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Andrew T. Guzman “How International Law Works: A Rational Choice Theory”, Oxford University Press, 2008. Brussels Convention for the Unification of Certain Rues Relating to the Immunity of State-Owned Vessels, opened for signature 10 April 1926, LNTS 176 (entered into force 8 January 1936). Ernest K. Bankas, “The State Immunity Controversy in International Law”, Springer Berlin Heidelberg, 2005. Justice Woo Bih Li “State Immunity in Commercial Dispute – An Overview of Singapore Law & A Re-visit to The Absolute Doctrine of State Immunity”, The Fifth Judicial Seminar on Commercial Litigation. 2016. Mauro Rubino – Sammartano “International Arbitration Law and Practice”. Kluwer Law International. 2001. Moses, Margaret L. “The Principles and practice of International Commercial Arbitration”, Cambridge University Press. 2008. Oguno, Paschal “The Concept of State Immunity Under International Law: An Overview”, International Journal Law Vol.2 Issue 5. 2016. Symeon C. Symeonides “Choice of Law”, Oxford University Press, 2016. Wiesinger, Mag. Eva “State Immunity from Enforcement Measures”, University of Vienna. 2006. Convention on Jurisdictional Immunities of States and Their Property, 2004. 2 December 2004 (not yet entered into force).

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SOVEREIGN IMMUNITY IN COMMERCIAL TRANSACTION UNDER INTERNATIONAL LAW

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Abstract

Under international law, states are granted immunity from both execution and judgment by foreign jurisdictions. However, as the frequency of transactions between states and private entities increases, the international community demands greater protection of the rights of these entities against potential infringement by foreign governments. In order to meet their needs, states must have access to external debt, and the existence of state immunity can impact foreign lenders' decisions to grant loans. In response, international law has introduced the restrictive doctrine of state immunity, which allows for a state to waive its immunity in commercial transactions. The traditional doctrine affords states full protection against any claims, including those involving their assets and properties. Therefore, this study aims to examine the current issue of state immunity in international commercial transactions from a legal perspective, using library research as its methodology. The study concludes that despite the introduction of the restrictive doctrine of state immunity, sovereign states retain immunity from claims in international commercial transactions under specific conditions as prescribed by international law.

Keywords: *International Law, Private International Law, Sovereign Immunity, Commercial Transaction.*

I. INTRODUCTION

State immunity is a principle of international law that enables states to carry out their public functions without being sued or subjected to prosecution in foreign courts.[1] Immunity, which is recognized by the courts of another state according to national law, is established as a rule of international law.[2] However, its application depends greatly on the laws and procedural rules of the forum state.[3] In addition, state immunity from enforcement measures prohibits courts from implementing any forms of constraint on foreign states.[4]

The functioning of international law is based on a horizontal order that lacks a legitimate supranational power or authority. The idea of subjecting a sovereign state to the jurisdiction of a foreign court without its consent presents issues of political tension and acrimony.[5] As a result, the horizontal nature of international law provides countries with the basis to disregard judgments granted immunity.[6] This is derived from the principles of independence, equality, and dignity of states.[7]

State immunity can pose a concern for private entities engaging in commercial transactions with representatives. This is because immunity may limit the ability of private entities to secure their interests in case of disputes. States often prioritize protecting their treasuries, both from immediate claims and potential future claims.[8]

This becomes particularly relevant when dealing with public entities

[1] James Crawford*, Brownlie's Principles of Public International Law, Ninth Edition* (Oxford: Oxford University Press, 2019), 717.

[2] Xiaodong Yang, *State Immunity in International Law* (New York: Cambridge University Press, 2012), 37

[3] Crawford, *Brownlie's Principles*, 717.

[4] *Ibid*.

[5] Muthucumaraswamy Sornarajah, "The Extraterritorial Enforcement of US Antitrust Laws: Conflict and Compromise," *International & Comparative Law Quarterly* 31, no. 1 (1982): 128 quoted in Ernest K. Bankas, *The State Immunity Controversy in International Law* (Berlin: Heidelberg: Springer, 2005), 37.

[6] *Ibid.*

[7] *De Haber v. The Queen of Portugal* (1851), 171; *The Parlement Belge* (1880) 5PD 197; *Principality of Monaco v. Mississippi* (1934) 292 US 3 13; *The Cristina* (1938) AC 485 quoted in Ernest K. Bankas, *The State Immunity Controversy in International Law Law* (Berlin: Heidelberg: Springer, 2005), 37.

