

**A Study on Commercial Transaction Proceedings  
in Which State Immunity Cannot Be Invoked**

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# Abstract

The principle of State immunity is recognized as a customary international law by States practice. Initially, the respondent State was entitled to the right to immunity in any litigation. However, with the development of society, sovereign States increasingly participate in the field of autonomy of private law, and the traditional dichotomy between civil society and political nation are facing challenge. This causes the principle of State immunity heading for a relativism tendency. In point of fact, ‘no sovereignty no immunity’ has increasingly become a shared understanding of international community. In the context of restrictive principle of State immunity, the commercial transaction is the most typical case of non-immunity from proceedings of adjudication and enforcement. It is very significant to recognize the law of State immunity and design a reasonable law system of State immunity by studying the exception to immunity of commercial transactions.

Regarding the content, the dissertation includes 6 chapters.

Concretely, the Chapter 1 is a introduction to the principle of State immunity. It gives a general account for the concept, characteristics, theoretical foundation, functions it serves and the developments of State immunity. Then, it introduces current development of State immunity in practice and the restrictive doctrine of State immunity. At last, it introduces the role of commercial transactions in regime of State immunity, and emphasizes the significance of commercial transaction to restrictive State immunity.

The Chapter 2 primarily gives the account of ‘commercial transaction’ which is generally regarded as the pivot of restrictive doctrine of State immunity. At first, it introduces the approaches to define commercial transaction. From its definition, the term commercial transaction has somewhat abstractness, so in some legislation, it is apt to be clarified by enumeration. Meanwhile, in view of complexity of commercial transaction in practice, neither nature approach nor purpose approach can be an advisable method to determine commerciality readily. Taking the UN *Convention on Jurisdictional Immunities of States and Their Property* as a reference, the context

approach may be a better criterion to identify what is commercial transaction. Finally, it demonstrates why the rule ‘non-immunity in commercial transactions’ constitutes a customary international law from the perspectives of ‘State practice’ and ‘*opinio juris*’.

The Chapter 3 analyzes the structure of the commercial transaction proceedings concerning State immunity, that is, a private party filed a lawsuit against a State before courts of another State. The root cause of the regime of State immunity is that a State is not entitled to exercise jurisdiction over another State according to the principle of sovereign equality. If a State is engaged in transactions in the same manner as a private person, it cannot invoke sovereign immunity in litigation, and then that litigation becomes an international civil litigation. This chapter examines the subject matter of international civil litigation from the perspective of plaintiff, defendant and the third party, and focuses on the analysis of ‘State’ as the defendant. Finally, it also discusses the relationship between State and State enterprise.

The Chapter 4 mainly discusses the cases to exercise jurisdiction to adjudication. As mentioned, in proceedings relating to commercial transaction, the courts of a State may exercise jurisdiction over another State. The establishment of adjudicatory jurisdiction shall be divided into two stages: in the first place, the court of forum State must confirm whether the immunity of a foreign State has been excluded in international level; and then, the court of forum State shall confirm whether it has general jurisdiction by jurisdictional connections of its procedural law in national level. Waiver of immunity, whether express or implied, constitutes the grounds for exercising jurisdiction.

The Chapter 5 mainly introduces the cases to exercise jurisdiction to enforcement. By virtue of absolute nature of immunity from enforcement, the court of requested State may take measures of constraint only if the appointed elements by law are satisfied. Generally, waiver of immunity may lead to the taking of measures of constraint. On condition that State property is specifically in use or intended for use by a State for commercial purposes and is in the territory of the forum State, the court of requested State is permitted to take execution measures against that property. However, from perspective of constitutional law, specific categories of property assuming sovereign functions, even used for commercial transactions, cannot be executed.

The Chapter 6 demonstrates the legitimacy of State immunity by expounding its procedural values. Then, it presents the recent development of the law of State immunity, especially in the field of commercial transaction, and introduces China's attitude towards State immunity. With the development of international law, the fairness and justice of international law have received more attention. Despite the procedural values, the legitimacy of claim of State immunity in the field of commercial transaction is going to decline. By weighing the pros and cons, this chapter points out Chinese Government shall adopt restrictive principle of State immunity in line with the development of international law, and establish the rule that 'State immunity cannot be invoked in commercial transactions'. Ultimately, it explains the necessity of legislation on State immunity and presents the outlook and scheme of China's legislation.

**Keywords:** State immunity; sovereignty; commercial transactions; jurisdiction



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## CHAPTER 1

### THE INTRODUCTION OF STATE IMMUNITY

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As States are subjects of international law, their relations between each other are governed and regulated by international law. For this reason, in the past, international law was referred to as the Law of Nations.<sup>1</sup> As the grant or denial of immunity to a foreign State, including its agents, activities or property, has direct bearing on the relations of the forum State with that State, the law relating to State immunity is guided by international law.<sup>2</sup> Initially, according to the international law, the courts of a State are not required to refrain from exercising their jurisdiction over a foreign State who is unwilling to be the defendant. However, there currently remains a hard core of situations where a foreign State is entitled to immunity.

As a matter of fact, the international community is the assembly constituted by independent sovereign States. Because of the lack of a centralized authority in international community, the vertical structure is not emerged from the global governance. No State is entitled to exercise sovereign rights over another State. As a consequence of the dispersion of authority in the international community, sovereign States are equal under international law. As a result, the doctrine of '*par in parem non habet jurisdictionem*' is recognized. In line with the doctrine, a kind of international customary law has taken shape through international practice. It requires the forum State to refrain from deciding cases in which a foreign State or its property is involved.

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<sup>1</sup> See: J. Brierly, *The Law of Nations*, 6<sup>th</sup> edition, Oxford University Press (1963), esp. pp.1~40 on the origins of international law.

<sup>2</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.12.

# 1. STATE IMMUNITY AS A PRINCIPLE OF INTERNATIONAL LAW

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## 1.1 THE CONCEPT OF STATE IMMUNITY

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Generally speaking, State immunity is a principle of customary international law aimed at facilitating the performance of State sovereign functions by preventing a foreign State from being sued in the courts of forum State. In other words, the principle requires that a foreign State's acts or properties should not fall within the extent of adjudicative or enforcement jurisdiction of the courts of the forum State.<sup>3</sup> State immunity is based on the principle of independence and sovereign equality among States and the practice of international comity, and its primary role of purpose is to prevent the international disputes from being triggered by the forum State exerting its jurisdiction over a foreign State.

As some scholars point out: 'it is the special feature of State immunity that it is at the point of interaction of international law and national procedural law.'<sup>4</sup> It means that the law of State immunity is mix of international and municipal law. Correspondingly the forum court has the right to depend substantially on their law and procedural rules conforming to international requirements. In the scope of municipal law, international law does not require the forum State to abstain from exerting its jurisdiction. However, when a foreign State becomes the defendant, there are some difficulties for the competent court in exercising its jurisdiction over a particular case. If the competent court applies its power without respecting the core interests and major concerns of a foreign State, it will be regarded as a behavior lack of comity which might result in international conflicts. Moreover, on account of the concept of *par in parem non habet jurisdictionem*, the exercise of jurisdiction over a foreign State would raise issues concerning its legitimacy from the perspective of international law. In view of these reasons, once a lawsuit against a State or State agency is filed in a municipal court, the foreign State is endowed with the right to

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<sup>3</sup> 黄进：《国家及其财产豁免问题研究》，中国政法大学出版社 1987 年版，第 1 页。

<sup>4</sup> B. Hess, 'The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property', from *European Journal of International Law*, Vol. 4 (1993), p.271.

refuse to submit to the jurisdiction of that court by invoking the law of State immunity.

Although State immunity restrains the jurisdiction of the forum State, ‘immunity does not mean impunity’. The principle of State immunity prevents these proceedings against a foreign State from continuing for the sake of due procedure, but it does absolve the defendant State from all responsibility for its wrongness. It is true that the rule of State immunity sometimes obstructs the investigation of the defendant’s international legal responsibility. Unfortunately, it is an established fact that we must accept, mainly because none of State are entitled to the role of judge or arbiter in international community in which lack of an effective authority leads up to the parallel sovereignty structure.

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## 1.2 THE CHARACTERISTICS OF STATE IMMUNITY

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### (1) A Principle of International Law

As the subjects of international community, relations between States are governed by international law. In practice, whether a foreign State or its property is given immunity would necessarily affect the relations between the forum and the foreign State. For this reason, even within the municipal law system, the legislative process concerning the design of jurisdiction must take into consideration international influence. It must give respect to the international customary law and practice.

Currently, it is universally recognized and accepted that States enjoy immunity by virtue of international law. Since the decision in the case of *Schooner Exchange v. McFaddon*, international community has accepted the customary rule that national courts were applying a principle of international law when they grant immunity to foreign States.<sup>5</sup> The rule that States are immune from jurisdiction has been confirmed by judicial authorities of various countries, regional conventions, international institutions, national legislation, and scholars’ opinion. In December 2004, the *United Nations Convention on Jurisdictional Immunities of States and Their Property* was adopted by the UN General Assembly by Resolution 59/38. Even without the required

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<sup>5</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p.34.

ratifications, the Convention represents a consensus of the current international community.

## (2) The Influence of Municipal Law

State immunity is a principle of international law, to which the forum court must have reference in a case against a foreign State. However, in practice, the domestic court by its nature applies ultimately nothing but domestic laws, because how to determine the jurisdiction largely depends on the domestic legislation. Here is a paradox that which law governs the issue of immunity, the international or else the national. One interpretation holds that the rules of international law and the national are identical on this point, but the argument is untenable in practice.

As a matter of fact, the term ‘immunity’, referring to exempt from jurisdiction, by definition assumes the existence of the jurisdiction. When the courts of forum State apply the principle of State immunity to deal with the suits against foreign States, they must take the jurisdictional rules of national law into consideration, because if there is no assumption of jurisdiction in the first place, then no issue of immunity arises.

In recognizing State immunity as a principle of international law, many countries have enacted domestic legislation implementing this principle according to their actual conditions and benefits. In terms of practice, international law leaves national legislation a wide discretion to determine the circumstances and scope of applying State immunity.

As the US legislators point out:

*“Sovereign immunity is a doctrine of international law under which domestic courts, in appropriate cases, relinquish jurisdiction over a foreign State ..... sovereign immunity is a question of international law to be determined by the courts. .... The central premise of the Foreign Sovereign Immunities Act is that decisions on claims by foreign States to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.*

*“Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations.”<sup>6</sup>*

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<sup>6</sup> See: US House of Representatives, Report No. 94-1487, (1976), pp. 8-9.



### (3) The Procedural Nature of State Immunity

That State immunity is a rule of law is generally acknowledged by international community. Usually, it allows foreign States to avoid civil jurisdiction of national courts. According to jurisprudence, immunity is not a matter purely for the discretion of the executive branch of the government of a State, but a competency based on the principle of sovereign equality. In particular, when a case went to a national court, in the examination for jurisdiction, the court found that the defendant is a foreign State. In the case, the national court should refrain from performing its right of jurisdiction to block the proceeding continues. If the national court insists on the accepting and hearing the case in which foreign States involves, it will deviate from the requirements of international law indeed. The authority of its decision will be undermined for wanting in legitimacy, and in practice, the enforcement will be impossible. As a result, to avoid foreign States being sued in national courts is a shared understanding of States. At the same time, foreign States enjoys the petition for the immunity.

State immunity is not only a right entitled to a State, but also a right of a procedural nature. In the case of *Jurisdictional Immunities of the State*, the International Court of Justice found that 'Italian Republic has violated its obligation to respect the immunity which the Federal Republic of Germany enjoys under international law'. According to the judgment of the Court, although the scope of State immunity shrank slowly under the influence of the restrictive doctrine of immunity, the principle of State immunity still provides the procedural values. The Court, clearly recognizing the importance of the protection of human rights in the international law system, did not put immunity of States in opposition to protection of human rights. Instead, the Court employs a circuitous route for its reasoning. It distinguished the substantive matters from the procedural, and held that protection of human rights is substantive matters; on the contrary, State immunity is only procedural, since it just shelves the legal proceedings in the stage of jurisdiction, but does not absolve the accused States from responsibility. In terms of International Court of Justice, the immunity belongs to the procedural matters which decide whether the litigation could continue or not. If a case beyond the competence or jurisdiction of the court, the proceedings will not be carried out, and so the substantial rights cannot be realized. The Court did not need to determine the relative importance of State immunity versus human rights, because these two factors were on a different level: State immunity is a procedural right, while human rights are

substantive issues. Hereby, the Court argues that although the protection to human rights is shared understandings of international community currently, however, the immunity as a right of States should have precedence over it at least in procedure. In the judgment, the Court affirms the procedural nature of immunity.

#### (4) As a Rule of Customary International Law

In many cases, the courts have underlined the nature of State immunity by declaring either that State immunity is a rule of customary international law or that it is, in the absence of treaties, a principle of general international law. Based on the accumulation of State Practice over the centuries, the *UN Convention on Jurisdictional Immunity of States and Their Property* in its preamble states that ‘the jurisdictional immunity of States and their property are generally accepted as a principle of customary law.’

As a matter of fact, if the rules of customary international law become the components of domestic legal system, they must be recognized and applied by national courts. The rule of State immunity is formed primarily by national courts’ practice. Because State immunity is largely a customary international law, a failure to grant immunity where such grant was required would constitute a breach of international law. It would give rise to international responsibility of the forum State.

However, State immunity is a principle of international law, not the rules in particular. It just points out that the courts of forum State should not exercise the jurisdiction in proceedings against a foreign State. When it comes to the matters about how to apply the rule of immunity, international law allows States a substantial measure of discretion in deciding on the concrete rules in light of which questions of immunity are to be settled. Admittedly, though rare, there remain cases where States tend to react strongly to a denial of immunity as a hostile act. For example, in the case of *Jurisdictional Immunities of the State*, Germany was discontented the exercise of jurisdiction of the courts of Italy and Greece in defiance of State immunity. But, how do national courts apply State immunity? Where is the border of State immunity? They are still difficult to answer, because State immunity is largely a matter of principle. Due to the ambiguity of the law of State immunity, Germany and Italy have had very different attitudes to the application of State immunity.

State immunity as a rule of international law means that a State enjoys immunity from jurisdiction of courts of another State by virtue of international law, not pursuant to national law. In other words, the grant or denial to immunity is pre-determined by

international law that is independent of national legal system. This means that the absence of national legislation on immunity does not in principle impact on the immunity of the defendant State.

It is not easy to find out the sequence and subtle interrelation between the rules under international law and the actual States practice. In some international cases, national courts have had to be aware from the start that it was not entirely free to do whatever they might regard as appropriate under its own legal system, but was obliged by a legal regime based on the international practice. Crucially, consistent State practice over a long period as reflected by the significant cases evidences the *opinio juris* among States. Once the *opinio juris* is fashioned, it reacts back to the States practice and make it repeat again. Customary international law evolves through this process.

Considering that the *UN Convention on Jurisdictional Immunities of States and Their Property* has not yet entered into force, it is just a normative document without the force of law. Therefore, the law of State immunity primarily derives from customary international law, which has been established through the repeated practice of States over a long period and the *opinio juris* held by States.

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### 1.3 THE THEORETICAL FOUNDATIONS OF STATE IMMUNITY

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Although international practice concerning State immunity dates back to a long time ago, the reason why a State is entitled to immunity before the courts of another State has never received a satisfactory explanation.<sup>7</sup>

As the law of State immunity required, the foreign State is not subject to the proceedings initiated in other States, when it can successfully invoke State immunity. The forum State refraining from exercising its jurisdiction would expect that once it becomes the defendant, the court of another State should take the same measure with respect to its case. Based on this circumstance, the forum State would be willing to make concessions on the issue of jurisdiction. The immunity of a State as a right is supported by such elements of reciprocity.<sup>8</sup> But reciprocity has no decisive effect on the formation of legal regime of State immunity.

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<sup>7</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p.44.

<sup>8</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 16.

Sometimes State immunity is described as gesture of comity between States.<sup>9</sup> Comity has been used to moderate the collisions of sovereignty between States. Technically, the act of a State is not interfered by another State is a manifestation of sovereignty, while the exercise of jurisdiction by courts of forum State is also a manifestation of sovereignty. Why must the forum State waive parts of its jurisdiction rather than the foreign State? It mainly because the forum State accede to waiver of its own jurisdiction and give effect to the sovereign act of a foreign State in its territory so as to avoid conflicts between them.

*‘Immunity reflects current political realities and relationships, and aims to give foreign States some present protection from the inconvenience of suit as a gesture of comity.’*<sup>10</sup>

We cannot deny the fact that a State ought to be immune from the jurisdiction of another States was deduced from the necessity of international comity. Yet such a view does not grasp the essence of immunity. From historical perspective, the case *The Schooner Exchange* perfectly demonstrated the legal basis for immunity. The Chief Justice Marshall in the case declared that:

*“The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in case under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.....*

*“This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extraterritorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the*

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<sup>9</sup> See: 龚刃韧：《国家豁免问题的比较研究》，北京大学出版社 2005 年版，第 23 页。

<sup>10</sup> See: *Dole Food Co. v. Patrickson*, 538 US 468, 479 (2003).

*confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.*

*“This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been started to be the attribute of every nation.”<sup>11</sup>*

Before Chief Justice Marshall handed down the famous and far-reaching decision, *lex non scripta* regarding absolute immunity did not exist ever before.<sup>12</sup> Immunity was seen purely as a matter of nature reason, logic and practical considerations regarding international intercourse, rather than an interpretation and application of existing legal orders.<sup>13</sup> It is right that common sense, reciprocity, comity of nations and peaceful coexistence together compels the appearance of State immunity, but all of them cannot give an ultimate account of the foundation of State immunity. Pursuant to these theories, State immunity is no more a legal norm but deemed to be a privilege granted by the forum State to a foreign State.

As mentioned in *The Schooner Exchange* case, the law of State immunity is the consequence of reasoning from the principles of sovereign independence and equality among States. In other words, State immunity was a product of the principle that no sovereign State is privileged over others.

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## 1.4 THE FUNCTIONS OF STATE IMMUNITY

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As a principle under international law, State immunity plays a very important role in international intercourse. By pleading State immunity, a State may be immune from the jurisdiction of the courts of another State both in the process of adjudication and enforcement. Why should international law require State in conformity with the law of State immunity? The reason is that State immunity serves certain of irreplaceable

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<sup>11</sup> *The Schooner Exchange v. McFaddon*, US, 11 US (7 Cranch) 116, 136~137 (1812).

<sup>12</sup> See: Ernest K. Bankas, *The State Immunity Controversy in International Law*, Springer Berlin (2005), p. 21.

<sup>13</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p.34.

functions in securing the order of international community. In particular, it has the following functions:

Firstly, the law of State immunity blocks the exercise of the jurisdiction of courts of the forum State over a foreign State. The foreign State is free to engage in various activities by claiming State immunity. The law of State immunity enables a foreign State to implement its public functions effectively. Without State immunity, the sovereignty of the defendant State may be threatened by the in appropriate jurisdiction of the courts of forum State.

Secondly, when a private party files a suit against a State to seek legal relief in the courts of another State, this may cause the tension between the States. State immunity is an institution to prevent the conflicts or impasse. In fact, State immunity plays a constructive part in reducing the risks of conflicts between States as well as guaranteeing the orderly conduct in international community through restraining jurisdiction of States with each other.

Thirdly, generally State immunity blocks the settlements of claims by private party relating to State and State property. From this perspective, State immunity constitutes an obstacle to the right to relief of private party to litigation. However, in the context of restrictive doctrine of State immunity, whether State immunity is granted to a foreign State heavily depends on the fact whether or not the activities that State engaged in have a sovereign attribute. State immunity constitutes an approach to the right to relief by distinguishing between matters concerning public functions of a State and private law claims.<sup>14</sup>

Fourthly, State immunity is an instrument for allocating international jurisdiction among States.<sup>15</sup> The regime of State immunity is a law relating to the issue of jurisdiction. The term ‘immunity’ refers to exemption from the jurisdiction. Granting immunity to a State means the denial of the jurisdiction of the courts of another State.

## 2. THE HISTORICAL SURVEY TO STATE IMMUNITY

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<sup>14</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 2.

<sup>15</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 2.

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## 2.1 THE CONCEPT OF SOVEREIGNTY AND ITS INFLUENCE TO IMMUNITY

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Sovereignty means supreme governing power. It is inseparable from States. Concretely speaking, Sovereignty involves a claim to supreme authority and control within a territory signifying coherence, unity and independence of a political and legal community.<sup>16</sup> Therefore, sovereignty is a nature of States and ‘it continues to be part of States so long as States subsist.’<sup>17</sup>

Because the concept of sovereignty claims political power is not restrained by law, sovereignty has been criticized by some scholars for a long time.<sup>18</sup> However, in view of the fact that sovereignty is an indispensable factor of States and has been accepted by the majority of international community, it still exists and shows a strong vitality.

Sovereignty encompasses two factors: supremacy and independence, it thus has an internal and external dimension. Internally, sovereignty claims to unified, comprehensive and direct authority within the territory over the inhabitants of a political entity. In external dimension, sovereignty involves a claim to autonomy from other powers. Sovereignty’s external aspect entails independence, impermeability and out of political control by foreign authorities.<sup>19</sup> Accordingly, there are no higher powers of jurisdiction or control externally over those of sovereign States. Sovereignty implies self-determination which leads up to the fact that States do not surrender to the foreign competence.

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## 2.2 THE ORIGIN OF STATE IMMUNITY

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Basically, the law of State immunity is primarily the result of a great deal of cases decided by different national courts in their handling of claims brought against foreign States.

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<sup>16</sup> See: Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism*, Cambridge University Press (2012), p. 26.

<sup>17</sup> See: Ernest K. Bankas, *The State Immunity Controversy in International Law*, Springer Berlin (2005), p. 2.

<sup>18</sup> See: Winston P. Nagan, Aitza M. Haddad, *Sovereignty in Theory and Practice*, from Vol. 13, San Deigo International Law Journal, (2012).

<sup>19</sup> See: Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism*, Cambridge University Press (2012), pp. 26~27.

The doctrine of absolute immunity is usually considered to be the original form of State immunity. The doctrine of absolute immunity, prevailing in 19<sup>th</sup> century, refers to a State is exempt from the jurisdiction of the courts of another State with regard to any subject matter. At that time, a State was almost impossible to become a defendant in the courts of another State.

The case of *Schooner Exchange* is universally recognized as the origin of State immunity. In this case, the US Supreme Court supported the France's claim of immunity for seizure of a vessel *Schooner Exchange*, and held that the forum State 'would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects'. It established the precedent of State immunity that a State should refrain from exercising jurisdiction over another State. However, considering that the *Schooner Exchange* case involves a warship with evident sovereign functions, so this case does not necessarily prove that the US Supreme Court holds States can be immune from all claims.<sup>20</sup> If the ship served for a commercial purpose, it is uncertain how the US Supreme Court would give an amenable reasoning.<sup>21</sup> Maybe the Court would not grant immunity to France. As a result, it is not accurate to say State immunity was manifested as absolute doctrine at the very beginning.

Despite this, we cannot deny the fact that in the early history State immunity was dominated by the absolute doctrine. In 19<sup>th</sup> century, State functions were confined to the sovereign spheres, such as legislation, administration, judicature. A State's agencies or instrumentalities in foreign States merely assumed a few diplomatic and military missions, and they did not frequently involve in commercial activities. In this context, almost all of State activities are sovereign activities, and the distinction between sovereign activities and commercial activities was meaningless, so it is not difficult to understand why States enjoyed immunity even in the field of commercial transactions, and why their property, even if used exclusively for commercial purposes, was not subject to measures of constraint.

In the early history of State immunity, State's activities are primarily limited to the governmental spheres. Because of the unitary attribute of State activity at that time, it is not necessary for most of the national courts to pay attention to the distinction between sovereign activities and commercial activities. The nature or purpose of State

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<sup>20</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 8.

<sup>21</sup> See: Gamel M. Badr, *State Immunity: An Analytical and Prognostic View*, Martinus Nijhoff (1984), pp. 10~14.



activities for which immunity is conferred on to a State is not mentioned in the discourse of judgments.

As time goes, sovereign States increasingly participate in the field of autonomy of private law, and the traditional dichotomy between civil society and political nation are facing challenge. This causes the principle of State immunity heading for a relativism approach.

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## 2.3 THE TRANSITION FROM ABSOLUTE IMMUNITY TO RESTRICTIVE IMMUNITY

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The history of State immunity is the history of the doctrine of restrictive immunity replacing that of absolute immunity.<sup>22</sup> But it does not mean that there is a sharp shift from absolute to restrictive immunity. The movement from absolute to restrictive immunity has experienced a gradual and lengthy process.<sup>23</sup>

Although State immunity was established by international community in *Schooner Exchange* case, in practice attempts have always been made to assert jurisdiction over foreign States. Even in the early history of State immunity, some States have begun to limit the scope of State immunity. The courts of Belgium and the Italy firstly adopted restrictive doctrine of State immunity.<sup>24</sup> The case *Rau v. Duruty*<sup>25</sup> in 1879, decided by the Belgian court of Appeal of Ghent, is deemed to be the first record of restrictive immunity. In the case, the Belgian court assumed jurisdiction, because the purchase of guano of a State entered into commerce and took place in Ostend port of Belgium. Then, In the case of *La Société Anonyme Compagnie du Chemin de Fer Liégeois-Limbourgeois v. État Néerlandais* in 1903, the Court of Cassation, Belgium, held that a foreign State cannot claim immunity when it was acting as a private person pursuant to private law. And thus, the Belgium formally accepted the restrictive doctrine of immunity. The Italy practice shifted to restrictive immunity during 1880s.

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<sup>22</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 6.

<sup>23</sup> The scholar Sompong Sucharitkul accounted for the transition from absolute to restrictive immunity comprehensively in the Chapter 5 of his book: *State Immunity*. See: Sompong Sucharitkul, *State Immunities and Trading Activities in International Law*, Frederick A. Praeger (1959), pp. 162~256.

<sup>24</sup> See: Sompong Sucharitkul, *State Immunities and Trading Activities in International Law*, Frederick A. Praeger (1959), pp. 233~251.

<sup>25</sup> *Rau v. Duruty*, Belgium (1879), 26 AJIL Supplement [1932] 612.

In the case *Morellet v. Governo Danese*<sup>26</sup>, the Court of Cassation held that a State had dual-personality: ‘political entity’ and ‘civil entity’. If a State exercises the rights in like manner as legal person of the private law, then it could not enjoy immunity. In the case *Gutierrez v. Elmilik*<sup>27</sup>, by applying the theory of dual personality of a State, the Court of Cassation reiterated Italy’s jurisdiction over the foreign State.

Later, Switzerland, Greece and Austria have practiced restrictive doctrine of State immunity. It can be seen that, based on the tradition of division between public law and private law, the countries from Civil law system first embraced the restrictive State immunity by distinguishing the capacity of State.

In spite of this, the international practice was dominated by the doctrine of absolute immunity in that period. The most sweeping changes occurred after the World War 2. As UK Privy Council declared in the judgment of *The Philippine Admiral* case:

*“There is no doubt that since the Second World War there has been both in the decisions of courts outside this country and in the views expressed by writers on international law a movement away from the absolute theory of sovereign immunity championed by Lord Atkin and Lord Wright in The Cristina towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a State which are done jure imperii and acts done by it jure gestionis and accords the foreign State no immunity either in actions in personam or in actions in rem in respect of transactions falling under the second head.”*<sup>28</sup>

The Tate Letter of US<sup>29</sup>, on May 19, 1952, indicates the arrival of a new era. US Department of State announced in the Tate Letter a new policy with regard to the filing of suggestions of immunity in suits against foreign States. The Tate Letter pointed out, two widely held and firmly established concepts of sovereign immunity exist in international practice. The Department of State would file a suggestion of immunity if the case arose from acts of the foreign government or its agencies which

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<sup>26</sup> See: *Morellet v. Governo Danese*, Italy (1882), 26 AJIL Supplement [1932] 481.

<sup>27</sup> See: *Gutierrez v. Elmilik*, Italy (1886), 26 AJIL Supplement [1932] 622.

<sup>28</sup> See: *The Philippine Admiral*, [1977] AC 373; 64 ILR 90.

