

**THE LEGAL IMPLICATIONS OF SOVEREIGN IMMUNITY IN INTERNATIONAL
COMMERCIAL TRANSACTIONS:
LESSONS FROM TRENDTEX TRADING VS. BANK OF NIGERIA**

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ABSTRACT

It is an obvious principle of international law that sovereign States are granted immunity from execution and judgment flowing from 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 allow States to waive their immunity in commercial transactions. The traditional doctrine afford States the full protection against any claims, including those involving their national assets and properties. The goal of this treatise was to evaluate the legal implications of the immunity of States in international commercial transactions using the case of Trendtex as reference point. This paper found amongst others that, notwithstanding the adoption of the restrictive doctrine of State immunity, sovereign States do retain immunity from claims in international commercial transactions under specific conditions as prescribed by international law.

Keywords: Sovereign Immunity, Commercial Transactions, International Law.

1. INTRODUCTION

State immunity is a principle of international law that enable 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 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

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* (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.

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 debts¹² 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:

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

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*

¹³ *Ibid*

¹⁴ Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (New York: JurisNet, 2001), 153.

¹⁵ *Ibid*

¹⁶ Yang, *State Immunity*, 78

¹⁷ Bankas, *The State Immunity*, 14.

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 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

¹⁸ *Ibid*

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.

²⁴ Yang, *State Immunity in International Law*, 79

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 honour judgments against it in other nations’ courts for actions taken in a commercial capacity.²⁹

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

²⁵ Shortell, Rights, Remedies, and the Impact, 125.

²⁶ Yang, State Immunity in International Law, 79

²⁷ Guzman, How International Law Works, 192.

²⁸ Rubino-Sammartano, International Arbitration Law and Practice, 136.

²⁹ *Ibid*

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.

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 paper explored 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 while reviewing the Trendtex Case.

2. 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-

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

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 State-wide 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 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

3. THE LEGAL STRUCTURE OF SOVEREIGN IMMUNITY

3.1 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

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.

³⁸ Bankas, *The State Immunity Controversy*, 48.

³⁹ *Ibid*

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.

3.2 Convention on Jurisdictional Immunities of States

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.

The 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

The above 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 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.

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

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.

4. 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

⁴¹ Christopher Shortell, “Rights, Remedies, and the Impact of State Sovereign Immunity”, State University of New York Press, 2008, p. 9

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*

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 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

5. THE COMMERCIAL EXCEPTION TO SOVEREIGN IMMUNITY

A commercial or private law exception to immunity is the hallmark of the restrictive approach. When a State is engaged in a commercial transaction, it acts as a trader, not as an independent sovereign State. Because it has ceased to act in a public capacity, it has no immunity for the commercial transactions. The distinction between the two types of acts is frequently addressed, especially in civil law jurisdictions, using the Latin terms, acts *jure imperii* and acts *jure gestionis*.

Immunity from jurisdiction is distinct from immunity from execution. Immunity from execution comprises measures of constraint directed against property of the foreign State either for the purpose of enforcing judgments or for the purpose of pre-judgment attachment. Both types of immunity are subject to a commercial exception, but it is generally more narrowly applied with regard to execution.

5.1 Immunity from jurisdiction

The most frequent basis for the exclusion of immunity for a transaction are its private law character or its commercial nature. The first is used in many civil law countries while the second is used in most of the national legislation adopted in common law countries, but both tend to the same result. For

⁴⁵ *Ibid*

⁴⁶ *Ibid*

⁴⁷ *Ibid*

⁴⁸ Shortell, Rights, Remedies, and the Impact, 77.