[8] Christopher Shortell, *Rights, Remedies, and the Impact of State Sovereign Immunity* (New York: State University of New York Press, 2008), 4.

or foreign governments, as new laws may be enacted that make it difficult to enforce judgments or awards. State immunity is particularly an issue concerning the transaction where a government is a party, as it is important to see if such a state increased its involvement in commercial activities and the inability of private parties to seek legal redress for the violation of commitments by state-owned enterprises hurt those enterprises' ability to operate efficiently.[9]

As states increasingly enter the commercial sphere through state-owned enterprises, they are subject to the same limitations as private entities in their commercial transactions. Sovereign immunity, which allows states to avoid their obligations, can be a point of contention and may lead to private parties seeking alternative means of redress.[10] However, private parties should still be entitled to fair compensation when public policy negatively impact their contract rights .[11] The use of sovereign immunity to repudiate state debts[12] can have a negative impact on state governments' ability to engage in development.[13]

The rigid sanctity of contracts suggested that one should avoid a contracting party, including running away from its commitments by twisting some contract term or doctrine to the advantage.[14] The government will have to resist the temptation to use its authority to obtain an undue advantage over the other contracting party.[15]

As international law adjusts to the need for transnational transactions, states enjoy immunity only regarding sovereign, public, governmental, or non-commercial acts (*acta jure imperii*).[16] Historically, this law acknowledges the doctrines of absolute and restrictive immunities. Marshall, CJ succinctly exposed the classic doctrine of sovereign immunity, hence:

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[9] Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* (New York: Oxford University Press 2008), 192.
[10] Shortell, *Rights, Remedies, and the* Impact, 76.
[11] *Ibid*.
[12] *Ibid.*, 82.
[13] *Ibid.*, 82.
[14] Mauro Rubino-Sammartano, *International Aribtration Law and Practice* (New York: JurisNet, 2001), 153.
[15] *Ibid*.
[16] Yang, *State Immunity*, 78.

> *"A nation would be considered to have broken its faith if it suddenly and without warning exercises its territorial powers in a way that is not in line with the customs and obligations of the international community.*[17] *Its entire and absolute territorial jurisdiction, being an inherent attribute of sovereignty, does not extend to foreign sovereigns or rights.*[18] *One sovereign is not accountable to another and is bound by the highest obligations to maintain the dignity of a nation by not placing the rights under the jurisdiction of another. A sovereign nation enters foreign territory only with express permission or with the expectation that the immunities of its independent nation, though not explicitly stated, will be implied and extended".*[19]

Absolute immunity is a privilege for a state under international law where it is immune against foreign court or tribunal proceeding under a public or commercial act. Following the traditional rule of sovereign immunity, states were completely immune from suit for acts undertaken in a sovereign or commercial capacity.[20] Therefore, absolute immunity refers to the privileges and exemptions granted by one state through its judicial machinery to entertain proceedings, attachments of property, or the execution of judgment.[21] This is to prevent foreign states from infringing sovereign prerogatives or interfering with the functions of a foreign agent under the guise of dealing with an exclusively private act.[22] The principle that federal and state courts should refrain from interfering with the federal executive's conduct of foreign affairs is expressed in a number of interrelated and overlapping doctrines, including the "act of state", the foreign sovereign immunity, and the "political question" doctrine.[23]

However, in "State Immunity in International law," Xiaodong Yang gives a different point of view regarding absolute immunity, which has been subject to three exceptions: (1) a state can waive its immunity, (2) immovable property has always been regarded as forming an integral

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17 Bankas, *The State Immunity*, 14.
18 *Ibid*., 15.
19 Paschal Oguno, "The Concept of State Immunity Under International Law: An Overview,", *International Journal Law* 2 (2016): 12.
20 Guzman, *How International Law Works*, 192.
21 Oguno, "The Concept of State Immunity," 15.
22 *Ibid*.
23 Symeonides, *Choice of Law*, 35.

part of the territory of the forum state, and (3) in some instances, a foreign state could not claim immunity.[24]

Restrictive immunity is preferred in transnational transactions to promote the same ground between a private and a sovereign entity. The decision to use sovereign immunity is risky and often results in unintended consequences putting the state in a worse position than when it simply consented to the suit.[25] Therefore, this immunity replaces absolute which provided sovereign acts under a commercial transaction. It allows a private entity to obtain a "guarantee" when dealing with a state. The exception to absolute immunity gives private entities something to claim, and without this exception, it is almost impossible to pursue claims against a sovereign party.

