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SCOPE AND EFFECT OF THE IMMUNITY PRINCIPLES  
IN INTERNATIONAL PRIVATE AND BUSINESS LAW  

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Dodik Setiawan Nur Heriyanto  
3rd year PhD student  

Dr. habil. Tamás Fézer, PhD  
Supervisor  

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<td>ASEAN</td>
<td>Association of South East Asian</td>
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<td>Bilateral Investment Treaty</td>
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CHAPTER I
INTRODUCTION

1.1. Background of the Study

In today's modern era, business activities are growing rapidly. 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), Petrobas (Brazil), Aramco (Saudi Arabia), Petróleos de Venezuela (Venezuela), and other oil companies owned by states control major forces in the world oil market.² Not

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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


accountability for state’s commercial behave. 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)\(^{18}\).


\(^{12}\) Ibid.


\(^{15}\) Philippine Embassy Case, Germany, Federal Constitutional Court, 13 December 1977, 46 BVerfG, 342; 65 ILR 146. p.164.


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’. 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 immunity.

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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 business 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. 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 contribute 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 century with the basis from the development of the principle of state equality and sovereignty. 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. 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 referring 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.

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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. Those sources include treaty practice, projects for codification, and certain municipal laws. 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. 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. 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.

   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

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24 Ibid.
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. 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.

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Diagram 1.1. Methodology of Research

Immunity Principle

- Historical Scope
  - Period of Absolute Immunity
  - Period of Functional Immunity
  - Period of restrictive immunity

- International Private and Business Law Practices

- Regulations Scope
  - National regulations
  - International treaties

- Modern and Universal Practices
  - Court decisions
  - Arbitration awards

- Case-Based Approach

- Normative Approach

- Doctrinal Methodology
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.


\(^{30}\) UN Convention on Jurisdictional Immunities, art.2(1)(c).


\(^{32}\) 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.

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). 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.

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). 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. 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).

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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 command and effective control of their military, economic, politic, education, and anything to achieve their common interest.

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. The idea of the distinctive right of the sovereign has been left 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 struck/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. Hernandes 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.”

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

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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.


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

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

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

The case of Banco National de Cuba v. Sabbatino\textsuperscript{52} was the interesting case in which the United States federal courts honors the act of state doctrine.\textsuperscript{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.\textsuperscript{54} The Court, then, contrary to the views of respected international lawyers\textsuperscript{55}, 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 referes to particular aspects of the substance, such as rights, liberties, and powers of a state.\textsuperscript{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.\textsuperscript{57}

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

\textsuperscript{50} Texas Trading and Milling Corporation v. Federal Republic of Nigeria, 647 F. 2d 300 (1982).
\textsuperscript{54} Banco Nacional de Cuba v. Sabbatino, loc.cit.
\textsuperscript{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.  

Maritain (1950) challenged the concept of sovereignty not in the judicial notions but in the philosophical notions. Generally, the concept of sovereignty conceives as absolute independence, supreme power to the body politic or the people, and power without accountability. Maritain 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. 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.

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. Sovereignty not only serves as an enabling concept with respect to the exercise of jurisdiction, but also as a

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60 Ibid. pp.355-356.
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{67} Currently, states have exercised their enforcement jurisdiction abroad without any consent from the host state. For example: Adolf Eichmann was arrested

\textsuperscript{64} Ivbid.
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. 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.

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. 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. 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,
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.”

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. However, Hay (2000) has different argument that reciprocity and comity are different concepts explaining that reciprocity emphasizes local concerns that may disfavor recognition of foreign judgments.

As state living in the international community, their interaction shall upholds the doctrine of international comity. As we see in the United States nowadays, its domestic courts have long served as the basis of its private international law (conflict of laws) and the enforcement of foreign judgments. 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.” Yet, until now, as faced by many countries domestic court, there has been no consistent meaning, parameter, and concept of comity. Despite the ubiquitous invocation of the doctrine of comity, its meaning is surprisingly elusive.

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.”