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

convenience, this note refers generally to the commercial exception to encompass both the commercial and private law exception. UNCSI Art. 2(c) defines “commercial transactions” to cover a wide range of contracts and transactions:

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

One of the key issues in identifying a commercial transaction relates to whether the nature or purpose of the transaction is determinative. The well-known *Empire of Iran* case explained the concerns about the expansion of immunity that results from reliance on the purpose of the transaction: “[T]he distinction between sovereign and non-sovereign cannot be drawn according to the purpose of the State transaction and whether it stands in a recognisable relations to the sovereign duties of the State. For, ultimately, activities of the State, if not wholly, then to the widest degree, serve sovereign purposes and duties”⁵⁰

A number of OECD jurisdictions focus on the nature of the act and in some cases this approach is mandated by statute.⁵¹ Courts in some other countries continue to refer to the purpose of the acts in making determinations about immunity. The UK SIA does not expressly address the issue and UK law arguably occupies a middle ground. In the *I Congreso del Partido* case, Lord Wilberforce broadened the test to some degree into a consideration of the “whole context” of the transaction that can involve elements of both tests.⁵² French cases have considered both the nature and the purpose of the acts at issue in making the determination; in order to grant immunity, they have

⁵⁰ *Empire of Iran* case, German Federal Constitutional Court (30 April 1963), 45 ILR 57.

⁵¹ *Empire of Iran* (“As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships; and not the motive or purpose of the State activity.”); US FSIA § 1603(d); Canadian SIA § 2

⁵² *I Congreso del Partido*, UK House of Lords, [1983] 1 AC 244, 64 ILR 307.

required that the act either be an "acte de puissance publique" or that it have been carried out "dans l'intérêt d'un service public".⁵³

The UNCSI provision in this area reflects the predominant focus on the nature of the act but also the continuing lack of general agreement to exclude entirely consideration of purpose. Article 2.2 UNCSI provides for primary consideration of the nature of the act, but notably allows consideration of the purpose if that is the practice in the State of the forum.⁵⁴

Because of the difficulty of applying general tests, many countries that have statutes accompany the general criteria with lists of transactions for which immunity is excluded. This approach is also used in the UNCSI, which, in addition to the transactions defined in Art. 2 as quoted above, contains a series of specific exceptions in Articles 11 (employment contracts), 14 (intellectual property), 15 (companies), 16 (shipping) and 17 (arbitration agreements). These provisions can greatly assist in defining the scope of immunity.

Another key question in the application of the commercial exception is the identification of the relevant act for consideration. Acts at the beginning of a transaction may be of one nature, but courts may find that the relevant acts for immunity purposes are later acts of a different nature. For example, an Italian Court of Cassation decision found that, while a bond issue by the government of Argentina was a private commercial matter not benefiting from immunity, the subsequent default on Argentina's public debt obligations, being motivated by the sovereign purpose of managing a serious economic crisis, did confer immunity from jurisdiction.⁵⁵ In contrast, German cases have applied a presumption that once a State has entered a market a characterization of that act as commercial continues, regardless of the nature of the act constituting its subsequent breach.⁵⁶

⁵³ P. Mayer and V. Heuzé, *Droit international privé* (9th ed. 2007) § 325

⁵⁴ Article 2.2 UNCSI: "In determining whether a contract or transactions is a commercial transaction under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the Forum, that purpose is relevant to determining the non-commercial character of the contract or transaction".

⁵⁵ See *Borri Loca v. Republic of Argentina*, Cassazione civile (sez. un.), decision no. 11225 of 27 May 2005.

⁵⁶ Fox at p. 517.

5.2 Immunity from execution and the commercial exception

Execution against State property generally raises more difficulties than adjudication. As noted by one author, to judge a foreign State is one thing, to subject it to coercive measures of execution is another.⁵⁷ At the same time, strong considerations of principle militate in favour of aligning jurisdiction and execution so that where a national legal system has jurisdiction to render a judgment, it can also enforce that judgment.

