological question of how to apply the proportionality principle is rooted in the words of the Court First Instances of the European Communities (third chamber):

> The principle of proportionality which is one of the general principles of Community law, requires that measures adopted by Community institutions should not exceed the limits of what is appropriate and necessary in order to

[1004] *R v. Oakes*, [1986] Supreme Court of Canada, 1 SCR 103, [139].
[1005] *Bank Mellat (Appellant) v. Her Majesty's Treasury (Respondent) (No. 1)* [2013] the UK Supreme Court UKSC 38.
[1006] Ibid [74].
[1007] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 144.
[1008] C-58/08 Vodafone and Others, Judgment of 8 June 2010, *European Court Reports 2010 I-04999*; Joined Cases C-92 and 93/09 Volker und Markus Schecke GbR, judgment of 09 November 2010, *European Court Reports 2010 I-11063*; Case C-236/09 Association belge des Consommateurs Test-Achats and Others, judgment of 1 March 2011, Reports of Cases 2011 I-00773.
[1009] *Nicaragua v. USA* [1986] ICJ judgement, 27 June 1986, ICJ Reports 1986. The Case concerning the dispute regarding Navigational Rights, Military and Paramilitary Activities in and against Nicaragua.
[1010] *Korea- Measures Affecting Imports of Fresh, Chilled and Frozen Beef* [2000] WTO Appellate body 11 December 2000, WT/DS161/AB/R, Report of the Appellate Body, [164].

> attach the legitimate objectives pursued by the legislation in question and where there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages cause must not be disproportionate to the aims pursued.[1011]

The proportionality test may be applied to determine the public purpose of the sovereign assets as to how and to what extent the MoCs against the assets intervenes into serving of public purpose of the defendant State. The judges of the forum State may also consider the availability of any other assets with less adverse impact on the defendant State and its subjects, but with equally effective means for enforcement. This test also requires the [non-national] judges of the forum States to assess certain regulatory (or sovereign) decisions of the defendant State which they may not be at the best position to decide according to the *best judge* principle. On the other hand, at the final level of proportionality *stricto sensu*, where the judges compare the effects of the MoCs on the State's public purpose objectively. Such analysis can possibly be made based on the transaction costs, future impact on States' commercial contracts, the cost efficiency of enforcement attempts of the judgement creditors, the length of interference via MoCs *etc*.[1012] Therefore, where the first two approaches rely on the subjective analysis of the asset's public purpose and the impact on the defendant State and its subjects, the final part of the test *i.e.*, comparative analysis based on quantitative representation of the cost-benefit analysis gives a more objective perspective.

5.2.3. Margin of appreciation (MoA)

Several approaches are prevalent from the judgments of the forum States in interpreting public purposes of foreign sovereign assets. The scope of margin of appreciation as an alternative approach for the forum States in adjudicating the issue of immunity from execution can be assessed. This approach receives the justification from the principle of "differential decision making". It is defined as differential judicial decision making as a means of honor to the separation of power and showing

[1011] *Pfizer Animal Health SA v. Commission* [2002] ECR Judgement 23 November 2002, II-3305 Case T-13/99, [411].
[1012] Kingsbury and Schill (n 999) 87.

hesitance in deciding the cases involving political issues.[1013] Bollee commented that the reason behind the French Court of Cassation's setting a higher standard for waiver clause, was to avoid the enforcement of ECtHR judgment against the French government's assets.[1014] The application of margin of appreciation may remove or at least reduce the fear from State's mind.

Margin of appreciation is a doctrine applied extensively by the ECtHR.[1015] It recognizes the appreciation granted to national lawmakers as well as judges in enacting and interpreting their own measures to achieve a legitimate purpose. This interpretative tool brings the check and balance with the supervisory power of the ECtHR to ensure, "*both the aim of the measure challenged and its necessity; it covers not only the basic legislation but also the decision applying it, even one given by an independent court*."[1016] In this legal doctrine, the degree of discretion varies from wide to narrow in margin of appreciation. Such as wide margin is applied in the cases involving "culturally, morally or religiously" sensitive questions;[1017] or the divergence between the private and public interests at stake.[1018] On the other hand, at the question of "strong European consensus in non-sensitive issues" such as freedom of press, private life issues etc., a restrictive margin is applied.[1019] Similarly, the extent of discretion of defendant State may gradually increase in the enforcement cases from the assets listed as immune to the non-immune assets and the least degree of deference as to the commonly commercial assets such as commercial ships or passenger aircrafts for freight.

Lemmens identified three types of cases where the ECtHR applies the margin of appreciation:[1020] the absence of law, questionable use of law in the fact in issue and the cases pertaining to the positive obligations of the States.[1021] All these three

[1013] Koen Lemmens, 'The Margin of Appreciation in the ECtHR's Case Law' (2018) 20 (2-3) European Journal of Law Reform, 78.
[1014] Sylvain Bollee, "L'abandon de l'exigence de specialite de la renunciation a l'immunite d'execution' (2015) 5 Dalloz 1936, translation taken from Kudrna (n 422), 136.
[1015] Lemmens (n 1013), 84.
[1016] *Handyside* (n 993) [49].
[1017] Lemmens (n 1013), 90.
[1018] *Paradiso and Campanelli v. Italy* [2017] ECtHR, 24 January 2017, Application no. 25358/12 [182].
[1019] Lemmens (n 1013), 92. *Redaktsiya Gazety Zemlyaki v. Russia* [2017] ECtHR, 21 November 2017, application no 16224/05, [35] and [39]; *Animal Defenders International v. UK*, [2013] ECtHR (GC), 22 April 2013, application no 48876/08, [102].
[1020] Lemmens (n 1013), 87.
[1021] Ibid.

characteristics match with the enforcement cases against foreign sovereign assets. Such as none of the international or national law provides objective standard of proof for the question of sovereign assets' immunity from execution. Given such lack of standard, the defendant State and the judgement creditors bring different sets of facts to prove in their favor. Finally, the objective of courts is to ensure the obligation of the State to honor its judgment debt. Apart from the question of where this test is applied, the methodological question is equally significant to determine whether it can be regarded as an alternative approach of the judges from forum States in an enforcement proceeding.

This test is applied in three forms: firstly, as a substantive one to balance the individual right. In this Dissertation, it is the rights of the judgement creditors. Secondly, the collective goal. Here, these are the rights and interests of the defendant State. Finally, as a structural one concerned with the review process determining the purpose of the sovereign assets.[1022] The margin of appreciation test grants a certain degree of discretion to the contracting States in determining the legitimacy of the measures limiting the rights.[1023] Similarly, in the execution suits, the defendant State may enjoy a certain degree of deference and the court of the forum State may examine the legitimacy of the purpose of the sovereign assets claimed by the defendant State. Defendant State enjoys a certain degree of deference in determining their defense and the adjudicators adopt customized standard as per the condition of the defendant State. The margin of appreciation test can be applied where the defendant State puts forward its subjective circumstances distinct from the usual form of commercial/public use of sovereign assets for which the court may examine the circumstances at the standard of reasonableness. This also mitigates the adversity for judgment creditors.

