



**ADDIS ABABA UNIVERSITY**  
**COLLEGE OF LAW AND GOVERNANCE**

**Topic: Immunity of Government Property against the Execution of Foreign Arbitral Awards: A Look at Ethiopian Perspectives**

**By: Ermias Tesfaye**

**Advisor: Prof. Zakarias Kenea**  
**ID No. GSE/6762/13**

**Submitted in Partial Fulfillment of the Requirements of the Degree  
LLM in Business Law at the faculty of law, Addis Ababa University**

**October, 2024**

**Addis Ababa**

## **Declaration**

I, hereby declare that this thesis is original and the result of my own work and has never been submitted to any other institution. I also declare that any secondary sources or materials used in this thesis have been duly acknowledged.

Name: Ermias Tesfaye

Date: October, 2024

**Approval Page**

**Addis Ababa University  
College of Law and Governance Studies  
School of Law  
Business Law Stream**

**Immunity of Government Property against the Execution of Foreign Arbitral  
Awards: A Look at Ethiopian Perspectives**

**Supervisor**

**Name**

**Signature**

**Date**

\_\_\_\_\_

**Approved by a Board of Examiners**

**Examiner One**

**Examiner Two**

**Name:** \_\_\_\_\_

**Name:** \_\_\_\_\_

**Signature:** \_\_\_\_\_

**Signature:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**Date:** \_\_\_\_\_



## **Acknowledgment**

First and foremost, I would like to express my deepest gratitude to God for bestowing upon me the strength, wisdom, and patience to complete this research.

I would like to convey my sincere gratitude to all those who have provided their invaluable insights, expertise, and support throughout the course of this research. Special thanks to my advisor, Prof. Zakarias Kenea for his continuous guidance, encouragement, and feedback.

Lastly, I would like to thank my family and friends for their support.

# Table of Contents

<b>Acknowledgment</b> .....	<b>I</b>
<b>Abbreviations</b> .....	<b>IV</b>
<b>Abstract</b> .....	<b>V</b>
<b>CHAPTER ONE: GENERAL FRAMEWORK OF THE RESEARCH</b> .....	<b>1</b>
1.1. Background of the Study .....	1
1.2. Statement of Problem .....	2
1.3. Objectives of the study .....	3
1.3.1. General Objective .....	3
1.3.2. Specific Objectives .....	3
1.4. Research Questions .....	4
1.5. Significance of the Study .....	4
1.6. Scope and Limitations of the Study .....	5
1.7. Research Methodology.....	5
1.8. Organization of the Study .....	6
<b>CHAPTER TWO: LEGAL AND CONCEPTUAL FRAMEWORK</b> .....	<b>7</b>
2.1. Introduction .....	7
2.2. Meaning and Significance of Government Property in the Execution of Foreign Arbitral Awards .....	7
2.3. Legal Basis for Sovereign Immunity in the Context of Enforcement of Foreign Arbitral Awards .....	9
2.3.1. Immunity from Jurisdiction.....	11
2.3.2. Immunity from Execution .....	12
2.4. Legal Theories on State Immunity .....	12
2.4.1. Absolute Immunity of the State.....	13
2.4.2. Restrictive immunity of the state.....	14
2.5. Waiver of Immunity .....	15
2.5.1. State Sovereign Immunity in the Context of State Commercial Activities: Acta Jure Gestionis .....	16
2.5.2. State Sovereign Immunity in the Context of Arbitration Agreements .....	17
2.5.3. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property .....	18

2.5.4. The European Convention on State Immunity of 1972.....	20
2.5.5. The U.S. Foreign Sovereign Immunities Act of 1976 (FSIA).....	22
2.5.6. Jurisdictional Immunity of Foreign States in India .....	23
<b>CHAPTER THREE: LEGAL FRAMEWORK FOR EXECUTION OF FOREIGN ARBITRAL AWARDS AGAINST GOVERNMENT PROPERTIES IN ETHIOPIA .....</b>	<b>24</b>
3.1. Introduction (Overview of Government Immunity in Arbitration).....	24
3.2. Definition and Nature of Government Properties in Ethiopia.....	25
3.3. Legislative Framework for Enforcement of Foreign Arbitral Awards in Ethiopia.....	26
3.3.1. Legal Definition of Foreign Arbitral Awards Under Ethiopian Law .....	26
3.3.2. Enforcement under the New York Convention .....	28
3.3.3. Enforcement Under the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 .....	30
3.3.4. Enforcement Under the Civil Procedure Code Under Article 458-461.....	33
3.4. Regulation of Immunity of Government Properties from Execution of Foreign Arbitral Awards in Ethiopia.....	35
3.4.1. The Civil Procedure Code Provisions and Proclamation No. 1237/2021 .....	35
3.4.2. The New York Convention.....	37
<b>CHAPTER FOUR: BALANCING SOVEREIGNTY AND ACCOUNTABILITY: THE DUAL IMPLICATIONS OF PROTECTING GOVERNMENT PROPERTIES AGAINST FOREIGN ARBITRAL AWARDS .....</b>	<b>48</b>
4.1. Introduction .....	48
4.2. Implications of Regulating Immunity of Government Properties From the Execution of Foreign Arbitral Awards .....	49
4.2.1. Positive implications of Regulating Immunity .....	49
4.2.2. Negative Implications of Regulating Immunity .....	50
4.3. Implications of Not Regulating Immunity of Government Properties Against Execution of Foreign Arbitral Awards .....	51
4.3.1. Positive Implication of Not-Regulating.....	51
4.3.2. Negative Implications of Not Regulating.....	52
<b>CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS .....</b>	<b>55</b>
5.1. Conclusions .....	55
5.2. Recommendations .....	56
<b>BIBLIOGRAPHY.....</b>	<b>57</b>

## **Abbreviations**

ICJ	International Court of Justice
UNSCI	United Nations Convention on Jurisdictional Immunities of States and Their Property
UN	United Nations
BITs	Bilateral Investment Treaties
MLTs	Multilateral Investment Treaties
ECSI	European Convention on State Immunity
ICSID	International Centre for Settlement of Investment Disputes
USA/U.S.	United States of America
ILC	International Law Commission
FSCI	Foreign Sovereign Immunities Act
CCP	Code of Civil Procedure
CPC	Civil Procedure Code
COMESA	Common Market for Eastern and Southern Africa
AF	Additional Facility
FDI	Foreign Direct Investment

## ***Abstract***

*This research investigates the immunity of government property against the execution of foreign arbitral awards within the Ethiopian legal framework. It identifies significant gaps in the existing laws that govern sovereign immunity, particularly in the context of Ethiopia's commitment to international conventions like the New York Convention. While this commitment represents a positive step towards aligning with global arbitration standards, the lack of explicit regulations creates uncertainty for international investors, undermining Ethiopia's attractiveness as a destination for foreign direct investment. The study contrasts Ethiopia's situation with jurisdictions that operate under a restrictive theory of sovereign immunity, which allows for enforcement in commercial contexts and offers well-defined legal protections for investors. Furthermore, the research examines the dual implications of regulating and not regulating government property immunity against the execution of foreign arbitral awards in Ethiopia. It underscores the imperative of striking a delicate balance between safeguarding state sovereignty and fostering a welcoming environment for foreign investment. The research emphasizes the importance of establishing a comprehensive legislative framework that delineates the boundaries of sovereign immunity, defining government property and the specific conditions under which enforcement may occur. Through adopting such measures, Ethiopia can foster a more favorable investment climate that balances state sovereignty with investor confidence, ultimately enhancing legal certainty and predictability in international arbitration.*

**Keywords:** Ethiopian Perspectives, Immunity of Government Property, Foreign Arbitral Awards

## **CHAPTER ONE: GENERAL FRAMEWORK OF THE RESEARCH**

### **1.1. Background of the Study**

The importance of international arbitration in resolving commercial disputes is becoming undeniable. It is a custom for business transactions and investment treaties to include provisions for resolving disputes through the use of international arbitration.<sup>1</sup> What made arbitration favorable compared to court procedures in resolving commercial disputes are the traits attached to it like confidentiality, expedience, flexibility etc. “Arbitration has become more effective over the years in international commerce due to the fact that parties now prefer to have their international disputes resolved through arbitration for the reason that it is faster and more efficient, it avoids uncertainty of local practice which is associated with litigation in national courts, enforceability and the parties freedom to select and design the arbitral procedures, confidentiality and other benefits.”<sup>2</sup>

With regard to enforcement of arbitral awards against government entities however, a complication may be exhibited in the process for the reason attributed to immunity of government property. “The notion of sovereign immunity from execution can be validly and most likely be raised by such states during the time when such private individuals known as foreign investors in an just concluded Investment Treaty Arbitration want to enforce and execute its arbitral awards by possibly getting the state assets attached from the court enforcement orders.”<sup>3</sup>

In principle, the concept of immunity of government property against the enforcement of arbitral awards refers to the exemption of assets owned by a state or its affiliates from becoming part of a claim based on the decisions of a foreign court or arbitral tribunal States will likely raise the valid concept of sovereign immunity from execution when foreign investors, who were involved in an Investment Treaty Arbitration dispute, seek to enforce their arbitral award and potentially

---

<sup>1</sup> Law and Practice of Foreign Arbitration and Enforcement of Foreign Arbitral Awards in Pakistan, Ahmad Ali Ghouri, SpringeBriefs in Law, 2013, page 2

<sup>2</sup> Sovereign Immunity and Enforcement of Awards in International Commercial Arbitration, Faizah Badmus- Busari, International Commercial Arbitration, Tulane Law School, LLM 2013, page 8

<sup>3</sup> Sovereign Immunity from Execution of Arbitral Awards Aman Prasad UIPPSALA UNIVERSITET, 2020, page 29

target state assets through court enforcement orders.<sup>4</sup> This principle of invoking immunity against execution of foreign arbitral awards is put in place so as to allow states to carry out their functions without interference from foreign courts or tribunals. The immunity of government property from being attached to facilitate the execution of foreign arbitral award may have an adverse effect on the other party who is seeking enforcement. “In addition, the doctrine of sovereign immunity is necessary to promote the functioning of all governments by protecting them from the burden of defending litigation abroad. The problem however, is that sovereign immunity rules may significantly impair the effectiveness of international commercial arbitration involving a State party since the plea of State immunity could have a major impact at every stage of the arbitration.”<sup>5</sup>

Hence, it is worth examining the immunity of government property in the context of international arbitration and the award thereof since the matter has sparked considerable discussion in the field of international arbitration with differing perspectives, where one side contends that the immunity granted to government property weakens the efficacy of international arbitration as a dispute resolution method and the other side argue that it is indispensable for safeguarding states from external interference and ensuring the smooth execution of their duties.

## **1.2. Statement of Problem**

The enforcement of foreign arbitral awards presents a significant challenge regarding the immunity of government property, causing debates within international law. Uncertainty surrounds whether government assets should be shielded from execution in foreign arbitral proceedings, necessitating a delicate balance between state interests and the integrity of international arbitration mechanisms. This ambiguity is evident in various state practices, even among nations adhering to restrictive principles in such matters.

Within the Ethiopian legal landscape, clarity is lacking concerning the regulation of government property immunity in the execution of foreign arbitral awards. Despite the recent enactment of the Arbitration and Conciliation Proclamation No. 1237/2021, ambiguity persists, particularly

---

<sup>4</sup> Ibid, page 29

<sup>5</sup> Sovereign Immunity and Enforcement of Awards in International Commercial Arbitration, Faizah Badmus- Busari, International Commercial Arbitration, Tulane Law School, LLM 2013, page 11, 12

concerning the treatment of state assets in commercial transactions. Resolving these uncertainties is essential for creating a stable legal environment conducive to foreign investments in Ethiopia.

An additional issue pertains to the implications arising from either regulating or not regulating immunity for government property in the context of enforcing foreign arbitral awards. The decision to establish a regulatory framework for government property immunity holds significant consequences for various stakeholders, including governments and foreign investors, necessitating a comprehensive analysis of the potential impacts.

Therefore, this thesis aims to explore whether government property should enjoy immunity from the execution of foreign arbitral awards, assess the scope of state immunity under international law concerning government assets in foreign arbitral proceedings, analyze the implications of regulatory decisions on government property immunity in the context of foreign arbitral awards enforcement, and evaluate the status of government property immunity under Ethiopian laws.

Furthermore, the thesis will investigate how the legal framework in Ethiopia, particularly Proclamation No. 1237/2021, addresses the treatment of government assets in foreign arbitral cases, highlighting any gaps or ambiguities that may exist. Through filling these gaps and providing clear recommendations, this study seeks to enhance legal certainty, protect the rights of foreign investors, and promote Ethiopia as an attractive hub for international business transactions.

### **1.3. Objectives of the study**

#### **1.3.1. General Objective**

As a general objective the thesis aims to examine the immunity of government property from the execution of foreign arbitral awards, evaluating the necessity of such immunity and exploring the implications of both regulating and non-regulating this immunity.

#### **1.3.2. Specific Objectives**

1. To analyze the legal principles and justifications underlying the immunity of government property from the execution of foreign arbitral awards;

2. To examine the international legal framework and practices concerning the immunity of government property in the context of foreign arbitral awards;
3. To analyze the existing legal framework in Ethiopia and assess the extent to which the immunity of government property against the execution of foreign arbitral awards is regulated;
4. To identify any gaps or inconsistencies in Ethiopia's laws regarding the immunity of government property and propose recommendations to enhance clarity and effectiveness.

#### **1.4. Research Questions**

1. Should government properties be immune from execution of foreign arbitral awards?
2. What are the implications of regulating and non-regulating immunities of government property from the execution of foreign arbitral awards?
3. How do other countries handle the immunity of government property when it comes to the execution of foreign arbitral awards?
4. Is immunity of government property against the execution of foreign arbitral awards regulated in Ethiopia's laws, where the state is involved in commercial activities?

#### **1.5. Significance of the Study**

It is clear and evident that there are complexities involved when it comes to the execution of foreign arbitral awards against government properties. In this regard this thesis aims to contribute its share to the existing body of knowledge. Hence, it will have a significance of helping to understand the legal principles and justifications behind granting immunity to government assets, which is crucial for maintaining national sovereignty and protecting the public interest. Furthermore, the study seeks to safeguard the rights of foreign investors by offering clear regulations on the immunity of government property, thereby fostering a more secure investment environment and positioning Ethiopia as an appealing destination for international business transactions. Moreover, through examining and identifying gaps in the existing legal framework, particularly in relation to Proclamation No. 1237/2021, the study aims to enhance legal mechanisms, bring into line them with international standards and best practices.