Different countries have adopted different approaches, but most limit execution against foreign States more than adjudication. In particular, immunity from execution must generally be specifically waived as such; a waiver of immunity from jurisdiction does not affect immunity from execution. A number of civil law jurisdictions have adopted the principle that a State enjoys immunity from execution for property in use for sovereign purposes, but not for property in use for commercial purposes. This approach was adopted in the German Constitutional Court's 1977 decision in the Philippine Embassy case, and in subsequent cases in Italy and Spain.⁵⁸ The Australian, Canadian and UK statutes generally allow for execution against foreign State property in use or intended for use in commercial purposes.⁵⁹

The French and US laws also distinguish between property used for sovereign as opposed to private purposes. However, for execution against State property, they generally require a link between the property and the original claim.⁶⁰ Both France and the US eliminate this special requirement of a link between the property and the underlying claim in cases involving property of an SOE rather than the foreign State itself. Thus, in *Sonatrach*, the Cour de Cassation expressly distinguished between foreign State and State agencies, finding that "the assets of public entities, distinct from the foreign State, whether or not

⁵⁷ D. Carreau, *Droit international public* (9th ed. 2007).

⁵⁸ The Philippine Embassy case, 65 ILR 146 (1977); *Condor and Filvem v. Minister of Justice*, Italian Constitutional Court, 101 ILR 394 (1992); *Abbott v. South Africa*, Spanish Constitutional Court, 113 ILR 411 (1992).

⁵⁹ Australia FSIA § 32(1) (immunity generally excluded for commercial property); Canadian SIA § 11 (execution against foreign State property allowed where the property is used or is intended for commercial activity); UK SIA § 13(4) (property in use or intended for use in commercial purposes is subject to attachment).

⁶⁰ US FSIA § 1610(a)(2); see *République démocratique du Congo*, French Cour de Cassation, (1ere ch. Civ. 25 January 2005) (immunity can only be excluded "lorsque le bien saisi se rattache ... à une opération économique, commerciale ou civile relevant du droit privé qui donne lieu à la demande en justice »); *Eurodif*, French Cour de cassation, (1re Ch. 14 March 1984), JCP II, 2205, note Synvet

enjoying legal personality, which are part of a group of assets (*patrimoine*) which been dedicated to activities in the private law sector, may be seized by all creditors of the public entity”.⁶¹ Immunity of execution was the most difficult problem encountered during the lengthy process leading to UNCSI. In 2002, agreement was achieved on a restrictive theory for post-judgment execution. However, there was still uncertainty about whether the assets would be required to have a link with the claim. Ultimately, the requirement of a link with the claim was eliminated. Article 19 thus allows post-judgment execution against property used for commercial purposes located in the territory of the forum. The property must have “a connection with the entity against which the proceedings was directed”. The Convention deals separately with pre-judgment and post-judgment execution, and Art. 18 strictly limits pre-judgment attachment.

In *AIG v. Republic of Kazakhstan*, in which an AIG affiliate had obtained an ICSID arbitration award against the Republic of Kazakhstan and registered it as a judgment in England. AIG then sought to execute against cash and securities located in a London bank. The National Bank of Kazakhstan (the central bank) intervened in the case and claimed that the assets were immune from enforcement under the UK SIA.

The assets were cash and securities that formed part of the National Fund of Kazakhstan (the “National Fund”), a sovereign wealth fund created in 2000 by a presidential decree. Kazakhstan conceded that, but for State immunity, the National Fund had an attachable interest in the accounts. Under an agreement of “trust management” between the Republic of Kazakhstan and the central bank, the National Fund was managed by the central bank. The central bank was given the right to invest the National Fund assets. The fee arrangement between the government of Kazakhstan and the central bank provided for the central bank earning a commission if the Fund profited, but paying compensation to Kazakhstan if the Fund incurred losses. The Government was identified as the beneficiary under the agreement.

⁶¹ *Société Sonatrach v. Migeon*, French Court of Cassation (1 October 1985), 77 ILR 525 [“Les biens des organismes publics, personnalises ou non, distincts de l’Etat étranger, lorsqu’ils font partie d’un patrimoine que celui-ci a affecté à une activité principale relevant du droit privé, peuvent être saisis par tous les créanciers, quels qu’ils soient, de cet organisme”.]; see US FSIA § 1610(b)(2).