In the case of *Export-Import Bank of the Republic of China v. Grenada* (2014),[1024] the US court considered the existing context in Grenada and concluded that the purposes of the funds used by Grenada i.e., managing its airports, seaports, and other civic facilities, were public although, these purposes had been usually procured from

[1022] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 80-81.
[1023] Benvenisti Eyal, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 New York University Journal of International Law and Politics, 843.
[1024] [2014] 2nd Cir court, F 3d WL 4773451 CA 2.

private persons in other countries. Similar in *Firebird Global Master Fund II Ltd. v. Republic of Nauru and Another* (2014),[1025] the Australian High Court considered the geographical size and location as well as economic condition of Nauru while hearing an enforcement case against certain bank accounts in its name. The Australian High Court commented:

> In determining substantial commercial purpose, it is also important to bear in mind the individual circumstances of Nauru. Its remote location and small geographical size and population render the provision of many commercial services uncommercial for private entities (such as banking and aviation services and the provision of fuel) […] it is in this context that the government operates many services beyond what may be considered core functions of government (such as police and fire fighting services) in order that its citizens may survive.[1026]

While applying this test, the ECtHR starts with presumption in favor of the State acts as legitimate and justifiable.[1027] It examines the legitimacy of the State's act and the underlying objectives considering the ECHR and also the necessity of the objectives in a democratic society in applying this test.[1028] The question of the limit of that appreciation of the national government was decided in respect of the measure at issue.[1029] The ECtHR, in some cases, quashed the States' defense of public purposes

[1025] *Firebird Global Master Fund II Ltd.* (n 946), [176].
[1026] Ibid .
[1027] Gary Born, Danielle Morris and Stephanie Forrest, 'A Margin of Appreciation: Appreciating its Irrelevance in International Law' (2020) 61 (1) Harvard International Law Journal 65, 79. In *Greece v. United Kingdom* (*the Cyprus* case) [1958] European Commission (Plenary) Application no. 176/56, Yearbook of European Convention on Human Rights, para 132, the European Commission stated, "*the assessment whether or not a public danger existed is a question of appreciation*" and accepted the appreciation made the UK Government as to the existence of a public danger.
[1028] In the case of *Castells v. Spain* [1992] ECtHR 14 EHRR 445, the politician of the opposition party was prosecuted for criticizing the government. The ECtHR observed that the opposition politicians have more freedom of expression in a democratic society to scrutinize the government and their actions. The statements regarding government in power actions receives higher protection. The ECtHR in *Von Hannover v. Germany* [*2004*] EMLR 379 [63] stated, "[…] *a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating '[…] to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "impart[ing] information and ideas on matters of public interest" […] it does not do so in the latter case.*"
[1029] *The Cyprus* case (n 1027), [143].

and put the private rights.[1030] The case laws of the ECtHR clearly indicate that mere legitimate objectives are not sufficient, the State also needs to ensure the safeguard to prevent the possible abuse of the same and compensate the damage caused to the private person.[1031] Similar approach can be a useful technique to examine the certificate forwarded by the defendant State. The good faith of the defendant State and its *bonafide* intention to honor the judgment debt may be considered as an indication of the fair exercise of its deference under the margin of appreciation test.

Like the previous two approaches, margin of appreciation also comes with some challenges. The judges of the ECtHR [applying the margin of appreciation] receive their legitimacy from the ratification of the ECHR by the defendant State. However, the forum State's judges get no direct legitimacy from the defendant State except the acceptance of their jurisdiction by the defendant State for the dispute. Moreover, in case before the ECtHR, the ECHR act as the basis of the concerned national legislation of the defendant State in question and the jurisdiction of the ECtHR as a quasi supra national court. Interpreting the same instrument with the deference of the defendant State reduce the risk of bias of the judges. However, the national legislation of the forum State on foreign sovereign immunity is the basis for the interpretation of commercial purpose of sovereign asset in enforcement litigation but it is not the basis of the regulatory management of the asset by the defendant State. Therefore, again the deference of the defendant State and the discretion of the forum State are not standing on the same source.

5.2.4. Safeguards under international legal instruments

Interpretation of commercial agreements plays a vital role in enforcement claim such as the treaty provisions on waivers of immunity from enforcement. In the case of *Eurodif* (1983) the French court refused to rely on the waiver clause in the arbitration

[1030] For instance, In the case of *Von Hannover* (n 1028), the petitioner complained against the publication of their photos in the newspaper as violation of their right to privacy under art 8 of the ECHR whereas the State argued for the freedom of press as essential right in a democratic society. Nevertheless, the ECtHR said the domestic court failed to balance the freedom of expression of the press and the freedom of privacy of the petitioner.

[1031] In the case of *Vukota-Bojic v. Switzerland* [2016] ECtHR Application no. 61838/10, Judgment 18 October 2016, the government argued that the alleged secret surveillance upon the aggrieved person is applied in a small number of cases and thereby necessary for public interest to prevent insurance fraud and ensure the due appropriation of public fund. Nevertheless, the ECtHR denied the justification and observed the failure of the legal framework to set out sufficient safeguards against abuse of this measures cannot be overlooked and thereby held the State responsible for violation.

clause when the arbitral award came before the court for enforcement.[1032] On the other hand, in the case of *Soiete Bec Freres v. Office des cereals de Tunisie* (1997) the French court provided a wider interpretation of the waiver clause stating the agreement in question should be interpreted in good faith.[1033] Similarly the French Court of Cassation permitted the enforcement of arbitral award against the bank accounts of Qatar government with a French bank relying on the consent to arbitrate under the ICC Arbitration Rules.[1034] It stated, "*the commitment taken by a State signatory to arbitration clause to enforce the award in the terms of article 24 of the ICC Rules implied a waiver of immunity from execution by the State*."[1035] Similar precedents are available where the express waiver in concerned international commercial agreement acted as the sole ground for allowed the MoCs against the assets of foreign sovereign which would otherwise enjoys immunity from execution.[1036] Hence, the interpretation of clauses in international agreement plays a vital role here.

The Vienna Convention on the Law of the Treaties (VCLT) (1969) puts certain standards to be followed while interpreting a treaty provisions, such as interpreting the provision in good faith, in the ordinary meaning of the terms, based on the context, in light of the objectives and purposes.[1037] Furthermore, this Convention (1969) requires the interpretation of any treaty provisions to be guided by the relevant rules of international law, regarding the parties and their relationships.[1038] Kulick commented on the scope of 'rules' in article 31 (3) I of this Convention (1969) being inclusive of all the sources of international law as contemplated by the ICJ Statute.[1039] The scope of sources of international law under the ICJ Statute (1945) include international custom and the general principles of law.[1040] In the case of *Sapphire Arbitration* (1963), the sole arbitrator relied on the quasi-international character of the

[1032] *Republique islamique d'Iran v Eurodif* [1983] France, Regional court of appeal, Paris 21 Aprol 1982, Rev. crit. DIP 101.
[1033] [1997] France, Regional Court of Appeal Rouen, 20 June 1996, Rev. arb. 263.
[1034] *Creighton* (n 721).
[1035] Ibid; translation taken from Kudrna (n 422), 134.
[1036] *Procureur* (n 413).
[1037] The VCLT 1969 (n 76) art 31 (1).
[1038] Ibid., art. 31 (3) (c).
[1039] Andreas Kulick, *Global Public Interest and International Investment Law*, (Cambridge University Press, 2012), 170.
[1040] The Statute of International Court of Justice 1945 (the ICJ Statutes) art 38.

agreement between the State entity and the private investor and applied the general principles of law as a source of law under article 38 of the ICJ Statutes (1945).[1041]