Additionally, this study contributes to legal scholarship by digging into a complex issue within international law and arbitration, providing valuable understandings that can enrich academic discussions and guide future research endeavors. The impacts of this research extend to various stakeholders, including governments, foreign investors, legal practitioners, and international arbitration bodies, influencing decision-making processes and practices related to the execution of foreign arbitral awards involving government property.

### **1.6. Scope and Limitations of the Study**

The concept of immunity of government property against the execution of foreign arbitral awards may encompass a vast area. However, this study will be limited to the examination of international treaties, conventions and case laws pertaining to government immunity and foreign arbitral awards. It has also gone through a comparative analysis of different jurisdictions thereby highlighting similarities and differences regarding the immunity of government property against the execution of foreign arbitral awards. The study was also focused on Ethiopia, for the purpose of examining the existing legal framework and practices regarding the immunity of government property from the execution of foreign arbitral awards.

This research has suffered from several limitations. One critical limitation of the study is the scarcity of Ethiopian scholarly works specifically addressing the topic. The absence or limited availability of written sources analyzing the Ethiopian laws on the immunity of government property in the context of foreign arbitral awards poses a challenge to conducting a comprehensive analysis. Additionally, the lack of established legal cases or judicial rulings related to the immunity of government property in the context of foreign arbitral awards within the Ethiopian legal system poses a significant challenge. Without relevant precedents to draw upon, the study may face difficulties in providing concrete examples, case analyses, or insights into how Ethiopian courts have interpreted and applied legal principles concerning this issue. To address these limitations, the author employed several strategic approaches including conducting an extensive analysis with legal frameworks and precedents from other jurisdictions that have dealt with similar issues.

### **1.7. Research Methodology**

The research methodology adopted for this study is doctrinal legal research, which seeks to provide a comprehensive analysis of the regulations governing the immunity of government

property in the context of enforcing foreign arbitral awards. Being a doctrinal study, it primarily involves an in-depth examination of legal frameworks, both at the national and international levels, as well as key concepts and principles relevant to the central theme of sovereign immunity. Given its doctrinal nature, the research has employed the qualitative research method.

Primary sources for this study will include laws pertaining to the immunity of government property against the execution of foreign arbitral awards, while secondary sources comprise journal articles and books. Notably, the Arbitration and Conciliation Proclamation No. 1237/2021, relevant provisions of the Civil Procedure Code and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 hold significance in this context.

### **1.8. Organization of the Study**

The study is structured into five chapters. The first chapter serves as an introduction, encompassing the background of the study, statement of the problem, objectives, research questions, significance, scope, limitations, and the research methodology. In the second chapter, the focus is on establishing the conceptual framework of foreign arbitration and state asset immunity. This section delves into defining state asset immunity and foreign arbitral awards, with a particular emphasis on examining relevant international laws. Journal articles and books are utilized to enrich this exploration.

Moving on to the third chapter, the analysis centers on the pertinent legal framework regarding the enforcement of foreign arbitral awards against government properties in Ethiopia. Here, gaps within the current legal structure are identified, alongside an examination of the legal systems and practices of other nations facing similar challenges. This comparative analysis provides valuable reference points for Ethiopian courts, given the deficiencies in domestic legislation. Chapter four is dedicated to exploring the dual implications of regulating and non-regulating immunity of government properties concerning the execution of foreign arbitral awards. This section delves into the complexities and implications of these two forms of immunity. Finally, chapter five encapsulates the conclusion and recommendations section of the thesis, summarizing the key findings and proposing actionable recommendations based on the research conducted throughout the study.

## **CHAPTER TWO: LEGAL AND CONCEPTUAL FRAMEWORK**

### **2.1. Introduction**

The principle of sovereign immunity has long been a cornerstone of international law, safeguarding states from the jurisdiction of foreign courts/tribunals and protecting government property from execution of foreign judgments/arbitral awards. This doctrine is rooted in the respect for state sovereignty and territorial integrity, fundamental tenets of international relations. However, as globalization intensifies and cross-border transactions become more commonplace, the applicability and scope of sovereign immunity are increasingly scrutinized, raising critical questions about its limits and exceptions. This chapter aims to examine the existing literatures and international laws on how the immunity of government property against the execution of foreign arbitral awards are addressed. Through examining the legal and conceptual frameworks that underpin sovereign immunity, this chapter has addressed several key questions: What are the legal and theoretical foundations of sovereign immunity? How state sovereignty shields government properties from execution of foreign arbitral awards? What are the common exceptions to sovereign immunity against execution of foreign arbitral awards? How sovereign immunity can be waived? Through a comprehensive literature review and analysis of relevant legal provisions, this chapter seeks to address the broader discourse on state immunity in international law.

### **2.2. Meaning and Significance of Government Property in the Execution of Foreign Arbitral Awards**

There is no single, comprehensive, universally accepted definition of ‘government property,’ as the term can vary based on legal, cultural, and contextual frameworks. Different scholars define the term ‘government property’ differently. For instance, Douglas Goetz defines ‘Government Property’ as all properties that are owned or leased to the Government, this includes the properties that are under the title of the federal, state, local government or any of its subdivisions, agencies, or instrumentalities.<sup>6</sup> Furthermore, government property has also been defined as

---

<sup>6</sup>Douglas Goetz, “The Classification of Government Property Under the New Far” Part 45 Rewrite' [2015] 19(3) Property Professional 1.

‘sovereign property encompass assets that have a special status due to their association with the State and its core governmental functions’<sup>7</sup>.

The United Nations Convention on Jurisdictional Immunities of States and Their Property has also used the term ‘Government Property’ in the convention. However, it does not explicitly define ‘government properties,’ but it does specify which types of properties are immune from enforcement measures. This list can provide us with the sense of what government property includes. The provided protected categories of government properties are:<sup>8</sup>

1. Military Property: Assets used for military purposes are immune because they are crucial for national defense and security.
2. Property of Diplomatic Missions: Assets used for diplomatic missions and consular posts are immune to ensure the smooth functioning of international diplomatic relations.
3. Property of the Central Bank or Other Monetary Authority: Assets held by the central bank or monetary authority are immune as they are essential for managing the state's monetary policy and financial stability.
4. Property Forming Part of the Cultural Heritage or Scientific Interest of the State: Properties that are part of the national cultural heritage or are of significant scientific interest are immune to preserve the state's cultural and scientific assets.

Besides, with regard to the significance of government property in the execution of foreign arbitral awards, it has huge importance in the satisfaction of claims of the awards-creditors. Against a sovereign State, enforcement of foreign arbitral award either necessarily commences with or culminates in attachment of property or assets belonging to the State<sup>9</sup>. Furthermore, the said enforcement trend is subjective to the type of property owned by the sovereign state that the

---

<sup>7</sup> Tope Adebayo LP. An Appraisal of Defense of Sovereign Immunity in the Enforcement of Foreign Arbitral Awards. (2023). [www.topeadebayolp.com](http://www.topeadebayolp.com).

<sup>8</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCIS) (adopted 2 December 2004, not yet in force) UNGA Res 59/38 (2 December 2004) art 10.

<sup>9</sup> Ibid.

judgement creditor seeks to attach in satisfaction of the judgement debt<sup>10</sup>. The state can have either commercial property or sovereign property. Enforcement against commercial properties and sovereign properties involves different legal considerations due to the distinct nature and status of these assets. This issue is deeply discussed in the following topics.

### **2.3. Legal Basis for Sovereign Immunity in the Context of Enforcement of Foreign Arbitral Awards**

This doctrine presents significant challenges in the context of state-investor arbitration, particularly regarding the enforcement of foreign arbitral awards. Understanding the legal basis for sovereign immunity in this context requires an exploration of various international conventions, judicial precedents, and scholarly literature that elucidate the complexities of this doctrine. Sovereign immunity is primarily based on customary international law, which recognizes the principle that states cannot be subjected to the jurisdiction of other states without their consent. This principle has been upheld in numerous cases and is widely accepted across different legal systems. The International Court of Justice (ICJ), have reinforced the principle of sovereign immunity. In *Germany Vs. Italy*, the Court held that the action of the Italian courts in denying Germany immunity constituted a breach of Italy's international obligations.<sup>11</sup>

Under the broad concept of sovereign immunity, a State cannot be subjected to the jurisdiction of the courts and tribunals of another State without the express agreement of the former State. Sovereign immunity from execution, as an element of the overarching concept of sovereign immunity,<sup>12</sup> precludes authorities of one State, from taking measures of constraint against the property of another State to satisfy the demands of creditors under court decisions, arbitral awards, and similar instruments<sup>13</sup>. In the investor-State arbitration context, the question of immunity from execution arises, depending on domestic law, at the stage of recognition and

---

<sup>10</sup> Molly Steele and Michael Heinlen, 'Challenges to Enforcing Arbitral Awards Against Foreign States in the United States' (2008) 42(1).

<sup>11</sup> Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99.

<sup>12</sup> Joseph W. Dellapenna, Book Review, The Law of State Immunity, 99 *Am. J. Int'l L.* 730 (2005).

<sup>13</sup> *Ibid.*

enforcement of an arbitral award against the respondent-State, or at the stage when execution against specific property of that respondent-State is sought<sup>14</sup>.

This doctrine has been widely applied in international law to protect states but, the question of whether sovereign immunity should be extended to the enforcement of foreign arbitral awards has been a subject of debate among scholars recently. On one hand, proponents of sovereign immunity argue that a state should not be forced to submit to the enforcement of a foreign arbitral award because it would violate its sovereignty. They argue that a state should only be held accountable for its actions through its own domestic courts, and not through foreign courts or tribunals. On the other hand, opponents of sovereign immunity argue that the enforcement of foreign arbitral awards is necessary for the development of international trade and commerce. They argue that the principle of sovereign immunity should not be used to shield a state from its contractual obligations, especially when it has voluntarily agreed to arbitrate disputes with private parties.

In recent years, there has been a trend toward limiting the scope of sovereign immunity in the enforcement of foreign arbitral awards. This trend is reflected in the New York Convention. Despite its brevity, the Convention is now widely regarded as “the cornerstone of current international commercial arbitration”. Article V of the New York Convention provides a framework and requires signatory states to enforce foreign arbitral awards, subject to certain limited grounds for refusal. Another important international instrument regarding the execution arbitral award against state parties is the United Nations Convention on Jurisdictional Immunities of States and Their Property (herein after referred to as “UNCISI”). UNCISI as was adopted by the UN General Assembly on December 2, 2004<sup>15</sup> with the purpose of enhancing the rule of law and providing legal certainty regarding the immunity of government properties, particularly in the dealings of states with natural or juridical persons.<sup>16</sup> UNCISI which has not yet entered into

---

<sup>14</sup> Ibid.

<sup>15</sup> Stewart David, 'The UN Convention on Jurisdictional Immunities of States and Their Property' [2005] 99(1) American Journal of International Law 1.

<sup>16</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not yet in force) UNGA Res 59/38 (2 December 2004), preamble.

force<sup>17</sup> has become a standard point of reference on questions of state immunity for courts, both national and international, and legal scholars serving as a catalyst for the development of the modern customary international law of state immunity.<sup>18</sup> The Convention outlines the conditions under which states and their property are immune from the jurisdiction of the courts of other states, with particular emphasis on the distinction between sovereign acts (*jure imperii*) and commercial acts (*jure gestionis*).<sup>19</sup>

These distinctions coupled with the debate among the scholars on the scope of sovereign immunity have led to two major theories, which are pivotal in determining the scope of immunity granted to states: absolute immunity and restrictive immunity. These doctrines provide contrasting views on whether and to what extent a state may be subject to legal proceedings. In the following sections, a detailed discussion of these two doctrines will be provided.

### **2.3.1. Immunity from Jurisdiction**

Immunity from Jurisdiction refers to the principle that a sovereign state cannot be subjected to the jurisdiction of foreign courts without its consent. In the context of investor-state arbitration, the arbitral tribunal cannot assume jurisdiction over the matter without consent of the state. This principle is enshrined in various legal texts and conventions, notably the UNSCI. Article 1 of this Convention clearly states that ‘a State enjoys immunity from the jurisdiction of the courts of another State,’ thereby emphasizing the non-justiciability of sovereign actions in foreign legal systems. The rationale behind this immunity lies in the respect for the sovereignty and equality of states, as well as the potential diplomatic repercussions that could arise from allowing one state to adjudicate the actions of another.

In the context of state-investor arbitration, immunity from jurisdiction poses significant challenges for investors seeking to hold states accountable for breaches of international investment agreements. For instance, when an investor initiates arbitration under a bilateral

---

<sup>17</sup> United Nations, ‘United Nations Convention on Jurisdictional Immunities of States and Their Property’ (UN Treaty Collection) [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=III-13&chapter=3&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=en) accessed 9 September 2024 at 9:27 PM.

<sup>18</sup> Roger O’Keefe, Christian J Tams, and Antonios Tzanakopoulos (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press 2013) 43

<sup>19</sup> Stewart (n 4) 3.

investment treaty (BIT), the state may invoke its immunity from jurisdiction to resist the proceedings. However, many BITs contain provisions that waive sovereign immunity, allowing investors to bring claims against host states in international arbitration forums. Its details are discussed in the following sections.

### **2.3.2. Immunity from Execution**

Immunity from execution, on the other hand, protects a sovereign state's assets from being seized or enforced against in foreign jurisdictions, even if a court has ruled against the state<sup>20</sup>. Article 19 of the UNSCI emphasizes that 'a State may not be subject to measures of constraint in the territory of another State in respect of its property'<sup>21</sup>. In state-investor arbitration, the issue of immunity from execution becomes particularly salient when an investor obtains an arbitral award against a state<sup>22</sup>. Even if the investor successfully proves its case and secures a favorable award, the ability to enforce that award against the state's assets may be severely limited by the doctrine of immunity from execution. While a state's claim for jurisdictional immunity may fail, there remains the potential for a plea of immunity from the execution of any subsequent award. The claimant foreign investor may overcome problems of jurisdiction, and the stresses of proceedings akin to a trial, only to find that the arbitration award cannot be executed against the host state opponent. However, this immunity is not absolute, and is considered waived, where a state has either agreed to arbitration, where the transaction is commercial, or both. Its detail is discussed in the following sections.