<sup>29</sup> The announcement of the State Department’s decision to follow a restrictive theory of sovereign immunity was made in a letter from Acting Legal Adviser Jack Tate to the Attorney General. See: 26 DEPARTMENT STATE BULL. 984 (1952), Letter of Jack B. Tate, Acting Legal Adviser, to the Acting Attorney General, Phillip B. Perlman, May 19, 1952.

were of a purely governmental character (*jure imperii*), but would deny immunity in instances where the acts engaged in were of a commercial nature which could be carried on by private individual or company (*jure gestionis*).<sup>30</sup> Although the suggestions of grant or denial immunity are from executive branch of US Government, the US courts treat such suggestions as binding advices. Since then, the absolute immunity has fallen into a decline gradually.

Moreover, another severe blow for absolute State immunity is that Germany thoroughly turned to the restrictive immunity in 1963. In the case *Empire of Iran*, the Federal Constitutional Court observed the history of State immunity: in the period up to the World War 2, the dominant State practice was to give foreign States unrestricted immunity. Foreign States were immune from the national jurisdiction with regard to both their governmental activities and non-governmental activities.

From then on, “*State immunity has been involved in a process of contraction; its history has become the history of the struggle over the number, nature and extent of the exceptions.*”<sup>31</sup>

The case *Empire of Iran* is a remarkable symbol in the history of the law of State immunity. The Federal Constitutional Court clearly denied that the unrestricted immunity can still be regarded as customary international law by distinguishing State activities into sovereign and non-sovereign, and furnished the method to achieve the distinction of State activities. The method of distinguishing State activities established by Federal Constitutional Court in *Empire of Iran* case was accepted by many countries’ judicial practice, and became the core of restrictive doctrine of State immunity. This case posed a great challenge to absolute doctrine of State immunity in theory.

Until 1970s, the absolute State immunity still had its market. For example, the framers of the *European Convention on State Immunity* had to concede that “the Convention represents a compromise between the doctrines of absolute and relative State immunity.”<sup>32</sup> But after the enactment of the *European Convention on State Immunity*, many of countries accepted the restrictive doctrine of State immunity via their national legislation. The representative and far-reaching is the US *Foreign*

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<sup>30</sup> See: John M. Niehuss, *International Law Sovereign Immunity: The First Decade of the Tate Letter Policy*, from Vol. 60: No. 8, Michigan Law Review (1962) pp. 1142~1153.

<sup>31</sup> See: *Empire of Iran*, German Federal Constitutional Court (1963), BvG Vol. 16, 27; 45 ILR 57.

<sup>32</sup> Council of Europe, *Explanatory Report to the European Convention on State Immunity*, Basel, 16. V. 1972, para. 56.

*Sovereign Immunities Act* (1976) and the *UK State Immunity Act* (1978). Influenced by the legislation, more and more countries have abandoned unrestricted State immunity in practice. The number of States persisting in absolute immunity is drastically reduced.

Currently, allowing for some minor deviations, it can be claimed that the absolute immunity was replaced by the restrictive immunity with the conclusion of *UN Convention on Jurisdictional Immunities of States and Their Property* in 2004.

Why is there a change from absolute State immunity to restrictive State immunity? As a matter of fact, since the 20<sup>th</sup> century, State functions have undergone tremendous changes. State activities does not merely confine in the political sphere, but goes into the economic field. The increase of State activity in commercial field leads to the competition between States and private parties. It seems necessary to exclude *acta jure gestionis* from the scope of State immunity so as to maintain the fairness in transactions or contracts.

*“It was felt necessary to grant to a greater degree than before legal protection of the courts to individuals, not only against their own State but also against foreign States.”*<sup>33</sup>

In addition, the distinction of public law and private law in Civil law system provides a basis for understanding the complications of State activity in methodology. Where there is no distinction of *actum jure imperii* (governed by public law) and *actum jure gestionis* (regulated by private law), there is no restrictive doctrine of State immunity.

Today, most of States changes their attitude towards absolute doctrine of State immunity. They no longer believe that it is a legally obligation to give foreign States immunity from jurisdiction for claims arising from non-sovereign activities.

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## 2.4 THE NEW CONSENSUS: UN CONVENTION ON STATE IMMUNITY

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<sup>33</sup> See: Stephen McCaffrey, Dinah Shelton, John Cerone, *Public International Law: Cases, Problems and Texts*, LexisNexis (2010), pp. 942~943.

State immunity is one of the orthodox principles of international law system. Until recently, however, there existed no comprehensive convention on the subject at the universal level. With the development of the practice of international community, a new shared understanding is approaching. In December, 2004, that situation changed with the adoption by the United Nations General Assembly of the *UN Convention on Jurisdictional Immunities of States and Their Property*. As its preamble said, the Convention aims to ‘enhance the rule of law and legal certainty’.

Although the Convention is unlikely to enter into force as treaty law in the immediate future, nonetheless, it has gradually begun to capture States parties. As in February, 2016, the circumstances about the conclusion of the Convention are as follows.<sup>34</sup>

Participant	Action	Date of Notification/Deposit	Date of Effect
Austria	Ratification	14/09/2006	
Austria	Signature	17/01/2005	
Belgium	Signature	22/04/2005	
China	Signature	14/09/2005	
Czech Republic	Signature	13/10/2006	
Czech Republic	Ratification	12/03/2015	
Denmark	Signature	19/09/2006	
Estonia	Signature	30/03/2006	
Finland	Signature	14/09/2005	
Finland	Acceptance	23/04/2014	
France	Approval	12/08/2011	

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<sup>34</sup> See: <https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280057946>, visited on 31<sup>th</sup> May, 2017.

France	Signature	17/01/2007	
Iceland	Signature	16/09/2005	
India	Signature	12/01/2007	
Iran Islamic Republic	Signature	17/01/2007	
Iran Islamic Republic	Ratification	29/09/2008	
Iraq	Accession	02/12/2015	
Italy	Accession	06/05/2013	
Japan	Acceptance	11/05/2010	
Japan	Signature	11/01/2007	
Kazakhstan	Accession	17/02/2010	
Latvia	Accession	14/02/2014	
Lebanon	Signature	11/11/2005	
Lebanon	Ratification	21/11/2008	
Liechtenstein	Accession	22/04/2015	
Madagascar	Signature	15/09/2005	
Mexico	Signature	25/09/2006	
Mexico	Ratification	29/09/2015	
Morocco	Signature	17/01/2005	
Norway	Signature	08/07/2005	
Norway	Ratification	27/03/2006	
Paraguay	Signature	16/09/2005	

Portugal	Signature	25/02/2005	
Portugal	Ratification	14/09/2006	
Romania	Ratification	15/02/2007	
Romania	Signature	14/09/2005	
Russian Federation	Signature	01/12/2006	
Saudi Arabia	Accession	01/09/2010	
Senegal	Signature	21/09/2005	
Sierra Leone	Signature	21/09/2006	
Slovakia	Signature	15/09/2005	
Slovakia	Ratification	29/12/2015	
Spain	Accession	21/09/2011	
Sweden	Signature	14/09/2005	
Sweden	Ratification	23/12/2009	
Switzerland	Signature	19/09/2006	
Switzerland	Ratification	16/04/2010	16/04/2010
Timor-Leste	Signature	16/09/2005	
United Kingdom	Signature	30/09/2005	

As regards the contents, the Convention is set out in 6 parts with Parts 2 to 4 containing the substantive provisions. Part 2 introduces the general principles of State immunity and the rules governing the expression of consent. Significantly, the Convention disposes of the immunity from adjudication and immunity from execution separately. Part 3 contains the exceptions to immunity from adjudication and sets out eight types of proceedings in which a foreign State may not invoke immunity when

summoned as the defendant before the courts of another State. The article 10 *Commercial Transactions* is the premier of these exceptions to immunity. Part 4 covers immunity from measures of constraint against the State property including attachment, arrest and enforcement of judgments. However, this immunity from execution may be waived by express consent of the foreign State. And in the case of allocation or earmarking of specific property for satisfaction of the claim which is the object of the proceeding, it is permitted to take coercive measures against the property of the foreign State, even without its consent. In view of the provisions of Part 3 and Part 4, it is obvious that the Convention embodies the frames of reference of restrictive doctrine of immunity.

However, the UN Convention does not provide the responsibility of violation of international law, and does not give endorsement to protect human rights against foreign States in national courts, either. Considering a few countries still applied absolute immunity, it seems difficult for them to accept the immunity out of the field of commercial or private law matters, so in Part 3 and Part 4, the Convention limited the application of restrictive doctrine in the scope of civil proceedings only.

Consequently, *UN Convention on Jurisdictional Immunities of States and Their Property* embodies the compromise and balance between State rights and private person's interests.<sup>35</sup> Its conclusion demonstrates that international community acknowledges and accepts the restrictive doctrine of State immunity as a new general understanding.

### 3. THE RESTRICTIVE DOCTRINE OF STATE IMMUNITY

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#### 3.1 THE SNOWBALL EFFECT OF RESTRICTIVE IMMUNITY IN INTERNATIONAL PRACTICE

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After World War 2, more and more States began to embrace the restrictive doctrine of State immunity in their practice. The US first officially made resistance to granting

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<sup>35</sup> See: 黄进、杜焕芳：《国家及其财产管辖豁免立法的新发展》，载《法学家》2005 年第 6 期。



State immunity to foreign States in international trade and commercial activities.<sup>36</sup> Under the circumstances of rule of law, everybody, no matter whom he or she is, has the right to get equal protection by law. The widespread and increasing practice on the part of governments of engaging in commercial activities raises the probability of private suits against foreign States in domestic courts. In order to prevent the loss in commercial transactions, it is obviously necessary to grant private party the right of access to justice. The US, by Tate Letter, began to accept the restrictive theory of State immunity in diplomatic policy.

On account of the US' international status and authority at that time, it is not difficult to understand that the great influence of *Tate Letter* on the practice of State immunity. As a result of the *Letter*, a move towards restrictive approach formally appears. Since the passage of the US *Foreign Sovereign Immunities Act* in 1976, the UK changed its direction promptly so as to 'avoid losing its advantage in the intense competition of international trade.' The Privy Council of UK followed the restrictive approach in the landmark case of *The Philippine Admiral*<sup>37</sup> in 1977, and then it enacted the *State Immunity Act* in 1978 which laid the cornerstone of application of restrictive State immunity in UK. Taking into account the leading position of UK in the Commonwealth, it is not difficult to imagine that UK's change of policy on State immunity had a great impact on the Commonwealth system. Following the UK's *State Immunity Act* of 1978, the members of Commonwealth such as Singapore, Pakistan, South Africa, Canada and Australia adopted the doctrine of restrictive immunity via their respective enactments of State immunity.

After the adoption of the UN Convention on State Immunity, December 2004, at least 2 sovereign States (Israel and Japan) established the rule of restrictive immunity by their national legislation. So far, according to statistics, ten countries expressed official endorsement of restrictive immunity by legislation.

Countries	Name of the Legislation	Date of Adoption	Standpoint
United States	Foreign Sovereign Immunities Act	21/10/1976	Restrictive
United Kingdom	State Immunity Act	20/07/1978	Restrictive

<sup>36</sup> See: *Letter of Tate*, US DEPARTMENT STATE, 26 BULL 984 (May 19<sup>th</sup>, 1952).

<sup>37</sup> See: *The Philippine Admiral*, [1977] AC 373; 64 ILR 90.

Singapore	State Immunity Act	26/10/1979	Restrictive
Pakistan	State Immunity Ordinance	1981	Restrictive
South Africa	Foreign States Immunities Act	1981	Restrictive
Canada	State Immunity Act	1982	Restrictive
Australia	Foreign States Immunities Act	1985	Restrictive
Argentina	Immunity of Foreign States from the Jurisdiction of Argentinean Courts	1995	Restrictive
Israel	Foreign States Immunity Law	2009	Restrictive
Japan	Act on Civil Jurisdiction of Japan with respect to a Foreign State, etc.	17/04/2009	Restrictive

Saving legislation, the restrictive immunity was accepted in other ways such as judicial precedent and accession to treaties. Some European countries, for example Belgium and Italy, embraced the restrictive approach by judicial decision as early as the late of 19<sup>th</sup> century.

Actually, since the beginning of the 20<sup>th</sup> century, the international community gradually denied the immunity to State-owned ships for commercial purposes.<sup>38</sup> In the 1920s, the *Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships*<sup>39</sup> established the restrictive immunity in the field of ships owned or operated by States. The absolute immunity was beginning to be undermined in the international scope.

The *European Convention on State Immunity* of 1972 furthered the spread of restrictive immunity. As in the preamble pointed out that “there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign States”, the European Convention confirmed the cases that a Contracting State cannot

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<sup>38</sup> 徐树：《论国有船舶的有限管辖豁免》，载《中国海商法研究》2012年02期。

<sup>39</sup> Done at Brussels, the 10<sup>th</sup> April, 1926.

claim immunity from the jurisdiction of a court of another Contracting State, which restricted the scope of State immunity.

The majority of European country did not ratify the European Convention until now, but it does not prevent the Convention from entering into force in 1976<sup>40</sup>. In fact, the *European Convention on State Immunity* of 1972 set an example for other European countries' legislation. The Convention promoted the acceptance of the restrictive approach not only in Europe but all over the world.

Countries	Signature	Ratification	Entry into Force	Notes	R.	D.	A.	T.	C.	O.
Albania										
Andorra										
Armenia										
Austria	16/05/1972	10/07/1974	11/06/1976			D.	A.			
Azerbaijan										
Belgium	16/05/1972	27/10/1975	11/06/1976			D.	A.			
Bosnia and Herzegovina										
Bulgaria										
Croatia										
Cyprus	15/12/1975	10/03/1976	11/06/1976							
Czech Republic										
Denmark										
Estonia										

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<sup>40</sup> The Article 36 (2) of *European Convention on State Immunity* provides that “the Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance”, so the Convention entered into force in June 11<sup>th</sup>, 1976, after three months the date of the deposit of Cyprus ratification. See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 22.

Finland										
France										
Georgia										
Germany	16/05/1972	15/05/1990	16/08/1990			D.	A.	T.		
Greece										
Hungary										
Iceland										
Ireland										
Italy										
Latvia										
Liechtenstein										
Lithuania										
Luxembourg	16/05/1972	11/12/1986	12/03/1987			D.	A.			
Malta										
Moldova										
Monaco										
Montenegro										
Netherlands	16/05/1972	21/02/1985	22/05/1985			D.	A.	T.		
Norway										
Poland										
Portugal	10/05/1979									
Romania										
Russia										
San Marino										
Serbia										

Slovakia										
Slovenia										
Spain										
Sweden										
Switzerland	16/05/1972	06/07/1982	07/10/1982			D.				
The former Yugoslav Republic of Macedonia										
Turkey										
Ukraine										
United Kingdom	16/05/1972	03/07/1979	04/10/1979			D.	A.	T.	C.	

Besides, some countries have no legislation, but their courts have applied restrictive doctrine in judicial practice.<sup>41</sup> Although some countries declared itself in support of the absolute doctrine, with the adoption of the 2004 *UN Convention on Jurisdictional Immunities of States and Their Property*, they are also likely to apply the restrictive approach in the near future. For example, with the signature in September 2005 of the UN Convention, China takes more appropriate attitudes towards the issues concerning State immunity.<sup>42</sup> It seems possible that China will shift its position to restrictive State immunity because China is committed to assimilate into the global governance all the way through. Likewise, India signed the UN Convention in January 2007. So the two largest countries' attitudes towards State immunity are undergoing subtle changes, which reinforce the fact that international community prefers to embrace the restrictive immunity in practice.

Obviously, there is a snowball effect on the application of the restrictive approach to State immunity.

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<sup>41</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 221.

<sup>42</sup> See: 邵沙平:《〈联合国国家及其财产管辖豁免公约〉对国际法治和中国法治的影响》,载《法学家》2005年第6期。

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## 3.2 THE DEFLECTION OF BENEFIT MECHANISM

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The practice of international community demonstrates that the restrictive immunity has been accepted by many countries at a fast rate. It is necessary to interpret the cause why the restrictive approach of State immunity gains the wide favor of international community, and to analyze the phenomenon of snowball effect?

As a matter of fact, the international law does not give a concrete account of the content and scope of State immunity. That is to say, in the international level, the law of State immunity is just a principle or general outline, and its content and details remain to be fashioned by the national legislation or judicial precedent. As a result, in what manner and extent the foreign States have the right to invoke immunity is determined by the domestic law of the forum State. This leads up to the viewpoint that,

*“..... State immunity has more the nature of a discretionary privilege than an obligation imposed by international law.”<sup>43</sup>*

Undeniably, in some cases the conferment of immunity depends on the political concerns. The practice of some countries, such as France, Italy, Russia and China, provides grounds of the argument that immunity has more the nature of political balance rather than normative elements. For instance, Article 61 of the 1961 *Fundamentals of Civil Procedure* of the USSR provided:

*“When a foreign State does not accord to the Soviet State its representatives or its property the same judicial immunities which, in accordance with the present Article, is accorded to foreign States, their representatives and their property in the USSR the Council of Ministers of the USSR or other authorized organ may impose retaliatory*

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<sup>43</sup> The case of *Republic of Austria v. Altmann* clearly demonstrates that the present majority view in the US Supreme Court is to treat State immunity as a matter purely of discretion. “The principal purpose of foreign sovereign immunity has never been to permit foreign States and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in US courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign States and their instrumentalities some present protection from the inconvenience of suit as a gesture of comity. Throughout history, courts have resolved questions of foreign sovereign immunity by deferring to the ‘decisions of the political branches ..... on whether to take jurisdiction’, a privilege granted by the forum State to foreign State.” See: *Republic of Austria v. Altmann*, US Supreme Ct 327 F 3d 1246 (2004); ILM 43 (2004) 1421.

*measures in regard of that State its representatives and that property in the USSR.”*

Similarly, the Article 3 of the *Law of China on Judicial Immunity from Compulsory Measures concerning the Asserts of Foreign Central Banks*<sup>44</sup> stipulates that:

*“For countries that do not provide assets of the Central Bank of the People's Republic of China and finance administration organs of Special Administration Regions with judicial immunity, or provide immunity below the Measures, the People's Republic of China will deal with in line with principle of reciprocity.”*

In view of increasing number of litigation against China, some Chinese scholars endorse the application of reciprocity principle in dealing with State immunity.<sup>45</sup> However, this suggestion may not as effective as they argue. Nor do all States practice strict reciprocity, and this makes the inefficiency of reciprocity, and more and more States accept the restrictive approach of State immunity in practice. Let's take an example to explain the phenomenon. A US company Bigcat filed a suit against China's agency Damao, and the US courts exercise their jurisdiction over China's agency Damao, because Damao engaged in a commercial transaction in the territory of US with Bigcat. If China strictly abides by the reciprocity principle, the courts of China may exercise the jurisdiction in a suit against the US or US's agencies on the same ground. As a result, the practice guided by reciprocity may betray the absolute position of State immunity.

Whether to grant immunity or not is more than an issue of international level. Indeed, it largely depends on the institution of jurisdiction of national legal system. In a State with the principle of checks and balance, the judicial system determines its jurisdiction only pursuant to the law rather than the political considerations. In other words, currently the extent to which the executive branch of a State may expand or reduce the immunity has been considerably restricted by the national law.

Because of the obscurity of the content of State immunity in international level, in what cases should the immunity be granted largely rests on the provisions of competence of the municipal law. As a result, under the circumstances that the scope

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<sup>44</sup> See: 《中华人民共和国外国中央银行司法强制措施豁免法》，中华人民共和国第十届全国人民代表大会常务委员会第十八次会议于 2005 年 10 月 25 日通过并施行。

<sup>45</sup> See: 王欣濛、徐树：《对等原则在国家豁免领域的适用》，载《武汉大学学报（哲学社会科学版）》，2015 年第 6 期。

of State immunity is restricted by the law of forum State, it will be very hard for a foreign State to invoke immunity because the principle of Rule of Law requires that the forum State should take actions in strict accordance with the provisions of its national law rather than the claim of the foreign State.

Admittedly, State immunity is a very important principle of international law, but the principle does not supply a specific content and scope of immunity, so if a foreign State plans to invoke immunity from jurisdiction of the courts of another State who follows the restrictive approach, it has to comply with the rule of that State. In brief, because of the divergence of cognition to State immunity, the application of the principle is largely depends on the attitude towards immunity of the forum State or its legislation in this respect.

Moreover, these States who accept the restrictive immunity have more ascendancy in jurisdiction than these States adhere to absolute immunity. Because if the plaintiff knows a State in accordance with absolute immunity, he could predict that his suit will be rejected by courts of that State. Accordingly, the plaintiff will refrain from bringing legal action against sovereign States before the courts of that State. Contrarily, he will take chances on the courts of these States who express respect for restrictive approach. It is obvious that taking restrictive approach conduces to enlarging the jurisdiction of courts, but in contrast holding the absolute immunity ground leads to the loss of the opportunity of jurisdiction.

The restrictive immunity causes a complexion in which States who adopt the approach will benefit much more than those who reject it. That is the reason why the restrictive immunity grows so fast as a rolling snowball.

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### 3.3 THE CRUCIAL ELEMENTS FOR THE APPLICATION OF RESTRICTIVE IMMUNITY

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The current practice of international community proves that the restrictive doctrine of State immunity is increasingly getting to be an international consensus. In context of restrictive State immunity, a State can invoke immunity before the courts of another State only with regard to sovereign activities, because the law of State immunity is used to facilitate the performance of governmental functions of State.



Therefore, it is very important for application of restrictive State immunity to clarify the question how to classify and evaluate State acts.

Empirically, the application of restrictive State immunity is supposed to meet a couple of rules established by international practice: the private act of States and the private act performed in the territory of the forum State<sup>46</sup>. They constitute the pillars of restrictive doctrine of State immunity.<sup>47</sup>

#### (1) The Classification of the Activity of State

State immunity has been recognized as a procedural plea that blocks the exercise of jurisdiction by virtue of the status of the defendant. In the dominant period of absolute State immunity, the courts paid close attention to the status of State, as long as the defendant has State identity, then it would be entitled to immunity. However, circumstances have been changed with the development of State immunity. Currently, it is widely recognized that a State can invoke immunity merely for its *acta jure imperii* rather than *acta jure gestionis*. Under the circumstance of restrictive immunity, the courts of a State generally deduce the status of State from State activities. Only a State's acts can be attributed to the governmental or sovereign classification, can the defendant State enjoy immunity in the courts of another State. The classification of State acts becomes a significant issue in the application of restrictive doctrine of State immunity in practice.

*“The consequence of the application of the restrictive doctrine, which changed the nature of immunity, shifts the emphasis to the attribute of the act not the personality of the sovereign, and makes immunity depend on function not status.”*<sup>48</sup>

In these countries who adopt restrictive approach, their courts usually employ a distinguishing technique to classify a State's acts in question, and then determine whether or not grant immunity to that State. The distinguishing technique derives from a tradition of the dichotomy between civil society and political nation. According to the dichotomy, the performance and operation of public power is restricted in the realm of political nation in order to defend the private autonomy. Traditionally, no matter what acts a sovereign State performs could be recognized as

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<sup>46</sup> The phrase ‘in the territory of the forum State’ is intended to be only a simplified form for various situations where an act has a jurisdictional connection with the territory of the forum State.

<sup>47</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 58.

<sup>48</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 103.

*acta jure imperii* which falls into the realm of political nation. However, with the expansion of State activities in economic field, it is improper to categorize all of acts of State into the domain of political nation. Assuming that a State is involved in a commercial contract, in this case the act of the State is inclined to be regarded as the ‘private act’ rather than the sovereign act, since the State does not perform its public or sovereign authority. Actually, it is hard to say that a State still implements its public or governmental functions on condition that the State involves in transactions or contracts in the manner of a private individual, and thus it cannot invoke State immunity.

To distinguish the identity of a sovereign State is not an intractable task, while to classify the attribute of the State’s activities is really arduous. In practice, the courts of forum State usually employ private person test, the essence of which is the analogy of the foreign State to a private individual.<sup>49</sup>

Based on the dichotomy between private law and public law, the theory of dual personality of State appeared. This theory argued that States existed both as ‘political entity’ and as ‘civil entity’ (juridical person of private law) according to the capacity of State. A State is obligated to provide for the administration of public organs and the interests of private individuals, so it may involve in the matters of private law. If a State acts in the same manner as a private person, it will lose the opportunity to invoke immunity in a suit. In essence, the private person test believes that the grant or denial of immunity to a foreign State depends on whether or not the State acts in the capacity of a private person.

As early as 1880s, the private person test was applied by some countries of Civil Law system, such as Italy and Belgium.<sup>50</sup> The landmark *Empire of Iran Case* signified that the international community began to accept this method. As the German Constitutional Court declared in the decision:

*“As a means for determining the distinction between acts jure imperii and jure gestionis one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign*

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<sup>49</sup> The “private person test” has been variously been expressed as “on an equal footing with private person”, “in the same manner as a private individual”, “in a private capacity”, “in the realm of private law” and so on.

<sup>50</sup> See: *Morellet v. Governo Danese*, Italy (1882), 26 AJIL Supplement [1932] 481. *Gutierrez v. Elmilik*, Italy (1886), 26 AJIL Supplement [1932] 622. *La Soci  Anonyme Compagnie du Chemin de Fer Li  geois-Limbourgeois v.   tat N  erlandais*, Belgium (1903), 31 JDIP [1904] 417.

*State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.”*<sup>51</sup>

The Austrian Supreme Court in the case *Steinmetz v. Hungarian* made a very similar statement as follows:

*“As soon as a foreign State acts in the capacity of a contractual partner in commercial transactions, for example as the owner of a nationalized undertaking, it thereby descends to the level of subjects of private law and is as much amenable to domestic jurisdiction as any other foreigner.”*<sup>52</sup>

More importantly, the private person test was confirmed by the *European Convention on State Immunity* 1972. The Article 7 (1) provides that,

*“A Contracting State 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.”*

The Article 26 and Article 27 (2) of the European Convention employ the same phrase, namely ‘in the same manner as a private person’.

The private person test as well as the theory of dual personality of State was well recognized by States of Civil law system.

Traditionally, Civil law States pay attention to abstract thinking and theory, and formulate general principles from abstractions, so they created the private person test to classify the non-sovereign acts of States in complicated cases. However, influenced by empiricism, Common law States usually do well in the case-to-case thinking, and usually use specific matters which based on experiences and cases to define the scope of State immunity. For instance, States of Anglo-American law system generally associate non-sovereign acts of State with commercial activities. If a State engaged in commercial transaction, then its acts can be readily recognized as non-sovereign activities, and the State cannot claim immunity. But this practice cannot accurately

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<sup>51</sup> See: *Empire of Iran Case*, Germany (1963), 45 ILR 57.

<sup>52</sup> See: *Steinmetz v. Hungarian*, Austria (1970), 65 ILR 15.

identify the sovereign acts as well as non-sovereign acts of State. The Common law States gradually drew on the private person test from the Civil law system.

In the US, the drafters of the *Foreign Sovereign Immunities Acts* 1976 mentioned the method in a report,

*“The sovereign immunity of foreign States should be restricted to cases involving acts of a foreign State which are sovereign or governmental in nature, as opposed to acts which are either commercial in nature or those which private persons normally perform.”*<sup>53</sup>

The British judicial practice accepted the private person test after the case of *I Congreso del Partido*.<sup>54</sup>

And also, the US Supreme Court declared in the case of *Republic of Argentina v. Weltover Inc.*,

*“When a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign’s actions are ‘commercial’ within the meaning of the Foreign Sovereigns Immunities Act ..... Thus, a foreign government’s issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a ‘commercial’ activity, because private companies can similarly use sales contracts to acquire goods.”*<sup>55</sup>

The UK and US Court’s change from a commercial activity for profit to conduct in the manner of a private party brings the restrictive approach closer to the Civil law criterion.<sup>56</sup>

Under the restrictive view of State immunity, States have dual personality: one assumes sovereign function, and the other belongs to the realm of private autonomy. Accordingly, it is necessary to classify the activity of State so as to limit the extent of State immunity, and the private person test provides for a basic method to this classification.

## (2) The Presumption of Jurisdiction Based on Territorial Connections

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<sup>53</sup> See: US House of Representatives, Report No. 94-1487, (1976), p. 14.

<sup>54</sup> See: *I Congreso del Partido*, England (1977), [1978] 1 QB 500, 528; 64 ILR 154.

<sup>55</sup> See: *Republic of Argentina v. Weltover Inc.*, US, 504 US 607, 614~615, (1992); 100 ILR 509.

<sup>56</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 345.