The challenges exist in applying these safeguards in the enforcement cases. Firstly, commercial agreements executed by States with the private parties do not fall under the scope of public international law but are subjected to private international law.[1042] In the *Serbian Loans* Case (1929), the PCIJ decided the municipal law to be the applicable law in case of the contracts between sovereign and private person.[1043] The applicable law in interpreting these contracts are already subjected to several considerations: the choice of law clause in the contract, the stabilization clause,[1044] the jurisdictions with closest connection.[1045] In this situation, the scope of applying the VCLT is minimum. Secondly, although article 38 of the ICJ Statute makes no hierarchical sources and the application of the general principles of international law are not made subject to other sources, the ICJ precedents show the use of general principles of international law, only "*in order to corroborate with an interpretation already derived from analysis treaty law or custom*."[1046] Thus, application of the general principles of international law may hardly contribute to the interpretation of public purposes by the national courts of the forum States. Thirdly, the requirement of interpretation based on the context, entrusts the [non-national] judges of the forum State with higher discretion. Many other factors in addition to the purposes of sovereign asset, come within the scope of 'context' *inter alia* the decision of defendant State as to purposes of the asset in question, the reasonableness of the decision, the deciding authority, alternative options, opportunity costs of the decision. Such broad scope of context gives higher discretion of the judges of forum State. Moreover, investigation by the judges of forum State while determining the 'context' acts as interference to the exercise of internal sovereignty of the defendant State.

[1041] *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, [1963] Arbitral Award (ad hoc arbitration) 15 March 1963.
[1042] Irmgard Marboe and August Reinisch, 'Contracts between States and Foreign Private Law Persons' in *Max Planck Encyclopedias of International Law*, (Oxford University Press, May 2011) Oxford Public International Law, para 2.
[1043] *France v. Serb Croat-Slovene State* [1929] Permanent Court of International Justice, judgment 12 July 1929 PCIJ series A no 20 (the *Serbian Loans* case).
[1044] The stabilization clause in the agreement between a State and private commercial counterpart means that in case of any subsequent dispute, the laws of the State will be applicable as it was at the time of the execution of the contract. Marboe (1042), para 12.
[1045] Ibid, para 3 and 11.
[1046] Kulick (n 1039), 204.

Finally, upon the application of general principles of international law, the judgment creditors may claim the application of general principles of international law as to define 'international public purpose' devoid of the domestic context in such interpretation to avoid ambiguities and bring more objective standard.

5.2.5. International public purpose instead of the national public purpose

The commercial counterparts of foreign sovereign wish to have an expressly defined public purpose. Such express definition reduces the discretion of the defendant State while claiming the use of the assets as public. Should there be any international public purpose instead of subjective public purpose of the assets advocated by the defendant States?

In support of this option, the New York Convention (1958) may be relevant to a certain extent. According to article V (2) of the New York Convention (1958), the forum State where the enforcement is sought, may refuse the enforcement if "*the recognition and enforcement of the award would be contrary to the public policy of that country*". From the apparent reading of the provision, the forum States rightfully interpret the 'public policy' at their national standard without reviewing the merit of the award. Nevertheless, Berg commented the term "public policy" in article V (2) of the New York Convention implies the international public policy.[1047] He justified his position on the ground of the distinctions between the national public policy and the international public policy as the subjectivity, and best judge principle. He further commented that application of the international public policy instead of the domestic ones would make the scope of enforcement of foreign arbitral award broader.[1048] He referred to the ICSID Convention where violation of public policy was not recognized as a ground for refusal of enforcement of ICSID award.[1049]

This approach may also contribute to balance the right of the judgement creditors to enforce and the immunity to sovereign assets. Taking inspiration from this approach in the New York Covention (1958), the question may arise whether any universal or at least global definition of public purpose exists in international law for the sovereign

[1047] Albert Jan van den Berg, New York Convention of 1958 Annotated List of Topics (2013), <http://www.newyorkconvention.org/11165/web/files/document/1/5/15975.pdf> accessed 6 April 2021, 53.
[1048] Ibid 29.
[1049] Ibid 9; The ICSID Convention 1966 art 54 (1), declares the automatic recognition of the ICSID award and proceeds to subsequent stages for enforcement.

assets. The UNGA Resolution on Permanent Sovereignty over Natural Resources (1962) provided a broader description of public purpose, as inclusive of "*public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign*."[1050] Having international public purpose would act as an objective standard for the sovereign assets in enforcement proceeding.

However, the challenges of this approach are numerous. Firstly, there is a definitional crisis. There is hardly any evident consensus as to the definition of or at least a defined scope of public purposes. Vig emphasized on the scope of public purpose, fitting into the national context instead of an international definition.[1051] Secondly, the interpretations of public purposes for the assets given by the forum States' courts might be inconsistent, therefore, unable to provide a comprehensive and coherent view of the scope of public purposes. Thirdly, majority of the targeted assets are liquid in nature. Hence attaching any specific purpose regardless of national or international are difficult and subject to proof.

Instead of defining the public purposes, the way of interpreting the public purposes can be an alternative option. In the commercial disputes between States and commercial counterparts, rule of law has been a key argument point. The judgment creditor requests the court to consider the contract law-based rule of law whereas the defendant State emphasizes on the international rule of law.

5.2.6. Rule of law in mitigating inconsistencies[1052]

Rule of law can be applied to mitigate the above-mentioned inconsistency while determining the questions of immunity of sovereign assets and possible alternative approach to international law-based rule of law. In commercial litigation before a

[1050] The United Nations on Permanent Sovereignty over National Resources 1962, (UNGA Resolution no. 1803, (XVII) art I, para 4 <https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/1803(XVII)> accessed 6 April 2021.

[1051] Zoltan Vig, *Taking in international Law* (Pattrocinium, 2019) 73. "*More important issue is what is covered by this concept (i.e., the terms explaining public purpose or public interest) than what term is used to express it*."

[1052] This part of the dissertation has been published as Ferdous Rahman, 'Defining Sovereign assets from immunity from execution: International Rule of Law versus International Law-based Rule of Law' (2021) 5 Journal of Legal, Political and Social Theory and Philosophy 165.

domestic court, procedural law is usually the *lex fori* (law of the forum).[1053] Notwithstanding the procedural safeguard in the *lex fori*, the vulnerability increases when a sovereign is brought before a foreign court (national court of another State) and the sovereign assets are not entitle to absolute immunity on the ground of being used or having purpose of *jure gestionis*.[1054] Barr warned for cautious application of the FSIA (1976) of the US avoiding adverse impact on international relations.[1055] Moreover, as illustrated before, the legal framework for the foreign sovereign immunity and particularly in the case of sovereign assets, has not been exhaustive. The involvement of a foreign sovereign's interest brings the question of rule of law safeguarding the interest of foreign sovereign and also in filling up the vacuums.

Rule of law connotes three popular meanings: formal,[1056] substantive[1057] and *a-culture*.[1058] Nevertheless, engagement of States in the law of foreign sovereign immunity brings the relevance of international law-based rule of law. The scope of international rule of law is broader than Dicey's definition of rule of law.[1059] From the theoretical perspective, the actors of international legal order *i.e.*, the States stand on horizontal relation unlike the subjects in domestic legal order. Hence, the international legal order demands the rule of law to be defined appropriate to its nature as distinct

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[1053] Dolinger J and Tiburcio C, 'The Forum Law Rule in International Litigation: Which Procedural Law Covers Proceedings to be Performed in Foreign Jurisdiction: Les Fori or Lex Diligentiae' (1998) 33 Texas International Law Journal 425, 428.

