

**UNIVERSITY OF DEBRECEN
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**SCOPE AND EFFECT OF THE IMMUNITY PRINCIPLES
IN INTERNATIONAL PRIVATE AND BUSSINESS LAW**

REVISED DRAFT OF PHD DISSERTATION

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TABLE OF CONTENT

Table of Content.....	ii
Table of Cases.....	iii
Table of Domestic Laws.....	vii
Table of Treaties.....	viii
List of Abbreviations.....	ix
 CHAPTER I: INTRODUCTION.....	 1
1.1. Background of Study.....	1
1.2. Problem Formulation.....	4
1.3. Research Contribution.....	5
1.4. Innovative Content.....	5
 CHAPTER II: RESEARCH METHODOLOGY.....	 9
2.1. Applied Methodology.....	9
2.2. Research Approach.....	9
2.3. Operational Definitions.....	11
2.4. Legal Materials.....	11
 CHAPTER III: THEORITICAL FRAMEWORK.....	 13
3.1. The Nature of State Immunity.....	13
3.2. The Act of State Doctrine.....	14
3.3. Jurisdiction and Sovereignty.....	16
3.4. The Doctrine of “Comity” or “Reciprocity”	19
3.5. Legal Pluralism.....	21
3.6. The General Concept of Conflict of Law.....	26
 CHAPTER IV: DEVELOPMENT OF THE IMMUNITY DOCTRINE IN INTERNATIONAL RELATIONS.....	 39
4.1. The Period of Absolute Immunity.....	39
1. Beginning Practice in Mesopotamia.....	39
2. Ancient Greece.....	42
4.2. The Period of Functional Immunity.....	47
4.3. The Period of Restrictive Immunity.....	51

CHAPTER V: THE LAW OF RESTRICTIVE IMMUNITY.....	56
5.1. International Treaties.....	56
1. European Convention on State Immunity.....	56
2. The United Nations on Jurisdictional Immunity of States and Their Property.....	60
5.2. National Laws.....	68
1. The United States Foreign Sovereign Immunities Act.....	68
2. The United Kingdom State Immunity Act.....	78
3. South African Foreign Sovereign Immunity Act.....	85
4. Australian Foreign States Immunities Act.....	91
5. Law of Judicial Immunity of Foreign Central Banks in China	96
6. Singapore State Immunity Act.....	101
 CHAPTER VI: LEGAL RESPONSE TO IMMUNITY DEFENSE IN COMMERCIAL AND BUSINESS TRANSACTION.....	 105
6.1. Immunity Blanket for ‘Non-State Actor’: Challenges in 21 st Century.....	105
1. Emerging ‘Non-State Actor’ in Current’s Global Economic Relations.....	106
2. The Use of Immunity by Hybrid Non-State Actor.....	110
6.2. The Role of Choice of Law.....	118
1. Effective Enforcement of Contractual Choice of Law.....	118
2. The law of London and New York as sophisticated governing law to restrict the doctrine of immunity.....	123
6.3. The Role of Arbitration Clause.....	132
1. Recent Case.....	132
2. Agreement to arbitrate is implied consent to waive state immunity.....	133
 CHAPTER VII: CONCLUSION.....	 136
 REFERENCES.....	 139

TABLE OF CASES

Australia

Victoria Aircraft Leasing Ltd v United States (2005) 218 ALR 640 .

Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd
(2004) 185 FLR 48.

Belgium

Leica AG v. Central Bank of Iraq et Etat Irakien, Cour d'appel, Brussels, 15 Feb.
2000.

China

Democratic Republic of Congo v. FG Hemisphere Associates LLC. (2009) 1
H.K.L.R.D. 410.

France

SOABI v. Senegal. Cass. Fr., 30 I.L.M. 1167.

Germany

Philippine Embassy Case, Germany, Federal Constitutional Court, 13 December
1977, 46 BVerfG, 342; 65 ILR 146.

India

Ali Akbar v. United Arab Republic. HIR SC 230 (1996).

International Court of Justice

ICJ Reports. (1949) Advisory Opinion: Reparation for Injuries Suffered in the
Service of the United Nations.

ICJ Reports (1949) Reparation for Injuries Case.

Island of Palmas Case, *Netherlands v. USA*, Vol II, 1928.

Nigeria

African Reinsurance Corporation v. Abate Fantaye. 3 NWLR (1986).

African Reinsurance Corporation v. AIM Consultants Ltd. 11 NWLR (2004).

African Reinsurance Corporation v. J.D.P. Construction Nigeria Ltd. 1 FWLR
(2008).

South Africa

*Inter-Science Research and Development Services (Pty) Ltd v Republica Popular
De Mocambique* 1980 (2) SA 111.

*The Minister of Home Affairs and Another v American Ninja IV Partnership and
Another* 1993 (1) SA 257 (A).

The United Kingdom

First Energy (UK) Ltd. v. Hungarian International Bank Ltd. (1993) 2 Lloyd's Rep 194.

Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd. (1989) 1 Q.B. 433.

NML Capital Limited v. Republic Argentina. (2011) U.K.S.C. 31.

Propend v. Sing, 11 ILR 611. *Holland v. Lampen Wolfe* (2000) 1 WLR 1537.

R. (Alamieyeseigha) v. CPS (2005) EWHC 2704.

Rahimtoola v. Nizam of Hyderabad, (1958) A.C. 379.

Robinson v. Bland, 2 Burr 1077 (K. B. 1760).

Schibsby v. Westenholz, L.R. 6 Q. B. 155 (1870).

Scottish Power Plc. v. Kvaerner Construction (Regions) Ltd. (1999) SLT 721.

Svenska Petroleum Exploration AB (Schweden) v. Government of the Republic of Lithuania & AB Geonafta (Lithuania). EWCA Civ 1529 (2006).

Thai-Europe Tapioca v. Pakistan (1975) 1 W.L.R. 1485.

The Parlement Belge, (1880) 5 P.D. 197, (1874–80) All. E.R. Rep. 104.

The Philippine Admiral (1976) 2 W.L.R. 214.

Trendtex Trading Corporation v. Central Bank of Nigeria (1977) 1 All E.R. 881.

Vita Food Products Inc. v. Usus Shipping Co. Court. (1939) A.C. 277.

The United States

Alaska Packers Association v. Industrial Accident Commission of California, 294 U.S. 532 (1934).

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

American Construction Machinery and Equipment Corp. v. Merchandised Construction of Pakistan Ltd., 659 F. Supp. 426 (S.D.N.Y. 1987).

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

Bank of the United States v. Planters Bank, 22 U.S. (9 Wheat.) 904 (1824).

Berizzi Bros. Co v. The Pesaro, 271 U.S. 562 (1926).

Broadbent v. OAS, 628 F.2d. 27 (DC Cir. 1980).

Brown v. Babbitt Ford, Inc., 117 Ariz. App. 192, 571 P.2d 689 (Ct. App. 1977).

Dole Food Co. v. Patrickson, 538 U.S. 468, 123 S.Ct. 1655 (2003)

Hanil Bank v. PT. Bank Negara Indonesia, 148 F.3d 127 (2d Cir. 1998).

Hilton v. Guyot, 159 U.S. 113 (1985).

Ipitrade International v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978).

International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC), 649 F. 2d 1354 (9th Cir.1981).

International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co., 264 F. App'x 13 (D.C.Cir. 2008).

Jackson v. People's Republic of China, 794 F.2d 1490, 1494 (11th Cir. 1986)

Jet Line Services v. M/V Marsa El Hariga, 462 F. Supp. 1165 (D. Md. 1978).

National American Corp v. Federal Republic of Nigeria, 448 F. Supp. 622. (S.D.N.Y. 1978).

Nazarian v. Compagnie Nationale Air France, 989 F. Supp. 504 (S.D.N.Y. 1998).

Permanent Mission of India to the United Nations v. City of New York, 551 U.S. 193 (2007).

Republic of Austria v. Altmann, 541 U.S. 677, 124 S.Ct. 2240 (2004).

Republic of Mexico v. Hoffman, 324 U.S. 30 (1945).

Samantar v. Yousuf, 560 U.S. 305, 130 S. Ct. 2278 (2010).

Santos v. Compagnie Nationale Air France, 934 F. 2d 890 (7th Cir. 1991).

Siegelman v. Cunard White Star Ltd., 221 F.2d 189 (2d Cir. 1995).

St. Louis v. The Ferry Co., 11 Wall (U.S.) 423 (1870).

Texas Trading and Milling Corporation v. Federal Republic of Nigeria, 647 F. 2d 300 (1982).

The Schooner Exchange v. McFaddon, 11 U.S. 7 (Cranch) 116 (1812).

Underhill v. Hernandez, 168 U.S. 250 (1897).

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983).

Wright-Moore Corp. v. Ricoh Corp., 908 F. 2d 128 (7th Cir.1990).

Uganda

Nelson Dhibikirwa v. Agro Management (U) Ltd. High Court Uganda, Application No. 651 (2010).

TABLE OF DOMESTIC LAWS

Australia

Australian Foreign Sovereign Immunities Act (1986)

China

Chinese Law on Judicial Immunity of Foreign Central Banks (2005).

Hong Kong Basic Law (1997)

Singapore

Singapore State Immunity Act, Chapter 313 (2014)

South Africa

The South African Foreign States Immunities Act (1981)

The United Kingdom

The State Immunity Act, 17 ILM 1123 (1978)

The United States

Restatement (Second) Foreign Relations Law of the United States (1965)

Restatement (Third) Foreign Relations Law of the United States. (1987)

The Foreign Sovereign Immunities Act (FSIA), 15 ILM 1388 (1976).

Uniform Commercial Code (1990).

TABLE OF TREATIES

Additional Protocol to the European Convention on State Immunity (1985).
Charter of the United Nations, 1 UNTS XVI (1945)
Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 3 (1958).
Convention on Contracts for the International Sale of Goods, Annex I, U.N. Doc. A/Conf. 97/18 (1980).
Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)
Convention on the Privileges and Immunities of the United Nations (1946)
European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).
European Convention on State Immunity, 1495 U.N.T.S. 181 (1972).
International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (1926)
Montivideo Convention on the Rights and Duties of States (1933).
Statute of International Court of Justice (1946) .
United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (2004).
Vienna Convention on Diplomatic Relations (1961).
Vienna Convention on the Law of Treaties (1969).

LIST OF ABBREVIATIONS

ASEAN	Association of South East Asian
BIT	Bilateral Investment Treaty
CISG	Convention on Contracts for the International Sales of Goods
DRC	Democratic Republic of Congo
EU	The European Union
FSIA	Foreign Sovereign Immunities Act
GONGO	A Government-Organized Non-Governmental Organization
ICSID	International Centre for Settlement of Investment Disputes
ILM	International Legal Material
ITC	International Trade Centre
JACT	The Joint Association of Classical Teachers
MNC	Multinational Company
NGO	Non-Governmental Organization
PICC	Principles of International Commercial Contracts
PTA	Preferential Trade Agreements
SIA	The State immunity Act
TTIP	Transatlantic Trade and Investment Partnership
UK	The United Kingdom
UCC	Uniform Commercial Code
UNCTAD	The United Nations Conference on Trade and Development
UN	The United Nations
UNIDROIT	Institut International Pour L'Unification du Droit Prive (International Institute for the Unification of Private Law)
U.S.	The United States

CHAPTER I

INTRODUCTION

1.1. Background of the Study

In today's modern era, business activities are growing rapidly.¹ This evolutive process is characterized by a growing number of trade agreements concluded by business parties of different nationalities. The more investment agreement deals, the more state receives economic advantages to support its development. Moreover, state plays important role in encouraging and maintaining the fair business environment within their territory by imposing laws, conducive political guarantee, and impartial policies.

As a part of efforts to boost their economic welfare, state is also conducting commercial activities. In fact, there are many ways of state involvement in the business network, such as: being major stockholder of corporation (or establishing state owned enterprise), engagement into profitable contract with private actors, and embed investment in foreign countries. Particularly several state owned enterprises (SOE) overrun world market and saddle up to compete with multinational private owned enterprises.

Most of multinational SOE's have engaged in oil reserves and production i.e. National Iranian Oil Company (Iran), Rosneft (Russia), National Petroleum Corporation (China), Petronas (Malaysia), Pertamina (Indonesia), Petrobras (Brazil), Aramco (Saudi Arabia), Petr leos de Venezuela (Venezuela), and other oil companies owned by states control major forces in the world oil market.² Not

¹ One of the key developments in the world economy is the technology innovation and its mass utilization in modern society that broken down traditional borders between nations and opened up new areas of economic opportunity. UNCTAD. (2014) *Trade and Development Report 2014*. New York and Geneva: United Nations. p.1.

² All of those companies owned by states though fully owned or partially owned (no dominant position). PIROG, R. (2007) *The Role of National Oil Companies in the International Oil Market*. US Congressional Research Service. [Online] Available from <http://fas.org/sgp/crs/misc/RL34137.pdf> [Accessed: March 1st, 2015]. pp.4-5. See also TORDO, S. et al. (2011) *National Oil Companies and Oil Creations*. *The World Bank Working Paper* No.218. pp.68-71. The top five countries that dominant in company ownership are China (96%), the United Arab Emirates (88%), Russia (81%), Indonesia (69%), and Malaysia (68%). KOWALSKI, et al.

only engaging in the exploration oil and gas, now multinational SOE's are also involved in many business sectors including financial sectors.³

The commercial passion of every state is basically protected by immunity. As developed in undisputed international usances⁴, state enjoy sovereign immunity for all their activities whether governmental (*acta jure imperii*) and commercial (*acta jure gestionis*).⁵ In addition, immunity has two different applications, such as: immunity from enforcement and jurisdictional immunity. Immunity from jurisdiction refers to a limitation of the adjudicatory power of national courts⁶, whereas immunity from enforcement prevents courts of the forum State from imposing measures of constraint on the foreign State.⁷

The historical record shows that immunity doctrine is an absolute conception though it had given to merchants who enjoyed the status of state dependents.⁸ This absolutism goes through the development of customary international law⁹ and impulse state confidence in international market commonly by using immunity as a safe harbor for their misconduct. The absolute character of immunity tends to fundamentally unfair for private entities when they get friction with state enterprise. The shield of immunity is commonly used to avoid private

(2013) State-Owned Enterprises: Trade Effects and Policy Implications. *OECD Trade Policy Paper* No. 147.

³ For non-financial Multinational SOE's, UNCTAD identified several sectors such as: telecommunication; transportation, shipping, and storage; food; utilities; and diversified activities. UNCTAD. (2011) *World Investment Report 2011: Non-Equity Modes of International Production and Development*. Geneva. pp.30-35. [Online] Available from: http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf [Accessed: January 2nd, 2017].

⁴ BYERS, M. (1999) *Custom, Power, and the Power of Rules*. Cambridge: Cambridge University Press. p.4. SHAW, M. N. (2008) *International Law*. Cambridge: Cambridge University Press. p.141.

⁵ YEE, S. (2003) Foreign Sovereign Immunities, Acta Jure Imperii and Acta Jure Gestionis: A Recent Exposition from the Canadian Supreme Court. 2 (2) *Chinese Journal Of International Law*. p.649.

⁶ LAUTERPACHT, H. (1951) The Problem of Jurisdictional Immunities of Foreign States. 28 *British Yearbook of International Law* 220. pp.220-225.

⁷ WIESINGER, M. (2006) *State Immunity from Enforcement Measures*. University of Vienna. p.1. [Online] Available from: http://intlaw.univie.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/wiesinger.pdf [Accessed: March 2nd, 2015].

⁸ ROLLINGER, R. and ULF, C. (eds.) (2002) Commerce and Monetary Systems in the Ancient World Means of Transmission and Cultural Interaction, *Proceedings of the Fifth Annual Symposium of the Assyrian and Babylonian Intellectual Heritage Project*, Innsbruck, Austria. p.97.

⁹ BROWNIE, I. (2008) *Principles of Public International Law*. 7th edition. Oxford: Oxford University Press. pp.323-327.

accountability for state's commercial behavior. Restrictive immunity, then, serves to delimit the using of immunity in state's commercial activities. This approach has been applied effectively in the Western European countries, the United States, Australia, and mostly common law countries.¹⁰

The restrictive immunity doctrine provided that states merely immune from jurisdiction relating to their "public acts" (*acta jure imperii*) but were not immune from jurisdiction for their "private acts" (*acta jure gestionis*).¹¹ This conception then adopted by several national laws i.e. Foreign Sovereign Immunity Act (the United States)¹², The State Immunity Act (the United Kingdom)¹³, and also used as a source of interpretation by judges i.e. in the case of *Stukonis v. USA Embassy*¹⁴, *Philippine Embassy Bank Account*¹⁵, *Leica AG v. Central Bank of Iraq et Etat Irakien*¹⁶, and other related cases that improving the appropriate test for determining the acts character as private or public. Furthermore, international communities agreed in initiative to universalize such restrictive immunity through multilateral treaties such as European Convention on State Immunity (1976)¹⁷ and United Nations Convention on Jurisdictional Immunities of States and Their Territory (2004)¹⁸.

¹⁰ McNAMARA, T. (2006) A Primer on Foreign Sovereign Immunity, *Paper* presented in Union Internationale des Avocats, Winter Seminar on International Civil Litigation and the United States of America. p.1. [Online] Available from: <http://www.dgslaw.com/images/materials/McNamara1.pdf> [Accessed: March 2nd, 2015]. See also NICHOLSON, F. (1961) Sucharitkul: State Immunities and Trading Activities. 2 *Boston College Law Review* 459. p.60-61. ALLEN, E. (1933) *The Position of Foreign States before National Courts, Chiefly in Continental Europe*. New York: The Macmillan Company. p.301.

¹¹ McNAMARA, T. *loc.cit.* DORSEY, W. (1997) Reflections on the Foreign Sovereign Immunities Act after Twenty Years, 28 *Journal of Maritime Law and Commerce* 257. pp.262-265.

¹² *Ibid.*

¹³ BOWETT, D. (1978) The State Immunity Act 1978. 37 (2) *The Cambridge Law Journal*. p.193.

¹⁴ TOLEIKYTĖ, N. *The Concept of State Immunity and The Main Challenges*. [Online] Available from: http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Toleikyte.pdf [Accessed: March 3rd, 2015].

¹⁵ Philippine Embassy Case, Germany, Federal Constitutional Court, 13 December 1977, 46 BVerfG, 342; 65 ILR 146. p.164.

¹⁶ *Leica AG v. Central Bank of Iraq et Etat Irakien*, Cour d'appel, Brussels, 15 Feb. 2000.

¹⁷ European Convention on State Immunity, May 16, 1972, 1495 U.N.T.S. 181.

¹⁸ United Nations Convention on the Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) [hereinafter 'UN Convention on Jurisdictional Immunities']

The concept of restrictive immunity has not fully gained universal acceptance because obviously some countries still placing immunity in absolute conception. In the recent case of *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, the High Court of Hong Kong by formal support from Minister of Foreign Affairs of Hong Kong affirmed ‘in position that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of ‘restrictive immunity’.¹⁹ Moreover, private actors have to work hard to prepare strong argumentation in determining the acts of state between public and private acts which quite often draining energy and even if the Court gives a favor for private actors, they have to deal again with the enforcement court which sometimes has different legal system and practices. They shall to do so unless there existed a consent from their partner’s state to waive their immunity under their private agreement.

In the twenty first century, a lot of international business and working group encouraged states to restrict the immunity doctrine within their national laws and practices. The main core of limiting such immunity is basically based on the growing of modern economic development that investors seek and need legal certainty to the place of investment. When a state could maintain justice within the business environment, this would increase their image as pro-investment states and boost their economic development for the nation’s welfare.

This dissertation will focus on four main research: first, tracing the conceptual development of immunity for protecting commercial circumstances in the past. It will describe the historical practices of immunity and its comparative explanation to present’s situation. Second, this study will analyses the law of restrictive immunity both in domestic laws and international treaties. Third, this dissertation will identify common challenges in the implementation of restrictive

¹⁹ *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, Judgment of the High Court of the Hong Kong Special Administrative Region No. 928 of 2008. par.14. [Online] Available from: http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=%28firm%29&TP=JU [Accessed: March 3rd, 2015].

immunity. Fourth, this study will figure out the best approach to restrict the use of immunity in commercial and business transaction.

1.2. Problem Formulation

In sharpening the research analysis, these dissertations will answer 4 (four) main problem formulations as stated as follows:

1. How does the concept of immunity doctrine develop?
2. How far international treaties and certain domestic laws regulate the restrictive approach of immunity?
3. What are the challenges in the application of restrictive immunity?
4. What are the best approaches to restrict the doctrine of immunity?

1.3. Research Contribution

This research will be hold for the following contributions, such as:

1. In general, this research will give brief description about history of the use of immunity doctrine in the past. The historical timeline is important as core material to understand the whole development of the application of the immunity doctrine in commercial activity;
2. For international community, this research will provide new understanding arguments especially in sharpening the approach of restrictive immunity in commercial activities of state; and
3. For certain group of people such as bussiness society, the result of this research hopefully could increase their confidence to do business with state party in twenty first century.

1.4. Innovative Content

There are various approaches of science that could be used to study about the immunity doctrine and its application. As factual academic evidence, this doctrine has been used as the main material of research by world scholars. Moreover, the doctrine of immunity is one of the oldest and accepted doctrine in

international law.²⁰ Its application by the judiciary institutions of every states represent diverse but ineluctably convergent trends. Different academic approaches used by international lawyers over the years have resulted in relevant legal analysis to sharp the doctrine of immunity.

In order to build good argumentations and different result of analysis, this research has three points of distinction with previous researches.

1. This study traces the historical practice of immunity in commercial activities and its comparative analysis to the present practice

Although there has no agreement between scholars about the exact time when the immunity firstly practiced in the past, many scholars contibute to reveal the practice of immunity in the past using the historical approach. With their academic contribution, we could understand that the doctrine of immunity was well established by the end of the seventeenth centruy with the basis from the development of the principle of state equality and sovereignty.²¹ However, most of them are analyzing the use of immunity in sovereign activities of state or some works are analyzing the broad scope of immunity.²² There are few academic researches in tracing the historical practice of immunity in commercial activities. Most academic works usually discussed current development of restrictive immunity by refering judicial decisions and interpretations.

To provide additional academic reference about the immunity practice in history, hence, this research attempts to present historical approach on the use of immunity in commercial activities. However, this study only presents the historical practice of immunity application in ancient mesopotamia and greece to capture the common practice in the past. Then, such practice would be compared with the present's practice in order to acknowledge the development of immunity doctrine.

²⁰ DENZA, E. (2008) *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*. Oxford: Oxford University Press. p.1.

²¹ DICKINSON, E. (1920) *The Equality of States in International Law*. Cambridge: Harvard University Press. pp.68-69.

²² ELIAS, T. (1988) *Africa and the Development of International Law*. London: Martinus Nijhoff. p.63.

2. This study presents current's domestic law and international treaties which supports the application of restrictive approach on immunity

Hazel Fox (2002) in her book already explained the sources of the law of state immunity.²³ Those sources include treaty practice, projects for codification, and certain municipal laws.²⁴ However, there are still another sources of law that could be relevant for example the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 and other new domestic laws regarding state immunity. This research will consider this new sources of law in order to re-investigate previous normative approach on the application of restrictive immunity in commercial activities wether it has some new development or not.

3. This study uses legal theories and conception of international private law to restrict the immunity

The process of globalization since twentieth century has challenged the Westphalian concept of state sovereignty.²⁵ Conflict between legal systems as the result of globalization process have dominant solution in private international law. The basic function of private international law in addressing transnational regulatory gaps is to coordinate the process of regulation by national authorities and national laws.²⁶ In particular, private international law rules help to determine when parties injured by the transnational activity of actors can make complaints under national legal regimes.²⁷

Private international law is often concerned with private transactions. Since the commercial activities of state contains private transaction in nature, thus certain regulatory system in private international

²³ FOX, H. (2002) *The Law of State Immunity*. Oxford: Oxford University Press. p.67.

²⁴ *Ibid.*

²⁵ MICHAELS, R. (2004) Territorial Jurisdiction after Territoriality. In SLOT, P.J. and BULTERMAN, M. (eds.) *Globalisation and Jurisdiction*. The Hague: Kluwer Law International. pp.113-115.

²⁶ WAI, R. (2002) Transnational Liftoff and Judicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization. 40 (2) *Columbia Journal of Transnational Law* 209. p.253.

²⁷ *Ibid.*

law could be use as legal test to restrict the means of the doctrine of immunity.

CHAPTER II

RESEARCH METHODOLOGY

2.1. Applied Methodology

The doctrinal research methodology applied within this study. This methodology is focused to analyse the doctrine of immunity and how it has been applied.²⁸ Immunity principle, in fact, has broadened scope but it has different applications. To explain the basic theoretical of immunity principle and its application in international private and business law needs several approaches.

2.2. Research Approach

Analyzing the formation of immunity's doctrine during the historical timeline needs historical approach to find its practical use in ancient states. Moreover, normative approach applied in this study when analyzing the rule and concept of immunity's doctrine in international treaties and modern state legislations. Furthermore, to get comprehensive conclusion about the use of immunity's doctrine in the twenty first century, this study will definitely use the case-based approach meaning that cases related with the application of this doctrine to be compiled and analyzed in order to achieve some substantial parameters and limitations of immunity arise within.

The diagram 1.1. below describes how this research is using the three different approach to analyze each problem in the dissertation.

²⁸ SALTER, M. and MASON, J. (2007) *Writing Law Dissertations*. New York: Pearson Education Limited. pp.44-45.

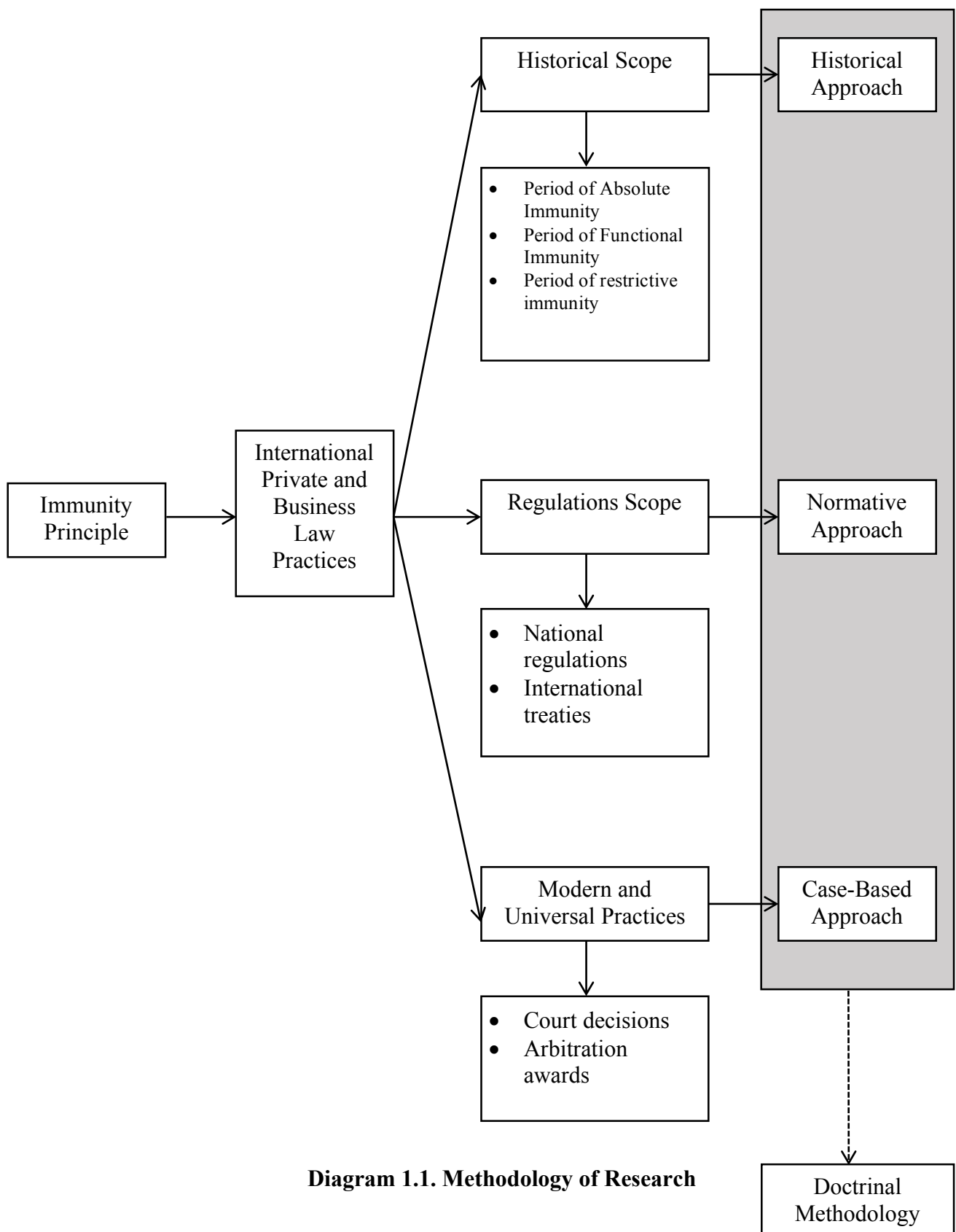


Diagram 1.1. Methodology of Research

2.3. Operational Definitions

Particular terminologies in this research should be defined to give better and similar understanding, such as:

1. Immunity means an exemption that a person enjoys from the normal operation of the law such as a legal duty or liability, either criminal or civil.²⁹
2. Commercial transaction means any commercial contract or transaction for the sale of goods or supply of services; any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; and any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.³⁰
3. Domestic law means national law or municipal law that comes from domestic/national legislatures and customs.
4. International treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.³¹
5. International private law means part of local legal system that governs the selection of appropriate law, and validity of judgments and jurisdictions of local and foreign courts, in civil cases containing a foreign element, such as where a contract made locally has to be performed in another country.
6. State means a person of international law that should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.³²
7. Non state actor means subject of international law including any entity that is not actually a state, often used to refer to armed groups, terrorists, civil society, religious. groups or corporations.

²⁹ BOWERS, C. M. (2013). *Forensic Testimony: Science, Law, and Expert Evidence*. Oxford: Academic Press. p.250.

³⁰ UN Convention on Jurisdictional Immunities, art.2(1)(c).

³¹ Vienna Convention on the Law of Treaties (1969), art.2 par.1(a).

³² Montivideo Convention on the Rights and Duties of States (1933), art.1.

8. Sovereignty means the absolute authority of a state to hold over a territory and people as well as independence internationally and recognition by other sovereign states as a sovereign states.³³

2.4. Legal Materials

The source of this study consists of the primary and secondary legal source. To observe and analyze in answering each problem formulations, this study will use library research to collect all related legal materials.

1. The primary legal sources used in this study are the binding instruments as stated as follows:
 - a. Convention on Jurisdictional Immunities of States and Their Property (2004);
 - b. Convention on Contracts for the International Sale of Goods (1988);
 - c. European Convention on State Immunity (1978);
 - d. Convention on the Settlement on Investment Disputes between States and Nationals of Other States (1965);
 - e. Related domestic regulations;
 - f. Court decisions; and
 - g. Arbitration awards.
2. The secondary legal sources used in this study are materials that supporting or describing the primary legal sources such as:
 - a. Books;
 - b. Journals;
 - c. Dictionaries; and
 - d. Encyclopedias.

³³ WEBER, C. (1995). *Simulating Sovereignty: Intervention, the State and Symbolic Exchange*. Cambridge: Cambridge University Press. p.1.

CHAPTER III

THEORITICAL FRAMEWORK

3.1. The Nature of State Immunity

State immunity is commonly defined as a state does not fall under the jurisdiction of foreign courts (immunity from jurisdiction) and that its property located in foreign territory is not subject to attachment and execution (immunity from execution).³⁴ This legal concept enables states to perform their public functions effectively and to protect their representatives to conduct international relations in order to achieve their national interest. When a state or its representatives is sued before the foreign domestic court, they may prevent their adjudication by pleading state immunity.

State immunity developed as an “undisputed principle of customary international law”. Every legal system (common law, civil law and other judicial systems) have the same legal concept about state immunity. The different part between their existing rule is only about the legal approach whether it has absolute character or restrictive character. The two approach is actually applied based on different rationale while absolute application of state immunity is traditional approach and restrictive application is practiced in modern era post mid-twentieth century.³⁵

The rationale behind the absolute character of state immunity is precluding one State from exercising jurisdiction over another under the principle of *par in parem non habet imperium* (an equal has no power over an equal).³⁶ This is a very old principle in international law which initially appeared to endorse an absolutist form of sovereignty, that implied over-simplified view of the role of sovereign in global settings.³⁷ The maxim could be traced back in 14th century from jurist Bartolus who wrote *Non-enim una civitas potest facere legem super alteram, quia par in parem non habet imperium* (for it is not for one city to make the law upon another, for an equal has no power over an equal).³⁸

³⁴ BOUCHEZ, L. (1979) The Nature and Scope of Immunity from Jurisdiction and Excecution. 10 *Netherlands Yearbook of International Law* 3. p.3.

³⁵ GORDON. (1977) The Origin and Development of the Act of State Doctrine. 8 *Rutgers Camden Law Journal* 595. p.596.

³⁶ BADR, G. (1984) *State Immunity: An Analytical and Prognostic View*. The Hague and Boston: Martinus Nijhoff. p.89.

³⁷ NAGAN, W. and ROOT, J. (2013) The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the United Nations Charter, and the Application of Modern Communications Theory. 38 *University Florida Faculty Scholarship* 375. p.376.

³⁸ BADR, G. *loc.cit.*

A sovereign is one who rules or has dominant position. It has authority over a defined territory. It also has the power to command³⁹ and effective control of their military, economic, politic, education, and anything to achieve their common interest.⁴⁰

In line with the maxim, sovereigns are equal only before the law. Legal principles and rules are to be enforced to all sovereigns equally. Sovereigns are unequal only in the side of politic but in the legal side, sovereigns must be placed the same. Courts treat all sovereigns equal. Thus, the doctrines of act of state and sovereign immunity affect the ways in which sovereigns interrelate.

The concept of sovereign has seemingly changed led by globalization. At the same time, the doctrine of sovereign immunity has been shaded consequently.⁴¹ The idea of the distinctive right of the sovereign has been leaved behind for centuries. The transformation relevant to the modification of the doctrine of sovereign immunity concerns the participation of governments in commercial activities and the rise of state business enterprises. As governments and state enterprises became more and more active in commercial activities in the modern era, private entities interacting with foreign states striked/attacked complete sovereign immunity as fundamentally unfair in eliminating judicial recourse and favoring state companies. This fact of twentieth century life has caused the abandonment of the absolute theory of sovereign immunity in favor of a restrictive theory.

3.2. The Act of State Doctrine

Chief Justice Fuller in the case of *Underhill v. Hernandez* explains in his decision about the act of state doctrine that,

“Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.”⁴²

Additionally, Zander (1959) briefly and baldly defines the doctrine as stated as follows: “act, which would otherwise be an actionable wrong, may be so authorized or

³⁹ John Austin regarded law as a command from a sovereign. According to Austin, to interpret a legal system, one must first identify a sovereign or a person or group of people who habitually obey(s) no one, and whose commands are habitually obeyed. AUSTIN, J. (1995) *The Province of Jurisprudence Determined*. Cambridge: Cambridge University Press. pp.199-212.

⁴⁰ THOMAS, C. (1985) *New States, Sovereignty, and Intervention*. Basingstoke: Palgrave Macmillan. p.11.

⁴¹ LAUTERPACHT, H. (1951) *op.cit.* p.220.

⁴² *Underhill v. Hernandez*, 168 U.S. 250 (1897).

adopted by a government to make it an “act of state” for which no individual is personally liable, and for which the government can be made responsible only through its own grace or through international recourse”.⁴³ The “act of state” includes not only an executive or administrative exercise of sovereign power by an independent state, or by its duly authorized officials, but also legislative and administrative acts such as code, statute, decree, or order.⁴⁴ Act of state cases that often involve in legislative or administrative actions of foreign governments are generally regarded as sovereign in nature.

The act of state doctrine becomes another challenge to the full implementation of international law by domestic courts. This doctrine bars judicial review of the behavior of foreign state.⁴⁵ Traditionally, private litigants who sue foreign countries in domestic courts encounter both the act of state doctrine and the doctrine of foreign sovereign immunity. But in the case of *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC)*, the court made distinction between the purpose of the two doctrines and explained that “sovereign immunity goes to jurisdiction of the court. The act of state doctrine is not jurisdictional. Rather, it is a prudential doctrine designed to avoid judicial action in sensitive areas”⁴⁶

The act of state doctrine does not determine court’s jurisdiction, but it is applied by court in reaching a determination on the merits of a case.⁴⁷ The act of state doctrine was based on the concept that to judge the “acts of state” by applying customary principles of judicial review would be an interference with the authority of another sovereign.⁴⁸ This concept comes up from the system of separation of powers, which entrusts the liability for conducting foreign policy in the executive branch, not in the judiciary.⁴⁹ However, where inquiry into the foreign state’s action would not be potentially embarrassing, political branches appear to allow the court to rule on the merits of a case. The doctrine demands a case-by-case analysis of the extent to which a particular dispute implicates these separation

⁴³ ZANDER, M. (1959) The Act of State Doctrine. 53 (4) *American Journal of International Law* 826. pp.826-827.

⁴⁴ MANN, F. (1943) The Sacrosanctity of Foreign Acts of State. 59 *Law Quarterly Rev* 42. p.155.

⁴⁵ CONFORTI, B. (1993). *International Law and the Role of Domestic Legal Systems*. Dordrecht: Martinus Nijhoff. pp. 0-23.

⁴⁶ *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC)*, 649 F. 2d 1354 (9th Cir.1981). p.1359.

⁴⁷ KAHALE, G. (1982) Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine. 6 *Fordham International Law Journal* 391. p.394.

⁴⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). p.423.

⁴⁹ *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S.682 (1976). p.697.

of power concerns, questioning the need for appropriate judicial review.⁵⁰ The doctrine is, therefore, a judicially-created attempt to protect general notions of comity among nations.⁵¹

The case of *Banco Nacional de Cuba v. Sabbatino*⁵² was the interesting case in which the United States federal courts honors the act of state doctrine.⁵³ In July 1960, the Cuban government retaliated against the United States for various measures imposed against the Castro government by expropriating property held by U.S. citizens in Cuba. This included the seizure of sugar owned by a company called C.A.V. A different American company, Farr, Whitlock & Co. had contracted to buy this sugar from C.A.V., but after it was seized, they bought it directly from the Cuban government. After receiving the sugar, however, Farr, Whitlock & Co. did not pay the Cuban government; instead, they paid C.A.V.'s legal representative, Sabbatino.⁵⁴ The Court, then, contrary to the views of respected international lawyers⁵⁵, found this decision dictated by the 'act of state doctrine', which bars American courts from reviewing the validity of another nation's official acts.

3.3. Jurisdiction and Sovereignty

Sovereignty and jurisdiction are legal doctrines that important to the development of international law and relations. These two doctrines have closed relationship in the matter of control of territory. The essence between these doctrines are: the term of "sovereignty" covers the legal personality of a state, jurisdiction refers to particular aspects of the substance, such as rights, liberties, and powers of a state.⁵⁶ Sovereignty explains the authority of the state over its populace, territory, and affairs, and operates in the international system along with the principle of equality of states.⁵⁷

In highlighting about the concept of sovereignty, Max Huber, an arbitrator of Island of Palmas case, stated that:

⁵⁰ *Texas Trading and Milling Corporation v. Federal Republic of Nigeria*, 647 F. 2d 300 (1982). p.316.

⁵¹ KRANE, S. (1980) Rehabilitation and Exoneration of the Act of State Doctrine. 12 *New York University Journal of International Law and Politics* 599. pp.606-608.

⁵² SIMMONDS, K. (1965) The Sabbatino Case and The Act of State Doctrine. 14 *International and Comparative Law Quarterly* 452. pp.454-457.

⁵³ BOGAARD, W. (1965) Act of State Doctrine after Sabbatino (Comments). 63 *Michigan Law Review* 528. pp.528-530.

⁵⁴ *Banco Nacional de Cuba v. Sabbatino*, *loc.cit.*

⁵⁵ HYDE. (1959) The Act of State Doctrine and the Rule of Law. 53 *American Journal of International Law* 635. ZANDER. *loc.cit.* REEVES. (1960) Act of State Doctrine and the Rule of Law-A Reply. 54 *American Journal of International Law* 141.

⁵⁶ ODUNTAN, G. (2012) *Sovereignty and Jurisdiction in Airspace and Outer Space: Legal Criteria for Spatial Delimitation*. New York: Routledge. p.55.

⁵⁷ *Ibid.*

“Sovereignty in the relations between states signifies independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.”⁵⁸

Maritain (1950) challenged the concept of sovereignty not in the judicial notions but in the philosophical notions.⁵⁹ Generally, the concept of sovereignty conceives as absolute independence, supreme power to the body politic or the people, and power without accountability. Maritain⁶⁰ based on his research stated that this three meaning are wrong. Absolute independence is inalienable because by virtue of its notion the sovereign state is a monadic entity which cannot cease to be sovereign without ceasing to be a state. The supreme power over the body politic, or the people, is all the more unquestionable as the state is mistaken for the body politic itself or for the personification of the people themselves. The sovereign states shall consider and accept the existence of pluralism in its people meaning that its power must be based on totalitarianism – a political system where the state recognizes no limits to its authority and strives to regulate every aspect of public and private life wherever feasible.⁶¹ Sovereign also could not be maintained without accountability because in fact in the democratic system, the people is the final judge of the stewardship of their governmental officials, hence, the authorized government cannot escape from the people’s supervision and control. Mann (1964) argued that jurisdiction has been described as one of the fundamental functions of public international law, viz. the function of regulating and delimiting the respective competences of states’.⁶²

Jurisdiction is the power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgement of a court.⁶³ Sovereignty not only serves as an enabling concept with respect to the exercise of jurisdiction, but also as a

⁵⁸ Island of Palmas Case, *Netherlands v. USA*, Vol II, 1928. [Online] available from: http://legal.un.org/riaa/cases/vol_II/829-871.pdf [Accessed May 2nd, 2015].

⁵⁹ JACQUES, M. (1950) The Concept of Sovereignty. 44 *The American Political Science Review* 343. p.343.

⁶⁰ *Ibid.* pp.355-356.

⁶¹ CONQUEST, R. (1999) *Reflections on a Ravaged Century*. New York: W.W. Norton Company. p.74.

⁶² MANN, F. (1964) The Doctrine of Jurisdiction in International Law. 111 *Recueil des Cours de l'Académie de Droit International* 1. p.15.

⁶³ BEALE, J. (1923) The Jurisdiction of a Sovereign State. 36 *Harvard Law Review* 241. p.241.

controlling device by adopting international rules that govern to support general domestic interest or sometimes not exclusively related with the domestic concerns.

The power of a sovereign to affect the legal rights of persons depends upon the law and upon the law must be based all sovereign jurisdiction.⁶⁴ In enforcing jurisdiction, the courts must obey the binding law and must also recognize that their decision must not cause any protest from any other country. In this matter, Judge Blackburn in *Schibsby v. Westenholz*, mentioned that:

“Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the Acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner, for we must obey them. But if, judgement being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgements is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English court’s jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created. This is precisely the question which we have now to determine with regard to a jurisdiction assumed by the French jurisprudence over foreigners.”⁶⁵

We also must understand that a sovereign cannot enforce legal jurisdiction on their courts or their legislature when they have no such jurisdiction to the principles of international law. Immunity as one of the example of international law doctrine which empowered certain government representatives not to obey the domestic law of other country or immune from the civil and administrative jurisdictions of other country.