Under the terms of a global custody agreement (GCA) between the central bank and the London bank, the London bank agreed to hold, in the name of the central bank, cash and securities of the National Fund as banker and custodian. The GCA appeared to be an ordinary contract for banking and custody services including holding cash deposits and securities. Sixteen accounts were established under the GCA. The securities in the accounts included UK government bonds, shares in UK listed companies and non-UK securities.⁶² The securities were very actively traded (6 700 trades per month over one 18-month period). The court considered that the cash and securities were not in use or intended for use for commercial purposes. The judge relied principally on the fact that the “overall aim of the exercise was to enhance the National Fund”. In this context, the judge found that the active trading of the securities accounts, the goal of obtaining high profits at reasonable risk levels and the results-based remuneration of central bank as manager of the Fund were not determinative. The judge relied on the purpose of the securities accounts being to assist the running of the National Fund and found that “the dealings [were] all part of the overall exercise of sovereign authority by the Republic of Kazakhstan”.⁶³

The claimants also argued that because the trading activities of the securities accounts were clearly financial transactions, they fell within the definition of commercial transactions within section 3(3) of the UK SIA. Section 3(3) notably provides that “any loan or other transaction for the provision of finance” constitutes a commercial transaction. The judge rejected the argument again on the basis of the broader purpose.

The dealings of the securities accounts must in my view be set against the background of the purpose of the GCA. That was established to assist in running the National Fund. The securities accounts contain assets which are

⁶² Because the value of UK securities exceeded the amount of the judgment debt, the court considered that the status of the non-UK securities was irrelevant. *Id.* n.48

⁶³ The court also relied on a letter to the court from the Kazakhstan Ambassador to the UK. The letter recognised that the assets formed part of the Fund and beneficially belonged to Kazakhstan. However, it stated that the Fund “was designed to ensure economic stability of Kazakhstan and to accumulate funds for future generations by way of investment in securities” and that the London assets “had never been used for commercial purposes ... and [were] not intended to be used for such purposes”. [*Id.*§ 25] The judge noted that under SIA§ 13(5)), such certificates are to be accepted as sufficient evidence of non-commercial use unless the contrary is proved. The judge found that the only contrary evidence was the trading of the accounts and that it did not establish commercial use. (*Id.*§ 92)

part of the National Fund. In my view the dealings are all part of the overall exercise of sovereign authority by the Republic of Kazakhstan.⁶⁴

Although the transactions were clearly of a nature that could be carried out by private parties, the decision does not use that approach. The National Fund appears to be similar to a number of other SWFs. The decree creating it (and subsequent applicable rules) provided in general terms that the fund's purpose was to ensure stable social and economic development, accumulation of financial resources for future generations and reduction of the vulnerability of the economy to the influence of unfavourable external factors. The principal source of funds was earnings and taxes from the oil sector. The matters on which the funds could be spent included deficits between planned and actual revenues from raw materials, specific projects as determined by the President and set out in the State budget, and the costs of managing the Fund.

AIG analysed the transactions based on their broad purpose. The nature of the activity as financial transactions was irrelevant in light of the overall purpose of earning money for the State. If the reasoning in AIG were to be adopted by other courts, SWFs would likely benefit from very broad immunity regardless of their structure. Potential claimants against an SWF would have great difficulty establishing that its activities are not for the purpose of seeking to increase the value of the fund. In contrast, as noted above, in the *Sarrió* case, the Swiss court expressly noted that the nature, and not the purpose, of the acts was determinative before noting that Kuwait had conceded that the underlying transactions were commercial.