[1054] Matti S. Kurkela and Santtu Turunen, *Conflict Management Institute, Due Process in Commercial Arbitration* (2nd edn Oxford University Press, 2010), 2; They argued that the parties to the arbitration proceeding need to be protected with the due process standards because arbitration is a not a proper (normal) court and the application of due process compensate them for their revocation of access to court right.

[1055] Barr (n 51).

[1056] In formal rule of law, application of due process with the expectation of social justice is the prime objective. Neumann Franz, T*he Rule of Law: Political Theory and the Legal System in Modern Society*, (Leamington Spa: Berg, 1985).

[1057] The substantive rule of law has broader periphery as to the formulation of a legal order regulating the aspects of social, economic, and political life of a State. B.S. Chimni, 'Legitimating the International Rule of Law' in James Crawford and Martti Koskenniemi, (eds) *the Cambridge Companion to International Law*, (Cambridge University Press, 2012), 290.

[1058] A-culture concept of rule of law concentrates on the conceptualization of the same of a single culture and measures the others on its standard.

[1059] Albert Venn Dicey*, Introduction to the study of the law of the constitution* (10th edn, Palgrave Macmillan, 1961), 42 *"[Rule of law] means in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government […] It means again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts […] [and] lastly, […] that in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land*."

from the national legal order. Moreover, where the national rule of law aims at achieving justice, the international rule of law values the stability in international legal order more than justice.[1060] Such objective of international rule of law corresponds with the thick definition of rule of law which means the substantive notion of justice, distinct from the justice understood relying on a set of ideals or some fixed process such as giving the remedy to the judgment creditor. Strong stated:

> The rule of law is intimately connected with some conception of justice which can reflect "corrective", substantive, distributive, social, procedural, organizational, interactional, interpersonal, communicative, communitarian, restorative and transitional" values, depending on the circumstances."[1061]

The objective of maintaining international legal order has kept the concept of international rule of law fluid. For defining international rule of law, 'principles' and 'rules' need to be distinguished. Rules are made based on principles. Principles are more generic and fundamental in nature. In other words, rule of law is not limited to some rules rather it presents the concepts of procedural due process by ideals of fairness, natural justice.[1062] Drawing the conclusion relying on the previous argument that the international rule of law as a set of principles, the question remains open whether the court should be guided with international rule of law or international law-based rule of law. Both have been discussed below.

5.2.6.1.International rule of law in execution cases

From this structural position, Chesterman analyzed three meanings of international rule of law: application of rule of law principles in relation to the States and other subjects of international law, supremacy of international law over national law and emergence of global rule of law with normative regimes.[1063] Chimni identified four approaches from more pragmatic view,[1064] such as the liberal,[1065] the realist,[1066] the

[1060] Simone Chesterman, 'Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis' (2007) 28 (3) Michigan Journal of International Law 553.
[1061] SI Strong, 'General Principles of Procedural Law' (2018) 122 (2) Pennsylvania State Law Review 347, fn. 144.
[1062] Jeremy Waldron, 'The Concept and the Rule of Law, (2008) 43 (1) Georgia Law Review 7.
[1063] Chesterman (n 1060).
[1064] Chimni (n 1057).
[1065] The liberal view assumes international law strong enough to censor the State conducts whenever necessary to make them comply therewith.

critical and the third world approach.[1067] These approaches are subject to the concerned role of international laws and this role varies from the conflicting interpretations to embrace the national interests from time to time. Therefore, the embraced international rule of law has no concrete meaning, but a set of principles varying with the development and economic growth of the international legal order. The international organization forwards the principles in the name of international rule of law, promoting its own mandate. Such as, the UN defines rule of law as obedience to existing international laws and its fundamental principles embodied in the UN Charter. The fundamental principles in the UN Charter consist of sovereign equality, non-intervention in external and internal affairs, peaceful settlement of international dispute, principles of fulfilling good faith obligation derived from international law.[1068] There are also some non-binding international instruments attempting to list different principles as the standard of international rule of law. For instance, International Bank for Reconstruction and Development proposed confidence on law, obedience thereto, quality of contract enforcement as the ideals of rule of law in international legal order.[1069]

For the purpose of interpreting sovereign assets, the international rule of law has been taken with its formal objective. The formal objective is to apply the due process in the transactions concerning the interests of the sovereign as well as the private litigants. According to the rule of law principles of Dicey, due process law is to prevent arbitrary power of the State authorities, equality of all including the government officials before law and constitutional law as fundamental law.[1070] The procedural law requires the court to follow the rule of law in assessment of the damage caused by the breach and pronouncement of the consequence of the same.[1071] One way of defining

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[1066] The realist approach brings the question of international policies and the accumulation of power. Hence, except in the rare cases where no national interests are involved, cooperation is found to establish rule of law.

[1067] The third world approach requires the rule of law to reflect the reality of international community, distinct from the international law brought by some elite States. Robert McCorquodale, 'Defining the International Rule of Law: Defying Gravity?' (April 2016) 65 International and Comparative Law Quarterly 277, 296. B S Chimni, 'Third World Approaches to International Law: A Manifesto' in A Anghie *et al* (eds) *The Third World and International Order: Law Politics and Globalization* (Martinus Nijhoff, 2003).

[1068] The UN Charter (n 88) art 2.

[1069] Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, *Governance Matters VI: Governance Indicators for 1996-2006,* World Bank Policy Research Working Paper No. 4280 (July 2007).

[1070] Dicey (n 1059).

[1071] The Rome Convention on the Law applicable to Contractual Obligations 1980 art 10 (1) (c).

general principles of procedural law for international rule of law is content based approach where rule of law acts as standard.[1072] Nevertheless, application of rule of law is manifestly subjected to the public policy and order of the forum State. The Rome Convention duly emphasized "*the application of rule of law of any country specified by the convention may be refuged only if such application is manifestly incompatible with the public policy (public order) of the forum.*"[1073] That means it diverts the interpretation again to the standard of non-national adjudicators in execution cases bringing the same inconsistency and unpredictability.

Since, there is no conclusive definition of international rule of law but a combination of several values, the international rule of law may require a specific set of principles to assess the purpose of the sovereign assets, other than the popular principles listed as international rule of law. However, setting the principles is a major challenge[1074] because of a few States being the epicenter of execution cases. The questionable role of the dominant forum States is one of the significant pitfalls here. For instance, in sovereign debt litigation, the US proposed a collective action clause after rejecting the proposal of sovereign debt restructuring mechanism advocated by IMF.[1075] Moreover, the sovereign debt litigation is controlled by few States' courts, hence their procedural practice and interpretation of international legal instruments in this regard dominates this area of law.[1076] Strong stated:

> International arbitration is controlled by a small cadre of industry 'insiders' because the various procedural norms are effectively ratified by States through adherence to the relevant treaties and through judicial interpretations of treaty norms that are highly consistent across national borders.[1077]

Fundamental principles of any industry derive from the practice of the prominent players of that industry. Same crisis exists in enforcement against sovereign assets and the question of sovereign assets' immunity from execution. This system lets the