However, moving immunity from absolute to restrictive takes a long process, and the period for this movement was after the Second World War:

> *"Since the Second World War, there has been a shift towards a more restrictive theory of sovereign immunity, which distinguishes between actions taken by a state in its official capacity (jure imperii) and those taken in a commercial capacity (jure gestionis). Under this restrictive theory, foreign states are not granted immunity in legal proceedings involving commercial transactions."*[26]

This shift had the effect of protecting private parties in cases of breaches by state-owned enterprises, hence, increasing the credibility of commercial commitments made by the state.[27] Failure to recognize this restrictive theory can result in the refusal of recognition of foreign or international arbitration awards.[28] Adopting this restrictive view of sovereign immunity means that a nation's domestic courts can hear cases against foreign state-owned commercial enterprises and, in turn, a state would be expected to honor judgments against it in other nations' courts for actions taken in a commercial capacity.[29]

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[24] Yang, *State Immunity in International Law*, 79.
[25] Shortell, *Rights, Remedies, and the Impact*, 125.
[26] Yang, *State Immunity in International Law*, 80.
[27] Guzman, *How International Law Works*, 192.
[28] Rubino-Sammartano, *International Arbiration Law and Practice*, 136.
[29] *Ibid.*

The new principle states that a state cannot claim complete immunity from legal proceedings involving disputes arising from its commercial transactions, and cannot claim immunity from execution.[30] This principle grants immunity to acts performed in the course of government (jure imperii), but not to commercial acts (*jure gestionis*).[31] Aside from the need for same level of parties under international commercial transactions, the increased number of states contributes to creating such a principle. The idea is to give assurance and protection to a private entity when dealing with a state but without denying that a state is a sovereign with immunity under international law. It is important to remember that restrictive immunity applies only to an international commercial transaction where a state acts under a private act.

An example of a state switching from the absolute to restrictive theory is the United States. Initially, it adhered to the absolute theory of foreign sovereign immunity but later adopted a modified practice that allowed the State Department to request immunity in actions against friendly sovereigns.[32] In 1952, the State Department began to apply the "restrictive theory," whereby immunity was recognized concerning a foreign state's sovereign or public acts.[33]

Since the adoption of restrictive immunity, issues related to jurisdiction have become more complex due to the shift in focus from the state's status to its activities.[34]

This research will explore the waiver of a sovereign's immunity under international law and the distinction between public and private acts of a sovereign, from the perspective of both a state and a private entity. It will also discuss a state's immunity, assets, and properties in commercial transactions with foreign private entities or corporation

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[30] Justice Woo Bih Li, "State Immunity in Commercial Dispute – An Overview of Singapore Law & A Re-visit to The Absolute Doctrine of State Immunity," The Fifth Judicial Seminar on Commercial Litigation, 2016.

[31] Roy Goode, Herbert Kronke, and Ewan McKendrick, *Transnational Commercial Law Texts, Cases and Material, Second Editions* (New York: Oxford University Press, 2015), 129.

[32] Symeonides, *Choice of Law* , 36.

[33] *Ibid.*

[34] Bankas, *The State Immunity Controversy*, 17.

II. SOVEREIGN IMMUNITY UNDER PUBLIC INTERNATIONAL LAW

Immunity under public international law is usually related to the diplomatic duty of a state's representative against any claim in a foreign jurisdiction. Usually, it does not include any financial obligation. Understanding international law regarding sovereign immunity will at least give clues to what falls under the public act. In case a written statement defines that the party bound themselves under a commercial transaction, the claim then is well-grounded. However, in the event that there is no such statement, the purpose of the transaction is to define the deal made under a commercial act for the private entity to make a claim.