## **2.4. Legal Theories on State Immunity**

In the discussion of sovereign immunity, two major theories are pivotal in determining the scope of immunity granted to states: absolute immunity and restrictive immunity. These doctrines provide contrasting views on whether and to what extent a state may be subject to legal proceedings. In the following sections, a detailed discussions of these two doctrines are provided.

---

<sup>20</sup> Olajide David Ademola & Abogunrin Oluseye Temilorun, *Sovereign Immunity from Legal and Arbitral Proceedings and Execution from Assets of a State: The Evolving Paradigm*, (2023), SSRN, <https://ssrn.com/abstract=3718108>.

<sup>21</sup> UNSCI, *supra* note at 15.

<sup>22</sup> Leo J Bouchez, 'The Nature and Scope of State Immunity from Jurisdiction and Execution' (1979) 10 *Netherlands YB Intl L* 3, 4.

### 2.4.1. Absolute Immunity of the State

The concept of absolute immunity, which emerged in the early 19th century, was based on the understanding that the activities of states were limited to traditional functions such as legislation, national defense, administration, and state-to-state political relations.<sup>23</sup> Under this doctrine, a state was considered entirely immune from the jurisdiction of foreign courts, irrespective of the nature of the activity or circumstances.<sup>24</sup> This meant that even in cases where a state engaged in commercial or private dealings, its immunity remained intact, and its property, even if used for commercial purposes, could not be subjected to enforcement measures or legal claims in foreign jurisdictions.<sup>25</sup> This view was premised on the principle that sovereign states should not be subjected to the authority of another state, reflecting the need to preserve their sovereignty and independence.<sup>26</sup>

However, as the nature and scope of state activities evolved over time, particularly with the rise of international trade and cross-border economic interactions, the concept of absolute immunity began to be questioned.<sup>27</sup> Two major factors contributed to the decline of absolute immunity: (i) state activities increasingly having extraterritorial effects due to the growth of international relations, and (ii) the expansion of state involvement in economic and commercial affairs.<sup>28</sup> These changes highlighted the need for a more refined approach to state immunity that could differentiate between sovereign activities (*jure imperii*) and commercial or private activities (*jure gestionis*).<sup>29</sup>

The absolute immunity doctrine was however not without any exceptions.<sup>30</sup> A state could waive its immunity by consenting to local jurisdiction, either by explicitly agreeing to submit to the

---

<sup>23</sup> Ibid 6.

<sup>24</sup> Malcolm N Shaw, *International Law* (6th edn, Cambridge University Press 2008) 701.

<sup>25</sup> Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press 2012) 7.

<sup>26</sup> Matthew (n 25) 3.

<sup>27</sup> Leo (n 30) 7.

<sup>28</sup> Ibid.

<sup>29</sup> Katherine Reece Thomas, *The Commercial Activity Exception to State Immunity: An Introduction* (Edward Elgar Publishing 2024) 5.

<sup>30</sup> Xiaodong (n 33)10.

court's authority or by appearing as a defendant without objecting.<sup>31</sup> In addition, when a state acted as a plaintiff, it could not later claim immunity from counterclaims directly related to its principal action.<sup>32</sup> Another notable exception was with respect to immovable property. As immovable property is considered an integral part of the territory in which it is located, it has always been subject to the jurisdiction of the forum.<sup>33</sup>

These exceptions paved the way for the eventual development of the restrictive theory of immunity, which distinguished between sovereign acts (*acta jure imperii*) and commercial acts (*acta jure gestionis*).<sup>34</sup>

However, the absolute immunity has continued to be the primary approach to state immunity in some jurisdictions. For example, China still officially adheres to the absolute doctrine, despite having signed (but not ratified) the UNCSI in 2005.<sup>35</sup>

#### **2.4.2. Restrictive immunity of the state**

The late 20<sup>th</sup> century marked a significant shift in international law from the doctrine of absolute state immunity to the concept of restrictive immunity.<sup>36</sup> This transition was not immediate, but rather a gradual process, reflecting the evolving role of states in global commerce and the need for fair competition between states and private entities.<sup>37</sup> The restrictive theory provides that when a state acts as a private individual or engages in commercial activities, it should not be granted immunity, instead, the state must be subjected to the same legal liabilities as any private entity under similar circumstances.<sup>38</sup>

---

<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Katherine (n 37) 5.

<sup>35</sup> Wenhua Shan and Peng Wang, 'Divergent Views on State Immunity in the International Community' (2016) 61 Netherlands Intl L Rev 3.

<sup>36</sup> Katherine (n 37) 5.

<sup>37</sup> Zixin (n 28) 30.

<sup>38</sup> Ernest K Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer 2005) 7.

The rationale behind this shift is rooted in the principle of fairness.<sup>39</sup> When a state enters into business dealings or competes with private corporations, it would be inherently unjust if the state could claim immunity and avoid legal accountability, creating an imbalance in the marketplace.<sup>40</sup> The restrictive theory addresses this concern by drawing a clear distinction between acts that are inherently sovereign (*jure imperii*) and those that are commercial or private (*jure gestionis*).

Therefore, in the application of restrictive doctrine the distinction between sovereign acts, which continue to benefit from immunity, and non-sovereign acts, which do not is important.

In determining whether an act is sovereign or commercial, the focus is given to the nature of the act itself, rather than its purpose.<sup>41</sup> For instance, if a state engages in a commercial transaction or acts as a trader, its actions are considered *jure gestionis*, and it is not entitled to immunity. In contrast, activities related to executive, legislative, or international functions (*jure imperii*) remain protected.<sup>42</sup>

This restrictive theory's influence has increased and it is reflected in three major legislations that are produced since 1970s, namely the United States Foreign Sovereign Immunities Act, the European Convention on State Immunity (ECSI) and in the UNCSI in 2004.<sup>43</sup>

## 2.5. Waiver of Immunity

A sovereign state, or its properly authorized representative, may waive its immunity from international jurisdiction over disputes in an investment contract or BIT provision, by the incorporation of an arbitration clause with another party<sup>44</sup>. This express waiver simplifies adjudication on the issue should it subsequently arise. The waiver of immunity by a host sovereign state may also be implicit, through the engagement in a commercial transaction with a foreign investor, or the choice of arbitration as a method of dispute resolution; as it would be

---

<sup>39</sup> Leo (n 30) 4.

<sup>40</sup> Ibid.

<sup>41</sup> Malcom (n 32) 710.

<sup>42</sup> Katherine (n 37) 5.

<sup>43</sup> Tom Ruys, Nicolas Angelet, and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press 2019) 4.

<sup>44</sup> Nasser Mehsin Al-Adba, *The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance the Investment Relationship* (2014) (Ph.D. thesis, University of Manchester)

anomalous to claim sovereign immunity from suit where the state has previously opted for a particular arbitration service. This implicit waiver is recognized in customary international law, forming part of the practice of states in negotiated provision to regulate disputes under international conventions to which they are a signatory<sup>45</sup>. The following sections discuss this issue in details.

### **2.5.1. State Sovereign Immunity in the Context of State Commercial Activities:**

#### **Acta Jure Gestionis**

Historically, sovereign immunity was absolute, barring any legal action against a state regardless of the nature of its actions. This perspective has shifted toward a more restrictive approach, particularly as international trade and investment have expanded. The UNSCI reflects this evolution, establishing a framework that allows for exceptions to immunity in commercial contexts. Article 5 of the Convention specifies that a state cannot invoke immunity in proceedings related to “a commercial transaction” or “an act of commercial activity.” This distinction acknowledges that when a state engages in commercial activities, it does not act as a sovereign but as a market participant, thereby waiving its immunity. Additionally, scholars asserts that a state may not claim entitlement to immunity from jurisdiction or execution where property that is subject to the dispute is used for commercial purposes or where the claim arises out of a commercial transaction<sup>46</sup>.

The interplay between state immunity and investor rights has generated significant jurisprudence. In the case of *Abaclat and Others v. Argentine Republic*, the tribunal held that Argentina could not invoke sovereign immunity to avoid arbitration regarding its sovereign debt obligations, categorizing the issuance of bonds as a commercial act rather than a sovereign act<sup>47</sup>. This decision underscores the tribunal's recognition that states, when engaging in commercial activities, must adhere to the same legal obligations as private entities.

---

<sup>45</sup> Ibid.

<sup>46</sup> Nasser Mehsin Al-Adba, *Supra* note at 43.

<sup>47</sup> *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna A. Beccara and Others v. The Argentine Republic*) (2011).

### 2.5.2. State Sovereign Immunity in the Context of Arbitration Agreements

A state that enters into an arbitration agreement with a foreign investor will effectively find itself being treated like any other private party, required to comply with agreement obligations, and without the special status of sovereign and the privileges it confers. In giving effect to such terms as part of the initial negotiation process, it is expected that a state will accede to the submission of disputes to the appropriate tribunal, and comply with, if not accept its findings and awards. Contractual agreements are presumed to have been freely negotiated between parties, and the ICJ in the *Anglo-Iranian Oil Case* asserted that the refusal of a state to honor its previously accepted arbitration is “a grave violation of international law”.<sup>48</sup> This is a generally accepted principle; to the extent that refusal is considered ‘a denial of justice’<sup>49</sup>. Moreover, a claim that the relevant contract is itself void ab initio is no defense in such cases.

In the realm of investor-state arbitration, the issue of state sovereign immunity and its applicability to commercial activities is particularly salient. Under various BITs, states consent to arbitrate disputes that arise from investments made by foreign investors. This consent is typically framed within the context of the state’s commercial activities related to the investment. For instance, the International Centre for Settlement of Investment Disputes (ICSID) Convention, which governs many investment arbitration cases, explicitly allows for disputes arising from “an investment” to be settled by arbitration, thus implicitly addressing sovereign immunity<sup>50</sup>. Article 25 of the ICSID Convention defines “investment” broadly, encompassing a wide range of commercial activities, which can include contracts, loans, and other financial transactions.

To support the above analysis, let us examine the existing international and national laws governing immunity of government properties against execution of foreign arbitral awards. The following legal frameworks are landmark legal instruments that devise the precedents in regulating the scope of immunity of government property from the execution of foreign arbitral awards. The UNSCI, The European Convention on State Immunity of 1972, the USA Foreign

---

<sup>48</sup> *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, ICJ 2 (1952).

<sup>49</sup> Nasser Mehsin Al-Adba, *Supra* note at 43.

<sup>50</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

Immunity Act of 1976 and the Jurisdictional immunity of foreign states in Indian are briefly discussed in the following sections.

### **2.5.3. The 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property**

UNCSI is a landmark multilateral agreement that codifies the principles of sovereign immunity in international law. It represents the first modern effort to comprehensively address issues of sovereign immunity, particularly the immunity of states from the jurisdiction of foreign courts and from enforcement actions involving state-owned properties.<sup>51</sup>

UNCSI presents a set of provisions that contribute to the uniformity of state practices toward state immunity that both the International Law Commission (ILC) and the UN General Assembly expected would be acceptable to the international community.<sup>52</sup> However, as discussed above this draft convention is yet to enter into force.

The Convention establishes restrictive immunity as the dominant doctrine in international law, which marks a significant departure from the traditional notion of absolute state immunity.<sup>53</sup>

Accordingly, under the UNCSI states generally enjoy immunity from foreign jurisdiction and execution, without the prejudice to the exceptions provided under the convention.<sup>54</sup> This contrasts with the earlier doctrine of absolute immunity, where states were immune from all foreign legal proceedings regardless of the nature of their activities.<sup>55</sup>

The UNCSI addresses immunity from execution proceeding in connection with court proceedings, including the enforcement of foreign arbitral awards between articles 18–21.

---

<sup>51</sup> Aman (n 61) 39.

<sup>52</sup> Zixin (n 28) 47.

<sup>53</sup> Roger (n 7) 45.

<sup>54</sup> UNCIS (n 9) Art. 5.

<sup>55</sup> Ylli Dautaj, 'Sovereign Immunity from Execution of Foreign Arbitral Awards in India: The "New" Kid on the (Super) Pro-Arbitration Block' (2021) 38(1) J Intl Arb 5.

According to Article 19, a state's property is generally immune from enforcement measures unless certain conditions are met.<sup>56</sup>

The first exception to this general rule is consent of the state party. Accordingly, if the state award-debtor consents to the execution proceeding the award-creditor can proceed to the execution measures.<sup>57</sup> This consent can be manifested in the following manners:<sup>58</sup>

- I. international agreement;
- II. by an arbitration agreement or in a written contract; or
- III. by a declaration before the court or by a written communication after a dispute between the parties has arisen;

In addition, the UNCSI provides an important exception to this rule. If the state's property is used or intended to be used for non-sovereign, commercial purposes, enforcement actions may be taken without the state's consent.<sup>59</sup> In such cases, the property must be located within the territory of the forum state, and there must be a connection between the property and the claim being enforced.<sup>60</sup>

Therefore, the restrictive theory adopted by the Convention acknowledges that states should not be granted immunity for commercial or non-sovereign activities (*jure gestionis*). However, immunity is preserved for activities related to core sovereign functions, this is shown under article 21 of the UNCSI, which lists down the specific categories of properties which shall not be considered as a property specifically in use or intended for use by state in commercial activity and thus immune from any enforcement actions thereto:<sup>61</sup>

- (a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts,

---

<sup>56</sup> Said Mahmoudi, 'Immunities of Foreign States' Property against Attachment: Recent Practice of the Swedish Courts' (1992) 61 *Nordic J Intl L* 2.

<sup>57</sup> UNCIS (n 9) Art. 19.

<sup>58</sup> *Ibid* Art.19 (a).

<sup>59</sup> *Ibid* Art. 19 (c).

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid* Art. 21.

special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;

- (b) property of a military character or used or intended for use in the performance of military functions;
- (c) property of the central bank or other monetary authority of the State;
- (d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;
- (e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.

The UNCSI represents an effort to consolidate and harmonize divergent state practices regarding sovereign immunity.<sup>62</sup> Prior to the Convention, national laws varied significantly in their treatment of immunity from execution, leading to inconsistent outcomes in international legal disputes.<sup>63</sup> By establishing a uniform legal framework, the UNCSI provides clarity and predictability for states and private entities alike when dealing with issues of enforcement against state-owned assets.