[1072] Strong (n 1061).
[1073] The Rome Convention 1980 (n 1071) art 16.
[1074] Barr (n 51).
[1075] Ferdous Rahman, 'Critical Review of the International and Contractual Measures for Optimal Restructuring' (2020) 14(4) Law and Financial Markets Review 249, 253.
[1076] Susan D Frank, James Freda, Kellen Lavin, Tobias Lehmann, and Anne Van Aaken, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration' (2015) 53 Columbia Journal of Transnational Law 429, 467-468.
[1077] Strong (n 1061), 398

dominant States to set their own general principle such as adoption of restrictive sovereign immunity in commercial matters instead of absolute ones. Following the 'a-culture' meaning of rule of law discussed above, the dominant States' domestic law form the basis of international law on foreign sovereign immunity and here the principles of international rule of law. These States put national stake at the priority. They could not overcome the contradictions of need on international forum and the self-interest. In following these meanings, it again returns to the question of 'an unqualified human good' and 'cultural achievement of universal significance'.[1078] States define the principles of international rule of law from different perspectives because of their various regional and group interests. Such as, in international investment law, the capital exporting home States no longer define the foundational principles of sovereignty from the perspective of its immunities, exemption, or exclusiveness but from State responsibility to protect the foreign investors.[1079] On the other hand, the capital importing host States emphasize on the non-interference to exercise sovereign authority and the corporate responsibility to domestic laws of the host State. The advocates of welfare State emphasis on State responsibility to protect its citizen, compliance with democratic governance and international human rights laws.[1080]

5.2.6.2.International law-based rule of law in interpreting sovereign assets

In order to converge the various group-interests, should the international law-based rule of law be the alternative instead of international rule of law?[1081] The concept of international law-based rule of law can be explained as implementing the similar objectives of rule of law but through international law. The objectives of rule of law, as identified by Dicey were the limitation of governmental power to ensure the people's right and freedom and the legal certainty.[1082] Undoubtedly, these objectives do not work in their literal meaning for international legal order, because of the

[1078] EP Thompson, *Wings and Hunters, the Origins of the Black Act,* (Pantheon 1975); Roberto Mangabeira Unger, *Law in Modern Society* (Free Press 1976).
[1079] Muthucumaraswamy Sornarajah. *The International Law on Foreign Investment* (Cambridge University Press, 2017).
[1080] Chirwa (n 91), 4.
[1081] Rodoljub Etinski and Bojan Tubic, 'International Law and the Rule of Law' (January 2016) 64(3) Anali Pravnog fakulteta u Beogradu 57; Simone Chesterman, 'Panel on the 2012 UN Declaration on the Rule of Law and its Projections' (2012) American society of International Law Proceedings, 107/2013/, 468.
[1082] Dicey (n 1059) 120.

different standing of States in international legal order unlike the subjects in domestic legal order. Here, the purpose of rule of law is not only to protect the subjects from the States but the States from other nation States at the international level.[1083] From perspective of international law, the objectives could be *inter alia* (i) the legal certainty in interpreting international law and (ii) the limitation of the interpretative power of the legal and non-legal authorities, acting in international legal order. Likewise, Chesterman stated the aim of rule of law in international legal order to maintain the 'order' not 'justice' as it is in domestic level.[1084] These two objectives also receive support from the Working Group 3 of the UNCITRAL (2020).[1085] In order to ensure legal certainty, interpretation of international law needs to be consistent, coherent, and predictable. On the other hand, international law is no more interpreted solely by the international courts but also by international arbitration tribunals (such as in ISDS arbitrations), domestic courts (for instance, in execution cases) and other non-legal international organizations. The broad and abstract nature of international law act as a boon in disguise. Its abstract nature gives the flexibilities to international law which is required to maintain the order.[1086]

From a comparative view, the international rule of law can be termed as 'internationalization of rule of law' whereas the international law-based rule of law as 'rule of law internationalized'.[1087] In 'internationalization of rule of law', a new set of principles are formulated to fit the concept of rule of law into international legal order. In the latter case, the objectives of rule of law are to be promoted in international legal order. It makes the scope of international law-based rule of law narrower than international rule of law. Here the precise question is whether any international treaty, any State act pursuant to international law, any given interpretation of the treaty and/or the States' act under the treaty conform with the principles of rule of law.

[1083] Jeremy Waldron, 'Are Sovereigns Entitled to the Benefits of the International Rule of Law?' (2011) 2 the European Journal of International Law 316, 324.
[1084] Chesterman (n 1081), 468.
[1085] Discussed in 5.2.7 of this dissertation.
[1086] Etinski (n 1081), 62.
[1087] Andre Nollkaemper, Jan Wouters, and Nicolas Hachez, 'Accountability and the Rule of Law at International Level' (2008)
<https://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/reports/report%20Accountability%20and%20Rule%20of%20Law.pdf > [accessed 12 February 2021]

The challenges in defining international rule of law to resolve the open questions in sovereign assets' immunity, can be mitigated with the application of international law-based rule of law, *albeit* cannot be eliminated. For instance, in sovereign debt litigation, the holdout creditor argues the contract law-based rule of law requiring the State to honor its debt.[1088] In contrast, the sovereign relies on the international law-based rule of law concerning its sovereignty and uninterrupted power of determining its monetary policy and intends to pay the debt accordingly. The State takes the forceful payment pursuant to an execution order of a foreign court as an encroachment to its internal sovereignty under the international law-based rule of law.[1089] Therefore, as to the first objective of certainty in interpreting the purpose of sovereign assets, which areas of international law should receive the priority in following international law-based rule of law? Whether it should be private international law respecting the right of the judgment creditor to be paid or public international law honoring sovereignty of the defendant State.

On the other hand, in terms of the second objective of limiting the extent of discretion of the interpreting authority, the power of the dominant form States in interpreting *jure imperii* and *jure gestionis* needs to be limited by bringing equal representation of States' interest in interpretation of international law on immunity of sovereign assets from execution. A consensus-based interpretation of *jure imperii* and *jure gestionis* can be a solution to achieve the objective.

5.2.7. *Global initiatives to bring consistency and predictability*

Unpredictable precedents make the legal framework shaky which affects the stability of global financial market.[1090] Besides the uncertainties in enforcing the awards and judgements against foreign sovereign increase the cost of investment for its commercial counterparts and reduce the access to market for States.[1091] Thus, it demands a certain and specific legal framework while adopting remedial measures.[1092] Foster opined to have an international convention as an alternative to

[1088] WMC Weidemaier and Anna Gelpern, 'Injunctions in Sovereign Debt Litigation' (2014) 31 (1) Yale Journal on Regulation 189.
[1089] Ibid.
[1090] Lee C Buchheit and G Mitu Gulati, 'Responsible Sovereign Lending and Borrowing, Law and Contemporary Problems' (Fall 2010) 73(4) A Modern Legal History of Sovereign Debt 63.
[1091] Discussed in n 986 of this Dissertation.
[1092] Fisch and Gentile (n 51)

the enforcement attempts before forum States and proposed to have a surety mechanism instead of several of enforcement litigations.[1093] Should there be any global initiative to bring consistency, coherence, and predictability in the enforcement proceedings against foreign sovereign assets? Such as with a view to ensuring the stability in ISDS reforms, the UNCITRAL Working Group III has been considering various reform options including the establishment of multilateral investment tribunal,[1094] and/or option for appeal from the decision of the investor-State arbitral tribunal,[1095] and enforcement issues for the investor-State arbitral awards.[1096] Finalization of these instruments is expected to achieve the desired coherence and consistency.