It is well known that the term ‘immunity’ refers to be exempt from jurisdiction. Where there is no presumed jurisdiction, there is no the issue of immunity. If the plaintiff to litigation considers the relevant matters beyond the competence of a State, he/she will not file a suit before the courts of that State. In this case, of course, State immunity has no opportunity to be applied.

Indeed, only a national court feels that it may be competent to hear and decide a case in which a foreign State is sued, and then it may have the opportunity to check whether or not it should grant immunity to that foreign State in the formal stage of establishment of jurisdiction. How does a national court get the general impression that a case comes within its jurisdiction? The most important connecting factor for a national court to determine the jurisdiction is territoriality. At the very beginning of State immunity, the Chief Justice Marshall explicated the relationship between the sovereign immunity and territorial jurisdiction in the *The Schooner Exchange* case,

*“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. .... 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.*

.....

*“This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.*

*“This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, has given rise to a class of cases in which every sovereign is understood to waive the exercise of a*

*part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.”*<sup>57</sup>

As to the opinion of US Supreme Court delivered in the decision, the territory is the boundary of sovereignty of a State, and every sovereign State is entitled the complete, exclusive and absolute jurisdiction based on territory. For the reason of common interest of States, each State compresses their territorial jurisdiction by themselves respectively. Therefore, based on the self-imposed diminution of jurisdiction, the State immunity appears in international practice. From the argumentation of US Supreme Court, it is readily to infer that territorial jurisdiction constitutes the foundation of State immunity.

It is worth noting that, on the one hand, the forum State may have right to exercise of jurisdiction by some other grounds (jurisdictional connections) permitted by national or international law, all of which should be more or less connected with territory. On the other hand, the territory just provides a prejudgment for jurisdictional issues from the appearance. Base on the territorial connections, national courts is approximately convinced that they may exercise the jurisdiction in the suits against a foreign State.

As a conclusion, the evolution of legal doctrine relating to State immunity experiences the transition from absolute doctrine to restrictive doctrine. It was in 1812 that the US Court first recognized a foreign State's claim to immunity from legal process, though not as a matter of right but of 'grace' and 'comity'.<sup>58</sup> Later, States became increasingly recognized that State immunity was mainly an international right entitled to sovereign States on the basis of principle of sovereign equality. Until 1970s, most of States in the world followed the doctrine of absolute immunity, under which the courts of the forum State would dismiss all claims against foreign States. The adoption of *European Convention on State Immunity* 1972 was a landmark in the history of the law of State immunity. After the Convention, more and more States were beginning to accept the theory of restrictive immunity via national legislation or judicial practice. In the context of restrictive State immunity, foreign States would continue to request immunity before the forum State in claims based on their public acts, but would not request immunity in claims based on their private acts. In fact, the

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<sup>57</sup> *The Schooner Exchange v. McFaddon*, US (1812), 11 US (7 Cranch) 116, 136~137.

<sup>58</sup> See: Charles H. Brower II, *International Decision: Republic of Austria v. Altmann*, 124 S. Ct. 2240, 99 AJIL 236, 237 (2005).

commercial transaction is the most important symbol and measure to distinguish State public acts from private acts. Consequently, identifying the commercial transaction is essential to the establishment of restrictive doctrine of State immunity.

## 4. THE ROLE OF COMMERCIAL TRANSACTIONS IN REGIME OF STATE IMMUNITY

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### 4.1 THE DETERMINATION OF EXCEPTIONS TO STATE IMMUNITY

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The application of State immunity shows a trait of double layer structure.<sup>59</sup> On the one hand, State immunity is a right of a foreign State, by which a foreign State is exempted from the exercise of jurisdiction of courts of forum State. On the other hand, the right to immunity of a foreign State needs to be recognized by the forum State in accordance with its relevant statute or precedents, and therefore is definitely affected by the forum State's domestic legal system. In the context of restrictive immunity, the scope of State immunity is ambiguous. States normally follow their own precedents or statutes respectively to determine whether to grant immunity to a foreign sovereign or not. Different States have different precedents or statutes on State immunity, so it is hard to engender a uniform judicial practice on the issue in international community. Fortunately, on examination of national legislation and judicial practice of different States, it can be find out the potential consensus in respect of scope of State immunity of international community.

#### (1) The Negative List of State Immunity

The negative list mainly enumerates the matters that, in essence, fall within the scope of private law or do not involve sovereignty. It aims to define the scope of State immunity by instruction the exceptions to immunity.

The enumeration by negative list of State immunity has been endorsed firstly by the *European Convention on State Immunity* 1972. The *US Foreign Sovereign Immunities*

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<sup>59</sup> See: 夏林华: 《不得援引国家豁免的诉讼》, 暨南大学出版社 2011 年版, 第 17 页。

Act 1976 also involved such practice in Article 1605. The UK *State Immunity Act* 1978 enumerated the exceptions to immunity from Article 2 to Article 11, encompassing submission to jurisdiction, commercial transactions or contracts, personal injuries and damage to property, ownership, possession and use of property, patent and trade marks, membership of bodies corporate, arbitrations, ships used for commercial purposes, and value added tax and custom duties. This was followed by other State's legislation of the common law system.<sup>60</sup>

The UN *Convention on Jurisdictional Immunities of States and Their Property* 2004 also adopted the negative list approach. The Part 3 of this Convention explicitly prescribed the matters for which State immunity cannot be invoked, including commercial transactions, contracts of employment, personal injuries and damage to property, ownership, possession and use of property, intellectual and industrial property, participation in companies or other collective bodies, ships owned or operated by a State, effect of an arbitration agreement. Such matters are the exceptions to State immunity.

Nevertheless, the negative list cannot exhaust all exceptions to State immunity, but it provides the key exceptions from immunity that are widely recognized by international general understandings. By merging the similar items of States' legislation, the matter 'commercial transactions' or 'commercial activities' is found in all legislation, so it is the most important exception to State immunity beyond the shadow of doubt.

## (2) The Positive List of Sovereign Acts Held Immune

Even in domestic litigation, a private party cannot bring a suit against government for its sovereign acts (not administrative acts) pursuant to the principle of administrative litigation law.<sup>61</sup> Based on the theory of checks and balances, the sovereign acts, such as legislation, diplomatic acts and national defense, are not subject to judicial authority's review, and the law-maker is not required to confirm this common sense by legislation. So, there is no legislation set out a list of sovereign acts of States. But in international practice, to give a list of sovereign acts of States is necessary. Some national courts have usually given one so as to clarify the cause why

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<sup>60</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 518.

<sup>61</sup> See: 胡建淼: 《行政法学》, 法律出版社 2015 年版, 第 485 页; [日] 藤田宙靖: 《日本行政法入门》, 杨桐译, 中国法制出版社 2012 年版, 第 134 页。



they exercise jurisdiction on a foreign State.<sup>62</sup> The content of positive list refers to matters which can be classified as State sovereign acts.

The positive list of sovereign acts enumerates specific matters for which State immunity can be invoked. Limited by the enumeration, the list cannot exhaust all circumstances of immunity. Such list may limit the scope of State immunity and causes the violations of sovereign rights of the defendant States. Therefore, the positive list approach is not welcomed in international practice.

In fact, the enumeration of positive list of sovereign acts exists only in the statement of some judgments and some scholarly works. The legal scholar Hersch Lauterpacht enumerated the categories of sovereign acts held immune in his article as follows: ‘legislative, executive and administrative acts, exaction of dues, denial of justice, and immunities of diplomatic and armed forces.’<sup>63</sup> In the case *Victory Transport Inc. v. Comisaria General* in 1964,<sup>64</sup> the US Court of Appeals described State immunity as ‘derogation from the exercise of jurisdiction of domestic courts’, and it should be strictly limited in the categories of governmental or public acts. Such acts usually include:

- ‘(i) internal administration;
- (ii) abstract State acts;
- (iii) acts concerning the army;
- (iv) activity concerning diplomatic activity;
- (v) public loans.’

The Institut de Droit International introduced a proposal entitled ‘Aspects of Jurisdictional Immunity of States’ in 1991. It provided the items against courts of the forum State exercising jurisdiction.

- ‘(i) transactions of the defendant State in terms of international law;
- (ii) internal, administrative, and legislative acts of the State;
- (iii) issues the resolution of which has been allocated to another remedial context;
- (iv) the content or implementation of the foreign, defence, and security policies of the State;

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<sup>62</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 521.

<sup>63</sup> See: Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, *British Year Book of International Law*, 28 (1951), pp. 237~239.

<sup>64</sup> See: *Victory Transport Inc. v. Comisaria General*, 336F 2d 354 (2d Cir. 1964).

(v) intergovernmental agreement creating agencies, institutions, or funds subject to the rule of public international law.’

No matter whose enumeration of positive list of sovereign acts, commercial transactions or activities between a State and a private party are not included.

Whether the negative list approach or positive list approach, they are all committed to the division of State acts. By distinguishing State private acts from sovereign acts, the scope of State immunity is fixed. And commercial transactions are the most typical private acts State involved. So, to a certain extent, the commercial transactions underlie the foundation of the edifice of restrictive State immunity.

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## 4.2 THE DESIGN OF REPRESENTATIVE LEGISLATION AND CONVENTIONS ON STATE IMMUNITY

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The next step is to recognize the position of commercial transactions by analysis of several representative legislation or conventions on State immunity.

### (1) The Exception Provisions in *European Convention on State Immunity*

In conformity with the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts, the *European Convention on State Immunity* 1972 is the first confirmation of restrictive immunity in the form of legal document. Chapter 1 of the Convention ‘immunity from jurisdiction’ defined the category of State immunity from the reverse perspective. It enumerated some exceptions to State immunity.

As regards the content of Convention, the provisions from the Article 1 to the Article 12 are about matters of which State immunity cannot be invoked. The Article 1 provided that a Contracting State instituting or intervening in proceedings or making a counterclaim in proceedings constitute the submission to the jurisdiction of the courts of another Contracting State. The Article 2 provided that a Contracting State may submit to the jurisdiction of the courts of another Contracting State by international agreements or by express consents. Article 3 provided that a Contracting State cannot claim immunity if ‘it takes any step in proceedings relating to the merits’. All of them can be considered as the waiver of immunity based on the consent, and existed in the age of absolute State immunity.

Subsequently, the Convention took the lead in supporting the restrictive State immunity by enumerating a series of exceptions to immunity from the Article 4 to the Article 12. The Article 4 provided that ‘if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the State of the forum’, a Contracting State cannot claim immunity from jurisdiction of the courts of another Contracting State. Indeed, the contract largely refers to the agreement concerning commercial transactions. The Article 7 provided that if a Contracting State ‘has on the territory of another State an office, agency, or other establishment through which it engages, in the same manner as a private person, in a commercial, industrial or financial activity’, it cannot claim immunity from jurisdiction of the courts of another Contracting State. This article is also the provision relating to exception of commercial activities. It defines the commercial activity by means of ‘private person test’ that has been used in some European countries’ judicial practice. The Article 4 and Article 7 embody the core of restrictive State immunity. And then, the Convention provided other exceptions to immunity respectively in other articles including: (i) contracts of employment; (ii) participation in companies, associations or other legal entities; (iii) a patent, industrial design, trade-mark, service mark or other similar right; (iv) the rights or obligations in immovable property; (v) rights or interests in immovable or movable property arising by way of succession, gift or *bona vacantia*; (vi) personal injuries and damage to tangible property; (vii) the relevant issues in arbitration.

The *European Convention on State Immunity* accumulated the general understandings on State immunity arising out of State practice, and played a crucial role in promoting the development of restrictive immunity. Indeed, most of exceptions to immunity in the European Convention were accepted by the UN Convention on State Immunity.

## (2) The Exception Provisions in US *Foreign Sovereign Immunities Act*

The US *Foreign Sovereign Immunities Act* 1976 believes 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.’ As mentioned in the preface of the Act, its tenet is to ‘define the jurisdiction of US courts in suits against foreign States, the circumstances in which foreign States are immune from suit and in which execution may not be levied on their property’. The exceptions to immunity of the Act

are designed based on the commercial activities. Actually, the general exceptions to the jurisdictional immunity of a foreign State provided in Article 1605 are largely based on the waiver and commercial activities.

The content of the Article 1605 (a) is mainly about the exceptional cases including waiver, commercial activities, rights in property, and personal injury or damage to property, in which paragraph (2) to (4) are in connection with commercial activities.<sup>65</sup>

The US *Foreign Sovereign Immunities Act* did not devote much writing to the matters of which State immunity cannot be invoked. However, with respect to commercial activities, this Act fully implemented the spirit of restrictive State immunity: a foreign State cannot claim jurisdictional immunity for its action based on or its rights in property in connection with commercial activities either in adjudication or in execution before the courts of US.

### (3) The Exception Provisions in UK *State Immunity Act*

The UK *State Immunity Act* 1978 is another modeled legislation under the guidance of restrictive theory of State immunity following the US *Foreign Sovereign Immunities Act*. Article 2 to Article 11 of this Act provided the exceptions to State immunity in detail.<sup>66</sup>

The Article 2 of this Act defined the non-immune case in respect of submission to the jurisdiction. The Article 3 provided that a State is not immune as respects proceedings relating to a commercial transaction or an obligation arising by virtue of a contract. The Article 4 to the Article 11 respectively provided the non-immune cases including contracts of employment, personal injuries and damage to property, possession and use of property, intellectual and industrial property, membership of bodies corporate, arbitrations, ships used for commercial purposes and value added tax or customs duties.

The UK *State Immunity Act* caused profound impact on the development of international law in respect of State immunity. Because of the historical and traditional reasons, the legislative idea of this Act was imitated by other States of Commonwealth of Nations. Later, Singapore, Canada, Pakistan, South Africa and Australia have enacted their own law on State immunity taking the UK *State*

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<sup>65</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), pp. 246~288.

<sup>66</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), pp. 346~383.

*Immunity Act* as a model. Accordingly, these countries accepted the restrictive principle in regime of State immunity.

In view of the worldwide influence of English-speaking countries, the UN Convention on State Immunity to a great extent drew lessons from UK *State Immunity Act*.

(4) The Exception Provisions in UN *Convention on Jurisdictional Immunities of States and Their Property*

The United Nations *Convention on Jurisdictional Immunities of States and Their Property* 2004 is an international convention with global influence in respect of State immunity. Under the guidance of the restrictive theory of State immunity, Part 3 of the Convention enumerated, by the negative list, the non-immune cases in international proceedings.

According to the content of this Convention, Article 10 (1) mainly introduced the rule that State immunity cannot be invoked in proceedings relating to ‘commercial transactions’. Because ‘commercial transaction’ is an abstract term, therefore, the Convention interpreted the meanings of ‘commercial transaction’ by a list in Article 2 ‘Use of terms’. Article 10 (2) mainly introduced the cases in which the commercial transactions exception does not apply, which encompasses ‘a commercial transaction between States’ and ‘if the parties to the commercial transaction have expressly agreed otherwise’. Article 10 (3) mentioned the status of a State enterprise is independent of a State, so the immunity from jurisdiction enjoyed by the State shall not be affected with regard to proceedings which relates to commercial transactions engaged in by its State enterprise. Then Article 11 to Article 17 respectively provided the exceptions to immunity comprising contracts of employment, personal injuries and damage to property, possession and use of property, intellectual and industrial property, participation in companies or other collective entities, ships owned or operated by a State and effect of an arbitration agreement.

The cases in which State immunity cannot be invoked provided from Article 10 to Article 17 are the most important part of the UN Convention. Among them, the Convention emphasized the exception of ‘commercial transactions’, and provided a detailed definition of the term ‘commercial transaction’, and certain of application circumstances of the rule of State immunity in commercial transactions.

As mentioned by some criticism, the content of the UN Convention is not avant-garde. In many aspects, the non-immune cases provided by the Convention do

not set out all of the circumstances in practice. However, it is a strategic circumvention by the drafter of the Convention in order to reduce the disputes amongst States. As an international convention, the UN Convention must be endorsed by most of States, so it shall be a compromise product rather than a perfect artwork. In fact, the Convention represented the greatest common denominator of different opinions in international community.

(5) The Exception Provisions in Japan *Act on the Civil Jurisdiction of Japan with respect to a Foreign State etc*

The *Act on the Civil Jurisdiction of Japan with respect to a Foreign State etc*, adopted by Japan in 2009, is the latest legislative achievement in the field of State immunity.

The past legislation usually mentions the term ‘State immunity’ or ‘sovereign immunity’ in the title, but this Act straightforward applies the term ‘civil jurisdiction with respect to a foreign State’ in its title. This shows that the core of the Act is about the cases in which Japanese courts can exercise jurisdiction over a foreign State, and implies Japan has fully accepted the restrictive principle of State immunity in international law. Since this Act was enacted after the adoption of UN Convention on State Immunity, it studied, to a large extent, the experiences and content of UN Convention. Likewise, Japan reserved its judgments on some controversial issues, so the Act mainly restricted the immune cases to the activities relating to commerciality.

The Chapter 2 of the Act is about the scope of jurisdiction with respect to a foreign State. The Section 2 of this chapter enumerated the cases of non-immunity from judicial proceedings in detail. The Article 5, the Article 6 and the Article 7 provide that ‘consent of a foreign State’ constitutes the non-immune case. The Article 5 is about express consent, and the Article 6 and the Article 7 concerns constructive consent. The Article 8 restricts a foreign State claim to State immunity before the courts of Japan in commercial transactions. The Article 9 to Article 16 provides the cases of non-immunity including labor contracts, death or injury of persons or loss of tangible objects, rights and interests pertaining to real property, rights and interests pertaining to administration or disposition of property in which the court participates, rights of intellectual property, qualification as a constituent member of an entity, operation of ships, and arbitration agreements.

For a long period, Japan’s attitude on State immunity is conservative. The enactment of the Act shows that Japan’s position on State immunity has changed from

the ambiguity to the endorsement of restrictive approach.<sup>67</sup> It reaffirms the fact that a series of cases of non-immunity provided by the UN Convention, and further assembles the international general understandings on the categories of restrictive immunity.

In addition, all of them are merely the representative legislation or conventions on State immunity. The cases of non-immunity in these legal documents can be illustrated as follows:

Cases of Non-immunity	European Convention on State Immunity 1972	US Foreign Sovereign Immunities Act 1976	UK State Immunity Act 1978	United Nations Convention on Jurisdictional Immunity of States and Their Property 2004	Japan Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc. 2009
Express Consent	Article 2	Article 1605 (a) (1)	Article 2	Article 7	Article 5
Implied Consent	Article 1	Article 1607	Article 2	Article 9	Article 6, Article 7
Commercial Transaction	Article 4, Article 7	Article 1605 (a) (2)	Article 3	Article 10	Article 8
Contracts of Employment	Article 5	Article 1605 (a) (5)	Article 4	Article 11	Article 9
Personal Injures or Death, and Damage to Property	Article 11	Article 1605 (a) (5)	Article 5	Article 12	Article 10
Rights or Interests in	Article 9,	Article 1605 (a)	Article 6	Article 13	Article 11,

<sup>67</sup> See: 许可：《日本主权豁免法制的最新发展与启示》，载《北方法学》2014年第5期。

Property	Article 10	(3), (4)			Article 12
Rights of Intellectual Property	Article 8		Article 7	Article 14	Article 13
Membership of an Entity	Article 6		Article 8	Article 15	Article 14
Ships Owned or Operated by States		Article 1605 (b)	Article 10	Article 16	Article 15
Effects of Arbitration Agreements	Article 12		Article 9	Article 17	Article 16
Responsibility on Human Rights					
Tax or Customs Duties			Article 11		

Although different legal instruments have different provisions pertaining to the cases of non-immunity, all of them treat ‘commercial transactions’ as the exception to State immunity. From the perspective of international practice, the commercial transaction exception is the most important exception to the general rule of a State’s immunity from the jurisdiction of the courts of another State.<sup>68</sup>

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<sup>68</sup> See: Roger O’keefe, Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press (2013), p. 54.



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### 4.3 THE SIGNIFICANCE OF COMMERCIAL TRANSACTION TOWARDS RESTRICTIVE STATE IMMUNITY

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The evolution of restrictive State immunity largely originates from the distinction of State functions: sovereign function and non-sovereign function. In many cases, the boundary between sovereignty and non-sovereignty is ambiguous. An intuitive method depends on whether a State engages in business or commercial activities in competition with private persons or companies, because most of States believe that in commercial activities a State does not act in exercise of governmental authority but rather acts which a private party may perform. Therefore, in most of time, States do not carry out the sovereign function in commercial activities. Increasing concern for private rights and international justice, ‘coupled with the increasing entry of States into what had previously been considered as private pursuits’<sup>69</sup> leads to the need to limit the scope of State immunity. Since sovereignty does not exist in commercial transactions, naturally State immunity shall not be applied in this field. The tendency to restrict State immunity initially emerged in commercial transactions.

As a conclusion, the commercial transaction constitutes the cornerstone of restrictive principle of State immunity. It promotes the improvement of the restrictive theory of immunity, and its development in practice. Without commercial exception, the establishment of restrictive State immunity will be disintegrated. Empirically, the rule that ‘a State is not immune from the jurisdiction of the courts of another State with respect to commercial transactions’ has been recognized by most of States’ practice.

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<sup>69</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.502.



## CHAPTER 2

# THE INTERPRETATION AND IDENTIFICATION TO THE COMMERCIAL TRANSACTION

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The commercial transaction is the most common and important issue in the proceedings in which State immunity cannot be invoked, laying the foundations of the restrictive doctrine of immunity. In the history of State immunity, the formation of restrictive doctrine largely results from the classification of the activities of State in commercial field. In practice, that a foreign State could not invoke immunity in commercial transaction proceedings is being declared by judicial decision increasingly, and more importantly, from 1970s most of international convention and national legislation provide that the courts of forum State have the jurisdiction in respect of the commercial activities of the foreign State. Inasmuch as the commercial transaction plays a very important role in the application of restrictive approach, it is necessary to figure it out what is the commercial transaction and how to identify or recognize it in the activities of the State?

## 1. THE CONCEPT OF COMMERCIAL TRANSACTION

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### 1.1 THE TERM COMMERCIAL TRANSACTION

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The term commercial transaction is abstract expression, synonymous with commercial activities or private act. In general, the meaning of the expression includes dual directions of broad sense and narrow sense.

#### (1) The broad sense of Commercial Transaction

The restrictive approach advocated extending immunity only to purely governmental activities, requiring courts to distinguish between public governmental

act (*actum jure imperii*) and private governmental act (*actum jure gestionis*).<sup>70</sup> In broad sense, the commercial transaction is considered to be very closely connected with other terms such as private act (*actum jure gestionis*), as opposed to public or sovereign act (*actum jure imperii*). It is usually employed by the States adhere to restrictive immunity as the general criterion, by which the domestic courts of the States decide whether or not a foreign State could invoke immunity in a proceeding. The lawsuit against the foreign state must be 'based upon' that commercial transaction. Hereby, the term commercial transaction represents all of exceptions to the State immunity, in which circumstances it refers to the non-sovereign activities.

(2) The narrow sense of commercial transaction

In the narrow sense, the commercial transaction refers to certain matters relating to commerciality which constitute an exception to immunity. As the Part 3 of UN *Convention on Jurisdictional Immunities of States and Their Properties* pointed out, in these proceedings relating to ① commercial transaction, ② contracts of employment, ③ personal injuries and damage to property, ④ ownership, possession and use of property, ⑤ intellectual and industrial property, ⑥ participation in companies or other collective bodies, ⑦ ship owned or operated by a State, ⑧ effect of an arbitration agreement, State immunity cannot be invoked.<sup>71</sup> To be distinguished from other exceptions, the commercial transaction definitely relates to commerce.

Furthermore, according to the principle of private international law, there is a distinction between the adjudication of cases and the enforcement to judgments, which respectively belong to the different stages of a proceeding. As to the State immunity, the exception to immunity from enforcement is stricter than from adjudication. Indeed, the eight exceptions of the UN Convention are just for the immunity of adjudication. In the enforcement, only the State property specifically use or intended for use commercial purpose could be deemed to be the exception to the immunity.<sup>72</sup> Actually, the term commercial transaction fulfills double functions in the

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<sup>70</sup> See: Amelia L. McCarthy, *The Commercial Activity Exception: Justice Demands Congress Define a Line in the Shifting Sands of Sovereign Immunity*, Vol. 77 *Marquette Law Review* (1994), 893.

<sup>71</sup> See: *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, from the Article 10 to the Article 17.

<sup>72</sup> See: *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, Article 19 *State immunity from post-judgment measures of constraint* provides that:

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

law of State immunity. On the one hand, it provides reference for the courts of the forum State to determine whether or not granting immunity from adjudicative proceedings to a foreign State; On the other hand, it forms the basis for the courts of the forum State to make the decision whether or not affording the property of a foreign State immunity from the enforcement measures.

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## 1.2 THE DIRECT APPROACH TO DEFINE THE COMMERCIAL TRANSACTION

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Nearly all of legal documents on State immunity indicate that a foreign State cannot invoke immunity to avoid the jurisdiction of the forum State, when it is involved in commercial transactions or activities.<sup>73</sup> But what is a commercial transaction is far from definite and settled.<sup>74</sup>

Some of legal documents give a very broad reference to commercial transaction, leaving it to be fixed by courts in judicial practice. For example, in the *European Convention on State Immunity* of 1972, Article 7 (1) stipulate that,

*“A Contracting State 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 individual, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment.”*

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(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen;  
or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

<sup>73</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p.76.

<sup>74</sup> See: 张露黎: 《论国家豁免中商业交易的认定》, 载《现代法学》2006年第2期。

The US *Foreign Sovereign Immunities Act* of 1976, Article 1603 (d) provide that, “A ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of any 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.”

Moreover, the Canada State Immunity Act, Article 2 gives a definition to the commercial activity. In this Act,

“Commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.”

Also, the Organization of American States: *Inter-American Draft Convention on Jurisdictional Immunity of States*<sup>75</sup>, Article 5 provide that,

“Trade or commercial activities of a State are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.”

It seems a little abstract and ambiguousness of the expression of commercial transaction or commercial activity. In practice, it is hard to find out what the meaning of the ‘commercial transaction’ exactly is merely according to the instruction of its definition. On the one hand, the scope of ‘transaction’ and ‘activity’ is not always determined and clear. For example, torts may be recognized as a kind of activity, but it is not a transaction. US used the term ‘activity’ in *Foreign Sovereign Immunities Act* 1976, while UK used the term ‘transaction’ in *State Immunity Act* 1978. So the classification of torts may have some epistemological differences between the two countries. On the other hand, what is the commercial is in complicity. Generally, the mere connection to a commercial activity alone does not necessarily make a State act or a transaction have the commercial attribute.<sup>76</sup> In the case *Saudi Arabia v. Nelson*<sup>77</sup>, the US Supreme Court held that the operation of a State hospital could be deemed to

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<sup>75</sup> The draft was approved by the Inter-American Juridical Committee on 21 January, 1983. See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), pp. 201~205.

<sup>76</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 236.

<sup>77</sup> See: *Saudi Arabia v. Nelson*, US (1993), 113 S. Ct. 1471, (No. 91-522).

be commercial activities, but the detention and torture of a hospital employee for reporting safety violations at the hospital could not.<sup>78</sup>

Despite providing a direct explanation of ‘commercial transaction’ in *Foreign Sovereign Immunities Act* 1976, the US Congress opposed the attempt of defining the term ‘commercial transaction’ in an extremely precise way, since it was considered as an unwise step.<sup>79</sup> In order to clarify the meaning of ‘commercial transaction’, some of legal documents prescribed the auxiliary method to recognize it. For example, the US *Foreign Sovereign Immunities Act* of 1976 suggested that the court look to the nature of the conduct and if it is private in nature, or is an activity that a private party could do, then it is a commercial transaction.<sup>80</sup> The *European Convention on State Immunity* of 1972 employed the term ‘in the same manner as a private person’ to help the court identify the really ‘individual, commercial or financial activity’.

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### 1.3 THE COMPOUND APPROACH TO DEFINE THE COMMERCIAL TRANSACTION

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Some legal documents define the commercial transaction with an approach of combining a broad reference with the enumeration of specific commercial activities. It makes the content of commercial transaction more concrete and unambiguous than the approach of merely providing a sweeping definition.