In addition, states are not entitled to enforce their laws outside their territory except by virtue of a permissive rule derived from international custom or from convention even where they have jurisdiction to prescribe their laws extraterritoriality.⁶⁶ A State’s jurisdictional assertions that pertain to acts carried out in its territory are in principle lawful, while assertions that pertain to acts done outside its territory are suspect, and even presumptively unlawful.⁶⁷ Currently, states have exercised their enforcement jurisdiction abroad without any consent from the host state. For example: Adolf Eichmann was arrested

⁶⁴ *Ibid.*

⁶⁵ *Schibsby v. Westenholz*, L.R. 6 Q. B. 155 (1870). pp.158-160.

⁶⁶ RYNGAERT, C. (2014) *The Concept of Jurisdiction in International Law*. [Online] Available from: <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf> [Accessed: June 10th, 2015].

⁶⁷ FORD, R. T. (1999) Law’s Territory (A History of Jurisdiction). 97 *Michigan Law Review* 843. p. 843.

in Argentina by Israeli secret agents, without the Argentina's consent as territorial state. He was charged with the 'crimes against the Jewish people' and 'crimes against humanity' under the Nazis and Nazi Collaborators (Punishment) Law on 1950.⁶⁸ However, such actions have usually met with intense protest by other states.

Judge Marshall in the case of *Schooner Exchange v. M'Faddon*, stated that:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

Thus, within its own territory then jurisdiction of the sovereign is exclusive, except indeed by its own consent to permit the exercise of jurisdiction by another sovereign. A legislature also has no jurisdiction outside the territory of the sovereign, any attempted legislation claiming to affect matters outside such territory must be merely void.⁶⁹

3.4. The Doctrine of "Comity" or "Reciprocity"

The doctrine of comity is one of the legal principle which means that a jurisdiction recognize and give effect to judicial decree and decisions rendered in other jurisdictions unless if it contrary to its public policy.⁷⁰ This doctrine has various term like "moral obligation", "reciprocity", "utility", or "expediency" that all of these terms have similar meaning and purpose. The use of term "comity" as the most appropriate phase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.⁷¹ Moreover, the Supreme Court of the United States defined the doctrine as stated as follows:

"Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative,

⁶⁸ If a state, acting through an organ the actions of which are attributable to it, purports to exercise powers in the territory of another state without the latter's consent, it commits an international tort. If Adolf Eichmann was forcibly abducted from Argentina by Israeli secret agents, this actions constituted as an international tort. BAADE, H. W. (1961) The Eichmann Trial: Some Legal Aspects. *Duke Law Journal* 400. p.405. See also MORGENTHAU. (1953) Jurisdiction in Seizures Effected in Violation of International Law. 29 *British Yearbook of International Law* 265. pp.267-274.

⁶⁹ *St. Louis v. The Ferry Co.*, 11 Wall (U.S.) 423 (1870). p.430.

⁷⁰ STORY, J. (1846) *Commentaries on the Conflict of Laws, Foreign, and Domestic*. Boston: C. Little and J. Brown. pp.37-38.

⁷¹ *Ibid.*

executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”⁷²

One sense in which comity has been understood is that of reciprocity. According to this theory, the forum state applies laws and recognizes judgments of another state, so that other states will, in turn, apply the forum state’s law and recognize the forum state’s judgments. Thus, some legal systems refuse to recognize the judgments of those states that do not reciprocate.⁷³ However, Hay (2000) has different argument that reciprocity and comity are different concept explaining that reciprocity emphasizes local concerns that may disfavor recognition of foreign judgements.⁷⁴

As state living in the international community, their interaction shall uphold the doctrine of international comity. As we see in the United States nowadays, its domestic courts has long served as the basis of its private international law (conflict of laws) and the enforcement of foreign judgements. The United States Supreme Court has continuously placed foreign sovereign immunity law as an attitude to uphold international comity. The act of state doctrine as well has considered to be “the highest considerations of international comity and expediency.”⁷⁵ Yet, until now, as faced by many countries domestic court, there has been no consistent⁷⁶ meaning, parameter, and concept of comity.⁷⁷ Despite the ubiquitous invocation of the doctrine of comity, its meaning is surprisingly elusive.⁷⁸

The doctrine of comity is the core basis of the foundation of private international law. In line with this argument, Story mentioned that:

“The true foundation on which the subject rests is that rules which are to govern are those which arise from mutual interest and utility; from the sense of the inconveniences which would arise from a contrary doctrine; and from a sort of moral necessity to do justice in order that justice may be done to us in return.”⁷⁹

⁷² *Brown v. Babbitt Ford, Inc.*, 117 Ariz. App. 192, 571 P.2d 689 (Ct. App. 1977). BLEIMAIER, J. K. (1978) The Doctrine of Comity in Private International Law. 24 *Catholic Lawyer* 327. p. 327.

⁷³ SINGAL. (2008) Preserving Power Without Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments. 59 *HASTINGS Law Journal* 943. pp.947-958.

⁷⁴ HAY, P. (2000) On Comity, Reciprocity, and Public Policy in the United States and German Judgements Recognition Practice. In BASEDOW J. et al. *Private Law in the International Arena: From National Conflict Rules toward Harmonization and Unification*. T.M.C. Asser Press. p.237.

⁷⁵ DODGE, W. S. (2015) International Comity in American Law. 115 (8) *Columbia Law Review* 2071. p.2072.

⁷⁶ BOOKMAN, P. K. (2015) Litigation, Isolationism. 67 *Stanford Law Review* 1081. p. 1103.

⁷⁷ CHILDRESS III, D. E. (2010) Comity as Conflict: Resituating International Comity as Conflict of Laws. 44 *University of California Davis Law Review* 11. p.51.

⁷⁸ PAUL, J. R. (1991) Comity in International Law. 32 *Harvard International Law Journal* 1. p.4.

⁷⁹ STORY, J. *op.cit.* p.35. WATSON, A. (1992) *Joseph Story and the Comity of Errors* 2. Georgia: University of Georgia Press. p.2.

The increasing number of bilateral and multilateral treaties, along with other international instruments regulating about the recognition of foreign judgments, arbitral awards, and applicable law, it might be expected that there will be less need for judicial dependence on the doctrine of comity because the treaties themselves set the boundaries for giving effect to foreign judgements and reflect the legislature's view as to the optimal balance between comity and other competing domestic interests. In practice, however, the doctrine of comity is still relevant in the interpretation of these instruments and in exercising any discretion which they confer.⁸⁰

3.5. Legal Pluralism

Legal pluralism is happened in every states or even in small group of society. There is, in every social arena one examines, a seeming multiplicity of legal orders, from the lowest local level to the most expansive global level. There are village, town, or municipal laws of various types; there are state, district or regional laws of various types; there are national, transnational and international laws of various types. In addition to these familiar bodies of law, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups within a society. There is also an evident increase in quasi-legal activities, from private policing and judging, to privately run prisons, to the ongoing creation of the new *lex mercatoria*, a body of transnational commercial law that is almost entirely the product of private law-making activities.⁸¹

Legal pluralism generally defined as a situation in which two or more legal systems interact in the same social field.⁸² Popisil (1971) stated that “every functioning subgroup in a society has its own legal system which is necessarily different in some respects from those of the other subgroups.” Subgroups in his definition refers to units such as family, lineage, community, and political confederation that are integral parts of a homogenous society,

⁸⁰ CHILDRESS III, D. E. *op.cit.* p.50. SCHUZ, R. (2014) The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency. 40 (1) *Brooklyn Journal of International Law* 31. p.35.

⁸¹ TAMANAHA, B. (2008) Understanding Legal Pluralism: Past to Present, Local to Global. 30 *Sidney Law Review* 375. p.375.

⁸² The term of ‘legal pluralism’ refers to the situation in which two or more laws interact’. HOOKER, B. (1975) *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*. Oxford: Clarendon Press. p.6.

hierarchically ranked, and essentially similar in rules and procedure.⁸³ In line with this definition, Griffith (1986), affirms that:

“Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Nevertheless, the ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of social and legal theory. A central objective of a descriptive conception of legal pluralism is therefore destructive, to break the stranglehold of the idea that what law is, is a single, unified and exclusive hierarchical normative ordering depending from the power of the state, and of the illusion that the legal world actually looks the way such a conception requires it to look.”⁸⁴

Based on Malinowski opinion, law should be meant “by function and not by form”. There are many societies who lack any centralised institution enforcing the law, but there is no society which is deprived from these rules which “are felt and regarded as the obligations of one person and the rightful claims of another”.⁸⁵ His reasoning operates in the following way: (1) the function of law is to maintain social order; (2) social order can be found in regularised patterns of actual behaviour; (3) the complex of social obligations constitutes the binding mechanism maintaining social order; (4) legal norms are norms abstracted from actual patterns of behaviour and law is identical with social control.⁸⁶ Thus, law is as plural as social life itself, of which it represents the rules which are “too practical to be backed up by religious sanctions, too burdensome to be left to mere goodwill, too personally vital to individuals to be enforced by any abstract agency.”⁸⁷

Schiller (2011) mentioned that legal pluralism is arguably not a theory, but a perspective. It assumes that norms, other than those made and recognised by the state, are regularly applied in semi-autonomous social fields and are to be taken as seriously as law.⁸⁸ Thus, pluralist ‘law’ is understood as norms that are not made or recognised by the state, that effectively regulate the behaviour of the members of the semi-autonomous social field concerned.⁸⁹ This working definition does not clarify a minimum of ethical value as necessary

⁸³ POSPISIL, L. (1971) *The Anthropology of Law: A Comparative Theory of Law*. New York: Harper and Row. p.107. MERRY, S. E. (1988) Legal Pluralism. 22 (5) *Law and Society* 869. p. 870.

⁸⁴ GRIFFITHS, J. (1986) What is Legal Pluralism?. *Journal of Legal Pluralism* 1. p.5.

⁸⁵ MALINOWSKI, B. (1926) *Crime and Custom in Savage Society*. London: Routledge. p.55.

⁸⁶ TAMANAHA, B. (1997) *Realistic Socio-Legal Theory: Pragmatism and A Social Theory of Law*. Oxford: Clarendon Press. p.104.

⁸⁷ *Ibid.* p.68. See also DUPRET, B. (2007) Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Respecification. 1 *European Journal of Legal Studies* 1. pp.3-4.

⁸⁸ BENNETT, T. W. (2004) *Customary Law in South Africa*. Lansdowne: Juta and Company Ltd. pp.27-30.

⁸⁹ GRIFFITHS, J. *loc.cit.*

requirement for the norm to be regarded as a 'legal norm'. Thus, the meaning of any act of the will being regularly observed by the addressees in the social field concerned has the quality of law. Legal pluralism, then, abstains from qualifying a pluralist legal norm whether it is good or bad.⁹⁰

Hooker (1975) defines legal pluralism as circumstances “in the contemporary world which have resulted from the transfer of whole legal systems across cultural boundaries”. In this regard, many post-colonial community leaders view legal pluralism as frustrating, messy, and obstructive to development progress.⁹¹ European Union Law is the best reference on example of legal systems unification though it has weakness in some parts.⁹²

In the context of European Union, the relationship between the member states and the European Union as a separate authority is obviously pluralistic because it contains and interacts with a multitude of coexisting, competing, and overlapping legal systems at many levels and in many contexts.⁹³ With this kind relationship, there is dualistic system within the European Union: member states of the European Union have their own legal system and their system are required to interact with the European Union legal system by following its treaties and regulations. In simple argument, the European Union is more pluralistic, but coherent and unified enough to be a legal system.⁹⁴ However, Barber (2006) stated that neither the European Union through the European Court of Justice and member states through their domestic courts consider the system pluralistic.⁹⁵ He mentioned that:

“The Court of Justice of the European Union (ECJ) makes three, interconnected, claims of supremacy. First, that the ECJ is entitled to definitively answer all questions of European Law. Secondly, that the ECJ is entitled to determine what constitutes an issue of European Law. Thirdly, that European Law has supremacy over all conflicting rules of national law. These claims are distinct: making any one of the claims does not entail making the

⁹⁰ SCHILLER, J. (2011) Legal pluralism – The Investor’s View. *Acta Juridica* 272. p.273.

⁹¹ BENTSI-ENCHILL, K. (1969) The Colonial Heritage of Legal Pluralism. 1 *Zambia Law Journal* 1. pp.1-3.

⁹² “As our world struggles with twin principles of universalism and pluralism, and as *inter-, trans-, supra,* and sub-national legal norms increasingly find their way into and among national legal systems, it becomes crucial to decide the ways and extent to which the national should be retained and should prevail, and the ways in which it should be eradicated. The EU's uniquely visible potentials for departing from national aspects of law, and the incipient stage of its development, make it useful for exploring how future orientations should deal with the nation-state model, however difficult it may be even to imagine effective alternatives to past experiences.” See GROSSWALD CURRAN, V. (2005) Remembering Law in the Internationalizing World. 34 (1) *Hofstra Law Review* 93. p. 97.

⁹³ TAMANAHA, B. (2008) *loc.cit.* p.387.

⁹⁴ BAUM, L. Legal Pluralism and the European Union. *Comparative European Legal History*. p. 17. [Online] Available from: [https://www.jur.lu.se/WEB.nsf/\(MenuItemByDocId\)/ID77DFD011813BD596C1257D860028A766/\\$FILE/Baum%20Liam.pdf](https://www.jur.lu.se/WEB.nsf/(MenuItemByDocId)/ID77DFD011813BD596C1257D860028A766/$FILE/Baum%20Liam.pdf) [Accessed: June 5th, 2015].

⁹⁵ BARBER, N. (2006) Legal Pluralism and the European Union. 12 (3) *European Law Journal* 306. p.323.

other two. National supreme courts have sometimes proved unwilling to accept these assertions. Most famously, the German courts have refused to cede their role as guardians of the German Constitution.”⁹⁶

Benda-Beckmann (2000) has analysed the transnational aspect of legal pluralism using the legal anthropology approach. These aspect includes the increasing importance of public international law for individuals in their relation to their national legal systems and their nation states, the dynamics of factual law-making in international organisations, the interactions between international organisations and national governments and various interest groups, the role of NGO’s, the practice of alternative dispute resolutions, *lex mercatoria* and international commercial arbitration, and the complex and conflicting relation between religious normative systems and the pluralistic national and international normative systems.⁹⁷ Using the same transnational aspect of legal pluralism, Santos (1995) highlighted that law is already operates in transnational field rather than being ordered by a single legal order, modern societies are are ordered by a plurality of legal orders, interrelated and socially distributed in different ways.⁹⁸ In the matter of the multitude of law-making actors in the transnational fields, Santos suggests drawing up a map in order to localise the different places and movements of these actors (actors who make local orders global, who influence local orders with transnational orders or provoke their resistance, and actors who make genuine transnational law:

“While some, admittedly the most significant, instances of the transnationalisation of law can be directly traced back to the networking of globalised localisms and localised globalisms which go together with the transformation of capital accumulation and Western cultural imperialism on a global scale, other instances, although connected with these transformations – if for no other reason, to resist against them – stem from autonomous political and cultural considerations, such as those lying behind the agendas of cosmopolitans and common heritage of mankind.”⁹⁹

⁹⁶ *Ibid.* MacCormick (2010) offers two possible models to resolve lictive account of competence-competence proffered by the ECJ and national courts: first, a situation of ‘radical pluralism ‘ in which there are no norms common to both systems which can resolve meta-jurisdictional conflicts, which leaves these to be settled through political compromise and institutional restraint; and second, pluralism under international law where international law functions as a common ground of validity both of member states systems and Community law. See MacCORMICK, N. (2010) *Questioning Sovereignty*. Oxford: Oxford University Press. pp. 100-117. MUNIZ-FRATICELLI, V. M. (2014) *The Structure of Pluralism*, Oxford: Oxford University Press. p.76.

⁹⁷ BENDA-BECKMANN, K. (2001) Transnational Dimensions of Legal Pluralism. In FIKENTSCHER, W. (ed.) *Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme*. München: Verlag der Bayerischen Akademie der Wissenschaften. pp.33-48.

⁹⁸ SANTOS, B. S. (1995). *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York: Routledge. p.114.

⁹⁹ *Ibid.* p.269. See also GÜNTHER, K. (2008) Legal Pluralism or Uniform Concept of Law?. 5 *No Foundations* 5. p. 14.

We cannot deny the existence of the growth of ‘self-creating’, ‘private’, or ‘unofficial’ legal orders. Gunther Teubner, suggests that functionally differentiated systems have developed with a global or transnational reach — commercial transactions, the internet, and sports organizations, for example — generating their own legal orders. What observers have dubbed the new *lex mercatoria* is the most often mentioned example.¹⁰⁰ This area of law has become new phenomenon in the development of legal pluralism in the globalization era. Transnational commercial transactions are increasingly conducted in connection with a body of rules and institutions that are not entirely tethered to the international legal system or to any particular nation state. Binding rules derive from several international treaties related commercial contracts, from standard terms utilized in model contracts, and from business customs or usages. Disputes between contracting parties are resolved through private arbitration. What makes the *lex mercatoria* noteworthy is that its norms, practices, and institutions are self-generated by the parties and their lawyers, although it intersects at various points with international law norms and national courts (when parties seek recourse from arbitration decisions). A different version of privately created rules in the economic sphere focuses on the efforts of NGOs to pressure corporations to adopt better practices, for example, by adopting corporate codes of conduct that address labor conditions for employees.¹⁰¹ The primary actors in these contexts are transnational corporations, NGOs (Amnesty International, Greenpeace, etc), trade associations, various subject-based international agencies, and lawyers who serve them; their collective activities are creating a multiplicity of regulatory orders with global reach.¹⁰²

The question is then will it be possible to create globalization of autonomous law? All scholars based on current research show their similar argument that though it is impossible but we are now having few signs of a strong, independent, large-scale, global development of genuine legal institutions, especially world or international courts.¹⁰³ Because of the restrictions of international public law and the regionalism of politics, worldwide legislation is a cumbersome process. A global administration scarcely exists despite the existence of numerous international organizations. Perhaps the most interesting

¹⁰⁰ TAMANAHA, B. (2001) *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press. pp. 125-127.

¹⁰¹ BLACKETT, A. (2001) Global Governance, Legal Pluralism, and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct. 8 *Indiana Journal of Global Legal Studies* 401. p.401.

¹⁰² SNYDER, F. (1999) Governing Economic Globalisation: Global Legal Pluralism and European Law. 5 *European Law Journal* 334. p. 335.

¹⁰³ HIGGINS, R. (1994) *Problems and Process: International Law and How We Use It*. Oxford: Clarendon Press.

and dynamic phenomenon within law's empire itself is the development of private worldwide law offices, multinational law firms, which tend to take a global perspective of conflict regulation.¹⁰⁴

Global law will grow mainly from the social peripheries, not from the political centers of nation states and international institutions. A new living law growing out of fragmented social institutions which had followed their own paths to the global village seems to be the main source of global law. This is why, for an adequate theory of global law, neither a political theory of law nor an institutional theory of autonomous law will do; instead a theory of legal pluralism is required.¹⁰⁵

3.6. The General Concept of Conflict of Law

Conflict of law has various term such as: international private law, *droit internationale prive*, *diritto internazinale privato*, *conflict des lois*, *conflicten recht*, and etc. It governs the choice of law to apply when there are conflicts in the domestic law of different nations related to private transactions between those nations. Indeed, conflict of law covers with all legal relationships between persons, legal persons, and between them, includes marriage law, contracts, and obligations. To differentiate with the private law, private international law is the area of law that comes into play whenever a court is dealing with a question that contains a foreign element¹⁰⁶, or a foreign connection. The actual purpose of private international law is to find out the answer of intersection between foreign elements and to provide just decision to solve the case that arises from different legal systems.¹⁰⁷

Conflict of laws is generally understood as having three branches: jurisdiction, choice of law, and recognition and enforcement of judgments.¹⁰⁸ Domestic courts apply the rules of jurisdiction to determine whether to assert adjudicative authority over a dispute arising from transnational activity, or to defer to the adjudicatory authority of another state by declining to assert its own authority. They apply choice-of-law rules to determine whether to apply domestic law or another state's law to transnational activity. And they apply the rules of recognition and enforcement to determine whether to recognize or enforce

¹⁰⁴ TEUBNER, G. *Global Bukowina: Legal Pluralism in the World Society*. pp.4-5. [Online] Available from: https://www.jura.uni-frankfurt.de/42852872/Bukowina_english.pdf [July 2nd, 2015].

¹⁰⁵ *Ibid.*

¹⁰⁶ GEORGE, J. P. and PERDESEN, F. C. (1988) Conflict of Law. 41 *Southwestern Law Journal* 383. p.383.

¹⁰⁷ KIESTRA, L. R. (2014) *The Impact of the European Convention on Human Rights on Private International Law*. T.M.C. Asser Press. p. 14.

¹⁰⁸ HAY, P., BORCHERS, P. J., and SYMEONIDES, S. C. (2010) *Conflict of Laws*. Fifth Edition. St. Paul.

foreign judgments - that is, the decisions of the courts of other states. These three branches correspond to three dimensions of governance authority: authority to adjudicate, authority to prescribe, and authority to enforce.¹⁰⁹

There are two main purpose of private international law. First, private international law will guide to the assertion of jurisdiction in a case with international connections, the application of a foreign law, or the recognition and enforcement of foreign judgments. Private international law guarantees parties in a dispute, which contains complex foreign elements, in getting just solution based on the law. Completely disregarding foreign laws and decisions, or even the willingness to entertain international cases, would lead to injustices for the parties involved in such international proceedings.¹¹⁰ Second purpose of private international law is to harmonize court decisions around the world. Von Savigny (1880)¹¹¹ mentioned that countries should strive to reach the same decisions in problems of private international law. This latter objective, however, is difficult to achieve, as every country is, in principle, free to decide how to deal with issues of private international law. This does not take anything away from the importance of this notion. The international harmony of decisions is not an empty vessel. The taking into account of foreign laws and decisions by States helps avoid 'limping' legal relationships, in example, legal relationships that are recognized in one country but not in another. One should not lose sight of the fact that rules of private international law are also in the interest of the (forum) State, as it benefits from stability with regard to cross-border legal relationships.¹¹²

Example of application of 'conflict of law' could be well described in this simple example: if A is a national of state A and B is a permanent citizen of state B. State A applied common law legal system and state B applied civil legal system. A and B agreed and signed transnational commercial contract in the state C which is applied common law legal system. They perform their agreement in the state B. If, for example, B breach their contract. Then, A submit the dispute before domestic court in state B (as the choice of forum). When there has no choice of law clause in their contract, judges in the domestic court of state B will characterize foreign elements in the contract such as: the nationality of the parties and the

¹⁰⁹ WHYTOCK, C. A. (2009) Domestic Courts and Global Governance. 84 (1) *Tulane Law Review* 67. p.67. RABEL, E. (1958) *The Conflict of Laws: A Comparative Study*. University of Michigan Law School. p.3.

¹¹⁰ DICEY, A.V., MORRIS, J.H.C., and COLLINS, L.A. (2012) *The Conflict of Laws*. London: Sweet&Maxwell. p.5.

¹¹¹ VON SAVIGNY, F.C. (1880) *A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time*. Edinburgh: Clark. p.64.

¹¹² See KUESTRA, L. R. *op.cit.* p.16.

signature of the agreement. In this matter, international private law plays to guide the judges in finding the applicable law¹¹³ to solve the dispute whether they will use the law of state C (*lex loci contractus* - the law of the country where the contract was signed) or the law of the state B (*lex loci solutionis* – the law of the country where relevant performance occurs and *lex fori* – the law of the country in which a legal action is brought).

There are two main sources of private international law such as: domestic legislations and international treaties. Each domestic legislation has their own statute regulating their private international rule and principles. Especially in common law legal system, the sources of private international law also include judicial decisions (court precedence). In the United States, state statutes can change conflict of laws rules although the limitations ruled by the United States Constitution and by treaties must also be followed. In certain parts, statutes directed to the conflict of laws problems are common. The exercise of jurisdiction by state courts is generally determined by explicit statutes. Within the limits set by the Constitution, the states have freedom in determining what cases their courts may hear, and how the jurisdiction of the court shall be acquired and exercised. Statutes regulating these matters are universal, and most of the litigation concerning what is broadly called jurisdiction of courts is concerned with the interpretation and application of these statutes.

In the United States, the recognition and enforcement of foreign judgement has different legal treatment. As to foreign judgements, almost state statutes are non-existent, the matter being left to the common law rules of conflict of laws. As to judgements of courts of sister states, the United States Constitution requires full faith and credit.¹¹⁴ No act of Congress yet prescribes in detail the conditions and methods of enforcement. The usual method now employed is the cumbersome one of a new suit on the judgement itself, and even this is denied unless the judgement is final. Some courts have gone beyond the minimum standards required by the Constitution and statutes of the United States.¹¹⁵

¹¹³ KOSTERS, J. (1920) Public Policy in Private International Law. 29 *Yale Law Journal* 745. pp.745-746.

¹¹⁴ In the case of *Alaska Packers Association v. Industrial Accident Commission of California*, Judge Stone described the test of application of the full faith and credit clause: "In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent. ... the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interest of each jurisdiction, and turning the scale of decision according to their weight." *Alaska Packers Association v. Industrial Accident Commission of California*, 294 U.S. 532 (1934). p.547.

¹¹⁵ JACOBS (1939) The Enforcement of Foreign Decrees for Alimony. 6 *Law & Contemporary Problem* 250. pp.263-264. See CHEATHAM, E. E. (1941) Sources of Rules for Conflict of Laws. *University of Pennsylvania Law Review* 430. p.448.

The problem of choice of law, as affected by state statutes, calls for more extended comment. The statutes of a state in the United States, like the common-law rules of a state, are for the most part formulated without regard to conflict of laws. The ordinary statutes and the ordinary common-law rules of a state are normally referred to and applied, however, in a conflict of laws case. When a transaction having contacts with states X and Y is sued on in state Y and the Y court determines the X contacts are the dominant ones, the Y court will refer to and use the X domestic law, whether it be statute or common law. Thus, the X domestic statute may be applied in the case, though not itself directed to the conflict of laws situation.¹¹⁶

The existence of international treaties¹¹⁷ in the field of private international law has significant purpose to reform and harmonize rule and principles in private international law. As we can see nowadays, there is increasing international rules of private international laws through bilateral and multilateral treaties.¹¹⁸ The codification of private law moved ahead at the international level, including the completion of many international legal works such as, UNCITRAL legal instruments, Europeanization of private law, and etc.

In an increasingly economically interdependent world, the importance of an improved legal framework for the facilitation of international trade and investment is widely acknowledged. The United Nations Commission on International Trade Law (UNCITRAL), established by the United Nations General Assembly by resolution 2205 (XXI) of 17 December 1966, plays an important role in developing that framework in pursuance of its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of commercial law. Those areas include dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods.

¹¹⁶ CHEATHAM, E. E. *loc.cit.*

¹¹⁷ International law tries to transcend national legal systems by creating a single body of international legal rules and a system of international courts to adjudicate transnational disputes, and harmonization seeks convergence and ultimately uniformity of national laws. WHYTOCK, C.A. (2014) Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments. 3 *Erasmus Law Review* 113. pp.113-124.

¹¹⁸ This increasing development of private international law is balanced with the development of international law nowadays that not only regulate between states but also other non-state actors and individuals. The United States Supreme Court has mentioned in the case *Hilton v. Guyot* that “International law, in its widest and most comprehensive sense – includes not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation by reason of acts, private or public, done within the dominions of another nation.” *Hilton v. Guyot*, 159 U.S. 113 (1985). p.163.

These instruments are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, non-member States, and invited intergovernmental and non-governmental organizations. As a result of this inclusive process, these texts are widely accepted as offering solutions appropriate to different legal traditions and to countries at different stages of economic development. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of private international trade/commercial law.¹¹⁹

One of the mandate of UNCITRAL is progressive and harmonization of international trade law by preparing and promoting the use of legislative instruments in key areas of international law.¹²⁰ The harmonization of private international trade/commercial law by UNCITRAL has been done through the creation of model laws and legal guides designed to inform domestic legislative drafters, in example: UNCITRAL Model Law on the Procurement of Goods, Construction, and Services with Guide to Enactment (1994); UNCITRAL Arbitration Rules (1976); and UNCITRAL Notes on Organizing Arbitral Proceedings. UNCITRAL works also include to supervise the implementation of other international instruments through its special working group, such as: The United Nations on Contracts for the International Sale of Goods (CISG), Convention on the Limitation Period in the International Sales of Goods, and New York Convention 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

The Convention on Contracts for the International Sale of Goods (CISG) endeavors to increase international trade through the creation of a uniform law of private international law on sales of goods.¹²¹ By all counts, the CISG represents the international community's most ambitious effort to promote efficiency and sustained growth of international trade.¹²² The CISG governs contracts for the international sales of goods between private businesses, excluding sales to consumers and sales of services, as well as sales of certain specified types

¹¹⁹ UNCITRAL (2013) *Basic Facts about the United Nations Commission on International Trade Law*. Vienna: UNCITRAL Secretariat. p.1.

¹²⁰ General Assembly Resolution 2205 (XXI), section II, para. 8.

¹²¹ The preamble of CISG stated about its goals that "being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, the parties have agreed to the CISG". The Convention on Contracts for the International Sale of Goods, Annex I, U.N. Doc. A/Conf. 97/18 (1980) [hereinafter 'CISG'], Preamble. See also MURPHY, M. T. (1989) United Nations Convention on Contracts for International Sales of Goods: Creating Uniformity in International Sales Law. 12 *Fordham International Law Journal* 727. pp.728-730.

¹²² BAILEY, J. E. (1999) Facing the Truth: Seeing the Convention on Contracts for the International Sales of Goods as an Obstacle to a Uniform Law of International Sales. 32 (2) *Cornell International Law Journal* 273. p.274.

of goods. It applies to contracts for sale of goods between parties whose places of business are in different Contracting States, or when the rules of private international law lead to the application of the law of a Contracting State. It may also apply by virtue of the parties' choice. Certain matters relating to the international sales of goods, for instance the validity of the contract and the effect of the contract on the property in the goods sold, fall outside the Convention's scope. The second part of the CISG deals with the formation of the contract, which is concluded by the exchange of offer and acceptance. The third part of the CISG deals with the obligations of the parties to the contract. Obligations of the sellers include delivering goods in conformity with the quantity and quality stipulated in the contract, as well as related documents, and transferring the property in the goods. Obligations of the buyer include payment of the price and taking delivery of the goods. In addition, this part provides common rules regarding remedies for breach of the contract. The aggrieved party may require performance, claim damages or avoid the contract in case of fundamental breach. Additional rules regulate passing of risk, anticipatory breach of contract, damages, and exemption from performance of the contract. Finally, while the CISG allows for freedom of form of the contract, States may lodge a declaration requiring the written form.¹²³

The CISG applies only to international transactions and avoids the recourse to rules of private international law for those contracts falling under its scope of application. International contracts falling outside the scope of application of the CISG, as well as contracts subject to a valid choice of other law, would not be affected by the CISG. Purely domestic sale contracts are not affected by the CISG and remain regulated by domestic law.¹²⁴ CISG has now gained worldwide acceptance.¹²⁵ It is indeed a story of worldwide success everyone has hoped for but most probably did not expect. And even though much has been said about the skepticism of commercial trade practice towards the Convention and its alleged minor role in the legal community – today this can be discarded as gossip.¹²⁶

¹²³ UNCITRAL (1980) *Explanatory Note of United Nations Convention on Contracts for the International Sale of Goods*. [Online] Available from: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html [Accessed: July 23rd, 2015].

¹²⁴ *Ibid.*

¹²⁵ SCHLECHTRIEM, P. (2005) Introduction. In ¹²⁵ SCHLECHTRIEM, P. and SCHWENZER, I. *Commentary on the UN Convention on the International Sale of Goods (CISG)*. Oxford: Oxford University Press. pp.1-4.

¹²⁶ SCHWENZER, I. and HACHEM, P. (2011) *The CISG – A Story of Worldwide Success*. [Online] Available from: https://ius.unibas.ch/uploads/publics/9587/20110913164502_4e6f6c6e5b746.pdf [July 27th, 2015].

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one of the few examples where a transnational commercial law instrument elaborated by one of the specialized intergovernmental agencies or the United Nations became a true success story.¹²⁷ Moreover, Pieter Sander also explained the success implementation of this Convention by stating that:

“The 1958 New York Convention is the most successful, multilateral instrument in the field of international trade law. It is the centerpiece in the mosaic of treaties on arbitration laws that ensure acceptance of arbitral awards in arbitration agreements. Courts around the world have been applying and interpreting the Convention for over 50 years in an increasing unified and harmonized fashion.”¹²⁸

There are two basic actions as regulated by the New York Convention 1958. The first action is the recognition and enforcement of foreign arbitral awards, i.e., arbitral awards made in the territory of another State. This field of application is defined in Article I. The general obligation for the Contracting States to recognize such awards as binding and to enforce them in accordance with their rules of procedure is laid down in Article III. A party seeking enforcement of a foreign award needs to supply to the court (a) the arbitral award and (b) the arbitration agreement (Article IV). The party against whom enforcement is sought can object to the enforcement by submitting proof of one of the grounds for refusal of enforcement which are limitatively listed in Article V (1). The court may on its own motion refuse enforcement for reasons of public policy as provided in Article V (2). If the award is subject to an action for setting aside in the country in which, or under the law of which, it is made (“the country of origin”), the foreign court before which enforcement of the award is sought may adjourn its decision on enforcement (Article VI). Finally, if a party seeking enforcement prefers to base its request for enforcement on the court’s domestic law on enforcement of foreign awards or bilateral or other multilateral treaties in force in the country where it seeks enforcement, it is allowed to do so by virtue of the so-called more-favourable-right-provision of Article VII(1).¹²⁹

¹²⁷ KRONKE, H. (2010) *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*. The Netherlands: Kluwer Law International. pp.1-3.

¹²⁸ ELKINSON, J. (2014). *The New York Convention*. [Online] Available from: https://www.conyersdill.com/publication-files/2014_10_Article_The_New_York_Convention.pdf [August 5th, 2015].

¹²⁹ VANDEN BERG, A.J. *The New York Convention of 1958: An Overview*. [Online] Available from: http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf [August 29th, 2015].

The second action contemplated by the New York Convention is the referral by a court to arbitration. Article II (3) provides that a court of a Contracting State, when seized of a matter in respect of which the parties have made an arbitration agreement, must, at the request of one of the parties, refer them to arbitration.¹³⁰

The New York Convention has significantly improved the law and practice of international commercial arbitration. In fact, the Convention is considered to be the most outstanding attempt to foster and codify arbitration laws due to its virtually worldwide acceptance, since the major nations of the world have followed to it. Currently, 156 states are parties to the New York Convention 1958. In 1986, fewer states had acceded or ratified to the New York Convention (as of 1 January 1986, 69 states were parties to the New York Convention), but even then, its value in filling a lacuna in enforcement mechanisms within the framework of international trade and commerce was well recognized.¹³¹

Accordingly, the New York Convention has significantly increased the legal framework for international commercial arbitration. However, like most international conventions, its operation faces some practical difficulties. One of the difficulties is that there has not been a uniform approach to the interpretation of the New York Convention by national courts. For instance, as we will see when dealing with the delocalization theory, different countries interpret Article V (1) (e) differently and this could have a significant impact on arbitral awards that were set aside in the place of arbitration. In addition, two national arbitration laws may still be involved when enforcement of a foreign award is sought (in example, the law of the country of origin of the award where the award may be subject to a setting aside procedure and the law of the country where enforcement of this award is sought), which can raise further difficulties.¹³²

The International Institute for the Unification of Private Law (UNIDROIT) traces its origins to the League of Nations and is today an autonomous international organization active in “modernising, harmonising and coordinating the private law of states and groups of states, and to prepare gradually for the adoption by the various states of uniform rules of private law.”¹³³ UNIDROIT has over the years prepared over seventy studies and drafts.

¹³⁰ *Ibid.*

¹³¹ DHILLON, D. and CHOW, C. (2008) Enforcement of Foreign Arbitral Awards and the New York Convention – The Singapore Experience. *Mealey's Executive Summary*. p.105.

¹³² New York Convention, art. V. See BRAZIL-DAVID, R. (2011) Harmonization and Delocalization of International Commercial Arbitration. 28 (5) *Journal of International Arbitration* 445. p.448.

¹³³ UNIDROIT also has duty such as: (a) preparing drafts of laws and conventions with the object of establishing uniform internal law; (b) preparing drafts of agreements with a view to facilitating international relations in the field of private law; (c) undertaking studies in comparative private law; (d) taking an interest in projects already undertaken in any of these fields by other institutions with which it may maintain relations

Many of these have resulted in international instruments, including international Conventions, Model Laws, Principles and Legal and Contractual Guides. In the case of Conventions, they were adopted by diplomatic Conferences convened by member States of UNIDROIT:

1. 1988 Ottawa Convention on International Financial Leasing;
2. 1988 Ottawa Convention on International Factoring;
3. 1995 Rome UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects;
4. 2001 Cape Town Convention on International Interests in Mobile Equipment
5. 2001 Cape Town Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment;
6. UNIDROIT Principles of International Commercial Contracts.

One of the well-known achievement of UNIDROIT in current years is the establishment of the UNIDROIT Principles of International Commercial Contracts (PICC).¹³⁴ PICC has also recognized as cornerstones in the efforts to modernize and harmonize international contract law.¹³⁵ The principles represent general rules of commercial contract law derived from various legal systems, and may be used by private parties as the law governing their contracts, as a supplementary source to be used in conjunction with the CISG, and as a codification of *lex mercatoria* for arbitration.

To an extent, PICC modelled on CISG. However, in three significant ways it departs from CISG. First, it is far broader in scope. CISG is limited to contracts for the sale of goods and furthermore eschews many issues relevant to sales contracts. For example, CISG avoids the question of contractual validity. On the other hand, PICC deals not only with the broad range of commercial contracts, but also with some questions of validity.¹³⁶ A second departure from CISG is that, to the extent that the two documents cover the same ground, PICC is a better, more mature product. For example, it deals with the "Battle of the Forms" in an innovative way, which presents a considerable improvement over the wretched draftsman-ship of United States Uniform Commercial Code in the section 2-207 and the

as necessary; (e) organizing conferences and publishing works which the Institute considers worthy of wide circulation. *See* Statute of International Institute for the Unification of Private Law, March 26th, 1993, art. 1.

¹³⁴ International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (1994) [hereinafter 'PICC'].

¹³⁵ DENNIS, M. J. (2014) Modernizing and Harmonizing International Contract Law: the CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward. 19 *Uniform Law Review* 114. p.114.

¹³⁶ HARTNELL, H. E. (1993) Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods. 18 *Yale Journal of International Law* 1. pp.1-5.

timorous Article 19 of CISG. The third departure is that PICC is not intended for adoption as a treaty or as a uniform law; rather, the document is in the nature of a restatement of the commercial contract law of the world.¹³⁷

With increasing frequency, the PICC are used as trade usages. In some systems, the PICC are even officially viewed in their entirety as an expression of business customs. This has happened in Ukraine, after the Supreme Economic Court, in 2008, issued a letter entitled ‘On Some Issues in the Application of the Civil and Commercial Codes of Ukraine’, which established that the PICC, among other texts, can be viewed as an expression of business custom.¹³⁸ Since then, Ukrainian courts have referred to the PICC in at least 34 cases. Similarly, courts in China have referred to the PICC as custom.¹³⁹ Explicit reference is made to the PICC for determination of usages also in Article 31(3) of the International Trade Center’s (ITC) Contractual Joint Venture Model Agreement (three parties or more) and Article 23(3) of this same Agreement (two parties only).¹⁴⁰

This use as usages is, at first sight, surprising. The PICC, properly understood, are largely not a restatement of such usages.¹⁴¹ They draw, to a large extent, on official law and represent a universal restatement, whereas trade usage is typically unofficial and specific to a particular trade. If courts, especially in formerly socialist countries, draw on them regardless, it appears they use them as a hook to escape their overly restrictive domestic laws. This gives them a rather powerful role that would deserve further analysis.¹⁴²

With those all explanation before, importantly, we shall differentiate between private international law with public international law. Public international law is an enormously diverse discipline if we compare with private international law.¹⁴³ In its outdated definition, it concerns with legally binding rules and principles regulating the relationships between

¹³⁷ PERILLO, J. M. (1994) UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and A Review. 63 (2) *Fordham Law Review* 281. pp.282-283.

¹³⁸ *Letter of the Supreme Economic Court of Ukraine, On Some Issues in the Application of the Civil and Commercial Code of Ukraine*, Doc 01-8/211 (7 April 2008). para. 2. [Online] Available from: http://pravo.ligazakon.ua/document/view/SD080085?edition=2008_04_07 [Accessed: September 15th, 2015].

¹³⁹ HUANG, J. (2008) Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation. *Manchester Journal of International Economic Law* 105. pp.135–136.

¹⁴⁰ MICHAELS, R. (2014) The UNIDROIT Principles as Global Background Law. 19 *Uniform Law Review* 643. p.649.

¹⁴¹ OSER, D. (2008) *The UNIDROIT Principles of International Commercial Contracts: A Governing Law?*. Leiden: Martinus Nijhoff. pp. 80-81.

¹⁴² MICHAELS, R. (2014) *loc.cit.*

¹⁴³ Bentham mentioned that “international law is divided into conflict of laws (or private international law) and public international law (generally termed as international law)”. BENTHAM, J. (1780) *Introduction to the Principles of Morals and Legislation*. London.

sovereign States.¹⁴⁴ In the connection with the recent trend in globalization, states nowadays not only are having interactions between them but also the other non-state actors or other subject of international law such as international organization, multinational companies, and non-governmental organization.¹⁴⁵ This area of law also include rules regarding when a State's court can claim jurisdiction (including, prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction), and it is this potential overlap, or connection, with the rules of private international law. Its sources of law include international treaty law, international customary law, general principles of law, and judicial decisions and scholars opinion.¹⁴⁶

The main parallel key between private and public international law is that they address the same structural problem: what rules should be put into place between two legal persons-be they human beings, corporations, or states-that operate on a plane of equality in all their dealings. That equality is surely true with respect to private law subjects, where neither party commands some special status or advantage over the other. It is equally true in international law, where the basic norm presupposes that all sovereign states should be regarded as equal, so that no sovereign can question the decisions that any other state makes with respect to its own citizens in its own territory. Meanwhile, the parallel key between ordinary private law and international law becomes conceptually closer in the area of: both private and international law ask what rules should govern the relations between any two separate parties to a dispute when neither party enjoys the kind of preferred status that sovereign immunity normally confers on a nation when it deals with persons within its territory.¹⁴⁷

Friedrich Carl von Savigny proposed the true community of law¹⁴⁸ based on his choice of law theory which implied 'in its full development, not only that in each particular state the foreigner is not postponed to the native (in which equality in the treatment of persons consists), but also that, in cases of *conflict of laws*, the same legal relations (cases)

¹⁴⁴ Lauterpacht observed that "the orthodox positivist doctrine has been explicit in the affirmation that only states are subjects of international law". LAUTERPACHT, H. (1975) *International Law: being the Collected Papers of Hersch Lauterpacht*. Cambridge: Cambridge University Press. p.489.

¹⁴⁵ VERZIIL, J. W. (1969) *International Law in Historical Perspective*. Leiden: A.W. Sijthoff. pp.17-43.

¹⁴⁶ The Statute of International Court of Justice (1946) art. 38 (1). See DEGAN, Vladimir Duro. (1997) *Sources of International Law*. The Hague.

¹⁴⁷ EPSTEIN, R. A. (2012) The Natural Bridge between Private Law and Public International Law. 13 *Chicago Journal of International Law* 47. p.51.