Another area of international commercial law involving sovereign interest but having the crisis of inconsistent precedents from domestic jurisdictions is the sovereign debt litigation. The Argentine debt default in 2001 resulted in the vast number of execution litigations. The scholars negated the establishment of international court for sovereign debt litigations as an alternative to mitigate the crisis.[1097] In view of the above, how can the global consensus contribute to the enforcement challenge for the judgement creditor as well as protect the sovereign assets from unjustified MoCs? The previous initiative in preparing an international convention related to foreign sovereign immunity (*i.e.*, the UN Convention) did not become successful as the UN Convention has not been effective yet since its acceptance in 2004. Moreover, the political economy among the forum States, the defendant States as well as States having interest in protecting commercial counterparts would act as an impediment in achieving the consensus. Such as States with less regulated market economy would prefer a narrower definition of public purpose as they mostly hold interest in protecting the private commercial creditors, whereas State with mixed and highly regulated economy would be inclined to have a broader scope in public purposes to

[1093] Foster (n 795).
[1094] UNCITRAL, Possible reform of investor-State dispute settlement: Selection and appointment of ISDS tribunal members (2021), <https://undocs.org/en/A/CN.9/WG.III/WP.203> accessed 8 April 2021.
[1095] UNCITRAL, Possible reform of investor-State dispute settlement: Appellate mechanism and enforcement issues (2021), <https://undocs.org/en/A/CN.9/WG.III/WP.202> accessed 8 April 2021.
[1096] UNCITRAL, Working Group III: Investor State Dispute Settlement Reform https://uncitral.un.org/en/working_groups/3/investor-state accessed April 8, 2021.
[1097] Michael Bradley, James D Cox, and G. Mitu Gulati, 'The Market Reaction to Legal Shocks and their Antidotes: Lessons from the Sovereign Debt Market' (January 2010) 39 (1) The Journal of Legal Studies 289.

prevent any MoC against their assets. The narrower interpretation empowers the private interest of the judgment creditors, and the broader interpretation makes more assets immune. Hence, no such global initiative can be seen in near future to solve the challenges in enforcement of judgments against sovereign assets.

5.3. Conclusion

The core focus of this dissertation is the interpretation of purpose of the sovereign assets for determining immunity from execution in enforcement litigations. There is international instrument *e.g.*, the UN Convention (2004) and regional convention like the ECSI (1972) regarding immunity of foreign sovereigns and their assets. The dominant forum States *e.g.*, the US, the UK, Germany have not ratified the UN Convention (2004). Although the UN Convention (2004) has not been effective yet, many jurisdictions follow its principles with persuasive value. The case-laws from the dominant forum States fill up the vacuum in law of foreign sovereign immunity. Given the current gap in legal framework, various approaches are advocated by the concerned stakeholders. For instance, defendant State advocates on accepting its statement of public purpose of the asset as it stands on the best position to determine. On the contrary, the judgment creditor emphasizes more on the scrutinization from the forum States instead of accepting the mere certificate from the State.

On the other hand, the judges of the forum States apply various tests in different cases such as control tests, beneficiary interest tests, the *Bancec* test, proportionality test, MoA *etc.* for examining the purpose. Coherence, consistency, and predictability are the desired outcome for each of these approaches which are yet to be achieved through these tests. After observing the fate of the UN Convention (2004) in terms of its effectiveness, any possible global initiative to define international public purpose or international rule of law is also doubtful. Therefore, in given situation, a model text may be an approach to bring consistency and certainty in interpreting the purpose of sovereign assets.[1098] Model texts are developed for modernization and harmonization of national laws where strict uniformity is not required. The study shows that States are more inclined to consider a model law while codifying their national legislation

[1098] UNCITRAL 'A guide to UNCITRAL Basic Facts about the United Nations Commission on International Trade Law' United Nations (2013) < https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf > accessed 01 October 2022 para 37 "*A model law is a legislative text that is recommended to States for enactment as part of their national law*".

than signing and ratifying an international convention.[1099] Development of model text is less expensive as it requires less negotiation sessions. Nevertheless, its flexibility of letting States to make some changes according to their own legal system makes it more lucrative than an international convention which creates an obligation and is difficult for amendment.

States may negotiation to prepare the model text and adopt on a consensus basis. Subsequently the texts of the model law may act as a guiding principle for the domestic legislation on sovereign immunity from execution. Such model text can limit the arbitrary and inconsistent interpretation of the domestic jurisdictions and ensure coherent interpretation of sovereign assets and their immunity, because where the forum State is allowing execution against the defendant State's asset, it would also rely on the absolute sovereign immunity when it comes to its own assets.[1100] Thus, a model text would bring both the forum State and the defendant State at the same page. The next chapter concludes the dissertation with a few suggestions as to the content of the model text.

[1099] Ibid para 38
[1100] Verdier (n 967) 211.

Chapter 6: Conclusion

The inherent nature of sovereignty demands immunity for its sovereign assets from any MoC before any foreign court. However, absolute sovereign immunity is no longer available for sovereign assets or with waiver of immunity from MoC or serving commercial purpose or use. This practice of restrictive sovereign immunity opens the doors of the forum States' courts against any sovereign entity for enforcement of commercial awards/judgments against its assets. After the commercial counterpart receives an arbitration award or a monetary judgement against the defendant State, the next step is the recognition of the award or judgment in a forum State where the enforcement will be sought. The judgment creditor targets one or more sovereign assets to seek MoCs in the court of the forum State where the assets are situated. Pursuant to the application of private judgment creditor, the court of the forum State determines the character of the sovereign assets, and whether to grant and/or reject immunity to the asset.

Earlier, the judgment creditor used to pursue diplomatic channel for payment of award value. Even till date, few scholars opined to return to diplomatic channel to ensure the honor of judgment debt.[1101] Some of them advised for preparing new convention to mitigate the dysfunctions of the current enforcement mechanism against foreign State.[1102] Nevertheless, failure of the UN Convention (2004) to receive required number of ratifications for effectiveness raises doubt as to the viability of another new international conventions. Therefore, instead of allowing diplomatic channel or military recourse to get the judgment debt paid and/or ratifying existing international convention, major capital exporting States open their court rooms for enforcement litigations against foreign sovereign assets, by recognizing the restrictive sovereign immunity principle for immunity of sovereign assets from execution.[1103]

The first research question of this dissertation was to map out the legal framework of law on foreign sovereign immunity when the foreign sovereign assets enjoy immunity from execution. The findings of this question, as discussed in the second chapter,

[1101] Irina Tarsis and Elizabeth Varner, 'Reviewing the Agrudas Chasidei Chadab v. Russia Federation, et al. Dispute,' (March 19, 2014) 18(8) American Society of International Law < https://www.asil.org/insights/volume/18/issue/8/reviewing-agudas-chasidei-chabad-v-russian-federation-et-al-dispute> accessed 15 August 2022.
[1102] Foster (n 795).
[1103] Weidemaier and Gelpern (n 1088), 68.

show that immunity is granted for the assets of public nature or having public purpose. Since, there is no comprehensive international convention, the national legislations have taken over. Three distinct practices are visible among States: States having specific statutory law on foreign immunity; States following the prevailing international law from time to time and State directing its courts to follow the briefs sent by its executive organ. Although a few States fall in the third category, sending executive notes to the courts is not unusual for the other two categories of States as well. Since the interests of another foreign States, the inter-State relations, diplomatic tensions are concerned with the question of foreign sovereign immunity, it is an international comity for the court to follow the executive brief. The courts ignoring the executive brief are criticized for breach of international comity.[1104] Nevertheless, this dissertation suggests that:

> The court should consider the notes from the executive organ with persuasive value instead of a biding one. When a judgment has already been passed against the foreign Sovereign, execution of the same should be the inevitable consequence. Therefore, intervention of the executive authority of the forum State should be limited. It ensures the judicial independence of the forum State and increases the confidence of the litigating parties in the administration of justice.