#### **2.5.4. The European Convention on State Immunity of 1972**

The European Convention on State Immunity (herein after referred to as “ECSI”) was the first attempt to put in legislative a legislative for state immunity.<sup>64</sup> ECSI is a foundational legal instrument that establishes rules for the sovereign immunity of states, particularly in relation to adjudication and enforcement proceedings.<sup>65</sup> Structured into five parts, the ECSI outlines the circumstances under which foreign states can claim immunity from the jurisdiction of courts in another state, and when exceptions to this immunity can be applied.<sup>66</sup> The aim of ECSI was to secure to individuals the protection of law in their private law claims against States.<sup>67</sup>

---

<sup>62</sup> Zixin (n 28) 46.

<sup>63</sup> Ibid.

<sup>64</sup> Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, Oxford University Press 2013) 267.

<sup>65</sup> Zixin (n 28) 46.

<sup>66</sup> Hazel (n 80) 23.

<sup>67</sup> European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) ETS No 74, art 23.

The ECSI takes a more absolute stance on immunity from enforcement of judgement or arbitral awards.<sup>68</sup> Article 23 of the Convention expressly states that no execution measures, such as the attachment or confiscation of property, can be taken against the property of a contracting state unless the state has given its written consent.<sup>69</sup> This provision reaffirms the principle of state sovereignty by ensuring that state-owned properties, especially those used for governmental purposes, remain protected from enforcement actions, unless the consent of the government is obtained in the first place.<sup>70</sup>

In addition, ECSI addresses the different opinions of governments regarding how one state's courts can enforce judgments and arbitration awards against the property of another state through two key mechanisms.<sup>71</sup>

First, the successful party in a dispute can request enforcement in the courts of the state that has not complied with the judgment. However, the execution of the judgment is governed by that state's domestic laws (as detailed in Articles 21 and 22). This means that while enforcement can be pursued, the specific methods and processes are left to the legal system of the state in question.<sup>72</sup>

Second, the Convention introduces an optional regime that allows for execution of judgments in certain cases. This applies specifically to judgments related to commercial or industrial activities that do not fall under state immunity. Under this regime, the judgment can be executed against the property of the state if that property is used exclusively for commercial purposes.<sup>73</sup> Article 26 specifies that these judgments may be notified to the Secretary-General of the Council of Europe, and the property used solely for commercial activities can be targeted for enforcement without reopening the merits of the original judgment.<sup>74</sup>

---

<sup>68</sup> Said (n 72) 43.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Hazel (n 80) 267.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

Furthermore, The Convention under article 24 allows contracting states to make a special declaration either when signing or ratifying the Convention, or at any time afterward, by notifying the Secretary General of the Council of Europe. This provision provides flexibility for members states to apply restrictive principles of state immunity, to extend their domestic laws on immunity within the framework of the Convention, without undermining the core principles of sovereign immunity for governmental acts.<sup>75</sup>

#### **2.5.5. The U.S. Foreign Sovereign Immunities Act of 1976 (FSIA)**

The Foreign Sovereign Immunities Act of 1976 (herein after referred to as “**FSIA**”) is a key piece of U.S. legislation that establishes the parameters for when a foreign sovereign state may be subject to legal action in U.S. courts.<sup>76</sup> It reflects a restrictive approach to sovereign immunity, limiting the extent to which foreign states and their property can claim immunity from jurisdiction and execution.<sup>77</sup> Over time, the FSIA has been amended to further narrow the scope of immunities extended to foreign states, particularly concerning commercial activities.<sup>78</sup>

FSIA under section 1609 grants state property immunity against execution and attachment.<sup>79</sup> However, Section 1610(a) provides several exceptions that allow for the execution of judgments against the property of foreign states.<sup>80</sup> One of the most notable exceptions is the "commercial activity" exception, which applies when the property is or was used in connection with the commercial activity that gave rise to the claim.<sup>81</sup> This means that property linked to non-sovereign functions, such as trade or business activities, can be subject to enforcement measures in the U.S.

---

<sup>75</sup> Ibid.

<sup>76</sup> George (n 55) 672.

<sup>77</sup> Said (n 72) 43.

<sup>78</sup> Ibid.

<sup>79</sup> Molly (n 16) 91.

<sup>80</sup> Giorgio (n 59) 2.

<sup>81</sup> Matthew (n 25) 4.

Another important exception under Section 1610(a) is the "waiver" exception, which applies when a foreign state explicitly or implicitly waives its immunity.<sup>82</sup> A waiver of immunity can facilitate the execution of an arbitral award against a state's commercial property in the U.S.

Despite its restrictive nature, FSIA preserves absolute immunity for certain categories of state property.<sup>83</sup> Diplomatic assets, central bank reserves, and military property enjoy additional protections.<sup>84</sup>

#### **2.5.6. Jurisdictional Immunity of Foreign States in India**

India does not have a comprehensive statute governing foreign state immunity. Instead, Section 86 of the Code of Civil Procedure (herein after referred to as "CCP") serves as the primary legal provision addressing the jurisdictional immunity of foreign states.<sup>85</sup>

Section 86 of the CCP provides that a foreign state can only be sued in Indian courts if the Central Government consents to such a lawsuit.<sup>86</sup> This consent requirement makes India's approach to sovereign immunity distinct, as it combines domestic legal authority with the discretion of the executive branch. When consent is granted, a foreign state cannot invoke the doctrine of sovereign immunity as a defense, even if that immunity would ordinarily apply under international law.<sup>87</sup>

In India, the legal framework for enforcing judgments or arbitral awards against foreign state assets is less developed. There is no specific law that addresses the execution of judgments against foreign state property, and the consent of the Central Government remains a critical factor in such cases.<sup>88</sup>

---

<sup>82</sup> Giorgio (n 59) 4.

<sup>83</sup> Ibid 8.

<sup>84</sup> Ibid.

<sup>85</sup> K I Vibbute, 'Transnational Trade Transactions of a Foreign State and Sovereign Immunity in India: An Appraisal' in Ko Swan Sik, MCW Pinto and JJG Syatauw (eds), *Asian Yearbook of International Law*, Volume 3 (1993) (Brill 1994) 48.

<sup>86</sup> Ibid

<sup>87</sup> Ibid

<sup>88</sup> Ingrid (n 52) 7

## **CHAPTER THREE: LEGAL FRAMEWORK FOR EXECUTION OF FOREIGN ARBITRAL AWARDS AGAINST GOVERNMENT PROPERTIES IN ETHIOPIA**

### **3.1. Introduction (Overview of Government Immunity in Arbitration)**

Sovereign immunity is a legal doctrine that protects a state and its properties from being subjected to the jurisdiction of foreign courts without consent<sup>89</sup>. In the context of foreign arbitral awards, this principle poses significant challenges when attempting to execute such awards against government properties. Under this doctrine, government properties are generally exempt from enforcement actions, as the state is considered immune from legal processes initiated by private parties.

In Ethiopia, the application of sovereign immunity can complicate the enforcement of foreign arbitral awards. While international conventions, such as the New York Convention, encourage the recognition and enforcement of arbitral awards, they also acknowledge the sovereign immunity of states<sup>90</sup>. This means that even if an arbitral award is valid, the state's properties may remain protected unless explicit exceptions apply. These exceptions often revolve around commercial activities or consent to arbitration, which may not always be present in governmental contexts.

Hence, this chapter delves into the complexities of enforcing foreign arbitral awards against government properties in Ethiopia. Through examining the legal framework, definitions, and regulatory aspects of government immunity, the chapter provides a comprehensive understanding of the barriers to enforcement. Additionally, the inclusion of case studies offers practical insights into how these legal principles operate in real-world scenarios. Ultimately, this chapter aims to identify the position of Ethiopia in its approach to execute foreign arbitral awards against its government properties.

---

<sup>89</sup> Emmanuel Gaillard, Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles, 2001, 15 Int'l Arb. Rep. A-1.

<sup>90</sup> Tecele Hagos Bahta, Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia, 5 Mizan Law Rev. 106-108 (2011).

### **3.2. Definition and Nature of Government Properties in Ethiopia**

Government Property refers to all properties that are owned or leased to the Government, this includes the properties that are under the title of the federal, state, local government or any of its subdivisions, agencies, or instrumentalities.<sup>91</sup>

Even though the Ethiopian law does not explicitly define government properties, the Ethiopian Federal Government Procurement and Property Administration Proclamation (Herein after referred to as “Procurement Proclamation”) provides the definition of public property as follows: “any property of the Federal Government other than public fund and land.”<sup>92</sup>

The Ethiopian law has followed a narrow approach to the definition of public property by excluding public funds and land. The implementation of this definition means that when executing a judgment or foreign arbitral award against the government, public funds and land could be excluded from attachment, thereby protecting critical financial and land resources from potential claims. This definition can be considered as aligning with the Constitution of the country, particularly concerning the regulation of land. The Federal Democratic Republic of Ethiopia's Constitution vests the ownership of land as the common property of the Nations, Nationalities, and Peoples of Ethiopia<sup>93</sup>, which underscores the strategic importance of land as a national asset that cannot be subjected to individual claims or foreign arbitral awards.

This broader constitutional framework ensures that land remains a protected resource for the collective benefit of all Ethiopian people, reinforcing the state's sovereignty over this crucial asset. By excluding public funds, the Procurement Proclamation also safeguards the financial stability of the government, ensuring that essential public services and governmental functions are not disrupted by the enforcement of arbitral awards.

---

<sup>91</sup>Douglas N. Goetz, “The Classification of Government Property under the New FAR Part 45 Rewrite,” 19 PROPERTY PROFESSIONAL 3 (2019).

<sup>92</sup> The Ethiopian Federal Government Procurement and Property Administration Proclamation, 2009, Art. 2 (21), Proc. No. 649, Neg. Gaz. Year 15, No. 60.

<sup>93</sup> Constitution of the Federal Democratic Republic of Ethiopia, 1995, Art. 40 (3), Proclamation No. 1, Neg. Gaz. Year 1, No. 1.

### **3.3. Legislative Framework for Enforcement of Foreign Arbitral Awards in Ethiopia**

#### **3.3.1. Legal Definition of Foreign Arbitral Awards Under Ethiopian Law**

Before proceeding to directly address the issue of legal framework governing enforcement of foreign arbitral award in Ethiopia, it is important to know the meaning of foreign arbitral award itself. This is an issue of essential importance because the whole issue of enforcement, from its inception, centers on whether an award is national or foreign. To put it in other words, enforcement of foreign arbitral awards involves the crucial preliminary decision of whether an arbitral award should be qualified as foreign or as domestic. If it qualifies to be a foreign award, its enforcement is subject in various states to various conditions<sup>94</sup>. Hence, one may ask the question what do we mean by ‘foreign arbitral award’? When is an arbitral award said to be ‘foreign’?

The term ‘foreign arbitral award’ has been expressly defined under the Arbitration and Conciliation Working Procedure Proclamation no. 1237/2021<sup>95</sup>. The proclamation under article 2(8) defined foreign arbitral award as *an arbitral award which is deemed to have been rendered in a foreign country in accordance with international treaties acceded and ratified by Ethiopia or a decision in which the seat of arbitration is mentioned to be outside of the Ethiopian territory.*

The definition of “foreign arbitral award” provided in Article 2(8) of the Proclamation establishes clear parameters for identifying awards that qualify as foreign. This definition incorporates two main criteria:

#### *a) Geographic Criterion*

The phrase “rendered in a foreign country” establishes a clear geographic boundary. This criterion specifies that only those awards made outside of Ethiopia can be classified as foreign.

---

<sup>94</sup> Hailegabriel G. Feyissa, The Role of Ethiopian Courts in Commercial Arbitration, 4(2) Mizan Law Rev. 298 (2010).

<sup>95</sup> Proclamation No. 1237/2021, Arbitration and Conciliation, Working Procedure Proclamation, 27<sup>th</sup> Year, No. 21, 2nd April 2021, Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia, 1237 F.N.G. 13051 (2021).

This distinction is essential for determining which awards are subject to international arbitration norms versus those governed by domestic arbitration laws. Hence, the seat of arbitration must be explicitly stated as being outside of Ethiopian territory.

Furthermore, the criteria which requires that the seat of arbitration be mentioned as outside Ethiopian territory, reinforces the notion of territoriality in arbitration. Through stipulating that the seat must be foreign, the definition distinguishes between domestic and foreign awards, thereby providing clarity on jurisdictional matters.

*b) Compliance with International Treaties Criterion*

The definition also highlights that foreign arbitral awards must be rendered in accordance with international treaties that Ethiopia has acceded to and ratified. This aspect underlines the importance of adhering to recognized international standards, which enhances the credibility and enforceability of the awards. It implies that awards must not only originate from abroad but must also align with the legal frameworks that Ethiopia has committed to at the international level.

When we review the provisions of the Ethiopian law in reference to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Herein after referred to as “the New York Convention”) we find similar parameters. Article (1) of the New York Convention, which Ethiopia has ratified, distinguishes between two types of arbitral awards that qualify as foreign arbitral awards.<sup>96</sup> First, awards “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought” are treated as foreign.<sup>97</sup> Second, awards that are “not considered as domestic awards in the State where their recognition and enforcement are sought” also fall under the category of foreign arbitral awards.<sup>98</sup> Therefore, Article 2 (8) of Ethiopia's Arbitration and Conciliation Working Procedure Proclamation mirrors international arbitration standards, particularly those established by the New York Convention. It provides a

---

<sup>96</sup> Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958: Article-by-Article Commentary* (2nd edn, Hart Publishing 2019) 57.

<sup>97</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, 330 UNTS 3, art 1.

<sup>98</sup> *Ibid.*

clear framework for recognizing and enforcing foreign arbitral awards based on the seat of arbitration and the relevant international treaties to which Ethiopia is a party.

Besides, one can ask whether these criteria are cumulative or not. Regarding whether the criteria are cumulative, it can be understood that they are indeed cumulative in nature. Both conditions must be satisfied for an arbitral award to be classified as a “foreign arbitral award.” An award that meets only one of the criteria, either being rendered in a foreign country or having a foreign seat of arbitration, would not qualify as a foreign arbitral award under this definition. This cumulative requirement emphasizes the need for both factors to jointly establish the foreign status of an arbitral award, reflecting a comprehensive approach to cross-border arbitration issues in Ethiopia.