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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.\(^8\)

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.\(^8\)

Legal pluralism generally defined as a situation in which two or more legal systems interact in the same social field.\(^8\) 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,


hierarchically ranked, and essentially similar in rules and procedure.\textsuperscript{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 ont he imagination of lawyers and social scientists that its picture of the legal world has been able successfully to maskerade 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 actualt looks the way such a conception requires it to look.”\textsuperscript{84}

Based on Malinowski opinion, law should be meaned “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”.\textsuperscript{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.\textsuperscript{86} Thus, law is as plural as social life itself, of which it represents the rules which are “too practival 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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{89} This working definition do not clarify a minimum of ethical value as necessary

\begin{footnotesize}
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\item \textsuperscript{84} MERRY, S. E. (1988) Legal Pluralism. 22 (5) Law and Society 869. p. 870.
\item \textsuperscript{89} GRIFFITHS, J. \textit{loc.cit.}
\end{itemize}
\end{footnotesize}
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 addresses 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 views that 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

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.
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 mercantoria and international commercial arbitration, and the complex and conflicting relation between religious normative systems and the pluralistic national and international normative systems. 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. 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.”

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.


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. This area of law has become a 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. 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.

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. 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

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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.\textsuperscript{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.\textsuperscript{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 internazionale 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 element\textsuperscript{106}, 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.\textsuperscript{107}

Conflict of laws is generally understood as having three branches: jurisdiction, choice of law, and recognition and enforcement of judgments.\textsuperscript{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


\textsuperscript{105} Ibid.


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.\textsuperscript{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.\textsuperscript{110} Second purpose of private international law is to harmonize court decisions around the world. Von Savigny (1880)\textsuperscript{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.\textsuperscript{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

\begin{thebibliography}{9}
  \bibitem{112} See KIESTRA, L. R. op.cit. p.16.
\end{thebibliography}
signature of the agreement. In this matter, international private law plays to guide the judges in finding the applicable law\textsuperscript{113} to solve the dispute whether they will use the law of state C (\textit{lex loci contractus} - the law of the country where the contract was signed) or the law of the state B (\textit{lex loci solutionis} – the law of the country where relevant performance occurs and \textit{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.\textsuperscript{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.\textsuperscript{115}


\textsuperscript{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.

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.\textsuperscript{116}

The existence of international treaties\textsuperscript{117} 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.\textsuperscript{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.

\textsuperscript{116} CHEATHAM, E. E. loc.cit.
\textsuperscript{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 \textit{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.” \textit{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.\footnote{UNCITRAL (2013) Basic Facts about the United Nations Commission on International Trade Law. Vienna: UNCITRAL Secretariat. p.1.}

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.\footnote{General Assembly Resolution 2205 (XXI), section II, para. 8.} 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.\footnote{The preambule 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’], Preambule. 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.} By all counts, the CISG represents the international community’s most ambitious effort to promote efficiency and sustained growth of international trade.\footnote{BAILEY, J. E. (1999) Facing the Truth: Seeing the Convention on Contracts for the International Sales of Good’s as an Obstacle to a Uniform Law of International Sales. 32 (2) Cornell International Law Journal 273. p.274.} 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
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.

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. CISG has now gained worldwide acceptance. 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.

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124 Ibid.


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.\textsuperscript{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.”\textsuperscript{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).\textsuperscript{129}

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.\(^\text{130}\)

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.\(^\text{131}\)

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.\(^\text{132}\)

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.”\(^\text{133}\) UNIDROIT has over the years prepared over seventy studies and drafts.

\(^{130}\) Ibid.


\(^{133}\) 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:

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;

One of the well-known achievements of UNIDROIT in current years is the establishment of the UNIDROIT Principles of International Commercial Contracts (PICC).\textsuperscript{134} PICC has also recognized as cornerstones in the efforts to modernize and harmonize international contract law.\textsuperscript{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 \textit{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.\textsuperscript{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

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


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

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\(^{143}\) 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. 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. 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.

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.