Another interesting point of view to establish whether a state agency is entitled to sovereign immunity as defined by the US court:

(1) Statutes and case law view the entity as an arm of the state,

(2) The source of the entity's funding,

(3) The entity's degree of local autonomy,

(4) The entity is primarily concerned with local as opposed to statewide problems,

(5) The entity has the authority to sue and be sued in its name, and

(6) The entity has the right to hold and use the property.[35]

Under public international law, a state is more likely to enjoy a wide range of immunity, while private gives the freedom to act as a private entity with its sovereign immunity, even though with certain limitations. Sovereign immunity became a reality from the interaction of the precepts of private and public international law and its legal inspiration . Even though it had been challenged in recent times, at least its influence had not been abandoned but modified to move in with time.[36] At this juncture, exploring the criteria by which general international law can be said to exist is appropriate.[37]

[35] Margaret L. Moses, *The Principles and practice of International Commercial Arbitration* (New York: Cambridge University Press, 2008), 32.

[36] Markesinis, "The Changing Law of Sovereign Immunity," *Cambridge Law Journal* 36, no. 2 (1977): 212, quoted in Ernest K. Bankas, *The State Immunity Controversy in International Law*, Berlin Heidelberg: Springer, 2005), 29-30.

[37] Bankas, *The State Immunity Controversy*, 30.

The public act of a state is represented by its legal personnel and acts under the public act known as a diplomatic mission. The immunity remains intact unless it is officially waived by the sending state.[38] In the absence of a waiver, a state representative cannot be made amenable to the jurisdiction of the receiving state.[39]

A. VIENNA CONVENTION ON DIPLOMATIC RELATIONS 1961

Vienna Convention on Diplomatic Relations 1961 (Vienna Convention 1961) addresses the issue of state immunity concerning its public acts. Its entry into force was on 24 April 1964 after at least 22 instruments of ratification submitted to the Secretary-General of the United Nations as stated in Article 51 of the Vienna Convention 1961. This contributes to the development of friendly relations between states by assuring the privileges and immunities under its public acts. However, the purpose is given to a state represented by its personnel performing the diplomatic mission as stated in its preamble.

The articles of the Vienna Convention 1961 elaborate the diplomatic missions and the criteria of a representative:

1. Article 1 defines the subject of a diplomatic mission, which is a person formally charged to represent the state. There are two issues under this article, the personnel and the act. The personnel has to be a representative legally acting in the state's name under a diplomatic mission. These two conditions assure a state and its personnel to claim absolute immunity. However, there are several exceptions, such as under Article 31, when a representative acts as a private person and becomes a party in a commercial activity.
2. Under Article 3 (1), "The functions of a diplomatic mission are (a) Representing the sending state in the receiving state, (b) Protecting the interests of the sending state and its nationals, within limits permitted by international law, (c) Negotiating with the Government of the receiving state, (d) Ascertaining by all lawful means conditions and developments in the receiving state, and reporting to the government of the sending state (e) Promoting friendly relations between the sending and receiving state, and developing their eco-

[38] Bankas, *The State Immunity Controversy*, 48.
[39] *Ibid*.

nomic, cultural as well as scientific relations."

B. VIENNA CONVENTION ON CONSULAR RELATIONS 1963

Vienna Convention on Consular Relations 1963 (Vienna Convention 1963) is adopted from Vienna Convention 1961, which addresses the consular relations between states. This convention came into force on 19 March 1967 after the twenty-second instrument of ratification was submitted to the Secretary-General of the United Nations (Article 77 of the Vienna Convention 1963).

As stated in the preamble, the convention's purpose is to ensure the efficient performance of functions by consular posts. Like the Vienna Convention of 1961, diplomatic staff members enjoy privileges and immunities under this convention. Furthermore, consular premises and archives are exempted under the waiver of immunity clause in an international commercial transaction. Article 1 of the Vienna Convention 1963 defines consular premises and consular archives as:

> *""Consular premises" are the buildings and the land ancillary used exclusively for the consular post irrespective of ownership. "Consular archives" includes all the papers, documents, correspondence, books, films, tapes, and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping."*

C. CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

Convention on Jurisdictional Immunities of States and Property 2004 (Convention 2004) protects states under the commercial act. In other words, this convention can complement the other two, particularly regarding the state's properties. The purpose is to enhance the rule of law and legal certainty in a commercial transaction between states with natural or juridical persons. It is expected to contribute to the codification and development of international law and the harmonization of practice in the relationship between states as well as private entities. Therefore, this convention is a kind of protection for a state and its property against the jurisdiction of a foreign court.