¹⁴⁸ GUTHRIE, W. (1869) *A treatise on the conflict of laws and the limits of their operation in respect of place and time by Friedrich Carl von Savigny*. Edinburgh: T. & T. Clarke Law Publishers. p.100.

have to expect the same decision, whether the judgment be pronounced in this state or in that'.¹⁴⁹ He promotes the universalist concept for conflict of laws that can be seen in his views on the necessity to reach uniform decisions were universally accepted, as were the main tenets of his method: it turns on the geographical seat of a legal relationship, it is blind to the contents of substantive law, and it has no bias for or against any of the eligible laws.¹⁵⁰

Even after the decline of the internationalist movement in the first decades of the twentieth century, the development of conflicts law in most countries was still dominated by universalist ideals. Harmony of decisions continued to be viewed as the strongest motive for maintaining a system of blind and neutral choice of law rules. Even if there was no 'superlaw' dictating the fundamentals of choice of law, most conflicts scholars as well as national courts and legislatures ostensibly accepted Savigny's 'categorical conflicts imperative'.¹⁵¹

'... [a complete accord in the treatment of collisions in all states] might be brought about by means of juridical science, and the practice of the tribunals guided by it. It could also be effected by a positive law, agreed to and enacted by all states, with respect to the collision of territorial laws. I do not say that this is likely, or even that it would be more convenient and salutary than mere scientific agreement; but the notion of such a law may serve as a standard to test every rule that we shall lay down as to collision. We have always to ask ourselves whether such a rule would be well adapted for reception into that common statute law of all nations.'¹⁵²

Those guideline refers to opinion of E. M. Meijers which stated that 'statutory rules of private international law should be drafted in such a way that they would fit into a world law'.¹⁵³ The notion that conflicts rules should be universally acceptable ties in nicely with the assumption that private international law is primarily concerned with an impartial 'coordination of legal systems',¹⁵⁴ which implies that all states involved would agree on the applicability of one and the same national law. Similarly, the proposition that conflicts law is meant to promote some kind of global 'conflicts justice',¹⁵⁵ rather than justice in the

¹⁴⁹ *Ibid.* p.100.

¹⁵⁰ See also DE BOER, T. M. (2010) Living Apart Together: The Relationship Between Public and Private International Law. 57 (2) *Netherlands International Law Review* 183. p.195.

¹⁵¹ *Ibid.* JUENGER, F. K. (1993) *Choice of Law and Multistate Justice*. Dordrecht: Martinus Nijhoff. p.39. DE NOVA, R. (1966) Historical and Comparative Introduction to Conflict of Laws. 118 *Recueil des Cours*. pp. 435-463.

¹⁵² DE BOER, T. M. *op.cit.* p.195. GUTHRIE, W. *op.cit.* pp.92-93.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ SYMEONIDES, S. C. (2001) Material Justice and Conflicts Justice in Choice of Law. In BORCHERS, P. J. and ZEKOLL, J. (eds.) *International Conflict of Laws for the Third Millennium, Essays in Honor of Friedrich K. Juenger*. New York: Transnational Publishers Inc. pp.125-140.

individual case, suggests that its rules are derived from universal principles. Necessarily, those rules must be blind to the contents of the eligible laws and their underlying policies, and indifferent to their national origins.

The European Private International Law is best example describing the unification of private international law existed in each member states of the European Union. This unification has supported the internationalist view of scholars that unifying private international law norms and rules are possible to be done. As we can understand from the European Private International Law, it bridges the differences between national legal orders for the European community needs in single market and economy. Most legal practitioners and scholars consider the European Private International Law as a means to achieve legal certainty.¹⁵⁶ Attempts to unified private international law firstly established under the patronage of The Hague Conference on Private international Law in 1893.¹⁵⁷ Between 1893 and 1906, at different sessions, the conclusion of six Conventions was achieved.¹⁵⁸ Balance with the development of European Union as community institution in Europe, number of crucial European Private of International Law documents was drafted since 1951, in example: Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (1968) and the Convention on the Service in the EU Member States of Judicial and Extra-Judicial Documents in Civil and Commercial Matters (1997).¹⁵⁹ However, Convention on the Law Applicable to the Contractual Obligations (Rome Convention) is considered as the principal document of the European Private International Law.¹⁶⁰

¹⁵⁶ LANDO, O. (1974) The EC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations: Introduction and Contractual Obligations. 38 *The Rabel Journal of Comparative and International Private Law* 6. pp.6-7.

¹⁵⁷ Article 1 of the Statute of the Conference stated that the aim of the Conference is to work towards the progressive unification of rules of private international law. Among the international organisations at The Hague, the Hague Conference on Private International Law is unique in that it is the only intergovernmental organisation with a “legislative” mission. However, its “laws” take the form of multilateral treaties or conventions, which are not primarily aimed at facilitating the relations between States, but rather the lives of their citizens, private and commercial, in cross-border relationships and transactions. VAN LOON, H. (2007) The Hague Conference on Private International Law. 2 *Hague Justice Journal* 3. pp.4-5.

¹⁵⁸ The following Conventions were concluded: (i) a Convention to regulate the conflict of laws and jurisdictions in matters of divorce and legal separation; (ii) a Convention to regulate the conflict of laws concerning marriage; (iii) a Convention to regulate the guardianship of infants; (iv) a Convention to regulate the effects of marriage on the rights and duties of spouses in their personal relationships, and on their estates; (v) a Convention concerning “l’interdiction et les mesures de protection analogues”; (vi) a Convention on Civil Procedure. See SAUNDERS, M. L. (1966) The Hague Conference on Private International Law. *Australian International Law*. p.115.

¹⁵⁹ Regulation (EC) No. 44/2001 (Brussels I Regulation) and No. 1348/2000.

¹⁶⁰ HORLACHER, H. M. (1994) The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations. 27 *Cornell International Law Journal* 173. pp.176-177.

CHAPTER IV

DEVELOPMENT OF THE IMMUNITY DOCTRINE IN INTERNATIONAL RELATIONS

4.1. The Period of Absolute Immunity

In this sub-chapter, I would like to emphasize the development of immunity doctrine in the past. The history of immunity doctrine begins with the use of absolute approach to the doctrine. At this time, the use of absolute approach in practice was the darkness era of immunity. Since we understand that the immunity has been practiced over centuries. We could trace back the use of the doctrine of immunity in the historical documents about diplomatic relations because the doctrine had existed as old as the history of diplomatic relations.¹⁶¹ Considering to focus on solving the main dissertation research problem, I will present only relevant historical part that represents the practice of immunity in the past. In this sub-chapter, the period of absolute immunity was begun in the Mesopotamia civilization and most importantly I also add the explanation of its practice in ancient Greece.¹⁶²

1. Beginning Practice in Mesopotamia

In ancient history, Mesopotamia was wellknown as the ‘land between the rivers’ reflecting their land was widely fertile due to seasonal rains and good for growing crops.¹⁶³ The lack of natural resources urged people of Mesopotamia to make trade to other cities. Trade became integral to the economy, custom, and culture of Mesopotamia. Aware that they were surplus in agricultural products then a vigorous trading system developed.¹⁶⁴

¹⁶¹ Oppenheim explained that “legation, as an institution for the purpose of negotiating between different states, is as old as history whose records are full of examples of legations sent and received by the oldest nations. And it is remarkable that even in antiquity where no such law as the modern international law was known, ambassadors everywhere enjoyed a special protection and certain privileges, although not by law but by religion, ambassadors being looked upon as sacrosanct.” OPPENHEIM, L. (1955) *International Law: A Treatise*. Peace. p.769.

¹⁶² Mesopotamia in today’s map is located in Asia and Greece is located in Europe. Based on my research, there had no practice of immunity in the ancient time of other continents. I could not find out the its historical practice in the ancient time of societies in Africa, North dan South America, and Australia.

¹⁶³ Mesopotamia’s land lies between Tigris and Euphrat’s river. The word Mesopotamia comes from the Greek means “the land between two rivers”. KASAK, E. and VEEDE, R. (2001) Understanding Planets in Ancient Mesopotamia. 16 *Electronic Journal of Folklore*. p.7. [Online] Available from: <http://haldjas.folklore.ee/folklore> [Accessed: October 10th, 2015].

¹⁶⁴ SCHOMP, V. (2004) *Ancient Mesopotamia: The Sumerians, Babylonians, and Assyrians*. New York: Franklin Watts. pp.9-15.

The third dynasty of Ur (2112 – 2004 BCE)¹⁶⁵ promoted foreign trade policy while at the same time the King ordered his peoples to increase agricultural productivity.¹⁶⁶ This dynasty became the capital of Sumer and Akkad.¹⁶⁷ At that time, merchants were the leading actor of the trade relations. They transported the goods from and to Mesopotamia and other cities even outside the Kingdom's territory, and also mostly made exchange for rare commodities needed by the people. They travelled by donkey caravan, river barges, and sea-going ships to all parts of the Fertile Crescent, Persia, Tilmun, Magan, and Melukka.¹⁶⁸ They imported copper, precious stones and woods, and ivory¹⁶⁹, and they also exported agricultural products (such as: barley, wheat, dates, leather and wool), dried fish and goods manufactured from local materials (such as fine woolen textiles, perfumed ointments and oils).¹⁷⁰ Cohen argued that merchant groups are culturally distinct, organizationally cohesive, and socially independent from their host communities while maintaining a high level of economic and social ties with related communities who define themselves in terms of the same general cultural identity.¹⁷¹

During the Ur period, the majority of the goods they transported were furnished by state (palace or temple) investment and the merchants also carried small quantities of goods on their own behalf.¹⁷² The nature of trade describe that state was an important customer for the merchant¹⁷³ though their relationship questioned by the history and texts.¹⁷⁴ However, Karen wrote that merchants at that time were the true agent of state:¹⁷⁵

“Texts referred to the same routes used for centuries for transportation of goods, the movement of troops, and the journeys of merchants or diplomatic

¹⁶⁵ GADD, C. J. (1971) Babylonia c. 2120 – 1800 B.C. (Chapter XXII). In EDWARDS, I. E. S. et al. (eds.) *The Cambridge Ancient History Volume 1 Part 2: Early History of the Middle East*. Cambridge: Cambridge University Press. pp.595-640.

¹⁶⁶ BERTMAN, S. (2003) *Handbook to Life in Ancient Mesopotamia*. Oxford: Oxford University Press. p.109.

¹⁶⁷ The third Dynasty of Ur represents an interesting symbiosis between a "Sumerian" tradition going back to the Presargonic city-states and an "Akkadian" heritage of a large super-regional state. BECKER, A. (1985) Neusumerische Renaissance? Wissenschaftliche Untersuchungen zur Philologie und Archäologie. 16 *Baghdader Mitteilungen* 229. pp.229-316.

¹⁶⁸ ALEXANDER, M. W. and VIOLET, W. (2012) Trade and Traders of Mesopotamian Ur. 19 (1) *American Society of Business and Behavioral Sciences*. p.12.

¹⁶⁹ *Ibid.*

¹⁷⁰ There is still unclear connection that the exported products used in exchange of imported goods for Mesopotamians. McINTOSH, J. (2008) *The Ancient Indus Valley*. California: ABC-CLIO. p.188.

¹⁷¹ COHEN, A. (1969) *Custom and Politics in Urban Africa: A Study of Hausa Migrants in Yoruba Towns*. University of California Press. p.266-267.

¹⁷² McINTOSH, J. *op.cit.* p.191.

¹⁷³ *Ibid.* p.14.

¹⁷⁴ *Ibid.* See also POWELL, M. A. (1977) Sumerian Merchants and the Problem of Profit. In HAWKINS, J. D. (ed.) *Trade in the Ancient Near East*. London: British School of Archeology in Iraq. p.27

¹⁷⁵ NEMET-NEJAT, K. R. (1998) *Daily Life in Ancient Mesopotamia*. Westport: Greenwood Press. p.273.

envoys, who were often the same persons. The Akkadian term showed the wide range of activities of this agents; the Akkadian word could be translated “messenger”, “envoy”, “ambassador”, “diplomat”, “deputy”, and even “merchant....”

As everybody else working for the third Ur state, merchants enjoyed the status of éren, i.e., state dependents.¹⁷⁶ Their work for the state entailed the procurement of foreign goods and even more importantly the distribution throughout the state economy of perishables and other commodities that could not efficiently handled by the central redistributive mechanisms held by the state.¹⁷⁷ Those works seem that state distributed the power in such areas to merchants and as consequence they enjoyed protection at times.¹⁷⁸ Such protection covered freedom of movement and protection against raids, hold-ups, and robbery.¹⁷⁹ Beside earned silver¹⁸⁰, they also receive state funds to acquire foreign goods.¹⁸¹ One record, for example, lists thirteen individual or groups of merchants from all over the third Ur state who received amounts of silver for the purpose of acquiring gold.¹⁸²

Merchants enjoyed the full confidence of the King, and one would not be wrong to suppose that in such enterprises commercial activity and diplomatic mission were combined.¹⁸³ This means that merchants enjoy the protection as similar as diplomatic mission while they worked as state’s commercial agent and even for their private purpose in business. The protection enjoyed by merchants classified as simply immunity protection since no separation of the use of the privilege as the agent of the state and as private individual. It influenced by their dominant closed relation with the royal institution of third Ur. Eventhough this protection was simply or primitive conception but it was the first basis of protection by the agent of state acting for commercial purposes during the historical timeline.

¹⁷⁶ ROLLINGER, R. and ULF, C. (eds.) *loc.cit.*

¹⁷⁷ *Ibid.*

¹⁷⁸ McINTOSH, J. *loc.cit.*

¹⁷⁹ HEISE, J. *History of the Bronze Age in Mesopotamia*. [Online] Available from: http://www.sron.nl/~jheise/akkadian/bronze_age.html [Accessed: October 13th, 2015].

¹⁸⁰ SNELL, D. C. (1982) *Ledgers and Prices Early Mesopotamian Accounts*. London and New Haven, Yale University Press. p.49.

¹⁸¹ DE MIEROOP, M. V. (2014) Silver as a Financial Tool in Ancient Egypt and Mesopotamia. In BENHOLZ, P. and VAUBEL, R. (eds.) *Explaining Monetary and Financial Innovation*. Switzerland: Springer International Publishing. p.26.

¹⁸² GARFINKLE, S. J. (2008) Silver and Gold: Merchants and the Economy of the Ur III State. In MICHALOWSKI, P. (ed.) *On Ur III Times: Studies in Honor of Marcel Sigrist*. Boston: American Schools of Oriental Research. pp.63-70.

¹⁸³ NEUMANN, H. (1999) Ur-Dumuzida and Ur-Dun. In DERCKSEN, J. G. (ed.) *Trade and Finance in Ancient Mesopotamia*. Leiden: Proceedings of the First MOS Symposium. p.52.

2. Ancient Greece

It is quite challenging when tracing the economic activities done by ancient Greece since this site wellknown as a source of philosophical, political, and legal thoughts. Based on anthropological found during the Archaic (776 – 480 BCE) and Classical (776 – 480 BCE) period Greece was actually divided into city-states or '*polis*'.¹⁸⁴ The obvious increase population and expanding territorial occupation positioned market as fundamental part of Greece's way of living in the past.

Agora built in each *polis* as public city centre that had major function as internal market.¹⁸⁵ Products sold in the market commonly came from domestic result and those market mostly limited to local exchanges within the countryside. There was little possibility but demanded import for luxury products from Asian, Africa, and Northern Europe.¹⁸⁶

In the ancient Greece, government had no dominancy to the market. The main economic concerns of the governments of the Greek city-states were to maintain harmony within the private economy (make laws, adjudicate disputes, and protect private property rights), make sure that food was available to their citizens at reasonable prices, and obtain revenue from economic activities (through taxes) to pay for government expenses.¹⁸⁷

The poetry of Hesiod, an 8th century poet from Central Greece¹⁸⁸, reveals the existence of *emporoi*¹⁸⁹, traders who hired of others ships for their economic benefits. Reed takes *emporoi* and *neukleroi* (traders who owned their own ships for their ventures) in the same group of traders¹⁹⁰ while the other group consisted people who pursued in trade as complementary living.¹⁹¹ *Emporoi* has some distinct characteristics such as: carried on

¹⁸⁴ Greg Anderson argued that *polis* was neither state-based nor stateless as such, but something in between. ANDERSON, G. (2009) The Personality of the Greek State. 129 *The Journal of Hellenic Studies* 1. p.2.

¹⁸⁵ See CAMP, J. M. (1986) *The Athenian Agora: Excavations in the Heart of Classical Athens*. London and New York: Thames and Hudson.

¹⁸⁶ GAGARIN, M. and FANTHAM, E. (eds.) (2010) *The Oxford Encyclopedia of Ancient Greece and Rome*. New York: Oxford University Press. p.306.

¹⁸⁷ HOGAN, C. M. (2011) *Economy of Ancient Greece*. [Online] Available from: <http://www.eoearth.org/view/article/151946/> [Accessed: October 25th, 2015].

¹⁸⁸ MARTIN, T. R. *An Overview of Classical Greek History from Mycenae to Alexander*. [Online] Available from: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0009%3Achapter%3D4> [Accessed: October 26th, 2015].

¹⁸⁹ In his poems, Hesiod explains about sailing ships and commerce but this just part-time work of peasants because they could not leave their farm in a long time. HASEBROEK, J. (1933) *Trade and Politics in Ancient Greece*. London: Biblo and Tannen Publishers. p.67.

¹⁹⁰ Plato puts both *emporoi* and *neukleroi* in similar group for those who wander about in the markets or from town to town, by sea and by land, exchanging money for goods or exchanging money for moneys. BOLKESTEIN, H. (1958) *Economic Life of Greece's Golden Age*. Netherland: E. J. Brill. p.111.

¹⁹¹ REED, C. M. (2003) *Maritime Traders in Ancient Greek World*. Cambridge: Cambridge University Press. p.10-11.

interstate trade, relied for much (or probably most) of their livelihood on interstate trade, traveled by sea, traveled in someone else's ship, owned the goods they trade in, and did not produce the goods they trade in. *Naukleroi* also has only single main characteristic: one who was the owner of a seagoing merchantman.¹⁹²

The earliest written sources of Homer and Hesiod attest to the existence of trade (*emporio*) and merchants (*emporoi*) from the 8th century BCE, although they often present the activity as unsuitable for the ruling and landed aristocracy.¹⁹³ Those written sources refers to both *Emporoi* and *Naukleroi* were involved from being largely agents of aristocrats or part timers to mostly independent professionals.¹⁹⁴

Most traders in ancient Greece were *xenoi* rather than *metics* but not all of them having status as *proxenos*.¹⁹⁵ *Proxenos* is citizen appointed in his own *polis* to look after affairs of another *polis* or citizen representing one Greek community in another *polis*.¹⁹⁶ *Proxenos* has special privilege that usually called as *proxenia*.¹⁹⁷ Some *Emporoi* and *Naukleroi* as benefactors to the Greece community were rewarded the titles of *proxenos* with *proxenos* decree and immune from the public obligations. Demetriou (2012) describes this privilege by giving real practice in Rhodes island:

“The grants of *proxenia* are reminiscent of the honors given by the island of Rhodes to the two residents of Naukratis. One of these inscriptions, dating to 440-411 BC, records the honors given to a man appropriately named

¹⁹² *Ibid.* pp.7-12. The word *Naukleroi* has direct meaning in commercial activity. See also FINLEY, M. I. (1935) *Emporos, Naukleros, and Kapelos: A Prolegomena to the Study of Athenian Trade*. 30 *Classical Philology* 320. pp.335-336.

¹⁹³ CARTWRIGHT, Mark. *Trade in Ancient Greece*. [Online] Available from: <http://www.ancient.eu/article/115/> [Accessed: October 27th, 2015].

¹⁹⁴ *Ibid.*

¹⁹⁵ Proxeny or Proxenia (Greek: *προξενία*) in ancient Greece was an arrangement whereby a citizen (chosen by the city) hosted foreign ambassadors at his own expense, in return for honorary titles from the state. The citizen was called *Proxenos* (*πρόξενος*; plural: *Proxenoí* or *Proxeni*, "instead of a foreigner") or *Proxeinos* (*πρόξεινος*). The proxyeny decrees, which amount to letters of patent and resolutions of appreciation were issued by one state to a citizen of another for service as *proxenos*, a kind of honorary consul looking after the interests of the other state's citizens. A cliché phrase is *euergetes* (*benefactor*) and *proxenos* (*πρόξεινος τε εὐεργέτης*). A *Proxenos* would use whatever influence he had in his own city to promote policies of friendship or alliance with the city he voluntarily represented. For example, Cimon was Sparta's *Proxenos* at Athens and during his period of prominence in Athenian politics, previous to the outbreak of the First Peloponnesian War, he strongly advocated a policy of cooperation between the two states. Cimon was known to be so fond of Sparta that he named one of his sons *Lacedaemonius*. Being another city's *Proxenos* did not preclude taking part in war against that city, should it break out - since the *Proxenos*' ultimate loyalty was to his own city. However, a *Proxenos* would naturally try his best to prevent such a war from breaking out and to compose whatever differences were threatening to cause it. And once peace negotiations were on the way, a *Proxenos*' contacts and goodwill in the enemy city could be profitably used by his city. The position of *Proxenos* for a particular city was often hereditary in a particular family. See THUCYDIDES and CRAWLEY, R. (trans.) (2006) *The History of the Peloponnesian War*. New York: Barnes and Nobles. p.33. HAZEL, J. (2002) *Who's Who in the Greek World*. New York: Routledge. p.56.

¹⁹⁶ JACT (1984) *The World of Athens: An Introduction to Classical Athenian Culture*. Cambridge: Cambridge University Press. p.370.

¹⁹⁷ *Ibid.*

Damoxenos (foreigner to the deme), who is described as living in Egypt. The mention of the Hellenion later on in the inscription suggests that this man's residence was probably Naukratis. Damoxenos was named *proxenos* and *euergetes* of the Lindians and was also given tax exemption on imports and exports for himself and his descendants both in times of war and peace. The other inscription, slightly later (411-407 BC), gave Pytheas' son, a resident in Egypt from Naukratis, and his descendants, the title of *proxenos* of All Rhodians. Pytheas' son and his descendants were also given the right to sail in and out of Rhodes both in times of war and peace. Although these two inscriptions are not Attic, they fit into Whitehead's scheme. Their earlier date may explain the fact that the inscriptions explicitly mention that these two men were residents of Naukratis and not Rhodes, where they were given the title *proxenoi*. The Rhodian inscriptions also gave the men they honored tax exemption on imports and exports and the right to sail to and from Rhodes at any time. This implies that they were probably *emporoi* or *naukleroi*, the same professions as those of the honorees of the Attic inscriptions, and that even though their official residence was Naukratis, they were mobile, as were traders who received the Athenian rewards. The grant of tax exemption on the specific route from Naukratis to Rhodes, even if it was restricted to specific individuals, is similar to the legislation that the Thracian authorities enacted that made several trade routes from Maroneia to Pistiros and from Pistiros to the Belana emporia tax exempt. The recipients of the Athenian honors, however, do not receive tax exemption either on their imports or exports, although their status as *proxenoi* implied that they received some relief on their residency taxes. In any case, the Attic and Rhodian inscriptions suggest that Athens and Rhodes had similar ways of rewarding their foreign traders: both *poleis* often granted the status of *proxenos* to them. If each *polis* whose traders dealt with a given emporion probably had a *proxenos* there, then *proxenia* should be understood as another network that connected various *poleis* with each other across the Mediterranean.¹⁹⁸

Compare with Mesopotamian practices that granting all traders with status of immune from public obligation, in Ancient Greece only trader with honorific condition got status of *proxenos*. These *proxenos* titles were not simple honors with no tangible advantages, as might be inferred from the fact that the *polis* often added privileges such as *ateleia* (immunity from public burdens)¹⁹⁹, *asylia* (freedom from seizure of one's goods)²⁰⁰, and *epimeleia* (an injunction to the officials of the state to watch over the *proxenos*' interests)²⁰¹. Having status as *proxenos* implied admission to a category of foreigners with

¹⁹⁸ DEMETRIOU, D. (2012) *Negotiating Identity in the Ancient Mediterranean: The Archaic and Classical Greek Multicultural Emporia*. Cambridge: Cambridge University Press. p.214.

¹⁹⁹ HARDING, P. (ed.) (1985) *From the End of the Peloponnesian War to the Battle of Ipsus: Translated Documents of Greece and Rome II*. Cambridge: Cambridge University Press. p.178.

²⁰⁰ REED, C. M. *op.cit.* p.xi.

²⁰¹ There had a clause in specific enabling the *proxenos* to seek redress in Athens at the court of the Polemarch. LOW, P. (2008) *Athenian Empire*. Edinburgh: Edinburgh University Press. p.136.

privileged status, although the concrete privileges were ill defined.²⁰² There are laws regulated the privileges of *proxenoi* in some *poleis* but not in all *poleis*. However this was not always the case, and even when a law existed, further privileges could be added. Privileges are therefore often mentioned explicitly, although this habit in no way prohibited explicit reference to others that were already attached by law to the titles of *proxenos* since reference to these as well served to further highlight the *polis*' liberality.²⁰³

Occasionally, *proxenos* were awarded Athenians citizenship but seldom awarded in the fifth century.²⁰⁴ However, Michell (2002) assumed that *proxenia* and citizenship were incompatible with each other since, it is claimed, a *proxenos* could not by a definition be a citizen of the state (*polis*) he was representing:

"It is generally assumed that *proxenia* and citizenship were incompatible with each other since, it is claimed, a *proxenos* could not by definition be a citizen of the state he was representing – but we should resist the temptation to make the Athenians this legalistic. Since the role of a *proxenos* was to look after the interests of the honouring state in his natal state, a subsequent grant of citizenship did not disenfranchise him in his own *polis* or nullify the *proxenia*. His status as *proxenos* would be threatened only if he was unable to fulfill his obligation to look after the interests of the awarding state. A good fourth-century example of the compatibility of citizenship and *proxenia* is given by an inscription honouring a Philes of Rhodes. In the main body of the decree he is awarded *proxenia*, while in a rider to the decree he is awarded citizenship. Osborne finds this problematic, assuming that *proxenia* is 'a privilege clearly incompatible with citizenship', and argues that the rider supersedes the main decree. Although it is clear that Philes was in Athens at the time of the awards, there is no reason to assume that he remained in Athens or that he did not return to his native Rhodes to exercise his *proxenia* on Athens's behalf while remaining an honorary Athenian citizen. In this case, the citizenship would have emphasised his rights in Athens and given him status there, but the

²⁰² *Ibid.* The *proxenos* decrees were also provided certain privileges such as: safeguarding the *proxenos* and his families from civil wrong, exemptions from all or specific taxes (*ateleia*), the right to own real property at Athens (*enktesis*), the right to sail and carry on trade in certain areas under Athenian blockade, compensation for losses or special payments, exemption from taxes on the import of shipbuilding materials, the establishment of a special commission to examine a case brought by the *proxenos*, guarantees that land and moneys will be inviolable.

²⁰³ The title *proxenos* normally denoted benefactions performed for individuals who resided in or were short-term visitors to the *proxenos*' *polis*. It is different with the title of *euergetes* which emphasized benefactions performed for an entire community that was not the *euergete*'s *polis*. A *proxenos* might also perform (or have performed) services for the entire *polis* from which he received the title – the title implied that its bearer was a benefactor of the entire city – and these services could be rendered in the *polis* that granted the title, rather than in the *proxenos*' own *polis*. But the purpose of mentioning both titles was to highlight the two directions in which benefactions could be oriented (toward persons in the benefactor's *polis* and those in another place) and the two levels at which it was possible to act (the individual and the communal). GYGAX, M. D. (2016) *Benefaction and Rewards in the Ancient Greek City*. Cambridge: Cambridge University Press. p.110.

²⁰⁴ *Ibid.*

proxenia would have emphasised his duties to the Athenians when in his natal state.”²⁰⁵

Burke has pointed out the fact that from “the late fifth and fourth centuries there are a number of instances where Athens and other states did designate as proxenoi men actively involved in maritime trade”.²⁰⁶ An inscription quoted by Kloppenborg and Ascoug (2011) provides an example of the designation of a foreigner as a *proxenos* and their honors as stated as follows:

“... of the presidents, Epameinon has put to a vote (the motion) that NN son of NN of the deme Anagyrous proposed: Whereas the shippers and merchants have declared Apollonides son of Demetrios of Sidon to be a good man and well-intentioned toward the people of Athens, the People (*demos*) resolved to commend Apollonides son of Demetrios of Sidon and to crown him with a golden crown of the value of 1000 drachmae, on account of the excellence and good will that he shows to the people of Athens: and he and his children shall be (designated as) *proxenoi* and benefactors (*euergetes*) of the people of Athens; and in accordance with the law he shall have possession (*enktesis*) of property and a house. Lett he secretary of the Council inscribe this decree on a stele and set it up ont he Acropolis and lett he treasurer of the People say for the inscribing of the stele (up to?) x drachmae, from the expenses designated for (the inscribing) of decrees.”²⁰⁷

The interaction between public and private aspects in Greek political relationships is fascinating to study: when the *polis* behaved as a corporate body, it often assumed models for relationships which to modern sensibilities could be considered more appropriate to personal activities than for impersonal state relations. However, the corporate *polis* could appeal to ties of kinship, form *proxenia* relationships as if they were *xenia*, and award citizenship in order to elicit strong bonds of responsibility to the state. All of these relationships implied and appealed to duties and obligations that were more natural to personal relationships. Even if it was manufactured or artificial, this call to loyalty and duty was still strong: kin should help kin, *proxenoi* should help benefactors, ‘citizens’ should help fellow citizens. How seriously this responsibility was taken depended on the individual and on individual situations, but it was part of what made these relationships work, and if it was

²⁰⁵ MITCHELL, L. G. (2002) *Greeks Bearing Gifts: The Public Use of Private Relationships in the Greek World*. Cambridge: Cambridge University Press. pp.39-40.

²⁰⁶ BURKE, E. M. (1992) The Economy of Athens in the Classical Era: Some Adjustments to the Primitivist Model. 122 *Transactions of the American Philological Association* 199. p.207.

²⁰⁷ KLOPPENBORG, J. S. and ASCOUGH, R. S. (2011) *Attica, Central Greece, Macedonia, Thrace*. New York: Walter de Gruyter. pp.205-206.

rejected or ignored it could lead to the failure of the relationship with all the (real or assumed) disappointment and anger that entailed.²⁰⁸

4.2. The Period of Functional Immunity

Functional immunity firstly applied at the same time of the international organization establishment. Yet, there are no international conventions which is regulated about the application of functional immunity theory. Some literatures refer to the Vienna Convention on Diplomatic Relations 1961 but the provisions are still abstract.²⁰⁹ Since the United Nations has international legal personality as international organization²¹⁰, to effectively manage numerous practical needs such as procurement contracts, the acquisition of property and the capacity to pursue its private law rights before national courts, the United Nations Charter provides privileges and immunities to representatives of its members and its officials to exercise their functions in relation with the organization.²¹¹

Functional necessity concept of immunity can be found clearly in article 105 article 1 and 2 which stated that:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.²¹²

²⁰⁸ MITCHELL, L. G. *op.cit.* p.40.

²⁰⁹ In the elaboration of the Vienna Convention on Diplomatic Relations, the Commission was guided by the functional theory “in solving problems on which practice gave no clear pointers, while also bearing in mind the representative character of the head of the mission and of the mission itself”. *Memorandum by Secretariat, International Law Commission*, U.N. GAOR 6th Sess., U.N. Doc. A/CN.4/596 (2008). p.21.

²¹⁰ “At the time of the adoption of the Charter of the United Nations there were not many legal instruments that could have served as examples for what was intended to be achieved. The Covenant of the League of Nations of 28 June 1919 merely provided for “diplomatic” privileges and immunities of its employees and the inviolability of its property. Only a subsequent agreement with the League’s host State, the so-called *modus vivendi*, stipulated that the League possessed international personality and capacity and that it could not “in principle, according to the rules of international law, be sued before the Swiss Courts without its consent.” (Communications du Conseil Fédéral Suisse concernant le Régime des Immunités Diplomatique du Personnel de la Société des Nations et du Bureau International du Travail, entered into by the League of Nations and the Swiss Government on 18 September 1926, 7 OJLN (1926), annex 911a, 1422). Thus, the privileges and immunities of international organizations was largely uncharted territory.” REINISCH, A. *Convention on the Privileges and Immunities of the United Nations and Convention on the Privileges and Immunities of the Specialized Agencies*. United Nations Audiovisual Library of International Law. [Online] Available from: http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf [Accessed: November 24th, 2015].

²¹¹ Article 104 of the United Nations charter stated that “the Organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.” Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art. 104 [hereinafter ‘UN Charter’].

²¹² *Ibid.* art. 105 par (1) and (2).

Immediately after the establishment of the United Nations, the General Assembly adopted the Convention on the Privileges and Immunities of the United Nations that usually called as “General Convention”. This Convention was adopted with the legal basis of Article 105 paragraph 3 of the United Nations Charter which stated that: “The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article (in UN Charter) or may propose conventions to the Members of the United Nations for this purpose.”²¹³ It was one of the first treaties to be published in the United Nations Treaty Series.

The aim of this General Convention is to provide privileges and immunities to the United Nations, including the member states representatives, the United Nations officials, and experts on mission for the United Nations. Even, the Convention provides certain range of privileges and immunities for member states representatives to exercise their functions including during their journeys to and from the place of meeting.²¹⁴ Moreover, the “functional” personality of the United Nations is defined as “juridical personality” encompassing the specific capacity: “(a) to contract; (b) to acquire and dispose of immovable and movable property; (c) to institute legal proceedings.”²¹⁵

The immunities that are granted to UN officials and to experts on mission are basically functional. In this matter, we can understand it through the language of the provision of the General Convention that the immunities apply to “words spoken and written and to [...] acts performed by them in their official capacity;”²¹⁶ this immunity continues to extend even after the person is no longer in the United Nations service. Certain high officials,

²¹³ *Ibid.* art. 105 par (3).

²¹⁴ The Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15. Article IV stated that: Representatives of Members to the principal and subsidiary organs of the United Nations and to conferences convened by the United Nations, shall, while exercising their functions and during their journey to and from the place of meeting, enjoy the following privileges and immunities: (a) immunity from personal arrest of detention and from seizure of their personal baggage, and, in respect of words spoken or written and all acts done by them in their capacity as representatives, immunity from legal process of every kind; (b) inviolability for all papers and documents; (c) the right to use codes and to receive papers or correspondence by courier or in sealed bags; (d) exemption in respect of themselves and their spouses from immigration restrictions, alien registration or national service obligations in the state they are visiting or through which they are passing in the exercise of their functions; (e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions; (f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys, and also (g) such other privileges, immunities and facilities not inconsistent with the foregoing as diplomatic envoys enjoy, except that they shall have no right to claim exemption from customs duties on goods imported (otherwise than as part of their personal baggage) or from excise duties or sales taxes.

²¹⁵ This provision clarifies that the United Nations should be able to enter into day-to-day operations governed by private law. *Ibid.* art. I, section 1.

²¹⁶ *Ibid.* art. III, section 7 (a).

as well as experts, also enjoy immunities like those of diplomats, but these apply only while the person enjoys the specified status. In some occasions, neither type of immunity appertains directly to the official concerned but are essentially those of the organization, and only the organization can assert or waive them.²¹⁷

In the case of waiver of immunity, the General Convention and related treaties provide different mechanism for Secretary General of the United Nations, officials, experts mission, and for member states representative in the United Nations. Specifically for the United Nations officials like permanently employed staff members: they enjoy functional immunity as provided by article V, section 18.²¹⁸ Privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves.²¹⁹ The Secretary-General shall have the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations.²²⁰ In the case of the Secretary-General, the Security Council shall have the right to waive immunity.²²¹

Domestic courts of member states could not determine the assertion of waiver of immunity of the United Nations officials. In a letter to a Permanent Representative of the United States, the United Nations Office of Legal Affairs explained:

“In the present case, the Secretary-General at no point waived the immunity of the Security Officer concerned... The authority granted in the Section 20 of the Convention to waive the immunity of any official is enjoyed exclusively by the Secretary-General, and waiver cannot be effected instead by the Court. That this is a reasonable understanding of the Convention is borne out not only by the specification in Section 20 of the conditions under which the Secretary-General may waive, but also by the provisions in Article VII (1) for the settlement of disputes regarding all differences arising out of the interpretation or application of the Convention. As already mentioned, the Convention foresees that disputes are not to be settled by the courts of a Member State party

²¹⁷ CHOUDHURY, F. (2016) The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability. 104 *The Georgetown Law Journal* 725. p.733.

²¹⁸ The Convention on the Privileges and Immunities of the United Nations (1946), art. V, section 18.

²¹⁹ *Ibid.*, art. V, section 20. *See also* section 18 stated that: “Officials of the United Nations shall: (a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity; (b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations; (c) be immune from national service obligations; (d) be immune, together with their spouses and relatives dependent on them, from immigration restrictions and alien registration; (e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned; (f) be given, together with their spouses and relatives dependent on them, the same repatriation facilities in time of international crisis as diplomatic envoys; (g) have the right to import free of duty their furniture and effects at the time of first taking up their post in the country in question.”

²²⁰ *Ibid.*

²²¹ *Ibid.*

to the Convention, but that differences between the United Nations on the one hand and a Member on the other hand are to be decided by an advisory opinion of the International Court of Justice. The fact that such a procedure is available conclusively demonstrates the weakness of the assumption by the Judge that national courts may determine the extent of immunity from jurisdiction enjoyed by a United Nations official acting in his official capacity as directed by the Secretary-General.”²²²

Different with the immunity and privileges of the United Nations officials, experts on missions²²³ for the United Nations work under a temporary and specific mandate. The ‘experts on missions’ are regarded as personnel other than those qualifying as representatives of members and as officials of the organization and they are employed under short-term contracts.²²⁴ They also protected by functionally limited privileges and immunities as regulated by the General Convention.²²⁵ Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.²²⁶

The concept of functional necessity is also relevant for the justification of diplomatic immunity.²²⁷ Based on this concept, privileges and immunities should be limited to those

²²² REINISCH, A. (2016) *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary*. Oxford: Oxford University Press.

²²³ This includes members of the International Law Commission, Special Rapporteurs, or members of United Nations peacekeeping operations.

²²⁴ MICHALS, D. B. (2012) *International Privileges and Immunities: A Case for A Universal Statute*. The Hague: Martinus Nijhoff. p.87.

²²⁵ The Convention on the Privileges and Immunities of the United Nations (1946), art. VI, section 22 stated that: “Experts (other than officials coming within the scope of article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular, they shall be accorded: (a) immunity from personal arrest or detention and from seizure of their personal baggage; (b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for the United Nations; (c) inviolability for all papers and documents; (d) for the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags; (e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions; (f) the same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.”

²²⁶ *Ibid.* section 23.

²²⁷ WRIGHT, S. L. (1987) Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts. 5 *Boston University International Law Journal* 177. pp.200-204. GROFF, J. D. (2000) A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right. 14 *Temple International and Comparative Law Journal* 209. p.216. McCLANAHAN, G. V. (1989) *Diplomatic Immunity: Principles, Practices, Problems*. London: C. Hurst & Co. Publishers. p.32.

necessary for the diplomat to carry out his official functions.²²⁸ The approach is justified by arguing that diplomats could not fulfill their roles without certain privileges and immunities.²²⁹ Proponents of this theory suggest that it is dynamic and contains safeguards preventing the needless expansion of privileges and immunities.²³⁰ The idea of functional necessity has been also acknowledged in the Vienna Convention on Diplomatic Relations 1961²³¹, an international treaty governing the diplomatic relations between states.²³² Although most scholars refer this Convention is using absolute approach of immunity but this doctrine is unique, unlike its historical antecedents, because it provides some rational basis for restricting the immunity of diplomats, as long as the restrictions do not hinder the diplomat from accomplishing his functions. However, functional necessity has not been carried to its logical conclusion in the diplomatic context. Perhaps this is because states are fearful that their diplomats would face unjust political prosecution or be rendered unduly cautious in accomplishing their functions.²³³ Thus, diplomats still enjoy absolute immunity for their private acts, even though a truly functional approach would not support this degree of immunity. This theory, however, has been proven viable under the Convention on the Privileges and Immunities of the United Nations.²³⁴

4.3. The Period of Restrictive Immunity

The idea of using restrictive approach of immunity firstly came out in the case of the *Schooner Exchange v. McFaddon*²³⁵ although the result of the case judges used the absolute immunity. This case has been almost became reference in judicial opinions in the United States. The case was begun on 24 August, 1811, John McFaddon & William Greetham, of the State of Maryland, filed their libel in the District Court of the United States for the District of Pennsylvania against the Schooner *Exchange*, setting forth that they were her sole owners, on 27 October, 1809, when she sailed from Baltimore, bound to St. Sebastians, in

²²⁸ McCLANAHAN, G. V. *loc.cit.*

²²⁹ FARHANGI, L. S. (1986) Insuring Against Abuse of Diplomatic Immunity. 38 *Stanford Law Review* 1517. p.1521.

²³⁰ *Ibid.* p.1522. WILSON, C. E. (1967) *Diplomatic Privileges and Immunities*. Tucson: University of Arizona Press. p.17. McCLANAHAN, G. V. *op.cit.* p.32. WRIGHT, S. L. *op.cit.* pp.202-203.

²³¹ *Ibid.* p.1521. GROFF, J. D. *op.cit.* pp.216-217. WRIGHT, S. L. *op.cit.* pp. 202-203.

²³² While the Vienna Convention on Diplomatic Relations acknowledges the theory of functional immunity it still provides for absolute immunity for certain classes of diplomatic personnel.

²³³ FARHANGI, L. S. *op.cit.* p.1522.

²³⁴ MAGINNIS, V. L. (2003) Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations. 28 *Brooklyn Journal of International Law* 989. pp.995-997.

²³⁵ *The Schooner Exchange v. McFaddon*, 11 U.S. 7 (Cranch) 116 (1812).

Spain. That while lawfully and peaceably pursuing her voyage, she was on 30 December, 1810, violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French, out of the custody of the libellants, and of their captain and agent, and was disposed of by those persons, or some of them, in violation of the rights of the libellants and of the law of nations in that behalf. That she had been brought into the port of Philadelphia, and was then in the jurisdiction of that court, in possession of a certain Dennis M. Begon, her reputed captain or master. That no sentence or decree of condemnation had been pronounced against her by any court of competent jurisdiction, but that the property of the libellants in her remained unchanged and in full force. They therefore prayed the usual process of the court to attach the vessel, and that she might be restored to them. Upon this libel the usual process was issued, returnable on 30 August, 1811, which was executed and returned accordingly, but no person appeared to claim the vessel in opposition to the libellants. On 6 September, the usual proclamation was made for all persons to appear and show cause why the vessel should not be restored to her former owners, but no person appeared.²³⁶

On 20 September, Mr. Dallas, the Attorney of the United States for the District of Pennsylvania, appeared and (at the instance of the executive department of the government of the United States, as it is understood), filed a suggestion to the following effect: "Protecting that he does not know and does not admit the truth of the allegations contained in the libel, he suggests and gives the court to understand and be informed. That inasmuch as there exists between the United States of America and Napoleon, Emperor of France and King of Italy, &c., a state of peace and amity, the public vessels of his said Imperial and Royal Majesty, conforming to the law of nations and laws of the said United States, may freely enter the ports and harbors of the said United States and at pleasure depart therefrom without seizure, arrest, detention or molestation. That a certain public vessel described and known as the *Balaou*, or *Vessel No. 5*, belonging to his said Imperial and Royal Majesty and actually employed in his service, under the command of the Sieur Begon upon a voyage from Europe to the Indies having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia for refreshment and repairs about 22 July, 1811. That having entered the said port from necessity and not voluntarily, having procured the requisite refreshments and repairs, and having conformed in all things to the law of nations and the laws of the United States, was about to depart from the said port of

²³⁶ *Ibid.* p.116.