Friedrich Carl von Savigny proposed the true community of law 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)

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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.


have to expect the same decision, whether the judgment be pronounced in this state or in that.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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.’\textsuperscript{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’.\textsuperscript{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’;\textsuperscript{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’,\textsuperscript{155} rather than justice in the

\begin{thebibliography}{99}
  \bibitem{149} Ibid. p.100.
  \bibitem{152} DE BOER, T. M. \textit{op.cit.} p.195. GUTHRIE, W. \textit{op.cit.} pp.92-93.
  \bibitem{153} Ibid.
  \bibitem{154} Ibid.
\end{thebibliography}
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.\textsuperscript{156} Attempts to unified private international law firstly established under the patronage of The Hague Conference on Private international Law in 1893.\textsuperscript{157} Between 1893 and 1906, at different sessions, the conclusion of six Conventions was achieved.\textsuperscript{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).\textsuperscript{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.\textsuperscript{160}


\textsuperscript{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.

\textsuperscript{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 ont he 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.

\textsuperscript{159} Regulation (EC) No. 44/2201 (Brussels I Regulation) and No. 1348/2000.

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 because the doctrine had existed as old as the history of diplomatic relations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{164}

\textsuperscript{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.

\textsuperscript{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.


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 ivory\(^{169}\), 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 merchant\(^{173}\) 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


\(^{169}\) 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.


\(^{172}\) 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 Archaeology in Iraq. p.27

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 priviledge 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.

177 Ibid.
178 McINTOSH, J. loc.cit.
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’.

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. 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.

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.

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

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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.


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


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.\textsuperscript{192}

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

Most traders in ancient Greece were xenoi rather than metics but not all of them having status as proxenos.\textsuperscript{195} Proxenos is citizen appointed in his own \textit{polis} to look after affairs of another \textit{polis} or citizen representing one Greek community in another \textit{polis}.\textsuperscript{196} Proxenos has special privilege that usually called as proxenia.\textsuperscript{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

\begin{flushright}
\textsuperscript{194} Ibid.
\textsuperscript{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: Proxenoi or Proxeni, "instead of a foreigner") or Proxeinos (πρόξεινος). The proxeny decrees, which amount to letters of patent and resolutions of appreciation were issued by one state to a citizen of another for service as prokexeno, a kind of honorary consul looking after the interests of the other state’s citizens. A cliché phrase is energeutes (benefactor) and proxenos (πρόξεινος τε ετι και ευργέτης). 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.
\textsuperscript{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 import 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.”

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), asylia (freedom from seizure of one’s goods), and epimeleia (an injunction to the officials of the state to watch over the proxenos’ interests). Having status as proxenos implied admission to a category of foreigners with

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200 REED, C. M. op.cit. p.xi.
privileged status, although the concrete privileges were ill defined.\textsuperscript{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, furth 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.\textsuperscript{203}

Occasionally, proxenos were awarded Athenians citizenship but seldom awarded in the fifth century.\textsuperscript{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 he 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 Athen’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

\textsuperscript{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 or moneys will be inviolable.

\textsuperscript{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 nor 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) \textit{Benefaction and Rewards in the Ancient Greek City}. Cambridge: Cambridge University Press. p.110.

\textsuperscript{204} Ibid.
proxenia would have emphasised his duties to the Athenians when in his natal state."

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”. An inscription quoted by Kloppenborg and Ascough (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.”

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

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 organization\(^{210}\), 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](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 settled by the courts of a Member State party

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.”

Different with the immunity and privileges of the United Nations officials, experts on missions 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. They also protected by functionally limited privileges and immunities as regulated by the General Convention. 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.