The UK *State Immunity Act* of 1978 is a representative legislation which adopted the compound approach to define the commercial transaction. The *State Immunity Act* mentioned the term ‘commercial transaction’ in Article 3 (1) which ruled that,

*A State is not immune as respects proceedings relating to*  
*(a) a commercial transaction entered into by the State; or*  
*(b) 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 the United Kingdom.*

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<sup>78</sup> See: *Saudi Arabia v. Nelson*, US (1993), 507 US 349, 361~362.

<sup>79</sup> See: HR Rep No. 94-1487, *Jurisdiction of United States Courts in Suits against Foreign States*, 94<sup>th</sup> Cong. (9<sup>th</sup> September 1976) p. 16.

<sup>80</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 235.

Although here using the expression of ‘commercial transaction’, it did not provide what is exact commercial transaction. Then, Article 3 (3) illustrated the content of commercial transaction with a specific list.

*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.*

Considering the UK’s leadership in the Commonwealth system, it is not difficult to understand the tremendous hold of UK *State Immunity Act* over the world. The Article 5 (3) of Pakistan *State Immunity Ordinance*, the Article 5 (3) of Singapore *State Immunity Act* and the Article 4 (3) of South Africa *Foreign State Immunities Act* adopted nearly the same words to describe the “commercial transaction”. Australia *Foreign States Immunities Act* has a bit difference with these legislations. In Article 11 (3), it interpreted the meaning of commercial transaction first, and then provided its content in detail.

*“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 engaged and, without limiting the generality of the foregoing, includes*

- (a) a contract for the supply of goods or services;*
- (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and*
- (c) a guarantee or indemnity in respect of a financial obligation, but does not include a contract of employment or a bill of exchange.”*

All of them adopt the same legislative tactics to introduce the commercial transaction, by which the abstract term are transformed into specific instances. Because of the worldwide power and influence of the Commonwealth system, the compound approach was carried out in the international law-making. The UN



*Convention on Jurisdictional Immunities of States and Their Property*, Article 2 (1) (c) applied the approach similar to the exposition of UK *State Immunity Act*, Article 3 (3).

*'commercial transaction' 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.*

Although the UN Convention on State immunity does not come into effect immediately, however, its arrangement for the use of terms like commercial transaction impacts on the national legislation indeed. For example, the Japan *Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc* of 2009, Article 8 (1) adopted the compound approach as well.

*A Foreign State, etc. shall not be immune from jurisdiction with respect to Judicial Proceedings regarding commercial transactions (meaning contracts or transactions relating to the civil or commercial buying and selling of commodities, procurement of services, lending of money, or other matters excluding labor contracts; the same shall apply in the following paragraph and Article 16) between said Foreign State, etc. and a citizen of a State other than said Foreign State, etc. (for those other than a State, the State to which they belong, hereinafter the same shall apply in this paragraph) or a judicial person or any other entity established based on the laws and regulations of the State or the State, etc. which belongs to the State.*<sup>81</sup>

It seemed as if the compound approach has achieved great success worldwide. But in fact this approach also has its drawbacks to identifying what exactly the meaning of

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<sup>81</sup> See: 日本国「外国等に対する我が国の民事裁判権に関する法律」，第八条：外国等は、商業的取引（民事又は商事に係る物品の売買、役務の調達、金銭の貸借その他の事項についての契約又は取引（労働契約を除く。）をいう。次項及び第十六条において同じ。）のうち、当該外国等と当該外国等（国以外のものにあつては、それらが所属する国。以下この項において同じ。）以外の国の国民又は当該外国等以外の国若しくはこれに所属する国等の法令に基づいて設立された法人その他の団体との間のものに関する裁判手続について、裁判権から免除されない。

commercial transaction, since the instances in the list are limited after all. All other types of commercial transaction should have to be determined under a reference to ‘any other transaction or activity’ or ‘other matters’.<sup>82</sup> Some legal instruments introduce a test in order to clarify that the commercial transaction should be the activity in which a State engaged ‘otherwise than in exercise of sovereign authority’.

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## 1.4 THE NEGATIVE APPROACH TO LIST NON-COMMERCIAL ACTIVITIES

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In order to understand the term commercial transaction well, it is not enough merely to know what the commercial transaction is. Actually, if we find out what the non-commercial activities are, then the commercial transaction appears spontaneously.

The commercial transaction is usually recognized as *actum jure gestionis*, contrary to *actum jure imperii*, so the negative approach is to analyze whether a State act in question falls within the sphere of sovereign authority. Once a State act is not considered as the exercise of sovereign authority, then it proves that the act can be attributed to commercial transactions. That means, if the dispute brings into question, for example, the legislative or international transactions of a foreign government, or the policy of its executive, the court of the forum State should grant immunity.

As a matter of fact, the sphere of State authority is established in international judicial practice. Acts in exercise of sovereign authority have been declared as including ‘the activities of the authorities responsible for foreign and military affairs, legislation and the exercise of police authority and the administration of justice’.<sup>83</sup> The US court has provided certain categories of strictly sovereign or public acts, which include,

- ‘(i) internal administrative acts, such as expulsion of an alien;
- (ii) legislative acts, such as nationalization;

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<sup>82</sup> See: UK *State Immunity Act*, Article 3 (3) (c); Pakistan *State Immunity Ordinance*, Article 5 (3) (c); Singapore *State Immunity Act*, Article 4 (3) (c); The UN *Convention on Jurisdictional Immunities of States and Their Property*, Article 2 (1) (c); Japan *Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc.*, Article 8 (1).

<sup>83</sup> See: *Empire of Iran*, German Federal Constitutional Court, Germany (1963), BvG, vol. 16, 27; 45 ILR 57, 81.

- (iii) acts relating to armed forces;
- (iv) acts relating to diplomatic activity;
- (v) public loans.’<sup>84</sup>

A similar list was given by works of scholars. For example, Lauterpacht enumerated ‘legislative, executive, and administrative acts, exaction of dues, denial of justice, and immunities of diplomatic and armed forces’ as the *acta jure imperii*,<sup>85</sup>

The *Aspects of Jurisdictional Immunity of States*, adopted by the Institut de Droit International in 1991, indicated the generally recognizable field of sovereign activity is as follows,

- ‘(i) transaction of the defendant State in terms of international law;
- (ii) internal, administrative, and legislative acts of the State;
- (iii) issues the resolution of which has been allocated to another remedial context;
- (iv) the content or implementation of the foreign, defense, and security policies of the State;
- (v) intergovernmental agreement creating agencies, institutions, or funds subject to the rule of public international law.’

The non-commercial activities list approach illustrated the concrete items that belong to sovereign authority. Admittedly, it is very helpful to define the commercial transaction from the negative perspective. The approach underlies much State practice but still leaves the decision largely to the court as a matter of discretion.<sup>86</sup> Realities are far more complicated than can be reflected by any list exhaustive, so it is not very wisdom to identify what commercial transaction is only through this approach.

## 2. THE COMPLEXITY OF COMMERCIAL TRANSACTION IN THE CONTEXT OF RESTRICTIVE STATE IMMUNITY

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### 2.1 THE AMBIGUITY OF COMMERCIAL TRANSACTION

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<sup>84</sup> See: *Victory Transport Inc. v. Comisaria General*, US 336 F. 2d 354 (2<sup>nd</sup> Cir. 1964), 360; 35 ILR 110, 116.

<sup>85</sup> See: Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, *British Year Book of International Law*, 28 (1951), pp. 237~239.

<sup>86</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.519.

It has been shown that how the globalization and privatization have caused big changes of the traditional realm between the public sector and the private sector. Therefore, it is somewhat difficult and perplexing to classify the State activities as commercial transaction or sovereign authority.

In the current legal instruments, the provision with respect to commercial transaction is either an abstract notion without concrete content or a broad list with many items. Both of them play a helpful but limited role in determining the essence of commercial transaction.

After extensive review of State practice, especially court decisions and legislation, it is not hard to find out the fact that the US *Foreign Sovereign Immunities Act* generalizes the matters relating to commerce into a ‘commercial activity’, so do the Canada *State Immunity Act* and Argentine *Immunity of Foreign States from the Jurisdiction of Argentinean Courts*. The UK *State Immunity Act*, South African *Foreign States Immunities Act*, Singapore *State Immunity Act*, Pakistan *State Immunity Ordinance*, Australia *Foreign States Immunities Act*, and Israel *Foreign States Immunity Law* use the term ‘commercial transaction’. The term ‘commercial transaction’ seems to be more prevalent in terms of the number of legislation. In these legislation, ‘transaction’ is interpreted as ‘contract’, ‘transaction’ and ‘activity’. Even in the UN Convention, the term ‘commercial transaction’ is defined, in Article 2 (1), as any ‘commercial contract or transaction’. So what is the difference among these terms ‘transaction’, ‘contract’ and ‘activity’?

The term transaction ‘is generally understood to have a wider meaning than the term ‘contract’, including non-contractual activities such as business negotiations.’<sup>87</sup> But it is narrower than ‘activity’. It would not include torts which are covered by the comprehensive term ‘activity’. Therefore, using the term ‘transaction’ to describe business or economic matters seems more accurate than ‘contract’ and ‘activity’.

As the weighty international legal instrument, the UN *Convention on Jurisdictional Immunities of States and Their Property* provides the authoritative interpretation for the term commercial transaction by the enumeration in Article 2 (1) (c). But the commercial transaction in reality is too complicated to be defined explicit. So after the Article 2 (1) (c) clarifying the meaning of commercial transaction, the Article 2 (2) gives an instruction to identify the commercial character of transactions in the

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<sup>87</sup> International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 2 (1) (c), para. 20.

indeterminate fields. And because of the complexity of State practice, also the abstract of commercial transaction, there would be different understandings in different context regarding commercial transaction. Accordingly, Article 2 (3) of the UN Convention on State Immunity contains a savings clause:

*The provisions of paragraphs 1 and 2 regarding the use of terms (including commercial transaction) in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.*

This Article demonstrates that the lawmaker of UN Convention has been aware of the divergence of opinions in recognition of commercial transaction.

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## 2.2 THE TECHNIQUES IN RECOGNITION OF COMMERCIAL TRANSACTION

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In consideration of these difficulties in recognition of commercial transaction, how to identify the commercial transaction is left the courts to their own devices. A survey of the relevant cases reveals the complexity of the identification of commercial transaction in practice.

The term commercial transaction in broad sense frequently used to indicate the distinction between *actum jure imperii* and *actum jure gestionis* which underlies the formation of restrictive doctrine of State immunity. But commercial transactions in which States are engaged are very complicated, and the dichotomy seems too theoretical to overcome the difficulties in identification of commerciality of State activities. In order to surmount these difficulties, the courts of forum State gradually develop certain techniques and tests to deal with the intricacies and varieties in reality. As Hazel Fox discussed in *The Law of State Immunity*, the approach of recognition of commercial transactions has undergone the following evolution<sup>88</sup>:

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<sup>88</sup> In the discussion, Professor Hazel Fox gives a set of methods and tests to surmount the difficulties in recognition of commercial transactions according to a time order. However, my discourse is different from her in 3 places. Firstly, the order of discussion is a bit different. Secondly, I think the private person test and the subject matter of the proceedings should be divided into different parts, not covered by 'the definition of State acts'. Last but most importantly, in my opinion, the nature approach and purpose approach is not merely aids to identify the focus of attention in defining State acts, so I emphasize the importance of criterion techniques in recognition of

(i) States perform acts in two capacities

The distinction of act of States underlies the foundation of restrictive doctrine of State immunity. According to the distinction, States could be engaged in the activities of both public sector and private sector, and may perform their conducts in two capacities: public acts and private acts. When a State acts in exercise of sovereign or governmental authority, the State is entitled to immune from the jurisdiction of the courts of another State, otherwise it cannot invoke immunity. This method is the prelude to the private person test.

(ii) implied waiver

Some early judicial decisions defended the national courts' exercise of jurisdiction over a foreign State from the point of waiver of immunity, and suggested that once the State was engaged in business with private parties, it could be regarded as waiver of immunity in an implied way.

Then, (iii) recognizing State acts by private person test

This method appeared in practice of Civil law States (Belgium and Italy) very early. If a foreign State performs or acts in the same manner as a private person without exercising its sovereign authority, it will not be given the sovereign status pursuant to the restrictive principle of State immunity. The private person test shifts the national courts' attention from the status of a State to the relationship of a private person with a State and the form by which it is performed.

(iv) the subject matter of the proceedings: State commercial acts

This method pays attention to give a general account of State commercial acts. If a State is engaged in activities in the commercial sphere, and its activities is likely to be treated as private law acts by the courts of some States, and so that State cannot claim immunity.

Undeniably, the definition of State act gives a useful guidance, but neither the private person test nor the abstract expression 'State commercial act' creates uniform results. The uncertainties have compelled the forum State to quest for alternative methods by which to reach a satisfactory consequence for the recognition of commerciality as required to give effect to the restrictive doctrine.

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commercial transactions. See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), pp.502~503.

(v) enumeration either by the list of non-sovereign (commercial) activities or by the list of sovereign activities

The enumeration techniques require a balancing exercise, including the weighing up of all relevant factors by reference to the fact whether the foreign State acts in the exercise of sovereignty or in a private capacity. Logically, enumeration techniques are by no means exhaustive. Even with the techniques from both positive aspect and negative aspect, some circumstances of commercial transaction are still missing. Therefore, in practice, national courts tend to by means of the enumeration method as well as other feasible techniques to determine whether or not a foreign State's conduct is commerciality. In most cases, the national courts may analyze the nature or purpose of transactions or activities in which State engaged.

(vi) the criteria for identifying the focus of attention in defining State acts:

(a) the purpose for which State acts may serve

(b) the nature of State acts

National courts usually employ the purpose or the nature of State acts as a criterion to identify the attribute of the acts of a foreign State. Currently, the criteria of purpose and nature are the most frequently used methods to identify commerciality in practice.

### 3. THE CRITERION TO DETERMINE COMMERCIALITY

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#### 3.1 A REVIEW OF THE CRITERION PROVISION IN UN CONVENTION

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Currently, one of the most intractable problems on State immunity is whether the nature of a transaction or the purpose for which a transaction is performed should be determinant of the character of the transaction.

As the legislative history show, the international community is far from shaping a uniform opinion regarding the criterion to determine commerciality.<sup>89</sup> International practice hovered between the nature criterion and the purpose criterion all long. This hesitation is manifested in the enactment of the UN Convention on State immunity.

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<sup>89</sup> See: 张露黎: 《论国家豁免中商业交易的认定》, 载《现代法学》2006年第2期。

The initial 1982 interpretative provision of UN General Assembly underlined ‘the nature of the course of conduct or particular transaction or act rather than its purpose’ should be the reference in determining the commercial character of State activities. However, in view of the endorsement of purpose criterion by some States, the Draft 1985 introduced this criterion. The purpose of the contract or transaction ‘should also be taken into account if that purpose is relevant to determine the non-commercial character of contract or transaction.’ This practice suffered wide criticisms, so the Draft Articles 1991 provided a new text which greatly restricted the application scope of purpose criterion. Pursuant to the provision, the purpose criterion can be applied only if ‘an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose.’ Arguments continue. The best way to eliminate arguments is probably not to mention the criteria to determine commerciality. After a review of the history of the Draft and the case law, the International Law Committee proposed deleting all reference to either the nature test or the purpose test in its report 1999.

*“As a result of this examination and in view of the differences of the facts of each case as well as the different legal traditions, the members of the group felt that alternative (f) above was the most acceptable. It was felt that the distinction between the so called nature and purpose tests might be less significant in practice than the long debate about it might imply.”<sup>90</sup>*

However, this did not end the controversy, so the Draft of Articles 2002 included two visions on the criterion. The first vision is a compromise between the Draft 1985 and Draft 1991, while the second vision follows the Draft 1999 and did not mention any criteria.

*“In determining whether a contract or transaction is a ‘commercial transaction’ under paragraph 1 (c), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.”*

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<sup>90</sup> See: The 1999 ILC Report, para. 60.



At last, being regarded as more instructive, the first version was accepted by the UN *Convention on Jurisdictional Immunities of States and Their Property*, and appears as the Article 2 (2) in the Convention.

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### 3.2 THE CRITERION PROVISION IN NATIONAL LEGISLATION

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Because of the limitation of our language in expression, the interpretation for the meaning of commercial transaction could not answer the constantly changes and unpredictable fluctuations in realities. Thus, it is necessary to establish a criterion to clarify what the commerciality is.

Almost all of cases concerning State immunity are related to the issue of identification of State acts. In these cases, the criterion approach was frequently employed to identify the focus of attention in defining the act of foreign States.<sup>91</sup> But these cases are extremely intricate and numerous, so the opinions of cases on the criterion issue may be contradictory with each other. In view of this, we only give a brief review to the national legislation.

In some legislation on State immunity, the criterion appears in provisions as means of clarifying the connotation of commercial transaction. The US *Foreign Sovereign Immunities Act* of 1976, Article 1603 (d) provides that,

*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.*

Therefore, the courts observe the nature of the conduct and if it is private in nature, or is an activity that a private party could do, then it is a commercial act. So ‘the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives ..... the issue is whether the particular actions that the foreign State performs (whatever the motives behind them) are the type of actions by which a private party engages in trade and traffic or commerce.’<sup>92</sup>

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<sup>91</sup> See: 林欣、李琼英：《国家对外商业活动中的主权豁免问题》，载《中国社会科学》1991年第2期。

<sup>92</sup> *Saudi Arabia v. Nelson*, 507 US 349 (1993), 360~361.

The UK *State Immunity Act* of 1978 provided the non-immune transaction by a list approach according to Article 3 (3), but did not give a criterion for identifying the commerciality of transactions. Although not expressly mentioned in the Act, UK courts usually employed the nature not the purpose of a foreign State act as a means of determining the character of transactions.<sup>93</sup> Most of legislation of the Commonwealth countries is like to the UK, in which the criterion clause is not included, but except Canada.

In the Canada *State Immunity Act*, Article 2 adopted the nature approach for giving the definitions of the commercial activity as auxiliary, which prescribes that,

*“‘Commercial activity’ means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.”*

Hereby, whether an activity is the commercial or not mainly depends on its nature not purpose.

Although the UN Convention on State Immunity affirmed the practice of applying criterion approach in deciding the commerciality of transactions, the recent national legislation, Israel and Japan, did not follow the UN Convention in this point. The reason may be that legislators were more willing to reserve this issue to judicial discretion due to the complexity of commercial transactions in practice.

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### 3.3 THE CRITERION OF NATURE APPROACH

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#### (1) The Practice of Nature Approach

Generally speaking, the commercial transaction underlies the heart of the restrictive doctrine of State immunity, so it is important to establish the criterion for deciding what constitutes a commercial activity in the application of restrictive approach. In practice, some States advocate that the nature of State acts is decisive, irrespective of the purpose for which State acts are undertaken. Definitely, every act of State serves a governmental purpose.<sup>94</sup> Applying the purpose criterion may lead to the international practice return to absolute State immunity. However, some other States hold that the

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<sup>93</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.273.

<sup>94</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p.75.

purpose for which a State act is performed should be taken into consideration, because the purpose and the nature of State acts are influenced with each other, it is impossible in some cases merely to analyze the nature of State acts without paying attention to its purpose.

Currently, most of legal instruments and judicial practice on State immunity support that the nature, not the purpose, of the particular act of a foreign State determines whether or not that foreign State can invoke State immunity. If a State act by its nature is a commercial or private act, no matter what purpose the act serves, the State cannot invoke immunity.

As mentioned above, the US *Foreign Sovereign Immunities Act*, as well as Canada *State Immunity Act* has adopted the nature approach as the criterion for deciding what constitutes commercial transaction. In the clause of the definition of commercial activity, the criterion of nature approach was introduced: the character of the activity is determined by the nature of State acts and is not affected by the purpose being pursued.

In most of cases concerning State immunity, the nature approach was usually employed as means of identifying the commercial transaction.

In the *Empire of Iran*, the Court distinguished the *acta jure gestionis* from the *acta jure imperii* by the nature of the subject of litigation.<sup>95</sup>

*“The distinction between sovereign and non-sovereign State activities cannot be drawn according to the purpose of the State transaction and whether it stands in a recognizable relation to the sovereign duties of the State. For, ultimately, activities of State, if not wholly then to the widest degree, serve sovereign purposes and duties, and stand in a still recognizable relationship to them. Neither should the distinction depend on whether the State has acted commercially. Commercial activities are not significant different from other non-sovereign State activities. As a means for determining between acts jure imperii and acts jure gestionis one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the State had*

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<sup>95</sup> See: Editor: Jost Delbrück, Wilfried Fiedler, Wilhelm A. Kewenig, Rüdiger Wolfrum, *German Yearbook of International Law* ( Vol. 25), Duncker & Humblot (1982), pp. 422~423.

*acted in the exercise of its sovereign authority, that is in public law, or like a private person, that is in private law.”*<sup>96</sup>

The decision gave profound influence on international law. Subsequently, many cases used the method as a frame of reference to distinguish the sovereign acts and non-sovereign acts of State. The difference between *actum jure imperii* and *actum jure gestionis* cannot be determined by a reference to the purpose of the act. Because most of activities conducted by State serve sovereign purpose and have a direct connection with such purpose, therefore, the purpose test is nearly a futile attempt.

*‘In distinguishing official acts from private acts, the purpose underlying the acts is of little or no importance since all State activity is directed in the last analysis towards the public interest.’*<sup>97</sup>

As a matter of fact, the nature of the act which the State performs is decisive for the question of immunity. Until recently, many States have clearly accepted nature approach via legislation or judicial decisions. But the acceptance of restrictive State immunity does not imply the acceptance of nature approach. Although some States hold the restrictive position on State immunity, they do not classify a foreign State act as commercial transaction or as sovereign activity by analysis of its nature.

## (2) The Difficulties in the Application of Nature Approach

Most of legislation provides that the nature of the course of conduct or particular transaction as the decisive factor to determine the commercial character of State activities. ‘The fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical.’<sup>98</sup>

However, the judicial practice proves that the criterion established by legislation may not adapt to all circumstances. Indeed, ‘if an activity is customarily carried on *for profit*, its commercial nature could readily be assumed.’<sup>99</sup> It means that the commercial nature of an act is largely affected by its purpose or motive for profit. Without considering the purpose or motive of an act, it will become very hard to determine nature of the act.

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<sup>96</sup> See: *Empire of Iran Case*, Germany (1963), 45 ILR 57, 80.

<sup>97</sup> See: *Italian v. Beta*, Switzerland (1966), 65 ILR 394, 401.

<sup>98</sup> US House of Representatives, Reports No. 94-1487, (1976), p. 16.

<sup>99</sup> US House of Representatives, Reports No. 94-1487, (1976), p. 16.

The US took the lead in adopting the nature approach via legislation. The Article 1603 (d) of *Foreign Sovereign Immunities Act* of 1976 provides that,

*“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.”*

But, in practice, the US courts do not interpret the Article 1603 (d) strictly.<sup>100</sup> Sometimes the essence of an act is largely defined by reference to its purpose. Unless the purpose was examined, its nature cannot be determined.

Whereas difficult it may be in some cases to separate ‘nature’ from ‘purpose’, in practice, the US Supreme Court expressed another line of reasoning in the case *Argentina v. Weltover*, in which the Court avoided the choice between nature approach and purpose approach, but, by contrast, employed the private person test to determine the commercial character of an act. It argued that,

*“..... the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign State performs are the type of actions by which a private party engages in ‘trade and traffic or commerce’.”*<sup>101</sup>

But literally the meaning of commercial activity does not on equal term with the act which private persons normally perform. Therefore, it is not accurate to describe the commercial activity by the private person test. The attempt of taking the private person test to replace the nature approach seems not a satisfactory choice.

In *Argentina v. Weltover*, Argentina contended that, in spite of the fact that the US *Foreign Sovereign Immunities Act* prohibits the consideration of purpose, however, the court should fully take account of the circumstance of a transaction in order to determine whether it is the commercial or not. The US Supreme Court said that ‘even in full context, the issuance of those bonds was not analogous to a private commercial transaction.’<sup>102</sup> It implies that the Supreme Court did not thoroughly exclude the contextual approach, and the contextual approach demands to take account of any relevant element of the activity regardless of its nature or purpose. Indeed, that not

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<sup>100</sup> The US courts do not believe that an absolute separation is always possible between the ontology and teleology of an act. See: *De Sanchez v. Banco*, US, 770 F. 2d 1385, 1393 (5<sup>th</sup> Cir. 1985).

<sup>101</sup> *Argentina v. Weltover*, US (1992), 504 US 607, 614.

<sup>102</sup> *Argentina v. Weltover*, US (1992), 504 US 607, 615~616.

only proves the inadequacy of the nature test, but also vindicates the purpose approach in implied way.

As a matter of fact, the judicial practice shows that the determination of commercial activities is a fairly complicated exercise. Only reference to the nature of a transaction is not enough to find a satisfactory answer. It would be necessary for the courts to go into detailed analysis of every circumstance in cases.

### (3) The Improvement of Nature Approach

As mentioned above, sometimes the courts of forum State may face difficulties in determining the nature of a transaction. Even in the frame of the UN *Convention on Jurisdictional Immunities of States and Their Property*, difficulties still exist. The UN Convention endeavored to give a satisfactory refinement on the nature criterion test, but the results are not so satisfactory.

States practice has produced some refinements of nature approach. They do not go beyond the techniques in recognition of commercial transaction as mentioned above. The most important refinement of nature test is analysis of the private law character, by examining whether the contract or transaction could have been engaged in by a private party. It need to the scrutiny about the specific features of the transaction in detail by comparison of the transaction between private individuals. For instance, in *Minister for Public Education of Portugal v. Di Vittorio Associates*, the court concluded that the transaction in the proceeding is of private law character by its nature, with the reasoning that agreement between the claimant and the defendant State had all the characteristics of an agreement between two private individuals.<sup>103</sup> Another refinement is to take account of the whole context of suit. For example, the State A's Embassy entered into a contract with a private person M who is a resident of State B. According to the contract, State A's Embassy will rent M's house as the office of embassy. If M filed a suit against State A's Embassy in the court of State B because the Embassy did not pay the rent in time, the court may not exercise its jurisdiction solely by reason of the commerciality of the nature of contract. Obviously, the rental contract between State A's Embassy and M was for a sovereign purpose from A's perspective, while from M's perspective was for a profit. But the denial of the effectiveness of the contract may cause State A's Embassy to fail to assume the

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<sup>103</sup> See: *Minister for Public Education of Portugal v. Di Vittorio Associates*, 65 ILR 32, 35 (France (Casablanca TC) 1955).

diplomatic functions. As a result, State B' court must take account of the whole context in which the claim against State A is made before exercising jurisdiction.

Certainly, there are some other refinements of nature test, but they are gradually eliminated from international practice over time. For example, some States usually take a measure of balance of interests as a means of nature test, by which the courts of these States 'weigh the defendant State's interest in benefiting from immunity against the forum State's interest in exercising jurisdiction and the private party's interest in acquiring judicial relief.'<sup>104</sup> Accompanied by the imprint of absolute State immunity, some States determine the grant or refusal of immunity by classifying the identity of the subject of immunity. The courts of these States differentiate transactions performed by States or governmental organs from transactions performed by State agencies or instrumentalities. If a transaction is performed by State agencies or instrumentalities rather than governmental organs, then it can be attributed to the commercial transaction. However, such refinements seem a bit obsolete.

As a matter of fact, there are various forms of performance of commercial transactions. In many cases, whether a contract or a transaction embraces commerciality is largely dependent on the discretion of the judiciary. In this process, the courts of forum State may consider the purpose of transactions and its effect on the nature of transactions. So the purpose approach is by no means thoroughly exclusive with nature approach, and sometimes it is an assistant of nature approach.

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### 3.4 THE CRITERION OF PURPOSE APPROACH

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According to the purpose approach, the act of States is to be recognized as the sovereign act if it is performed for sovereign purpose. The purpose test suffered much criticism over years, but it still survived in current international practice, and its feature was reserved by the UN *Convention on Jurisdictional Immunities of States and Their Properties*, in which Article 2 (2) stipulates that,

*"In determining whether a contract or transaction is a 'commercial transaction', ..... its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the*

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<sup>104</sup> See: Roger O'keefe, Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press (2013), p. 70.

*practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.”*

As a way of limiting the scope of State immunity, the purpose approach appears earlier than the nature approach. It plays an important role in the time when the State function was confined to such public matters as executing the legal order, carrying out the foreign affairs or maintaining the armed force for the national defense.<sup>105</sup> However, influenced by the ideology of socialism and the changes of State functions, States increasingly engaged in the field of autonomy of private law, so the purpose approach lost much of its validity. With the evolution of the doctrine of restrictive immunity, the criterion of ‘public purpose’ has been excluded by degrees in the international practice. But until now the purpose approach did not die thoroughly.