This convention is different from the Vienna Convention 1961 and 1963, at the diplomatic and consular relations of states accordingly. It states the condition to exercise a claim of jurisdiction and the properties immune from a court order or tribunal award. Commercial transaction under this convention defines as:

> *"(i) any commercial contract or transaction for the sale of goods or supply of services, (ii) any contract for a loan or other transaction of a financial nature, including obligation of guarantee or indemnity in respect of loan or transaction, (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment."*

Article 2 (2) elaborates further on determining commercial transaction as a contract. This article emphasizes the nature of the contract or transaction and the purpose of the parties who bound themselves to the said contract or transaction. This convention also gives a more elaborated meaning to state:

> *"(i) the state and its various organs of government, (ii) constituent units of a federal state or political subdivisions, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity, (iii) agencies or instrumentalities of the entities, to perform in the exercise of the sovereign authority of the state (iv) representatives of the state acting in that capacity."*[40]

This definition will aid in determining when a private entity has bound itself to a representative that holds legal authority on behalf of a state. This convention also establishes that under international relations, a state should respect the immunity of another by refraining from exercising jurisdiction. As previously discussed, a state is not immune in commercial transactions. The restrictive immunity principle states that a state acting under commercial law is not immune to jurisdiction or proceedings. This convention further explains the immunity of a state in commercial transactions and the conditions or requirements for a state to be brought before a court or tribunal proceeding.

The reason a state may choose to waive its immunity in commercial transactions with a private entity is because it provides the opportunity

[40] Convention on Jurisdictional Immunities of States and Their Property, 2004.

for broader participation in developing countries. This can include expanding commerce through international trade, and enhancing national security by procuring advanced weaponry. By not limiting commercial transactions to national or state-to-state, a state can take advantage of these opportunities. However, sovereign immunity can be a barrier for the state, resulting in the loss of potential remedies and opportunities for justified remedies.[41]

This convention assures a private entity that by binding to a sovereign, a guarantee of a claim will be obtained against a state. Under Article 7 (1), there are three options for a state to waive its immunity (a) by international agreement, (b) in a written contract, and (c) by a declaration before the court or by a written communication in a specific proceeding. It can be concluded that the waiver of immunity should be stated explicitly and agreed upon between parties. Meanwhile, a statement by the sovereign shall not be deemed enough to conclude such waiver. Article 7 (2) adds that a statement merely agreeing to a choice of law does not automatically make a state to exercise such regulation. Once a state becomes a party or intervenes in a proceeding, it can no longer invoke its immunity under the jurisdiction. However, when it intervenes before a court to invoke immunity or assert its right or interest in a property at issue in the proceeding, it should not be considered an exercise of jurisdiction as stated under Article 7 (1). The appearance of a state representative before a court also should not be considered as consent to the exercise of jurisdiction.

D. 28 US CODE § 1605 – FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA)

The Foreign Sovereign Immunities Act (FSIA) states that a foreign state shall not be immune from the jurisdiction of courts of the US in any of the following case:

1. The foreign state has waived its immunity either explicitly or by implication, and such waiver cannot be withdrawn except under the terms of the waiver
2. The action is based upon a commercial activity carried on in the US

[41] Christopher Shortell, "*Rights, Remedies, and the Impact of State Sovereign Immunity*", State University of New York Press, 2008, P.9.

by the foreign state, or act performed in connection with foreign state that act causes a direct effect in the US

3. Rights in property taken in violation of international law are in issue and any property exchanged is present in the US in connection with a commercial activity carried on by the foreign state. Furthermore, any property exchanged is owned or operated by an agency or instrumentality of the foreign state, which is engaged in a commercial activity in the US
4. Rights in property acquired by succession or gift situated in the US are in issue.
5. Money damages are sought against a foreign state for personal injury or loss of property, occurring in the US and caused by the tortious act, omission of that foreign state or employee while acting within the scope of office or employment, except this paragraph shall not apply to—
    a. any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of abuse, or
    b. any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights, or
6. The action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or may arise between the parties concerning a defined legal relationship, and subject matter capable of settlement by arbitration under the laws of the US, or to confirm an award made under such an agreement to arbitrate, when (A) the arbitration takes place or is intended to take place in the US, (B) the award is or may be governed by a treaty or other international agreement in force for the US calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a US court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

A "commercial activity" is either a normal course of commercial behavior or a specific transaction, under 28 USC § 1603(d). The commercial nature of an activity is determined by its course of conduct, specific transaction, or act, and not by its goal.