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

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


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.

necessary for the diplomat to carry out his official functions.\textsuperscript{228} The approach is justified by arguing that diplomats could not fulfill their roles without certain privileges and immunities.\textsuperscript{229} Proponents of this theory suggest that it is dynamic and contains safeguards preventing the needless expansion of privileges and immunities.\textsuperscript{230} The idea of functional necessity has been also acknowledged in the Vienna Convention on Diplomatic Relations 1961\textsuperscript{231}, an international treaty governing the diplomatic relations between states.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textsuperscript{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

\begin{itemize}
\item \textsuperscript{228} McCLANAHAN, G. V. \textit{loc.cit.}
\item \textsuperscript{231} \textit{Ibid.} p.1521. GROFF, J. D. \textit{op.cit.} pp.216-217. WRIGHT, S. L. \textit{op.cit.} pp. 202-203.
\item 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.
\item \textsuperscript{233} FARHANGI, L. S. \textit{op.cit.} p.1522.
\item \textsuperscript{235} The Schooner Exchange v. McFaddon, 11 U.S. 7 (Cranch) 116 (1812).
\end{itemize}
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. . . .”

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.

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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.\(^\text{239}\)

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.\(^\text{240}\) 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.\(^\text{241}\) 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.\(^\text{242}\) 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.\(^\text{243}\)

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.\(^\text{244}\) 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.\(^\text{245}\) 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.\textsuperscript{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.\textsuperscript{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...”\textsuperscript{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 he 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.\textsuperscript{249}

\textsuperscript{246} Ibid. pp.145-146.
\textsuperscript{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 Marchall stated consistently that: “When a government becomes a partner in any trading company, it devets 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.
5.1. International Treaties

During the globalization on international market, the need to apply restrictive immunity has become a common approach that will not attach immunity for commercial purpose. This condition has proven in certain multinational treaties 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. 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. The Additional Protocol to the European Convention, which establishes a European Tribunal of State Immunity to determine disputes under the Convention.

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

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

The European Convention on State Immunity regulates important solutions to solve the common problems in the matter of sovereign immunity;\textsuperscript{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 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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{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. \textit{See HERNDL, K.} (1962) \textit{Zur Frage der Staatenimmunität} (translation: observation to the question on state immunity), \textit{Juristische Blätter}, p.15.

\textsuperscript{256} \textit{Ibid.}

\textsuperscript{257} \textit{Ibid.} p.10.
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.

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\(^{258}\) 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. 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. 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.

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.

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

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

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.

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 it is part of the State would not enjoy immunity in respect of its commercial activities.

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273 Ibid.

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. 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.

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.” 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.” 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.”

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

277 UN Convention on Jurisdictional Immunities, Preamble.
279 UN Convention on Jurisdictional Immunities, art.5.
specific proceeding. 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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{287} A state intervening to present a claim in a proceeding before a

\textsuperscript{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.”

\textsuperscript{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.”

\textsuperscript{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.”

\textsuperscript{283} Ibid.

\textsuperscript{284} Ibid. art.8 par.(2).

\textsuperscript{285} Ibid. art.8 par.(3).

\textsuperscript{286} Ibid. art.8 par.(4).

\textsuperscript{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. 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.

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.” 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. 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.

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.

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

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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.”

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.

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 prejudge 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.”

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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 States[^297], 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 commission must have occurred in the territory of the forum state and the actor of the act or commission 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 torturous 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 torts 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.

(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 became universal in

\(^{301}\) UN Convention on Jurisdictional Immunities. art.13.

\(^{302}\) *Ibid.* art.15 (1).

\(^{303}\) *Ibid.* art.15 (2).

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 impotance 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

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

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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 (\textit{acta iure imperii}) of foreign states, but not for their commercial acts (\textit{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


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


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.”

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.”

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

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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 contact 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. 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.

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. 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. 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. 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

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

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.”

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.

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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.” 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.” 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. 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.

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.

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.
335 Ibid.
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 1978\(^{341}\), 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


\(^{340}\) 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

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\(^{344}\) 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).


\(^{346}\) 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 *Rahimtoo v. Nizam of Hyderabad*, 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.\(^\text{347}\)

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.”\(^\text{348}\)

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 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*).\(^\text{349}\)

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.\(^\text{350}\)

The provisions of Chapter II apply to proceedings instituted against a Contracting State in accordance with the present article.\(^\text{351}\) 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.”


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.”
352 Ibid. section 14 (2).
353 Ibid.
355 Ibid. section 2 (1).
356 Ibid. section 2 (2).
b. Commercial transactions and contracts to be perform in the United Kingdom, although the parties can agree in writing that this exception does not apply. This 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”. 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. 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 bar-racks. 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.”