Philadelphia and to resume her voyage in the service of his said Imperial and Royal Majesty when on 24 August, 1811, she was seized, arrested, and detained in pursuant of the process of attachment issued upon the prayer of the libellants. That the said public vessel had not at any time, been violently and forcibly taken or captured from the libellants, their captain and agent on the high seas, as prize of war or otherwise, but that if the said public vessel, belonging to his said Imperial and Royal Majesty as aforesaid, ever was a vessel navigating under the flag of the United States and possessed by the libellants, citizens thereof, as in their libel is alleged (which nevertheless the said Attorney does not admit), the property of the libellants in the said vessel was seized and divested, and the same became vested in His Imperial and Royal Majesty within a port of his empire or of a country occupied by his arms, out of the jurisdiction of the United States and of any particular state of the United States, according to the decrees and laws of France in such case provided. And the said attorney submitting whether, in consideration of the premises, the court will take cognizance of the cause, respectfully prays that the court will be pleased to order and decree that the process of attachment heretofore issued be quashed, that the libel be dismissed with costs, and that the said public vessel, her tackle, &c., belonging to his said Imperial and Royal Majesty be released, &c. And the said attorney brings here into court the original commission of the said Sieur Begon. . . .²³⁷

On 27 September, 1811, the libellants filed their answer to the suggestion of the district attorney, to which they except because it does not appear to be made for or on behalf or at the instance of the United States or any other body politic or person. They aver that the schooner is not a public vessel, belonging to His Imperial and Royal Majesty, but is the private property of the libellants. They deny that she was compelled by stress of weather to enter the port of Philadelphia or that she came otherwise than voluntarily, and that the property of the libellants in the vessel never was divested, or vested in His Imperial and Royal Majesty within a port of his empire or of a country occupied by his arms. The district attorney produced the affidavits of the Sieur Begon and the French consul verifying the commission of the captain and stating the fact that the public vessels of the Emperor of France never carry with them any other document or evidence that they belong to him than his flag, the commission, and the possession of his officers. In the commission it was stated that the vessel was armed at Bayonne.²³⁸

²³⁷ *Ibid.* pp.119-120.

²³⁸ *Ibid.*

On 4 October, 1811, the district judge dismissed the libel with costs upon the ground that a public armed vessel of a foreign sovereign in amity with our government is not subject to the ordinary judicial tribunals of the country so far as regards the question of title by which such sovereign claims to hold the vessel. From this sentence, the libellants appealed to the circuit court, where it was reversed on 28 October, 1811. From this sentence of reversal, the district attorney, appealed to this Court.²³⁹

Chief Justice Marshall delivered the opinion of the court. He noted that by the definition of sovereignty, a state has absolute and exclusive jurisdiction within its own territory, but that it could also by implied or express consent waive jurisdiction.²⁴⁰ Moreover, Marshall also noted that under international custom jurisdiction was presumed to be waived in a number of situations. For instance, a foreign sovereign and his diplomatic representatives were generally free from the jurisdiction of domestic courts when visiting.²⁴¹ Similarly, if a state granted permission for a foreign army free passage across its territory, it generally implied a waiver of jurisdiction over that army.²⁴² This custom was firmly enough established and necessary for international relations that it would be wrongful for a country to violate it without prior notice.²⁴³

Marshall further noted that while the right of free passage by an army need usually be explicitly granted (likely because such passage inevitably involves physical damage of some sort), by maritime custom a nation's ports were presumptively open to all friendly ships. While a nation could close its ports to the warships of another country, it would have to issue some form of declaration to do so. Without such a declaration, a friendly foreign warship could enter a nation's port with its implied consent.²⁴⁴ Marshall further distinguished the difference between private merchant ships and citizens (who are subject to a nation's jurisdiction when they enter its ports with the nation's implied consent), and military ships. Namely, private ships do not carry with them the sovereign status of military ships, with the privileges that accompany it.²⁴⁵ From this, Marshall arrived at the conclusion that, by customary international law, a friendly warship that enters a nation's open port are exempted

²³⁹ *Ibid.* pp.118-120.

²⁴⁰ *Ibid.* p.136.

²⁴¹ *Ibid.* p.137.

²⁴² *Ibid.* p.139.

²⁴³ *Ibid.* p.137.

²⁴⁴ *Ibid.* p.141.

²⁴⁵ *Ibid.* pp.141-145.

from that nation's jurisdiction.²⁴⁶ Applying this analysis to the facts at hand, Marshall found that the courts did not have jurisdiction over the case.

The opinion in this case is considered the classic statement of the absolute doctrine of sovereign immunity.²⁴⁷ However, the fundamental distinction between the activities of a sovereign in its public capacity as opposed to those undertaken in a private capacity, the basis of the restrictive theory of sovereign immunity, was evidenced in the opinion: "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual..."²⁴⁸ Further, the conduct of the French naval forces that formed the factual setting of this opinion would have been exempted from judicial process under either the absolute or restrictive theories of sovereign immunity, since the conduct at issue could in no sense be termed as commercial in nature. It might be more accurate to maintain that, although the rationale of *The Schooner Exchange v. McFaddon* had its foundation in the comity among states and their coequal dignity, the actual holding of the case is somewhat equivocal as to the exact scope of the doctrine. It is also significant that the Court considered the merits of the defendant's claim after the executive had filed a suggestion of immunity.²⁴⁹

²⁴⁶ *Ibid.* pp.145-146.

²⁴⁷ *Berizzi Bros. Co v. The Pesaro*, 271 U.S. 562 (1926), p. 573.

²⁴⁸ *The Schooner Exchange v. McFaddon*, 11 U.S. 7 (Cranch) 116 (1812), p. 145. In the case of *Bank of the United States v. Planters Bank*, Justice Marshall stated consistently that: "When a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself". *Bank of the United States v. Planters Bank*, 22 U.S. (9 Wheat.) 904 (1824). p.907.

²⁴⁹ MURPHY, D. T. (1968) *The American Doctrine of Sovereign Immunity: An Historical Analysis*. 13 *Villanova Law Review* 583. p.587.

CHAPTER V

THE LAW OF RESTRICTIVE IMMUNITY

5.1. International Treaties

During the globalization on international market, the need to apply restrictive immunity has been become common approach that will not attach immunity for commercial purpose. This condition has proven in certain multinational treaties²⁵⁰ such as European Convention on State Immunity 1972 and The United Nations on Jurisdictional Immunity of States and their Property 2004. In this sub-chapter, i would like to emphasize the content of the two treaties with regard to the normative concept of restrictive approach on immunity.

1. European Convention on State Immunity

The European Convention on State Immunity was the first comprehensive international multilateral treaties in relation with state immunity. It was adopted on 16 May 1972 by the Council of Europe and came into force on 11 June 1976. The Convention is an attempt at international legislation on one of these perennial problems among a group of European states to establish restrictive measures on immunity. It is currently ratified by 8 countries in the European Union such as: Austria, Belgium, Germany, Luxembourg, Netherlands, Switzerland and the United Kingdom.²⁵¹ Five of those (Austria Belgium, Netherlands, Luxembourg and Switzerland) also are parties to its Additional protocol, that establishes the European Tribunal in matters of State Immunity.²⁵² The Additional Protocol to the European Convention, which establishes a European Tribunal of State Immunity to determine disputes under the Convention.²⁵³

The fact that the Convention took some six years to complete and the complexity of the resulting instrument (forty-one articles plus an Annex and an Additional Protocol) reflect the difficulty of this particular task. The Convention was

²⁵⁰ The rules of immunity originate from customary. However, in the modern development of international law, immunity then has been adopted into bilateral and multilateral treaties.

²⁵¹ Council of Europe. (2016) *Chart of Signatures and Ratifications of Treaty European Convention on State Immunity*. [Online] Availavle from: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures> [November 20th, 2015].

²⁵² The Additional Protocol to the European Convention on State Immunity, came into force on 22 May 1985.

²⁵³ EDWARDS, R. (1981) Extraterritorial Application of the US Iranian Assets Control Regulations. 75 *American Journal of International Law*. p.870.

drawn up in the Council of Europe but is open to accession by non-member states on the invitation of the Committee of Ministers.²⁵⁴

The European Convention on State Immunity regulates important solutions to solve the common problems in the matter of sovereign immunity;²⁵⁵ it lays down procedural rules concerning proceedings before the courts of a Contracting State involving another Contracting State; it provides a special procedure for giving effect in a Contracting State to a judgement given against that state in another Contracting State; it provides for the settlement of disputes between the Contracting States by the International Court of Justice, but creates a separate and optional system, involving a European Tribunal, for the settlement of disputes arising out of the non-implementation by a Contracting State of a judgement given against it and disputes relating to the interpretation and application of the Convention.²⁵⁶

The Convention does not specify the cases in which a state may claim immunity but it lists a series of cases in which a Contracting State may not claim immunity. It provides that a Contracting State shall be entitled to immunity if the proceedings do not fall within the excepted cases, but it goes on to create an optional regime under which a Contracting State may declare that, in cases not included in the excepted cases, its courts will be entitled to entertain proceedings against other Contracting States to the extent that they are entitled to entertain proceedings against states not parties to the Convention.²⁵⁷

We can see from the content of the Convention; all the provisions support the application of restrictive measures of immunity, in example: a contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the

²⁵⁴ ALLOTT, P. (1974) European Convention on State immunity. 33 (1) *The Cambridge Law Journal* 8. pp.8-9.

²⁵⁵ The Committee of Ministers of the Council of Europe set up a Committee of Experts with the following terms of reference for guiding the Conference in drafting the Convention on State Immunity: "...to examine the problems relating to State immunity in the light of the observations made during the Third Conference of European Ministers of Justice, with a view to choosing the best method of resolving the difficulties existing in this matter, whether by elaborating a Convention or by any other means that seem appropriate as a result of such a study." The Committee of Experts held 14 meetings between 1965 and 1970 and succeeded in elaborating the European Convention on State Immunity and its Additional Protocol. See HERNDL, K. (1962) Zur Frage der Staatenimmunität (translation: observation to the question on state immunity). *Juristische Blätter*. p.15.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.* p.10.

forum.²⁵⁸ This shall not apply where: the individual is a national of the employing State at the time when the proceedings are brought; at the time when the contract was entered into the individual was neither a national of the State of the forum nor habitually resident in that State; or the parties to the contract have otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.²⁵⁹

A Contracting State also cannot claim immunity from the jurisdiction of a court of another Contracting State if it participates with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one hand and the entity or any other participant on the other hand.²⁶⁰

A Contracting State also cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.²⁶¹

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate.²⁶²

- a. to a patent, industrial design, trade-mark, service mark or other similar right which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected, and in respect of which the State is the applicant or owner;
- b. to an alleged infringement by it, in the territory of the State of the forum, of such a right belonging to a third person and protected in that State;
- c. to an alleged infringement by it, in the territory of the State of the forum, of copyright belonging to a third person and protected in that State;
- d. to the right to use a trade name in the State of the forum.

²⁵⁸ The European Convention on State Immunity, art.5(1).

²⁵⁹ *Ibid.* art.5(2).

²⁶⁰ *Ibid.* art.6(1).

²⁶¹ *Ibid.* art.7(1).

²⁶² *Ibid.* art.8.

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to: (a) its rights or interests in, or its use or possession of, immovable property; or (b) its obligations arising out of its rights or interests in, or use or possession of, immovable property - and both of it is situated in the territory of the State of the forum.²⁶³ A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to a right in movable or immovable property arising by way of succession, gift or bona vacantia.²⁶⁴ A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.²⁶⁵

In the matter of International Arbitration Agreement, where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in respect of any proceedings relating to: the validity or interpretation of the arbitration agreement; the arbitration procedure; the setting aside of the award; and unless the arbitration agreement otherwise provides.²⁶⁶

For those countries that are both parties to the European Convention on Human Rights and the European Convention on State Immunity, conflicting obligations could arise from the two Council of Europe treaties. Such conflict would for instance involve the obligation to grant an individual's right to access to a court against a foreign State versus the obligation to recognise that the alleged foreign State enjoys immunity. However, article 33 of the European Convention on State Immunity contains an important clause to solve this problem by stating that "existing

²⁶³ *Ibid.* art.9.

²⁶⁴ *Ibid.* art.10.

²⁶⁵ *Ibid.* art.11.

²⁶⁶ *Ibid.* art.12(1).

agreements in special fields and the European Convention on Human Rights can be considered as such an existing agreement in the special field of human rights.”²⁶⁷

2. The United Nations on Jurisdictional Immunity of States and Their Property

It took many years for international communities to construct a treaty with restrictive immunity version. This long effort was because disagreements between states whether to use (still) absolute immunity or restrictive immunity. China and the Soviet Union have been strongly supported to apply absolute immunity. Eventually, in December 2004, the United Nations Convention on Jurisdictional Immunities of States and their Property (UN Convention on Jurisdictional Immunities) was adopted by the United Nations General Assembly.²⁶⁸ Capping more than a quarter of a century of intense international negotiation, the new treaty is the first modern multilateral instrument to articulate a comprehensive approach to issues of state or sovereign immunity from suits in foreign courts.²⁶⁹ The main purpose of this Convention is to provide single rule and measures on state immunity. It will also harmonize the restrictive approach of state immunity into the domestic law of Contracting States. Indeed, the Convention builds on experience under the 1972 European Convention on State Immunity as well as on state practice under various domestic statutory regimes.²⁷⁰

Unfortunately, this Convention has not yet come into force because its failure to be ratified by minimum number of states to bring the Convention comes into effect.²⁷¹ Until now, there are only 12 states parties to this Convention, including: Austria, France, Islamic Republic of Iran, Japan, Kazakhtan, Lebanon, Norway,

²⁶⁷ BRÖHMER, J. (1997) *State Immunity and the Violation of Human Rights*. The Hague: Martinus Nijhoff. p.188.

²⁶⁸ UN Convention on Jurisdictional Immunities.

²⁶⁹ STEWART, D. P. (2005) The UN Convention on Jurisdictional Immunities of States and Their Property. 99 (1) *The American Journal of International Law* 194. p.194.

²⁷⁰ DICKINSON, A., LINDSAY, R., and LOONAM, J. P. (2004) *State Immunity: Selected Materials and Commentary*. Oxford: Oxford University Press.

²⁷¹ UN Convention on Jurisdictional Immunities, art.30 paragraph (1) and (2) stated that: “(1) The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary- General of the United Nations. (2) For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.”

Portugal, Romania, and Saudi Arabia.²⁷² The treaty was opened for signature since 2005 and Norway became the first state to ratify the Convention.²⁷³

Anthony Aust defined the 'state' which enjoys immunity under the definition of the Convention including:

- a. Its various organs of government. That is to say, all branches or emanations of government through which the government acts, including agencies and diplomatic missions. Proceedings against a government are effectively against the State. The legislature and judicial organs are also part of the State, although they are unlikely to have proceedings brought against them as such in a foreign court.
- b. Constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of the sovereign authority, and are acting in that capacity.' Entitlement depends on the constitutions of the State.²⁷⁴
- c. Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in exercise of sovereign authority of the State.' This depends on the constitution and laws of the State. The reference to 'other entities' would not normally include a corporation established by the State which has an independent legal personality, even if its purpose is non-commercial. The BBC and the British Council were both created, and are largely financed, by the State but are not part of it. Their assets are therefore not those of the United Kingdom. Most States have similar, so-called public corporations or parastatals. But they, and even a purely commercial entity, like a bank, could have immunity in respect of, say, the processing of requests for exemption from foreign exchange control restrictions or to do with economic sanctions. On the other hand, a state trading organisation, even if it is part of the State would not enjoy immunity in respect of its commercial activities.

²⁷² Committee of Legal Advisers on Public International Law (CAHDI). (2011) *State of Signatures and Ratifications of the UN Convention on Jurisdictional Immunities of States and Their Property and the European Convention on State Immunity*. [Online] Available from: http://www.coe.int/en/web/cahdi/meeting-documents?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_type=content&_101_assetEntryId=2066048 [Accessed: November 28th, 2015].

²⁷³ *Ibid.*

²⁷⁴ *See R. (Alamieyeseigha) v. CPS* (2005) EWHC 2704.

- d. Representatives of the State acting in that capacity. This covers all natural persons authorised to represent a State, in its various manifestations, in respect of acts done them on behalf of the State, and includes the Head of State acting in his official capacity. If a public official is sued for something that he did in his official capacity (even if it were contrary to international law), this would amount to suing the State, and so he could plead State Immunity.²⁷⁵ Diplomats also have personal immunity from suit, and Article 3 of the UN Convention on Jurisdictional Immunities provides that the Convention is without prejudice to the privileges and immunities enjoyed under international law by diplomatic missions, consular posts and other diplomatic missions and delegations, and persons connected with them. Furthermore, customary international law regulates certain special areas (such as foreign forces). Being *lex specialis*, it is not affected by the United Nations Convention, the fifth preambular paragraph of which affirms that the rules of customary international law continues to govern matters not regulated by the Convention.²⁷⁶

The preamble of the Convention's states that, "the jurisdictional immunities of States and their property are generally accepted as a principle of customary international law."²⁷⁷ It may be true that all states recognize jurisdictional immunity, but as we have already alluded to, that is so only at an abstract level; there is "substantial disagreement on detail and substance."²⁷⁸ Article 5 of the United Nations Convention starts by ruling that, "A State enjoys immunity, in respect to itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention."²⁷⁹

Under Article 7 of the convention, a state cannot invoke immunity from jurisdiction in a proceeding before a court of another state "with regard to a matter or case" if it has expressly consented to the exercise of jurisdiction by the court with regard to that matter or case by international agreement, in a written contract, by a declaration before the court, or by means of a written communication in a

²⁷⁵ *Propend v. Sing*, 11 ILR 611. *Holland v. Lampen Wolfe* (2000) 1 WLR 1537.

²⁷⁶ AUST, A. (2010) *Handbook of International Law*. Cambridge: Cambridge University Press. pp.149-150.

²⁷⁷ UN Convention on Jurisdictional Immunities, Preamble.

²⁷⁸ FINKE, J. (2010) Sovereign Immunity: Rule, Comity, or Something Else?. 21 *European Journal of International Law* 853. p.871.

²⁷⁹ UN Convention on Jurisdictional Immunities, art.5.

specific proceeding.²⁸⁰ But, agreement by a state for the application of the law of another state (for example, though a contractual choice of law clause) is not of itself to be interpreted as consent to the exercise of jurisdiction by the courts of that other state.²⁸¹

Nor may a state, according to Article 8, invoke immunity from jurisdiction in a proceeding before a court of another state if it has itself instituted the proceeding in question, intervened in that proceeding, or "taken any other step relating to the merits."²⁸² However, if the state satisfies the court that it could not have acquired knowledge of facts on which to base a claim to immunity until after it took such a step, the state can nonetheless claim immunity based on those facts, provided that it does so at the earliest possible moment.²⁸³

A State shall not be considered to have consented to the exercise of jurisdiction by a court of another State if it intervenes in a proceeding or takes any other step for the sole purpose of: (a) invoking immunity; or (b) asserting a right or interest in property at issue in the proceeding.²⁸⁴ The appearance of a representative of a State before a court of another State as a witness shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.²⁸⁵ Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be interpreted as consent by the former State to the exercise of jurisdiction by the court.²⁸⁶

Based on article 9 of the Convention, a state instituting a proceeding before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the principal claim.²⁸⁷ A state intervening to present a claim in a proceeding before a

²⁸⁰ *Ibid.* art.7 par.(1) stated that: "A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: by international agreement; in a written contract; or by a declaration before the court or by a written communication in a specific proceeding."

²⁸¹ *Ibid.* art.7 par.(2) stated that: "Agreement by a State for the application of the law of another State shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State."

²⁸² *Ibid.* art.8 par.(1) stated that: "A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has: (a) itself instituted the proceeding; or (b) intervened in the proceeding or taken any other step relating to the merits. However, if the State satisfies the court that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it took such a step, it can claim immunity based on those facts, provided it does so at the earliest possible moment."

²⁸³ *Ibid.*

²⁸⁴ *Ibid.* art.8 par.(2).

²⁸⁵ *Ibid.* art.8 par.(3).

²⁸⁶ *Ibid.* art.8 par.(4).

²⁸⁷ *Ibid.* art.9 par.(1).

court of another State cannot invoke immunity from the jurisdiction of the court in respect of any counterclaim arising out of the same legal relationship or facts as the claim presented by the State.²⁸⁸ A state making a counterclaim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of the court in respect of the principal claim.²⁸⁹

In relation with the restrictive approach on state immunity, the United Nations Convention provides the rule of exception on immunity for commercial transactions. The basic provision is in the article 10 paragraph (1) which stated that: “If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.”²⁹⁰ Those rule does not apply: (a) in the case of a commercial transaction between States; or (b) if the parties to the commercial transaction have expressly agreed otherwise.²⁹¹ Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of: (a) suing or being sued; and (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.²⁹²

The term of “commercial transactions” under this Convention means “(i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.”²⁹³

To determine whether a particular contract or transaction has “commercial transaction” in nature, article 2 (2) of the Convention states that: “reference should

²⁸⁸ *Ibid.* art.9 par.(2).

²⁸⁹ *Ibid.* art.9 par.(3).

²⁹⁰ *Ibid.* art.10 par.(1).

²⁹¹ *Ibid.* art.10 par.(2).

²⁹² *Ibid.* art.10 par.(3).

²⁹³ *Ibid.* art.2(1)(c).

be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.”²⁹⁴

The definition of “commercial transaction” and the determination of commercial nature of a transaction became dominant discussion during the meetings of the International Law Commission and in the subsequent negotiation of the convention, because of the differing approaches reflected in various domestic legal systems. The final formulation in the Convention actually represents a compromise of past debates.

A number of states were concerned during the negotiations to clarify that the immunity of a state would not automatically be waived when one of its enterprises engages in a commercial transaction. Others wanted to make it abundantly clear that legally distinct state-owned commercial enterprises do not enjoy derivative immunity simply by virtue of their state ownership or interests. Resolving this issue required finding an accommodation for a number of well-known problems, including those related to underfunded, or “shell”, state enterprises. The result is reflected in Article 10 (3), which provides that when a state enterprise (or other entity established by a state) that has an independent legal personality and is capable of suing and being sued, and of acquiring, owning or possessing, and disposing of property (including by state authorization), is involved in a proceeding that relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that state shall not be affected.²⁹⁵

In this context, reference should be made to the understanding annexed to the convention, which states that the “term 'immunity' in article 10 is to be understood in the context of the present Convention as a whole” and that “article 10, paragraph 3, does not prejudice the question of 'piercing the corporate veil', questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.”²⁹⁶

²⁹⁴ *Ibid.* art.2(2).

²⁹⁵ STEWART, D. P. *op.cit.* p.199.

²⁹⁶ *Ibid.*

The Convention also regulates about the employment contracts. According to Article 11, contracts of employment concluded between a mission or the representation of a foreign State and an employee who is not a national of that State nor a permanent resident in the State of the forum are not in principle covered by the jurisdictional immunity of foreign States²⁹⁷, unless:

- a. the employee is expected to perform particular functions in the exercise of governmental authority on behalf of the foreign State concerned in France. Conversely, where the employee is not tasked with any special responsibilities in the exercise of public authority, his or her dismissal by a foreign State is an act of private management which is not covered by jurisdictional immunity;
- b. The employee is a diplomatic agent, as defined in the Vienna Convention on Diplomatic Relations of 1961, or a consular officer, as defined in the Vienna Convention on Consular Relations of 1963, or a member of the diplomatic staff of a permanent mission to an international organization or of a special mission, or is recruited to represent a State at an international conference, or any other person enjoying diplomatic immunity;
- c. the subject-matter of the proceeding is the recruitment, renewal of employment or reinstatement of an individual;
- d. the subject-matter of the proceeding is the dismissal or termination of employment of an individual and such a proceeding would interfere with the security interests of the foreign State;
- e. the foreign employer State and the employee have otherwise agreed in writing, insofar as the courts of the State of the forum do not have exclusive jurisdiction for considerations of public policy, by reason of the subject-matter of the proceeding.²⁹⁸

In the matter of torts act, the Convention regulates the possibility to claim monetary compensation as the result of a foreign state's tortious act or omission. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise

²⁹⁷ UN Convention on Jurisdictional Immunities, art.11(1) stated that: "Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State."

²⁹⁸ *Ibid.* art.11(2).

competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.²⁹⁹ Based on the language of this article 12 of the Convention, there are two legal prerequisites: the act or omission must have occurred in the territory of the forum state and the actor of the act or omission must have been present in the forum state at the time of the act or omission. In simple case, if Y, as a state agent of state Y, commits a tortious act in the forum state X, while present in the state X, state X is subject to the jurisdiction of the courts of state Y for liability arising from that act. But, state X would have no jurisdiction over state Y or its officials for acts committed in the outside territory of state X. The presence of the actor of the act or omission causing the injury or damage within the territory of the State of the forum at the time of the act or omission, has been inserted to ensure the exclusion from the application of the article 12 of the Convention of cases of transboundary injuries or trans-frontier tort or damage, such as export of explosives, fireworks, or dangerous substances which could explode or cause damage through negligence, inadvertence or accident. It is also clear that cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the areas covered by article 12 of the UN Convention on Jurisdictional Immunities.³⁰⁰

Relating with the ownership, possession, and the use of property, unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the determination of: (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum;

²⁹⁹ *Ibid.* art.12.

³⁰⁰ This clause attempts to restrict the extraterritorial effect of the non-commercial torts exception. It limits application of that exception to instances where the tortfeasor is in the forum state at the time the act or omission occurred. Report of the International Commission on the work of its forty-third session, A/46/10, Suppl.10 (1991). draft art. 12, par.7. See O'KEEFE, R. and TAMS, C. J. (2013) *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*. Oxford: Oxford University Press. p.222. KINDALL, M. P. (1987) Immunity of States for Non-commercial Torts: A Comparative Analysis of the International Law Commission Draft. 75 (5) *California Law Review* 1849. p.1859.

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or (c) any right or interest of the State in the administration of property, such as trust property, the estate of a bankrupt or the property of a company in the event of its winding up.³⁰¹

In relation with the participation in companies or other collective bodies, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body: (a) has participants other than States or international organizations; and (b) is incorporated or constituted under the law of the State of the forum or has its seat or principal place of business in that State.³⁰² A State can, however, invoke immunity from jurisdiction in such a proceeding if the States concerned have so agreed or if the parties to the dispute have so provided by an agreement in writing or if the instrument establishing or regulating the body in question contains provisions to that effect.³⁰³

The Convention also adopted the legal effect of arbitration agreement as provided in the European Convention on State Immunity. The United Nations Convention states that if a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a commercial transaction, that State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to: (a) the validity, interpretation or application of the arbitration agreement; (b) the arbitration procedure; or (c) the confirmation or the setting aside of the award, unless the arbitration agreement otherwise provides.³⁰⁴

5.2. National Laws

The restrictive approach of state immunity has adopted by some states into their national laws through specific statute containing detail provisions of the use of restrictive immunity. Application of restrictive approach in domestic laws has become universal in

³⁰¹ UN Convention on Jurisdictional Immunities. art.13.

³⁰² *Ibid.* art.15 (1).

³⁰³ *Ibid.* art.15 (2).

³⁰⁴ *Ibid.* art.17.

common law countries but certain states are still using absolute approach of immunity. Dominantly, states are still using unclear approach of immunity when it comes to commercial activities of a state. But recently, we could see many domestic courts decision affirms the use of restrictive approach of immunity.

In this part, I would like to explain the substance of domestic law of states which are using restrictive approach of immunity, such as: The United States Foreign Sovereign Immunities Act 1976, The United Kingdom State Immunity Act 1978, Australian Foreign States Immunities Act 1985, Law of Judicial Immunity in China 2005, and Singapore State Immunity Act 2014. These domestic laws hopefully represent about practical guideline on the application of restrictive approach to immunity. All of these domestic laws except Law of Judicial Immunity in China 2005 are incorporated in their common law legal system. But there is no doubt that this approach is still relevant to be applied in the civil law countries.

1. The United States Foreign Sovereign Immunities Act

As previously discussed in this dissertation, the judgement of the United States Supreme Courts in the case of *The Schooner Exchange v. McFadden* has became the source of the American jurisprudence on foreign sovereign immunity. In this case, the plaintiffs who are American asserted as the right holder of an armed French ship discovered in the United States port at that time. The plaintiffs then searched for order of execution on that armed French vessel. Justice Marshall based his argument into international customary law that jurisdiction was presumed to be waived in a number of conditions. He cited the principle of equality between states and “absolute independence of sovereigns and a common interest impelling them to mutual intercourse”³⁰⁵ In similar concept, if a state granted permission for a foreign army free passage across its territory, it generally implied a waiver of jurisdiction over that army.³⁰⁶ This custom was firmly enough established and necessary for international relations that it would be wrongful for a country to violate it without prior notice.³⁰⁷ Citing their decision to the impotence of maintaining friendly relations with other nations then the Supreme Court confirmed that state immunity is based upon international comity among nations. The Supreme Court ultimately

³⁰⁵ *The Schooner Exchange v. McFaddon*, 11 U.S. 7 (Cranch) 116 (1812). p.137.

³⁰⁶ *Ibid.* p.139.

³⁰⁷ *Ibid.* p.137.

endorsed the suggestion of the executive branch and refused to permit the exercise of jurisdiction by a US court over the French war ship.

In the decades post *The Schooner Exchange* decision, the doctrine of foreign sovereign immunity gradually evolved in the United States to give more and more deference to the executive branch in the decision-making process of whether immunity should be afforded. During World War II, the United States courts abdicated almost all judicial decision-making with respect to state immunity and instead determined that position statements from the United States' State Department were dispositive of a foreign state's immunity.³⁰⁸

Traditionally, the United States' State Department provided the judiciary with suggestions of immunity, based upon the Department's judgments regarding customary international law and reciprocal practice.³⁰⁹ Before 1952, the State Department followed a theory of absolute foreign sovereign immunity for friendly sovereigns. Under that doctrine, "a sovereign cannot, without [its] consent, be made a respondent in the courts of another sovereign" regardless of the nature of the acts alleged to have been committed.³¹⁰ The Department would file "suggestions of immunity" with the court, invoking considerations of international law and international comity to request sovereign immunity in particular cases, and the United States courts generally gave absolute deference to those suggestions.³¹¹

Meanwhile, for various reasons governments were increasingly becoming engaged in state-trading and various commercial activities. Lawyers, scholars and private parties urged that the complete immunity of states engaged in commercial activities was not required by international law and was undesirable because absolute immunity (even for friendly nations) deprived private parties that dealt with state enterprises of judicial remedies and gave state businesses an unfair competitive advantage.³¹² In 1952, Acting Legal Adviser of the State Department, Jack Tate, delivered a well-known letter to the Acting Attorney General that became popular

³⁰⁸ *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240 (2004). p.2248. See McNAMARA, T. *op.cit.* p.3.

³⁰⁹ *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). p.34.

³¹⁰ *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193 (2007). p.199. KOH, H. H. (2011) Foreign Official Immunity After Samantar: A United States Government Perspective. 44 (5) *Yale Law School Faculty Scholarship Series* 1142. pp. 1142-1143.

³¹¹ *Samantar v. Yousuf*, 560 U.S. 305, 130 S. Ct. 2278 (2010). p. 2285.

³¹² See McNAMARA, T. *loc.cit.*

with the term of “Tate Letter”.³¹³ The Tate Letter explained the United States’ adherence to the “restrictive approach of sovereign immunity”, which extended immunity to public acts (*acta iure imperii*) of foreign states, but not for their commercial acts (*acta iure gestionis*). Tate Letter pointed out that:

“The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.”³¹⁴

The Tate Letter is not and was not international law by itself. However, it endorsed a trend in legal expectations in the form of evidence brought to the attention of the court as to whether the executive branch believes as a political matter that the immunity of a state should be honored in the courts. However, the Tate Letter is expectation creating about the restrictive reach of sovereign immunity. It was a clear communication about what the United States understood to be the developing state of an international law doctrine. Following the Tate Letter, neither party to litigation in the United States courts could assume that immunity was absolute and therefore, each party had to hold an expectation that the Tate Letter might generate restrictive

³¹³ TATE, J. B. (1952). Acting Legal Adviser, Department of State, letter to Philip B. Perlman, Acting Attorney General (May 19th, 1952). 26 *Department State Bulletin* 984.

³¹⁴ *Ibid.* American courts were not obliged to follow the recommendations of the State Department; however, the judiciary generally defers to the executive in matters of international relations. See, e.g., *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 712-13, 96 S.Ct. 1854, 1869-70, 48 L.Ed.2d 301 (1976) (embracing the restrictive theory of immunity). See also DOBROVIR, W. A. (1968) A Gloss on the Tate Letter’s Restrictive Theory of Sovereign Immunity. 54 *Virginia Law Review* 1. pp.1-4.

expectations about the reach of sovereign immunity. Furthermore, that the United States practice in using the letter would in general aspire to be consistent.³¹⁵

When the United States was debating to adopt the restrictive approach of state immunity, many nations especially European States had also begun to formulate their own restrictive immunity into their domestic law and policy. Moreover, in 1972, the European community concluded the first multilateral treaty on foreign sovereign immunity, the European Convention on State Immunity and its Additional Protocol. Such efforts had aspired the United States to legislate the same content into its domestic law.

In 1976, after long debate and discussion, the United States passed the Foreign Sovereign Immunity Act.³¹⁶ The purpose of this act is as practical guideline and explanation for resolving problems related sovereign immunity through the judicial institutions without any influence from the State Department. This Act governs all litigation in both state and federal courts against foreign states and governments, including their “agencies and instrumentalities.” It provides the exclusive basis for obtaining jurisdiction over these entities in U.S. courts (including special rules for service of process) and contains “a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.”³¹⁷

In practice, the FSIA transferred the responsibility for determining when sovereign immunity would be granted from the State Department to the judiciary.³¹⁸ Foreign states’ claim to immunity “would henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”³¹⁹ As the House Report made clear, the FSIA was intended to provide the

³¹⁵ NAGAN, W. and ROOT, J. *op.cit.*, p.414.

³¹⁶ The Foreign Sovereign Immunities Act (FSIA) of 1976 is a United States law, codified at Title 28, §§ 1330, 1332, 1391(f), 1441(d), and 1602–1611 of the United States Code, that establishes the limitations as to whether a foreign sovereign nation (or its political subdivisions, agencies, or instrumentalities) may be sued in U.S. courts—federal or state. (In international law, government protection against lawsuits in foreign courts is known as state immunity; government immunity in domestic courts is known as sovereign immunity.) It also establishes specific procedures for service of process, attachment of property and execution of judgment in proceedings against a foreign state. The United States Foreign Sovereign Immunities Act, 15 ILM 1388 (1976) [hereinafter ‘US FSIA’].

³¹⁷ The reference to “civil actions” does not suggest, however, that states or their agencies or instrumentalities can be subject to criminal proceedings in U.S. courts; nothing in the text or legislative history supports such a conclusion. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983). p.488.

³¹⁸ US FSIA, section 1602 stated that: “The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in the United States courts.”

³¹⁹ *Ibid.*

“sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before federal and state courts in the United States.”³²⁰

The US FSIA recognizes restrictive immunity when immunity is granted for “public acts, or, acts of a governmental nature that typically performed by a foreign state, but no immunity for acts of a private nature even though undertaken by a foreign state.” The establishment of the US FSIA has the main purpose as the legal basis for the judiciarys adjudication of claims by foreign sovereigns that they are immune from suit in the United States Courts. In detail, 28 U.S.C. section 1602 stated that: “The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”³²¹

More specifically, the restrictive immunity has adopted in the section 1605 (a) (2) which stipulates that foreign states are not immune from the jurisdiction of courts in the United States or of the States in any case:

- a. in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
- b. in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
- c. in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial

³²⁰ LOEWENSTEIN, A. (2001) The Foreign Sovereign Immunities Act and Corporate Subsidies of Agencies or Instrumentalities of Foreign States. 19 (2) *Berkeley Journal of International Law* 350. p.236.

³²¹ *Ibid.* section 1602.

- activity in the United States;
- d. in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;
 - e. not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to— (a) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or (b) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or
 - f. in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.³²²

Section 1605 (a) (2) of FSIA above has two legal bases: first, carrying on in the United States of a commercial activity.³²³ In this basis, commercial activities may include either a “regular course of commercial conduct” or “a particular commercial transaction or act.” These activities encompass either the concept of doing business on a regular basis, such as that conducted by an airline or a state trading corporation, or the notion of “transacting business” perhaps on the basis of a single contract, such as sale of a service or product, the leasing property, the borrowing of money, an employment contract, or an investment in a security issued by an American

³²² *Ibid.* section 1605 (a) (2). Eventhough the Act gives definition of “commercial activity” but this definition has no clear concept. Section 1603 (d) and (e) stated that: “(d) A “commercial activity” means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose. (e) A “commercial activity carried on in the United States by a foreign state” means commercial activity carried on by such state and having substantial contact with the United States.”

³²³ *Ibid.* section 3 (3). Commercial transaction under this provision has definition: (a) Any contract for the supply of goods or services; (b) Any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) Any other transaction or activity (whether of a commercial, industrial, financial, professional, or other similar character) into which a State enter sor in which it engages otherwise than in the exercise of sovereign immunity...”

corporation. Moreover, it is not necessary that the transaction involved be “performed or executed in its entirety in the United States.” It is sufficient that the activity involved, either initially or at some point during performance, has some “substantial” contact with the United States. The second legal bases is acts committed abroad in connection with a commercial activity abroad, but causing a “direct effect” in the United States. The FSIA is actually not specify what is meant by this expression.³²⁴ However, it would appear from its legislative history that the assertion of jurisdiction under clause 3 of section 1605 (a) (2) should be consistent with both the “minimum contacts” requirements set forth in the case of *International Shoe Co. v. Washington* which lead to the conclusion that in order to found jurisdiction the conduct in question should have a “substantial” effect in the United States, and the effect should occur “as a direct and foreseeable result” of that particular conduct.³²⁵

In *International Shoe Co. v. Washington*, International Shoe, a company resided outside of the State of Washington employed salesmen to enter the State and solicit orders for shoes.³²⁶ The State of Washington sought to require the company to pay into the state unemployment compensation fund. The defendant maintained that it was not amenable to personal jurisdiction in Washington courts because it maintained no office in the State and never made contracts for the sale or purchase of goods in the State.³²⁷ Justice Stone, writing for the majority, stated that in analyzing whether the exercise of jurisdiction met the demands of due process, the Court must determine if the contacts made with the forum were sufficient to make it “reasonable” to bring the defendant into the Washington court.³²⁸ In making this determination, the inconvenience to the defendant in coming to the forum should be considered. The Court noted that the satisfaction of due process depends upon “the quality and nature of the activity in relation to the fair and orderly administration of the laws.” Justice Stone concluded that the shoe company, through its regular

³²⁴ DELAUME, G. R. (1980) Long-Arm Jurisdiction Under the Foreign Sovereign Immunities Act. 74 (3) *American Journal of International Law* 640. p.642.

³²⁵ *Ibid.* See also Restatement (Second) Foreign Relations Law of the United States (1965). section 18.

³²⁶ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³²⁷ The shoe company supplied each salesman with one shoe out of a pair in a line of design samples. The salesmen’s only duties were to display the shoes to buyers and solicit orders. The orders were sent out-of-state to the company’s St. Louis office where they were filled and shipped FOB into Washington. The Salesmen were not authorized to make contracts or collect money from their customers.

³²⁸ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). p.319.

contacts with Washington, conducted a large amount of business within the state and received the benefits and protections of the laws of Washington.³²⁹ Therefore, the requirements of due process were met in the exercise of jurisdiction over the defendant.³³⁰

In order to qualify for the FSIA's presumption of immunity under Section 1604 US FSIA, the entity in question must be a "foreign state" within the meaning of Section 1603 (a). Rather than defining what constitutes a foreign state affirmatively, however, the FSIA merely states what is included within the ambit of the Act – beyond a foreign state proper. Thus section 1603 (a) specifies that a foreign state includes "a political subdivision of a foreign state" and an "agency or instrumentality of a foreign state."³³¹

For FSIA purposes, no distinction is drawn between the "state" and its "government." Thus, the statute applies whether the named defendant is, for example, Indonesia, the republic of Indonesia, the Government of Indonesia, or one of its integral governmental components including its ministries and government bodies such as House of Representative (DPR), People's Consultative Assembly (MPR), and Indonesian Financial Investigation Bureau (BPK).

In most circumstances, political subdivisions are readily equated with the state (or government). Rather than naming the state itself, sometimes government ministries, embassies, consulates, militaries or other related subdivisions of states are separately named as parties in FSIA litigation. Whether these entities are actually separate from the state itself may depend on the unique factual situation presented. However, as a general rule, government ministries, embassies, consulates and militaries are usually afforded FSIA protection as foreign states or political subdivisions or agencies or instrumentalities of foreign states.³³²

³²⁹ *Ibid.* Justice Stone said: "... But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of the state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can in most instances, hardly be said to be undue.

³³⁰ According to this case, the exercise of jurisdiction over a foreign defendant is proper when his activities within the forum are such that he enjoys the „benefits and protections of the laws of that state." If the defendant is not physically present within the forum, his contacts in the forum must be significant enough that the exercise of jurisdiction is not unjust. JOHNSON, E. and WORTHINGTON, C. (1982) Minimum Contacts Jurisdiction Under The Foreign Sovereign Immunities Act. 12 *The Georgia Journal of International and Comparative Law* 209. p.209.

³³¹ LOEWENSTEIN, A. *op.cit.* p.356.

³³² McNAMARA, T. *op.cit.* p.6.

An “agency or instrumentality” in turn is defined in Section 1603 (b) as any entity which (1) “is a separate legal person, corporate or otherwise”; (2) “is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof”; and (3) “is neither a citizen of a State of the United States ...nor created under the laws of any third country.”³³³ In the House Report accompanying the FSIA, Congress explained the definition of “agency or instrumentality” was “intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.”³³⁴ These entities can be in a variety of forms including a transport organization such as a shipping line, airline, steel company, foreign bank, state trading corporation, or an export association.³³⁵ By including foreign government owned companies into the definition of a foreign state, Congress granted the same immunities that it provided to foreign governments to a corporation.³³⁶

It is easy for the United States court to determine whether a foreign government owned companies meets the definition of a foreign state under Section 1603. This is because most foreign government owned companies are owned by one state government which owns more than 50 percent of the shares of that corporation. The difficulty arises when the foreign government owned companies is owned by several foreign governments or when the foreign government does not directly own the corporation but rather one of its agencies or instrumentalities is involved in the chain of ownership. The federal courts have deemed these two situations as *pooling* and *tiering* respectively. Although there remains a split in the circuits over the latter issue, a large number of courts have stretched far under these two doctrines to encompass foreign government owned companies under the definition of a foreign state.³³⁷

³³³ US FSIA, Section 1603 (b). Under this definition, foreign corporations incorporated in and at least fifty percent owned by the foreign state, are regarded as agencies or instrumentalities of a foreign state. Corporations that are less than fifty percent owned by a foreign state do not fall within the definition of an agency or instrumentality of a foreign state.

³³⁴ H. R. Rep. No. 94-1487 (1976), p. 15-16.

³³⁵ *Ibid.*

³³⁶ HARJANI, S. R. (1999) Litigating Claims over Foreign Government-Owned Corporations Under the Commercial Activities Exception to the Foreign Sovereign Immunities Act. 20 *Northwestern Journal of International Law and Business* 181. p.184.