III. SOVEREIGN IMMUNITY UNDER PRIVATE INTERNATIONAL LAW

Private international law rules sit within the 'private law' of a national legal system.[42] In the domestic legal system context, private law 'deals with the relationships between people or organizations.[43] It also deals with such relationships, but with the added element of a foreign element.'[44]

Private international law addresses three main issues: jurisdiction, recognition and enforcement of foreign judgments, and choice of law. Jurisdiction refers to when a local court has the power to hear and determine a case, or the case's connections to another state or country limit. Recognition and enforcement of foreign judgments refers to when a judgment from another state or country can be recognized or enforced in the local court. Choice of law refers to when the local court will decide a case using the local jurisdiction (lex fori) or the laws of another state or country.[45] This is only relevant when the application of the local laws would result in a different outcome than the application of the foreign regulations.'[46]

Private international law typically deals with issues related to commercial transactions between states and private entities.[47] This can include issues related to immunity, which can affect private entities and states when a state invokes immunity to avoid its obligations under a commercial contract.[48] This can negatively impact the state's credit

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[42] Poomintr Sooksripaisarnkit and Sai Ramani Garimella, *China's One Belt One Road Initiative and Private International Law* (New York: Routledge, 2018), 10.
[43] *Ibid*.
[44] *Ibid.*
[45] *Ibid.*, 11-12.
[46] *Ibid.*, 11-12.
[47] *Ibid.*, 10.
[48] Shortell, *Rights, Remedies, and the Impact*, 77.

rating and limit its options for future commercial transactions. As a result, states may need to make costly efforts to improve their credit standing.[49]

IV. WAIVER OF IMMUNITY

There are two types of waivers of immunity for a state: waiver of immunity to a foreign jurisdiction and a foreign court judgment or tribunal award. Immunity from jurisdiction refers to the limitation on a forum state's ability over a foreign state.[50] Essentially, it prevents the forum state's courts from having adjudicative and enforcement jurisdiction in certain cases involving a foreign state.[51] Therefore, immunity does not exempt an entity from being subject to the law, but exempt them from the usual methods of enforcing compliance.[52]

Under the State Immunity Act 1978, a foreign state can waive their immunity from jurisdiction in four ways (1) by submitting to the jurisdiction after a dispute arises, (2) by a prior written agreement, (3) by initiating proceedings, and (4) by participating or taking a step in proceedings.[53]

In some countries, the forum state will allow execution against the commercial assets of a foreign sovereign.[54] However, a state can also pass national laws that prevent such execution. These laws also address the parties' rights in arbitration and the limited reasons for setting aside an award under one state's law and refusing to recognize or enforce it in another state.[55] This adds another obstacle for the private entity even after

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[49] Christopher Shortell, "Rights, Remedies, and the Impact of State Sovereign Immunity", State University of New York Press, 2008, P.77.

[50] Mag. Eva Wiesinger, "State Immunity from Enforcement Measures", 2006.

[51] James Crawford, "Brownlie's Principles of Public International Law", Oxford University Press, 2019, P.717.

[52] Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, James Sloan, "*Part 2 the United Nations: What it is, 16 United Nations Privileges and Immunities*", Oxford University Press, 2015, P.832.

[53] James Crawford, "*Brownlie's Principles of Public International Law 9th Edition*", Oxford University Press, 2019, P.724.

[54] Margaret L. Moses, "The Principles and practice of International Commercial Arbitration", 2008.

[55] Moses, *The Principles and Practice*, 35.

successfully bringing a claim before a court or arbitration. Additionally, national courts may also determine that laws and jurisdiction do not apply to certain disputes involving international organizations, similar to the immunity required.[56]

In Indonesia, information is gathered about a claim brought before a national court between a third party and an international organization. This is not related to any contractual obligation and is likely a case under public international law, which is distinct from the topic discussed in this writing.