The approach in AIG would also make the treatment of sovereign debtors and creditors markedly different. A State that raises funds in the sovereign debt market is now generally considered to engage in private activity even if the funds are destined for immediate public purposes.⁶⁵ In contrast, under the reasoning in AIG, investment activity by an SWF would benefit from immunity. Overall, successfully executing against foreign State property remains difficult for private parties. As an evidentiary matter, it can be difficult to obtain information to demonstrate that property is in commercial use. Where property can be located that is in commercial use, it frequently belongs

⁶⁴ *Ibid.* § 92

⁶⁵ UK SIA s. 3(3) (the same statute that was at issue in AIG); *Republic of Argentina v. Weltover*, 505 US 607 (1992); UNCSI Art. 2(1)(c)(ii).

to an SOE that is a different entity than the debtor and execution is rejected on the basis that it is an independent entity. While a unified approach to jurisdiction and execution would seem logical, the reality is that while jurisdiction has been substantially expanded, immunity from execution remains as “the last bastion of State immunity” in private law cases. There are a number of well-known cases where judgment creditors have spent many years in largely fruitless efforts in multiple jurisdictions to obtain satisfaction for judgments or arbitration awards.⁶⁶ At the same time, factual data is lacking about the degree to which States evade their obligations; although States may take longer to honour their obligations, it may be the case that all but a few States do so.⁶⁷

6. THE TRENDTEX CASE IN THE LIGHT OF SOVEREIGN IMMUNITY

The facts of the case⁶⁸ were that on 25th April 1975, the Ministry of Defence in Nigeria agreed to buy 240,000 tons of Portland cement from England Company, the Pan-African Export and Import Co. Ltd. The price was US \$60.00 per ton C.I.F Lagos Apapa Ports, shipment at the rate of 20,000 tons a month, plus or minus 10 percent, all to be delivered not later than August 15th, 1976.

In order to fulfil their contract to supply the cement, Pan-African entered into a contract with the Trendtex Trading Corporation of Zurich, Switzerland the contract was dated 24th July 1975 wherein Pan-African agreed to purchase 240,000 tons of Portland cement from Trendtex at the rate US \$59.50 per ton C.I.F Lagos/Apapa which shows only a small profit US \$00.50 a ton in favour of Pan-African, all other terms were to be as agreed in the Central Bank of Nigeria letter of credit to (Midland Bank advice no 83035) are transferred to the seller to the buyer. In order to fulfil the contract to supply cement also, Trendtex agreed to buy 240,000 tons of cement from Alsen Breifenburg of Hamburg and established a letter of credit issued by a swiss bank for the price. Trendtex has started shipment of the cement in tons consignment in August covering over 41,600 tons and in October two further consignment covering over 21,460 tons which were not honoured by Midland Bank and after several effort by Trendtex to get payment including traveling to Lagos to make representation to the government in October, they were bluntly told that no

⁶⁶ See, for example, the discussion of the *NOGA v. State of Russia* case in Fox, p. 653-655.

⁶⁷ *Ibid*

⁶⁸ *Trendtex Trading vs Bank of Nigeria (1977)* 1 QB 529

payment will be made on the last two vessels and that demurrage would only be paid on the first two vessels if certified by the Central Bank of Nigeria for payment. Dissatisfied, Trendtex on the 4th November 1975 issued a writ in the High Court of Justice in London against the Central Bank of Nigeria, claiming demurrage on all six vessels amongst others including damages on account of their obligation to their supplier Alsen-Breitenburg. The Central Bank of Nigeria applied to set aside the writ on the grounds that the Central Bank of Nigeria is a department of the Federal Republic of Nigeria and therefore immune from suit. The suit was set-aside by Donaldson J. on 26th March 1976⁶⁹, hence the appeal by Trendtex Co. to the Court of Appeal wherein Lord Denning MR in allowing the appeal held amongst others, “in my opinion the plea of sovereign immunity does not avail the Central Bank of Nigeria” elsewhere, while delivering his ruling in this matter before arriving at the above conclusion said ... this conclusion would be enough to decide the case but I find it so difficult that I prefer to rest my decision on the grounds that there is no immunity in respect of commercial transactions, even for a government department.