³³⁷ *Ibid.*

The Supreme Court in *Dole Food Co. v. Patrickson*³³⁸ held that indirect ownership is not sufficient under the FSIA. The Supreme Court concluded that the state must itself own a majority of the shares of a corporation if the corporation is to be deemed an instrumentality of the state under the provisions of the FSIA.³³⁹ This decision has been characterized by some commentators as “severely limiting” the protections of the FSIA for state-owned companies and likely to result in state owned companies being sued more often in less predictable state courts. The opinion may also cause ironical results (and presumably unintended results). For example, under *Patrickson* an entity that is just 51% directly owned by a foreign state would qualify for FSIA protection. However, an entity that is 100% owned by a foreign sovereign, but held through another 100% owned holding company, would not receive FSIA protection even though the foreign state's real interests may be greater than in the case of direct partial ownership. To ensure FSIA protection, state-owned companies in tiered organizations may need to consider the benefits of restructuring with direct state ownership of all companies in the corporate group.³⁴⁰

2. The United Kingdom State Immunity Act

Before the enactment of UK State Immunity Act 1978³⁴¹, the United Kingdom used the absolute approach of immunity. These absolute doctrine of immunity is stated in precedent of *The Parlement Belge*.³⁴²

“as a consequence of the absolute independence of every sovereign authority and of the international comity' which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and everyone declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any State

³³⁸ *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S.Ct. 1655 (2003)

³³⁹ *Ibid.* p.1663.

³⁴⁰ McNAMARA, T. *loc.cit.*

³⁴¹ The State Immunity Act, 17 ILM 1123 (1978) [hereinafter ‘UK SIA 1978’].

³⁴² *The Parlement Belge*, is interesting in so far as Judge Phillimore was trying to break through this wall, refusing to grant immunity to a postal package belonging to the King of Belgium, which was transported by officers of the Belgian marine, with the argument that the ship had been chartered *for commercial purposes*. However, the judgment was reversed by the Court of Appeals, stating that international comity required that courts had to deny competence ‘over the person of any sovereign or ambassador of any other State or over public property of any State which is destined to public use.’ Sir Ian Sinclair observed that, at first sight, this judgment was not incompatible with the restrictive immunity doctrine, for it was first of all the public usage of the ship that let the court conclude *pro immunitatem*. Sinclair’s view is not merely speculative in the sense that, if the ship really had been used exclusively for private purposes, immunity would have had to be denied. *The Parlement Belge*, (1880) 5 P.D. 197, (1874–80) All. E.R. Rep. 104. See HIGGINS, R. (1977) Recent Developments in the Law of Sovereign Immunity in the United Kingdom. 71 *American Journal of International Law* 423.

which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.”

Lalive (1953) wrote that the United Kingdom long applied the absolute doctrine of immunity to foreign sovereigns. The particular reason for this doctrine, he argued, was that the Crown, under English common law, has a supreme status (‘The King can do no wrong’). In addition, after some leading cases, the doctrine of *stare decisis* that is part of English common law, has built an almost insurmountable wall for drawing a foreign sovereign in front of British tribunal.³⁴³

In 1978, the Parliament of the United Kingdom passed the State Immunity Act to implement the European Convention on State Immunity of 1972 into British domestic law.³⁴⁴ The doctrine of absolute state immunity was changed to restrictive immunity, whereby a foreign state could be sued in the British courts for certain activities including commercial activities of foreign sovereigns.

The State Immunity Act not only enables the United Kingdom to ratify the Brussels Convention of 1926 with its 1934 Protocol on immunity of state-owned ships and the European Convention on State Immunity 1972, but also codifies the law on the immunities to be afforded to any state in proceedings before the courts of the United Kingdom.³⁴⁵ Because the immunities granted by the Act are more restrictive than the regime under the European Convention, the United Kingdom will be making a declaration to this effect under Article 24.³⁴⁶ Such a declaration will

³⁴³ LALIVE, J. F. (1953) L’immunité de Jurisdiction des États et des Organisations Internationales. 84 *Recueil des cours de l’Académie de droit international de La Haye* 209. p.222.

³⁴⁴ The Act was passed following the ratification by the UK of the European Convention on State Immunity. The Convention came into force on 11 June 1976 but only eight states are parties. The 1978 Act is modelled on its provisions and reflects the UK view of the international law on state immunity. The Act states the general rule that a state is immune before the courts of another state and then proceeds to list a number of exceptions to that general rule. The basis for most of these exceptions is a recognition that a state’s acts may not only be of a sovereign or public nature but may also be of a commercial or private law nature and that it is not appropriate – or required by international law – to give immunity for the second kind of activity. The Act does not draw a straightforward distinction between public or sovereign acts of the state on the one hand, and private acts on the other. Instead it opts for a list approach identifying specific exceptions to immunity. One exception is for proceedings relating to commercial transactions, and to state obligations under a contract which are to be performed in the UK. FOAKES, J. and WILMSHURST, E. *State Immunity: The United Nations and Its Effect*. Chatham House. p.5. [Online] Available from: <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bpstateimmunity.pdf> (January 16th, 2016).

³⁴⁵ International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels 1926 and Protocol.

³⁴⁶ Article 24 of European Convention on State Immunity stipulates that: “(1) Notwithstanding the provisions of Article 15, any State may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, or at any later date, by notification addressed to the Secretary General of

enable the law on state immunity in the United Kingdom to develop beyond the limits laid down by the European Convention. The Act follows the trend of recent developments in the common law rules. Since Lord Denning's famous lone dissent in 1958 in *Rahimtoola v. Nizam of Hyderabad*³⁴⁷ the judges have shown themselves increasingly willing to reconsider the old authorities under which foreign states were immune from virtually all proceedings before the courts of the United Kingdom. The passing of the Act is also in part due to the concern of the City (and the Government) that valuable business would be lost to New York as a consequence of the passing by the United States Congress of the Foreign Sovereign Immunities Act 1976. The Solicitor-General, Mr. Peter Archer commented in the debate of the Bill in the Second Reading Committee:

“The position now obtaining in the courts of the United States accords with the interests of all those who, in commerce or finance, engage in transactions with foreign States. Unless we change our law, much of the work connected with these transactions - an important invisible export - could be lost to this country.”³⁴⁸

The Act came into force on November 22, 1978 and the United Kingdom has thus joined the ever-increasing number of states who adopt the doctrine of restrictive immunity under which a state is granted immunity only in respect of certain acts in the exercise of sovereign authority (*acta iure imperii*). Part I of the Act is closely modelled on the European Convention, whose main principles (with variations, some of great significance) are applied globally. The basic approach of this part of the Act is to provide an exhaustive list of cases in which there is no entitlement to immunity and to state a residual rule that in other cases a state is impleaded before the courts of

the Council of Europe, declare that, in cases not falling within Articles 1 to 13, its courts shall be entitled to entertain proceedings against another Contracting State to the extent that its courts are entitled to entertain proceedings against States not party to the present Convention. Such a declaration shall be without prejudice to the immunity from jurisdiction which foreign States enjoy in respect of acts performed in the exercise of sovereign authority (*acta iure imperii*). (2) The courts of a State which has made the declaration provided for in paragraph 1 shall not however be entitled to entertain such proceedings against another Contracting State if their jurisdiction could have been based solely on one or more of the grounds mentioned in the annex to the present Convention, unless that other Contracting State has taken a step in the proceedings relating to the merits without first challenging the jurisdiction of the court. (3) The provisions of Chapter II apply to proceedings instituted against a Contracting State in accordance with the present article. (4) The declaration made under paragraph 1 may be withdrawn by notification addressed to the Secretary General of the Council of Europe. The withdrawal shall take effect three months after the date of its receipt, but this shall not affect proceedings instituted before the date on which the withdrawal becomes effective.”

³⁴⁷ *Rahimtoola v. Nizam of Hyderabad*, (1958) A.C. 379.

³⁴⁸ H.C. Deb., Vol. 949, col. 412 (May 4, 1978). WHITE, R. C. A. (1979) The State Immunity Act 1978. 42 *The Modern Law Review* 72. pp.72-73.

the United Kingdom is entitled to immunity. Part II contains provisions implementing the important Articles of the European Convention which require states to give effect to judgments of the courts of other Convention countries against them. This is the only part of the Act that is limited to the European forum. The only really significant provision of Part III deals with the personal immunities of sovereigns and heads of state.³⁴⁹

The State Immunity Act protects foreign sovereigns with immunity including “the head of state or sovereign officials in his public capacity”, “the government of the State”, and “any department of the State.”³⁵⁰ The statute then excludes “a separate entities” (which are legally distinct from the executive organs of the government and capable of suing and being sued) and views them as private parties that do not benefit from immunity from suit or execution.³⁵¹ An entity is deemed separate when its activities have nothing to do with sovereign authority or where a state in similar circumstances is not immune.³⁵² The effect of these definitions is to grant immunity whenever any activity concerns the power and authority of the state.³⁵³

Part one of the Act specifies exceptions of immunity blanket which lists as stated as follows:³⁵⁴

- a. Basically based on the Act, a State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.³⁵⁵ However, Section 2 (2) also adds that “State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission”.³⁵⁶

³⁴⁹ *Ibid.*

³⁵⁰ UK SIA 1978. section 14 (1) (a) (b) and (c). This Section stipulates that “The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to: (a) the sovereign or other head of that State in his public capacity; (b) the government of that State; and (c) any department of that government, - but not to any entity (hereafter referred to as a “separate entity”) which is distinct from the executive organs of the government of the State and capable of suing or being sued.”

³⁵¹ FARIEALLO, F., DE CHAZOUMES, L. B., and DAVIS, K. E. (eds) (2016) *The World Bank Legal Review, Volume 7 Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice Systems*. World Bank Publications.

³⁵² *Ibid.* section 14 (2).

³⁵³ *Ibid.*

³⁵⁴ BOWETT, D. W. *op.cit.* pp.193-196.

³⁵⁵ *Ibid.* section 2 (1).

³⁵⁶ *Ibid.* section 2 (2).

- b. Commercial transactions and contracts to be performed in the United Kingdom, although the parties can agree in writing that this exception does not apply. This is a crucial provision and section 3 (3) defines “commercial transaction” to mean “any contract for the supply of goods or services”, “any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation”, “any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority”.³⁵⁷ It will be readily apparent that in that last phrase lies the genesis of many a future litigation. The old distinction between acts *iure imperii* and *iure gestionis* lingers on, for it remains open for the state to contend that the activity is conducted in the exercise of sovereign authority, and thereby to maintain its immunity. Perhaps a clear example would be a state's purchase or sale of armaments, but there are likely to be many controversial activities. Exception of immunity in commercial activities was firstly used in *Trendtex Trading Corporation v. Central Bank of Nigeria*.³⁵⁸ The Central Bank of Nigeria had been established in 1958 to issue legal tender and provide financial services to the Nigerian Government. The Bank had issued a letter of credit (said to be irrevocable) for U.S.\$14,000,000 in favour of the plaintiff. This sum was to pay for a quarter of a million tons of cement which Trendtex had sold to a third party. The plaintiff had shipped the cement to Nigeria, where it was to have been used in the construction of army barracks. The ships carrying the cement arrived at Lagos and found, incredibly, almost fourteen hundred other vessels, carrying over twenty million tons of cement, waiting on demurrage! Amidst this chaos, the Central Bank refused to meet the cost of the cement or the demurrage charges. Trendtex issued a writ in November, 1975, claiming against the Bank for payment to cover the letter of credit and

³⁵⁷ *Ibid.* section 3 (3). This section stipulates that: “In this section “commercial transaction” means: (a) any contract for the supply of goods or services; (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority; but neither paragraph of subsection (1) above applies to a contract of employment between a State and an individual.”

³⁵⁸ *Trendtex Trading Corporation v. Central Bank of Nigeria* (1977) 1 All E.R. 881.

demurrage. An injunction was granted against the Bank preventing the removal of funds to a place outside the United Kingdom. The Bank appealed against this order claiming that it was a department of state possessing the right to sovereign immunity and therefore beyond the Court's jurisdiction. Mr Justice Donaldson agreed: Trendtex looked to the Court of Appeal. The Appeal Court held that the Central Bank was not a government department but a legal entity of its own right and therefore not entitled to sovereign immunity. Lord Denning, M.R. and Lord Justice Shaw ventured so far as to state that even if the Bank had been a government department that it would not have been entitled to immunity. The letter of credit, upon which Trendtex had sued, was a commercial document.³⁵⁹

- c. Contracts of employment where the contract is made in the United Kingdom and the work is to be wholly or partly performed there.³⁶⁰ However, the exception can be excluded by written contract and will in any event not apply if the individual is a national of the contracting state or neither a national of, nor resident in, the United Kingdom.
- d. Actions for personal injuries or damage to property caused by an act or omission in the United Kingdom.³⁶¹
- e. The state's ownership, possession or use of immovable property in the United Kingdom. In *Thai-Europe Tapioca v. Pakistan*,³⁶² a German owned ship on charter to carry goods from Poland to Pakistan had been bombed in Karachi by Indian planes during the 1971 war. Since the agreement provided for disputes to be settled by arbitration in England, the matter came eventually before the English courts. The cargo had previously been consigned to a Pakistani government. The shipowners sued the government for the sixty-seven-day delay in unloading that had resulted from the bombing. The government pleaded sovereign immunity and sought to have the action dismissed. The Court of Appeal decided that since all the relevant events had taken place outside the jurisdiction and in view of the action being *in personam* against the foreign government rather than against the ship itself,

³⁵⁹ SUTHERLAND, P. F. (1978) The Foreign Sovereign Immunity Question. 13 (4) *Western Australia Law Review* 409. pp.414-415.

³⁶⁰ UK SIA 1978. section 4.

³⁶¹ *Ibid.* section 5.

³⁶² *Thai-Europe Tapioca v. Pakistan* (1975) 1 W.L.R. 1485.

the general principle of sovereign immunity would have to stand. Lord Denning declared in this case that there were certain exceptions to the doctrine of sovereign immunity. It did not apply where the action concerned land situated in the UK or trust funds lodged in the UK, nor was there any immunity when a commercial transaction was entered into with a trader in the UK and a dispute arises which is properly within the territorial jurisdictions of UK courts.³⁶³

- f. Patent, trademark, design rights, infringements of the same (or of copyright) and the right to use a trade or business name in the United Kingdom.³⁶⁴
- g. The state's membership of bodies corporate which have members other than states and are incorporated or controlled or have a principal place of business within the United Kingdom. However, this exception can be excluded by agreement in writing or by the instrument constituting the body corporate.³⁶⁵
- h. Disputes which the state has agreed in writing to submit to arbitration.³⁶⁶
Presumably, therefore, an English court may now entertain proceedings to enforce an arbitration award, or to stay proceeding in England pending an arbitration abroad, under the same conditions as apply in the case of any foreign arbitration between private parties and notwithstanding that one of the parties is a foreign sovereign.
- i. Admiralty proceedings relating to ships used for commercial purposes.³⁶⁷
This is an important exception because, in the past, many of the issues have

³⁶³ *Thai-Europe Tapioca v. Pakistan* [1977] 2 W.L.R. 356. See SHAW, M. N., *op.cit.* pp.498-499.

³⁶⁴ UK SIA 1978. section 7.

³⁶⁵ *Ibid.* section 8.

³⁶⁶ *Ibid.* section 9.

³⁶⁷ *Ibid.* section 10. This section stipulates that: "(1) This section applies to: (a) Admiralty proceedings; and (b) proceedings on any claim which could be made the subject of Admiralty proceedings. (2) A State is not immune as respects: (a) an action in rem against a ship belonging to that State; or (b) an action in personam for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes. (3) Where an action in rem is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, subsection (2)(a) above does not apply as respects the first-mentioned ship unless, at the time when the cause of action relating to the other ship arose, both ships were in use or intended for use for commercial purposes. (4) A State is not immune as respects: (a) an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or (b) an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid. (5) In the foregoing provisions references to a ship or cargo belonging to a State include references to a ship or cargo in its possession or control or in which it claims an interest; and, subject to subsection (4) above, subsection (2) above applies to property other than a ship as it applies to a ship. (6) Sections 3 to 5 above do not apply to proceedings of the kind described in subsection (1) above if the State in question is a party to the Brussels Convention and the claim relates to the

arisen in relation to ships although in *The Philippine Admiral*³⁶⁸ the Privy Council declined to accord immunity when the vessel was commercially operated. The Judicial Committee of the Privy Council clearly indicated that their decision affected only actions in rem. Although *The Philippine Admiral* represents a major development in the British law of sovereign immunity, nevertheless steps remain to be taken by the United Kingdom to fully embrace the restrictive doctrine. This decision should provide the impetus for the British Government to ratify the 1926 Convention and the 1972 Convention; such acts would extend the doctrine to actions in personam and establish clear standards for its application.³⁶⁹

- j. Liability for VAT, excise or customs duty and rates in respect of premises occupied for commercial purposes.³⁷⁰

3. South African Foreign Sovereign Immunity Act

Before 1980, South African courts generally adhered English judgements establishing the absolute immunity approach. However, in 1980, the restrictive approach was applied in the case of the case of *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mocambique*.³⁷¹ The presiding judge, Margo J, said that it must be accepted that the rule of international law on sovereign immunity which prevails today is that reflected in the restrictive doctrine; international law forms part of our law; and there is no statute or principle of South African law in conflict with the doctrine. The court held that the Government of Mozambique was not entitled to immunity in respect of trading activities and ordered an attachment to satisfy the judgment.³⁷²

In 1981, the South African legislature passed the Foreign States Immunities Act of 1981 which is mostly having the same provisions as the United Kingdom's State Immunity Act 1978. In terms of this legislation, a foreign state shall not be

operation of a ship owned or operated by that State, the carriage of cargo or passengers on any such ship or the carriage of cargo owned by that State on any other ship.”

³⁶⁸ *The Philippine Admiral* (1976) 2 W.L.R. 214.

³⁶⁹ WURM, P. (1976) Case Comment: The Phillipine Admiral. 3 (1) *Brooklyn Journal of International Law* 95. p.105.

³⁷⁰ UK SIA 1978. Section 11.

³⁷¹ *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mocambique* 1980 (2) SA 111.

³⁷² CROSS, E. *Sovereign Immunity in Commercial Transaction*. [Online] Available from: <http://www.asahi.com/english/Haerald-asahi/TKY200607210638.html> [February 5th, 2016].

immune from the jurisdiction of the courts of South Africa in proceedings relating to a commercial transaction entered into by a foreign state or an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the South Africa. A commercial transaction means any contract for the supply of services or goods, any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of such loan or financial obligation and any other transaction, whether commercial, industrial, financial, professional or other similar character in which it engages.

The South African Foreign States Immunities Act of 1981 also lists certain exception of immunity, such as:

a. Waiver of immunity³⁷³

A foreign state shall not be immune from the jurisdiction of the courts of the South Africa in proceedings in respect of which the foreign state has expressly waived its immunity or deemed to have waived its immunity. Waiver of immunity may be effected after the dispute which gave rise to the proceedings has arisen or by prior written agreement, but a provision in an agreement that it is to be governed by the law of the Republic shall not be regarded as a waiver. A foreign state shall be deemed to have waived its immunity: if it has instituted the proceedings; or if it has intervened or taken any step in the proceedings.

b. Commercial transactions³⁷⁴

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to: a commercial transaction entered into by the foreign state; or an obligation of the foreign state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in South Africa. It shall not apply if the parties to the dispute are foreign states or have agreed in writing that the dispute shall be justiciable by the courts of a foreign state. Commercial transaction under this Act means: any contract for the supply of services or goods; any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any

³⁷³ The South African Foreign States Immunities Act (1981) as amended by: Foreign States Immunities Amendment Act 48 of 1985 - Government Notice 908 in Government Gazette 9712, dated 24 April 1985. Commencement date: 24 April 1985 [hereinafter 'The South African FSIA']. section 3.

³⁷⁴ *Ibid.* section 4.

such loan or other transaction or of any other financial obligation; and any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does not include a contract of employment between a foreign state and an individual.

c. Contracts of employment³⁷⁵

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to a contract of employment between the foreign state and an individual if: the contract was entered into in the Republic or the work is to be performed wholly or partly in South Africa; and at the time when the contract was entered into the individual was a South African citizen or was ordinarily resident in South Africa; and at the time when the proceedings are brought the individual is not a citizen of the foreign state. But it does not apply if: the parties to the contract have agreed in writing that the dispute or any dispute relating to the contract shall be justiciable by the courts of a foreign state; or the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post.

d. Personal injuries and damage to property³⁷⁶

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to: the death or injury of any person; or damage to or loss of tangible property, caused by an act or omission in the South Africa.

e. Ownership, possession and use of property³⁷⁷

A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to: any interest of the foreign state in, or its possession or use of, immovable property in the South Africa, any obligation of the foreign state arising out of its interest in, or its possession or use of,

³⁷⁵ *Ibid.* section 5.

³⁷⁶ *Ibid.* section 6.

³⁷⁷ *Ibid.* section 7.

such property, or any interest of the foreign state in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*. It shall not apply to proceedings relating to a foreign state's title to, or its use or possession of, property used for a diplomatic mission or a consular post.

f. Patents, trade-marks, etc.³⁷⁸

A foreign state shall not be immune from the jurisdiction of the courts of the South Africa in proceedings relating to: any patent, trade-mark, design or plant breeder's right belonging to the foreign state and registered or protected in the South Africa or for which the foreign state has applied in the South Africa, or an alleged infringement by the foreign state in the South Africa of any patent, trade-mark, design, plant breeder's right or copyright, or the right to use a trade or business name in the South Africa.

g. Membership of associations and other bodies³⁷⁹

A foreign state which is a member of an association or other body (whether a juristic person or not), or a partnership, which: has members that are not foreign states; and is incorporated or constituted under the law of the South Africa or is controlled from the South Africa or has its principal place of business in the South Africa, shall not be immune from the jurisdiction of the courts of the South Africa in proceedings which relate to the foreign state's membership of the association, other body or partnership; and arise between the foreign state and the association or other body or its other members or, as the case may be, between the foreign state and the other partners.

h. Arbitration³⁸⁰

A foreign state which has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, shall not be immune from the jurisdiction of the courts of the South Africa in any proceedings which relate to the arbitration. It shall not apply if: the arbitration agreement provides that the proceedings shall be brought in the courts of a foreign state; or the parties to the arbitration agreement are foreign states.

³⁷⁸ *Ibid.* section 8.

³⁷⁹ *Ibid.* section 9.

³⁸⁰ *Ibid.* section 10.

i. Admiralty proceedings³⁸¹

A foreign state shall not be immune from the admiralty jurisdiction of any court of the South Africa in: an action *in rem* against a ship belonging to the foreign state; or an action *in personam* for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes. A foreign state shall not be immune from the admiralty jurisdiction of any court of the South Africa in: an action *in rem* against any cargo belonging to the foreign state if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or an action *in personam* for enforcing a claim in connection with any such cargo if the ship carrying it was, at the time when the cause of action arose, in use or intended for use for commercial purposes.

j. Taxes and duties³⁸²

A foreign state shall not be immune from the jurisdiction of the courts of the South Africa in proceedings relating to the foreign state's liability for: sales tax or any customs or excise duty; or rates in respect of premises used by it for commercial purposes.

Under the South African Foreign State Immunity Act, a foreign state is actually not expressly defined. Even though section 1 (2) defined a foreign state that includes: the head of state acting in his capacity as such, the government of the state, and any department of the government.³⁸³ However, this definition excludes the term of separate entity and territory forming a constituent part of a federal foreign state. The Act also does not provide the foreign state should be sovereign in nature. Whether a particular territory will qualify as a state for purposes of immunity must be determined by the Minister of Foreign Affairs and Information and not by the courts. In accordance with the general principles governing recognition under South African law, section 17 provides that the status of a foreign territory, whether the territory forms part of a federal state, and who is the head of state or government of a particular territory, is to be determined by means of certificate from the Minister of Foreign Affairs and Information. Such a certificate constitutes 'conclusive

³⁸¹ *Ibid.* section 11.

³⁸² *Ibid.* section 12.

³⁸³ *Ibid.* section 1 (2).

evidence' of the status so accorded. As seen above, 'any government department' is also regarded as part of foreign state. Section 17 of this law, however, provides no guidance on this point and it is consequently for the courts to decide whether (or not) an entity can be regarded as a department of the foreign government. In determining the status of the entity within the foreign state the courts will have to be guided by the law of the foreign state. Just how widely the term 'department' must be construed is uncertain and will emerge only through practice. Whether it should be limited to purely government departments in the sense that the body must function within and as a recognizable part of the formal governmental structure, or whether political control or influence coupled with apparent independence (but falling short of the requirements set for a 'separate entity') within the foreign system, would constitute sufficient government involvement, is unclear.³⁸⁴

In South Africa, any litigation against the South African is governed by the State Liability Act 20 of 1957. In *the Minister of Home Affairs and Another v American Ninja IV Partnership and Another*, the court held that in the absence of any particular enabling statutory provision, the State's power to contract is a common law prerogative.³⁸⁵ Where such contract is concluded the State exercises its powers with the concurrence of the persons affected and is liable under the Act 1957. Section 1 of Act 1957 provides that any claim against the State which would, if that claim had arisen against a person, be the ground of action, shall be cognisable by any competent court whether the claim arises out of any contract lawfully entered into or on behalf of the State or out of any wrong committed by an authorised servant if the State acting as such. In this case, the court held that a circular in terms of which the government would grant financial assistance comprising of tax concessions and payment of subsidies to the producers was a bilateral commercial agreement, which was contractually binding on the government. Under Act 1957, the property of the South African government cannot be attached in execution but an amount required to satisfy the judgment may be paid out from the National or Provincial Revenue Fund.³⁸⁶

³⁸⁴ BOTHA, N. (1982) Some Comments on the Foreign States Immunities Act 87 of 1981. XV *CILSA* 334. pp.335-336.

³⁸⁵ *The Minister of Home Affairs and Another v American Ninja IV Partnership and Another* 1993 (1) SA 257 (A).

³⁸⁶ CROSS, E. *loc.cit.*

4. Australian Foreign States Immunities Act

In 1984, the Australian Law Reform Commission produced the Foreign State Immunities Act. This Act entered into force on April 1st, 1986.³⁸⁷ This Act basically inspired by Sovereign Immunities Act established in 1978 (in the United Kingdom) and the Foreign Sovereign Immunities Act enacted in 1978 (in the United States).

The Attorney-General is responsible for the administration of the Australian Foreign Sovereign Immunities Act, which applies in relation to all civil litigation in Australian courts involving ‘foreign states’ as defined in the Act. This Act defines “foreign states” as a country the territory of which is outside Australia, being a country that is: an independent sovereign state; or a separate territory (whether or not it is self-governing) that is not part of an independent sovereign state.³⁸⁸ The FSI Act provides a general immunity for foreign states from the jurisdiction of the courts of Australia in civil proceedings³⁸⁹, with a limited number of defined exceptions. The exceptions are as stated as follows:

a. submission by foreign states³⁹⁰

A foreign State is not immune in a proceeding in which it has submitted to the jurisdiction. A foreign State may submit to the jurisdiction at any time, whether by agreement or otherwise, but a foreign State shall not be taken to have so submitted by reason only that it is a party to an agreement the proper law of which is the law of Australia. A may be subject to a specified limitation, condition or exclusion (whether in respect of remedies or otherwise). Without limiting any other power of a court to dismiss, stay or otherwise decline to hear and determine a proceeding, the court may dismiss, stay or otherwise decline to hear and determine a proceeding if it is satisfied that, by reason of the nature of a limitation, condition or exclusion to which a submission is subject (not being a limitation, condition or exclusion in

³⁸⁷ This Act was enacted following the Australian Law Reform Commission’s report on Foreign State Immunity (Report No. 24), which recommended that the law of foreign state immunity be put on a legislative footing. This Act is based directly on the recommendations of the Report.

³⁸⁸ Australian Foreign Sovereign Immunities Act (1986) [hereinafter ‘Australian FSIA’]. section 3 (1).

³⁸⁹ *Ibid.* section 9.

³⁹⁰ *Ibid.* section 10.

respect of remedies), it is appropriate to do so. An agreement by a foreign State to waive its immunity has effect to waive that immunity and the waiver may not be withdrawn except in accordance with the terms of the agreement. Foreign State shall not be taken to have submitted to the jurisdiction in a proceeding by reason only that: it has made an application for costs; or it has intervened, or has taken a step, in the proceeding for the purpose or in the course of asserting immunity. Where the foreign State is not a party to a proceeding, it shall not be taken to have submitted to the jurisdiction by reason only that it has intervened in the proceeding for the purpose or in the course of asserting an interest in property involved in or affected by the proceeding. Where the intervention or step was taken by a person who did not know and could not reasonably have been expected to know of the immunity; and the immunity is asserted without unreasonable delay; the foreign State shall not be taken to have submitted to the jurisdiction in the proceeding by reason only of that intervention or step.

b. commercial transactions of foreign states³⁹¹

A foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction. It does not apply: if all the parties to the proceeding: are foreign States or are the Commonwealth and one or more foreign States; or have otherwise agreed in writing; or in so far as the proceeding concerns a payment in respect of a grant, a scholarship, a pension or a payment of a like kind.

In this section, commercial transaction means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes: a contract for the supply of goods or services, an agreement for a loan or some other transaction for or in respect of the provision of finance; and a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange.

³⁹¹ *Ibid.* section 11.

In *Victoria Aircraft Leasing Ltd v United States*³⁹², the Victorian Court of Appeal had to consider an action to recover an aircraft that had been sold to a Nauruan government entity pursuant to a loan guaranteed by Eximbank, a United States government agency. The defendant argued that the plaintiff's claim was defeated because of an agreement entered into between the Nauruan and United States governments. Under the alleged agreement, Nauru agreed to assist in the defection of a North Korean scientist to the United States, to cooperate with the United States in investigating the involvement of Nauruan organisations in the transfer of money for the purposes of international terrorism, and to reform Nauru's laws to prevent money laundering and the production of false Nauruan passports. In exchange for these promises, Nauru alleged, the United States would provide Nauru with funds to assist it in its loan repayments to Eximbank and ensure that Eximbank gave Nauru additional time to comply with its obligations. A third party notice was issued against the United States, which applied to have it set aside on the ground of foreign state immunity. The key question for the Court was whether the alleged agreement between Nauru and the United States was a 'commercial transaction' within section 11 of the Australian FSIA.

The trial judge found that the agreement did not fall within the scope of the commercial transaction exception³⁹³ and a unanimous Court of Appeal agreed.³⁹⁴ First, as a matter of statutory interpretation, the Court of Appeal found that sub-section (3)(b) 'contemplates a loan or like transaction'.³⁹⁵ It 'does not extend to a promise to influence the creditor to give his debtor extra time to pay or refrain from exercising rights under a security nor ... to a promise to pay money which could be used by the recipient to repay a debt to another'. Sub-section (3)(c) is 'concerned with a guarantee of the performance of another's obligation [but] ... does not embrace a promise to prevent a creditor exercising rights under a security'.

³⁹² *Victoria Aircraft Leasing Ltd v United States* (2005) 218 ALR 640 .

³⁹³ *Wells Fargo Bank Northwest National Association v Victoria Aircraft Leasing Ltd* (2004) 185 FLR

48.

³⁹⁴ *Victoria Aircraft Leasing Ltd v United States*, *op.cit.* p.646.

³⁹⁵ *Ibid.* p.645.

Second, the Court said, even if an aspect of the transaction fell within one of the limbs of sub-s (3), ‘the transaction viewed as a whole’ was not encompassed by the provision.³⁹⁶ Each of the promises alleged to have been made by Nauru and each of the actions alleged to have been performed in reliance on representations allegedly made by the United States ‘concerned governmental functions of Nauru’ — in particular, ‘activities relating to its diplomatic and foreign relations, national security, intelligence, terrorism and the reform of banking laws and passport abuse’.³⁹⁷ While the United States had allegedly promised to assist Nauru with its repayments under the loan, the context in which this offer was made was ‘as part of a package or program of assistance in return for political favours’. The vagueness and lack of specificity as regards the time of the alleged promises of the United States also suggested that they were ‘political arrangements between states’ rather than binding commercial obligations.³⁹⁸

On balance, it seems hard to disagree with the Court’s conclusion, although it does suggest that difficult issues may lie ahead: in particular, what degree or level of ‘commerciality’ is required before a transaction will fall within s 11(3)? Since most agreements with states are likely to have at least some ‘governmental’ aspect (for example, relating to a sovereign purpose), it is troubling that the mere presence of such an element may be enough to establish immunity. Australian courts will have to be careful to ensure that the philosophy of restrictive immunity upon which the FSIA is based — which allows suits against foreign states where they engage in commercial transactions — is not easily circumvented.³⁹⁹

c. contracts of employment concerning Australia⁴⁰⁰

A foreign State, as employer, is not immune in a proceeding in so far as the proceeding concerns the employment of a person under a contract of employment that was made in Australia or was to be performed wholly or partly in Australia.

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.* p.646.

³⁹⁸ *Ibid.*

³⁹⁹ GARNETT, R. (2005) Foreign States in Australian Courts. 29 *Melbourne University Law Review* 704. pp.708-710.

⁴⁰⁰ Australian FSIA. section 12.

d. personal injury and damage to property

A foreign State is not immune in a proceeding in so far as the proceeding concerns: the death of, or personal injury to, a person; or loss of or damage to tangible property; caused by an act or omission done or omitted to be done in Australia.

e. Ownership, possession and use of property⁴⁰¹

A foreign State is not immune in a proceeding in so far as the proceeding concerns: an interest of the State in, or the possession or use by the State of, immovable property in Australia; or an obligation of the State that arises out of its interest in, or its possession or use of, property of that kind.

f. copyrights, patents, trade marks⁴⁰²

A foreign State is not immune in a proceeding in so far as the proceeding concerns: the ownership of a copyright or the ownership, or the registration or protection in Australia, of an invention, a design or a trade mark; an alleged infringement by the foreign State in Australia of copyright, a patent for an invention, a registered trade mark or a registered design; or the use in Australia of a trade name or a business name. It does not apply in relation to the importation into Australia, or the use in Australia, of property otherwise than in the course of or for the purposes of a commercial transaction.

g. where the foreign state is a member of a body corporate⁴⁰³

A foreign State is not immune in a proceeding in so far as the proceeding concerns its membership, or a right or obligation that relates to its membership, of a body corporate, an unincorporated body or a partnership that: has a member that is not a foreign State or the Commonwealth; and is incorporated or has been established under the law of Australia or is controlled from, or has its principal place of business in, Australia; being a proceeding arising between the foreign State and the body or other members of the body or between the foreign State and one or more of the other partners.

h. supervisory jurisdiction of courts with respect to arbitration which is entered into voluntarily by a foreign state⁴⁰⁴

⁴⁰¹ *Ibid.* section 14.

⁴⁰² *Ibid.* section 15.

⁴⁰³ *Ibid.* section 16.

⁴⁰⁴ *Ibid.* section 17.

Where a foreign State is a party to an agreement to submit a dispute to arbitration, then, subject to any inconsistent provision in the agreement, the foreign State is not immune in a proceeding for the exercise of the supervisory jurisdiction of a court in respect of the arbitration, including a proceeding: by way of a case stated for the opinion of a court; to determine a question as to the validity or operation of the agreement or as to the arbitration procedure; or to set aside the award.

i. actions *in rem* in relation to ships and cargos

A foreign State is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim in connection with the ship if, at the time when the cause of action arose, the ship was in use for commercial purposes. A foreign State is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim against another ship if: at the time when the proceeding was instituted, the ship that is the subject of the action *in rem* was in use for commercial purposes; and at the time when the cause of action arose, the other ship was in use for commercial purposes. A foreign State is not immune in a proceeding commenced as an action *in rem* against cargo that was, at the time when the cause of action arose, a commercial cargo.

5. Law of Judicial Immunity of Foreign Central Banks in China

China is actually still applying the absolute approach of immunity.⁴⁰⁵ With this regard, sovereignty and non-interference in the domestic affairs of states to be China's core principles of international law.⁴⁰⁶ In supporting this legal fact, Xue Hanqin (2011) stated that:

⁴⁰⁵ A survey of State practice and provisions of some international instruments on immunity reveals that the restrictive immunity approach has become the preferred choice, although it is by no means subject to universal acceptance. While most European countries, North America, and some African countries have endorsed restrictive immunity, many States are yet to do so. For instance, China still applies absolute immunity. ABASS, A. (2014) *Complete International Law: Text, Cases, and Materials*. Oxford: Oxford University Press. p.275.

⁴⁰⁶ Prime Minister of China Wen Jiabao noted in a 2008 speech to the United Nations General Assembly: "China's persistent stand of the primacy of State sovereignty has its deep roots embedded in the miserable experience in its modern history. . . . "Respect for sovereignty and non-interference in the internal affairs of other countries is the prerequisite for sound State-to-State relations. The Chinese people have learned from their modern history of humiliation that when a country loses sovereignty, its people lose dignity and status." HANQIN, X. (2011) *Chinese Contemporary Perspectives on International Law: History, Culture, and International Law*. 355 *Collected Courses of The Hague Academy of International Law* 41. p.90.

“(China) holds absolute immunity in case of acts of foreign States from national jurisdiction and execution. It is of the view that the principle of immunity is a right of State under customary international law rather than [of] comity. . . . In its judicial practice, Chinese national courts have neither exercised jurisdiction over acts of foreign States, nor have they enforced any decisions involving public property of foreign States.”⁴⁰⁷

Despite the strong international trend toward a restrictive theory of immunity, China has maintained its commitment to absolute immunity. For instance, in a U.S. case involving creditors seeking to enforce defaulted Chinese government bonds in U.S. courts, the government of China sent an aide memoire to the U.S. government demanding full immunity even though its bond sales were commercial activities not normally granted immunity.⁴⁰⁸ In this aide-memoire, China argued that:

“The absolute jurisdictional immunity of States in foreign courts is still a valid rule under international law on the basis of the principle of sovereign equality (par in parem non habet imperium, an equal has no power over an equal). So far there has not been enough evidence to prove that by State practice and *opinio juris*, this customary international law rule has changed.”⁴⁰⁹

Perhaps, there is one law in China that applies restrictive approach of immunity. The restrictive approach applies through the Law on Judicial Immunity of Foreign Banks which was enacted in 2005. The main purpose of the law is to adhere the principle of reciprocity by the exemption of the assets of a foreign central bank from judicial measures of constraint, including pre-judgement attachment, injunction, and post-judgement execution, unless the pertinent of foreign central bank or its government waives the immunity in writing, or the assets concerned are set aside precisely for the execution.⁴¹⁰ This law which only has four articles, serves to fill the legal gap in the Hong Kong Special Administrative Region (Hong Kong Government) and Macau Special Administrative Region, since applicable law prior to the handover ceased to be effective when the territories returned to Chinese

⁴⁰⁷ *Ibid.* pp.100-101.

⁴⁰⁸ Aide Memoire from Wu Xuequian (1983) Chinese Minister of Foreign Affairs, to George Shultz, U.S. Secretary of State (February 10th, 1983), reprinted in 22 *International Legal Materials* 81. p.81.

⁴⁰⁹ HANQIN, X. *op.cit.* pp.100-101. KU, J. G. (2016) The Significance of China's Views on the Jus Cogens Exception to Foreign Government Official Immunity. 26 *Duke Journal of Comparative and International Law* 503. p.509.

⁴¹⁰ Chinese Law on Judicial Immunity of Foreign Central Banks (2005), art. 1.

control.⁴¹¹ The demand for regulatory regime for the assets of foreign central banks is especially acute in the Hong Kong Government given that it is a financial centre and attracts capital flows and other asset forms from foreign central banks. The Chinese government felt that Hong Kong Government required a guarantee of immunity from judicial measures of constraint in order to maintain capital flows and other forms of investment by foreign central banks, and to enhance its status as a financial hub.⁴¹²

Under the provision of the Law, For the purposes of this Law, a foreign central bank means the central bank of a foreign country and of a regional economic integration organization, or the financial administration institution exercising the functions of a central bank. For the purposes of this Law, the property of foreign central banks includes the cash, notes, bank deposits, securities, foreign exchange reserve and gold reserve of the foreign central banks and the banks' immovable property and other property.⁴¹³ Where a foreign country grants no immunity to the property of the central bank of the People's Republic of China or to the property of the financial administration institutions of the special administrative regions of the People's Republic of China, or the immunity granted covers less items than what are provided for in this Law, the People's Republic of China shall apply the principle of reciprocity.⁴¹⁴

In fact, provisions of this Law is to meant to respond to the hopes of the Hong Kong Government. When China gained sovereign control over the Hong Kong Government, the United Kingdom's State Immunity Act of 1978, which was extended to the British Hong Kong by virtue of the State Immunity (Overseas Territories) Order 1979, lost its force in the Hong Kong Government. However, Chinese national legislation governing the immunity of foreign central banks was not in place when the handover of sovereignty occurred. Unfortunately, the Hong Kong Government itself is not in a position to regulate such matters as the Hong Kong Basic Law reserved competence over foreign affairs excusively to the Central People's Government of the People's Republic of China. In view of this legal gap,

⁴¹¹ QI, D. (2008) State Immunity, China and Its Shifting Position. 7 *Chinese Journal of International Law* 307. p.316.

⁴¹² WU, C. (2014) One Country, Two State Immunity Doctrines: A Pluralistic Depiction of the Congo Case. 9 (2) *National Taiwan University Law Review* 197. pp.204-205.

⁴¹³ Chinese Law on Judicial Immunity of Foreign Central Banks (2005), art.2.

⁴¹⁴ *Ibid*, art.3. WU, C. *loc.cit*.

foreign central banks were concerned about the status of their assets in the Hong Kong Government, and this uncertainty had the potential to prejudice the interests of the Hong Kong Government as an international financial centre. The Hong Kong Government thus requested that the Central People's Government of the People's Republic of China pass an Act regulating judicial immunity of assets of foreign central banks, which resulted in the Law on Judicial Immunity of Foreign Central Banks.⁴¹⁵

From the outset, the Hong Kong Government played a pivotal role in the initiation of the legislative process. This is evident from the objectives of this Law: to secure the confidence of foreign central banks in the Hong Kong Government; and to strengthen the territory's role as an international financial centre. As the economic interests of the Hong Kong Government with regards to the immunity of foreign central banks, and the national interests of China on the general issue of state immunity are not in conflict, and as the position taken in the Law, namely, immunity from judicial measures of constraint, is consistent with China's traditional approach, the Central People's Government of the People's Republic of China had little difficulty in passing the legislation to meet the regulatory demand from the Hong Kong Government, however unsatisfactorily.⁴¹⁶

Surprisingly, the judgement in *Democratic Republic of Congo v. FG Hemisphere Associates LLC*. turned Hong Kong's longstanding policy of allowing sovereigns to be sued under certain exceptions.⁴¹⁷ The case arose from an attempt by FG Hemisphere ("Hemisphere"), a US distressed debt fund, to enforce two ICC arbitration awards (made in Paris and Zurich) in Hong Kong against the Democratic Republic of Congo ("DRC") by attaching funds owed to the DRC by the Chinese State-owned China Railway Group. The issues before the Court were about: (1) whether the DRC enjoyed immunity from suit (i.e. sovereign immunity) in Hong Kong in respect of its commercial activities (i.e. whether the doctrine of *absolute* State immunity or *restrictive* State immunity was applicable in Hong Kong) and, in particular, whether Hong Kong could validly adhere to a doctrine of State immunity which was inconsistent with the doctrine adopted by the PRC; (2) whether the DRC

⁴¹⁵ *Ibid.* ZHU, L. (2007) State Immunity from Measures of Constraints for the Property of Foreign Central Banks: The Chinese Perspective. 6 *Chinese Journal of International Law* 67. pp.73-74.