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,

361 Ibid. section 5.
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

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

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\(^{368}\) *The Philippine Admiral* (1976) 2 W.L.R. 214.


\(^{370}\) UK SIA 1978. Section 11.

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

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 immunity

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 transactions

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

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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 employment\(^ {375}\)

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 property\(^ {376}\)

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 property\(^ {377}\)

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 bodies\(^{379}\)

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. Arbitration\(^{380}\)

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.


i. **Admiralty proceedings**\(^{381}\)

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 duties**\(^{382}\)

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

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\(^{381}\) *Ibid.* section 11.

\(^{382}\) *Ibid.* section 12.

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 by paid out from the National or Provincial Revenue Fund. 386

4. Australian Foreign States Immunities Act


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. The FSI Act provides a general immunity for foreign states from the jurisdiction of the courts of Australia in civil proceedings, with a limited number of defined exceptions. The exceptions are as stated as follows:

a. submission by foreign states

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

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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 states

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 exception 393 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 an- other’s obligation [but] ... does not embrace a promise to prevent a creditor exercising rights under a security’.

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394 *Victoria Aircraft Leasing Ltd v United States*, op.cit. p.646.
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. Each of the promises alleged to have been made by Nauru and each of the actions alleged to have been performed in reliance on representa- tions 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’. 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.

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.

c. contracts of employment concerning Australia

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.

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396 Ibid.
397 Ibid. p.646.
398 Ibid.
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 property\(^\text{401}\)
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 marks\(^\text{402}\)
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 corporate\(^\text{403}\)
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 state\(^\text{404}\)

\(^{401}\) 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.\textsuperscript{405} With this regard, sovereignty and non-interference in the domestic affairs of states to be China’s core principles of international law.\textsuperscript{406} In supporting this legal fact, Xue Hanqin (2011) stated that:

\begin{itemize}
  \item 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) \textit{Complete International Law: Text, Cases, and Materials}. Oxford: Oxford University Press. p.275.

  \item 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 \textit{Collected Courses of The Hague Academy of International Law} 41. p.90.
\end{itemize}
“(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.”

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. 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.”

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. 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

control. 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.

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. 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.

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 exclusively to the Central People’s Government of the People’s Republic of China. In view of this legal gap,

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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

\(^{416}\) WU, C. loc.cit.
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. 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’.”

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. 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) HKC 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;

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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 employment\textsuperscript{425}

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 property\textsuperscript{426}

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 property\textsuperscript{427}

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 \textit{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

\textsuperscript{425} Ibid. section 6.
\textsuperscript{426} Ibid. section 7.
\textsuperscript{427} Ibid. section 8.
interest, if the claim is neither admitted nor supported by *prima facie* evidence.

f. Patents, trade marks, etc.  
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.  
A 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. Arbitrations  
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 purposes  
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

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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 duties

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.

\[^{432}\text{Ibid. section 13.}\]
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

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.\textsuperscript{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 sovereignty\textsuperscript{437} 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 1990\textsuperscript{438} and sometime more technical like Mutual Legal Assistance agreement between Canada and Mexico in 1977\textsuperscript{439}.

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: the progressive activities of states in today’s era have also given rise to


\textsuperscript{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 state\textsuperscript{441} 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.\textsuperscript{442} Intense contacts between state and non-state actor after World War II indicates Westphalian State Model\textsuperscript{443} 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.\textsuperscript{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


\textsuperscript{442} UN Charter 1945. art. 1.


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.

Non-state actors are in fact subject of international law and they possess certain rights and obligations. Their role and status in international legal order is perspective-specific. 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. This practices would tend to create multiplicity models of personality because each non-state actors are non-identical in their nature.

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 this 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. They are

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not part of political parties." They are subject to the national law where they reside. 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 (Amnesty 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.

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. 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. 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

\[\text{\textsuperscript{450}}\] Ibid.
\[\text{\textsuperscript{451}}\] Ibid, p.18.
\[\text{\textsuperscript{453}}\] 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.
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.”