Neither the international conventions nor the national legislations have made clear distinction between the public assets and the asset with commercial purposes. From the functional comparison of the legal instruments, mere list of immune assets and the characteristics of non-immune assets are derived. Hence, the case laws play the vital role to determine the purposes of sovereign assets in question. When it comes to case laws, substantive and procedural questions are the core issues. The second research question concentrated on these questions. The substantive questions consist of ownership of the asset and its attribution whereas the procedural questions are related to applicable law, presumption of use, burden of proof, interpretation of waiver clause.

[1104] *NML vs. Argentina*, [2011] 952 NE 2d 482. The decision of the court was criticized on the grounds of breach of international comity by way of ignoring the amicus brief sent by the US government and granting the injunctive remedy going beyond the US law of equitable remedy. See more, Barr (n 51).

The findings regarding the substantive questions entail that construing ownership as a single unit prevents certain sovereign assets from execution. While determining the ownership of the assets, the beneficiary interest and the control interest come into question. Generally, States hold control interest, however, in few cases, they hold mere beneficiary interest.[1105] In the latter case, the legal ownership of the assets is usually not bestowed upon the defendant State. Hence, the assets are not available for attachment for State's debt. It also means that these assets do not enjoy immunity in an enforcement litigation for the debt of the SOE even though their legal owner is a State instrumentality. Such as, the sovereign wealth fund is managed in the name of the SOE as the legal owner whereas the State is the beneficiary of the fund. In this case, if only *de jure* ownership is considered, the fund cannot be executed for the debt of the State. Similarly, this fund does not enjoy immunity if the judgment debt is owed by the SOE managing the fund. Therefore, this dissertation recommends that:

> Instead of taking the ownership as a single unit, the divisible property rights should be acknowledged such as right to receive proceeds, right to control the proceeds, distinct from the assets *per se*.

The second substantive question before the court is attribution of the asset. Different tests such as nature test, commercial purpose test, commercial activity test is advocated. Among these tests, purpose test has a comparatively settled footing although the judicial interpretations are not uniform. The finding also shows that no single test can bring consistent outcome while determining the immunity of sovereign assets from execution, especially for the liquid assets. Majority of the targeted sovereign assets are liquid in nature such as receivables from third party, funds in bank accounts, the central bank's assets, sovereign wealth funds, *etc.* The challenge with the liquid assets is that these assets have no inherent purpose. Therefore, this dissertation suggests that

> Test should be varied based on the types of assets and in some cases, combination of multiple tests can be useful. Such as, for the diplomatic assets, the purpose test is appropriate whereas for the assets held in the name of central bank, the commercial activity test [*e.g.*, regulatory functions of the central bank] and the nature test [*e.g.*, separate legal entity of the central bank,

[1105] For instances, *AIG Capital* (n 373); *Rubin v. Iran* [2003] DDC 456 F. Supp. 2d 234

> defendant State's control over its governance *etc*.] can bring more consistent result.
>
> Moreover, for liquid assets, the court should consider the purpose of the use instead of the source of fund such as appropriation of fund in purchasing military equipment. In this hypothetical case, the procurement is a commercial activity but the purpose of the procured object [*i.e.*, the military equipment] is public. It removes the questions related to the transactions which might or might not be public. Such approach allows the focus of both the defendant State and the judgment creditor exclusively on the use of the asset instead of the nature of the transaction from which it was earned. The precedent of the *Connecticut* case[1106] can be a relevant reference here. Its acceptance in other jurisdictions with persuasive precedential value, even outside the US indicates its legitimacy.

Another part of this research question was procedural issues in an enforcement litigation dealing with sovereign asset and its immunity from execution. The finding shows inconsistent procedural legal practices as to the proof of the asset's purpose, nature, and/or its use, the interpretation of waiver clause, nexus requirement, burden of proof, standard of evidence *etc*.

Interpretation of waiver clause has been another controversial issue in the law of the foreign sovereign immunity. Three different types of interpretations are found. Firstly, courts providing narrow interpretation of wavier clause requires the waiver of immunity from execution to 'express' and 'specific'. If the asset in question falls in the list of immune assets *e.g.*, diplomatic asset, courts, in some cases, required it to be specific to the asset. Such strict requirement for the waiver clause makes the outcome of enforcement litigations more unpredictable. Secondly, courts providing liberal interpretation, accept the waiver clause implied for the immunity from execution. Finally, there are a few jurisdictions which presume the waiver of immunity from execution if the waiver of immunity from jurisdiction is established. This approach was followed by the Constitutional Court of South Africa[1107] and the Swiss courts.[1108]

[1106] *Connecticut* (n 294); Discussed in 4.4.6 and 4.4.8 of this dissertation.
[1107] *Zimbabwe* (n 445), [60]- [61]. The Constitutional Court of South Africa, observed, *"rule of law is a foundation value […] and it is settled that the rule of law embraces the fundamental right of access to*

Because of such diverse interpretations, the outcome of enforcement litigations varies even when all of them rely on the same waiver clause.

> Uniformity as to the waiver clause for the immunity from execution can be ensured by accepting a single waiver clause for both the immunity from jurisdiction and immunity from execution. It does not reduce the protection for States, rather increases the confidence of their private commercial counterparts. Such confidence reduces the transactional cost of commercial contract for States.

Similarly, the standard of proof varies as to the nature of the assets such as tangible or intangible assets. The burden of proof varies as per the *lex fori* of the case. Unsettled burden of proof causes some challenges for the judgment creditor in proving the commercial use or purpose. The question of burden of proof determines whether judgment creditor is required to prove the prima facie case of commercial purpose or rebut the presumption of public purpose of the asset in question. The situation gets worse in case of assets with mixed purpose. How and to what extent the burden proof can be divided in case of mixed use of asset? Inconsistent precedents have been found in case of mixed use of assets, especially in case of diplomatic accounts.[1109] Few courts denied to distinct the partial commercial use of the assets from its public use and some other courts commented that partial public use of the same does not entitle the assets to immunity. These challenges affect the enforcement strategy, increases transaction cost, and reduces the cost and time efficiency of the enforcement litigation. Meanwhile, the defendant State may complicate the situation by changing its use or allocating it for some public purpose. Therefore, this dissertation proposes that:

> The challenge of interpreting the mixed use can be mitigated with the help of earmarked asset. If the asset has been earmarked for commercial use, it loses

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courts […] The right to an effective remedy or execution of a court order is recognized as a crucial component of the right of access to courts."

[1108] *Royaume de Grece* (n 487) 198. The Swiss Federal Supreme Court opined, "*as soon as one admits that in certain cases a foreign State may be a party before Swiss courts to an action designed to determine its rights and obligations under a legal relationship in which it had become concerned, one must admit also that that foreign State may in Switzerland be subjected to measures intended to ensure the forced execution of a judgment against it. It that were not so, the judgment would lack its most essential attribute, namely that it will be execution even against the will of the party against which it is delivered.*"

[1109] Discussed in 4.2.1.4 of this dissertation.

its immunity for the earmarked portion. Nevertheless, earmarking of the asset may not be available in all cases. Therefore, in these cases, proportionality test may be relevant.[1110] The proportional ratio between the public use and the commercial use of the asset, the prolong length of commercial and public use can help the court to decide the immunity.