⁴¹⁶ WU, C. *loc.cit.*

⁴¹⁷ *Democratic Republic of Congo v. FG Hemisphere Associates LLC*. (2009) 1 H.K.L.R.D. 410.

had waived its immunity; and (3) what steps, if any, the Court should take in light of certain provisions of the Hong Kong Basic Law which allocate responsibility for matters of foreign affairs to the Central People's Government of the People Republic of China and restrict the Court's jurisdiction in respect of such matters.

In 2010, the Court of Appeal held that, while China continues to follow the absolute approach to sovereign immunity, its failure to impose its immunity doctrine on Hong Kong through legislation justified a finding that the common law restrictive immunity doctrine, which had been developed prior to the 1997 transformation of Hong Kong from a British overseas territory to a special administrative region of the People's Republic of China, continued to apply in Hong Kong. The decision was appealed to the Hong Kong Court of Final Appeal.

On June 8, 2011, the Hong Kong Court of Final Appeal, in a 3-2 split, turned that ruling and held that foreign states enjoy absolute immunity from suit in Hong Kong and that no exception from immunity for commercial activity or arbitration matters exists.⁴¹⁸ The majority held that absent an explicit and unequivocal waiver of immunity - manifested by a voluntary submission to the jurisdiction of the forum state - a Hong Kong court cannot exercise jurisdiction over a foreign state. The issue was reached following the submission by the Hong Kong Secretary of Justice received from the Office of the Commissioner of the Ministry of Foreign Affairs, that characterized the position adopted by the Central People's Government to say that: "the consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'".⁴¹⁹

As a result of in *Democratic Republic of Congo v. FG Hemisphere Associates LLC.*, Hong Kong clearly departed from its previous position – grounded in English case law – that provided for a commercial exception to sovereign immunity both in jurisdiction and execution proceedings.⁴²⁰ In light of the Court's analysis, this

⁴¹⁸ The Hong Kong Court of Final Appeal recently held in *FG Hemisphere Associates* that: (1) absolute immunity is unequivocally part of the PRC's legal culture and (2) there is no room for deviation from the "one nation, one system" principle in this context. *Democratic Republic of Congo v. FG Hemisphere Associates LLC.* (2011) HKEC 747, par.183.

⁴¹⁹ *Ibid.* par.197.

⁴²⁰ In the *Democratic Republic of Congo v. FG Hemisphere Associates LLC.* case, specific factors caution against drawing any conclusion on Chinese intent to phase out restrictive immunity in Hong Kong. To begin with, the SIA was not unique in its position as an expired British statute. As mentioned above, the group

position may signal a temporary lapse in Hong Kong jurisprudence until the People Republic of China judicial discourse takes a different course. At this point, however, the holding of the Hong Kong Court of Final Appeal appears permanent and speaks loudly of the presence of absolute immunity in current legal discourse.⁴²¹

6. Singapore State Immunity Act

The Singaporean position concerning sovereign immunity is actually codified in the State Immunity Act.⁴²² Moreover, Singapore's position is also clear: adopting restrictive approach of immunity.

Under Singapore's State Immunity Act, a State is immune from the jurisdiction of the courts of Singapore except:

a. Submission to jurisdiction⁴²³

A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of Singapore. A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of Singapore is not to be regarded as a submission.

b. Commercial transactions and contracts to be performed in Singapore⁴²⁴

A State is not immune as respects proceedings relating to a commercial transaction entered into by the State; or an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in Singapore, but this subsection does not apply to a contract of employment between a State and an individual.

In this Act, "commercial transaction" means:

- 1) any contract for the supply of goods or services;

of British and Chinese officials in charge of "localization" allowed half of all the then-applicable British statutes to lapse. DING, Y. (2012) Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?. 26 *Emory International Law Review* 997. p.1003.

⁴²¹ ENGSTRÖM, D and MARIAN, C. (2012) Restrictive Absolutes: Using Party Autonomy to Reconcile Absolute Immunity with the Liberal Standard for Restrictive Immunity Adopted by the Swedish Supreme Court in the *Sedelmayer* Decision. 2 *Czech (& Central European) Yearbook of Arbitration* 61. p.64-65. China argued that it had maintained the absolute doctrine as a fundamental part of its sovereignty; that only a handful of developed countries had adopted the restrictive rule; and that the restrictive rule was not applicable to those developing countries that did not agree to it, such as China. *See Jackson v. People's Republic of China*, 794 F.2d 1490, 1494 (11th Cir. 1986).

⁴²² Singapore State Immunity Act, Chapter 313, Revised Edition 2014 [hereinafter 'Singapore SIA'].

⁴²³ *Ibid.* section 4.

⁴²⁴ *Ibid.* section 5.

- 2) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- 3) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

c. Contracts of employment⁴²⁵

A State is not immune as respects proceedings relating to a contract of employment between the State and an individual where the contract was made in Singapore or the work is to be wholly or partly performed in Singapore.

d. Personal injuries and damage to property⁴²⁶

A State is not immune as respects proceedings in respect of death or personal injury or damage to or loss of tangible property - both caused by an act or omission in Singapore.

e. Ownership, possession and use of property⁴²⁷

A State is not immune as respects proceedings relating to: any interest of the State in, or its possession or use of, immovable property in Singapore; or any obligation of the State arising out of its interest in, or its possession or use of, any such property. A State is not immune as respects proceedings relating to any interest of the State in movable or immovable property, being an interest arising by way of succession, gift or *bona vacantia*. The fact that a State has or claims an interest in any property shall not preclude any court from exercising in respect of it any jurisdiction relating to the estates of deceased persons or mentally disordered persons or to insolvency, the winding up of companies or the administration of trusts. A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property which is in the possession or control of a State; or in which a State claims an interest, if the State would not have been immune had the proceedings been brought against it or, in a case in which a State claims an

⁴²⁵ *Ibid.* section 6.

⁴²⁶ *Ibid.* section 7.

⁴²⁷ *Ibid.* section 8.

interest, if the claim is neither admitted nor supported by *prima facie* evidence.

f. Patents, trade marks, etc.⁴²⁸

A State is not immune as respects proceedings relating to: any patent, trade mark or design belonging to the State and registered or protected in Singapore or for which the State has applied in Singapore; an alleged infringement by the State in Singapore of any patent, trade mark, design or copyright; or the right to use a trade or business name in Singapore.

g. Membership of bodies corporate, etc.⁴²⁹

State is not immune as respects proceedings relating to its membership of a body corporate, an unincorporated body or a partnership which: has members other than States; and is incorporated or constituted under the law of Singapore or is controlled from or has its principal place of business in Singapore, being proceedings arising between the State and the body or its other members or, as the case may be, between the State and the other partners. This does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

h. Arbitrations⁴³⁰

Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration. This provision has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States.

i. Ships used for commercial purposes⁴³¹

This provision applies to: Admiralty proceedings; and proceedings on any claim which could be made the subject of Admiralty proceedings. A State is not immune as respects: an action in rem against a ship belonging to that State; or an action in personam for enforcing a claim in connection with such

⁴²⁸ *Ibid.* section 9.

⁴²⁹ *Ibid.* section 10.

⁴³⁰ *Ibid.* section 11.

⁴³¹ *Ibid.* section 12.

a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.

j. Custom duties⁴³²

A State is not immune as respects proceedings relating to its liability for: any customs duty or excise duty; any goods and services tax; or any tax in respect of premises occupied by it for commercial purposes.

⁴³² *Ibid.* section 13.

CHAPTER VI

LEGAL RESPOND TO IMMUNITY DEFENSE IN COMMERCIAL AND BUSINESS TRANSACTION

6.1. Immunity Blanket for ‘Non-State Actor’: Challenges in 21st Century

In simply investment conceptual approach, the more economic relations the more benefit for state would be gained. There is no doubt that each states could make economic cooperation between them to achieve their mutual interests. In fact, state-to-state relationship is no longer enough to boost their economic welfare. Thus, states are having more possibility to enhance their cooperation with emerging new global economic player or later in this study called as ‘non-state actor’.⁴³³

This study is curious about the existing term of ‘non-state actor’ to define non-state entities in international relations.⁴³⁴ Unfortunately, this term does not reflect the reality of today's era that state also involves in the creation of non-state actor. In example, states have a big chance to be the member of shareholders in Multinational Company, no matter how much money they allocated in.⁴³⁵ Investing state's budget into corporation's capital undeniable earns profitable dividend in return regularly. State's control of ownership in business entities proves that this particular form could not be classified as non-state actor. To maintain legal certainty, this study will describe categorization of ‘non-state actor’ based on current global situation.

This sub-chapter will recommence prior discussions among scholar about growing number of non-state actor and their behavior in current world's economy. From the existence of various non-state actors, this study then elaborates categorization of non-state actors. Categorization of ‘non-state actor’ under this part is important to determine whether they could be justified in using immunity doctrine to protect their activities. Prior finding shows

⁴³³ STILES, K. W. (2000) States, Non-State Actors, and Global Policy Formulation. In HIGGOTT, R. A., UNDERHILL, G. R. D., and BIELER, A. *Non-State Actors and Authority in the Global System* London and New York: Routledge. pp.32-40.

⁴³⁴ MANSBACH, R. W., FERGUSON, Y., and LAMPERT, D. (1976) *The Web of World Politics: Non State Actors in the Global System*. New Jersey: Prentice Hall. p.273.

⁴³⁵ There are three types of state ownership in corporation: fully owned, when the government owns all of the shares of the firm; majority owned, when the government own most of the shares of the firm; and minority owned, when the government owns less than the majority of the shares of the firm. CUERVO, A. et al. (2014) Governments as Owners: State-owned Multinational Companies. 45 *Journal of International Business Studies* 919. p.923.

that complexities of company's structure and state's domination in corporate's capital could be use to legitimate their non-compliance of business ethics and regulations ruled domestically and internationally.⁴³⁶ Moreover, group of non-state actors under those circumstances is ranked in powerful economic position. International law, so far, does not have binding rule to limit their business conduct that leads to legal certainty dilution. Their dominant power tends to encroachment to domestic sovereignty⁴³⁷ and prone to circumvent from legal responsibility.

This sub-chapter also analyzes the using of immunity as a defense of commercial activities done by hybrid non-state actor. State involvement in the internal system of non-state actor predisposes to their status as foreign sovereign. A range of legal instruments and state practices would be as ground basis to find the legal facts whether hybrid non-state actors use immunity disproportionately or not.

1. Emerging 'Non-State Actor' in Current's Global Economic Relations

State-to-state cooperation in international economic relation is classified as traditional way of relationship. Apparently, all Bilateral Investment Treaties (BIT's) and Preferential Trade Agreements (PTA's) concluded between states are still exist and contain economic reciprocal obligations. In other side, relationship could also be non-economic matters, in example: bilateral treaty between Netherland and Suriname encouraging cultural contacts between both nations in 1990⁴³⁸ and sometime more technical like Mutual Legal Assistance agreement between Canada and Mexico in 1977⁴³⁹.

Modern economic development in twenty first century is somehow a huge challenge for states to increase their economic stability. State-to-state cooperation is insufficient to gain multi sector advantages. A deviation of state centric paradigm appeared:⁴⁴⁰ the progressive activities of states in today's era have also given rise to

⁴³⁶ MILLER, A. S. (1971-1972) The Global Corporation and American Constitutionalism: Some Political Consequences of Economic Power. 6 *Journal of International Law and Economics* 235. pp.235-240.

⁴³⁷ Political choice to adapt with the globalization drives state to abdicate its sovereignty into liberalization system. See MILNER, H. V. and KEOHANE, R. O. (1996) Internationalization and Domestic Politics: An Introduction. In KEOHANE, R. O. and MILNER, H. V. (eds.) *Internationalization and Domestic Politics*. New York: Cambridge University Press. pp.23-24.

⁴³⁸ JANSSEN, R. (2011) *In Search of a Path: An Analysis of the Foreign Policy of Suriname from 1975 to 1991*. Leiden: Koninklijk Instituut voor Taal, Landen Volkenkunde Press. p.232.

⁴³⁹ BASSIOUNI, M. C. (2008) *International Criminal Law*. Leiden: Koninklijke Brill NV. p.538.

⁴⁴⁰ Scholars nowadays agree the existence of non-state actors. States are no more a single actor in international relations. Keohane and Nye argued that state-centric approach from realism lenses was inadequate because the state did not have full control over international economy and its role in the

the growing number of particular entities which are not state⁴⁴¹ and commonly known as ‘non-state actor’. Each non-state actors have looser organizational structure and flexible way of living. This condition makes them steadily grown into important player in international economic relations.

The rise of non-state actor under history begin in the post World War II where the United Nations established to promote international cooperation through maintaining international peace and security, promoting human rights, fostering social and economic development, protecting the environment, and providing humanitarian aid.⁴⁴² Intense contacts between state and non-state actor after World War II indicates Westphalian State Model⁴⁴³ has eroded. The supremacy concept of state as the main actor in international relations under Westphalian State Model has no longer idealist concept since emerging non-state actors in globalization challenge the sovereignty of states. Non-state actor now could intervene the state sovereignty through institutional order and policy. Moreover, advance technology and communication influences non-state actor to promote their core activities within the territory of state.

Since there has no definite parameter, international law scholars have diverse opinion in giving possible entities that classified as ‘non-state actor’. In the simple way, all subjects of international law minus states are under the category of ‘non-state actor’ such as: non-governmental organizations, multinational corporations, intergovernmental organizations, national liberation armies, and even individuals.⁴⁴⁴ In specific, the Cotonou Agreement concluded between the European Union and the African, Caribbean and Pacific Group States in 2000 is the only international treaty that elaborate the distinction between state and non state actor in their mutual economic cooperation:

“The actors of cooperation will include: (a) state (local, national, and regional), including ACP national parliaments; (b) ACP regional

international economic system. KEOHANE, Robert O. and NYE, Joseph S. (eds.) (1971) *Transnational Relations and World Politics*. Cambridge: Havard University Press. p.332. LYCK, M. (2009) *Peace Operations and International Criminal Justice*. New York: Routledge. pp.15-16.

⁴⁴¹ ICJ Reports. (1949) Advisory Opinion: Reparation for Injuries Suffered in the Service of the United Nations. p. 174.

⁴⁴² UN Charter 1945. art. 1.

⁴⁴³ Westphalian State Model means a state system where state recognize each other as sovereign states and adhere to the Treaty of Westphalia of 1648 by not interfering each other internal affairs. See NAGEL, S. (2000) *Handbook of Global International Policy*. New York: CRC Press. p.323.

⁴⁴⁴ See HOFMANN, R. And NILS, G. (1999) *Non-State Actors as New Subjects of International Law*. Berlin: Duncker & Humblot. BIANCHI, A. (ed.) (2009) *Non-State Actors and International Law*. Aldershot: Ashgate.

organizations and the African Union. For the purpose of this agreement the notion of regional organizations or levels shall also include sub-regional organizations or levels; and (c) non-state: private sector, economic and social partners, including trade union organizations, and civil society in all its forms according to national characteristics.”⁴⁴⁵

Non-state actors are in fact subject of international law⁴⁴⁶ and they possess certain rights and obligations. Their role and status in international legal order is perspective-specific.⁴⁴⁷ Development of international legal system seems to assist non-state actor and its new emerging variant with rights and obligations though current international instruments are still insufficient regulating their status, legitimate personality, role, and behavior. In particular, their personality is always contested in international law. State practices are frequently giving opportunity and range of legal solution to address their unclear personality. These practices would tend to create multiplicity models of personality because each non-state actors are non-identical in their nature.⁴⁴⁸

Taking into consideration that non-state actor has different legal nature in practice, this study categorized two types of non-state actor in international economic relations, such as: ‘hybrid non-state actor’ and pure-privately owned ‘non-state actor’. The key difference of these both types is in the direct ownership, control, or responsibility of state within its structural system. In the hybrid type, state has dominant control over institutional policy because they are a part of the membership or ownership holder of the entity. The control of the state is the direct linkage to their responsibility of any activities done by the non-state actor.

Non-state actor like non-governmental organization (NGO) is essentially voluntary self governing body and free from governmental influence.⁴⁴⁹ They are

⁴⁴⁵ Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States of the Other Part, Revised Version, Ougadougou, 22 June 2010. p.6.

⁴⁴⁶ SCHWARZENBERGER, G. (1957) *International Law*. London: Stevens & Sons, Ltd. pp.89-90. See BROWNLEE, I. *op.cit.* Chapter II.

⁴⁴⁷ NOORTMAN, M. and RYNGAERT, C. (2010) *Non-State Actor Dynamics in International Law: from Law-Takers to Law-Makers*. London: Ashgate. D’ASPREMONT, J. (2015) Non-State Actors and the Social Practice of International Law. In NOORTMAN, M., REINISCH, A., and RYNGAERT, C. (eds). *Non State Actors in International Law*. Oregon: Hart Publishing. pp.11-12.

⁴⁴⁸ ICJ Reports (1949) *Reparation for Injuries Case*. p.178.

⁴⁴⁹ Council of Europe. (2002) *Fundamental Principles on the Status of Non-governmental organizations in Europe and explanatory memorandum*. [Online] Available from: <http://www.coe.int/t/dghl/standardsetting/cdcj/ONG/Fundamental%20Principles%20E.pdf> [Accessed: February 15th, 2016].

not part of political parties.⁴⁵⁰ They are subject to the national law where they reside.⁴⁵¹ Unfortunately, Myanmar, Zimbabwe, China, North-Korea, and Russia impose strict restrictions to the operation of NGO. NGO works independently in various area appertaining in environmental (Greenpeace, World Wide Fund for Nature, and International Union for Conservation of Nature), humanitarian aid and assistance (International Red Cross and Red Crescent/ICRC), human rights (Amnesti International), education (European Association of History Educators), health (Doctors Without Borders), and other certain areas. Current development of international law affords them with the right to bring cases in certain adjudicative forum.⁴⁵²

In some extent, NGO could provide voluntary assistance through contractual agreement with state or other non-state actor. This contractual agreement has no profit gain but in fact threatening their independency. In water service contract practices, NGO is under pressure with the contractual requirements. The pressure is on NGOs to become increasingly commercial in order to implement their contracts efficiently.⁴⁵³ The position of NGO in doing such commercial activities would questioning their position as voluntary organization. The output of contracting out to deliver certain services to NGOs would make them prefer to reach quantitative requirements under the contract than the qualitative objectives of their organization to increase community development. Thus, in this situation, this study puts NGO not as the hybrid non-state actor.

The hybrid type of non-state actor is somehow to cover any entity that is not easily characterized but state participation still found in their internal system. Recent research about the rise of non-state actors in global governance by Thomas G. Weiss, D. Conor Seyle, and Kelsey Coolodge gives an example of United Nations that could not easily classified as non-state actor.⁴⁵⁴ They argue:

“Yet the UN itself is not easily characterized. Depending on the issue and angle, the UN is both state and non state actor. In fact, calling the

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.* p.18.

⁴⁵² European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). art.25(1).

⁴⁵³ In water service contracts practice, NGO is under pressure with the contractual requirements. The pressure is on NGOs to become increasingly commercial in order to implement their contracts efficiently. CLAYTON, A. (1999) *Contracts or Partnerships: Working through Local NGOs in Ghana and Nepal*. London: Water Aid. p.20.

⁴⁵⁴ WEISS, T. G., SEYLE, D. C., and COOLODGE, K. (2013) *The Rise of Non-State Actors in Global Governance: Opportunities and Limitations*. One Earth Future Foundation. p.5.

UN an “intergovernmental organization” is somewhat misleading. ... Although states pay the bills and make decisions within the intergovernmental arena, UN actions must be implemented by staff members and increasingly must embrace non-state actors as well for appropriate actions and normative development. In some ways, then, the UN is hard to qualify as an exclusively state-based actor.”⁴⁵⁵

Both the type of non state actor have possible opportunity to enter economic cooperation. For example: bilateral agreement between the United States with European Union under Transatlantic Trade and Investment Partnership (TTIP). This agreement will help ‘made in America’ products and services accessibility into European market and at the same level European products and services will enter the United States market access without barriers.⁴⁵⁶ Studies undertaken by the European Commission suggest overall economic gains accruing from TTIP would equate to a one off increase in European GDP in the range of 0.3%, with a similar level of gain for the United States’ economy.⁴⁵⁷

2. The Use of Immunity by Hybrid Non-State Actor

It is obvious in global practice that hybrid non-state actors like international organization and Multinational Corporation (MNC) are frequently conducting economic cooperation. Nonetheless, Government-organized NGOs (GONGO) is possible to be classified as hybrid non-state actor that doing commercial function but we still insist that their role as voluntary and independent entity would make their reputation at a risk. Moreover, their economic activities are in contravention with their origin character and such GONGO only established under non-democratic states⁴⁵⁸.

Multinational Company (MNC) as one of the emerging non-state actor is now becoming significant world economic player and their operation easily cut across the border of state influenced by revolution of technology in communication

⁴⁵⁵ *Ibid.*

⁴⁵⁶ European Commission. (2015) *Report of the Tenth Round of Negotiations for the Transatlantic Trade and Investment Partnership*. Brussels. [Online] Available from: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153667.pdf [Accessed: February 26th, 2016].

⁴⁵⁷ KHAN, U. (2015) *The Transatlantic Trade and Investment Partnership: International Trade Law, Health Systems and Public Health*. [Online] Available from: http://www.eph.org/IMG/pdf/LSE_study-TTIP_International_Trade_Law_Health_Systems_and_Public_Health_website.pdf [Accessed: March 1st, 2016].

⁴⁵⁸ BRATTON, M. (1989) The Politics of NGO-Government Relations in Africa. 17 (4) *World Development* 569. pp.569-585.

and transportation. With a very flexible cross border operation, MNC has strong economic power and their (some of them) budget larger than state's GDP. As example, in January 2000, America online, a MNC based in New York City that has business focus on electronic mass media, raised 160 billion US\$ (four times of Nigerian's GDP) to take over Time Warner.⁴⁵⁹ Anderson and Cavanagh (2002) on their research in 2000 released a conclusion that of the world's 100 largest economic entities, 51 are now corporations, and 49 are countries.⁴⁶⁰

Another non-state actor which also having possibility to do economic partnership is international organization. International organization is "an association of states established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfill particular functions within the organization".⁴⁶¹ This definition contains basic elements of international organization: states membership, treaty (charter), special organs, and certain goals.⁴⁶² Association of South East Asian Nations (ASEAN) and European Union are two examples of regional organization that become destination of various economic cooperation, such as: ASEAN-China Free Trade Agreement in 2000⁴⁶³, ASEAN-the United States Trade and Investment Arrangement signed in 2006⁴⁶⁴, and EU-Canada Comprehensive Economic and Trade Agreement in 2014⁴⁶⁵.

Noting to the undeniable fact that powerful non-state actors have the ability to influence both national and international's policy. The presence of those powerful non-state actors is basically empowered by political, economical, and legal cultural dimension of international relations system. Under political dimension, the creation

⁴⁵⁹ LEYS, C. (2001) *Market-driven Politics: Neoliberal Democracy and The Public Interest*. New York: Verso. p.17.

⁴⁶⁰ ANDERSON, S., and CAVANAGH, J. (2002) *Of the World's 100 Largest Economic Entities, 51 are now Corporations and 49 are Countries*. Institute for Policy Studies. [Online] Available from: <http://www.corporations.org/system/top100.html> [Accessed: March 5th, 2016].

⁴⁶¹ FISCHER, P. (2012) *International Organizations*. Bratislava. [Online] Available from: <http://paneuro.uni.com/files/sk/fp/ulohy-studentov/2rocnikbc/io-skript.1.10.2012.new-version.pdf>. 18-23. [Accessed: March 7th, 2016].

⁴⁶² MALANCZUK, P. (1997) *Akehurst's Modern Introduction to International Law*. New York: Routledge. pp.92-96.

⁴⁶³ Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China (2004) [Online] Available from: <http://www.aseansec.org/16646.htm> [Accessed: March 8th, 2016].

⁴⁶⁴ Trade and Investment Framework Arrangement between the United States of America and the Association of Southeast Asian Nations (2006) [Online] Available from: https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf [Accessed: March 8th, 2016].

⁴⁶⁵ Consolidated CETA Text (2014) [Online] Available from: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [Accessed: March 9th, 2016].

and activities of non-state actors frequently contain certain agenda and political interest to control world's economy. With huge economic power, their behavior tends to be violent to achieve their ultimate goal. Moreover, the less binding legal instruments affect their flexibility performance never certain to reach minimum standard of reasonable behavior. This three dimensional condition bolster non-state actor to misuse the immunity concept.

State involvement in hybrid non-state actor's internal system creates problematic issues especially about the using of immunity. Under international law, states enjoy immunity as sovereign entity.⁴⁶⁶ Immunity is granted to state officials and sovereign entities in order to respect and maintain mutual recognition between states. In line with the maxim, *par in parem non habet imperium* (an equal has no power of an equal), a sovereign state is not subject to the jurisdiction of another state.⁴⁶⁷ Immunity has positive side: all state officials and entities could do their function effectively without any interference. However, in practice immunity is frequently used by sovereign entities as a shield to avoid them from the enforcement to the general rule of territorial jurisdiction.

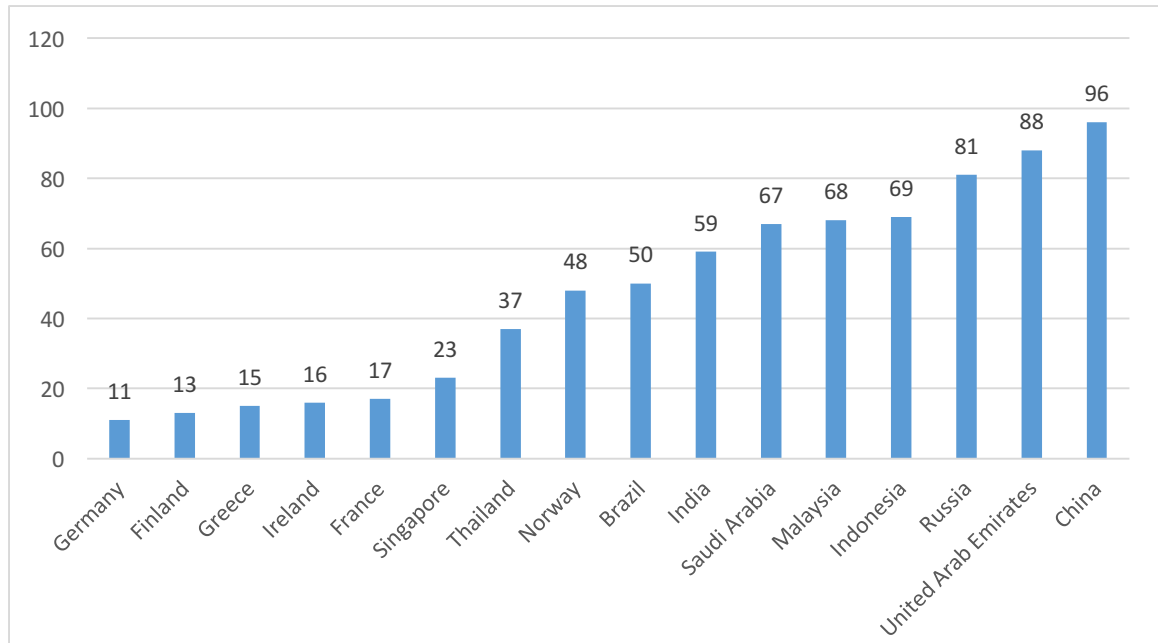
World globalization forces state to involve in business structure. States now could be the owner of multinational corporation and do business to gain economic gain for adding state's income. Such corporations that state has structural position within are usually called as 'State Owned Company' or 'State Owned Investor'. We have a lot of example in practice that this state owned corporations are working on significant business market and become huge source of state's financial budget. Moreover, nowadays there are large number of State Owned Multinational Corporations in which sovereign state holds majority ownership. In example, French Électricité de France S.A., an electric utility company which has operational companies in Europe, Asia, America, and Middle East, is 85% owned by the French government.⁴⁶⁸ CITIC Group Corporation that has 44 subsidiaries company in China, Hong Kong, the United States, Canada, Australia, and New Zealand is 100%

⁴⁶⁶ MURPHY, S. D. (2012) *Principles of International Law*. Thomson/West. p.302.

⁴⁶⁷ SINCLAIR, I. M. (1980) The Law of Sovereign Immunity: Recent Developments. 167 *Recueil Des Cours* 113. p.198.

⁴⁶⁸ National Audit Office of Great Britain. (2010) *The Sale of the Government's Interest in British Energy*. The Stationery Office. p.22.

owned by People's Republic of China.⁴⁶⁹ Kowalski, *et. al.* (2013) found that 21 out of 38 countries have a Country State Owned Company's Share (CSS) higher than zero.⁴⁷⁰ See the ten countries with CSS higher than 10 percent under Graphic 1 below:



Graphic 1. Average State Owned Company shares among countries' top ten firms (%)⁴⁷¹

State Owned Multinational Corporations have different character with the private one because of the state ownership in the entity. Theoretically, as a sovereign entity, state enjoys immunity and this study found that mostly such corporations use the immunity to protect their business interest and to avoid civil liability. It is true that in certain states like the United States and the United Kingdom restrict the applicability immunity for commercial purpose.⁴⁷² Through the Foreign Sovereign Act (FSIA) enacted in 1976, the United State courts possible to apply restrictive

⁴⁶⁹ CITIC (2014) *History*. [Online] Available from: <http://www.citic.com/AboutUs/History> [Accessed: March 15th, 2016]. See HAMILTON, S. and ZHANG, J. (2011) *Doing Business with China: Avoiding the Pitfalls*. Palgrave Macmillan. pp.144-145.

⁴⁷⁰ KOWALSKI, P., et al. (2013) *State Owned-Enterprises: Trade Effects and Policy Implications*. OECD Trade Policy Paper No. 147. OECD Publishing. pp.22-23.

⁴⁷¹ *Ibid.*

⁴⁷² The exception of immunity in cases where the action is based on a commercial activity carried on in the United States by the foreign state, or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. See US FSIA, 28 U.S.C. section 1330.

immunity for private suits against foreign state.⁴⁷³ Restrictive immunity even has been accepted as legal doctrine in the United States prior the enactment of FSIA. The United States courts evidently apply restrictive immunity in conscientious and prudent. In *Jet Line Services v. M/V Marsa El Hariga* describe that immunity defense by foreign corporation wholly owned by a foreign government remains an affirmative defense, whose burden to plead and prove rests upon the foreign state.⁴⁷⁴ This Libyan companies were found to be a foreign state and held immune based on variety convincing evidences about their sovereign status including an affidavit by the Libyan attaché, State Department verification of the attaché's diplomatic status, Lloyd's Register of Ships and another similar federal cases.⁴⁷⁵

In other cases, the United States courts deprive immunity privilege for state owned enterprises due to the applicability of commercial activities exception. Under FSIA, three conditions must be satisfied for United States courts exercise jurisdiction over foreign state: foreign sovereign's commercial activity must be carried on within the United States⁴⁷⁶, such commercial act has substantial contact with the United States⁴⁷⁷, and it has produced a direct or an indirect effect in the United States⁴⁷⁸. In *Nazarian v. Compagnie Nationale Air France*, the plaintiffs, the two Iranian passengers residing in the United States, claimed of negligence in creating severe situation arose from mistreatment of the defendant's employee during disrupted flight back to New York.⁴⁷⁹ In other side, the defendant (Air France) claimed immunity because of their status as 'foreign state' under FSIA in which the majority of shares owned by the Republic of France. The Court held that a claim of negligence would require proof of a foreseeable duty of care which exists as the result of commercial activity in the United States.⁴⁸⁰ By selling its tickets to the two Nazarians in New York, Air France created a duty of reasonable care in providing safe passage.

⁴⁷³ *Ibid.* section 1605 (a) (2).

⁴⁷⁴ *Ibid.* section 1603 (a) and (b).

⁴⁷⁵ *Jet Line Services v. M/V Marsa El Hariga*. 462 F. Supp. 1165 (D. Md. 1978). p.1171.

⁴⁷⁶ US FSIA. section 1603 (e).

⁴⁷⁷ *Ibid.*

⁴⁷⁸ *Ibid.* section 1605 (a) (2). See CARL, B. M. (1979) Foreign Sovereigns in American Courts: the United States Foreign Sovereign Immunities Act in Practice. 33 *Southwestern Law Journal* 1009. p.1009.

⁴⁷⁹ *Nazarian v. Compagnie Nationale Air France*. 989 F. Supp. 504 (S.D.N.Y. 1998). pp.508-509.

⁴⁸⁰ In *Santos v. Compagnie Nationale Air France*, the Court held that the defendant owed the plaintiff duty of care. To determine whether the Court has jurisdiction, such duty must arose from commercial activity in the United States. See *Santos v. Compagnie Nationale Air France*. 934 F. 2d. 890 (7th Cir. 1991). p.893.

Air France therefore has no immunity for these negligence claims and the Court has subject-matter to hear the case.⁴⁸¹

Currently, the number of states other than the United States and the United Kingdom have been implementing restrictive immunity for commercial activities by foreign state, its agent, and its instrumentalities⁴⁸² through their national laws such as: Canadian Sovereign Immunity Act 1982, Australian Foreign States Immunity Act 1985, and Singapore State Immunity Act 2014. In 2015, Russia adopted the Law on Jurisdictional Immunities of Foreign States. Nevertheless, using this law, the Russian courts would be based their decision to the principle of reciprocity that questionable in practice.⁴⁸³ Furthermore, most countries in the world (Third World countries in particular) are uncertain to apply restrictive immunity and some of them still accord absolute immunity for commercial activities of foreign sovereign.⁴⁸⁴

With no adoption of immunity exception in commercial activities of foreign sovereignty in domestic laws, business entities would prefer to take attempts to avoid their private liability using immunity blanket. To prevent chaotic legal condition, the role of the court is important to apply restrictive immunity as universally accepted doctrine. Though absolute approach on immunity still exists⁴⁸⁵, the Nigerian Court progressively shows their opposed to the blanket immunity for dispute arose from commercial transaction.⁴⁸⁶

Unsurprisingly, China found inconsistent to apply restrictive immunity. In the case *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, the Hong Kong Secretary of Justice gave the explanation of the questioned immunity

⁴⁸¹ See LARSEN, P. B., SWEENEY, J., and GILLICK, J. (2012) *Aviation Law: Cases, Laws, and Related Sources*. Leiden-Boston: Martinus Nijhoff. pp.1162-1164.

⁴⁸² See US FSIA. section 1603 (a) and (b).

⁴⁸³ Reciprocity defined as this analogy: "If Russian property has limited or no immunity in a particular country, Russia shall be empowered to establish similar restrictions on that country's property located in the Russian territory." This law has uncertain applicability since there is no limitation on how far to limit the 'reciprocity'. ROUDIK, P. (2015) *Russian Federation: New Law Allows Seizure of Foreign Governments' Property*. [Online] Available from: <http://www.loc.gov/law/foreign-news/article/russian-federation-new-law-allows-seizure-of-foreign-governments-property/> [Accessed: April 1st, 2016].

⁴⁸⁴ *Ali Akbar v. United Arab Republic*. HIR SC 230 (1996). See BANKAS, E. K. (2005) *The State Immunity Controversy in International Law*. Germany: Springer. p.119.

⁴⁸⁵ Nigerian domestic courts frequently prefer to adopt absolute immunity approach as generalized under Nigerian Diplomatic Act, 1962. *African Reinsurance Corporation v. Abate Fantaye*. 3 NWLR (1986). 811.

⁴⁸⁶ *African Reinsurance Corporation v. AIM Consultants Ltd*. 11 NWLR (2004). 223. *African Reinsurance Corporation v. J.D.P. Construction Nigeria Ltd*. 1 FWLR (2008). 203-204. See KOLAWOLEOKE, E. and PHILIP, F. A. (2010) Jurisdictional Immunity of International Institutions in Nigeria: An Appraisal. 6 (1) *Nigerian Bar Journal* 68. pp.74-76.

that China's position to state and its property in foreign court have absolute immunity and will never applied the restrictive immunity theory.⁴⁸⁷

Dealing cooperation with international organization also raises debate on immunity challenges. Sources of law for their immunity are vary. It could be provided by their constitutive treaties or national legislations. United Nations have privileges and immunities based on General Convention on the Privileges and Immunities of the United Nations of 1946 which sets out the immunities of the United Nations and its personnel and emphasizes the inviolability of its premises, archives and documents.⁴⁸⁸ National legislations that regulate privileges and immunities of international organization, such as: The United States International Organizations Immunities Act 1945 and UK International Organization's Act 1968.

Functional necessity approach of immunity for international organizations and its agency emanates as the result of development for effective and justice application.⁴⁸⁹ This approach includes the exemption of immunity protection for commercial activities done by international organization. Application of functional necessity approach provides certainty and effective affirmation for civil liability. In *E GmbH v. European Patent Organization*, the Austrian appellate court allowed a lawsuit brought by an international organization's landlord for rent obligation because it qualified as an act outside of organizational main function.⁴⁹⁰

It must be noted that there has no consistent practice in confronting immunity blanket for international organizations.⁴⁹¹ The minimum principles appears to be that officials of international organizations are immune from legal process in respect of all acts performed in their official capacity.⁴⁹² Perhaps general acceptance of customary rule on immunity for international organization only valid for the United Nations because of the constant treaty practice of granting immunity for this

⁴⁸⁷ *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, High Court of the Hong Kong, 2008. [Online] Available from: [http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=\(firm\)&TP=JU](http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_body.jsp?ID=&DIS=63653&QS=(firm)&TP=JU) [Accessed: April 5th, 2016].

⁴⁸⁸ SHAW, M. N. *op.cit.* p.776.

⁴⁸⁹ WHITE, N. D. and MACLEOD, S. (2008) EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility. 19 *European Journal of International Law* 965. p. 972.

⁴⁹⁰ REINISCH, A. (2000) *International Organizations Before National Courts*. Cambridge: Cambridge University Press. p.213.

⁴⁹¹ RYNGAERT, C. (2010) The Immunity of International Organizations before Domestic Courts: Recent Trends. 7 *International Organizations Law Review* 121. pp.124-130.

⁴⁹² BROWNIE, I. *op.cit.* p.680.

organization.⁴⁹³ The approach taken by Ugandan and Tanzanian's court could be the worst practice that the immunity in proceedings of international organization should be judged on the basis of an interpretation of treaty provisions and not on the customary law doctrine of sovereign immunity.⁴⁹⁴ By this position, international organization possibly enjoys absolute immunity from jurisdiction even though recent trend on customary international law is applying restrictive immunity.⁴⁹⁵

Certain cases show that international organization and its agency still enjoy the absolute immunity even for their commercial activities. In the United States, the enactment of International Organizations Immunities Act (IOIA) grants certain international organization absolute immunity through the plain rule: "the same immunity from suit and every form of judicial process as is enjoyed by foreign governments."⁴⁹⁶ Although restrictive immunity was codified in the United States Foreign Sovereign Act, some courts like the D.C. Circuits have continued to grant absolute immunity under IOIA.⁴⁹⁷ In *Broadbent v. Organization American States*, the D.C. Circuit affirmed that the Organization enjoys absolute immunity from breach of contract and employment claim for damages.⁴⁹⁸ This ruling also upheld in the later cases such in *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.* by affording absolute immunity to the defendant as the World Bank's entity and the Court ruled that IOIA immunity was absolute and was not subject to FSIA exceptions.⁴⁹⁹ The same case also happened in Kenya between *Gerard Killeen v. International Centre of Insect Physiology & Ecology*, a dispute that arose from employment contract between plaintiff and defendant as international organization.⁵⁰⁰ In this case, the Kenyan Court granted the defendant absolute immunity from legal process under the Privileges and Immunity Act.

⁴⁹³ Restatement (Third) Foreign Relations Law of the United States (1987). p. 493. See ENGDAHL, O. (2007) *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International Law*. Leiden: Martinus Nijhoff. p.148.

⁴⁹⁴ *Nelson Dhibikirwa v. Agro Management (U) Ltd.* High Court Uganda, Application No. 651 (2010).

⁴⁹⁵ OPPONG, R. F. (2013) *Private International Law in Commonwealth Africa*. Cambridge: Cambridge University Press. p.124.

⁴⁹⁶ YOUNG, A. I. (2012) Deconstructing International Organization Immunity. 44 *Georgetown Journal of International Law* 311. p. 314. See Foreign Relations and Intercourse, 22 U.S.C. art. 288 a (b).

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Broadbent v. OAS*. 628 F2d. 27 (DC Cir. 1980). pp.30-35.

⁴⁹⁹ *Inversora Murten, S.A. v. Energoprojekt-Niskogradnja Co.* 264 F. App'x 13 (D.C.Cir. 2008). pp.14-15.

⁵⁰⁰ VOLKEN, P. and BONOMI, A. (2008) *Yearbook of Private International Law Volume IX - 2007*. European Law Publishers. p.235.

The absolute immunity application for commercial activities of international organization would lead legal uncertainty. More specifically giving absolute immunity blanket in the adjudication of employment-related claims against the organization is unfavorable to protect the employee's right. It means that bringing the organization to be accountable for their activities still far from our expectation. At least, European Court of Human Right provided brighter argument in facing conflict between immunities and the right to access the court.⁵⁰¹ However based on recent cases, the Court merely required the plaintiff to seek any available dispute mechanism within the organization rather than to adopt functional necessity approach for immunity of international organization.

6.2. The Role of Choice of Law

To find better solution for the uncertainty implementation of restrictive immunity, this sub chapter presents legal analyses that divided into two parts. First, the study analyses the role of choice of law to exclude certain laws with unjust approaches. In providing deep analyses, this study takes philosophical and normative perspective to determine the benefits of choice of law provision. The two perspectives provide bigger image on the obedience of all judicial institutions to use the chosen law to resolve any dispute between the parties.

Second, in dealing with the immunity problems, this study attempts to provide predictable choice of law that provides effective measures to restrict immunity in commercial relationships. This study suggests the English and New York law as the most sophisticated and effective governing law particularly to avoid the misuse of immunity by state parties. Additionally, this study recommends certain measures how to choose any possible governing laws (other than the law of English and New York) that provide predictable outcome to restrict the immunity.

1. Effective Enforcement of Contractual Choice of Law

Choice of law refers to the specific provision in the contract which the parties mutually agreed upon the selection of law that has jurisdiction to resolve any dispute arising under the contract. Both the term 'choice of law' and 'governing law' have the same meaning under Private International Law to describe a particular clause in

⁵⁰¹ SINGER, M. (1995) Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns. 36 *Virginia Journal of International Law* 53. pp.58-60.

a contract which law applicable to the contract. In simple example: A, a limited liability company established under the law of Hungary, enters into investment agreement with the Government of China. They prefer to choose the English law to govern their contract than Hungarian Law or Chinese Law because of contractual performance reason (in London).

Choice of law clause provides benefits such as: eliminating multiple potentially inconsistent legal mandatory rules that might be applied to the contract⁵⁰² and enabling parties to use the applicable law to define their rights and duties in a contract. In the absence of choice of law clause, the determination of appropriate applicable law becomes complicated.⁵⁰³ Preselecting of applicable law essentially deflates uncertainty and unpredictability which drive various disadvantages unfavorable to business relationship.⁵⁰⁴ It also enables the parties to escape from unsatisfactory⁵⁰⁵ and inefficient⁵⁰⁶ legal system. In broader scope, frequent enforcing choice of law is encouraging states to reform their law to be more efficient and friendly with fair and just business environment.⁵⁰⁷ It also encourages courts to prevent ‘forum shopping’. With this range of benefits, choice of law clause is frequently attached in most contract.

The obedience of choice of law clause could be view in two different perspectives: normative and philosophy. In normative side, most judicial institutions

⁵⁰² RIBSTEIN, L. E. and O’HARA, E. A. (2008) Corporations and the Market for Law. 2 *University of Illinois Law Review* 661. p.668.