The enforcement of foreign arbitral awards in Ethiopia is governed by a variety of legal frameworks. This multiplicity arises from the ratification of international convention and domestic legislation. As it stands, creditors holding foreign arbitral awards have several avenues available to them for enforcing these awards within the Ethiopian legal system. They can pursue enforcement under one of the following specific laws, each of which may have different requirements and procedures. This multi-faceted approach ensures that foreign arbitral awards can be recognized and enforced, thus providing a degree of legal certainty for international investors and parties engaged in cross-border transactions. The following sections discuss those avenues in detail.

### **3.3.2. Enforcement under the New York Convention**

The Ethiopian Parliament has recently ratified the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards,” commonly known as the “New York Convention,” through Proclamation No. 1184/2020. According to the Convention, state parties are required to recognize and enforce arbitral agreements, including arbitration clauses. Furthermore, ordinary courts are barred from exercising jurisdiction over the merits of the case, ensuring that disputes are resolved through arbitration as agreed upon by the parties<sup>99</sup>. Additionally, foreign arbitral

---

<sup>99</sup> See Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), Art. II (1), (2), (3).

awards must be enforced in the same manner as domestic arbitral awards, except in exceptional circumstances recognized by the Convention<sup>100</sup>.

Through ratifying the Convention, Ethiopia commits to fulfilling both the obligations explicitly mentioned and those implied within its framework. This ratification signifies a significant step towards aligning Ethiopian arbitration practices with international standards, thereby promoting greater legal certainty and predictability in international commercial relations. As a result, several previously contentious issues that have been the subject of debate among legal scholars and practitioners are now addressed by the terms of the Convention.

For instance, the Ethiopian Supreme Court’s cassation bench had previously issued a ruling that rejected parties’ agreements designating the outcome of arbitration as final. In this decision, the cassation bench argued that its authority, as granted by the FDRE Constitution and reinforced by the “Federal Courts Proclamation Re-Amendment Proclamation No. 454/1997,” could not be restricted by a clause asserting the finality of arbitration<sup>101</sup>. This perspective raised concerns about the potential for judicial interference in arbitration outcomes, undermining the principle of party autonomy that is central to arbitration. However, following Ethiopia’s ratification of the Convention, this power of cassation may now be regarded as limited, at least concerning cases that fall within the Convention’s scope of application.

Besides, Ethiopia has adopted the Convention with three specific reservations that outline the conditions of its application. First, the Convention will only apply to the recognition and enforcement of arbitral awards that are made within the territory of another contracting state. This means that Ethiopia will not recognize or enforce awards from states that are not parties to the Convention, thus limiting its international arbitration scope. Second, the application of the Convention is restricted to disputes arising from legal relationships classified as “commercial” under Ethiopian law. This reservation ensures that the benefits of the Convention are confined to commercial matters, thereby excluding other non-commercial disputes that may be suitable for arbitration. Finally, the Convention will not have any retroactive effect, meaning it will only

---

<sup>100</sup> *Id.* Art I and V

<sup>101</sup> National Mineral Corporation PLC V. Dani Drilling PLC, Federal Supreme Court Cassation Bench, File Number 42239, year 2010.

apply to awards rendered after its ratification. This reservation safeguards previous arbitration agreements and awards from being impacted by the new provisions established by the Convention, thus maintaining the integrity of prior legal situations. Collectively, these reservations reflect Ethiopia's commitment to engaging with international arbitration while ensuring that the application aligns with its existing legal framework.

### **3.3.3. Enforcement Under the Arbitration and Conciliation Working Procedure**

#### **Proclamation No. 1237/2021**

Ethiopia has adopted a comprehensive Arbitration and Conciliation Working Procedure under Proclamation No. 1237/2021 (hereafter referred to as “the Proclamation”), which became effective upon its publication in the Federal Negarit Gazette on April 2, 2021. This significant legislative development marks a pivotal shift in Ethiopia's approach to alternative dispute resolution, as the Proclamation repeals the arbitration and conciliation provisions previously established in the Civil Code and the Civil Procedure Code.

Furthermore, the Proclamation empowers arbitral tribunals to determine the existence or non-existence of a valid arbitration agreement between contracting parties. This includes the authority to assess whether they have jurisdiction over the matters at hand. The Proclamation also recognizes the principle of severability, which states that if certain terms of an arbitration agreement are deemed illegal or unenforceable, the remaining terms will still remain in effect. Additionally, if the main agreement containing an arbitration clause becomes null or void, the arbitration clause itself will not be rendered invalid. This clarification eliminates any ambiguity for parties wishing to include arbitration clauses in their contracts, providing them with greater confidence in the enforceability of their agreements and the arbitration process itself.

It should be noted that the proclamation is only applicable for foreign arbitral awards concerning commercial matters. This is because article 3 (1) of the proclamation outlines the scope of application for the Proclamation as “*without prejudice to the International Treaty to which Ethiopia is a signatory, this Proclamation shall apply to commercial related national arbitration, international arbitration whose seat is in Ethiopia ...*”

As we can understand from the reading the provision of the proclamation, there are three elements in this definition; namely, “...without prejudice to international treaties to which

Ethiopia is a signatory”, “...commercial related national arbitration...” and “...international arbitration with seat in Ethiopia...”. These elements worth elaborations. The phrase “...without prejudice to the International Treaty to which Ethiopia is a signatory” indicates that the Proclamation respects and does not override any existing international treaties that Ethiopia has ratified. This ensures that any obligations or standards set forth in these treaties take precedence over the Proclamation’s provisions when applicable.

Concerning the second element the Proclamation explicitly applies to national arbitration that is commercially related. This means that domestic arbitration proceedings that involve commercial disputes will be governed by the rules established in the Proclamation, providing a clear legal framework for resolving such issues efficiently. Regarding the third element, it indicates that the provision extends the Proclamation’s applicability to international arbitration where the seat (or legal jurisdiction) is located in Ethiopia. This is significant because it positions Ethiopia as a viable venue for international arbitration, encouraging foreign parties to choose Ethiopia as a location for resolving disputes.

Moreover, the proclamation stipulated conditions under which the foreign arbitral awards can be enforced in Ethiopia. Article 53(1) of the proclamation states that “*where a foreign arbitral award falls under International Treaties ratified by Ethiopia, it may be recognized or enforced in accordance with such treaties*”. This provision indicated that foreign arbitral awards falling under international treaties ratified by Ethiopia may be recognized or enforced according to those treaties. Potential questions that arise here may include: What types of treaties does this sub-article refer to? Has the Ethiopian government ratified any similar treaties to date?

These treaties encompass bilateral or multilateral agreements endorsed for purposes such as judicial cooperation between the participating states<sup>102</sup>. They consist of treaties already ratified by Ethiopia or those that may be ratified in the future. As of now, Ethiopia has not ratified any such bilateral or multilateral treaties, except for the Judicial Assistance Treaty signed with Djibouti<sup>103</sup>. Nevertheless, it remains ambiguous whether the enforcement of foreign arbitral awards falls

---

<sup>102</sup> Tecele Hagos Bahta, the Ratification of the New York Convention in Ethiopia: Towards Efficacy and Avoidance of Divergent Paths, 15 Mizan Law Review 493 (2021).

<sup>103</sup> A Proclamation to Ratify the Treaty on Judicial Assistance between the Transitional Government of Ethiopia and Djibouti, 31 May 1995.

under the scope of the aforementioned Judicial Assistance Treaty. This treaty primarily addresses the mutual recognition and enforcement of judgments and other forms of evidentiary assistance between the two nations.

- **Grounds Under which Foreign Arbitral Awards May not be Enforced Under the Proclamation**

Sub-Article 2 of article 53 of the proclamation outlines specific grounds upon which a foreign arbitral award may not be recognized or enforced, providing essential safeguards to ensure that the arbitration process aligns with both international standards and domestic legal principles. The first ground emphasizes the necessity of reciprocity; that is, Ethiopia will only recognize awards from jurisdictions that extend similar recognition to Ethiopian awards. This requirement aims to maintain a balanced approach to international arbitration and protect national interests.

The second ground addresses the validity of the arbitration agreement and the legitimacy of the tribunal. If an award is based on an invalid arbitration agreement or was rendered by a tribunal not established according to the laws of the country where it was issued, it cannot be enforced. This clause ensures that parties are not bound by awards lacking a proper legal foundation. The third ground stipulates that an award must be enforceable under Ethiopian law, further ensuring that local legal standards are respected.

Moreover, Sub-Article 2 includes provisions to protect the rights of the parties involved in the arbitration process. For instance, if one party did not have equal rights in appointing arbitrators or in presenting evidence, the award may be deemed unenforceable. This emphasizes the importance of due process and fairness in arbitration. Additionally, the provision regarding arbitrability ensures that the subject matter of the dispute must be appropriate for arbitration under Ethiopian law.

Finally, the clause that allows for non-enforcement of awards that contravene public policy, morals, or security serves as a necessary safeguard to protect national interests and societal values. This aligns with common practices in many jurisdictions, ensuring that international arbitration does not undermine local laws.

Sub-Article 3 clarifies the procedural aspect by stating that applications for the enforcement of arbitral awards, as outlined in Sub-Articles 1 and 2, must be submitted to the Federal High Court. This creates a clear legal pathway for enforcement, ensuring that such applications are addressed by a competent judicial authority.

#### **3.3.4. Enforcement Under the Civil Procedure Code Under Article 458-461**

The provisions of the Civil Procedure Code (CPC) are pertinent to the enforcement of arbitral awards, regardless of whether these awards pertain to civil or commercial disputes. This broad applicability underscores the importance of the CPC in governing arbitration processes and ensuring that awards are effectively enforced.

Article 461 of the CPC specifically addresses the enforcement of foreign arbitral awards; however, it has been repealed by the recent proclamation<sup>104</sup>. Notably, this new proclamation is limited in scope, as it applies exclusively to commercial matters. This raises a crucial question: does the repeal of Article 461 affect its application to civil matters? Currently, it remains unclear whether the provisions for the enforcement of foreign arbitral awards in civil cases are still valid. In this regard, it can be argued that Article 461 should continue to be applicable to avoid leaving the enforcement of foreign arbitral awards in civil matters in a state of uncertainty<sup>105</sup>. Without a clear legal framework, parties involved in civil disputes could find themselves unable to enforce arbitral awards effectively, which could undermine the integrity and reliability of the arbitration process.

Furthermore, the arbitral rules outlined in the CPC, including Article 461, are expected to remain relevant for the foreseeable future. This is envisaged with no equivocation under article 77 of the proclamation of Arbitration and Conciliation which deals with the transitional provisions<sup>106</sup>.

---

<sup>104</sup> See Art. 78(2) of the Proclamation.

<sup>105</sup> Tecele Hagos Bahta, *Supra* note 16.

<sup>106</sup> Article 77 of the Arbitration and Conciliation Working Procedure Proclamation No. 1237/2021 states that (1) “Any arbitration agreement signed before the coming into force of this Proclamation shall be governed by the law that had been in force before the effective date of this Proclamation. (2) Arbitral proceedings initiated before the coming into force of this Proclamation or cases of arbitration pending before courts, ongoing proceedings and execution of decisions shall be governed by the law in force before the coming into force of this Proclamation. (3)

Article 77 of the Proclamation is indeed a signpost for arbitrating parties to cautiously pay heed of the date on which the Proclamation enters into force, which is 2 April 2021. The 2<sup>nd</sup> day of April 2021 is an important cutoff date for all arbitration agreements and arbitral awards which straddle the dates prior to and post the entry into force of the Arbitration and Conciliation Proclamation No.1237/2021.

This also shows that article 461 will have a far-reaching repercussion in the future, not only in its application to commercial matters, as enumerated under article 77 of the proclamation but also in so far as non-commercial matters are concerned. Thus, unless the conditions for the recognition and enforcement of foreign arbitral awards on civil matters are set out by legislative dispensation in the foreseeable future, there is no doubt that Art. 461 of the Civil Code will continue to apply.

In the light of this, an award-creditor may have a spectrum of choices based on which the party may seek for the recognition and enforcement of an arbitral award. In this regard, the following options should be carefully trodden upon by the award-creditor:

- a) For arbitral awards made prior to 22 November 2020 (the date of entry into force of the New York Convention in Ethiopia), one has to rely solely on Arts. 458-461 of the Civil Procedure Code on the recognition and enforcement of foreign arbitral awards.
- b) For arbitral awards made post 22 November 2020, an award-creditor may have the option of resorting to the provisions of the New York Convention or to the domestic rules on the recognition and enforcement of foreign arbitral awards, where the latter are more favorable terms for the party seeking recognition and enforcement of the arbitral award.
- c) For arbitral awards made post 2 April 2021 (the date of entry into force of the new Arbitration and Conciliation Proclamation No.1237/2021), an award-creditor may have the options of choosing between enforcement under the terms of the New York Convention or under the terms of the new Arbitration and Conciliation Proclamation, whichever is the more favorable regime for the enforcement and recognition of the arbitral award.

---

Contracting parties who have concluded arbitration agreement or in the process concluding an agreement before the coming into force of this Proclamation may agree to be governed by this Proclamation.”

As indicated above, because of the ‘commercial reservation’ entered into in Ethiopia, commercial arbitral awards are divided into three; namely, ‘foreign arbitral awards’, ‘non-domestic arbitral awards’ and ‘domestic arbitral awards.’ Domestic arbitral awards find no application under the New York Convention. Therefore, domestic arbitral awards (concerning both commercial and civil matters), foreign and non-domestic arbitral awards concerning civil matters, and foreign arbitral awards made in non-convention states (concerning both commercial and civil matters) are subject to the conditions set out either under the Civil Procedure Code or the Arbitration and Conciliation Proclamation. This is due to the international nature of the New York Convention and the two reservations registered by Ethiopia in ratifying the Convention.

### **3.4. Regulation of Immunity of Government Properties from Execution of Foreign Arbitral Awards in Ethiopia**

The regulation of immunity of government properties from the execution of foreign arbitral awards is a significant aspect of international arbitration law and public international law. In Ethiopia, this issue is particularly salient given the country’s engagement with international treaties and increasing foreign investments. Understanding the legal framework governing this immunity is essential for both domestic and international entities operating in Ethiopia.