The purpose approach demands for the courts of forum State to determine whether a transaction is commercial or not should take the motive or purpose of the transaction into account. If a transaction or contract apparently serves for political policy or public function, it should be excluded from the scope of commercial transaction.

The transactions between States and private parties are usually not same as commercial transactions between private parties. Indeed, many transactions in which States participate are not for profit, but for specific State function or to promote public interest. For example, some governmental activities, such as the governmental purchase of armaments, the lease of officials for the foreign embassy, the imports of grain and cotton to relief of the victims of a natural calamity and the purchase of medicines to prevent infectious diseases, often employ the appearance of commercial transactions. But those activities certainly assume governmental functions, so their purpose is different from the commercial transactions for profit. By the purpose test, some transactions or contracts in which States or governments involve should not be attributed to commerciality, because they are for the purpose of political domination or public service. From certain of States’ perspective, it seems reasonable to invoke immunity for their activities for governmental purposes.

The purpose approach as a method to identify commercial transactions is broadly applied in States judicial practice. There are a lot of relevant examples. For instance, although the *State Immunity Act* of Canada adopted the nature approach in Article 2,

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<sup>105</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 98.



but in the case of *Re Canada Labour Code*, the Canadian Supreme Court applied a purpose approach, because the purpose of an activity of US was relevant to the determination of the nature of that activity. In the opinion of the majority of judges,

*“Nature and purpose are interrelated, so it is impossible to determine the former without considering the latter. The definition of commercial activity in the State Immunity Act does not preclude consideration of its purpose ..... if consideration of purpose is helpful in determining the nature of an activity, then such considerations should be and are allowed under the Act.”*<sup>106</sup>

As the case *Re Canada Labor Code* shows the purpose of State activity is usually interrelated with the nature of activity. It may be difficult to recognize the nature of State acts without examining the purpose. Moreover, sometimes a transaction may include a set of State conducts. In this context, it is impracticable to analyze the nature of every act. In fact, analysis of the purpose of the transaction is conducive to identification of the relevant conduct that is really related to the claims of litigation.

Some States claim to support the nature test as a mean of determining commerciality, but their practice is often contradictory to the statement. For example, in the comment from Italy on the draft articles of *Convention on Jurisdictional Immunities of States and Their Property*, Italy considers ‘the nature test to be in principle the sole criterion for determining the commercial character of a contract or transaction.’<sup>107</sup> But in judicial practice, Italian courts generally employ the purpose test as a criterion for determining commerciality of a contract or transaction. In some cases, Italian courts conferred sovereign immunity on the respondent State, in that the respondent State’s particular act was considered as having a sovereign nature for it purportedly fulfilled the political purposes or governmental aims.

Similarly, US *Foreign Sovereign Immunities Act* 1976 in Article 1603 (d) provides that,

*“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.”*

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<sup>106</sup> See: *Re Canada Labour Code*, Canada, Federal Court of Appeal, 1989, (1990) 1 FC 332. Also, *Re Canada Labour Code (Unites States of America v. Public Service Alliance of Canada)*, Canada Supreme Court, (1992) 91 DLR (4<sup>th</sup>) 449, 461.

<sup>107</sup> See: Replies received from States, UN Doc. A/56/291/Add.1. p. 3.

But the judiciary of US did not dogmatically apply the nature test persistently in practice. Actually, the US courts have ‘a great deal of latitude in determining what is a commercial activity for the purposes of the Act.’<sup>108</sup> In the case *De Sanchez v. Banco Central de Nicaragua*, the Fifth Circuit Appeal Court gave the immunity to Nicaragua for its refusal to honor a check which Nicaragua Central bank had issued to cover a private bank debt. The court held that the issuance of check was to control Nicaragua’s reserves of foreign currency, so it is for the sovereign purpose. Then, the Fifth Circuit Appeal Court reasoned that,

‘Often, the essence of an act is defined by its purpose. Unless we can inquire into the purpose of such acts, we cannot determine their nature.’<sup>109</sup>

It would seem that, according to the opinion of the US court in this case, the nature test is in essence a purpose test. At least, to determine the nature of activities of a foreign State is dependent on the examination of purpose of those activities. From the case, it can be seen that, nature approach confirmed by *Foreign Sovereign Immunities Act* notwithstanding, the US courts did not thoroughly exclude the purpose test as a mean of determining commerciality of activities of foreign States.

The UK *State Immunity Act* did not mention the criterion for determination of a commercial transaction. The France’s position on this issue is also ambivalent.<sup>110</sup> On the one hand, France announced that commerciality is based on the nature of activities; on the other hand, it expressed the opinion in judicial practice that ‘an act is considered as a governmental act if its purpose is the performance of a public service.’<sup>111</sup>

Objectively, the nature approach has more rationality. However, in view of the complexity of the cases, it is difficult to apply the nature approach persistently. As a result, the purpose approach becomes a complementary but effective method in determining the commerciality in a transaction or contract. Chinese government addressed necessity to retain the purpose approach in its reply to the draft articles of *Convention on Jurisdictional Immunities of States and Their Property*.

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<sup>108</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.343.

<sup>109</sup> See: *De Sanchez v. Banco Central de Nicaragua*, US, Court of Appeals, 770 F.2d 1385 (5<sup>th</sup> Cir. 1985), at 1393.

<sup>110</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 103.

<sup>111</sup> See: *Clerget v. Banque*, France, (1969), 52 ILR 310, at 313.

*“..... The State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. The government of China endorses this principle but, in determining whether a contract or transaction is a commercial transaction under the Convention, applying only the nature test is far from adequate. The purpose of the State for engaging in the transaction must also be considered. Adopting a rule on jurisdictional immunities of States and their property would no doubt provide protection for natural or juridical person involved in the transaction, but this should not jeopardize the public purpose of the State for engaging in the transaction. A balance must be struck between the nature test and the purpose test to protect the property of States used for public purposes under exceptional circumstances. It has been argued that the nature test is ambiguous, since it seems possible to identify certain public purposes in every transaction that is carried out by a State. In this respect, the Government of China believes that applying the nature test in no way provides additional protection for commercial transaction carried out by a State; its purpose is not to disregard the special interest of a State under exceptional circumstances, such as the procurement of food supplies to relieve a famine situation, purchase goods to revitalize an affected area, or supply medicaments to combat a spreading epidemic. The purpose test may not have clear and concise determining criteria as the nature test, but it is by no means impossible to apply. If, in practice, the purpose of a State engaging in a given commercial transaction is indeed relevant to the determination of the non-commercial nature of the contract or transaction, the defendant State should be given an opportunity to prove its case. The Government of China agrees in principle with the views of the purpose of the State for engaging in the transaction must also be considered ..... The purpose test is a supplementary standard employed to minimize unnecessary disputes which could arise from differences in State practice if only the nature test is applied. Applying the purpose test would not hamper the flexibility of national courts in making judicial interpretations when dealing with relevant cases, but would provide guidance to Governments, courts and enforcement officials, and ensure*

*that relevant factors concerning the contract or transaction are taken into consideration.”*<sup>112</sup>

Likewise, Japan also questioned the feasibility of applying the nature approach alone.

*“Japan questions the sufficiency of the nature test in determining whether a certain contract or transaction is a commercial transaction. Precedents in national legislations and court decisions also seem to indicate that there is little convergence on national practices on this issue. At this point, it seems most appropriate to leave it up to the discretion of national courts to decide what should be understood as a commercial transaction.”*<sup>113</sup>

So Japan endorsed that the UN Convention should leave some room for the discretion of national courts in determining whether a certain contract or transaction is a ‘commercial transaction’. In view of this, the Japan’s *Act on the Civil Jurisdiction of Japan with respect to a Foreign State etc* 2009 does not involve the standard to determine commercial transactions, but leaves it to the discretion of judicial authority.

As a matter of fact, the fissure between ‘nature test’ and ‘purpose test’ cannot be ignored in practice of States. This is mainly reflected in the divergent views between the developed States and the undeveloped States. Most developed States tend to adopt nature test to identify commerciality of transactions or contracts, because they are generally the foreign investors. The nature test greatly curtails the scope of State immunity, and reduces the risks of private party, so it would effectively protect the overseas interests of enterprises from the developed States. Contrarily, undeveloped States are usually the invested States: the recipient of foreign direct investment. They tend to adopt the purpose test so that they can make effective defense on the grounds of public purpose in the proceedings.

Consequently, the international community needs a consensus. As mentioned, the purpose test may not have clear and concise determining criteria as the nature test, but ‘a balance must be struck between the nature test and the purpose test to protect the property of States used for public purposes under exceptional circumstances.’<sup>114</sup> Therefore the UN Convention on State Immunity adopted the context approach that

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<sup>112</sup> See: Replies received from States, UN Doc. A/56/291, p. 3.

<sup>113</sup> See: Replies received from States, UN Doc. A/56/291/Add. 2, p. 2.

<sup>114</sup> See: Replies received from States, UN Doc. A/56/291/Add. 2, p. 3.

mixed nature approach and purpose approach together for determination of commercial transactions.

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### 3.5 THE CRITERION OF CONTEXT APPROACH

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In the drafting of the *UN Convention on Jurisdictional Immunities of States and Their Property*, States have argued fiercely over the criteria for determination of commercial transaction. This is reflected in the contradiction between developed States and undeveloped States. Indeed, most of developed States support the only legal nature of the transaction should be the deciding factor. They oppose the purpose approach because of the worry that, ‘as the purpose of a transaction is often not recognizable at the time of the agreement unless it is laid open, claiming a non-commercial purpose when it comes to judicial review will thus often be tantamount, to depriving a private party of any means to seek judicial relief.’<sup>115</sup>

However, these developed countries have ignored the positions of other States, especially undeveloped States, while articulating what they consider to be correct practice. In fact, most undeveloped States are more inclined to use the purpose test to measure and determine the character of State’s activities. Obviously, the claim that nature test is the only right choice for international law is a subjective assumption. Let alone not all of developed States hold such bias. For instance, Japan has doubts about the adequacy of the nature test as the sole method in determining the commerciality of transactions.<sup>116</sup> France believes ‘the criterion of the purpose of the act must be applied in order to determine whether or not the operation in question is commercial.’<sup>117</sup> Austria welcomes a compromise ‘which allows for flexibility and at the same time provides for a higher degree of legal certainty, in particular for private parties’, so Austria accepts the application of context approach in determining the character of a transaction.<sup>118</sup>

Considering the complication of the cases and the inconsistency of State practice about State immunity, the emerging consensus, namely context approach, appears to

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<sup>115</sup> See: Replies received from States, UN Doc. A/47/326/Add. 1, p. 4.

<sup>116</sup> See: Replies received from States, UN Doc. A/56/291/Add. 2, p. 2.

<sup>117</sup> See: Replies received from States, UN Doc. A/53/274, p. 4.

<sup>118</sup> See: Replies received from States, UN Doc. A/53/274, p. 2.

be that the whole context of transactions or contracts including the nature and the purpose of the particular State act must be taken into account. Such an approach not only largely meets the demands of the developed States, but also gives consideration to the concerns of undeveloped States, greatly reducing the conflicts and disputes caused by the application of a single approach, so the context approach is a necessary and far-sighted compromise.

However, the context approach adopted by the UN Convention does not equate the purpose test with the nature test. Indeed, it is focused. In accordance with the provision of UN Convention,

*“In determining whether a contract or transaction is a commercial transaction, reference should be made primarily to the nature of the contract or transaction.”*

And then, the Convention accepts two cases in which the purpose of contract or transaction should be taken into consideration together with its nature: (i) agreement between the parties, and (ii) the practice of the forum State.<sup>119</sup> In addition to the nature of contracts or transactions, ‘the purpose should be taken into account if the parties to the contracts or transactions have so agreed.’ It reflects the principle of party autonomy. Moreover, the practice of the forum States also constitutes the basis of application of purpose test.

Consequently, on the condition of certain limits, the UN Convention admits of the context approach, emphasizing the dominance of nature approach and the necessity of purpose approach, in determining whether a transaction is a commercial transaction. The definition of commercial transaction in Article 2 (1) (c) and the context approach in Article 2 (2) of UN Convention together constitutes the epistemological measures access to ‘commercial transaction’.

After obtaining a general understanding of the commercial transaction, the question shall be examined whether it is a customary international law or not that foreign States cannot invoke immunity in the proceedings relating to commercial transactions.

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<sup>119</sup> See: Roger O’keefe, Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press (2013), p. 70.

## 4. WHETHER THE COMMERCIAL TRANSACTION EXCEPTION TO IMMUNITY CONSTITUTES A CUSTOMARY INTERNATIONAL LAW

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### 4.1 THE FORMATION OF CUSTOMARY INTERNATIONAL LAW

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In terms of the technique of law-making, international law retains the characteristics of a primitive law system. There is neither domestic legislature to formulate laws nor authorized administrative agency to formulate rules.<sup>120</sup> In this background, the system of international law is primarily formed from the consensus in conventions negotiated among states or from the shared understandings on the basis of practice. In consideration that international conventions or treaties are usually statement in principle, and the specific rules need to be formed in States practice, so the international law-making largely depends on the approach of practice. Repeated practices in the international community results in legal phenomena. Then, shared understandings, the underpinnings of law, are extracted from the phenomena. Finally, these shared understandings further evolve into the rules of customary international law.<sup>121</sup>

According to the Article 38 (1) (b) of *Statute of International Court of Justice*, the International Court of Justice, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply ‘international custom, as evidence of a general practice accepted as law’. This is generally determined through two factors: the general practice of states and what states have accepted as law, or in the academic words ‘State practice’ and ‘*opinio juris*’.<sup>122</sup>

The practice of States, the objective element, needs to meet 3 conditions for the purpose of being recognized as the ‘general practice’ which is necessary to form a custom. The first element is the time factor. As is widely known, a custom literally refers to informal understandings that govern the behavior of members of society. Its

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<sup>120</sup> See: 朱晓青主编：《国际法学》，中国社会科学出版社 2012 年版，第 12 页。

<sup>121</sup> See: Jutta Brunnee and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account*, Cambridge University Press (2010), pp. 65~77.

<sup>122</sup> See: Anthony Aust, *Handbook of International Law*, 2<sup>nd</sup> edition, Cambridge University Press (2010), pp. 6~7. And also see: 杉原高嶺：《国际法学講義》（第 2 版），有斐閣 2013 年，64 頁。

formation shall experience a long period, because without such long period of time, it is difficult to form general understandings. The second element is the consistency factor. It is required that, in the long period of practice, States shall repeatedly and consistently perform the activities. If States make changes under the influence of interests, it may result in the break of consistency required by a custom. The third element is the generalization factor. A general practice shall be based on the activities conducted by quite a number of States. In other words, it is inappropriate to recognize activities conducted by only few States as a custom, even if the activities are repeated practiced for a long time.

Nevertheless, international customary law cannot be formed if only the requirement of existence of ‘general practice’ is satisfied. The aim of law-making may be achieved only if the State practice becomes law by ‘acceptance’. According to the general understanding, ‘*opinio juris*’, meaning the opinion of law, is the belief that an action was implemented as an obligation of law.<sup>123</sup> States must act out of a sense of legal obligation rather than act out of convenience, necessity or political expediency. It is a subjective constituent element as the source of international law.<sup>124</sup> Because ‘*opinio juris*’ refers to the mental state of a State, it is hard to fix and to prove. In practice, a variety of evidences, such as legislation, governmental statements, official documents, treaties, judicial decisions and scholars’ opinions, are employed to prove the existence of *opinio juris*. More importantly, according to the opinion of ICJ, State practice can also be the evidence to prove the existence of ‘*opinio juris*’. That means ‘*opinio juris*’ in a custom can be reflected in State practice.<sup>125</sup> In the *North Sea Continental Shelf cases* 1969, the ICJ stated that,

*“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”*<sup>126</sup>

Nevertheless, a State’s psychological state may change constantly, and thus it is not necessary that ‘*opinio juris*’ is an important motive for each instance of action. However, because of the subjective nature of ‘*opinio juris*’ in the constitution of

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<sup>123</sup> See: 赵维田：《习惯国际法刍议》，载《法学研究》1988年第5期。

<sup>124</sup> See: 邵沙平 主编：《国际法》，高等教育出版社 2008 年版，第 32 页。

<sup>125</sup> See: 朱晓青主编：《国际法学》，中国社会科学出版社 2012 年版，第 17 页。

<sup>126</sup> See: *North Sea Continental Shelf cases*, Judgment, I.C.J. Reports 1969, p. 45, para. 77.



customary international law, it may be possible to reach general understandings of law among States but is very hard to reach specific rules. Actually, the customary law normally embodies as the principles or laws in macro system rather than the detailed rules. So it can be a method to determine whether commercial transactions exception to immunity constitutes an international rule on the basis of the 2 elements of customary international law: 'State practice' and '*opinio juris*', but only such a method is not sufficient.

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## 4.2 THE PROMOTION OF TREATIES ON CUSTOMARY INTERNATIONAL LAW

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Traditionally, the customary international law is maintained as a common law which has universal effects. With the interaction of the members of international community goes deeper, the design of the rule of international law has a tendency moving from the general to the specific, and it is usually hard to reach a common understanding among States for law-making in micro fields, let alone '*opinio juris*'. Under the circumstances, States are primarily through treaties to form rules of agreement between them. On the one hand, treaties concluded among several States could serve as examples of other States, thereby contributing to the formation of general understandings of international community on a given issue. On the other hand, certain long-standing and repeatedly practiced rules are confirmed in the form of treaties by States, and these treaties can refine the principles and customs established in international practice.

The question is not so simple. A treaty is constituted by a set of norms that are from the consensus among State parties. Treaties can be loosely compared to contracts: both are means of willing parties assuming rights and obligations among themselves. Resembling contracts, the legal effect of treaties is only in the contracting parties, not in the third-party State. Therefore, treaties do have a considerable degree of limitations in international law-making. Neither bilateral treaties nor multilateral treaties do have universal effects in international community. But, treaties play an important exemplary role in shaping international law. Despite the difficulty in reaching international common understandings with respect to certain matters, however, the treaties concluded by the powers have potential influences on the

international community. They may indirectly affect the attitudes and legislative measures of other States, and thus promote the formation of general understandings among States. For example, the *European Convention on State Immunity* 1972 is a regional treaty, but in view of great influences of Europe, the treaty gives impetus to the development of consensus on State immunity all over the world. Subsequently, a number of States have adopted their own law on State immunity. In fact, treaties, especially the treaties between powers, are an important driving factor to the emergence of customary international law.

The *UN Convention on Jurisdictional Immunities of States and Their Property* was adopted by the General Assembly in December 2004 but is yet to come into force due to the limited number of States approving it. Nevertheless, many rules enumerated in the Convention are the summary of the long-standing experiences of international practice. They largely reflect the custom and general understandings of the important members of international community. The fact that the powerful States' practice and consensus on State immunity become the rules of the Convention leads up to another consequence: with the influence of Convention, they affected the position of many other States on State immunity. As a matter of fact, after the Convention was adopted, some sovereigns soon changed their conservative practice on the issue of State immunity. For example, Israel and Japan, emulating the provisions of UN Convention, established the rule that foreign States cannot invoke immunity in certain proceedings respectively by their national statutes. Consequently, the UN Convention recognizes the custom and general understandings of a number of States by the form of text, and then by virtue of the influence of the Convention, the consensus based on the customary practice in a certain range expands to other States and becomes more specific in international community.

Obviously, there is an interaction among customs, general understandings and treaties. The general practice carried out for a long time by States may become customs and shared understandings within a certain range, and then such customs and shared understandings fashioned by States practice may be established in the form of treaty via the agreement of certain States. By virtue of the influence of treaties, the custom or general understandings that originate in certain States are gradually extended to other States, and then become a greater consensus. The process promotes the formation of '*opinio juris*' in international community and eventually leads to the emergence of customary international law. In the regime of State immunity, making

use of the influence of UN Convention, some crucial rules provided by the Convention, specifically the rule that ‘State immunity cannot be invoked in commercial transaction proceedings’, has been gradually accepted by most of States, and embraced by the customary international law step by step.

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#### 4.3 OTHER EVIDENCES IN THE PRACTICE OF TREATIES

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Other evidences in the practice of treaties also support the rule that ‘no immunity exists in commercial transactions’ as customary international law.

Over long-term practice in commercial activities, a custom of resolving disputes by arbitration is spontaneously formed among States and private parties. It is not difficult to understand that, based on the assumption of rational economic person<sup>127</sup>, a private party can predict that, in a transaction with States, there may be circumstances under which a dispute cannot be resolved by the parties through negotiation due to the conflicts of interests; under such circumstances, by virtue of the procedural obstacle of State immunity, the private party may hardly claim its rights before a court through proceedings. In view of this, the private party usually concludes an arbitration agreement with the State so as to hand the possible disputes in future over to an independent third party: an arbiter.

Arbitration, a form of alternative dispute resolution, ‘is a technique for resolution of disputes outside the judicature.’<sup>128</sup> Arbitration is often used for resolution of commercial disputes, particularly in the context of international commercial transactions. In essence, arbitration is a mechanism under which the parties agree to submit existing or possible disputes to an arbitration board to resolve.<sup>129</sup> The Choice of arbitration as a means of settling disputes indicates that the parties voluntarily accept the jurisdiction of the arbitration board. It is evidenced in more and more cases that, commercial contracts, especially concluded between a private party and a State, usually contain arbitration clauses, so as to circumvent the invalidity of relief in subsequent disputes due to the State party invoking jurisdictional immunity. As a matter of fact, in order to prevent the investment host States from maliciously

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<sup>127</sup> See: David M. Kreps, *Notes on the Theory of Choice*, West view Press (1988), at Preface.

<sup>128</sup> See: <https://en.wikipedia.org/wiki/Arbitration>, visited on 31<sup>th</sup> May, 2017.

<sup>129</sup> See: [英] 施米托夫: 《国际贸易法文选》, 赵秀文译, 中国大百科全书出版社 1993 年版, 第 674 页。

claiming sovereign immunity, hence causing losses of interests to private investors, the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (*Washington Convention*) established the International Centre for Settlement of Investment Disputes (ICSID), an international arbitration institution intended to resolve legal disputes arising from the investment between a Contracting State and the nationals of another Contracting State.<sup>130</sup> Indeed, most of States around the world are Contracting States of the Convention.<sup>131</sup> Even some States with firm adherence to the idea of sovereignty also acknowledged that the application of the Convention covers commercial transaction matters. Most importantly, the fact shows that, most of States are not intended to adhere to the idea of sovereign immunity in the field of commercial transactions; otherwise, they would not proactively conclude the *Washington Convention* which requires the Contracting States submit to the jurisdiction of an arbitration board. Logically, since a State does not resist the exercise of jurisdiction of an arbitration board on the ground of State immunity in commercial transactions, it also has no reason to resist the exercise of jurisdiction of the court of another State in litigation. It confirms the truth of a customary rule in international community that States do not oppose the jurisdiction over themselves relating to commercial transaction matters.

By the practice of treaties in arbitration, it can be seen that the *opinion juris*: ‘no immunity in commercial transactions’ has been formed in States practice.

In conclusion, although the debate over the doctrine of absolute immunity and the doctrine of restrictive immunity continues in international practice,<sup>132</sup> it is undeniable that the rule, ‘States cannot invoke immunity in commercial transactions’, embraces the basic elements of customary international law: ‘State practice’ and the ‘*opinio juris*’,<sup>133</sup> so it roughly become a rule of customary international law.

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<sup>130</sup>See: 赵秀文: 《国际商事仲裁法原理与案例教程》, 法律出版社 2010 年版, 第 31 页。

<sup>131</sup>See: ICSID’s 161 member States which have signed the center’s convention include 160 United Nations member States plus Kosovo. Of these member States, at least 153 are ‘contracting member States, that is they have ratified the contract. [https://en.wikipedia.org/wiki/International\\_Centre\\_for\\_Settlement\\_of\\_Investment\\_Disputes](https://en.wikipedia.org/wiki/International_Centre_for_Settlement_of_Investment_Disputes), visited on 31<sup>th</sup> May, 2017.

<sup>132</sup> See: 徐冬根: 《国际私法》, 北京大学出版社 2013 年版, 第 188 页~第 190 页。

<sup>133</sup> See: 水島朋則: 「主権免除の国際法」, 名古屋大学出版会 2012 年, 14 頁~15 頁。

## CHAPTER 3

### THE STRUCTURE OF THE COMMERCIAL TRANSACTION PROCEEDINGS CONCERNING STATE IMMUNITY

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Although so far the international community has not reached a consensus on the definition of commercial transactions, nevertheless the increasing States' practice demonstrate the truth that States cannot invoke immunity in the commercial transaction proceedings. Accordingly, the repeated practice further promotes the formation of *opinio juris*, leading to a international customary rule that a sovereign State shall not be immune from jurisdictional immunity when it involving proceedings relating to commercial transactions. Under the circumstance, a State is no longer involved in the proceedings as a sovereign. For this reason, the proceedings have gradually been dominated by international civil procedures.

#### 1. INTERNATIONAL CIVIL LITIGATION RELATING TO COMMERCIAL TRANSACTIONS

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##### 1.1 THE INTRODUCTION TO INTERNATIONAL CIVIL LITIGATION

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###### (1) The Characteristics of International Civil Litigation

The international civil litigation refers to the civil proceedings with foreign-related elements in respect of the subject matter, the object matter or the legal facts.<sup>134</sup> It has

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<sup>134</sup> See: 李双元、谢石松：《国际民事诉讼法概论》，武汉大学出版社 2001 年版，第 8 页。

two defining characteristics: the equality of litigants and foreign-related factors. The international civil proceedings are essentially a civil litigation that mainly governs and regulates the civil legal relationships between the equal parties. Then, the litigation must have the foreign-related factors by which it becomes an international proceeding. In such litigation, the international civil procedures are required to be applied either because of the substantive legal relation involving foreign factors, or because of the form of process including foreign factors.<sup>135</sup> In particular, the foreign related factors are as follows.

Firstly, the subject-matter of litigation relates to the foreign elements, which means at least one of the parties in civil proceedings has a foreign status for the courts of forum State. For example, if a Chinese citizen A initiates an action against Japanese Company B for a commercial dispute, it can be identified as an international civil proceeding for Chinese courts, because the defendant is a foreign party.

Secondly, the object matter of litigation relates to the foreign elements. If the object of litigation is located abroad for the courts of forum State, then it constitutes an international civil proceedings. For example, a Chinese A files an action against a Chinese B before Chinese courts by virtue of a dispute to the ownership of a building located in Japan. It can be classified to as an international civil proceeding for Chinese courts.

Thirdly, the legal facts of litigation relates to foreign elements. In some actions, the legal facts that cause to the occurrence, alteration or elimination of civil legal relationship relate to foreign factors, and the actions should be regarded as international civil proceedings as well. For example, a Chinese citizen A was infringed by China Travel Service B in his travel in Thailand. After back to China, A filed a lawsuit against B before the courts of China. In the action, the infringement relationship between A and B did not matter foreign factors, but act of tort take place in Thailand, so it constitute an international civil proceeding.

In addition, some scholars hold the view that the wording ‘foreign-related’ includes the form of procedure relates to foreign elements.<sup>136</sup> For example, based on the agreement of the parties, the courts of forum State applied a foreign law to determine the rights and duties between them. The case also includes foreign-related factors.

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<sup>135</sup> See: 沈涓主编：《国际私法》，社会科学文献出版社 2006 年版，第 378 页。

<sup>136</sup> See: 沈涓主编：《国际私法》，社会科学文献出版社 2006 年版，第 379 页。

## (2) The Main Content of International Civil Litigation

The international civil relations usually involve more than one jurisdictional area, and therefore it has some different contents from the national civil litigation.<sup>137</sup>

In the international civil litigation with foreign-related factors in respect of subject matters, the courts of forum State shall solve the issue of the position of civil procedure of foreigner firstly. Only a foreigner is conferred the right of access to justice principle by the forum State, then the national courts can deal with the proceedings brought by the foreigner. The position of civil procedure of foreigner largely involves a set of issues, such as recognition to the national treatment principle, the capacity to action of foreigners, the burdens of costs of litigation and determination to the qualification of jurisdictional immunity, etc.