Immunity from the execution of foreign judgments and orders against the property of a state can be waived by the express consent.[57] This consent cannot be inferred from a waiver of immunity from jurisdiction.[58] The exceptions to immunity from execution are narrow in scope, and courts tend to respect states' discretion in claiming that the property at issue is used for public purposes.[59] This is understandable, given that measures of constraint are much more intrusive than a foreign court's exercise of declaratory jurisdiction.[60]

Mag. Eva Wiesinger elaborates on the conditions for enforcement against state property. The first thing to be determined is the purpose of the object of execution. Property allocated or earmarked by the state for the satisfaction of the claim, which is the object of the proceeding, is subject to enforcement measures by the forum state.[61]

The purpose of a property can be elaborated under Article 19 (c) of the Convention 2004. Under this article, a state's property shall be immune from execution provided the property is used for non-commercial purposes. Article 21 of the Convention 2004 lists five categories of state property not used by the state for other than non-commercial governmental purposes. These include (i) property used in

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[56] Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran, James Sloan, *Oppenheim's International Law: United Nations* (New York: Oxford University Press, 2015), 831.
[57] Crawford, *Brownlie's Principles*, 725.
[58] *Ibid*.
[59] *Ibid*.
[60] *Ibid.*
[61] Convention on Jurisdictional Immunities of States and Their Property, 2004. 2 December 2004 (not yet entered into force), Art. 18(b).

the performance of the functions of the diplomatic or consular mission, (ii) property for military use, (iii) property of the central bank or other monetary authority, (iv) property forming part of the cultural heritage which is not placed or intended for sale, (v) property forming part of an exhibition of objects of scientific, cultural or historical interest not placed or intended for sale.

A. PROPERTY FOR NON-COMMERCIAL PURPOSE

Property used for non-commercial purposes is determined on the national's laws and regulations for commercial or non-commercial use. This property includes those in its jurisdiction and outside the state for diplomatic as well as consular missions as stated under the Vienna Convention 1961 and 1963.

B. MILITARY PROPERTY

The broad wording of Article 21(b) of the Convention 2004 could lead to protection from the attachment of ordinary commercial things used for a military purpose, such as food or clothing.[62] It is important to note that the property should be used for the performance of military functions. State-owning of military equipment used for commercial purposes such as for sale, does not fall under military property as stated under Article 21(b) of the Convention 2004. The 1926 Brussels Convention for the Unification of Certain Rules Relating to The Immunity of State-Owned Vessels distinguishes between normal state-owned ships that exclusively serve non-commercial governmental purposes.[63]

C. PROPERTY OF CENTRAL BANK

It is particularly difficult to include the property of the central bank under this exemption due to the apparent independence of the central bank from the government, such as the Bank Indonesia. Law No. 23 of the Year 1999 as amended by Law No. 2 the Year 2008, it states that

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[62] Mag. Eva Wiesinger, "State Immunity from Enforcement Measures," University of Vienna, July 2006, 13.

[63] Brussels Convention for the Unification of Certain Rues Relating to the Immunity of State-owned Vessels, art. 2.

Bank Indonesia is a separate entity from the government, including its property. The Convention 2004, Article 21, may seem to suggest that separating the property of the central bank is a good thing. However, this convention has yet to be enforced. This means that the property of the central bank is not considered as property under the Vienna Convention 1961 and Vienna Convention 1963. It is important to consider this issue and its implications.

The separation of Bank Indonesia is a good thing when the government makes an international contract with a foreign private entity. This ensures that in the event of legal proceedings, the property of Bank Indonesia will not be included. In addition, the property of the central bank may be considered commercial property, which would depend on the decision of the court or tribunal.

D. CULTURAL HERITAGE, SCIENTIFIC, OR HISTORICAL PROPERTY

This property is a new addition to state immunity, which allows states to protect their cultural heritage, such as historical sites. In the best practice of international contracts, cultural heritage, scientific, or historical property is not yet included in the exemptions under the waiver of immunity clause.