As discussed in the previous sections, Ethiopia’s legal framework regarding the execution of foreign arbitral awards is rooted in both domestic law and international treaties. These include the Arbitration and Conciliation Proclamation No. 1237/2021, the Civil Procedure Code and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In addition to these laws different Bilateral Investment Treaties (BITs) signed between foreign countries and Ethiopia are also relevant. Let us look at whether the immunity of government property against execution of foreign arbitral award is regulated or not under each of these instruments below:

#### **3.4.1. The Civil Procedure Code Provisions and Proclamation No. 1237/2021**

As discussed in the previous section, the proclamation applies only to commercial related arbitrations. Furthermore, Article 461 of the civil procedure code applies to the enforcement of foreign arbitral awards in civil matters. Article 53 (2) of the proclamation outlines specific grounds on which a foreign arbitral award may not be recognized or enforced. This provision provides essential safeguards to ensure that the arbitration process adheres to both international

standards and domestic legal principles. The grounds include reciprocity, the validity of the arbitration agreement, the legitimacy of the tribunal, due process, enforceability of the awards, non-arbitrability, and public policy and morality. Among these grounds, the issues of unenforceability and non-arbitrability under Article 53(2)(c) and (e) warrant further discussion.

Article 53(2)(c) states that “*the arbitral award rendered cannot be enforced in accordance with Ethiopian law*” now, one may ask that does it mean by “the arbitral award rendered cannot be enforced”? What does ‘the condition laid down in Ethiopian laws’ refer to? To determine the significance of the term ‘cannot be enforced’, let us consider what the nature of an award may look like. A final award may come up with one or more of the following remedies:<sup>107</sup> monetary compensation, punitive damages or exemplary damages, specific performance, injunctive relief, declaratory relief, interest, costs, etc. Now, assuming that the foreign arbitral award imposes specific performance against the award-debtor. To determine whether Ethiopian courts can enforce this award or not we have to see the conditions under which ‘specific performance may be enforced under Ethiopian laws. Such conditions are stipulated under the civil code. In this regard, the conditions for ordering specific performance as laid down under Art.1776 of the Civil Code states that “*Specific performance of a contract shall not be ordered unless it is of special interest to the party requiring it and the contract can be enforced without affecting the personal liberty of the debtor*”. From the reading of the above legal provision, Ethiopian courts cannot not enforce a foreign award granting specific performance if it affects the personal liberty of the award-debtor. Moreover, in the event that a dispute arising from an administrative contract is resolved by means of arbitration, Ethiopian courts cannot recognize and enforce an award granting specific performance against an administrative authority as specific performance remedies against an administrative authority cannot be ordered under Art. 3194 of the Civil Code<sup>108</sup>.

---

<sup>107</sup> Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed., Sweet & Maxwell 1999).

<sup>108</sup> See the non-applicability of specific performance remedies against an administrative authority under Art. 3194 of the Civil Code, a provision under Title XIX of the Civil Code (Arts.3131-3306 of CC) that deals with Administrative Contracts.

Now, let us analyze this situation from the perspective of a foreign arbitral award directed at the Ethiopian government as the award-debtor state. The primary question is whether Ethiopian courts can enforce an arbitral award that imposes pecuniary awards against the award-debtor against the government. To address this, the courts must thoroughly examine domestic laws concerning sovereign immunity, particularly regarding the execution of state-owned property or accounts. This is especially relevant in cases where the award-debtor is the state itself, state entities, state-owned enterprises (SOEs), or business organizations in which the government holds a majority or minority stake.

A key point of inquiry is whether Ethiopia has enacted any domestic legislation that specifically protects government property from being subject to enforcement actions stemming from foreign arbitral awards. Additionally, we need to ascertain if there are existing legal provisions related to sovereign immunity that prevent the execution of state assets in cases where the state is the debtor.

Upon reviewing Ethiopian domestic laws relevant to international arbitration, including the New York Convention, the provisions of the Civil Procedure Code, and the Arbitration and Conciliation Proclamation, we find that there is no explicit mention of sovereign immunity in the context of enforcing foreign arbitral awards. Consequently, Ethiopian law lacks specific regulations that address the enforcement of such awards against sovereign states. The absence of clear legal guidelines means that Ethiopian law neither explicitly allows nor prohibits the execution of foreign arbitral awards against government property. As a result, the legal status of state immunity concerning the execution of foreign arbitral awards remains uncertain in Ethiopia. This lack of clarity leaves the matter in a state of limbo, as there are no definitive judicial or legislative rulings to guide the enforcement of these awards against the state.

### **3.4.2. The New York Convention**

As discussed in the previous sections, Ethiopia has ratified the New York Convention with three reservations; namely, the necessity of reciprocity, the need to be a commercial nature and the non-retrospective applicability of the convention. Ethiopia has ratified this convention through proclamation no. 1184/2020. The second recital in the preamble of the ratification Proclamation clearly states the purpose behind ratifying the New York Convention. It unequivocally states that the goal of this ratification is to enhance foreign investment by solidifying the country's reputation for

enforcing contracts with foreign entities<sup>109</sup>. This specific emphasis on establishing the necessary framework to enforce foreign contracts in order to bolster the country's credibility and attract more foreign investment deserves further exploration.

The importance of ratifying international agreements as a means to encourage foreign investments has been highlighted within the context of the Common Market for Eastern and Southern Africa (COMESA) Treaty<sup>110</sup>. In the realm of investment dispute resolution, arbitration has rightfully earned praise as “the most independent and impartial forum” for holding host states accountable for any abuses, lack of transparency, or discretionary policies that may negatively impact investors’ assets.

It is worth noting that Ethiopia has entered into approximately 30 bilateral investment treaties (BITs) and several multilateral investment agreements (MIAs)<sup>111</sup>. These agreements offer both substantive and procedural protections to investors' rights, thereby fostering and encouraging capital inflows into the country. The procedural protections include mechanisms for resolving disputes between investors and host states, which are embedded in the BITs and MIAs to ensure the enforcement of substantive protections. Of particular significance is the provision for arbitration under the International Centre for Settlement of Investment Disputes (ICSID) for resolving disputes<sup>112</sup>. Despite being a signatory since 1967, Ethiopia is yet to ratify the ICSID Convention. However, the relevance of ratifying the New York Convention cannot be overstated, as it would streamline the recognition and enforcement of arbitral awards based on the Additional Facility (AF) Rules of ICSID. While ICSID awards do not require the invocation of the New York Convention for enforcement, ICSID (AF) awards necessitate the application of the New York Convention for their recognition and enforcement<sup>113</sup>. This distinction underscores the critical role that the New York Convention plays in facilitating the enforcement of arbitral awards and ensuring a robust investment dispute resolution framework.

Upon examining the country’s bilateral investment treaties (BITs), it becomes evident that the

---

<sup>109</sup> Proclamation 1184/2020, Supra note at 17.

<sup>110</sup> Common Market for Eastern and Southern Africa, COMESA: Common Market for Eastern and Southern Africa (International Organizations, 2002) <https://www.loc.gov/item/lcwaN0003866/>.

<sup>111</sup> Tecele Bahta Hagos, Supra note 16.

<sup>112</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. XXVIII, opened for signature Mar. 18, 1965, 17 U.S.T. 1270.

<sup>113</sup> Id.

ICSID Additional Facility consistently ranks as the second choice for investment arbitration by an investor-claimant whose home nation is a party to the ICSID Convention<sup>114</sup>. As highlighted by Dolzer and Scheurer, the enforcement of non-ICSID awards, including Additional Facility awards, is contingent upon the national law of the enforcement location and the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>115</sup>. It is worth noting that ICSID Convention awards are conclusive and binding, akin to judgments of national courts, and are not subject to review by domestic courts. Conversely, ICSID Additional Facility awards fall within the purview of the New York Convention. These awards stem from investment arbitrations and entail financial obligations for the respondent states.

In the context of Ethiopia, the issue of state immunity from execution remains unresolved, lacking judicial or legislative frameworks. The process for enforcing ICSID awards is dictated by the laws governing judgment execution in individual countries<sup>116</sup>. As per Article 55 of the convention, states reserve the right to reject the enforcement of foreign judgments against their assets if there are domestic statutes safeguarding the immunity of the state or any foreign state from execution. States vary in their stance on immunity from jurisdiction or execution. Some nations uphold absolute immunity, shielding all acts conducted by or on behalf of the state, while others adhere to restricted immunity, protecting only acts of *jure imperii*, actions carried out in its sovereign capacity as opposed to commercial activities (*acts jure gestionis*).

Examining the legal landscape within Ethiopia concerning sovereign immunity against the execution of foreign arbitral awards reveals a concerning gap in the regulatory framework. Despite the absence of specific rules governing the enforcement of arbitral awards against sovereign states, it is evident that the current laws do not provide a clear shield for government assets from the enforcement of foreign arbitral awards, thus highlighting the concept of sovereign immunity against such executions.

Although the arbitration and conciliation proclamation explicitly states that administrative contracts under article 7(7) are not subject to arbitration, this provision does not inherently safeguard government property from potential executions stemming from foreign arbitral awards, emphasizing the critical need for more robust protective measures.

---

<sup>114</sup> Tecele Hagos Bahta, *Supra* note at 16.

<sup>115</sup> *Ibid.*

<sup>116</sup> See article 55 of the ICSD “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”

Furthermore, a notable discrepancy arises in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by Ethiopia, as it fails to address the issue of sovereign immunity under the grounds for refusing the execution of foreign arbitral awards within the enforcing jurisdiction. This indicates that the Ethiopian position in this regard is unclear, leaving a crucial aspect of sovereign immunity from execution noticeably unaddressed.

An important inquiry that arises is the basis on which sovereign immunity against the execution of foreign judgments can be invoked as a defense in Ethiopia. As previously highlighted, the domestic laws in Ethiopia do not explicitly address the immunity of government property against the execution of foreign arbitral awards. To explore the potential avenues for addressing this issue within the framework of international law binding on Ethiopia, it is crucial to delve into the relevant international treaties that Ethiopia has signed and/or ratified to date.

Furthermore, an examination of the jurisprudence of foreign nations becomes essential as it can offer valuable insights into how similar challenges have been interpreted and resolved within diverse legal contexts. By exploring these international legal instruments and leveraging the experiences of other jurisdictions, a more comprehensive understanding can be attained to guide Ethiopia in clarifying its position on sovereign immunity and addressing the complexities surrounding the execution of foreign judgments.

#### *A. Public International Law*

In the realm of Public International Law, the concept of sovereign immunity operates as a distinct subset, drawing from various sources such as treaties, customary international law, general legal principles, and to an extent, judicial decisions and scholarly works, as outlined in Article 38(1) of the Statute of the International Court of Justice (ICJ). Due to the absence of a comprehensive multilateral framework governing sovereign immunity, its development has chiefly relied on domestic legal precedents and statutes. This decentralized evolution underscores the notion that while immunity is a fundamental tenet of international law, its practical application is heavily influenced by the specific laws and procedures of the jurisdiction in question.

Sovereign immunity, although situated within the realm of public international law, is predominantly interpreted and enforced by national courts, thus straddling the intersection

between international and domestic legal systems<sup>117</sup>. This intersection necessitates a detailed examination of how the international legal framework translates into national laws and judicial practices.

Presently, the landscape of sovereign immunity law lacks uniformity due to the absence of a universally binding multilateral treaty and the decentralized nature of its development<sup>118</sup>. Compounded by varying state practices and divergent perspectives, the law has evolved disparately both in substance and procedure, particularly concerning the mechanisms that facilitate or impede the enforcement of arbitral awards or judgments against states claiming immunity. Despite these divergences, there exists a degree of agreement on fundamental substantive principles, rooted in customary international law, underscored by the ICJ, and evident in municipal court precedents. This consensus acknowledges a general principle of immunity while recognizing certain exceptions, partially enshrined in the UN Convention on Jurisdictional Immunities of States and Their Property (UNCIS). Additionally, there appears to be a widespread understanding that immunity from jurisdiction should be distinguished and treated differently from immunity from execution.

In many legal systems, the traditional absolute immunity theory has given way to the more modern restrictive theory regarding immunity. The absolute theory perceives sovereign immunity as a relationship exclusively between states, positing that a foreign state cannot be subject to the jurisdiction of a domestic court or have judgments enforced against it without its explicit consent. This approach, however, has proven increasingly impractical in a world characterized by growing interconnectedness and interdependence among nations.

In response to these challenges, the restrictive theory of immunity emerged. This newer perspective dictates that a state should only be immune in matters relating to acts of governmental authority (*“acta iure imperii”*), while transactions of a commercial or non-governmental nature (*“acta iure gestionis”*) should not enjoy the same immunity. The term “restrictive theory” itself now embodies the widely accepted principle of sovereign immunity as

---

<sup>117</sup> Ylli Dautaj, Immunity from Suit for International Organizations: The Judiciary's New Que of Separating Lawsuit Sheep from Lawsuit Goats, 27 Ind. J. Glob. L. Stud. 207, 212-13 (2020).

<sup>118</sup> James Crawford, Brownlie's Principles of Public International Law 934 (8th ed. 2012).

delineated by customary international law<sup>119</sup>. This shift in approach reflects a more nuanced understanding of immunity, aligning with contemporary global realities and legal expectations.

During the early stages of the restrictive theory's development, a significant debate arose regarding the criteria for categorizing commercial activity; whether it should be assessed based on the "nature of the act" (Nature Test) or the "purpose of the act" (Purpose Test). This distinction offers courts a choice in determining whether a particular activity qualifies as commercial or governmental in nature. The Nature Test is typically applied during the jurisdictional phase to establish the nature of the act in question. In this discussion, the focus will not delve into the intricacies of immunity from jurisdiction. While this aspect holds some importance and complexities in the realm of international arbitration, it is generally understood that by agreeing to an arbitration clause or being party to a multilateral arbitration agreement, a State effectively waives its immunity from jurisdiction<sup>120</sup>.