The international civil litigation is concerned in the distribution rules of jurisdiction among sovereign States. Admittedly, in national civil litigation, a State may reasonably distribute civil cases within its judicial system by sovereignty, so the allocation of jurisdiction of courts at all levels and all regions can be coordinated. However, on account of equal structure of international community, there is no sovereign authority to distribute the jurisdiction concerning international civil litigation systematically. In practice, States determine whether they are competent in jurisdiction according to their own national laws, which may cause the potential risks of conflict of jurisdiction. And once the conflict of jurisdiction arises, no sovereign determines, from the global governance perspective, which State's courts are entitled to exercise of jurisdiction.

The international civil litigation will inevitably involve the application of law. The foreign-related civil relations generally relate to more than one jurisdictional area, therefore after the determination of competence, the courts of forum State, by its national conflict rules, decide which State's substantive law shall be applied to regulate the foreign-related civil relations. As a matter of fact, the burdens of rights and obligations of parties depend largely on the choice of law.

Furthermore, it involves a set of procedural matters as well, such as the service of legal documents, extraterritorial evidence collection, limitation of action and also the recognition and enforcement of judgment, etc.

## (3) The Circumstance of a Foreign State Being Sued

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<sup>137</sup> See: 李旺: 《国际民事诉讼法》, 清华大学出版社 2011 年, 第 2 页。

Although international civil litigation is very different from national civil litigation in many aspects, certain commonalities exist between them from the perspective of the structure of proceedings. Both of them aim at dealing with the disputes arising out of civil relations of which the primary feature lies in the equality between parties. More and more international practice certified that the equality of status of parties underlies the essence of international civil litigation. Pursuant to that requirement, a sovereign State appears to be difficult to become a party of international civil proceedings.

Indeed, according to the traditional understanding of principle of State immunity, a State is immune from the jurisdiction of the court of another State for *par in parem non habet jurisdictionem*. It excludes the possibility of the involvement of a State in a civil action before the court of another State. However, with the dissemination of restrictive doctrine of immunity, the acts of State are divided into *actum jure imperii* and *actum jure gestionis*, and the State is conferred dual personality accordingly: the political entity and the civil entity. Substantially, the sovereign immunity of a State is restricted to matters involving acts of a State which are governmental in nature, as opposed to acts which private persons normally perform. When a State performs an act in the manner of a private person pursuant to private law, it shall be considered as a private party. In other words, a State may be placed in the same status with a private person due to the attribute of its act in international civil litigation, which implies the possibility of the State as a defendant.

Since, in international civil litigation, States may enjoy the same status as the private party, is it possible for a State to sue a private party as a claimant before the court of another State? In theory, it may exist. But in practice no State is willing to be subject to the jurisdiction of other States, so it is unlikely to initiate an action before the court of another State. Even if disputes a State involved need to be resolved through litigation, a feasible approach is that the State places the disputes in its own judicial system, but not of another State. As a result, a State can be a defendant in international civil proceedings, but generally does not appear as a plaintiff.

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## 1.2 THE CONSTITUENT ELEMENTS OF INTERNATIONAL CIVIL LITIGATION RELATING TO COMMERCIAL TRANSACTIONS

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To determine whether an action constitutes an international civil action requires the investigation from two levels: (i) to analyze the defining characteristics of the legal relations involved in the litigation; (ii) to examine whether the legal relations have foreign factors or international nature. Likewise, they can be regarded as the constituent matters of international civil litigation relating to commercial transactions.

Concretely, in term of the legal relations, international civil litigation is the action arising out of foreign-related civil disputes. The object matter of the litigation is the controversial civil relations between the equal parties. Correspondingly, so far as a State is engaged in commercial activities in the manner of private person, the commercial activities possesses the necessary characteristic of civil relations, and thus shall be regulated by private law. Next, it is still necessary to examine whether the subject matter, object matter or legal facts in litigation has foreign-related factors or not. In the commercial transaction litigation in which States involved, the defendant is usually a foreign State which is different from the forum State, so the litigation has the foreign-related factors in aspect of subject matter. Briefly, the commercial transaction proceedings in which State immunity cannot be invoked satisfies the constituent conditions of international civil litigation.

Meanwhile, it is worth to noting that the party of defendant in the commercial transaction litigation is a foreign State. The subject matter, a matter of particular importance in litigation, includes a private party and a sovereign entity, so such litigation is very special in structure: private suits against foreign States in domestic courts.

As regards the suits against foreign States, two prerequisite questions have to be addressed: the status of litigation of foreign States and the capacity of litigation of foreign States. In modern times, for the status of civil actions of foreigners, States practice generally accepted the principle of national treatment. Under national treatment, if a State grants a particular right, benefit or privilege to its own citizens, it must also grant those advantages to the citizens of other States while they are in that State. Subject to such principle, in commercial transaction litigation foreign States like private foreigners are conferred the same status as the nationals of the forum State.

The litigation capacity issue is more complicated. There are two opposite views on the determination of the capacity of civil actions of foreigners. The *lex fori* doctrine holds that the capacity of actions is a matter of procedure, so it shall be determined by

the civil procedure law of forum State. The other is *lex personalis* doctrine. It advocates the capacity of actions is a matter of procedure though. The capacity is closely associated with litigants, so it shall be determined by the respective personal law of the litigant. As a matter of fact, in the cases foreign States are sued, it may be inappropriate to determine the litigation capacity by the *lex fori*, in that the capacity of foreign States is related to sovereignty. Contrarily, the *lex personalis* doctrine has some intractable problems. Providing that a foreign State pursues absolute immunity, its defendant capacity may be denied before the courts of forum State on the grounds of the observance of State immunity under the domestic law. The deficiency of capacity of actions of defendant will block the continuation of litigation.

In conclusion, the commercial transaction proceedings against foreign States basically satisfy the qualifications of international civil litigation. However, in view of the particularity of defendant status, there are still many possibilities for the courts of forum State to recognize and define the litigation.

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### 1.3 THE RELATIONSHIP OF SUBJECT MATTER OF LITIGATION

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The regime of State immunity aims to guarantee the exercise of sovereign functions of a foreign State. Once the State is not in sovereign operation, it shall not be protected by immunity. A State can be sued for commercial transactions before the court of forum State.

The commercial transaction proceedings concerning State immunity normally involves triple parties: the private party as the plaintiff, the foreign State as the defendant and the court.

As to the plaintiff, it must be a private party including natural and juridical person. It is worth noting that the plaintiff of international civil action generally cannot be a State. Otherwise, the action may become a proceeding between two States, divorced from the nature of international civil litigation. Pursuant to the Article 34 of *Statute of the International Court of Justice*, the action between two States falls within the scope of jurisdiction of the International Court of Justice. Usually, the plaintiff is different from the defendant in nationality, but this is only an empirical conclusion rather than a necessary requirement.

In respect of defendant, the proceeding possesses a remarkable trait: the foreign identity. The defendant must be a foreign State. The situation in practice is far more complicated than the theoretical generalization. For instance, do the enterprises owned or operated by a State belong to the public sectors of State? Are the private corporations involved in commercial transactions for sovereign purpose a so-called State? Whether the constituent units or political subdivisions of a State enjoy the State personality?

In connection with the forum State, it must have a mutually exclusive relationship with the defendant State in identity. It means the forum State and the defendant State must not be the same State. The reason is that only the forum State and the defendant State have different nationalities, the logical premise of State immunity may appear. In particular, the law of State immunity is from the international principle: '*par in parem non habet jurisdictionem*' that implies at least two sovereigns exist. Once the forum State and the defendant State are identical, the action hereby involves only one sovereign and becomes a case where the court of a State exercises jurisdiction on itself. Thus, it is divorced from the category of State immunity.

In summary, the relationship of subject-matter of the commercial transaction litigation in which State immunity cannot be invoked has the following essentials:

- (i) The commercial transactions between the private party and the foreign State belong to the civil relations with the private law attribute.
- (ii) The structure of the litigation is private suits against States in domestic courts.
- (iii) The plaintiff is private party including natural and juridical person.
- (iv) The defendant is a foreign State. It is not excluded that, in some cases, a foreign State participates in the litigation as the third party.
- (v) The forum State and the defendant State must have different nationalities.
- (vi) The position of the plaintiff and the defendant may be exchanged, only when a counterclaim is filed by the foreign State.

## 2. THE PRIVATE PARTY AS PLAINTIFF

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In the commercial transaction proceedings concerning State immunity, no special requirement was demanded for the identity of plaintiff. From the perspective of the forum State, the plaintiff may be either a native or a foreigner, which imposes no

decisive influence on the proceedings. However, in judicial practices, the difference in identity of the plaintiff may influence the procedural rules and law application in the proceedings to a certain extent.

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## 2.1 THE NATIVES AS PLAINTIFF

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In cases where a native is the plaintiff, the court of forum State normally determines the capacity to action of the plaintiff in accordance with the procedural requirements of its national civil procedural law.

Theoretically, a plaintiff in civil litigation can be divided into plaintiffs in form and plaintiffs in substance. A plaintiff in form refers to those identified on the complaint; it is purely a litigious concept with no association with the substantial legal relations. A plaintiff in substance normally is a subject of a civil relationship, and has rights and obligations in substantial law. In line with the theory of civil procedural law, before a court made a judgment, the rights and obligations of the parties are still in an unresolved state, so the court does not need to, at the beginning of a proceeding, require the plaintiff to prove that the plaintiff himself is a subject of a civil relationship and therefore has the rights in or takes the obligations of the matters of action. Otherwise, it may lead up to the phenomenon that the court usually rejects to settle civil disputes, and may harm the plaintiff in exercise of the right of action. Therefore, plaintiffs in commercial transaction proceedings concerning State immunity also mainly refer to plaintiffs in form.

Although a plaintiff in form results from subjective claims in an action, however, for it has the function of initiating a proceeding, it is necessary to consider the plaintiff's civil capacity to action, including the capacity of rights to action and the capacity to engage in action.

A plaintiff's capacity of rights to action refers to the legal standing required for plaintiffs of civil actions to exercise rights and take obligations. Generally, the capacity of rights to action is merely an abstract standing in law; a person with such standing will not necessarily become a plaintiff in litigation, but may actually become a plaintiff by filing an action. In addition, the capacity of rights to action is one of the constructive conditions for litigation, and therefore only the plaintiff has such capacity for rights to action, he may initiate an action. If the plaintiff lacks the capacity on the

occasion of initiating an action, the court has to reject the claims of that incompetent plaintiff.

A plaintiff's capacity of rights to action is closely related to their capacity for civil rights. In principle, the capacity of rights of action and the capacity for civil rights are consistent with each other to a great extent. The capacity for rights of action normally is not separable from the identification of the standing of a subject in substantial law. If a plaintiff has the capacity of rights to action but does not have the capacity for civil rights, the rights or obligations granted by the decision of the court cannot be implemented. Therefore, a plaintiff having the capacity of rights to action generally has the capacity for civil rights. However, there are exceptions in certain circumstances in which the capacity of rights to action may exist separately from the capacity for civil rights. For example, in commercial transactions, the legal personality of some companies may be invalidated because of 'piercing the corporate veil,' but this does not prevent such companies from having the capacity of rights to action.

A plaintiff's capacity to engage in action mainly refers to the standing that the plaintiff can take part in the litigation by himself to exercise litigation rights and take litigation obligations. In practice, a plaintiff normally has both the capacity of rights to action and the capacity to engage in action. However, there are cases in which the plaintiff has the capacity of rights to action but does not have the capacity to engage in action. If the plaintiff has the capacity of rights to action but does not have the capacity to sue, the plaintiff's statutory agent must take part in the litigation on the plaintiff's behalf. The capacity of rights to action and capacity to engage in action of natural persons may exist for different periods of time, while those of legal persons or other organization exist for the same period of time.

Generally, a person having the capacity for civil conducts has the capacity to sue or be sued. However, these capacities are different in classification. The capacity for civil conducts of natural persons is classified into three categories, including no capacity for civil conducts, limited capacity for civil conducts, and full capacity for civil conducts. While the capacity to engage in action is classified into two categories: full capacity or no capacity to engage in action. In civil actions, only those having full capacity for civil conducts have the capacity to engage in action; while those having no capacity for civil conducts or limited capacity for civil conducts do not have the capacity to sue or be sued.

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## 2.2 THE FOREIGNERS AS PLAINTIFF

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Unlike the cases in which a native is the plaintiff, on the occasion that a foreigner is the plaintiff, in the process of determining the capacity to action of the plaintiff, the court normally needs to examine the litigious status of the foreigner at first, and then determines their capacity to action.

In principle, if a subject in an international civil action involves foreign elements, the issue of the foreigner's status in litigation must be resolved at first. In this respect, international practice is generally accepted the doctrine of national treatment which refers a state should treat foreigners in the same way as it treats natives.<sup>138</sup> This is a fundamental principle that is most widely adopted in governing the status in litigation of foreigners. The Article 26 of the *International Covenant on Civil and Political Rights* adopted by the United Nations in December 1966 indirectly confirmed the doctrine of national treatment in civil actions.

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

In fact, the doctrine of national treatment is universally recognized and acknowledged in international conventions and national legislation. It is intended to safeguard the equal status of the litigious parties in civil litigation, thereby avoiding discriminatory treatment arising from the identity. Indeed, in consideration of the difference in ideology, political system, legal tradition, and social customs among States, the divergence in litigation system is inevitable. The doctrine of national treatment is usually based on the reciprocity between States.

It is a complex question to determine the capacity to action of foreigners. In many cases, the capacity to action in international civil actions is classified as a procedural matter. According to the principle of applying the procedural rules of forum State, the

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<sup>138</sup>See: 杜新丽主编：《国际民事诉讼与商事仲裁》，中国政法大学出版社 2009 年版，第 12 页~第 15 页。

capacity to action of foreigners is generally governed by the procedural law of forum State. However, as the situation in the international community has changed drastically, this position is open to discussion currently. There is a viewpoint that, although the States universally provides the capacity to engage in action in civil procedural law, it does not necessarily to take the capacity to engage in action as a procedural matter. Another viewpoint holds that litigation procedures are also subject to conflict of rules, and the governing law shall be determined according to the doctrine of the most significant relationship<sup>139</sup>, therefore, this issue shall be governed by *lex civilis personalis*. Moreover, for the purpose of protecting of the stability of civil relations and the security of commercial transactions, in the event that a person does not have the capacity to engage in action in *lex civilis personalis*, but has the capacity to engage in action pursuant to the law of forum State, the capacity to engage in action of foreigners should be acknowledged.<sup>140</sup>

In addition, the capacity to engage in action of foreigners is exposed to another variable, that is, the public policy of forum State. Sometimes, the public policy constitutes an obstacle to the capacity to engage in action of the plaintiff. This primarily exists in the following two cases: Firstly, the substantial rights of foreigners in specific matters are denied, so it is necessary to limit the capacity to engage in action of foreigners in corresponding fields. For example, the Article 8 of *Land Administration Law of China* prescribes the public ownership of land. This implies that foreigners are forbidden to own land in China in person. As a result, foreigners cannot initiate lawsuits with respect to disputes on land ownership in China. Secondly, the capacity to engage in action of foreigners is directly denied by law or statute. For example, according to English case law, in the state of war, foreigners from the enemy States are forbidden to file lawsuits before the courts of England, unless a royal privilege is granted.<sup>141</sup>

The commercial transaction proceedings concerning State immunity basically involve transaction or contractual relations between a State and a private, so the plaintiff of the litigation normally has full capacity of rights to action and capacity to engage in action.

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<sup>139</sup>See: 李双元、谢石松：《国际民事诉讼法程序概论》，武汉大学出版社 2001 年版，第 74 页~第 79 页。

<sup>140</sup>See: 李旺：《国际民事诉讼法》，清华大学出版社 2011 年版，第 61 页。

<sup>141</sup>See: J. H. C. Morris, *Dicey and Morris on the Conflict of Laws*, Stevens & Sons Limited (1980), pp151~154.

### 3. THE FOREIGN STATE AS DEFENDANT OR THIRD PARTY

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#### 3.1 THE DEFINITION OF STATES IN INTERNATIONAL LAW

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In the international litigation concerning State immunity, States usually appear as the defendant, but sometimes as the third party. In theory, the notion of State is an abstract personality. Its operation must be achieved by the agencies or instrumentalities acting in State capacity. Limited by the divisions of ideology, political system and traditions, the international community has divergent views on the specific meaning of the wording 'State', so it is necessary to further examine the concept of State under the law of State immunity.

Generally speaking, the modern international law defines States as 'having a permanent population, defined territory, one government, and the capacity to enter into relations with other sovereigns.'<sup>142</sup> It is normally understood that a sovereign State is neither dependent on nor subjected to any other authority or State.<sup>143</sup> Sovereign States are exclusively international persons. As mentioned in *Oppenheim's International Law* 'a State proper is in existence when people are settled in a country under its own sovereign government.'<sup>144</sup> The widely accepted criteria for Statehood are formulated by the Article 1 of *Montevideo Convention on Rights and Duties of States* 1933.

*"The state as a person of international law 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."*<sup>145</sup>

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<sup>142</sup> See: Malcolm Nathan Shaw, *International law*, Cambridge University Press (2003), p.178.

<sup>143</sup> See: 邵津主编:《国际法》,北京大学出版社2008年版,第34页。

<sup>144</sup> See: L. Oppenheim, M. A., LL. D., *International Law: A Treatise*, 3<sup>rd</sup> edition, edited by Ronald F. Roxburgh, The Lawbook Exchange, Ltd. (2006), pp. 126~127.

<sup>145</sup> *League of Nations Treaty Series*, Vol.165, No. 3802.



Affected by the convention, the international community has gradually recognized the four conditions that must be possessed by States as international persons. In particular,

(i) 'a permanent population' refers to a settled people who live together as a community;

(ii) 'a defined territory' refers to a country in which the people has settled down;

(iii) 'government' refers to a central government operating as a political entity and in effective control of the territory;

(iv) 'capacity to enter into relations with the other states' mainly refers to sovereignty and independence.<sup>146</sup>

The most important condition of Statehood is the sovereign criterion by which the independence and autonomy of a State is confirmed. Actually, sovereignty is the supreme power of a State to deal with the internal affairs and foreign affairs independently, and it constitutes the fundamental attribute of States.<sup>147</sup> The idea of sovereignty guarantees the independence of States in legal personality, which is a prerequisite for States to enjoy rights and to assume obligations in international community.

Once an entity satisfies the qualifications of Statehood, then it gets the personality in international law and becomes a sovereign State.<sup>148</sup>

By contrast, in history, there was a constitutive theory of Statehood. According to constitutive theory, a State can obtain personality and capacity of international law only if it is recognized as sovereign by other States. The recognition is the prerequisite for a State becoming an international person and the subject of international law. Logically, pursuant to the constitutive theory, the State covered by the principle of State immunity must be experienced the process of 'recognition'. But this theory is not respected by current international practice. Statehood itself is independent of recognition. In the modern world, 'every new State becomes a member of the family of Nations *ipso facto* by its rising into existence, and that

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<sup>146</sup> See: Anthony Aust, *Handbook of International Law*, 2<sup>nd</sup> edition, Cambridge University Press (2010), pp. 15~16.

<sup>147</sup> See: 朱晓青主编: 《国际法学》, 中国社会科学出版社 2012 年版, 第 58 页。

<sup>148</sup> Generally, it is named as 'the declarative theory of Statehood' which underlines the matters of fact on which an entity constitutes a State.

recognition supplies only the necessary evidence for this fact.’<sup>149</sup> For instance, the Article 3 of *Montevideo Convention on Rights and Duties of States* provides that,

*“The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts.”*<sup>150</sup>

International law does not require a State to be recognized by other States, so the effect of ‘constitutive theory of Statehood’ on the question of State immunity is very limited. In practice, the courts of forum State normally do not rely on the ‘recognition’ as the basis for determining the existence of a foreign State. For instance, in *Klinghoffer v. S. N. C. Achille Lauro*,<sup>151</sup> the US Court of Appeals for the Second Circuit held that the contemplation of territories was insufficient for there to be a finding of a sovereign State, and thus Palestine Liberation Organization was not a foreign State, despite the fact that some countries had recognized it as sovereign State.

In the field of State immunity, the range of the use of ‘State’ is usually greater than the general sense of the State. The concept of State under the frame of State immunity not only refers to the political entity or the person in international law, but also includes governmental organs or departments of a State, the constituent units and political subdivisions within a State, agencies or instrumentalities of a State and representatives of a State acting in that capacity. It can be seen that the ‘State’ standing in the regime of State immunity is rather complicated. Nevertheless, in the context of restrictive principle of State immunity, the identification to the State status tends to follow the ‘conduct criterion’ rather than the ‘identity criterion’. As a result, the meaning of State was further expanded. The entities that actually perform sovereign functions or public service in the name of State are eligible to be treated as so-called sovereign States.

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<sup>149</sup> See: L. Oppenheim, M. A., LL. D., *International Law: A Treatise*, 3<sup>rd</sup> edition, edited by Ronald F. Roxburgh, The Lawbook Exchange, Ltd. (2006), pp. 135.

<sup>150</sup> *League of Nations Treaty Series*, Vol.165, No. 3802.

<sup>151</sup> See: *Klinghoffer v. S. N. C. Achille Lauro*, 937 F 2d 44, 47 (2d Cir. 1991); 96 ILR 68.

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## 3.2 THE CONCEPT OF STATES IN TREATIES OR LEGISLATION ON STATE IMMUNITY

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It is an important task for the law of State immunity to clarify what the State refers to. In fact, the determination of the identity of States is the basis for further exploration of the attribution of States' conduct. For this reason, most of treaties or national legislation on State immunity affirmed the definition of States and the approach to identify States in their clauses.

(1) The 'Contracting States' in *European Convention on State Immunity*

The *European Convention on State Immunity* 1972 did not elaborate the meaning of a State, but provided a satisfactory means of identifying a State. The Article 27 of *European Convention on State Immunity* 1972 expresses the category of Contracting State definitely. Firstly, it illustrates the legal entity that does not enjoy State status.

*"The expression Contracting State shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions."*

The purpose of the clause is not to interpret what the Contracting State is. By contrast, it is intended to illustrate the fact that the legal entity, even it is entrusted with public functions, cannot be regarded as a Contracting State. Such an approach would prevent the widening of the scope of State immunity as a result of the expansion of the identity of Contracting States. Subsequently, paragraph 2 provides additional information about the Contracting State.

*"Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority."*

The clause is a further explanation of the previous paragraph. It demonstrates that the legal entity of a Contracting State in exercise of sovereign authority cannot be subject to the competence of the courts of another Contracting State.

Why is the *European Convention on State Immunity* so concerned about the identity of the legal entity? In practice, proceedings are frequently initiated by a private party, not against a State itself, but against a legal entity established by a State

and exercising public functions,<sup>152</sup> so it is necessary for the Convention to clarify the status of the legal entity. The legal entities are various. Some of legal entities may themselves constitute the organs of the State. In order to identify these legal entities distinct from the State, the *European Convention on State Immunity* employed a dual test comprising (i) distinct existence separate and apart from the departments of the State and (ii) the ability to assume the role of either plaintiff or defendant in court proceedings.<sup>153</sup> In line with the Article 27, the legal entities may be political subdivisions, agencies or instrumentalities of a Contracting State such as State-owned banks or national railway corporation, so they may assume public functions. But this is not sufficient to prove they are eligible to invoke immunity. Only on the occasion of actually performing conducts in exercise of sovereign authority, the entities of a Contracting State is immune from the competence of courts of another Contracting State. The definition of State in *European Convention on State Immunity* reflected the directions of restrictive principle of State immunity.

The practice of *European Convention on State Immunity* had far-reaching effects. It provides a legislative approach of defining ‘States’ in the context of restrictive immunity. Later, the UK introduced the term ‘separate entity’ in its *State Immunity Act 1978* by referring the concept of ‘legal entity’ of the Convention, and then the approach of defining ‘States’ was extended to the legislation of other Commonwealth countries. In fact, it provides a methodological support for the application of restrictive immunity, and results in worldwide influence.

(2) The ‘Foreign State’ in *Foreign Sovereign Immunities Act US*

The US *Foreign Sovereign Immunities Act 1976* provides the definition of a foreign State in Article 1603 (a) and (b).

“(a) A foreign State, except as used in section 1608 of this title, includes a political subdivision of a foreign State or an agency or instrumentality of a foreign State as defined in subsection (b).

(b) An agency or instrumentality of a foreign State means any entity:

(1) which is a separate legal person, corporate or otherwise, and

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<sup>152</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 61.

<sup>153</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 62.

*(2) which 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) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.”*

The *Foreign Sovereign Immunities Act* 1976 is to ‘define the jurisdiction of US courts in suits against foreign States, the circumstances in which foreign States are immune from suit and in which execution may not be levied on their property’, so it is necessary to clarify what a foreign State is in the first place. The *Foreign Sovereign Immunities Act* does not explain the definition of foreign States in detail, but enumerates the category of foreign States. As defined by Article 1603, a foreign State includes three entities: (i) a foreign State; (ii) political subdivisions of a foreign State; and (iii) agencies or instrumentalities of a foreign State. As a matter of fact, there is usually no dispute that an established nation is a foreign State for purpose of *Foreign Sovereign Immunities Act*. The question in practice is how to determine whether an entity is an agency or instrumentality of a foreign State mentioned in Article 1603 (b).

The Article 1603 (b) provides broad criteria for identifying the agency and instrumentality of a foreign State. The first criterion attributes separate legal persons to the category of the agencies or instrumentalities of a foreign State, including State enterprises, associations, foundations, or any other entity can sue or be sued in its own name or hold property by its own name.<sup>154</sup>

The second criterion prescribes two kinds of entities that can be agencies or instrumentalities of a foreign State. The organs or political subdivisions of a foreign State that engage in a public activity on behalf of the foreign government belong to the agencies or instrumentalities of that foreign State. An entity is also the agency or instrumentality of a foreign State if a majority share or other ownership interest in the entity is owned by that foreign State or political subdivision thereof. The situation in practice is far more complex than imagined. If an entity is entirely owned by a foreign State, they would be included within the definition.

*“Where ownership is divided between a foreign State and private interests, the entity will be deemed an agency or instrumentality of a*

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<sup>154</sup> See: HR Rep No. 94-1487, *Jurisdiction of United States Courts in Suits against Foreign States*, 94<sup>th</sup> Cong. (9<sup>th</sup> September 1976) p. 15.

*foreign State only if a majority of the ownership interests is owned by a foreign State or by a foreign State's political subdivision.*"<sup>155</sup>

Another problem in practice is tier control. In *Dole Food Company v. Patrickson*, the Supreme Court of US determined that in order for a government owned company to qualify as a foreign State under the *Foreign Sovereign Immunities Act*, because a majority of its 'shares or other ownership interest' are owned by a foreign State or political subdivision, the foreign State must own or hold the majority ownership interests of the company directly.<sup>156</sup> Tiered subsidiaries of an agency or instrumentality are not counted an agency or instrumentality of a foreign State of the Article 1603 (b).

The third criterion is a proviso. It excludes a certain entities from the scope of agencies or instrumentalities of a foreign State. They not only include the entities which are citizen of a State of US, but also the entities which are created under the laws of third countries.

In judicial practice of US, the party claiming immunity must present *prima facie* evidence that establishes that it is a foreign State. Once the *prima facie* evidence is presented, for the suit to proceed, the opposing party must prove that one of exceptions to immunity provided by *Foreign Sovereign Immunities Act* apply.<sup>157</sup>

Obviously, the meaning of 'foreign State' is greatly expanded by incorporating the agencies or instrumentalities into the scope of State.<sup>158</sup> A State trading corporation, a mining enterprise, a transport organization, a steel company, a national bank, an export association and so on can all be classified as a foreign State under the Article 1603 (b) of *Foreign Sovereign Immunities Act*. Why does the United States choose such a legislative design? Does it expand the regulation extent of the regime of State immunity?

Admittedly, the US *Foreign Sovereign Immunities Act* is 'the product of many years of work by the Department of State and Justice in consultation with members of the bar and academic community.'<sup>159</sup> So the Act is prudent enough in the choice of

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<sup>155</sup> See: HR Rep No. 94-1487, *Jurisdiction of United States Courts in Suits against Foreign States*, 94<sup>th</sup> Cong. (9<sup>th</sup> September 1976) p. 15.

<sup>156</sup> See: *Dole Food Company v. Patrickson*, 123 S Ct 1655 (2003); 538 US 468, 479 (2003).

<sup>157</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 230.

<sup>158</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.333.