However, these lists of property should be limited by the conditions outlined in Article 19(c). The property should be located in the state of the forum and have a connection to the entity against which the proceeding was directed, hence, eliminating the possibility of attaching state property in a third state through a treaty on the enforcement of judgment.[64] The wording of Convention 2004 is certainly broader and allows attachment against all property of the entity involved in the proceedings, irrespective of the subject matter of the suit.[65] The annex to Convention 2004 contains understandings concerning, inter alia, Article 19, where the connection with the entity is to be understood as broader than ownership or possession.[66] This could mean that a lien or an

[64] Wiesinger, "Enforcement Measures," 16.
[65] *Ibid*., 17.
[66] *Ibid.*

indirect interest in the defendant's asset suffices to allow attachment.[67]

This convention is not yet come into force. According to Article 30 of Convention 2004, such a convention will come into force on the thirtieth day after submission of the thirtieth instrument of ratification. By the time this journal was written, a total of 28 states had their document of ratification submitted to the Secretary-General of the United Nations. With the effectiveness of such a convention, there are several additions to what properties shall be exempted from claims made against a state under the principle of restrictive immunity.

Even though the Convention has not come into force, it has been cited by several courts as reflecting an international consensus on state immunity.[68] It has been adopted by the Supreme Court of Japan and signed, though not ratified, by several states historically opposed to restrictive immunity, such as China and Russia. Independently of the UN Convention, the restrictive theory of immunity is widely accepted, although not unanimously. However, at a certain point, the respondent state's adherence to 'absolute' immunity is not the issue, it is when a forum state is free to adopt a regime of restrictive immunity, despite dissenting views from a few states. A broad consensus exists regarding the types of exceptions to restrictive immunity, as reflected in legislation, the European Convention, and the UN Convention.

Even though state immunity is a principle of international law, it is applied under the proceedings of the forum.[69] This means that the court or tribunal will look to its own national law or seat to determine immunity.[70] The counterparty is allowed to bring claims against the state in that agreed-upon forum to have a foreign jurisdiction govern a commercial contract, such as the immunity under United Kingdom law. United Kingdom imposes restrictive immunity as stated in its State Immunity Act 1978 (SIA). Under Section 2(1) of SIA, a state which submitted its jurisdiction to a court is not immune to a submitted proceeding. However, a mere statement under an agreement that a

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[67] *Ibid*.

[68] Crawford, *Brownlie's Principles*, 178.

[69] "State Immunity: An Overview," Ashurst, accessed 12 June 2022, https://www.ashurst.com/en/news-and-insights/legal-updates/state-immunity--an-overview/

[70] *Ibid*.

state chooses the United Kingdom as its governing law shall not be regarded as a submission under Section 2(1). Furthermore, Section 3 of SIA states exemptions to state immunity regarding commercial transactions and obligations of a state is to be performed a whole or part in the United Kingdom. SIA defines its commercial transaction under Subsection 3 (3) as (a) any contract of goods or services, (b) loan/transaction/guarantee/indemnity relating to financial obligation, and (c) other transaction/activity by a state that is not regarded to act under sovereign authority. Therefore, under SIA, a private entity can make any claim before a court or tribunal in the United Kingdom to fulfil the condition under SIA.

It is also suggested that states enter into bilateral treaties to waive immunity in commercial contracts.[71] However, some countries may not be able to waive immunity due to constitutional constraints, such as in Colombia.[72] Some constitutional provisions do not allow a waiver of jurisdiction or enforcement measures concerning state property.[73] On the other hand, when the national law does not permit restrictive immunity, such judgment or award could not be executed in the state following the existence of the property. The court judgment or tribunal award cannot be registered or executed when the state's national law does not allow any exemption.

V. CONCLUSION

The doctrine of state immunity protects international subjects, persons, and states in commercial transactions. It allows corporations to legally enter into agreements with governments, which benefits the state by increasing the number of corporations willing to participate in such transactions. However, both parties have their own interests to protect, with the state and corporation safeguarding its properties and underlying assets as a guarantee. These parties must negotiate and agree on a contract or agreement that allows the state to waive its immunity while also making exceptions to protect its own interests. The execution of this waiver and its exceptions will ultimately be determined by the

[71] Bankas, *The State Immunity Controversy*, 363.
[72] *Ibid*.
[73] *Ibid.*

relevant judicial proceedings or tribunal, as well as the laws of the chosen jurisdiction. In this way, public international law, allows states to protect their immunity and assets in commercial transactions.

The domestic laws regarding foreign state immunity and exemptions can have a direct impact on commercial transactions between sovereign entities and private entities. In the absence of such laws, it is important for private entities to understand, which international laws or treaties apply to the states involved, in order to be aware of potential claims brought before a court or arbitration.

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