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. 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.

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 states.

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

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455 Ibid.
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 2000\(^ {463}\), ASEAN-the United States Trade and Investment Arrangement signed in 2006\(^ {464}\), and EU-Canada Comprehensive Economic and Trade Agreement in 2014\(^ {465}\).

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

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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.\footnote{MURPHY, S. D. (2012) \textit{Principles of International Law}. Thomson/West. p.302.} Immunity is granted to state officials and sovereign entities in order to respect and maintain mutual recognition between states. In line with the maxim, \textit{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.\footnote{SINCLAIR, I. M. (1980) \textit{The Law of Sovereign Immunity: Recent Developments}. 167 \textit{Recueil Des Cours} 113. p.198.} 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.\footnote{National Audit Office of Great Britain. (2010) \textit{The Sale of the Government’s Interest in British Energy}. The Stationery Office. p.22.} CITIC Group Corporation that has 44 subsidiaries company in China, Hong Kong, the United States, Canada, Australia, and New Zealand is 100%
owned by People’s Republic of China. Kowalski, et. al. (2013) found that 21 out of 38 countries have a Country State Owned Company’s Share (CSS) higher than zero. 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 (%)](image)

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. Through the Foreign Sovereign Act (FSIA) enacted in 1976, the United State courts possible to apply restrictive

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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. 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.

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.

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 States, such commercial act has substantial contact with the United States, and it has produced a direct or an indirect effect in the United States. 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. 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. By selling its tickets to the two Nazarians in New York, Air France created a duty of reasonable care in providing safe passage.

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473 Ibid. section 1605 (a) (2).
474 Ibid. section 1603 (a) and (b).
476 US FSIA. section 1603 (e).
477 Ibid.
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.\textsuperscript{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 instrumentalities\textsuperscript{482} 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.\textsuperscript{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.\textsuperscript{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 exists\textsuperscript{485}, the Nigerian Court progressively shows their opposed to the blanket immunity for dispute arose from commercial transaction.\textsuperscript{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


\textsuperscript{482} See US FSIA. section 1603 (a) and (b).

\textsuperscript{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) \textit{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].


that China’s position to state and its property in foreign court have absolute immunity and will never applied the restrictive immunity theory.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{490}

It must be noted that there has no consistent practice in confronting immunity blanket for international organizations.\textsuperscript{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.\textsuperscript{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


\textsuperscript{491} BROWNIE, I. \textit{op.cit.} p.680.
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. By this position, international organization possibly enjoys absolute immunity from jurisdiction even though recent trend on customary international law is applying restrictive immunity.

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.” 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. 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. This ruling also upheld in the later cases such as 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. 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. In this case, the Kenyan Court granted the defendant absolute immunity from legal process under the Privileges and Immunity Act.

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497 Ibid.
498 Broadbent v. OAS. 628 F2d. 27 (DC Cir. 1980). pp.30-35.
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.\textsuperscript{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

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 contract 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. Preselecting of applicable law essentially deflates uncertainty and unpredictability which drive various disadvantages unfavorable to business relationship. It also enables the parties to escape from unsatisfactory and inefficient 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. 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

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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.\textsuperscript{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.\textsuperscript{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 territory\textsuperscript{510} because national boundaries become less important\textsuperscript{511}.

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:\textsuperscript{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


\textsuperscript{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. In practice, the United States Courts have quite generally enforced contractual choice of law as close to the United Kingdom practice particularly in the leading case Vita Food Products Inc. v. Usus 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.

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.

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. 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. 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.

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516 Vita Food Products Inc. v. Usus Shipping Co. Court. (1939) A.C. 277.
517 The Restatement (Second) of Conflict of Laws (1977). section 187. comment g.
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 case\textsuperscript{521} and requires an express choice to be enforced even
if the chosen law has no connection with the contract.\textsuperscript{522} The rationale basis for the
freedom to choose an unconnected law is commercial convenience\textsuperscript{523} and well
preserved application of economic doctrine \textit{laissez faire}\textsuperscript{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 performance\textsuperscript{525} or otherwise determined by
article 4 (1) Rome I Regulation\textsuperscript{526}.