Understanding this waiver is crucial for a comprehensive perspective on the immunity debate, particularly in the context of execution immunity. It's essential to note that the fact that a state cannot claim immunity from jurisdiction does not necessarily mean that the state is not immune from the actual execution of the award<sup>121</sup>. The differentiated treatment of immunity from execution is rooted in the belief that seizing state assets for enforcement purposes significantly infringes upon a state's autonomy and ability to pursue its public objectives, far more than the mere pronouncement of a judgment by a foreign court.

Therefore, in the execution phase, courts carefully consider whether the assets in question were utilized for commercial purposes, emphasizing the need to distinguish between activities that fall under the realm of governmental authority and those that are commercial in nature. This nuanced approach aims to balance the rights of creditors seeking enforcement with the sovereign interests of states in managing their assets and fulfilling their public functions.

---

<sup>119</sup> Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 1 (Feb. 3, 2012).

<sup>120</sup> Ylli Dautaj & Maxime Chevalier, a Liberal Push and the Sovereign Pull: Recognition, Enforcement, and Execution in the ICSID Convention, *American Review of International Arbitration* (2022).

<sup>121</sup> Ylli Dautaj, Enforcing Arbitral Awards against States and the Defense of Sovereign Immunity from Execution, 16 *Manchester J. Int'l Econ. L.* 389 (2019).

Ultimately, the success of an award-creditor against a reluctant award-debtor state hinges on the willingness of domestic courts to apply public international law in a flexible and pragmatic manner. Courts often exhibit reluctance in granting coercive measures against states, underscoring the unresolved nature of sovereign immunity from execution. This enduring challenge underscores why it is often dubbed as “the last fortress, last bastion of sovereign immunity”, representing a complex and difficult legal frontier that continues to test the boundaries of international law and state immunity<sup>122</sup>.

### *B. Jurisprudence of Other Countries*

In this subsection, we will explore the jurisprudence of India and the United States, both of which have established substantial legal frameworks regarding sovereign immunity over many years. This analysis is crucial because it offers valuable insights and precedents that Ethiopian courts may reference, particularly in the absence of domestic laws specifically addressing sovereign immunity in relation to the execution of foreign arbitral awards.

India's approach to sovereign immunity has evolved through various landmark cases and statutory provisions, reflecting a balance between state sovereignty and the need for accountability. Similarly, the United States has established a comprehensive body of law concerning sovereign immunity, primarily through the Foreign Sovereign Immunities Act (FSIA), which delineates the circumstances under which foreign states can be sued in USA courts. Exploring the jurisprudence of these two countries will enable us to identify key principles and interpretations that may inform the Ethiopian judiciary.

#### *i) India*

India has long embraced the restrictive doctrine of sovereign immunity, a legal principle that limits the extent to which states can claim immunity from judicial jurisdiction<sup>123</sup>. This approach has been evident for several decades. In 1982, the Delhi High Court addressed issues of immunity from jurisdiction in the context of the Arbitration Act of 1940, marking a significant moment in the evolution of Indian jurisprudence concerning state immunity.

---

<sup>122</sup> Ibid.

<sup>123</sup> Ylli Dautaj, Sovereign Immunity from Execution of Foreign Arbitral Awards in India: The “New” Kid on the (Super) Pro-Arbitration Block, 15 Arb. L. Rev. 19 (2024).

During this case, the High Court made a critical distinction between sovereign acts (*acta jure imperi*) and private acts (*acta jure gestionis*). Sovereign acts refer to actions taken by a state in the exercise of its governmental functions, while private acts pertain to activities that resemble those of a private individual or entity. The court explained that the classification of an act as either sovereign or private is determined by examining the “nature” or “purpose” of the transaction, concepts commonly known as the “nature test” and the “purpose test.” This framework indicates that Indian courts have a long-standing familiarity with the restrictive theory of immunity, enabling them to scrutinize the context of each case. Furthermore, India has signed the UNCSI, although it has not yet ratified it. This signing indicates India’s openness to a more liberal approach regarding sovereign immunity, suggesting a willingness to align with international norms that favor accountability and legal recourse in commercial transactions.

As a result, foreign state assets in India are not granted absolute immunity from enforcement. A foreign state can waive its immunity, either explicitly or implicitly. Indian courts have upheld that a waiver is effective in situations where the sovereign state voluntarily invokes jurisdiction as a plaintiff or appears as a defendant in a case without raising an objection, thereby engaging fully in the legal process.

A notable example that illustrates these principles is the case of *Ethiopian Airlines v. Ganesh Narin Saboo*<sup>124</sup>. In this landmark decision, the Indian Supreme Court ruled that Ethiopia had effectively waived its airline’s right to immunity by entering into the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the Warsaw Convention). This ruling underscores how participation in international agreements can lead to the relinquishment of sovereign immunity in specific contexts, particularly concerning commercial activities.

Moreover, the Supreme Court explicitly concluded that sovereign immunity does not apply to commercial transactions. This ruling emphasizes that parties involved in contractual dealings should be held accountable for their commercial activities and obligations, regardless of their sovereign status. This stance reinforces the principle that states engaging in commercial

---

<sup>124</sup> *Ethiopian Airlines v. Ganesh Narin Saboo* (AIR 2011 SC 3495).

transactions must adhere to the same legal standards as private entities, thereby promoting fairness and accountability in international commerce.

*ii) United States of America*

The United States has codified the law of sovereign immunity through the FSIA, enacted in 1976. Although the FSIA was established in 1976, it has undergone several amendments to adapt to changing international dynamics and legal interpretations. U.S. courts have played a critical role in applying the FSIA, significantly shaping the understanding and implementation of sovereign immunity laws<sup>125</sup>. This influence arises from the high volume of cases involving foreign sovereigns, positioning U.S. courts as pivotal in resolving issues related to sovereign immunity. Additionally, the substantial presence of foreign states' assets within the United States enhances the importance of U.S. courts in the context of enforcing foreign arbitral awards, making the U.S. legal system a vital venue for such matters.

The enactment of the FSIA aimed to address specific shortcomings that existed during the common law era regarding sovereign immunity. Its primary objectives include:

- **Codifying the Restrictive Theory of Sovereign Immunity:** The FSIA adopts the restrictive doctrine, which limits immunity for foreign states, allowing for legal action in certain circumstances.
- **Ensuring Judicial Application:** It mandates that the application of sovereign immunity be determined by the courts rather than the State Department, enhancing judicial independence in these matters.
- **Establishing Jurisdictional Procedures:** The FSIA provides a statutory service procedure to facilitate establishing jurisdiction over foreign states.
- **Facilitating Judgment Execution:** It seeks to remedy the challenges associated with executing judgments against foreign states, thereby improving access to justice for litigants.

---

<sup>125</sup> M. Steele & M. Heinlen, Challenges to Enforcing Arbitral Awards against Foreign States in the United States, 42 Int'l Law. 87 (2008).

Under the FSIA, foreign states are not granted absolute immunity from lawsuits or from the execution of their assets following a judgment or arbitral award<sup>126</sup>. The FSIA delineates separate regimes for immunity from jurisdiction and immunity from execution. Each regime articulates a general rule regarding immunity while outlining specific exceptions, creating a nuanced legal framework. Moreover, the FSIA treats pre-judgment attachment and post-judgment execution differently, and it establishes distinct principles for executing against state property versus property held by state agencies or instrumentalities. As a general rule, the property of a foreign state is immune from execution in the U.S., unless an exception applies, meaning that immunity is not automatic *ipso facto*.

According to Article 1610(a) of the FSIA, immunity from execution can only be withheld or conditioned if the property in question is located in the U.S. and is used for commercial activities within the country. Notably, the U.S. legal framework tends to employ the Purpose Test rather than the Nature Test when determining the applicability of exceptions to immunity.

For example, in *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, the Republic of Congo claimed immunity from the execution of property held by Chevron Texaco Corp. regarding intangible obligations, such as bonuses and royalties from natural resource extraction. The Ninth Circuit concluded that this property was not used for commercial activities in the U.S. and, therefore, was “not subject to execution or collection under Article 1610(a) of the FSIA.”

Similarly, in *Export-Import Bank of China v. Grenada*, the judgment-creditor sought to restrain taxes, fees, and charges from various private entities to state entities for the use of facilities located in Grenada. Grenada argued that the state entities were separate legal entities and that the funds were immune from attachment. The district court held that the funds were indeed immune because they were not located in the U.S. and were not used for commercial activities there. The Second Circuit upheld this ruling, reiterating that the analysis of the commercial activity exception must focus on how the state utilizes its funds, rather than how those funds were generated. In this case, the funds were deemed to be used for public purposes, specifically for

---

<sup>126</sup> Nancy B. Turck, French and USA Courts Define Limits of Sovereign Immunity in Execution and Enforcement of Arbitral Awards, 17 *Arbitration Int'l* 327 (2014).

maintaining facilities in Grenada, and thus were not classified as being used commercially in the U.S.

Overall, these cases highlight the complexities of enforcing judgments against foreign sovereigns in the U.S., emphasizing the need for a careful analysis of the nature and use of foreign state assets in relation to the FSIA framework.

## **CHAPTER FOUR: BALANCING SOVEREIGNTY AND ACCOUNTABILITY: THE DUAL IMPLICATIONS OF PROTECTING GOVERNMENT PROPERTIES AGAINST FOREIGN ARBITRAL AWARDS**

### **4.1. Introduction**

The principle of state immunity has long been a cornerstone of international law, protecting sovereign states from being subjected to the jurisdiction of foreign courts/tribunals. This immunity extends to government properties, ensuring that they cannot be executed upon to satisfy foreign arbitral awards. However, as globalization increases cross-border trade and investment, the need to regulate this immunity has become more pressing, raising complex questions about the balance between state sovereignty and the enforcement of international arbitral awards.

Historically, state immunity was absolute, meaning that a state could not be sued in foreign courts without its consent. This principle is rooted in the notion of sovereign equality, which posits that no state should be subject to the jurisdiction of another. However, the evolution of international law has seen a shift towards a more restrictive approach, particularly in the context of commercial activities. The distinction between acts *jure imperii* (sovereign acts) and acts *jure gestionis* (commercial acts) has become increasingly important. In many jurisdictions, states are now held accountable for their commercial activities, allowing for the execution of arbitral awards against state-owned enterprises. This shift reflects a growing recognition that states should not be able to evade their obligations under international law simply by invoking immunity<sup>127</sup>. In the context of Ethiopia, the legal framework remains notably silent on this matter, leaving the country's position ambiguous compared to other nations that have clearly defined their stances through their domestic laws and court practices. This lack of clarity is significant, especially as international law and various treaties recommend specific approaches to state immunity. Hence, this chapter delves into the positive and negative consequences of regulating or not regulating sovereign immunity, illustrating the complex interplay between state sovereignty and the enforcement of arbitral awards (interest of investors).

---

<sup>127</sup> Catharine Titi, ed., *Public Actors in International Investment Law* (Springer 2021), <https://doi.org/10.1007/978-3-030-58916-5>.

## 4.2. Implications of Regulating Immunity of Government Properties From the Execution of Foreign Arbitral Awards

### 4.2.1. Positive implications of Regulating Immunity

Regulating immunity of government properties from the execution of foreign arbitral awards is a critical legal issue with far-reaching implications. Establishing clear regulations in this regard can have positive implications, promoting the legal landscape, international relations, justice system and the enforcement of foreign arbitral awards. Let's delve into the detailed analysis of the implications of regulating immunity of government properties against the execution of foreign arbitral awards.

- **Enhancing Investor Confidence:** One of the primary benefits of regulating immunity is the enhancement of investor confidence. When states clarify that certain properties are not immune from execution in the case of foreign arbitral awards, it sends a positive signal to investors. This transparency can attract FDI by assuring investors that they have recourse in case of disputes. Research indicates that countries with robust legal frameworks for investment protection tend to attract more foreign investments<sup>128</sup>.
- **Facilitating International Trade:** A clear regulatory framework regarding the immunity of government properties can facilitate international trade. When investors know they can enforce arbitral awards against state assets, they are more likely to engage in cross-border transactions. This can lead to increased economic activity and deeper integration into the global economy. Countries that adopt such regulatory measures often experience economic growth as a result of enhanced trade relationships. Regulating immunity can also lead to an increase in FDI<sup>129</sup>. Investors are more likely to commit capital to jurisdictions where they perceive a robust legal framework that protects their rights and allows for the enforcement of arbitral awards. Through limiting immunity, states can create a more favorable investment climate, signaling to potential investors that their

---

<sup>128</sup> Susan D. Franck, Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, 19 Pac. McGeorge Global Bus. & Dev. L.J. 337 (2006).

<sup>129</sup> Josef C. Brada, Zdenek Drabek & Ichiro Iwasaki, Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis, 35 J. Econ. Surveys 34 (2021), <https://doi.org/10.1111/joes.12392>.

interests will be safeguarded<sup>130</sup>. This influx of foreign investment can stimulate economic growth, create jobs, and enhance technological transfer, ultimately benefiting the host country's economy.

- **Strengthening Rule of Law:** Regulating immunity can also contribute to the strengthening of the rule of law within a country<sup>131</sup>. Through holding states accountable for their commitments under international treaties or agreements, such regulations can foster a culture of compliance and respect for legal obligations. This can lead to better governance and improved dispute resolution mechanisms, ultimately benefiting both domestic and foreign stakeholders.
- **Promotion of Legal Harmonization:** Another positive outcome of regulating immunity is the potential for legal harmonization among states<sup>132</sup>. Aligning domestic laws with international standard can enable countries to contribute to a more cohesive global legal framework. This harmonization can facilitate smoother international transactions and reduce the complexities associated with navigating different legal systems. Furthermore, it can enhance cooperation among states in resolving disputes, fostering a collaborative approach to international arbitration.
- **Enhanced Enforcement of Arbitral Awards:** Regulating the immunity of government properties can enable the country to facilitate the enforcement of foreign arbitral awards, ensuring that parties to arbitration receive timely and effective remedies<sup>133</sup>. This can strengthen the credibility of the arbitration process and promote compliance with international legal obligations.

#### 4.2.2. Negative Implications of Regulating Immunity

While regulating immunity of government properties against execution of foreign arbitral awards have several positive implications as discussed above, it may also raise several negative consequences. These negative implications are briefly discussed below.

---

<sup>130</sup> Ibid.

<sup>131</sup> Stephan Haggard, Andrew MacIntyre & Lydia Tiede, *the Rule of Law and Economic Development*, 11 *Annu. Rev. Polit. Sci.* 205 (2008).