<sup>159</sup> See: HR Rep No. 94-1487, *Jurisdiction of United States Courts in Suits against Foreign States*, 94<sup>th</sup> Cong. (9<sup>th</sup> September 1976) p. 9.

the legislative policy. As a matter of fact, the Act has accepted the restrictive doctrine of State immunity, and established a set of general exceptions to jurisdictional immunity of a foreign State in its Article 1605. In this context, the foundation for the US courts to determine whether the immunity is granted to a foreign State is no longer the identity of the State but the conduct of the State. For this reason, even if the scope of the concept of foreign States is expanded, the sphere of influence of the regime of State immunity would not be enlarged accordingly.

(3) The ‘States’ in *State Immunity Act* UK

The UK *State Immunity Act* 1978 provides States entitled to immunities and privileges in the supplementary provisions. Given the complexity of the understanding of States in practice, the *State Immunity Act* illustrates the meaning of States in the Article 14.

*“(1) 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.*

*(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if:*

*(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and*

*(b) the circumstances are such that a State would have been so immune.*

*.....”*

The Article 14 (1) formulates the key definition ‘State’ for the purpose of the *State Immunity Act*. Then, the Article 14 (2) conditionally extends the immunities and privileges conferred on States to ‘the separate entity’ against which proceedings might be brought.<sup>160</sup>

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<sup>160</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 398.

The immunities and privileges conferred by *State Immunity Act* apply to any foreign State, including the Commonwealth States other than the United Kingdom. The qualification of the identity of a State must be determined on the conditions provided by the Article 14 (1). The Article 14 (1) holds that foreign States in the concept of State immunity should not be limited to the sovereign States established by the general international law, and they should include the categories as follows: (i) the head of a State in public capacity, (ii) the government of a State, and (iii) the department of government of a State.

The heads of a State is generally regarded as the representatives and symbol of the State. In reality, however, the heads of a State do not always act in the name of the State, only when the heads are acting in a public capacity, they may have the right to invoke the immunities and privileges conferred by the *State Immunity Act*. The UK is a constitutional monarchy with a parliamentary system of governance. It retains the tradition of monarchy. The monarch, as the head and symbol of UK, enjoys a high status in politics and social life. This respect for monarchy influenced the legislative choice of *State Immunity Act 1978*. As a result, on the basis of the reciprocity principle, the Act attaches great importance to the protection of the immunities of the head or the monarch of a foreign State. Even if the head of a State is acting in a personal capacity, certain immunities and privileges may be conferred on him by the Article 20 of the Act. But it does not mean the Article 20 has apparent contradictions with the Article 14 (1) (a). Definitely, the former refers to the ‘diplomatic immunities and privileges’ that largely regulated by *Diplomatic Privileges Act 1964*, whereas the latter refers to the ‘sovereign immunity’. They belong to different conceptual systems respectively.

The government is the system by which a sovereign State or a community is controlled and managed. States are abstract existence. The operation of States must rely on the government and its departments. In many cases, when referring to a State, it refers to the government of that State. Practice gradually causes such a shared understanding that the government is the natural representative of a State. Therefore, the State immunity necessarily contains the immunity to the government of a State. The Article 14 (1) (b) sets out the position that the government can be attributed to the category of States.

The government of a State is a bulky and complex system consisting of many departments and organs. Thus, the Article 14 (1) (c) categorizes the departments of a



government as a State in the concept of State immunity. However, ‘the Act does not provide any guidance as to the test to be applied to determine whether a party to proceedings is a department of the government of a foreign State.’<sup>161</sup> Case law provides a useful reference for understanding the department of government for the purpose of the Article 14 (1) (c). Whether a party to proceedings is to be accorded the status of a department of government of a foreign State depends not on any single factor, but on a consideration of all relevant circumstances, such as its constitution, function, powers and duties, activities and its relationship with that State.

Moreover, certain separate entities may even be entitled to immunities and privileges for acts in exercise of sovereign authority of the State. An entity is a ‘separate entity’ if it is distinct from the executive organs of the government and capable of suing or being sued. In practice, the term ‘separate entity’ effectively expands the category of foreign States in the regime of State immunity.

Usually, a separate entity is to be treated as private party and not immune from the jurisdiction of the courts of UK. But the Article 14 (2) of *State Immunity Act* grants the immunity to a separate entity by two conditions. At first, the proceedings must relate to anything done by it in the exercise of sovereign authority. It is mirrored the well-established principle of customary international law that only sovereign acts, *acta jure imperii*, of a party to proceedings can be immune from jurisdiction of the courts of forum State. Secondly, the circumstances must be such that a State would have been immune if proceedings had been brought against it. In terms of content, the Article 14 (2) (b) impose no extra requirement to the condition set out in Article 14 (2) (a) for granting a separate entity to immunity.<sup>162</sup> The Article 14 (2) (b) is considered to be a tautology of the Article 14 (2) (a). Why does the UK *State Immunity Act* 1978 introduce the concept of ‘separate entity’? The answer may be found in the judicial opinions of the case *Kuwait Airways v. Iraqi Airways*,

*“The immunities of the sovereign and the entity are of an entirely different character. The former is a matter of status, inherent in the nature of the person or body claiming it, and all embracing except when specially excluded by the Act. By contrast the separate entity has no*

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<sup>161</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 402.

<sup>162</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.255.

*status entitling it to a general immunity and is endowed by Article 14 only with a case by case immunity in the situations there described.*”<sup>163</sup>

Influenced by the term ‘legal entity’ of *European Convention on State Immunity* 1972, the UK *State Immunity Act* 1978 imitated it and employed the term ‘separate entity’ to denote the private party which is distinct from the organs, agencies or instrumentalities of government of a State. In practice, the judicial authority of UK can make use of the characterization of ‘separate entity’ to identify the analogous organizations or entities of foreign States other than the executive organs of government. Once a foreign organization or entity cannot be, for certain, categorized as the State for the purpose of Article 14 (1), the courts of UK would include it in the concept of the separate entity, and then decide whether or not to confer immunity on it by analyzing the attribute of its conduct in line with the Article 14 (2).

The provision of ‘separate entity’ of UK *State Immunity Act* was followed by the legislation of other countries especially the Commonwealth members. The Article 16 (2) of Singapore *State Immunity Act* 1979, the Article 15 (2) of Pakistan *The State Immunity Ordinance* 1981, the proviso of Article 1 (2) of South Africa *Foreign States Immunities Act* 1981, the Article 3 (1) of Australia *Foreign States Immunities Act* 1985, and even the Article 1 of Israel *Foreign States Immunity Law* 2009 all employed the concept of ‘separate entity’.

In proceedings, the party claiming immunity must present *prima facie* evidence to establish its State identity. According to the Article 21, a certificate by or on behalf of the Secretary of State is to be treated as conclusive evidence on any question whether any country is a State for the purpose of Part 1 of *State Immunity Act*.

(4) The ‘Foreign State’ in *Act on the Civil Jurisdiction of Japan with respect to a Foreign State etc*<sup>164</sup>

Despite the absence of the wording ‘State immunity’ in its title, the *Act on the Civil Jurisdiction of Japan with respect to a Foreign State etc* is remarkable and representative of legislation on State immunity in recent years. The enactment of the Act signifies that Japan completely turns to support the restrictive principle of State immunity. Because the Act was enacted after the *UN Convention on Jurisdictional*

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<sup>163</sup> See: *Kuwait Airways Corp. v. Iraq Airways Co. (No. 2)*, [2001] 1 WLR 429; 3 All ER 694 at 719, HL; 103 ILR 340.

<sup>164</sup> The Act in Japanese is 「外国等に対する我が国の民事裁判権に関する法律」 日本国 平成二十一年四月十七日。

*Immunities of States and Their Property*, it mainly uses the contents of UN Convention as reference. The Article 2 of the Act provides the specific meaning for the ‘foreign State’.

*“In this Act, a ‘foreign State etc’ shall mean the entities listed in the following items (hereinafter referred to as a ‘State etc’), excluding Japan and any entity which pertains to Japan:*

- (a) A State and the governmental institutions thereof;*
- (b) A state within a federal State and any other administrative divisions of a State equivalent thereto having the authority to exercise sovereign power;*
- (c) In addition to what is listed in the preceding two items, entities that are granted the authority to exercise sovereign power (limited to cases in which said power is exercised);*
- (d) A representative of an entity listed in the previous three items acting based on its qualifications.”*

The definition of the ‘foreign State’ in the *Act on the Civil Jurisdiction of Japan with respect to a Foreign State etc* resembles the Article 2 (1) (b) of the UN Convention both in terms of concrete contents and logical structures. It can be seen as a manner of transformation<sup>165</sup> of the UN Convention: Japanese legislature transfers the international Convention into its municipal law by legislation.

The Act is slightly different from the UN Convention in the expression of ‘State’. Since the Act is a municipal law of Japan, it excludes the Japan and any entity which pertains to Japan from the category of States. Meanwhile, the Act applies the term ‘foreign State etc’ which obviously embraces a broader connotation than the ‘State’ in the UN Convention. The term ‘foreign State etc’ covers certain Stateless entities and international organizations. Inclusion of them in the Act actually amounts to the recognition of their immunity under certain circumstances. This accurately grasps the development of the international law in future.

As to other national legislation on State immunity, Singapore *State Immunity Act*, Pakistan *The State Immunity Ordinance*, South Africa *Foreign States Immunities Act* and Australia *Foreign States Immunities Act* have largely followed the provision of

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<sup>165</sup> The transformation theory hold that customary international law is only part of a State’s municipal law to the extent that it has been formally accepted into that State’s municipal law by means such as legislation, judicial decision or usage.

‘foreign State’ of UK *State Immunity Act*. The Argentina *Immunity of Foreign States from the Jurisdiction of Argentinean Courts*<sup>166</sup> uses the term ‘foreign State’ in its provisions, but it does not give a detailed interpretation of the term.

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### 3.3 THE CONCEPT OF STATES IN UN CONVENTION ON STATE IMMUNITY

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The UN *Convention on Jurisdictional Immunities of States and Their Property* 2004, in the light of previous experience of legislation and developments in States practice, gives the explanation of the term ‘State’ in Article 2 (1) (b).

“*State means:*

- (i) *the State and its various organs of government;*
- (ii) *constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;*
- (iii) *agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;*
- (iv) *representatives of the State acting in that capacity.”*

As mentioned in Article 1, the purpose of the Convention is to define the immunities and privileges of a State before the courts of another State. States are the subject of the right to immunity. It is very significant to clarify the meaning of ‘State’ for it constitutes the cornerstone to understand the system of the Convention as a whole. The Article 2 is committed to illustrating a series of use of terms in Convention, including the key concept ‘State’.

Different from the meaning of ‘State’ in general international law, the State defined in Article 2 (1) (b) is merely a concept in the context of State immunity. In view of various jurisprudential approaches to the meaning of ‘State’ in States practice, to clarify the contents of the ‘State’ in detail for the purpose of the Convention is necessary. Although the interpretation given is basically circular for it relies

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<sup>166</sup> The Act in Spanish is ‘*Inmunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos*’, 31<sup>st</sup> May, 1995, Argentina Law No. 24, 488.

repeatedly on the word ‘State’ to define the term ‘State’, it is nevertheless a pragmatic approach.<sup>167</sup> In fact, the ‘State’ should be understood in the light of its object and purpose,

*“..... to identify those entities or persons entitled to invoke the immunity of the State where a State can claim immunity and also to identify certain subdivisions or instrumentalities of a State that are entitled to invoke immunity when performing acts in the exercise of sovereign authority.”*<sup>168</sup>

Consequently, the Article 2 (1) (b) provides that the term ‘State’ should be accounted four categories of entities and individuals.

#### (1) The State and Its Various Organs of Government

The Article 2 (1) (b) (i) brings within the meaning of ‘State’ as used in the Convention ‘State and its various organs of government’. Sovereign States certainly are in the category of the concept of ‘State’ for the purpose of the Convention. The use of term ‘State’ here refers to any so-called State in general international law, which must meet the certain requirements normally consisting of ‘a permanent population’, ‘a defined territory’, ‘government’ and ‘capacity to enter into relations with the other states’. The scope of State immunity covers all sovereign States no matter what the forms of their governments are, whether a kingdom, an empire, a republic or otherwise.

The State is abstract existence. It is generally represented by the government in most of its international relations or transactions. Thus, a proceeding against the State is equivalent to that against its government. States practice has long recognized the practical effect of an action against a government as identical with a suit against the State.<sup>169</sup> The term ‘State’ in context of State immunity obviously should contain the government and its organs. The use of term ‘various organs of Government’ in this Article is intended to include all of branches of government, not only limited to the executive branch only.

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<sup>167</sup> See: Roger O’keefe, Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press (2013), p. 46.

<sup>168</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 2, para. 5.

<sup>169</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 2, para. 9.

It should be noted that some government departments, such as the head of a State and the ministry of foreign affairs of a State, are not only entitled to State immunity, but also to diplomatic immunity. The Article 3 reaffirms the present Convention is without prejudice to the privileges and immunities accorded under international law to heads of State and diplomatic organs. It proves the fact that State immunity differs from diplomatic immunity. Accurately, the immunity of the organs of government including heads of State and diplomatic organs in Article 2 (1) (b) merely refers to State immunity.

## (2) Constituent Units of a Federal State or Political Subdivisions of a State

The Article 2 (1) (b) (ii) provides that constituent units of a federal State and political subdivisions are accounted as States for the purpose of the Convention. The expression of this clause seems not so concise. Do not constituent units of a State themselves belong to political subdivisions of that State?

It is said that no special provision for federal States appeared in the use of terms ‘State’ in original draft of the Convention. In some federal systems, constituent units are distinguishable from the political subdivisions.<sup>170</sup> For traditional or political reasons, they are to be conferred the same immunity as States, even without the supplementary condition that they perform acts in the exercise of sovereign authority. While in other federal systems, constituent units are considered a kind of political subdivisions, and they are to be conferred the immunity of the State only on condition that they perform acts in exercise of sovereign authority. Therefore, the Article 2 (1) (b) distinguishes the constituent units of a federal State from political subdivisions of a State in its clause.

The *European Convention on State Immunity* 1972 takes a different approach as to the status issue of constituent units of a State. It provides, as a general rule, the constituent units of a federal State are not accorded immunity from jurisdiction in the Article 28 (1),<sup>171</sup> although these constituent units may invoke immunity in accordance with the rule in Article 27 (2).<sup>172</sup> But States practice has not been uniform on this question. Some national legislation does treat constituent units of a State as a

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<sup>170</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 2, para. 11.

<sup>171</sup> The Article 28 (1) of the *European Convention on State Immunity* provides that ‘without prejudice to the provisions of Article 27, the constituent states of a Federal State do not enjoy immunity.’

<sup>172</sup> The Article 27 (2) of the *European Convention on State Immunity* provides the entitlement of legal entities to immunity only if proceedings relate to acts performed by them in the exercise of sovereign authority.

foreign State for the purposes of State immunity. The obvious examples are Article 1603 (a) of US *Foreign Sovereign Immunities Act*, Article 2 of Canada *State Immunity Act* and Article 3 (3) of Australia *Foreign States Immunities Act*. In order to seek a compromise of States practice, the UN Convention also provides a conditional approach to define the political subdivisions of a State.

The term ‘political subdivisions of a State’ here refers to layers of government except for the central government or federal constituent units.’<sup>173</sup> The political subdivisions of a State are constituted or authorized under municipal law to act as organs of the central government or as State agencies, so they may in fact be exercising sovereign authority. The political subdivisions cannot necessarily be treated as the ‘State’ of Article 2 (1) (b). To qualify as a ‘State’, such subdivisions must satisfy the requirements of function and time respectively: (i) they are entitled to the performance of sovereign authority; (ii) they are actually acting in that capacity. In summary, the entitlement of political subdivisions of a State to immunity relies on their conducts in exercise of sovereign authority, not on their identity.

### (3) Agencies and Instrumentalities of a State and Other Entities

In accordance with the Article 2 (1) (b) (iii), the term ‘State’ encompasses ‘agencies or instrumentalities of State or other entities’. Such agencies or instrumentalities have the right to invoke jurisdictional immunity only to the extent that they are entitled to perform acts in exercise of sovereign authority. Beyond this sphere, they do not enjoy any immunity.

It is probably the most difficult clause of Article 2 (1) (b), because the concept of ‘agencies or instrumentalities of a State or other entities’ is broad and uncertain. According to the commentary of International Law Commission, the term ‘agencies or instrumentalities’ is intended to cover State enterprises or other entities established by the State for specific purposes and retaining some connections with it, such as the central bank, State utilities, State commodity boards, sovereign wealth funds and so on. ‘Other entities’ could include private entities not established by State but conferred on sovereign authority.<sup>174</sup> For example, in practice, some commercial banks are entrusted by the government of a State to deal with import and export

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<sup>173</sup> See: Roger O’Keefe, Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press (2013), p. 48.

<sup>174</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 2, para. 15.

licensing which is exclusively within governmental functions, the commercial banks hereby belongs to ‘other entities’ of Article 2 (1) (b) (iii).

International Law Commission points out in its commentary there is in practice no bright line to be drawn between agencies or instrumentalities of a State and departments of government.<sup>175</sup> It reveals the semantic resemblance between ‘agencies or instrumentalities’ and ‘organs of government’. Such recognition takes sufficient account of the complexities of reality.

Although the Article 2 (1) (b) (iii) illustrates the qualifications of ‘State’, in practice, it is rather intractable to analyze whether ‘agencies or instrumentalities of a State or other entities’ meet the requirements of ‘States’ for the purposes of the Convention.

It is not hard to understand the following case. A national oil enterprise of a State engages in a purely commercial transaction in the same manner as a private company. In any proceeding against it in the court of another State in relation to the transaction, the enterprise cannot invoke the immunity since it does not actually perform sovereign authority in the commercial transaction. However, the reality is not as simple as imagined. For instance, a national bank of a State issues national debts in accordance with the government’s order. As usual, the issuance of the debts to public takes the forms of commercial transaction. On the face of the case, the bank will be treated as ‘State’ under Article 2 (1) (b) (iii), and will enjoy at least *prima facie* immunity by virtue of Article 5, since the bank is under orders of the government to issue bonds. But whether the bank is ultimately immune from the jurisdiction of the courts of forum State mostly depends on the evaluation of the issuance of that bank in detail.

Therefore, it is worth emphasizing the fact that ‘agencies or instrumentalities of State or other entities’ are recognized as a State does not necessarily signify that they will obtain the right to immunity in the final analysis.<sup>176</sup> The acquisition of the ‘State’ qualification is merely to meet the requirements on the subject, and it is just the first step for the entitlement to immunity.

#### (4) Representatives of a State

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<sup>175</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 2, para. 16.

<sup>176</sup> See: Roger O’Keefe, Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press (2013), p. 52.



The Article 2 (1) (b) (iv) indicates ‘representatives of the State acting in that capacity’ should be treated as a ‘State’ for the purpose of the Convention. The ‘representative’ includes ‘all the natural persons who are authorized to represent the State in all its manifestations.’<sup>177</sup>

The representatives of a State are characterized as a ‘State’ only they are acting in that capacity. Concretely, in any proceedings against the representatives of a State in the court of another State, the representatives may invoke immunity on condition that they perform acts in the representing capacity, not in a private capacity.

In conclusion, the Article 2 (1) (b) of the Convention is a compromising product based on the international practice rather than an art work deduced by normative reasoning. Some of terms in this Article are not specific and accurate enough, especially about the ‘agencies or instrumentalities of State or other entities’, however, this is a necessary price to achieve the minimum consensus among States. In any case, the Article 2 (1) (b) solves a fundamental issue in the law of State immunity: What the State is.

## 4. THE STATUS OF STATE ENTERPRISES IN STATE IMMUNITY

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### 4.1 THE GENERAL UNDERSTANDING OF THE STATE ENTERPRISE

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The State enterprise has different names in different countries. It also often uses the following names: State-owned enterprise, governmental-owned company, commercial government agency and public sector undertaking. Briefly, a State enterprise is a legal entity that undertakes commercial activities on behalf of the State, its owner.

State enterprises, of course, are established to operate in commercial activities for profit, but sometimes they may perform public policy as well, especially for the

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<sup>177</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 2, para. 17.

public utility. For example, in most of countries the State-owned railway enterprise is a public service run for profit.

State enterprises do not merely refer to these enterprises exclusively owned by a State. Actually, whether an enterprise is wholly or partially owned by a State, it could be a so-called State enterprise. In practice, it is difficult to determine tangibly what level of State ownership would qualify an entity to be treated as State-owned enterprise. In view of the complexity of State enterprises, another concept ‘State-linked company’ is employed to describe the corporate entities that may be private or public where an existing government owns a stake by a holding company. However, to determine whether a company is classified as the State-linked company is still difficult, as the consensus about the effective controlling share that a State should own has not been established. A simple example is that, China Investment Corporation acquired 10% interests of the global investment bank Morgan Stanley in 2007, but it is hard to think that Morgan Stanley has become a China’s State-linked corporation.

Due to the differences in ideology, political regime and economic system, the organization structure and function of State enterprises among States are different from each other. In spite of this, it is generally accepted that the definite features of the State enterprises are that they have a form of companies for commercial affairs and have independent legal personality. This implies State enterprises have the independent capacity to assume civil liability by all of their own property. Indeed, the State ownership means State is a substantial shareholder of State enterprises, and is responsible for the investment within its investment limits. The State and State enterprises are separated in personality.

Because of the vacancy of a shared understanding of State enterprises among States, the term of State enterprise has not been widely used in the legislation or conventions on State immunity. State enterprises are incorporated into the concept of entity, agencies or instrumentality of States. The concept of ‘legal entity’ of Article 27 of *European Convention on State Immunity* 1972 contains State enterprises. The Article 1603 (b) of US *Foreign Sovereign Immunities Act* 1976 incorporates State enterprises into concept of the agency or instrumentality. The ‘separate entity’ of Article 14 of UK *State Immunity Act* 1978 encompasses State enterprises. Subsequently, some Commonwealth nations such as Singapore, Canada, South Africa, Pakistan and Australia imitated the practice of UK’s legislation with the term ‘separate entity’ to

denote State enterprises. The *UN Convention on Jurisdictional Immunities of States and Their Property* 2004 make a compromise between the legislative practice of US and that of UK, applying the term ‘agencies, instrumentalities or entities’ to express State enterprises in its Article 2 (1) (b) (iii). Japan’s legislation on State immunity, *Act on the Civil Jurisdiction of Japan with respect to a Foreign State etc* 2009, uses the term ‘entity’ to refer to the State enterprise in Article 2 (c).

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## 4.2 THE RELATIONSHIP BETWEEN STATE AND STATE ENTERPRISE IN THE CONTEXT OF STATE IMMUNITY

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### (1) The Complicacy of the Relationship

Theoretically, the relationship between States and their enterprise is a capital or equity controlling relationship in essence. A State set up enterprises by its own property, and once the enterprises were established, ownership to the property is converted from the State to State enterprises. As the shareholder, the State bear limited liability in the scope of its capital contribution. The State and its owned enterprises are separate in legal personality, and thus State enterprises are independent from its investor, the State.

However, practice is always more complex than theory. Some socialist countries have their characteristics in design of State-owned enterprises. For example, in China, Chinese government is the main investor of State enterprises, but Chinese government merely confers the right to operate and manage State property on State enterprises. It does not transfer the ownership of its property to these enterprises. In fact, the property of Chinese State enterprises is still owned by China, and the State Council, as the central government, exercises the ownership of the enterprises’ property on behalf of China.<sup>178</sup> In line with the jurisprudence, it implies that Chinese State enterprises lack their own property, so in logical they cannot assume responsibility independently, and do not have integral legal personality accordingly. Moreover, the Article 6 and Article 7 of *Constitution of China* provides that,

*“The basis of the socialist economic system of the People's Republic of China is socialist public ownership of the means of production .....*

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<sup>178</sup> See: 施天涛：《商法学》，法律出版社 2006 年版，第 58 页。

*The state economy is the sector of socialist economy under ownership by the whole people; it is the leading force in the national economy. The state ensures the consolidation and growth of the state economy.”*

In order to maintain and promote the dominant position of public economy in the national economy, many companies are funded by Chinese government. They involve not only public utilities, but all walks of life. A number of the so-called State enterprises in China are operated at a profit without the function of public services. While in the representative capitalist States, for example America, the number of State enterprise is very limited, and State enterprises are established often for a certain purposes of public service. Because of the diversity of States' circumstances, the relationship between the State and State-owned enterprises has become more and more complicated.

## (2) The Position of Structuralism and of Functionalism

The international practice on State immunity shows two different positions in the relationship between States and State enterprises: one is 'structuralism' and the other is 'functionalism'.<sup>179</sup> Structuralism argues that the relationship between a State and State enterprises is based on the status of State enterprises in the economy system of that State. Concretely, according to the law and institutional design of a State, if State enterprises are granted to independent legal personality and not controlled by the government, they should be excluded from the category of State and could not be protected by jurisdictional immunities.

In contrast, functionalism realizes that the diversity of institutional structure among States causes the complexity of the recognition of State enterprises, and therefore it claims that regardless of the status of State enterprises in the economy system of a State, the relationship between a State and State enterprises is determined by the functions and performance of State enterprises. If State enterprises are conferred on governmental authority and provide public service, they should be attributed to the category of State and could benefit from jurisdictional immunities.

As a matter of fact, the structuralism and the functionalism are not mutually exclusive, and the courts of forum State may choose both of them to deal with the status of State enterprises according to current situation and governmental policy.

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<sup>179</sup> See: 龚刃韧: 《国家豁免问题的比较研究》, 北京大学出版社 2005 年版, 第 148 页。

In the case *Dole Food Company v. Patrickson*,<sup>180</sup> Patrickson and a group of farm workers filed suit against Dole Food Company and others (Dole petitioners) seeking relief for injuries allegedly caused by the overseas use of the pesticide DBCP. Dole petitioners impleaded two other corporations, Dead Sea Bromine Company and Bromine Compounds Limited (collectively, Dead Sea Companies) that allegedly produced pesticide DBCP that was used on foreign fruit farms. The plaintiffs brought the suit in Hawaii state court. But the Dead Sea Companies sought removal of the suit to federal court under 28 U.S.C.<sup>181</sup> Article 1441 (d) which provides that ‘any civil action brought in a state court against a foreign State may be removed by the foreign State to the District Court of United States.’ The Article 1603 of *Foreign Sovereign Immunities Act* defines a ‘foreign State’ to include an ‘agency or instrumentality of a foreign State’. The Court of Appeals reversed the Federal District Court’s order granting removal, holding that the Dead Sea Companies are not agencies or instrumentalities of a foreign State for purposes of *Foreign Sovereign Immunities Act*.<sup>182</sup>

The determination of whether the Dead Sea Companies were instrumentalities of Israel was the crucial issue in this case. The Court of Appeals had to examine the structural relations between the Dead Sea Companies and Israel. As the companies were disclosed, they were not a direct State-owned enterprise of Israel but were separate from Israel by one or more intermediate corporate tiers. This implied the Dead Sea Companies were merely subsidiary of the instrumentalities of Israel. So, during the period of time in which the use of DBCP occurred, the State Israel did not itself possess a majority of the shares of the Dead Sea Companies, but it possessed shares of other corporations that in turn possessed shares of the Dead Sea Companies.<sup>183</sup> As a result, the Dead Sea Companies did not qualify the ‘instrumentality’ status provided by *Foreign Sovereign Immunities Act*. Afterwards, the Supreme Court of United States maintained the decision of Court of Appeals for Ninth Circuit.

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<sup>180</sup> *Dole Food Co. v. Patrickson*, 538 US 468, 479 (2003).

<sup>181</sup> 28 U.S.C. refers to title 28 of United States Code.

<sup>182</sup> See: <https://www.justice.gov/osg/brief/dole-v-patrickson-amicus-curiae-petition>, visited on 31<sup>th</sup> May, 2017.

<sup>183</sup> The State of Israel did not have direct ownership of shares in either of the Dead Sea Companies at any time pertinent to this suit. Rather, these companies were, at various times, separated from the State of Israel by one or more intermediate corporate tiers. For example, from 1984 to 1985, Israel wholly owned a company called Israeli Chemicals, Ltd.; which owned a majority of shares in another company called Dead Sea Works, Ltd.; which owned a majority of shares in Dead Sea Bromine Co., Ltd.; which owned a majority of shares in Bromine Compounds, Ltd.