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 16\textsuperscript{th} century\textsuperscript{527}
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’.

\textsuperscript{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.
\textsuperscript{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.”
\textsuperscript{524} See CUTLER, A. C. (2003) Private Power and Global Authority: Transnational Merchant Law in
\textsuperscript{525} Rome I Regulation 2008. art. 4. par. 2-3.
\textsuperscript{526} \textit{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 \textit{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 (e), 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.”
\textsuperscript{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
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’. Moreover, Cook stated that party autonomy permits parties to do a ‘legislative act’. 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’ 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 draftsman which relieves courts of problems of resolving ambiguities… A tendency toward certainty in commercial transactions should be encouraged by the Courts.”

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. 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

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immunity as legal protection for its representative, assets, and activities. However, this study supports 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 two different acts of state. According to the restrictive immunity, private acts of state (\textit{acta jure gestionis}) are no longer immune. Only public acts of state (\textit{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 systems have developed from two primary sources: codified law (including constitutional law, statutory law, 

\(^{533}\) Lauterpacht, H. (1951) \textit{op.cit.} pp.227-228.  
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.\textsuperscript{536} Although in some circumstances the precedent-following has \textit{per incuriam} limit\textsuperscript{537}, 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…”\textsuperscript{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’\textsuperscript{539}, but in contrast English Law clearly deny the adoption of good faith principle into its contract law\textsuperscript{540}. With strong ground on precedent, such differences motivate the court

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\textsuperscript{537} It means that later courts were not bound by earlier decisions that were wrongly decided.
\textsuperscript{539} Uniform Commercial Code (1990). Section 1-(203)
\end{flushleft}
to give certain measures and legal reasoning 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 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.\(^{544}\)


\(^{543}\) US FSIA. section 1602.

\(^{544}\) *Id.* section 1605 (a) (2).
In National American Corp v. Federal Republic of Nigeria\textsuperscript{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\textsuperscript{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.\textsuperscript{547} Prior to the Sovereign Immunity Act 1978, restrictive approach firstly applied in the landmark case Trendtext Trading Corp v. Central Bank of Nigeria\textsuperscript{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

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\textsuperscript{546} Hanil Bank v. PT. Bank Negara Indonesia. 148 F.3d 127 (2d Cir. 1998).
\textsuperscript{547} UK SIA 1978. section 3.
\textsuperscript{548} Trendtext Trading Corp v. Central Bank of Nigeria. 1 Q. B. 529 (1977).
\end{flushright}
development of international as Lord Denning stated his leading argument that:

“The 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.”

Until now, the English courts maintain to apply restrictive immunity. Recent case in *NML Capital Limited v. Republic Argentina* 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). 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. 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.

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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.
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

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{560}

\textsuperscript{557} SINCLAIR, I. M. (1973) \textit{loc.cit.}


\textsuperscript{560} BOLTENKO, O. (2015), \textit{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. 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. 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. 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 1997. 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. McFadden, 11 U.S. 116. pp.137-139.
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.\textsuperscript{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:

\begin{quote}
“...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.”\textsuperscript{566}
\end{quote}

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.\textsuperscript{567}

\textsuperscript{565} FG Hemisphere Associates LLC v. Democratic Republic of the Congo, loc.cit.
\textsuperscript{566} Ibid. at 44.
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.\textsuperscript{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.\textsuperscript{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’.\textsuperscript{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.”\textsuperscript{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”.\textsuperscript{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.”\textsuperscript{573} Not only in the Common Law system, French Cour de Cassation in the SOABI v. Senegal case stated that “whereas... a


\textsuperscript{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.

\textsuperscript{570} US FSIA. section 1605 (a) (1).


foreign state has submitted to arbitration, in doing so, has accepted that the award may be granted exequatur…”  

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 20\textsuperscript{th} 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 20\textsuperscript{th} 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.
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