⁵⁰³ WANG, F. F. (2010) *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US, and China*. Cambridge: Cambridge University Press. p.93.

⁵⁰⁴ PFEIFFER, M. (2012) Choice of Law in International Family and Succession Law. 4 *The Lawyer Quarterly* 291. p.292.

⁵⁰⁵ In the history, the recognition of *lex mercatoria* started in the Middle Ages was actually because of the dissatisfaction of traders with the existing civil law at that time. Goldman defines *Lex mercatoria* as a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade without reference to a particular national system or laws. See DE LY, Filip. (1992) *International Business Law and Lex Mercatoria*. Amsterdam: T. M. C. Asser Instituut. pp.210-215. GOLDMAN, B. (1987) The Applicable Law: General Principles of Law – the Lex Mercatoria. In LEW, J. D. M. (ed.) *Contemporary Problems in International Arbitration*. London: Springer. p.116. CREMADES, B. and PLEHN, S. (1984) The New Lex Mercatoria and the Harmonization of the Laws of the International Commercial Transactions. 2 *Boston University International Law Journal* 317. p.324. HORN, N. (2001) The Use of Transnational Law in the Contract Law of International Trade and Finance. In BERGER, K. (ed.) *The Practice of Transnational Law*. The Hague/London/Boston: Kluwer Law. p.67. MICHAELS, R. (2007) The True Lex Mercatoria: Law Beyond the State. 14 *Indiana Journal of Global Legal Studies* 447. p.447. JEMIELNAK, J. (2005) Legitimation Arguments in the Lex Mercatoria Cases. 18 *International Journal for the Semiotics of Law* 175. p.175.

⁵⁰⁶ KOBAYASHI, B. H. and RIBSTEIN, L. E. (1999) Contract and Jurisdictional Competition. In BUCKLEY, F.H. (ed.) *Fall and Rise Freedom of Contract*. North Carolina: Duke University Press. pp.325-327.

⁵⁰⁷ *Ibid*. See O’HARA, E. A. and RIBSTEIN, L. E. (2000) From Politics to Efficiency of Choice of Law. 67 *The University of Chicago Law Review* 1151. p.1154.

and parties as well honor the contractual choice of law. In the past, traditional scholars argue that the parties' agreement on foreign law as their governing law insulted the sovereignty of a state.⁵⁰⁸ It undermined the existence of state's legislature as created by people's consensus. This traditional point of view, although theoretically good, has nevertheless eroded because of globalization's influence.⁵⁰⁹ Sovereignty in the modern society has a limit. Free and open market have led the states to lost their control over the people and activity on their territory⁵¹⁰ because national boundaries become less important⁵¹¹.

In the United States, although most judicial institutions respect the binding choice of law, there are two reasonable measures to disregard contractual choice of law. The Restatement (Second) of Conflict of Laws provides that:⁵¹²

- (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
- (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either:
 - (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
 - (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

The rationale of the two limitations above is to ensure that parties autonomy to choose their governing law would not in violation with fundamental rules of the

⁵⁰⁸ BEALE, J. H. (1935) *A Treatise on the Conflict of Laws*. New York: Baker, Voorhirs & Co. p.1079. See MOVSESIAN, M. L. (2002) Two Cheers for Freedom of Contract. 23 *Cardozo Law Review* 1529. pp.1542-1543.

⁵⁰⁹ SASSEN, S. (1996) *Losing Control: Sovereignty in an Age of Globalization*. New York: Columbia University Press. p.51. See HIGGINS, R. (1999) International Law in a Changing International System. 58 *Cambridge Law Journal* 78. p.82.

⁵¹⁰ CHAYES, A. and CHAYES, A. H. (1998) *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, MA: Harvard University Press.

⁵¹¹ STRANGE, S. (2003) The Declining Authority of States. In HELD, D. and MCGREW, A. (eds.) *The Global Transformation Reader: An Introduction to the Globalization Debate*. Cambridge: Polity Press. pp.127-133.

⁵¹² The Restatement (Second) of Conflict of Laws (1977). Section 187.

state. The ‘substantial relationship’ test seems to intensify the parties’ conformity with the mandatory rules.⁵¹³ In practice, the United States Courts have quite generally enforced contractual choice of law⁵¹⁴ as close to the United Kingdom practice particularly in the leading case⁵¹⁵ *Vita Food Products Inc. v. Unus Shipping Co. Court*, in which the Court enforced the contractual choice of English law though there was no substantial connection with the contract for shipment of goods from New Foundland to New York.⁵¹⁶

Most importantly, express choice of law is subject to the requirement of public policy. All judicial institutions have the same ground that they will refuse to enforce the law which outrages with their own fundamental policy. The only problem is what constitute public policy might be various concept and interpretation in every legal system. The comments to Restatement describes that laws which makes certain kinds of contract illegal, or which are designed to protect parties from the ‘oppressive use of superior bargaining power’ are inappropriate to fundamental policy.⁵¹⁷

There has been progressive development in interpreting ‘fundamental policy’ by the Courts into narrow approach with just results. Franchise Agreement, for instance, basically involves unequal bargaining power between franchisor and franchisee.⁵¹⁸ The franchisor has superior power by offering one-sided and unnegotiable (‘take it or leave it’) franchise agreement to the franchisee. However, most states apply certain legislations to protect franchisees from perceived franchiser abuse.⁵¹⁹ In *Wright-Moore Corp. v. Ricoh Corp.*, the Court applied Indiana Franchise Law instead of the chosen New York Law because the franchisor found with its superior bargaining power force the franchisee to waive the legislatively provided protections through choice of law.⁵²⁰

⁵¹³ See O’HARA, E. A. and RIBSTEIN, L. E. (2000) Conflict of Laws and Choice of Law. In BOUCKAERT, B. and DE GEEST, G. (eds.) *Encyclopedia of Law and Economics, Volume V: The Economics of Crime and Litigation*. Cheltenham: Edward Elgar. p.568.

⁵¹⁴ RIBSTEIN, L. E. (1993) Choosing Law by Contract. 18 *Journal of Corporation Law* 245. p.245.

⁵¹⁵ MIN, Y. T. (2008) The Effective Reach of Choice of Law Agreements. 20 *Singapore Academy of Law Journal* 723. p.725.

⁵¹⁶ *Vita Food Products Inc. v. Unus Shipping Co. Court*. (1939) A.C. 277.

⁵¹⁷ The Restatement (Second) of Conflict of Laws (1977). section 187. comment g.

⁵¹⁸ KILLION, W. L. (2008) The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship. 28 (1) *Franchise Law Journal* 23.

⁵¹⁹ CARPINELLO, G. F. (1990) Testing the Limits of Choice of Law Clauses: Franchise Contracts as a Case Study. 74 *Marquette Law Review* 57. p.71.

⁵²⁰ *Wright-Moore Corp. v. Ricoh Corp.* 908 F. 2d 128 (7th Cir.1990).

The European practice on the enforcement of contractual choice of law uses the same approach in *Vita* case⁵²¹ and requires an express choice to be enforced even if the chosen law has no connection with the contract.⁵²² The rationale basis for the freedom to choose an unconnected law is commercial convenience⁵²³ and well preserved application of economic doctrine *laissez faire*⁵²⁴. Only in the absence of contractual choice of law, the contract would be governed by the law with the closest relationship with the parties and their performance⁵²⁵ or otherwise determined by article 4 (1) Rome I Regulation⁵²⁶.

Most scholars agree that the obedience of judicial institutions to enforce choice of law in common law system is a form of accolade to the doctrine of ‘party autonomy’. This doctrine has been recognized as a doctrine since in the 16th century⁵²⁷ and it covers the philosophical basis that ‘the parties have liberty to choose the applicable substantive law and these law will govern the contractual relationship between the parties’.

⁵²¹ See *Akai v. People's Insurance*. (1998) 1 Lloyd's Rep 90. See HOLTZMAN (1975) Arbitration in East-West Trade. 9 *International Law Journal* 77. p. 77.

⁵²² Article 3 (1) of Rome I Regulation 2008 stated that “A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.”

⁵²³ STONE, P. (2010) *EU Private International Law*. Chetelham: Elgar European Law. p.301. See HEUZÉ, V. and MAYER, P. (2007) *Droit International Privé*. Paris: Montchrestien. pp.700-705.

⁵²⁴ See CUTLER, A. C. (2003) *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*. Cambridge: Cambridge University Press. p.54. SYMEONIDES, S. C. (2008) *American Private International Law*. The Netherlands: Kluwer Law International. pp.47-50. HALE, R. L. (1923) Coercion and Distribution in a Supposedly Non-Coercive State. 38 *Political Science Quarterly* 470. p. 470. COHEN, M. R. (1933) The Basis of Contract. 46 *Harvard Law Review* 553. p.562.

⁵²⁵ Rome I Regulation 2008. art. 4. par. 2-3.

⁵²⁶ *Ibid.* art.4. par.1. stipulates that “to the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows: (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence; (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated; (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country; (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence; (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence; (g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined; (h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.”

⁵²⁷ The party autonomy originates from the writings of French scholar, Charles Dumoulin (1500-1566). He argued that ‘the will of the parties is sovereign’. See LORENZEN, E. G. (1921) Validity and Effects of Contracts in the Conflict of Laws. 30 *Yale Law Journal* 565. pp.572-575.

Lord Mansfield pointed out that ‘the law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as to the rule by which it is to be governed’.⁵²⁸ Moreover, Cook stated that party autonomy permits parties to do a ‘legislative act’.⁵²⁹ It means that the parties are given power to put every factual substance they agreed to their contract. The Courts should regard the party autonomy ‘without unduly straining the traditional canons of positivist jurisprudence’⁵³⁰ but merely to relieve the Courts to solve the problem as mentioned in *Siegelman v. Cunard White Star Ltd.*:

“Instead of viewing the parties as usurping the legislative function, it seems more realistic to regard them as relieving the Courts of the problem of resolving a question of conflict of laws. Their course might be expected to reduce litigation, and is to be commended as much as good draftsmanship which relieves courts of problems of resolving ambiguities... A tendency toward certainty in commercial transactions should be encouraged by the Courts.”⁵³¹

Today, supported by normative legislation and philosophical basis of party autonomy, choice of law clauses are generally upheld by the Courts. The general acceptance of course get widely recognition by countries of the world.⁵³² Nevertheless, the principle of party autonomy has its limitations. Such limitations should be applied as narrow as to protect parties’ basic rights and ‘super mandatory law’ (public policy) of a state with predictable and just outcomes.

2. The law of London and New York as sophisticated governing law to restrict the doctrine of immunity

In international law, the doctrine of immunity is a derivation from the principle of *par in parem non habet imperium* (one sovereign power can not exercise jurisdiction over another sovereign power). As sovereign entity, state enjoys

⁵²⁸ *Robinson v. Bland*, 2 Burr 1077 (K. B. 1760). p.1078. BLOM, J. (1980) Choice of Law Methods in the Private International Law of Contract. In BOURNE, C. B. (ed.) *The Canadian Yearbook of International Law (Annuaire Canadien de Droit International): Volume XVIII*. The University of British Columbia Press. p.163.

⁵²⁹ COOK, W. W. (1942) *The Logical and Legal Bases of the Conflict of Laws*. Cambridge: Harvard University Press. pp.392-395. ZHANG, M. (2006) Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law. 20 *Emory International Law Review* 511. p.511.

⁵³⁰ PREBBLE, J. (1973) Choice of Law to Determine the Validity and Effect of Contracts a Comparison of English and American Approaches to the Conflict of Laws. 58 *Cornell Law Review* 433. p.495.

⁵³¹ *Ibid. Siegelman v. Cunard White Star Ltd.* 221 F.2d 189 (2d Cir. 1995). p.195.

⁵³² LANDO, O. (1986) Contracts: Chapter 24. In DAVID, R. et al. *International Encyclopedia of Comparative Law Volume III*. Mohr: Tübingen. See REESE, W. L. M. (1960) Contract and the Restatement of Conflict of Laws Second. 9 *International and Comparative Law Quarterly* 531. p.532.

immunity as legal protection for its representative, assets, and activities. However, this study support with the Lauterpacht's view that the doctrine of immunity is basically not part of customary international law considering the inconsistencies of its practice.⁵³³ Prior the mid-twentieth century, state immunity was seen in nearly absolute terms.⁵³⁴ In the globalization era as state became more active in commercial activities, private entities interacting with foreign states lashed out absolute sovereign immunity as fundamentally unfair in eliminating judicial recourse and favoring state parties.

During development, approach on state immunity changed to restrictive immunity. This approach is based on the the two different acts of state. According to the restrictive immunity, private acts of state (*acta jure gestionis*) are no longer immune. Only public acts of state (*acta jure imperii*) have privilege to be immune from foreign jurisdiction. Belgian courts were the first to adopt the private acts exception in early 1857.⁵³⁵ In modern era, restrictive immunity has been adopted in the common law countries through their domestic legislations but some states still apply absolute approach of immunity.

Considering that restrictive approach of immunity doctrine has no universal application, this study found that choice of law provision is effective solution of the immunity bridge problem. To avoid unfair treatment, parties in international commercial agreement must select the law which gives favorable and fair business relationship. The chosen governing law will determine the validity and enforceability of the contract. This study recommends that the Law of New York and the English Law could be the suitable governing law for contractual agreement involving state parties. The two laws are worthy governing law because of the modern and sophisticated system of law, guarantee of predictability, and both of the laws apply restrictive immunity.

a. Modern and sophisticated law

The modern and sophisticated laws of English and New York are built based on common law system. These system has developed from two primary sources: codified law (including constitutional law, statutory law,

⁵³³ LAUTERPACHT, H. (1951) *op.cit.* pp.227-228.

⁵³⁴ HENDERSON, C. W. (2010) *Understanding International Law*. Oxford: John Wiley & Sons. p.140. See *Schooner Exchange v. McFadden*. (1812) 11 US (7 Cranch) 116. p.135.

⁵³⁵ ALEBEEK, R. V. (2008) *The Immunity of States and Their Officials in International Criminal and International Human Rights Law*. Oxford: Oxford University Press. p.14. See FINKE, J. *op.cit.* p.858.

and regulatory law) and case law (precedent). If the codified law is unclear, the interpretation decided by the Courts. The decision of a court has legal significance: it binds future decisions of the court on the same material facts. These system universally known as the doctrine of precedent, the cornerstone of common law system.⁵³⁶ Although in some circumstances the precedent-following has *per incuriam* limit⁵³⁷, but Duxbury described the authority of precedent by this following argument:

“.... precedent-following might be accepted by decision-makers and others as a common standard of correct adjudicative practice, deviation from which is likely to meet with criticism or ensure. This argument is considerably more sophisticated and enlightening than anything advanced by classical legal positivists, who, instead of seeking to explain why judges follow precedents, were as much exasperated as bewildered by the fact that they do follow precedents, given that precedents are not handed down to later judges as coercive orders. In so far as decision-makers do internalize precedent-following as a norm. ... there is a stronger likelihood that decision-makers will follow precedents when the precedents themselves provide reasons for decisions on particular facts. When judges follow precedent, that is, they tend to do so on the basis of the reasons that were provided to justify the decision that was reached, and because of the applicability of those reasons to the facts of the case before them...”⁵³⁸

In fact, the precedent system takes part in modernizing the law. Both statutory law and case law are fulfilling each other. They are more adaptable with the upcoming complexity and even complicated legal disputes. In certain areas, English and New York Law may have differences for instance in the adoption of good faith. New York Law confirms that ‘every contract imposes obligation of good faith in its performance’⁵³⁹, but in contrast English Law clearly deny the adoption of good faith principle into its contract law⁵⁴⁰. With strong ground on precedent, such differences motivate the court

⁵³⁶ HARRIS, B.V. (2002) Final Appellate Courts Overruling Their Own “Wrong” Precedents: The Ongoing Search for Principle. 118 *Law Quarterly Review* 408. pp.412-413.

⁵³⁷ It means that later courts were not bound by earlier decisions that were wrongly decided.

⁵³⁸ DUXBURY, N. (2008) *The Nature and Authority of Precedent*. Cambridge: Cambridge University Press. p.151.

⁵³⁹ Uniform Commercial Code (1990). Section 1-(203)

⁵⁴⁰ CARTWRIGHT, J. (2007) *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*. Oxford: Hart Publishing. p.60.

to give certain measures and legal reasoning⁵⁴¹ rather than adverse legal constraints.

b. Guarantee of predictability

Consistency of binding precedent in the common law legal system provides predictability. For experienced parties, the laws that assures predictability fit their basic needs. During negotiation, parties can predict that the existing codified rules and case law sufficiently provide guidance for their future performance. Moreover, the contract would be more efficient if the chosen governing law paired with the forum selection clause that has same jurisdiction. Choosing the English Law as governing law and the courts of England and Wales as intended dispute settlement forum in the agreement will prevent parties from the problem of competition between the *lex fori* on the enforceability and interpretation of the forum selection clause with the chosen law.⁵⁴²

c. Restrictive approach of immunity

As we previously discussed, both English law and New York law grant immunity but not for commercial activities of a state. These restrictive immunities conception also recognize as binding precedent. The US FSIA legislates that the immunity of foreign state is not extended to suits based on its commercial acts.⁵⁴³ Specifically in its section 1605 (a) (2), a foreign state has no immunity based on three conditions: in an action based upon a commercial activity carried on in the United States, upon an act performed in the United States in connection with a commercial activity of a foreign state elsewhere, or upon an act outside of the territory of the United States in connection with a commercial activity of the foreign state elsewhere that causes a direct effect in the United States.⁵⁴⁴

⁵⁴¹ English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness. See *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd.* (1989) 1 Q.B. 433. *First Energy (UK) Ltd. v. Hungarian International Bank Ltd.* (1993) 2 Lloyd's Rep 194. *Scottish Power Plc. v. Kvaerner Construction (Regions) Ltd.* (1999) SLT 721. McKENDRICK, E. (2010) *Contract Law: Text, Cases, and Materials*. Oxford: Oxford University Press. p.501. ABELL, M. and HOBBS, V. (2013) The Duty in Good Faith in Franchise Agreements – A Comparative Study of the Civil and Common Law Approaches in the European Union. 11 *International Journal of Franchising Law* 1. pp.9-11.

⁵⁴² CLERMONT, K. M. (2015) Governing Law on Forum-Selection Agreements. 66 *Hastings Law Journal* 643. p.652.

⁵⁴³ US FSIA. section 1602.

⁵⁴⁴ *Id.* section 1605 (a) (2).

In *National American Corp v. Federal Republic of Nigeria*⁵⁴⁵, the defendant claimed immunity from the failure of contractual obligation to perform the letter of credit to the applicant based on sale and delivery of cement contract that contained choice of 'New York City' law. The Court found that their cement contract met with commercial nature under FSIA. Defense that such contract was signed by the Nigerian high official was irrelevant to justify as governmental acts. The Court also found that the cause of action was outside the jurisdiction but having consequences in the United States met the requirement of 1605 (a) (2) FSIA. Thus, defendant's defense of sovereign immunity should be denied based on commercial nature of the contract and its direct effect to the United States.

Restrictive immunity even applied in *Hanil Bank v. PT. Bank Negara Indonesia*⁵⁴⁶ where the only connection to fulfil the jurisdictional nexus measure were the funds that deposited in a New York Bank account. The defendant as Indonesian government owned company asserted immunity for its failure to pay the obligated funds to the designated bank account in New York. However, the Court held that the commercial activities exception applied because of the defendant's failure to pay the letter of credit destined for New York had a direct effect in the United States.

United Kingdom's State Immunity Act provides general regulation of immunity and lists certain exceptions of immunity to promote the doctrine of restrictive immunity.⁵⁴⁷ Prior to the Sovereign Immunity Act 1978, restrictive approach firstly applied in the landmark case *Trendtext Trading Corp v. Central Bank of Nigeria*⁵⁴⁸. In this case, the defendant refused to establish letter of credit as required by the term's of cement's sale contract because of congestion policy in Lagos. The Court of Appeals of England, on which Lord Denning sat, rejected to extend the absolute approach of immunity claimed by the defendant. The Court avoid previously binding precedent that affirmed absolute approach of immunity to follow the

⁵⁴⁵ *National American Corp v. Federal Republic of Nigeria*. 448 F. Supp. 622. (S.D.N.Y. 1978)

⁵⁴⁶ *Hanil Bank v. PT. Bank Negara Indonesia*. 148 F.3d 127 (2d Cir. 1998)..

⁵⁴⁷ UK SIA 1978, section 3.

⁵⁴⁸ *Trendtext Trading Corp v. Central Bank of Nigeria*. 1 Q. B. 529 (1977).

development of international as Lord Denning stated his leading argument that:

“Seeing that the rules of international law have changed - and do change - and that the courts have given effect to the changes without an act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form a part of our English law. It follows too, that a decision of this court - as to what was the ruling of international law 50-60 years ago - is not binding in this court today. International law knows no rule of stare decisis. If this court is today satisfied that the rule of international law on a subject has changed from what it was 50-60 years ago, it can give effect to that change - and can apply the change in our English law without waiting for the House of Lords to do it.”⁵⁴⁹

Until now, the English courts maintain to apply restrictive immunity. Recent case in *NML Capital Limited v. Republic Argentina*⁵⁵⁰, the Supreme Court confirms that states cannot claim immunity when facing enforcement in England of foreign adverse judgments in commercial cases.

Instead of three reasons above, particularly in oil and gas contracts, the survey conducted by the School of International Arbitration found that the most frequently used governing law is English law (40 per cent) then followed by New York law (17 per cent).⁵⁵¹ Moreover, the English Commercial Court also recorded that, over the period from 31 March 2012 to 1 April 2013, almost 81% of cases before it involved a foreign party, and around 49% of cases were entirely between foreign parties.⁵⁵² Hence, there is no doubt that English and New York law are the most attractive law in commercial agreement and importantly apply the doctrine of restrictive immunity for greater achievement of fairness and justice in international business.

⁵⁴⁹ *Ibid.* p.554. See REED, R. K. (1979) A Comparative Analysis of the British State Immunity Act of 1978. 3 *Boston College International and Comparative Law Review* 175. p.185. HIGGINS, R. (1977) *loc.cit.*

⁵⁵⁰ *NML Capital Limited v. Republic Argentina*. (2011) U.K.S.C. 31.

⁵⁵¹ MISTELIS, L. et al. (2010) *The 2010 International Arbitration Survey: Choices in International Arbitration*. The School of International Arbitration, University of London. [Online] Available from: <http://www.arbitration.qmul.ac.uk/docs/123290.pdf> [Accessed: May 20th, 2016].

⁵⁵² WILLEMS, M. (2014) *English Law*. [Online] <https://www.andrewskurth.com/insights-1105.html> [Accessed: June 15th, 2016].

The question then arises: is there any law other than English and New York law that also suitable for commercial activities and adopt restrictive immunity? Of course, there are other domestic laws that apply restrictive approach of immunity, such as: Canadian Sovereign Immunity Act 1982, Australian Foreign States Immunity Act 1985, and Singapore State Immunity Act 2014. Additionally, European Union Convention on State Immunity 1972 applies restrictive immunity and adopted by eight member of Council of Europe.⁵⁵³

The jurisprudence of other Western European States was also tending more and more to favour the doctrine of restrictive immunity based on the distinction between acts *jure gestionis* and acts *jure imperii*. In the *Dralle case* in 1950, the Austrian Supreme Court, having thoroughly analysed comparative jurisprudence in the matter, broke definitively with the former rule of absolute immunity, and embraced the principle that Austrian courts could entertain proceedings against foreign States in respect of acts *jure gestionis*. In the subsequent case of *Holubek v. United States*, the Austrian Supreme Court sought to define the distinction more precisely by declaring that “an act under private law may be assumed if the State performs through its organs such activities as can also be performed by private persons;” in the view of the court, what was decisive was the nature of the act and not the motive or purpose for which it was performed.⁵⁵⁴ Perhaps of even greater significance was the judgment of the German Bundesverfassungsgericht in 1963 in a case concerning proceedings brought against Iran for repair work done at the Embassy's heating plant at the request of the Iranian Ambassador in Bonn. The Court refused to admit the plea of sovereign immunity advanced on behalf of Iran, and held that German courts have jurisdiction in proceedings arising out of acts performed by a foreign State in a non-sovereign capacity. The Court went on to say: “The distinction between acts *jure imperii* and acts *jure gestionis* can only be based on the nature of the act of the State or of the resulting legal relation, not on the motive or purpose of

⁵⁵³ Austria, Belgium, Cyprus, Georgia, Luxembourg, Netherlands, Switzerland, and the United Kingdom.

⁵⁵⁴ WHITEMAN, M. M. (1968) *Digest of International Law*. Volume 6. Washington D.C.: U.S. Government Printing Office. p.566.

the activity. What is relevant is whether the foreign State acted in the exercise of its sovereign power, thus in the sphere of public law, or acted like a private person, thus within the sphere of private law.’’⁵⁵⁵

The determination of State activity as sovereign or non-sovereign must be made according to the *lex fori*, subject to the limitation, deriving from international law, that “domestic law may not treat such acts as acts *jure gestionis* which, according to the view of the great majority of States, belong to the sphere of public power in its narrower and proper sense.” In the instant case, the Court held that a contract for the repair of Embassy premises did not fall within the intrinsic sphere of State power and that the exercise of German jurisdiction would not impair any diplomatic privileges or immunities. The judgment of the Bundesverfassungsgericht in this case marked a decisive break with earlier tradition. Until 1945, German courts had, in large measure, recognised and given effect to the absolute immunity rule; from 1945 onwards, jurisprudence and doctrine had been divided with a growing movement in favour of a restrictive rule of immunity. The 1963 judgment of the Bundesverfassungsgericht finally resolved the doubt in favour of the restrictive rule.⁵⁵⁶

In recent years, the French courts, after some hesitations, seem to have come down firmly in favour of a restrictive theory of immunity, based on the distinction between acts *jure imperii* and acts *jure gestionis*. The Cour de Cassation, in the recent case of *Administration des Chemins de Fer iraniens c. Societe Levant Express Transport*, reaffirmed an earlier decision of 1929 in holding that foreign States and foreign State agencies enjoy immunity from jurisdiction only to the extent that the act giving rise to the dispute constitutes an act of sovereign authority (*acte de puissance publique*) or has been carried out in the interest of a public service. The immunity is based on the nature of the activity and not on the status of the person who exercises it, and account may be taken of the fact that the domestic law of the foreign State in question characterises the activity carried out by the State

⁵⁵⁵ *Ibid.* SINCLAIR, I. M. (1973) The European Convention on State Immunity. 22 (2) *The International Law and Comparative Law Quarterly* 254. p.263.

⁵⁵⁶ SCHAUMANN, W. and HABSCHEID, W. J. (1968) *Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht*. Karlsruhe, pp. 161-162. SINCLAIR, I. M. (1973) *op.cit.* pp.263-264.

agency as being commercial in nature. It would seem that French courts consider themselves entitled to entertain proceedings if the foreign State has acted as a private businessman or trader could have acted. The Cour d'Appel of Paris has upheld a claim to sovereign immunity advanced by the Spanish Government in connection with a dispute about premises leased to the Spanish Tourist Office in Paris. The court took into consideration the fact that, although there was a clause in the lease authorising commercial activities in the premises to be let, there was no evidence that the Spanish Tourist Office had engaged in commercial activities; accordingly, the lease, entered into by the Spanish State with a view to ensuring the functioning of the Spanish Tourist Office in France, was an act of an administrative character carried out in the interest of a public service, and immunity could properly be claimed.⁵⁵⁷

A big hope to adopt restrictive immunity still questionable under the new Russian Law on Jurisdictional Immunity of Foreign States and Foreign Sovereign Assets in the Russian Federation. The new law empowers Russian Court, based “on a reciprocity principle”, to exercise the same jurisdiction over foreign sovereign assets located in Russia that is accorded to Russia’s sovereign assets abroad shall have based their cases with reciprocity principle.⁵⁵⁸ Obviously, China has been applied restrictive immunity under the China Law of Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks 2005 but its application is still uncertain.⁵⁵⁹ For instance, the government of China made clear about their position in 2008 that the commercial exception to state immunity does not apply unless state party waived its immunity before the forum State.⁵⁶⁰

⁵⁵⁷ SINCLAIR, I. M. (1973) *loc.cit.*

⁵⁵⁸ BOLTENKO, O. (2015) Enforcement of Treaty Awards against Russia in Asia: A Safe Heaven for Russian Assets. [Online] Available from: <http://kluwerarbitrationblog.com/2015/09/03/enforcement-of-treaty-awards-against-russia-in-asia-a-safe-heaven-for-russian-assets/> [Accessed: July 5th, 2016].

⁵⁵⁹ See *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*. (2009) 1 H.K.L.R.D. 410.

⁵⁶⁰ BOLTENKO, O. (2015), *loc.cit.*

6.3. The Role of Arbitration Clause

This study found that an agreement to arbitrate is implied consent to waive the state immunity. This concept spreads to some civil law jurisdictions and has potential guideline to solve the problem of immunity before arbitration tribunal and enforcement courts.

1. Recent Case

As we understand in the global market development, states are involving commercial activities to increase their economic gain and power in international community. The good part of this development is the existence of competition between state and multinational corporations. This competition, in fact, increases the the GDP of the state, productivity, and technology advancement.

The using of immunity is actually becoming the worst part of state involvement in global market.⁵⁶¹ In particular, the state sometimes claims for immunity before the arbitration tribunal or domestic court that has authority to recognize and enforce foreign arbitral award. In the dispute between state and investor before the International Centre for Settlement of Investment Disputes (“ICSID”), the wording of the Convention itself does not reflect that state could invoke immunity before the arbitration.⁵⁶² In addition, Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (“New York Convention”) does not provide specific list of refusal ground of the enforcement of foreign arbitral awards.⁵⁶³ Thus, immunity has possibility to be a defense to object the arbitration proceeding or to refuse the enforcement of arbitral awards.

In *Democratic Republic Congo & Ors v. FG Hemisphere Associates*, the Hong Kong Court of Final Appeal has concluded that absolute approach of immunity applies in Hong Kong based on the reason of mutual relations between states under the Basic Law 1997⁵⁶⁴. This judgment is in favor of DRC because it had not waived

⁵⁶¹ Chief of Justice Marshall mentioned about how immunity can be an obstacle to the implementation of international law. See *Schooner Exchange v. McFaddon*. 11 U.S. 116. pp.137-139.

⁵⁶² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965) *International Centre for Settlement of Investment Disputes*. art.25-27. [Online] Available from: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf [Accessed: July 20th, 2016]

⁵⁶³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

⁵⁶⁴ Hong Kong Basic Law (1997) stipulates the continuation of common law system for Hong Kong Special Administrative Region of the People Republic of China. However, there was already indication of Hong Kong to modify a common law “flavor” of its own post the transfer sovereignty 1997 from the United Kingdom. See FISHER, M. and GREENWOOD, D. G. (2011) *Contract Law in Hong Kong*. Hong Kong: Hong Kong University Press. p.29.

its immunity before the Hong Kong Courts.⁵⁶⁵ Hong Kong also prefers to follow absolute approach of immunity as directed by the People Republic of China in the formal letter from the Office of the Commissioner of the Ministry of Foreign Affairs to the Court of First Instance, the Court of Appeal, and the Court of Final Appeal stated that:

*“...The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of ‘restrictive immunity’. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent.”*⁵⁶⁶

With this judgment, China is actually inconsistent with their commitment as signatory parties of the UN Convention on Jurisdictional Immunities. Moreover, seeking enforcement of foreign arbitral awards in China requires expressly waiver of immunity. This practice would lead uncertain practice of restrictive immunity and influences the countries that have no affirmed legal approach on immunity.

2. Agreement to arbitrate is implied consent to waive state immunity

Practical lawyers recommend how important of waiver of immunity clause in a contract. This clause indicates a consent of state unconditionally and irrevocably not to invoke immunity as sovereign entity. However, not whole parties in international commercial transactions aware about this clause. In this matter, private parties must build strong argument against the state parties which claim for immunity of their commercial activities. Using the immunity, state parties are sometimes reluctant to abide their agreement to arbitrate.⁵⁶⁷

⁵⁶⁵ *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, loc.cit.

⁵⁶⁶ *Ibid.* at 44.

⁵⁶⁷ DOMKE, M. (1971) The Enforcement of Maritime Arbitration Agreements With Foreign Governments. 2 (3) *Journal of Maritime Law and Commerce* 617. p.618.

Waiver of immunity could be implicit such as in the form of arbitration clause or agreement. This means that submission to arbitration is implied consent to waive state immunity. It depends in certain circumstances that waiver of immunity clause is not sufficient enough.⁵⁶⁸ Choice of law clause also has important role to restrict the immunity. Choosing the law of the country which restricts the immunity is also waiver of immunity by implication.⁵⁶⁹ This legal concept has been recognized as common rule under the common law system in example under section 1605 (a) (1) of the US FSIA stated that ‘a party’s agreement to arbitrate in the United States is considered consent to enforcement of that agreement and, therefore, a waiver of immunity in enforcement actions’.⁵⁷⁰ Moreover, in the section 456 of the US Restatement stated that: “under the law of the United States, an agreement to arbitrate is a waiver of immunity from jurisdiction in: an action or other proceeding to compel arbitration pursuant to the agreement and an action to enforce an arbitral award rendered pursuant to the agreement.”⁵⁷¹

The connection between the submission of arbitration and waiver of immunity is also applied in the precedent. The Court in *American Construction Machinery and Equipment Corp. v. Merchandised Construction of Pakistan Ltd.* argued that “by engaging in most aspects of arbitration, Merchandised Construction of Pakistan, Ltd. as sovereign respondent waived its right to immunity under US FSIA”.⁵⁷² This case followed the previous case in *Ipitrade International v. Federal Republic of Nigeria* which stated that “agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver. This waiver cannot be revoked by a unilateral withdrawal.”⁵⁷³ Not only in the Common Law system, French *Cour de Cassation* in the *SOABI v. Senegal* case stated that “whereas... a

⁵⁶⁸ *Svenska Petroleum Exploration AB (Schweden) v. Government of the Republic of Lithuania & AB Geonafta (Lithuania)*. EWCA Civ 1529 (2006).

⁵⁶⁹ The FSIA legislative history outlined that “with respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of particular country should govern a contract.” BORN, G. (1996) *International Civil Litigation in US Courts: Commentary and Materials*. Third Edition. The Netherlands: Kluwer Law international. p.227.

⁵⁷⁰ US FSIA. section 1605 (a) (1).

⁵⁷¹ Restatement (Third) Foreign Relations Law of the United States (1987). section 456 (2) (b).

⁵⁷² *American Construction Machinery and Equipment Corp. v. Merchandised Construction of Pakistan Ltd.* 659 F. Supp. 426 (S.D.N.Y. 1987). p.3.

⁵⁷³ *Ipitrade International v. Federal Republic of Nigeria*. 465 F. Supp. 824 (D.D.C. 1978).

*foreign state has submitted to arbitration, in doing so, has accepted that the award may be granted exequatur...*⁵⁷⁴

⁵⁷⁴ *SOABI v. Senegal*. Cass. Fr., 30 I.L.M. 1167. MULLER, A. S. and MIJS, W. (1994) *The Flame Rekindled: New Hopes for International Arbitration*. Dordrecht: Martinus Nijhoff. p.168.

CHAPTER VII

CONCLUSION

In free trade era, each country is conducting economic relationships without border and in many ways of cooperation. They are possible to enter into agreement with private parties for certain economic goals. Both parties in the agreement could not deny with the existence of dispute between them during the performance of their agreement. In practice, state parties tend to claim immunity as a defence for their breach of contract. Their position as sovereign entity claims to be expanded not only for their political activities (*acta jure imperii*) but also in commercial activities though some jurisdictions regulate the restrictive immunity for *acta jure gestionis* (private and commercial acts of a state).

Before the 20th century, state immunity remained absolute. In the past, even, as proved under historical practice in Mesopotamia and Greece, traders or merchants enjoyed absolute immunity due to their position as the representative of their King or *polis* in which their commercial acts and diplomatic mission were combined. This absolute approach also had been applied by modern nations. Until in 1972, Council of Europe initiated to adopt restrictive approach of immunity through European Convention on State Immunity. This Convention inspired to apply the restrictive approach not only in European region but universal through the United Nations on Jurisdictional Immunity of States and Their Property (2004). Unfortunately, only limited number of states ratified both of this sophisticated treaties. It means that absolute approach of immunity is still being used by states even until now. The absolute immunity is actually influenced by the old concept of Westphalian legacy on state sovereignty although Hugo Grotius insisted that sovereignty has some limits and the exercise of sovereignty must be reasonable.

This study found that post 20th century there are three group of states in practicing state immunity: first, group of states which apply restrictive approach of immunity. This group includes not only common law states but also some civil law states such as: the United States, the United Kingdom, Australia, Singapore, Canada, South Africa, Austria, Belgium, Germany, Luxembourg, Netherlands, and Switzerland. Second, group of states which apply absolute approach of immunity such as: China and Russia. Third, group of states which has unclear measure of state immunity but supportive to restrictive approach of immunity, such as: Indonesia, Malaysia, India, and Thailand. The number of states in the third group is increase dominantly influenced by free market competition and investment opportunity.

We cannot deny that in 21st century, the existence of hybrid non-state actor raises challenge in the using of immunity as a defense of their commercial activities. This study concluded that powerful hybrid non-state actors take frequent attempts to use immunity to avoid contractual obligation. The absence of uniform standard to restrict immunity would be potential danger in international economic relations. Indeed, immunity as valuable protection for sovereign entities must be used as less restrictive as possible in particular for commercial relationships. Some legal domestic jurisdictions that applied restrictive immunity have been effectively maintain qualitative and quantitative just legal reasoning. Yet, un-guided restrictive interpretation of immunity leads to uncertainty implementation and disturbing fair business relationships.

In order to support the universal application of restrictive approach of immunity, this study highlighted the role of choice of law and arbitration clause in the international business contract. With range of benefits particularly in enabling parties to escape from unfair and inconsistent legal systems, choice of law also plays important role to select certain laws with restrictive approach of immunity. This study recommends that English and New York law are the most suitable governing law in dealing with the immunity challenges because the two laws confidently provide codified law and binding precedent to exempt immunity privileges for state and other sovereign entities. Moreover, the two laws are also widely accepted as governing law in commercial agreements because of their sophisticated laws and assurance of predictability. There are some laws other than New York and English law that also provide restrictive approach of immunity such as Canadian Sovereign Immunity Act 1982, Australian Foreign States Immunity Act 1985, and Singapore State Immunity Act 2014. Austria, Belgium, Cyprus, Georgia, Luxembourg, Netherlands, and Switzerland as the member of Council of Europe also apply restrictive immunity based on their ratified Convention on State Immunity 1972. Countries like China and Russia which, although legislatively apply restrictive immunity, are nevertheless uncertain in practice. The rest of the world seems having unclear approach of immunity.

This study also found that some national jurisdictions have been recognized the conceptual connection between the arbitration agreement and waiver of immunity. The common law system ruled that agreement to arbitrate is implied consent to waive the state immunity. This rule embodied in the codified law as well as in the court's judgements. French which has civil law's legal system is applying the same concept. Hence, this concept shall be the guideline for other national jurisdictions which still unclear to adopt certain

measure to restrict the immunity before the arbitration or before the enforcement courts.

REFERENCES

1. Books

- ABASS, A. (2014) *Complete International Law: Text, Cases, and Materials*. Oxford: Oxford University Press.
- ALEBEEK, R. V. (2008) *The Immunity of States and Their Officials in International Criminal and International Human Rights Law*. Oxford: Oxford University Press.
- ALLEN, E. (1933) *The Position of Foreign States before National Courts, Chiefly in Continental Europe*. New York: The Macmillan Company.
- AUSTIN, J. (1995) *The Province of Jurisprudence Determined*. Cambridge: Cambridge University Press.
- BADR, G. (1984) *State Immunity: An Analytical and Prognostic View*. The Hague and Boston: Martinus Nijhoff.
- BANKAS, E. K. (2005) *The State Immunity Controversy in International Law*. Germany: Springer.
- BASSIOUNI, M. C. (2008) *International Criminal Law*. Leiden: Koninklijke Brill NV.
- BEALE, J. H. (1935) *A Treatise on the Conflict of Laws*. New York: Baker, Voorhirs & Co.
- BECKER, A. (1985) Neusumerische Renaissance? Wissenschaftliche Untersuchungen zur Philologie und Archäologie. 16 *Baghdader Mitteilungen* 229.
- BENDA-BECKMANN, K. (2001) Transnational Dimensions of Legal Pluralism. In FIKENTSCHER, W. (ed.) *Begegnung und Konflikt – eine kulturanthropologische Bestandsaufnahme*. München: Verlag der Bayerischen Akademie der Wissenschaften.
- BENNETT, T. W. (2004) *Customary Law in South Africa*. Lansdowne: Juta and Company Ltd.
- BENTHAM, J. (1780) *Introduction to the Principles of Morals and Legislation*. London.
- BERTMAN, S. (2003) *Handbook to Life in Ancient Mesopotamia*. Oxford: Oxford University Press.
- BLOM, J. (1980) Choice of Law Methods in the Private International Law of Contract. In BOURNE, C. B. (ed.) *The Canadian Yearbook of International Law (Annuaire Canadien de Droit International): Volume XVIII*. The University of British Columbia Press.
- BOLKESTEIN, H. (1958) *Economic Life of Greece's Golden Age*. Netherland: E. J. Brill.
- BORN, G. (1996) *International Civil Litigation in US Courts: Commentary and Materials*. Third Edition. The Netherlands: Kluwer Law international.

- BOWERS, C. M. (2013). *Forensic Testimony: Science, Law, and Expert Evidence*. Oxford: Academic Press.
- BRÖHMER, J. (1997) *State Immunity and the Violation of Human Rights*. The Hague: Martinus Nijhoff.
- BROWNLIE, I. (2008) *Principles of Public International Law*. 7th edition. Oxford: Oxford University Press.
- BYERS, M. (1999) *Custom, Power, and the Power of Rules*. Cambridge: Cambridge University Press.
- CAMP, J. M. (1986) *The Athenian Agora: Excavations in the Heart of Classical Athens*. London and New York: Thames and Hudson.
- CARTWRIGHT, J. (2007) *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer*. Oxford: Hart Publishing.
- CHAYES, A. and CHAYES, A. H. (1998) *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, MA: Harvard University Press.
- CLAYTON, A. (1999) *Contracts or Partnerships: Working through Local NGOs in Ghana and Nepal*. London: Water Aid.
- COHEN, A. (1969) *Custom and Politics in Urban Africa: A Study of Hausa Migrants in Yoruba Towns*. University of California Press.
- CONFORTI, B. (1993). *International Law and the Role of Domestic Legal Systems*. Dordrecht: Martinus Nijhoff.
- CONQUEST, R. (1999) *Reflections on a Ravaged Century*. New York: W.W. Norton Company.
- COOK, W. W. (1942) *The Logical and Legal Bases of the Conflict of Laws*. Cambridge: Harvard University Press.
- CUTLER, A. C. (2003) *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*. Cambridge: Cambridge University Press.
- D'ASPREMONT, J. (2015) Non-State Actors and the Social Practice of International Law. In NOORTMAN, M., REINISCH, A., and RYNGAERT, C. (eds). *Non State Actors in International Law*. Oregon: Hart Publishing.
- DEGAN, Vladimir Duro. (1997) *Sources of International Law*. The Hague.
- DE LY, Filip. (1992) *International Business Law and Lex Mercatoria*. Amsterdam: T. M. C. Asser Instituut.