From the above decision, it is clear that State immunity is protected as a right of States in international law⁷⁰ but this State immunity otherwise called sovereign immunity does not extend to commercial contracts or transaction. In reviewing the decision of the courts in the Trendtex case vis-à-vis the position of the law as it were, it is our view that the position of the law as espoused in the Trendtex has not changed as the law on sovereign immunity remains. However, the issue of State immunity waiver clauses in transactions tries to paint a picture of a shift from the position of the law but in actual fact immunity waiver functions in a manner that prevents States that have already inserted the waiver clause in their transactions not to subsequently plead sovereign immunity and escape liabilities. Another point to note is that once the transaction is commercial in nature, with or without immunity waiver clause, the courts are not likely to grant the plea of sovereign immunity. This was the decision reached in the following cases *AIC LTD VS FGN*⁷¹ wherein the question as to whether a judgment obtained by AIC LTD in the Federal High Court of Nigeria against the Federal Government of Nigeria was

⁶⁹ (1976) 1 WLR 868

⁷⁰ The UN Convention on Jurisdictional Immunities of State and their property 2004. Art. 10 provided lucidly that state immunity cannot be invoked for commercial contracts.

⁷¹ (2003) EWHC 1357 (QBD)

registrable in the United Kingdom and therefore enforceable as a judgment of the High Court of England, the Federal Government of Nigeria pleaded that it was immuned from jurisdiction by virtue of section 1 of the State Immunity Act of 1978 UK and that there was no waiver of such immunity. The UK court in accepting the plea of immunity by the Nigerian Federal Government came to the conclusion that the Defendants immunity from the proceedings is not surprising as the judgment sought to be registered centred on a “purely domestic matter”.

A similar decision was also reached in the case of *L R Avionics Technologies Ltd vs Fed. Rep. of Nigeria*⁷² wherein the High Court of England set aside an order enforcing an arbitral award against the government of Nigeria on the grounds of State immunity. It is for all the above reasons that the Export-Import Bank of China insisted on the insertion by Nigeria the sovereign immunity clause in the 2018 Rail Contract between it and the Nigerian government.

7. CONCLUSION

It is true that the security of lives and property of the people and their welfare is the primary purpose of government the world over, but inherent in the above brings a huge financial obligation on the door-step of government and in trying to achieve the above for her citizens, every government tries to come up with different methods of generating revenue to finance its obligations owed the citizens. It is also in trying to improve the living standards of citizens by way of providing the necessary basic infrastructural needs of the State that government creates the necessary environment or foundation for both commercial activities by providing both the legal and institutional frameworks to streamline and regulate commercial activities between individuals and corporate bodies and government institutions at the local level or within the State. At international level, there are also laws that regulates commercial activities between nations, in this case, they are called Conventions, Protocols, Treaties, etc and they are usually in the form of bilateral or multilateral as the case may be as seen in the case of the World Trade Organisation (WTO) in the cause of this work above. The paper comes to a conclusion with a critical review of the Trendtex case⁷³, and came to the conclusion that there has not been any serious change of the position of the

⁷² (2016) EWHC 176 (COMM)

⁷³ Supra

law as it affects sovereign immunity or State immunity as the case may be, even in commercial activities of State as clearly Stated by master of the rolls himself Lord Denning MR in that case, even in the more recent cases mentioned above like the cases of *LR Avionics Technologies Ltd vs Federal Republic of Nigeria* and the *AIC LTD vs. FGN supras*.

The paper recommends that in order to forestall the ugly occurrence of the Trendtex case in the future, the Government should engage the services of legal experts and competent international business outfit for proper advice in all aspects of such transaction from beginning to the end. The engagement of legal experts, consultants, and other business advisory services can help prevent the government from falling into similar calamity as the Trendtex case. Besides, requisite insurance and risk amelioration scheme should be subscribed by the government whenever the government is involved in commercial activity.