<sup>132</sup> James D. Wilets, *Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization*, 31 *U. Pa. J. Int'l L.* 753 (2009).

<sup>133</sup> Ibid.

- **Risks to State Sovereignty:** On the flip side, regulating immunity can pose significant risks to state sovereignty<sup>134</sup>. States may perceive the limitation of immunity as an infringement on their sovereign rights, leading to tensions in international relations. The principle of state sovereignty is foundational to international law, and any perceived encroachment can result in diplomatic disputes. States may react defensively, potentially leading to retaliatory measures that could harm bilateral relations and undermine international cooperation.
- **Impact on Government Operations:** Allowing government assets to be attached to satisfy claims can disrupt government operations. Seizing such assets may impede the government's ability to carry out essential functions and provide public services effectively.
- **Public Perception and Accountability:** The seizure of government assets for commercial purposes can raise questions about accountability and transparency. The public may perceive such actions as a misuse of public resources or as a sign of financial mismanagement, potentially eroding trust in the government.

### **4.3. Implications of Not Regulating Immunity of Government Properties Against Execution of Foreign Arbitral Awards**

When states choose not to regulate this immunity, they are essentially opting to maintain the traditional protections afforded to their assets. This decision has far-reaching implications, both beneficial and detrimental, for various stakeholders involved in international investment and arbitration. This sub section explores both the positive and negative implications of not regulating the immunity of government properties, examining how it affects state sovereignty, investor confidence, and international relations.

#### **4.3.1. Positive Implication of Not-Regulating**

The issue of whether government properties should be immune from the execution of foreign arbitral awards is a complex and multifaceted legal topic. The lack of regulation in this area has some positive implications that warrant thorough examination.

---

<sup>134</sup> Kamal Huseynli, *Enforcement of Investment Arbitration Awards: Problems and Solutions*, 3 Baku State U. L. Rev. 1 (2017).

- **Preservation of State Sovereignty:** One of the primary benefits of not regulating immunity is the preservation of state sovereignty<sup>135</sup>. Maintaining sovereign immunity can enable states to protect their assets from external claims, allowing them to govern without interference from foreign investors or arbitral tribunals. This protection is crucial for maintaining national integrity and authority, particularly in jurisdictions where the rule of law may be perceived as fragile. Sovereign immunity serves as a bulwark against foreign encroachments, ensuring that states retain control over their resources and properties.
- **Protection of Public Assets:** Unregulated sovereign immunity means that the state maintains its traditional immunity on its affairs including in its commercial capacity. This serves to protect public assets from foreign creditors<sup>136</sup>. States often rely on these assets to fund essential services and infrastructure projects. By preventing the execution of foreign arbitral awards against state property, governments can prioritize domestic needs and ensure that public resources remain available for the benefit of their citizens.

#### 4.3.2. Negative Implications of Not Regulating

The issue of sovereign immunity, particularly concerning the execution of foreign arbitral awards against government properties, is a critical area of international law that has significant negative implications. The absence of domestic laws that limit the scope of this immunity can lead to both negative outcomes, affecting foreign investment, state accountability, and international relations as discussed below.

- **Continued Deterrence of Foreign Investment:** While preserving immunity can protect state interests, it may simultaneously deter foreign investment<sup>137</sup>. Investors are often wary of jurisdictions where they perceive a lack of legal recourse for enforcing contracts or arbitral awards. The absence of regulation regarding the execution of awards can create an environment of uncertainty, leading potential investors to seek opportunities in countries with clearer legal frameworks. In an increasingly interconnected global

---

<sup>135</sup> Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 Va. J. Int'l L. 810 (2005).

<sup>136</sup> *Ibid.*

<sup>137</sup> David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working Papers on International Investment No. 2010/02 (2010), <https://dx.doi.org/10.1787/5km91p0ksqs7-en>.

economy, the inability to enforce arbitral awards can hinder a country's competitiveness in attracting foreign capital. Research indicates that countries with robust protections for foreign investments tend to attract more FDI.

- **Erosion of Investor Confidence:** Not regulating the immunity of government properties can lead to an erosion of investor confidence<sup>138</sup>. When investors believe that their rights are not adequately protected, they may hesitate to enter into contracts or invest significant resources in a country<sup>139</sup>. This lack of confidence can result in decreased economic activity, as potential investors may opt to invest elsewhere where they perceive a safer and more predictable legal environment. The chilling effect on investment can stifle economic growth and innovation within the host country.
- **Erosion of Accountability:** On the flip side, the lack of regulation may lead to significant negative implications, primarily the erosion of accountability. When government properties are immune from the execution of foreign arbitral awards, it can create a perception that states are not held accountable for their contractual obligations. This lack of accountability can deter foreign entities from engaging in business transactions with governments, fearing that they may not receive fair treatment in the event of a dispute.
- **Impediment to Justice:** The principle of sovereign immunity can create significant barriers to justice for foreign investors and creditors. When states are not compelled to honor foreign arbitral awards, it undermines the effectiveness of international arbitration as a mechanism for dispute resolution. A lack of accountability can lead to grievances and distrust among international investors.
- **Risk of State Abuse:** Unregulated immunity may embolden states to act arbitrarily, knowing that their assets are shielded from legal claims. This can result in a lack of recourse for aggrieved parties, contributing to an environment where states may neglect their obligations or engage in corrupt practices without fear of repercussions.
- **Erosion of Trust in International Arbitration:** The effectiveness of international arbitration as a dispute resolution mechanism relies heavily on the principle that arbitral

---

<sup>138</sup> Josef C. Brada, Zdenek Drabek & Ichiro Iwasaki, *Supra* note at 43.

<sup>139</sup> Olajide David Ademola & Oluseye Temilorun, *Sovereign Immunity from Legal and Arbitral Proceedings and Execution from Assets of a State: The Evolving Paradigm*, (2023) (<https://ssrn.com/abstract=3718108>).

awards will be recognized and enforced. When states assert sovereign immunity to avoid compliance with these awards, it undermines the credibility of arbitration as a viable alternative to litigation. This erosion of trust can lead to a decline in the use of arbitration, resulting in a backlog of disputes in domestic courts and a shift away from international commercial agreements.

- **Impact on International (Diplomatic) Relations:** The refusal to recognize or enforce foreign arbitral awards can strain diplomatic relations between states. Countries that fail to honor international commitments may find themselves isolated or subject to retaliatory measures, which can adversely affect their standing in international forums.

To sum up, the implications of regulating and not regulating the immunity of government properties from the execution of foreign arbitral awards present a complex interplay of positive and negative implications. While regulation can enhance investor confidence, strengthen the rule of law, and facilitate international trade, it also risks undermining state sovereignty and uncertainties in legal framework. On the other hand, while not regulating sovereign immunity offers positive implications such as the preservation of state sovereignty, and protection of public assets, it also carries significant negative repercussions. These include the deterrence of foreign investment, erosion of investor confidence, and erosion of trust in international arbitration. Additionally, it also poses significant challenges to justice and accountability. To foster a sustainable environment for international commerce, states must consider regulatory approaches that balance these interests, ensuring that the principles of sovereignty do not come at the expense of the right of innocent investors (private party). Through careful regulation, states can enhance their attractiveness as investment destinations while upholding the rule of law in international relations.

## **CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS**

### **5.1. Conclusions**

The examination of Ethiopia's legal framework reveals significant gaps regarding the immunity of government properties against the execution of foreign arbitral awards. While Ethiopia's commitment to international conventions, such as the New York Convention, is a positive step towards integrating with global arbitration standards, significant gaps remain in the domestic legal framework that govern scope of sovereign immunity. This gap not only undermines the predictability and reliability that investors seek but also raises concerns regarding Ethiopia's reputation as a destination for foreign direct investment. The lack of explicit laws creates uncertainty for international investors, as there are no clear guidelines to navigate the complexities of sovereign immunity in this context. This absence of regulation not only raises critical questions about enforceability but also exposes the legal community to varied judicial interpretations, potentially leading to inconsistent rulings that undermine legal certainty and predictability.

In contrast, many jurisdictions have established frameworks that clearly define the scope of sovereign immunity, often operating under the restrictive theory that allows for enforcement in commercial contexts. These countries benefit from well-developed jurisprudence that protects investors' rights and aligns domestic laws with international standards. Ethiopia's lack of similar legislative clarity diminishes its attractiveness to foreign investors and complicates dispute resolution processes. To foster a more favorable investment climate, Ethiopia should consider developing comprehensive regulations addressing sovereign immunity, drawing insights from the diverse approaches of other jurisdictions.

On the other hand, the examination of regulating and not regulating immunity of government property against the execution of foreign arbitral awards in Ethiopia reveals both positive and negative implication on the foreign direct investment climate in the country. This research highlights the necessity of striking a balance between protecting state sovereignty and ensuring a conducive environment for foreign investment. On one hand, the state must protect its vital assets and maintain control over its resources; on the other, it must provide assurances to investors that their rights will be respected and that they can seek recourse in the event of disputes. Ethiopia's approach must ensure that while it welcomes foreign investment, it does not

compromise on essential state functions or the protection of its resources. To achieve this balance, Ethiopia should create comprehensive legislation that delineates the boundaries of sovereign immunity in the context of foreign arbitral awards, including definitions of what constitutes government property and the specific conditions under which enforcement against such properties may occur.

## **5.2. Recommendations**

On the basis of the findings of the research, the writer would like to make the following recommendations:

- The Ethiopian government should explicitly define the scope and limitations of sovereign immunity concerning the enforcement of foreign arbitral awards in its legal framework. This can be achieved by amending existing laws or introducing new legislation that outlines when and how sovereign immunity can be invoked, particularly in commercial contexts.
- Legislation should be enacted to establish clear criteria for determining the enforceability of foreign arbitral awards against government properties. This should include:
  - Specific exceptions to sovereign immunity based on the nature of the dispute (e.g., commercial activities).
  - Guidelines on the types of government assets that may be exempt from enforcement actions.
- Ensure consistency between the provisions of the Arbitration and Conciliation Working Procedure Proclamation and the Civil Procedure Code. This could involve:
  - Clarifying the applicability of Article 461 of the Civil Procedure Code to ensure that it continues to provide a framework for civil disputes.
- Ethiopia should consider ratifying additional international treaties that address sovereign immunity and the enforcement of arbitral awards, such as the UN Convention on Jurisdictional Immunities of States and Their Property. This would help to align Ethiopia's legal framework with international standards and provide clearer guidance on the treatment of sovereign immunity.

## BIBLIOGRAPHY

### Books, Articles and other Documents

1. Bjorklund, Andrea K. "Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims." *Virginia Journal of International Law* 45 (2005): 810.
2. Brada, Josef C., Zdenek Drabek, and Ichiro Iwasaki. "Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis." *Journal of Economic Surveys* 35, no. 1 (2021): 34–70. <https://doi.org/10.1111/joes.12392>.
3. Dellapenna, Joseph W. "Book Review: The Law of State Immunity." *American Journal of International Law* 99 (2005): 730.
4. Feyissa, Hailegabriel G. "The Role of Ethiopian Courts in Commercial Arbitration." *Mizan Law Review* 4, no. 2 (2010): 298-300.
5. Franck, Susan D. *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*. 19 Pac. McGeorge Global Bus. & Dev. L.J. 337 (2006).
6. Gaillard, Emmanuel. "Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles." 15 Int'l Arb. Rep. A-1 (2001).
7. Gaukrodger, David. *Foreign State Immunity and Foreign Government Controlled Investors*. OECD Working Papers on International Investment No. 2010/02 (2010). <https://dx.doi.org/10.1787/5km91p0ksqs7-en>.
8. Goetz, Douglas N. "The Classification of Government Property Under the New FAR Part 45 Rewrite." *PROPERTY PROFESSIONAL*, vol. 19, no. 3, 2019.
9. Haggard, Stephan, Andrew MacIntyre, and Lydia Tiede. "The Rule of Law and Economic Development." *Annual Review of Political Science* 11, no. 1 (2008): 205–234.
10. Huseynli, Kamal. "Enforcement of Investment Arbitration Awards: Problems and Solutions." *Baku State University Law Review* 3, no. 1 (2017): 1-40.
11. Nasser Mehsin Al-Adba. *The Limitation of State Sovereignty in Hosting Foreign Investments and The Role of Investor-State Arbitration to Rebalance the Investment Relationship*. Ph.D. thesis, University of Manchester, 2014.
12. Olajide David Ademola & Abogunrin Oluseye Temilorun. *Sovereign Immunity from Legal and Arbitral Proceedings and Execution from Assets of a State: The Evolving Paradigm*. (2023). SSRN. <https://ssrn.com/abstract=3718108>.

13. Olajide David Ademola & Oluseye Temilorun. *Sovereign Immunity from Legal and Arbitral Proceedings and Execution from Assets of a State: The Evolving Paradigm*. (2023).
14. Tecele Hagos Bahta, Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia, 5 Mizan Law Rev. 106 (2011).
15. Tecele Hagos Bahta, the Ratification of the New York Convention in Ethiopia: Towards Efficacy and Avoidance of Divergent Paths, 15 Mizan Law Review 493 (2021).
16. Titi, Catharine, ed. *Public Actors in International Investment Law*. Cham, Switzerland: Springer, 2021. <https://doi.org/10.1007/978-3-030-58916-5>.
17. Wilets, James D. "Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization." *University of Pennsylvania Journal of International Law* 31 (2009): 753.

### **Ethiopian Laws, International Instruments and Other Documents**

1. Common Market for Eastern and Southern Africa. COMESA: Common Market for Eastern and Southern Africa. International Organizations, 2002. <https://www.loc.gov/item/lcwaN0003866/>.
2. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).
3. Ethiopian Federal Government Procurement and Property Administration Proclamation No. 649/2009, 15th Year No. 60, Federal Negarit Gazeta (Addis Ababa, 9th September 2009).
4. Proclamation No. 1/1995. A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia. August 21, 1995.
5. Proclamation No. 1237/2021, Arbitration and Conciliation, Working Procedure Proclamation, 27<sup>th</sup> Year, No. 21, 2nd April 2021, Federal Negarit Gazette of the Federal Democratic Republic of Ethiopia.

### **Cases**

1. *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (2011).
2. *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, ICJ 2 (1952).