- DEMETRIOU, D. (2012) *Negotiating Identity in the Ancient Mediterranean: The Archaic and Classical Greek Multithnic Emporia*. Cambridge: Cambridge University Press.
- DE MIEROOP, M. V. (2014) Silver as a Financial Tool in Ancient Egypt and Mesopotamia. In BENHOLZ, P. and VAUBEL, R. (eds.) *Explaining Monetary and Financial Innovation*. Switzerland: Springer International Publishing.
- DENZA, E. (2008) *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*. Oxford: Oxford University Press.
- DICEY, A.V., MORRIS, J.H.C., and COLLINS, L.A. (2012) *The Conflict of Laws*. London: Sweet&Maxwell.
- DICKINSON, A., LINDSAY, R., and LOONAM, J. P. (2004) *State Immunity: Selected Materials and Commentary*. Oxford: Oxford University Press.
- DICKINSON, E. (1920) *The Equality of States in International Law*. Cambridge: Harvard University Press.
- DUXBURY, N. (2008) *The Nature and Authority of Precedent*. Cambridge: Cambridge University Press.
- ELIAS, T. (1988) *Africa and the Development of International Law*. London: Martinus Nijhoff.
- ENGDAHL, O. (2007) *Protection of Personnel in Peace Operations: The Role of the 'Safety Convention' Against the Background of General International Law*. Leiden: Martinus Nijhoff.
- FARIEALLO, F., DE CHAZOUMES, L. B., and DAVIS, K. E. (eds) (2016) *The World Bank Legal Review, Volume 7 Financing and Implementing the Post-2015 Development Agenda: The Role of Law and Justice Systems*. World Bank Publications.
- FISHER, M. and GREENWOOD, D. G. (2011) *Contract Law in Hong Kong*. Hong Kong: Hong Kong University Press.
- FOX, H. (2002) *The Law of State Immunity*. Oxford: Oxford University Press.
- GADD, C. J. (1971) Babylonia c. 2120 – 1800 B.C. (Chapter XXII). In EDWARDS, I. E. S. et al. (eds.) *The Cambridge Ancient History Volume 1 Part 2: Early History of the Middle East*. Cambridge: Cambridge University Press.
- GAGARIN, M. and FANTHAM, E. (eds.) (2010) *The Oxford Encyclopedia of Ancient Greece and Rome*. New York: Oxford University Press.
- GARFINKLE, S. J. (2008) Silver and Gold: Merchants and the Economy of the Ur III State. In MICHALOWSKI, P. (ed.) *On Ur III Times: Studies in Honor of Marcel Sigrist*. Boston: American Schools of Oriental Research.

- GOLDMAN, B. (1987) *The Applicable Law: General Principles of Law – the Lex Mercatoria*. In LEW, J. D. M. (ed.) *Contemporary Problems in International Arbitration*. London: Springer.
- GUTHRIE, W. (1869) *A treatise on the conflict of laws and the limits of their operation in respect of place and time by Friedrich Carl von Savigny*. Edinburgh: T. & T. Clarke Law Publishers.
- GYGAX, M. D. (2016) *Benefaction and Rewards in the Ancient Greek City*. Cambridge: Cambridge University Press.
- HAMILTON, S. and ZHANG, J. (2011) *Doing Business with China: Avoiding the Pitfalls*. Palgrave Macmillan.
- HARDING, P. (ed.) (1985) *From the End of the Peloponnesian War to the Battle of Ipsus: Translated Documents of Greece and Rome II*. Cambridge: Cambridge University Press.
- HASEBROEK, J. (1933) *Trade and Politics in Ancient Greece*. London: Biblio and Tannen Publishers.
- HAY, P. (2000) On Comity, Reciprocity, and Public Policy in the United States and German Judgements Recognition Practice. In BASEDOW J. et al. *Private Law in the International Arena: From National Conflict Rules toward Harmonization and Unification*. T.M.C. Asser Press.
- HAY, P., BORCHERS, P. J., and SYMEONIDES, S. C. (2010) *Conflict of Laws*. Fifth Edition. St. Paul.
- HAZEL, J. (2002) *Who's Who in the Greek World*. New York: Routledge.
- HENDERSON, C. W. (2010) *Understanding International Law*. Oxford: John Wiley & Sons.
- HIGGINS, R. (1994) *Problems and Process: International Law and How We Use It*. Oxford: Clarendon Press.
- HOFMANN, R. And NILS, G. (1999) *Non-State Actors as New Subjects of International Law*. Berlin: Duncker & Humblot. BIANCHI, A. (ed.) (2009) *Non-State Actors and International Law*. Aldershot: Ashgate.
- HOOKE, B. (1975) *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws*. Oxford: Clarendon Press.
- HORN, N. (2001) The Use of Transnational Law in the Contract Law of International Trade and Finance. In BERGER, K. (ed.) *The Practice of Transnational Law*. The Hague/London/Boston: Kluwer Law.

- JACT (1984) *The World of Athens: An Introduction to Classical Athenian Culture*. Cambridge: Cambridge University Press.
- JANSSEN, R. (2011) *In Search of a Path: An Analysis of the Foreign Policy of Suriname from 1975 to 1991*. Leiden: Koninklijk Instituut voor Taal, Landen Volkenkunde Press.
- JUENGER, F. K. (1993) *Choice of Law and Multistate Justice*. Dordrecht: Martinus Nijhoff.
- KEOHANE, Robert O. and NYE, Joseph S. (eds.) (1971) *Transnational Relations and World Politics*. Cambridge: Harvard University Press.
- KIESTRA, L. R. (2014) *The Impact of the European Convention on Human Rights on Private International Law*. T.M.C. Asser Press.
- KOBAYASHI, B. H. and RIBSTEIN, L. E. (1999) Contract and Jurisdictional Competition. In BUCKLEY, F.H. (ed.) *Fall and Rise Freedom of Contract*. North Carolina: Duke University Press.
- KOWALSKI, P., et al. (2013) *State Owned-Enterprises: Trade Effects and Policy Implications*. OECD Trade Policy Paper No. 147. OECD Publishing.
- KRONKE, H. (2010) *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*. The Netherlands: Kluwer Law International.
- LANDO, O. (1986) Contracts: Chapter 24. In DAVID, R. et al. *International Encyclopedia of Comparative Law Volume III*. Mohr: Tübingen.
- LARSEN, P. B., SWEENEY, J., and GILLICK, J. (2012) *Aviation Law: Cases, Laws, and Related Sources*. Leiden-Boston: Martinus Nijhoff.
- LAUTERPACHT, H. (1975) *International Law: being the Collected Papers of Hersch Lauterpacht*. Cambridge: Cambridge University Press.
- LEYS, C. (2001) *Market-driven Politics: Neoliberal Democracy and The Public Interest*. New York: Verso.
- LOW, P. (2008) *Athenian Empire*. Edinburgh: Edinburgh University Press.
- LYCK, M. (2009) *Peace Operations and International Criminal Justice*. New York: Routledge.
- MacCORMICK, N. (2010) *Questioning Sovereignty*. Oxford: Oxford University Press.
- MALINOWSKI, B. (1926) *Crime and Custom in Savage Society*. London: Routledge.
- MANSBACH, R. W., FERGUSON, Y., and LAMPERT, D. (1976) *The Web of World Politics: Non State Actors in the Global System*. New Jersey: Prentice Hall.

- McCLANAHAN, G. V. (1989) *Diplomatic Immunity: Principles, Practices, Problems*. London: C. Hurst & Co. Publishers.
- McINTOSH, J. (2008) *The Ancient Indus Valley*. California: ABC-CLIO.
- McKENDRICK, E. (2010) *Contract Law: Text, Cases, and Materials*. Oxford: Oxford University Press. p.501.
- MICHAELS, R. (2004) Territorial Jurisdiction after Territoriality. In SLOT, P.J. and BULTERMAN, M. (eds.) *Globalisation and Jurisdiction*. The Hague: Kluwer Law International.
- MICHALS, D. B. (2012) *International Privileges and Immunities: A Case for A Universal Statute*. The Hague: Martinus Nijhoff.
- MILNER, H. V. and KEOHANE, R. O. (1996) Internationalization and Domestic Politics: An Introduction. In KEOHANE, R. O. and MILNER, H. V. (eds.) *Internationalization and Domestic Politics*. New York: Cambridge University Press.
- MITCHELL, L. G. (2002) *Greeks Bearing Gifts: The Public Use of Private Relationships in the Greek World*. Cambridge: Cambridge University Press.
- MULLER, A. S. and MIJS, W. (1994) *The Flame Rekindled: New Hopes for International Arbitration*. Dordrecht: Martinus Nijhoff.
- MUNIZ-FRATICELLI, V. M. (2014) *The Structure of Pluralism*, Oxford: Oxford University Press.
- MURPHY, S. D. (2012) *Principles of International Law*. Thomson/West.
- NAGEL, S. (2000) *Handbook of Global International Policy*. New York: CRC Press.
- National Audit Office of Great Britain. (2010) *The Sale of the Government's Interest in British Energy*. The Stationery Office.
- NEMET-NEJAT, K. R. (1998) *Daily Life in Ancient Mesopotamia*. Westport: Greenwood Press.
- NEUMANN, H. (1999) Ur-Dumuzida and Ur-Dun. In DERCKSEN, J. G. (ed.) *Trade and Finance in Ancient Mesopotamia*. Leiden: Proceedings of the First MOS Symposium.
- NOORTMAN, M. and RYNGAERT, C. (2010) *Non-State Actor Dynamics in International Law: from Law-Takers to Law-Makers*. London: Ashgate.
- ODUNTAN, G. (2012) *Sovereignty and Jurisdiction in Airspace and Outer Space: Legal Criteria for Spatial Delimitation*. New York: Routledge.

- O'HARA, E. A. and RIBSTEIN, L. E. (2000) Conflict of Laws and Choice of Law. In BOUCKAERT, B. and DE GEEST, G. (eds.) *Encyclopedia of Law and Economics, Volume V: The Economics of Crime and Litigation*. Cheltenham: Edward Elgar.
- O'KEEFE, R. and TAMS, C. J. (2013) *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*. Oxford: Oxford University Press.
- OPPENHEIM, L. (1955) *International Law: A Treatise*. Peace.
- OPPONG, R. F. (2013) *Private International Law in Commonwealth Africa*. Cambridge: Cambridge University Press.
- OSER, D. (2008) *The UNIDROIT Principles of International Commercial Contracts: A Governing Law?*. Leiden: Martinus Nijhoff.
- POSPISIL, L. (1971) *The Anthropology of Law: A Comparative Theory of Law*. New York: Harper and Row.
- POWELL, M. A. (1977) Sumerian Merchants and the Problem of Profit. In HAWKINS, J. D. (ed.) *Trade in the Ancient Near East*. London: British School of Archeology in Iraq
- RABEL, E. (1958) *The Conflict of Laws: A Comparative Study*. University of Michigan Law School.
- REED, C. M. (2003) *Maritime Traders in Ancient Greek World*. Cambridge: Cambridge University Press.
- REINISCH, A. (2000) *International Organizations Before National Courts*. Cambridge: Cambridge University Press.
- _____. (2016) *The Conventions on the Privileges and Immunities of the United Nations and Its Specialized Agencies: A Commentary*. Oxford: Oxford University Press.
- SALTER, M. and MASON, J. (2007) *Writing Law Dissertations*. New York: Pearson Education Limited.
- SANTOS, B. S. (1995). *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*. New York: Routledge.
- SASSEN, S. (1996) *Losing Control: Sovereignty in an Age of Globalization*. New York: Columbia University Press.
- SCHAUMANN, W. and HABSCHEID, W. J. (1968) *Die Immunität ausländischer Staaten nach Völkerrecht und deutschem Zivilprozessrecht*. Karlsruhe.
- SCHLECHTRIEM, P. (2005) Introduction. In SCHLECHTRIEM, P. and SCHWENZER, I. *Commentary on the UN Convention on the International Sale of Goods (CISG)*. Oxford: Oxford University Press.

- SCHOMP, V. (2004) *Ancient Mesopotamia: The Sumerians, Babylonians, and Assyrians*. New York: Franklin Watts.
- SCHWARZENBERGER, G. (1957) *International Law*. London: Stevens & Sons, Ltd.
- SHAW, M. (2008) *International Law*. Cambridge: Cambridge University Press.
- SNELL, D. C. (1982) *Ledgers and Prices Early Mesopotamian Accounts*. London and New Haven, Yale University Press.
- STILES, K. W. (2000) States, Non-State Actors, and Global Policy Formulation. In HIGGOTT, R. A., UNDERHILL, G. R. D., and BIELER, A. *Non-State Actors and Authority in the Global System* London and New York: Routledge.
- STORY, J. (1846) *Commentaries on the Conflict of Laws, Foreign, and Domestic*. Boston: C. Little and J. Brown.
- STRANGE, S. (2003) The Declining Authority of States. In HELD, D. and MCGREW, A. (eds.) *The Global Transformation Reader: An Introduction to the Globalization Debate*. Cambridge: Polity Press.
- SYMEONIDES, S. C. (2001) Material Justice and Conflicts Justice in Choice of Law. In BORCHERS, P. J. and ZEKOLL, J. (eds.) *International Conflict of Laws for the Third Millennium, Essays in Honor of Friedrich K. Juenger*. New York: Transnational Publishers Inc.
- SYMEONIDES, S. C. (2008) *American Private International Law*. The Netherlands: Kluwer Law International.
- TAMANAH, B. (1997) *Realistic Socio-Legal Theory: Pragmatism and A Social Theory of Law*. Oxford: Clarendon Press.
- _____. (2001) *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press.
- THOMAS, C. (1985) *New States, Sovereignty, and Intervention*. Basingstoke: Palgrave Macmillan.
- THUCYDIDES and CRAWLEY, R. (trans.) (2006) *The History of the Peloponnesian War*. New York: Barnes and Nobles.
- VERZIIL, J. W. (1969) *International Law in Historical Perspective*. Leiden: A.W. Sijthoff.
- VOLKEN, P. and BONOMI, A. (2008) *Yearbook of Private International Law Volume IX - 2007*. European Law Publishers.
- VON SAVIGNY, F.C. (1880) *A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time*. Edinburgh: Clark.

- WANG, F. F. (2010) *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US, and China*. Cambridge: Cambridge University Press.
- WATSON, A. (1992) *Joseph Story and the Comity of Errors 2*. Georgia: University of Georgia Press.
- WEBER, C. (1995). *Simulating Sovereignty: Intervention, the State and Symbolic Exchange*. Cambridge: Cambridge University Press.
- WEISS, T. G., SEYLE, D. C., and COOLODGE, K. (2013) *The Rise of Non-State Actors in Global Governance: Opportunities and Limitations*. One Earth Future Foundation.
- WHITEMAN, M. M. (1968) *Digest of International Law*. Volume 6. Washington D.C.: U.S. Government Printing Office.
- WILSON, C. E. (1967) *Diplomatic Privileges and Immunities*. Tucson: University of Arizona Press.
- 2. Periodicals**
- ABELL, M. and HOBBS, V. (2013) The Duty in Good Faith in Franchise Agreements – A Comparative Study of the Civil and Common Law Approaches in the European Union. 11 *International Journal of Franchising Law* 1.
- ALEXANDER, M. W. and VIOLET, W. (2012) Trade and Traders of Mesopotamian Ur. 19 (1) *American Society of Business and Behavioral Sciences*.
- ALLOTT, P. (1974) European Convention on State immunity. 33 (1) *The Cambridge Law Journal* 8.
- ANDERSON, G. (2009) The Personality of the Greek State. 129 *The Journal of Hellenic Studies* 1.
- AUST, A. (2010) *Handbook of International Law*. Cambridge: Cambridge University Press.
- BAADE, H. W. (1961) The Eichmann Trial: Some Legal Aspects. *Duke Law Journal* 400.
- BAILEY, J. E. (1999) Facing the Truth: Seeing the Convention on Contracts for the International Sales of Goods as an Obstacle to a Uniform Law of International Sales. 32 (2) *Cornell International Law Journal* 273.
- BARBER, N. (2006) Legal Pluralism and the European Union. 12 (3) *European Law Journal* 306.
- BEALE, J. (1923) The Jurisdiction of a Sovereign State. 36 *Harvard Law Review* 241.
- BENTSI-ENCHILL, K. (1969) The Colonial Heritage of Legal Pluralism. 1 *Zambia Law Journal* 1.
- BLEIMAIER, J. K. (1978) The Doctrine of Comity in Private International Law. 24 *Catholic Lawyer* 327.

- BOGAARD, W. (1965) Act of State Doctrine after Sabbatino (Comments). 63 *Michigan Law Review* 528.
- BOOKMAN, P. K. (2015) Litigation, Isolationism. 67 *Stanford Law Review* 1081.
- BOTHA, N. (1982) Some Comments on the Foreign States Immunities Act 87 of 1981. XV *CILSA* 334.
- BOUCHEZ, L. (1979) The Nature and Scope of Immunity from Jurisdiction and Execution. 10 *Netherlands Yearbook of International Law* 3.
- BOWETT, D. (1978) The State Immunity Act 1978. 37 (2) *The Cambridge Law Journal*.
- BRATTON, M. (1989) The Politics of NGO-Government Relations in Africa. 17 (4) *World Development* 569.
- BRAZIL-DAVID, R. (2011) Harmonization and Delocalization of International Commercial Arbitration. 28 (5) *Journal of International Arbitration* 445.
- BURKE, E. M. (1992) The Economy of Athens in the Classical Era: Some Adjustments to the Primitivist Model. 122 *Transactions of the American Philological Association* 199.
- CARL, B. M. (1979) Foreign Sovereigns in American Courts: the United States Foreign Sovereign Immunities Act in Practice. 33 *Southwestern Law Journal* 1009.
- CARPINELLO, G. F. (1990) Testing the Limits of Choice of Law Clauses: Franchise Contracts as a Case Study. 74 *Marquette Law Review* 57.
- CHEATHAM, E. E. (1941) Sources of Rules for Conflict of Laws. *University of Pennsylvania Law Review* 430.
- CHILDRESS III, D. E. (2010) Comity as Conflict: Resituating International Comity as Conflict of Laws. 44 *University of California Davis Law Review* 11.
- CHOUDHURY, F. (2016) The United Nations Immunity Regime: Seeking a Balance Between Unfettered Protection and Accountability. 104 *The Georgetown Law Journal* 725.
- CLERMONT, K. M. (2015) Governing Law on Forum-Selection Agreements. 66 *Hastings Law Journal* 643.
- COHEN, M. R. (1933) The Basis of Contract. 46 *Harvard Law Review* 553.
- CREMADES, B. and PLEHN, S. (1984) The New Lex Mercatoria and the Harmonization of the Laws of the International Commercial Transactions. 2 *Boston University International Law Journal* 317.

- CUERVO, A. et al. (2014) Governments as Owners: State-owned Multinational Companies. 45 *Journal of International Business Studies* 919.
- DE BOER, T. M. (2010) Living Apart Together: The Relationship Between Public and Private International Law. 57 (2) *Netherlands International Law Review* 183.
- DELAUME, G. R. (1980) Long-Arm Jurisdiction Under the Foreign Sovereign Immunities Act. 74 (3) *American Journal of International Law* 640.
- DE NOVA, R. (1966) Historical and Comparative Introduction to Conflict of Laws. 118 *Recueil des Cours*.
- DENNIS, M. J. (2014) Modernizing and Harmonizing International Contract Law: the CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward. 19 *Uniform Law Review* 114.
- DHILLON, D. and CHOW, C. (2008) Enforcement of Foreign Arbitral Awards and the New York Convention – The Singapore Experience. *Mealey's Executive Summary*.
- DING, Y. (2012) Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?. 26 *Emory International Law Review* 997.
- DOBROVIR, W. A. (1968) A Gloss on the Tate Letter's Restrictive Theory of Sovereign Immunity. 54 *Virginia Law Review* 1.
- DODGE, W. S. (2015) International Comity in American Law. 115 (8) *Columbia Law Review* 2071.
- DOMKE, M. (1971) The Enforcement of Maritime Arbitration Agreements With Foreign Governments. 2 (3) *Journal of Maritime Law and Commerce* 617.
- DORSEY, W. (1997) Reflections on the Foreign Sovereign Immunities Act after Twenty Years, 28 *Journal of Maritime Law and Commerce* 257.
- DUPRET, B. (2007) Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Respecification. 1 *European Journal of Legal Studies* 1.
- EDWARDS, R. (1981) Extraterritorial Application of the US Iranian Assets Control Regulations. 75 *American Journal of International Law*.
- ENGSTRÖM, D and MARIAN, C. (2012) Restrictive Absolutes: Using Party Autonomy to Reconcile Absolute Immunity with the Liberal Standard for Restrictive Immunity Adopted by the Swedish Supreme Court in the *Sedelmayer* Decision. 2 *Czech (& Central European) Yearbook of Arbitration* 61.
- EPSTEIN, R. A. (2012) The Natural Bridge between Private Law and Public International Law. 13 *Chicago Journal of International Law* 47.

- FARHANGI, L. S. (1986) Insuring Against Abuse of Diplomatic Immunity. 38 *Stanford Law Review* 1517.
- FINKE, J. (2010) Sovereign Immunity: Rule, Comity, or Something Else?. 21 *European Journal of International Law* 853.
- FINLEY, M. I. (1935) Emporos, Naukleros, and Kapelos: A Prolegomena to the Study of Athenian Trade. 30 *Classical Philology* 320.
- FORD, R. T. (1999) Law's Territory (A History of Jurisdiction). 97 *Michigan Law Review* 843.
- GARNETT, R. (2005) Foreign States in Australian Courts. 29 *Melbourne University Law Review* 704.
- GEORGE, J. P. and PERDESEN, F. C. (1988) Conflict of Law. 41 *Southwestern Law Journal* 383.
- GORDON. (1977) The Origin and Development of the Act of State Doctrine. 8 *Rutgers Camden Law Journal* 595.
- GROFF, J. D. (2000) A Proposal for Diplomatic Accountability Using the Jurisdiction of the International Criminal Court: The Decline of an Absolute Sovereign Right. 14 *Temple International and Comparative Law Journal* 209.
- GÜNTHER, K. (2008) Legal Pluralism or Uniform Concept of Law?. 5 *No Foundations* 5.
- GRIFFITHS, J. (1986) What is Legal Pluralism?. *Journal of Legal Pluralism* 1.
- GROSSWALD CURRAN, V. (2005) Remembering Law in the Internationalizing World. 34 (1) *Hofstra Law Review* 93.
- HALE, R. L. (1923) Coercion and Distribution in a Supposedly Non-Coercive State. 38 *Political Science Quarterly* 470.
- HANQIN, X. (2011) Chinese Contemporary Perspectives on International Law: History, Culture, and International Law. 355 *Collected Courses of The Hague Academy of International Law* 41.
- HARJANI, S. R. (1999) Litigating Claims over Foreign Government-Owned Corporations Under the Commercial Activities Exception to the Foreign Sovereign Immunities Act. 20 *Northwestern Journal of International Law and Business* 181.
- HARRIS, B.V. (2002) Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle. 118 *Law Quarterly Review* 408.
- HARTNELL, H. E. (1993) Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods. 18 *Yale Journal of International Law* 1.

- HERNDL, K. (1962) Zur Frage der Staatenimmunität. *Juristische Blätter*.
- HIGGINS, R. (1977) Recent Developments in the Law of Sovereign Immunity in the United Kingdom. 71 *American Journal of International Law* 423.
- _____ (1999) International Law in a Changing International System. 58 *Cambridge Law Journal* 78.
- HORLACHER, H. M. (1994) The Rome Convention and the German Paradigm: Forecasting the Demise of the European Convention on the Law Applicable to Contractual Obligations. 27 *Cornell International Law Journal* 173.
- HUANG, J. (2008) Direct Application of International Commercial Law in Chinese Courts: Intellectual Property, Trade, and International Transportation. *Manchester Journal of International Economic Law* 105.
- HYDE. (1959) The Act of State Doctrine and the Rule of Law. 53 *American Journal of International Law* 635.
- JACOBS (1939) The Enforcement of Foreign Decrees for Alimony. 6 *Law & Contemporary Problem* 250.
- JACQUES, M. (1950) The Concept of Sovereignty. 44 *The American Political Science Review* 343.
- JEMIELNAK, J. (2005) Legitimation Arguments in the Lex Mercatoria Cases. 18 *International Journal for the Semiotics of Law* 175.
- JOHNSON, E. and WORTHINGTON, C. (1982) Minimum Contacts Jurisdiction Under The Foreign Sovereign Immunities Act. 12 *The Georgia Journal of International and Comparative Law* 209.
- KAHALE, G. (1982) Characterizing Nationalizations for Purposes of the Foreign Sovereign Immunities Act and the Act of State Doctrine. 6 *Fordham International Law Journal* 391.
- KILLION, W. L. (2008) The Modern Myth of the Vulnerable Franchisee: The Case for a More Balanced View of the Franchisor-Franchisee Relationship. 28 (1) *Franchise Law Journal* 23.
- KINDALL, M. P. (1987) Immunity of States for Noncommercial Torts: A Comparative Analysis of the International Law Commission Draft. 75 (5) *California Law Review* 1849.
- KLOPPENBORG, J. S. and ASCOUGH, R. S. (2011) *Attica, Central Greece, Macedonia, Thrace*. New York: Walter de Gruyter.
- KOH, H. H. (2011) Foreign Official Immunity After Samantar: A United States Government Perspective. 44 (5) *Yale Law School Faculty Scholarship Series* 1142.

- KOLAWOLEOKE, E. and PHILIP, F. A. (2010) Jurisdictional Immunity of International Institutions in Nigeria: An Appraisal. 6 (1) *Nigerian Bar Journal* 68.
- KOWALSKI, et al. (2013) State-Owned Enterprises: Trade Effects and Policy Implications. *OECD Trade Policy Paper* No. 147.
- KRANE, S. (1980) Rehabilitation and Exoneration of the Act of State Doctrine. 12 *New York University Journal of International Law and Politics* 599.
- KU, J. G. (2016) The Significance of China's Views on the Jus Cogens Exception to Foreign Government Official Immunity. 26 *Duke Journal of Comparative and International Law* 503.
- LALIVE, J. F. (1953) L'immunité de Jurisdiction des États et des Organisations Internationales. 84 *Recueil des cours de l'Académie de droit international de La Haye* 209.
- LANDO, O. (1974) The EC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations: Introduction and Contractual Obligations. 38 *The Rabel Journal of Comparative and International Private Law* 6.
- LAUTERPACHT, H. (1951) The Problem of Jurisdictional Immunities of Foreign States. 28 *British Yearbook of International Law* 220.
- LOEWENSTEIN, A. (2001) The Foreign Sovereign Immunities Act and Corporate Subsidies of Agencies or Instrumentalities of Foreign States. 19 (2) *Berkeley Journal of International Law* 350.
- LORENZEN, E. G. (1921) Validity and Effects of Contracts in the Conflict of Laws. 30 *Yale Law Journal* 565.
- MAGINNIS, V. L. (2003) Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations. 28 *Brooklyn Journal of International Law* 989.
- MANN, F. (1943) The Sacrosanctity of Foreign Acts of State. 59 *Law Quarterly Rev* 42.
- _____ (1964) The Doctrine of Jurisdiction in International Law. 111 *Recueil des Cours de l'Académie de Droit International* 1.
- MERRY, S. E. (1988) Legal Pluralism. 22 (5) *Law and Society* 869.
- MORGENSTERN. (1953) Jurisdiction in Seizures Effected in Violation of International Law. 29 *British Yearbook of International Law* 265.
- MOVSESIAN, M. L. (2002) Two Cheers for Freedom of Contract. 23 *Cardozo Law Review* 1529.
- MICHAELS, R. (2007) The True Lex Mercatoria: Law Beyond the State. 14 *Indiana Journal of Global Legal Studies* 447.

- _____. (2014) The UNIDROIT Principles as Global Background Law. 19 *Uniform Law Review* 643.
- MILLER, A. S. (1971-1972) The Global Corporation and American Constitutionalism: Some Political Consequences of Economic Power. 6 *Journal of International Law and Economics* 235.
- MIN, Y. T. (2008) The Effective Reach of Choice of Law Agreements. 20 *Singapore Academy of Law Journal* 723.
- MURPHY, D. T. (1968) The American Doctrine of Sovereign Immunity: An Historical Analysis. 13 *Villanova Law Review* 583.
- MURPHY, M. T. (1989) United Nations Convention on Contracts for International Sales of Goods: Creating Uniformity in International Sales Law. 12 *Fordham International Law Journal* 727.
- NAGAN, W. and ROOT, J. (2013) The Emerging Restrictions on Sovereign Immunity: Peremptory Norms of International Law, the United Nations Charter, and the Application of Modern Communications Theory. 38 *University Florida Faculty Scholarship* 375.
- NICHOLSON, F. (1961) Sucharitkul: State Immunities and Trading Activities. 2 *Boston College Law Review* 459.
- O'HARA, E. A. and RIBSTEIN, L. E. (2000) From Politics to Efficiency of Choice of Law. 67 *The University of Chicago Law Review* 1151.
- PAUL, J. R. (1991) Comity in International Law. 32 *Harvard International Law Journal* 1.
- PERILLO, J. M. (1994) UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and A Review. 63 (2) *Fordham Law Review* 281.
- PFEIFFER, M. (2012) Choice of Law in International Family and Succession Law. 4 *The Lawyer Quarterly* 291.
- PREBBLE, J. (1973) Choice of Law to Determine the Validity and Effect of Contracts a Comparison of English and American Approaches to the Conflict of Laws. 58 *Cornell Law Review* 433.
- QI, D. (2008) State Immunity, China and Its Shifting Position. 7 *Chinese Journal of International Law* 307.
- REED, R. K. (1979) A Comparative Analysis of the British State Immunity Act of 1978. 3 *Boston College International and Comparative Law Review* 175.
- REESE, W. L. M. (1960) Contract and the Restatement of Conflict of Laws Second. 9 *International and Comparative Law Quarterly* 531.

- REEVES. (1960) Act of State Doctrine and the Rule of Law-A Reply. 54 *American Journal of International Law* 141.
- RIBSTEIN, L. E. (1993) Choosing Law by Contract. 18 *Journal of Corporation Law* 245.
- _____ and O'HARA, E. A. (2008) Corporations and the Market for Law. 2 *University of Illinois Law Review* 661.
- ROLLINGER, R. and ULF, C. (eds.) (2002) Commerce and Monetary Systems in the Ancient World Means of Transmission and Cultural Interaction, *Proceedings of the Fifth Annual Symposium of the Assyrian and Babylonian Intellectual Heritage Project*, Innsbruck, Austria.
- RYNGAERT, C. (2010) The Immunity of International Organizations before Domestic Courts: Recent Trends. 7 *International Organizations Law Review* 121.
- SAUNDERS, M. L. (1966) The Hague Conference on Private International Law. *Australian International Law*.
- SCHILLER, J. (2011) Legal pluralism – The Investor's View. *Acta Juridica* 272.
- SCHUZ, R. (2014) The Doctrine of Comity in the Age of Globalization: Between International Child Abduction and Cross-Border Insolvency. 40 (1) *Brooklyn Journal of International Law* 31.
- SIMMONDS, K. (1965) The Sabbatino Case and The Act of State Doctrine. 14 *International and Comparative Law Quarterly* 452.
- SINCLAIR, I. M. (1973) The European Convention on State Immunity. 22 (2) *The International Law and Comparative Law Quarterly* 254.
- _____ (1980) The Law of Sovereign Immunity: Recent Developments. 167 *Recueil Des Cours* 113.
- SINGAL. (2008) Preserving Power Without Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments. 59 *HASTINGS Law Journal* 943.
- SINGER, M. (1995) Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns. 36 *Virginia Journal of International Law* 53.
- SNYDER, F. (1999) Governing Economic Globalisation: Global Legal Pluralism and European Law. 5 *European Law Journal* 334.
- STEWART, D. P. (2005) The UN Convention on Jurisdictional Immunities of States and Their Property. 99 (1) *The American Journal of International Law* 194.
- SUTHERLAND, P. F. (1978) The Foreign Sovereign Immunity Question. 13 (4) *Western Australia Law Review* 409.

- TAMANAH, B. (2008) Understanding Legal Pluralism: Past to Present, Local to Global. 30 *Sidney Law Review* 375.
- TATE, J. B. (1952). Acting Legal Adviser, Department of State, letter to Philip B. Perlman, Acting Attorney General (May 19th, 1952). 26 *Department State Bulletin* 984.
- TORDO, S. et al. (2011) National Oil Companies and Oil Creations. *The World Bank Working Paper* No.218.
- VAN LOON, H. (2007) The Hague Conference on Private International Law. 2 *Hague Justice Journal* 3.
- WAI, R. (2002) Transnational Liftoff and Judicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization. 40 (2) *Columbia Journal of Transnational Law* 209.
- WU, C. (2014) One Country, Two State Immunity Doctrines: A Pluralistic Depiction of the Congo Case. 9 (2) *National Taiwan University Law Review* 197.
- WURM, P. (1976) Case Comment: The Phillipine Admiral. 3 (1) *Brooklyn Journal of International Law* 95.
- WHITE, N. D. and MACLEOD, S. (2008) EU Operations and Private Military Contractors: Issues of Corporate and Institutional Responsibility. 19 *European Journal of International Law* 965.
- WHITE, R. C. A. (1979) The State Immunity Act 1978. 42 *The Modern Law Review* 72.
- WHYTOCK, C. A. (2009) Domestic Courts and Global Governance. 84 (1) *Tulane Law Review* 67.
- WHYTOCK, C.A. (2014) Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments. 3 *Erasmus Law Review* 113.
- WRIGHT, S. L. (1987) Diplomatic Immunity: A Proposal for Amending the Vienna Convention to Deter Violent Criminal Acts. 5 *Boston University International Law Journal* 177.
- YEE, S. (2003) Foreign Sovereign Immunities, Acta Jure Imperii and Acta Jure Gestionis: A Recent Exposition from the Canadian Supreme Court. 2 (2) *Chinese Journal Of International Law*.
- YOUNG, A. I. (2012) Deconstructing International Organization Immunity. 44 *Georgetown Journal of International Law* 311.
- ZANDER, M. (1959) The Act of State Doctrine. 53 (4) *American Journal of International Law* 826.
- ZHANG, M. (2006) Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law. 20 *Emory International Law Review* 511.

ZHU, L. (2007) State Immunity from Measures of Constraints for the Property of Foreign Central Banks: The Chinese Perspective. 6 *Chinese Journal of International Law* 67.

3. The United Nations Documents

Report of the International Commission on the work of its forty-third session, A/46/10, Suppl.10 (1991).

International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (1994).

Memorandum by Secretariat, International Law Commission, U.N. GAOR 6th Sess., U.N. Doc. A/CN.4/596 (2008).

UNCITRAL (2013) *Basic Facts about the United Nations Commission on International Trade Law*. Vienna: UNCITRAL Secretariat.

UNCTAD. (2014) *Trade and Development Report 2014*. New York and Geneva: United Nations.

4. Miscellaneous

Aide Memoire from Wu Xuequian (1983) Chinese Minister of Foreign Affairs, to George Shultz, U.S. Secretary of State (February 10th, 1983), reprinted in 22 *International Legal Materials* 81.

ANDERSON, S., and CAVANAGH, J. (2002) *Of the World's 100 Largest Economic Entities, 51 are now Corporations and 49 are Countries*. Institute for Policy Studies. [Online] Available from: <http://www.corporations.org/system/top100.html> [Accessed: March 5th, 2016].

BAUM, L. Legal Pluralism and the European Union. *Comparative European Legal History*. [Online] Available from: [https://www.jur.lu.se/WEB.nsf/\(MenuItemByDocId\)/ID77DFD011813BD596C1257D860028A766/\\$FILE/Baum%20Liam.pdf](https://www.jur.lu.se/WEB.nsf/(MenuItemByDocId)/ID77DFD011813BD596C1257D860028A766/$FILE/Baum%20Liam.pdf) [Accessed: June 5th, 2015].

BOLTENKO, O. (2015) Enforcement of Treaty Awards against Russia in Asia: A Safe Heaven for Russian Assets. [Online] Available from: <http://kluwerarbitrationblog.com/2015/09/03/enforcement-of-treaty-awards-against-russia-in-asia-a-safe-haven-for-russian-assets/> [Accessed: July 5th, 2016].

CARTWRIGHT, Mark. *Trade in Ancient Greece*. [Online] Available from: <http://www.ancient.eu/article/115/> [Accessed: October 27th, 2015].

CITIC (2014) *History*. [Online] Available from: <http://www.citic.com/AboutUs/History> [Accessed: March 15th, 2016].

Committee of Legal Advisers on Public International Law (CAHDI). (2011) *State of Signatures and Ratifications of the UN Convention on Jurisdictional Immunities of*

- States and Their Property and the European Convention on State Immunity*. [Online] Available from: http://www.coe.int/en/web/cahdi/meeting-documents?p_p_id=101&p_p_lifecycle=0&p_p_state=maximized&p_p_mode=view&_101_struts_action=%2Fasset_publisher%2Fview_content&_101_type=content&_101_assetEntryId=2066048 [Accessed: November 28th, 2015].
- Consolidated CETA Text (2014) [Online] Available from: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf [Accessed: March 9th, 2016].
- Council of Europe. (2002) *Fundamental Principles on the Status of Non-governmental organizations in Europe and explanatory memorandum*. [Online] Available from: <http://www.coe.int/t/dghl/standardsetting/cdcj/ONG/Fundamental%20Principles%20E.pdf> [Accessed: February 15th, 2016].
- Council of Europe. (2016) *Chart of Signatures and Ratifications of Treaty European Convention on State Immunity*. [Online] Available from: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/074/signatures> [November 20th, 2015].
- CROSS, E. *Sovereign Immunity in Commercial Transaction*. [Online] Available from: <http://www.asahi.com/english/Haerald-asahi/TKY200607210638.html> [February 5th, 2016].
- ELKINSON, J. (2014). *The New York Convention*. [Online] Available from: https://www.conyersdill.com/publication-files/2014_10_Article_The_New_York_Convention.pdf [August 5th, 2015].
- European Commission. (2015) *Report of the Tenth Round of Negotiations for the Transatlantic Trade and Investment Partnership*. Brussels. [Online] Available from: http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153667.pdf [Accessed: February 26th, 2016].
- FISCHER, P. (2012) *International Organizations*. Bratislava. [Online] Available from: <http://paneuro.uni.com/files/sk/fp/ulohy-studentov/2rocnikbc/io-skript.1.10.2012.new-version.pdf>. 18-23. [Accessed: March 7th, 2016].
- FOAKES, J. and WILMSHURST, E. *State Immunity: The United Nations and Its Effect*. Chatham House. [Online] Available from: <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bpstateimmunity.pdf> (January 16th, 2016).
- Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People's Republic of China (2004) [Online] Available from: <http://www.aseansec.org/16646.htm> [Accessed: March 8th, 2016].
- HEISE, J. *History of the Bronze Age in Mesopotamia*. [Online] Available from: http://www.sron.nl/~jheise/akkadian/bronze_age.html [Accessed: October 13th, 2015].

- HOGAN, C. M. (2011) *Economy of Ancient Greece*. [Online] Available from: <http://www.eoearth.org/view/article/151946/> [Accessed: October 25th, 2015].
- MARTIN, T. R. *An Overview of Classical Greek History from Mycenae to Alexander*. [Online] Available from: <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0009%3Achapter%3D4> [Accessed: October 26th, 2015].
- KASAK, E. and VEEDE, R. (2001) Understanding Planets in Ancient Mesopotamia. 16 *Electronic Journal of Folklore*. [Online] Available from: <http://haldjas.folklore.ee/folklore> [Accessed: October 10th, 2015].
- KHAN, U. (2015) *The Transatlantic Trade and Investment Partnership: International Trade Law, Health Systems and Public Health*. [Online] Available from: http://www.epha.org/IMG/pdf/LSE_study-TTIP_International_Trade_Law_Health_Systems_and_Public_Health_website.pdf [Accessed: March 1st, 2016]
- Letter of the Supreme Economic Court of Ukraine, On Some Issues in the Application of the Civil and Commercial Code of Ukraine*, Doc 01-8/211 (7 April 2008). para. 2. [Online] Available from: http://pravo.ligazakon.ua/document/view/SD080085?edition=2008_04_07 [Accessed: September 15th, 2015].
- McNAMARA, T. (2006) A Primer on Foreign Sovereign Immunity, *Paper* presented in Union Internationale des Avocats, Winter Seminar on International Civil Litigation and the United States of America. [Online] Available from: <http://www.dgslaw.com/images/materials/McNamara1.pdf> [Accessed: March 2nd, 2015].
- MISTELIS, L. et al. (2010) *The 2010 International Arbitration Survey: Choices in International Arbitration*. The School of International Arbitration, University of London. [Online] Available from: <http://www.arbitration.qmul.ac.uk/docs/123290.pdf> [Accessed: May 20th, 2016].
- Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States of the Other Part, Revised Version, Ougadougou, 22 June 2010.
- PIROG, R. (2007) The Role of National Oil Companies in the International Oil Market. *US Congressional Research Service*. [Online] Available from: <http://fas.org/sgp/crs/misc/RL34137.pdf> [Accessed: March 1st, 2015].
- REINISCH, A. *Convention on the Privileges and Immunities of the United Nations and Convention on the Privileges and Immunities of the Specialized Agencies*. United Nations Audiovisual Library of International Law. [Online] Available from: http://legal.un.org/avl/pdf/ha/cpiun-cpisa/cpiun-cpisa_e.pdf [Accessed: November 24th, 2015].

- ROUDIK, P. (2015) *Russian Federation: New Law Allows Seizure of Foreign Governments' Property*. [Online] Available from: <http://www.loc.gov/law/foreign-news/article/russian-federation-new-law-allows-seizure-of-foreign-governments-property/> [Accessed: April 1st, 2016].
- RYNGAERT, C. (2014) *The Concept of Jurisdiction in International Law*. [Online] Available from: <https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf> [Accessed: June 10th, 2015].
- SCHWENZER, I. and HACHEM, P. (2011) *The CISG – A Story of Worldwide Success*. [Online] Available from: https://ius.unibas.ch/uploads/publics/9587/20110913164502_4e6f6c6e5b746.pdf [July 27th, 2015].
- TOLEIKYTĖ, N. *The Concept of State Immunity and The Main Challenges*. [Online] Available from: http://www.tf.vu.lt/dokumentai/Admin/Doktorant%C5%B3_konferencija/Toleikyte.pdf [Accessed: March 3rd, 2015].
- Trade and Investment Framework Arrangement between the United States of America and the Association of Southeast Asian Nations (2006) [Online] Available from: https://ustr.gov/sites/default/files/uploads/agreements/tifa/asset_upload_file932_9760.pdf [Accessed: March 8th, 2016].
- TEUBNER, G. *Global Bukowina: Legal Pluralism in the World Society*. [Online] Available from: https://www.jura.uni-frankfurt.de/42852872/Bukowina_english.pdf [July 2nd, 2015].
- UNCITRAL (1980) *Explanatory Note of United Nations Convention on Contracts for the International Sale of Goods*. [Online] Available from: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html [Accessed: July 23rd, 2015].
- UNCTAD. (2011) *World Investment Report 2011: Non-Equity Modes of International Production and Development*. Geneva. pp.30-35. [Online] Available from: http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf [Accessed: January 2nd, 2017].
- VAN DEN BERG, A.J. *The New York Convention of 1958: An Overview*. [Online] Available from: http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf [August 29th, 2015].
- WIESINGER, M. (2006) *State Immunity from Enforcement Measures*. University of Vienna. [Online] Available from: http://intl.wu.wi.ac.at/fileadmin/user_upload/int_beziehungen/Internetpubl/wiesinger.pdf [Accessed: March 2nd, 2015].
- WILLEMS, M. (2014) *English Law*. [Online] <https://www.andrewskurth.com/insights-1105.html> [Accessed: June 15th, 2016].