Another developing area of the procedural question for immunity of sovereign assets is the grant of pre-judgment attachment. It has also been a controversial issue in the laws of foreign sovereign immunity. International instruments, national legislations as well as some courts show hesitance in granting pre-judgement MoCs. Courts granting pre-judgment MoCs received criticisms. The finding shows that the international conventions do not allow prejudgment MoCs unless the defendant State expressly consented thereto. The national legislations also follow stringent provisions for this. Nevertheless, some case laws are found granting prejudgment MoCs against the defendant State to prevent removal of assets from the jurisdiction of the forum State or as security for the cost of litigation. The dilemma behind such converse position between the legal framework and the judicial practice is to protect the interest of the judgement creditor and simultaneously, not to interfere with the sovereign functions of the defendant State. Therefore, this dissertation proposes that:

> The prejudgment MoCs should be allowed with the same waiver of immunity from execution. Because absence of these MoCs vitiates the purpose of the execution suits. Various forms of pre-judgment MoCs serve various purposes supporting both the defendant State and the judgment creditor. Order of discovery helps the judgment creditor to target only the local sovereign assets in the forum State's territory, cost of security discourages the judgment creditor from bringing multiplicity of proceedings. It also reduces the risk of removal of assets from the forum State's territory.

The coherence is yet to be reached for the requirement of nexus between the jurisdiction and the assets in question or between the targeted assets and the debt to be recovered. The requirements of nexus of the judgment debt with the assets, the judgment debt with the forum State and the forum State with the targeted assets have

[1110] Discussed in 5.2.2 of this dissertation.

not been settled. Different jurisdictions follow different approaches.[1111] Without the territorial nexus, the forum State may entertain a case where it has no direct control over the asset and thereafter leaving the judgment creditor with a mere paper judgment. This dissertation advocates in favor of nexus requirement. It suggests that

> The nexus requirement should receive more emphasis than now. The judgment creditor should prove the nexus before opening the other substantive questions before the court. This requirement of not entertaining an enforcement litigation without proving the nexus with the jurisdiction would prevent the multiplicity of proceeding and enforcement attempts of the judgment creditor in various jurisdictions. It will also reduce the risk of vulture litigations.
>
> The nexus requirement between the debt in question and the targeted asset for enforcement should also have some nexus so that the judgment creditor cannot abruptly choose and pick the assets for the enforcement litigation. It will also reduce the interference to the non-related public functions of the defendant State in the territory of forum State.

The courts' interpretations of purpose of sovereign assets play a vast role in determining the loose ends of the legal framework of foreign sovereign immunities. Therefore, to have pragmatic view of substantive and procedural issues in an enforcement litigation, this dissertation proceeds with some specific assets scrutinized in enforcement litigations in its fourth chapter. The third research question was how the deciding courts interpret the purposes of various sovereign assets for the question of their immunity from execution. It further pondered into the consistency and coherence of the interpretations of the purposes of various sovereign assets. List of immune assets, characteristics of non-immune assets [as the outcome of the first research question], and commonly targeted sovereign assets are scrutinized. The case analysis shows that many assets listed as immune in international instruments and national legislations were subjected to MoCs and similarly, many assets commonly taken as non-immune were held as immune by the deciding courts. The lack of a comprehensive and effective interpretation of purpose results at the inconsistency, unpredictability. It adversely affects the inter-State relations as well as the relations of

[1111] Discussed in 3.5.7 of this dissertation.

the defendant State with its subjects. The core finding of this research question is the desired convergence between the law of foreign sovereign immunity and the other related areas of law such as fiscal law, laws related to real property, business and corporate law, banking and financial laws, intellectual property law *etc.* Therefore, this dissertation proposes that:

> Relevant international commercial laws should be considered to reduce divergence between the public functions and the private activities. Reference to the separate entity in law can an appropriate example here. The defendant State uses the defense of separate legal entity of the legal owner of the asset, both as sword and shield. This defense is relevant for multiple categories of assets including the central bank's assets, cultural institutions, State owned entities *etc.* The issue of separate legal entity relies on the corporate and business law for its foundation. Under the law of corporate governance, piercing the corporate veil is allowed only in limited cases. Similar approach can be followed here. The separate legal entity should be denied when used by the defendant State to hide the sovereign assets. Otherwise, the mass use of piercing the corporate veil would disrupt the international business functions of these corporate entities. Therefore, the judgment creditor targeting the assets of SOEs should carry a higher burden of proof.
>
> On the other hand, when the judgment creditor establishes the case with strong evidence, protection should be granted in exceptional cases to prevent interference to the sovereign function through its SOEs using the concession agreements. Hence, instead of granting the immunity to the non-State actors for their delegated acts and applying the international norms to them, the presumption should be contrary to it [*i.e.*, the State instrumentalities do not enjoy immunity] unless the entity claiming the immunity proves their function as State authority. Such non-applicability presumption receives support from the effectiveness of rule of law as the administrative separation of power does not work in question of immunity. It is also coherent with the principles of international law as the State itself is the subjects of immunity, hence automatic grant of immunity to non-State actors contradicts the international norms of sovereign immunity.

Where the third research question concludes with suggestions for specific types of assets in convergence with their related areas of laws, the next research question explores certain comprehensive interpretative techniques. The research question was: to what extent the interpretive tools from other areas of laws can contribute to achieve more consistency, coherence and predictability in interpreting the purposes of sovereign assets. The finding shows that the divergence in group-interests of States and mandate of international organizations have failed to agree on a uniform process of interpretation of purpose of sovereign assets. Such as, accepting the public purpose argument given by the defendant State without contest is unfair to the judgment creditor. Similarly, requiring the purpose of the asset to be international public purpose devoid of its local context is a burden of the defendant State and its subjects. Therefore, this dissertation advocates that:

> Despite the *jure gestionis* of the defendant State, its standing as a sovereign State and its responsibility to its subjects should also receive attention. The precedent of the Australian High Court in *Firebird Global Master Fund II Ltd. v. Republic of Nauru and Another* (2014)[1112] showed the importance of context specific considerations before granting any MoCs. The application of margin of appreciation as an interpretative tool can balance the interests of both the defendant State and the judgment creditor.[1113] Its application on one hand protects the judgment creditor from heavier burden of proof and on the other, helps the defendant State to put forward its special context before the court. With the presumption of public use of the sovereign assets, the burden of proof lies with the judgment creditor to bring convincing evidence as to the commercial use of the same. With the application of margin of appreciation, the judgment creditor carries the burden of prima facie evidence, and the defendant State shows its side of the evidence with its deference. This approach is in support of the highly indebted poor countries. The instances of vulture funds show the devasting effect on the least developed countries and/or countries with special circumstances.[1114] This approach also helps the

[1112] *Firebird Global Master Fund II Ltd.* (n 946) [176].
[1113] Discussed in 5.2.3 of this dissertation.
[1114] Defined 'vulture funds' in n 51 of this dissertation.

courts to distinguish between a vulnerable defendant State and a stubborn defendant State intentionally defaulting in payment.

Finally, this dissertation advocates for developing an inter-States consensus-based model law to have uniform principles of sovereign assets' immunity in international law with a view to bringing consistency, coherence, and predictability with legitimacy. The scholars argued the shift in international law paradigm as a valid ground to reconsider the role of the non-State actors in international lawmaking.[1115] The legal certainty of interpreting the sovereign assets is one of the objectives of the international law-based rule of law and introduction to the definitive interpretative tools can reduce the discretion of the forum State's courts in this regard.[1116] Forum States consensus as to the interpretative tools, delimitation of executive organs, the standards of waiver clause, burden of proof, nexus requirements, interpretation of mixed assets can contribute to the development of international rule of law in regards to laws of foreign sovereign.

[1115] Oddenino and Bonetto (n 173).
[1116] Discussed in 5.2.6 of this dissertation.

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