In the *Dole Food Company case*, the reason that Court of Appeals for Ninth Circuit did not recognize the Dead Sea Companies as instrumentality of Israel is primarily based on their subsidiary status in the tiered structure of State enterprises of Israel. Obviously, this analysis approach reflected structuralism.

While in the recent case *OBB Personenverkehr AG v. Sachs*,<sup>184</sup> the US court changed the approach to identify the status of OBB. In the case, Carol Sachs is a resident of California who purchased in the United States a Eurail pass ticket for rail travel in Europe. She suffered injuries when she fell onto the tracks at the Innsbruck train station of Austria while attempting to board a train operated by the Austrian State-owned railway (OBB). She filed a suit against the railway in Federal District Court in which she alleged the railway was responsible for causing her injuries. The railway claimed that the suit should be barred by *Foreign Sovereign Immunities Act*, as it is an enterprise owned by Austrian government. In response, Sachs countered that her suit was permitted by sovereign immunity under *Foreign Sovereign Immunities Act*'s commercial activity exception because it is based upon the railway's sale of the ticket to her in the US. The District Court held that Sachs's suit did not fall within Article 1605 (a) (2) and dismissed the suit, but the en banc of Court of Appeals for Ninth Circuit reversed. Then, OBB appealed to the Supreme Court of the US. The Supreme Court held that the term 'based upon' in Article 1605 (a) (2) of *Foreign Sovereign Immunities Act* requires courts to identify the particular conduct upon which a plaintiff's claim is based. Sachs's injury was base upon conduct that occurred solely in Austria, and the suit therefore fell outside the commercial activity exception of *Foreign Sovereign Immunities Act*. Ultimately, the Ninth Circuit's decision was reversed for lack of jurisdiction.

Logically, the US Supreme Court's decision is premised on the fact that OBB, the Austria State-owned enterprise, can be categorized as an instrumentality of Austria under Article 1603 (b) of *Foreign Sovereign Immunities Act*. The defendant OBB Personenverkehr AG is owned by OBB Holding Group, a joint-stock company created by the Republic of Austria to operate rail service within Austria. OBB Holding Group in turn is owned by an Austrian government department, Federal Ministry of Transport, Innovation and Technology. So the OBB resembles the Dead Sea Companies in structure, since it is not a direct State-owned enterprise of Austria

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<sup>184</sup> See: *OBB Personenverkehr AG v. Sachs*, 577 US \_\_\_\_ (2015).

but merely subsidiary of a holding group owned by a government department of Austria. The OBB is controlled by Austria via corporate tiers as well. But it is recognized by the US courts as an instrumentality of a foreign State, and therefore is granted immunity. In the *OBB case*, the US courts apparently do not analyze the relationship between OBB and Austria from the structuralism position. Actually, the OBB is attributed to the category of State by US courts largely because it performs the sovereign function of public service. Here, the US courts' analysis is clearly based on the functionalism.

By comparison of *Dole Food Company case* and *OBB case*, it can be seen that in international practice, structuralism and functionalism do not have an absolute boundary. The opposition between them is largely due to the theoretical argument rather than pragmatism. As a principle, States practice tends to accept the independent status of State enterprise. However, as the *OBB case* reveals, the practice is much more complicated than theoretical imagination, so the determination of whether applying structuralism or functionalism must be dependent on the specific circumstances of cases.

### (3) The Drawback of Mixing State Enterprises with States

By the impact of the national economic system, some socialist countries advocate that State enterprises should be given the State treatment in the proceedings relating to commercial transactions. Through this strategy, they expect to extend the scope of State immunity to State-owned enterprises in order to protect the enterprises' interests abroad.

However, in the context of restrictive immunity, the practice is often counterproductive. Truly, once State-owned enterprises are granted to the status of State, they may get the opportunity to invoke jurisdictional immunity. But under the guidance of restrictive immunity, the courts of forum State not only analyzes the identity of the defendant, but also analyzes the conduct of the defendant.<sup>185</sup> Even though a foreign State enterprise has been vested the State status, it is still not permitted to invoke the jurisdictional immunity if the act performed by that enterprise belongs to the category of commercial activities. In this case, the State status is not the shield of State enterprises from jurisdiction of the courts of forum State. On the contrary, the mixture of State enterprise with State may result in some adverse

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<sup>185</sup> See: 赵建文:《国家豁免的本质、适用标准和发展趋势》,载《法学家》2005年第6期。

consequences. For example, in a suit against State B, State B requested the protection of State immunity before the court of forum State A. The court of State A, by examining the nature of its conduct, considered that State B did not have the qualifications for invoking immunity, and sentenced State B lost the suit. In the subsequent process for enforcement of the judgment, the court of State A did not find the property of State B that was available for execution in its territory. But some enterprises owned by State B operated in State A. For the purpose of execution, the court of State A may review State B's position on State-owned enterprise. Provided that State B usually claimed on international occasions that the property of its State enterprise is wholly owned by State, for this excuse the court of State A may execute the property in its territory of the State-owned enterprises of B.

It can be seen that the approach of treating State enterprises as State may draw fire against themselves, harming the enterprises' interest oversea. This is not just a hypothesis. In practice there have been similar cases. Take the case *Walters v. ICBC*<sup>186</sup> as example. This case originates from another case *Walters v. Century International Arms*.<sup>187</sup> In November, 1990, the petitioners' son Kale Ryan Walters was killed on hunting trip with his father because the Chinese manufactured rifle<sup>188</sup> the boy carrying was allegedly malfunctioned and discharged. So the Walters sued China and entities controlled by China in US District Court for Western District of Missouri on theories of products liability and breach of warranty in connection with manufacture and export of the gun in question. After being served with petitioners' complaint, China returned the documents claiming sovereign immunity, and thereafter entered no appearance in Missouri action. The District Court held that it had jurisdiction over China under the exceptions to sovereign immunity for carrying on commercial activity within the US under Article 1605 (a) (2) of *Foreign Sovereign Immunities Act* and committing a damages caused by 'tortious act or omission' under Article 1605 (a) (5) of that Act. On October 22, 1996, the Court made a default judgment against China for \$ 10 million. But the Walters did not successfully collect on the Missouri's default judgment in the following 10 years. In 2009, the Walters

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<sup>186</sup>See: *Debbie Walters, Max Walters, Plaintiffs–Petitioners–Appellants, v. Industrial and Commercial Bank of China, Ltd., Bank of China Ltd., China Construction Bank Corporation, Respondents–Appellees, The People's Republic of China, Defendant*. Docket No. 10–806–cv (United States Court of Appeals, 2<sup>nd</sup> Circuit, July 7, 2011). 651 F. 3d 280, 283 (2<sup>nd</sup> Cir. 2011).

<sup>187</sup>See: *Walters v. Century Int'l Arms, Inc.*, No. 93-5118-CV-SW-1 (W.D. Mo. Oct. 22, 1996).

<sup>188</sup> This weapon was apparently manufactured by China North Industries Corporation, an agency or instrumentality of China conducting commercial activity in the US.



changed their enforcement efforts. In September, 2009, they registered the Missouri default judgment in the District Court for Southern District of New York, and then they served restraining notices and subpoenas on the New York branches of China's national banks, such as Industrial and Commercial Bank of China, Bank of China and China Construction Bank, forbidding the transfer of any of China's assets held by them and demanding documents concerning such assets. According to the Walters' claims, all funds of China being held within the US by any or all of the banks as is necessary fully satisfy the Missouri default judgment. Logically, Walters claimed that the assets of China's State-owned enterprises is identical to the property of China, so in the case that no available execution property of China or its instrumentality was found in US, they turn to apply for the execution on the property of Chinese national banks. Although finally the US Court of Appeals for the Second Circuit did not support Walters' claims, however, the potential risks of *Walters case* has given China a big lesson: it is really necessary to divide the standing of State and of State enterprises on the issue of State immunity.<sup>189</sup>

The Article 2 (1) (b) (iii) of UN Convention on State Immunity actually incorporates State enterprises under the concept of 'agency', 'instrumentality' and 'other entities', but this does not mean State enterprises are identical to State under the framework of the Convention. Indeed, the agency or instrumentality of a State or other entities must meet the functional standards 'be entitled to perform and are actually performing acts in the exercise of sovereign authority of the State', and thus can be given the status of sovereign States. The expression of UN Convention in regard to the relationship between State and State enterprises is very clear and tangible. In general, State enterprises are separate entities with legal personality, they are not a kind of departments or organs of States, but on the occasion of authorization for sovereign functions, they may be entitled to State status.

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### 4.3 THE ATTRIBUTION OF LIABILITY OF STATE ENTERPRISES

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<sup>189</sup> Chinese scholars suggest that China can take waiver of the immunity of Chinese State enterprise before the courts of US as a bargaining condition in exchange for the fair and impartial treatment in the US. See: 梁一新: 《论国有企业主权豁免资格》, 载《比较法研究》2017年第1期。

Although international community has not form a consensus on the attribution principle of liability of State enterprises hitherto, the dominant opinion of States ensures that State immunity cannot be applied to State enterprises, particularly considering the increasing tendency worldwide towards privatization and increasing commercial autonomy of State-owned enterprises.<sup>190</sup> Especially as to commercial activities, the States from Civil Law system hold that, under the principles of current law on commerce and the established views in the legal doctrine, the enterprises founded on the basis of State property are subject to the private law and State property will be transformed into property belonging to the newly founded economic entity.<sup>191</sup> A number of States is persistent in the position in favor of non-liability of State enterprises for State debts, and vice versa. As a matter of fact, in the context of restrictive immunity, the distinction between State enterprises and the parent State helps to avoid abuse of judicial process against the State.

Some States disagree with the absolute distinction between States and their enterprises. They believe that the relationship between States and State enterprises is very close, so the parent State may make use of the legal personality of such enterprises to engage in commercial activities and to escape the debt caused by the business. For example, in the comments of the draft of the UN *Convention on Jurisdictional Immunities of States and Their Property*, Germany made a reply to the Article 10 (3) ‘Concept of a State enterprise or other State entity in relation to commercial transactions’. It accounted that,

*“In certain cases, it may be appropriate to disregard the separate legal personality of a State enterprise or other entity and to have recourse to the State itself. Indeed, to exclude the possibility of such a recourse entirely would enable States to avoid financial liability for commercial transactions by setting up independent entities.”*<sup>192</sup>

Germany’s claim is, in effect, to recognize the disregard of the corporate entity on the issue of State immunity. When a State abuses the legal personality of State enterprises and its limited liability as the shareholder by shutting debts and evading liabilities, it should deny such separate legal personality: ‘piercing the corporate veil’,

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<sup>190</sup> See: Replies received from States, UN Doc. A/53/274, p. 2.

<sup>191</sup> See: UN Doc. A/C. 6/48/3, p. 3.

<sup>192</sup> See: Replies received from States, UN Doc. A/53/274/Add.1. p. 3.

and demand the State to bear joint liabilities for protecting the interests of the creditors.

Another economic power Japan expressed roughly the same worry as Germany's. Japanese government thought that the existence of a special form of segregated property of State enterprises 'bears the danger of States hiding behind State enterprises so that they might be exempt from responsibility in relation to those enterprises.'<sup>193</sup>

As a compromise product, the UN Convention on State Immunity has balanced the position of States, distinguishing the liabilities between States and their enterprises, meanwhile implying the possibility of the application of 'piercing the corporate veil'. Firstly, in Article 10 (3), it provides that,

*"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."*

Although the Convention distinguished the property between States and State enterprises, but it does not pursue this position consistently. Some economic powers doubt the necessity of retaining a provision on this issue, because these States are anxious that such provision may expand the transaction risks caused by the abuse of the 'independent legal personality'. The preference of Germany and Japan would therefore be to delete the Article 10 (3).

As a response to such position, in the annex to the Convention, it pointed out the Article 10 (3) does not prejudice the question of 'piercing the corporate veil', 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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<sup>193</sup> See: Replies received from States, UN Doc. A/56/291/Add.2. p. 2.

This indicates that the Convention does not preclude the possibility that a State assume joint liabilities for State-owned enterprises' debts.

As a conclusion, in the context of absolute immunity, it is not difficult to understand relationship between a State and State enterprises. Once a State enterprise is found to have State status, it is entitled to the right of access to immunity. However, in the context of restrictive immunity, the attribution of liability of State enterprises becomes more and more complicated. In general, the dichotomy between State and State enterprises is appropriate and reasonable: a State enterprise is involved in a proceeding which relates to a commercial transaction, the immunity from jurisdiction enjoyed by the parent State shall not be affected, and vice versa. But in certain cases, some States engaged in commercial transactions by the independent legal personality of State enterprises. Once debt disputes arise in transactions, States often maliciously flee funds to reduce the losses, and make use of the independent status of enterprises and limited liability of the shareholder to prevent the joint liabilities. Hereby, State enterprises have become the camouflage and shield of States to evade the debts liability in commercial transactions. In order to protect the transaction security, it is necessary to recognize the institution of disregard of the corporate entity.

## CHAPTER 4

# THE COMMERCIAL TRANSACTION EXCEPTION TO IMMUNITY FROM ADJUDICATION

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Technically speaking, the jurisdiction means the competence and authority of courts to accept and hear cases and to carry out justice. In the domestic legal system, the distribution and regulation of the jurisdiction is definite comparatively due to the unified and centralized sovereignty. When it comes to the international legal system, however, the situation is very different. The independence and sovereign equality among States leads up to the fact that the international society is devoid of a unified and centralized authority. Therefore, countries have the right to design their own rules of jurisdiction directed by their national interests.

## 1. THE INTRODUCTION TO INTERNATIONAL CIVIL JURISDICTION

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### 1.1 THE DEFINITION OF INTERNATIONAL CIVIL JURISDICTION

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The jurisdiction to adjudicate means the power vested in the court of a State by international treaties or municipal law to adjudicate upon and determine a case. In particular, the international civil jurisdiction will be used to indicate the power of a court to adjudicate in cases involving foreign elements.<sup>194</sup> Generally, the court of a state ‘exercises jurisdiction to adjudicative when the court responds to a dispute between individuals or other legally recognized entities for the purpose of making a

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<sup>194</sup> See: 李双元、欧永福 编：《现行国际民商事诉讼程序研究》，人民出版社 2006 年版，第 8 页。

decision regarding the dispute that is binding within the State on the individuals or entities involved in the dispute.’<sup>195</sup>

The jurisdiction to adjudicate plays a very important role in litigation. On the one hand, the admissibility in law of jurisdiction is the premise for a court to institute legal proceedings. A court cannot accept and hear a claim unless it has established the jurisdiction validly. In the international level, the jurisdiction underlies the basis of the international civil proceedings as well. If the established jurisdiction of a court is improper in law, the decision of the court will be invalid by virtue of due process, and impossible to be recognized and enforced.

On the other hand, to a certain extent, the State who has the jurisdiction over a case occupies a decisive impact on its judgment. Although the jurisdiction of a court does not imply that *lex fori* will be applied according to the principle of the conflict of laws. Sometimes, however, the jurisdiction may affect the substantial rights and obligations of the litigants involved in international proceedings, because the State who exercises the jurisdiction in a lawsuit, whose rule of conflict of laws will be applied in order to find the applicable law by which the rights and obligations of the litigants are fixed.

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## 1.2 THE DIVISION OF DIRECT JURISDICTION AND INDIRECT JURISDICTION

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On the basis of raw power, a sovereign State may authorize its courts to make adjudications that are binding within that State. On the international level, however, the issue of jurisdiction becomes more complicated, because the forum State has to consider whether its judgment can be recognized and accepted by the court of another State.

Accordingly, the establishment of jurisdiction can become relevant at two different stages. The first stage involves the proceedings before the court that renders the original decision. The court will not hear a case, much less render a decision, unless it determines that it has jurisdiction to do so. The second stage concerns the proceedings before the court requested to recognize and enforce. The requested court will not

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<sup>195</sup> Russell J. Weintraub, *Commentary on the Conflict of Laws*, Thomson Reuters/Foundation Press (2010), p. 129.

recognize or enforce the decision of the rendering court, unless it determines that the rendering court had competent jurisdiction.<sup>196</sup> Some legal orders distinguish these two stages of jurisdiction. For instance, the jurisdiction, in French law, was divided between direct jurisdiction (*compétence directe*) and indirect jurisdiction (*compétence indirecte*).<sup>197</sup> Generally, the direct jurisdiction is in the adjudication stage of a proceeding, while the indirect jurisdiction is in the enforcement stage of a proceeding.<sup>198</sup>

For example, a Chinese court adjudicated a case involving foreign elements, and its decision needed to be recognized and enforced in Japan. Due to the application of person involved in the lawsuit, the Japanese court should check whether the judgment of the Chinese court can be recognized and enforced according to the rules required by Japanese law, if it intends to carry out the decision from China. One of the prerequisite condition of recognition and enforcement of judgment demands that the Chinese court should have due jurisdiction to adjudicate. In case of discovering the ineligibility of the Chinese court in jurisdiction, Japan will not recognize and enforce the decision. In the process of enforcement, Japan's review to the jurisdiction of Chinese court is about the indirect jurisdiction.

The direct jurisdiction and indirect jurisdiction are the interrelated conceptions in international civil proceedings, but in this chapter, the use of term "jurisdiction" substantially refers to the direct jurisdiction.

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### 1.3 THE PRINCIPLES OF THE EXERCISE OF JURISDICTION

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Without hierarchical power structure, international community leaves a great discretion for States to design jurisdictional rules under their sovereignty.<sup>199</sup> Because

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<sup>196</sup> Ralf Michaels, *Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions, Conflict of Laws in a Globalized World*, Cambridge University Press (2007), pp. 35~39.

<sup>197</sup> See: Arthur Nussbaum, *Jurisdiction and Foreign Judgments*, 41 COLUM. L. REV. 221, 225 (1941); 225; Ronald A. Brand, *Enforcement of Judgments in the United States and Europe*, 13 J.L. & COMMERCE 193, 201-2 (1994); Eugene. F. Scoles, Peter Hay, Patrick J. Borchers, Symeon C. Symeonides, *CONFLICT OF LAWS* 288 n.21 (4<sup>th</sup> ed. 2004).

<sup>198</sup> The direct jurisdiction means the jurisdiction of the rendering court, because the court is directly involved into the question whether or not it should exercise jurisdiction. The indirect jurisdiction refers to the jurisdiction of the requested court, because the court is engaged with the question indirectly, via the recognition procedure, whether or not the original jurisdiction was admissible. See: 李浩培:《国际民事程序法概论》, 法律出版社 1996 年版, 第 46 页。

<sup>199</sup> See: Anthony Aust, *Handbook of International Law*, 2<sup>nd</sup> edition, Cambridge University Press (2010), p. 42.

of lack of the uniform rule of jurisdiction in international level, the jurisdiction issues are regulated primarily by the municipal law. States design the rule of jurisdiction in line with their interest, so it is inevitable to cause the phenomenon of the conflict of jurisdiction. If the States of international community are all inclined to expand their respective jurisdiction, it will obstruct the establishment of a sound and stable international order. Therefore, it is necessary to elaborate the general principles to establish jurisdiction.

#### (1) Dual Considerations

Broadly speaking, there are various reasons from two perspectives to interpret why a court may be the suitable forum to decide a dispute in which foreign elements are involved.

##### (a) The Positive Considerations

At first, the consent of parties to litigation to the jurisdiction of a court constitutes the legitimate reason for that court exercising the jurisdiction. If both parties have agreed to the litigation to proceed in the forum State, its courts can exert the jurisdiction smoothly. For example, if Japanese company A and Chinese enterprise B are consent to submit to the jurisdiction of the court of China, there can be little opposition to the assumption of jurisdiction by the court of China.

Secondly, the establishment of jurisdiction may involve a set of elements, chief among which is connections between defendant and the court of forum State. Usually, the plaintiff should go to the court of the defendant's location filing a lawsuit. In international civil disputes, it seems more righteous for a person to have to defend a case in the court of his own State. The phenomena became a legal principle: '*actor sequitur forum rei*': a plaintiff should initiate legal proceedings in the court located in the area where the dispute subject or the defendant is situated. In the cases concerning State immunity, there is hardly any room to apply the principle '*actor sequitur forum rei*' on the face, because the litigation concerning State immunity is private suits against foreign States in domestic courts.

It is worth mentioning that the connections between defendant and the court of the forum State should not be interpreted in a narrow sense. Sometimes, other connections between the defendant State and the forum State can be taken into consideration. For example, in English law, the jurisdiction of English courts can be established, even if a foreign defendant is or has been present in England, because



pursuant to English law the presence is recognized as a territorial connection between England and the defendant.

Thirdly, sometimes there is a connection between the substance of claim and the forum State, in this case the courts of forum State may be appropriate to exercise jurisdiction. But under this circumstance, a foreign defendant may be inconvenience to defend proceedings in the forum State.

#### (b) The Negative Considerations

These positive considerations are only one half of the coin. Although, in certain situations, the courts of a State are *prima facie* the suitable forum, there are good grounds for the court of another State to hear and judge the case.

There are various reasons may explain why a court of State A may be a more appropriate forum, notwithstanding the fact that there is a sufficient connection with State B to justify the assumption of jurisdiction by the courts of State B. For example, it may be more convenient for a party to litigation to be joined to related proceedings already pending in the court of State A, when it seeks to invoke the court's jurisdiction of State B.

The jurisdictional inquiry of a State should take into account of the countervailing factors which may declines the assumption of jurisdiction of the courts of the State by virtue of inconvenience.<sup>200</sup>

#### (2) Quad Requirements

Concretely speaking, there are 4 rules regulating and directing a State to establish its jurisdiction in international proceedings.

##### (a) Sovereignty and Public Interest

Jurisdiction is the stretch of sovereignty of States, and the design for jurisdiction is related to the realization of the functions of the sovereign. In general, States should take State interest into account when they the draft the rules of jurisdiction. It is not difficult to understand that a State will put the issues regarding political institutions, economic outlooks and public policies in the list of its exclusive jurisdiction. Therefore, foreign States' sovereign power is kept out of jurisdiction in those issues, and the litigants also could not submit to the jurisdiction of foreign courts via their agreement. Moreover, for the purpose of getting a better position on the contention of jurisdiction in international level, States are inclined to take advantage of an open

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<sup>200</sup> See: C. M. V. Clarkson & Jonathan Hill, *The Conflict of Law*, 4<sup>th</sup> edition, Oxford University Press (2011), pp. 59~60.

legislative technique to design more connections of jurisdiction so as to endow their own with more jurisdictional opportunities. Furthermore, in certain circumstances, for its sovereignty and public orders, the forum State usually refuses to recognize and enforce the judgment of a foreign State by invoking the reservation of public orders.

On the other hand, as Confucius said: ‘Never impose on others what you would not choose for yourself’.<sup>201</sup> In international community, States need to comply with the rule: “do unto others as you would be done by” as well, which implies that a State ought to give respect for the sovereignty of other States while insisting on the recognition of its own sovereign rights. As an outcome of sovereign compromise and concession, the law of State immunity demands States to restrain their respective jurisdiction in the association.

#### (b) Fairness and Justice

The purpose of a lawsuit is to settle an argument or a dispute. Legal proceedings undertake the task not only to protect the rights of individuals but also to achieve fairness and justice. Legal proceedings observe a certain order and procedure, and the establishment of jurisdiction lies on the first stage of the order system. Actually, the jurisdiction concerns the legitimacy of the litigation and the justifiability of the application of law. States hereby ought to be very prudent to set up the criterion of exercise of jurisdiction. They must find a balance among the value of protection of individual rights, keeping the peace of society and implementation of fairness and justice of law. Sometimes, the principle of fairness and justice can redress the partiality from the concept of sovereignty.

In practice, the restrictive doctrine of State immunity was in large part affected by the principle. On the one hand, limited by the international principle of the equality of sovereignty, a court should prevent itself to exercise jurisdiction on the occasion of the defendant being a sovereign State. If not, it will be regarded as contempt for the dignity of foreign States. The impolite action may give rise to the hostility among States, and endanger the peace and security of international community. On the other hand, as States were involved in the commercial activities more and more frequently, if the dispute between States and individuals could not be settled by litigation, it will harm the due rights of the private. This approach is full of prejudice. On the account, some States redefine the scope of State immunity via analyzing the concept of State or

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<sup>201</sup> 《论语 颜渊》

distinguishing the act of State, and propose that State cannot invoke immunity in the field of commercial transactions. The practice shapes the restrictive immunity which balances the sovereignty of States and the rights of individual in a proper way. It is obvious that the principle of fairness and justice has played an important role in shaping the jurisdictional rule of international community.

### (c) Equality and Reciprocity

It is widely known that the modern international community is an egalitarian society in which every State is on equal terms in sovereignty. Although some people still hold that almost everywhere society was hierarchically arranged, in matters of vital interest to the Great Powers, there was little reason to expect precisely equal treatment, however, more and more international practice demonstrates that all States enjoy sovereign equality.<sup>202</sup> They have equal rights and duties and are equal members of the international community, notwithstanding the differences of an economic, social, political or other nature. As the Chief Justice of United States John Marshall pointed out, “No Nation has ever yet pretended to be ‘the custos morum’ of the whole world.”<sup>203</sup>

The principle of sovereign equality and independence conceives the idea of reciprocity in international intercourse.

*“..... Through the late colonialist period of the League of Nations, the international legal system remained essentially a matter of inter-state convenience, a bilateral system of ‘transactions’ and mutual benefits designed to serve the common interest of nations that qualified as sovereign and independent. The system was ethically enhanced, but not transformed, by the Covenant. Its chief claim to be a system of justice was the principle of reciprocity.”*<sup>204</sup>

As to the international jurisdiction, the equality and the reciprocity imply that the any foreign State, no matter how powerful and wealthy it is, has the right to be equally treated before the court. If a court takes discriminate actions against a foreign State, the State reserves the right to take similar measures. The principle of equality and reciprocity ensures that in the design of the rule of jurisdiction, every State should give enough deference to other sovereigns and avoid observing unilateral policy. The

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<sup>202</sup> 朱晓青：《国际法学》，中国社会科学出版社 2012 年版，

<sup>203</sup> *U.S. v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (No. 15,551), (CC. Mass. 1822).

<sup>204</sup> Douglas M. Johnston, *The Historical Foundations of World Order*, Martinus Nijhoff Publishers (2008), p. 74.

reciprocity based on the equality is a pragmatic legal system binding State actions rather than a suggestion. For example, Article 3 of the *Law of China on Judicial Immunity from Compulsory Measures concerning the Assets of Foreign Central Banks* stipulates that,

*“For countries that do not provide assets of the Central Bank of the People's Republic of China and finance administration organs of Special Administration Regions with judicial immunity, or provide immunity below the measures, the People's Republic of China will deal with in line with principle of reciprocity.”*

Obviously, Chinese government complies with the reciprocity in international legal practice.

Although there are some critiques of the principle of reciprocity and nor do all States practice strict reciprocity, at least, most of States are affected by reciprocity. For example, after *Foreign Sovereign Immunities Act* 1976, the US turned to restrictive principle of sovereign immunity. But in practice, the US is more flexible to deal with the case in which foreign sovereigns involved. The US Supreme Court is inclined to treat State immunity as a matter purely of discretion,<sup>205</sup> and the reason is that the US must take the feeling of other sovereigns into account.

#### (d) The Facilitation of Litigation

In view of the jurisdiction's great influence on the legal action, selecting a proper court not only ensures the litigation proceeds smoothly, but also reduces the cost of lawsuit and promotes optimal allocation of law resources. Therefore, in the process of formulating the rules of jurisdiction, the lawmaker of a State should regard the principle of facilitation of litigation as an important guideline.

The principle of facilitation includes two aspects: facilitate bringing an action for parties and facilitate accepting and hearing a case for courts. On the one hand, designing the rule of jurisdiction, the lawmaker should pay attention to the convenience of parties to attend the litigation. On the behalf of parties' interest, the international practice gradually accepted the jurisdiction by agreement. That means in many cases the parties are granted the right to select the jurisdictional court based on their agreement.

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<sup>205</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.14.

On the other hand, a general principle has now emerged that a State may exercise jurisdiction if there is a sufficiently close connections between the subject matter and the State. If the connections are unsubstantial, the court may face difficulties in the subsequent proceedings, so it is necessary to give the court the discretion to decide whether exercise its jurisdiction or not. Actually, in the Anglo-American system on jurisdiction, the flexible discretion to stay actions on the basis of *forum non conveniens* is an effective solution. This gives competent courts an opportunity to refuse to try cases on the condition that there is a clearly more appropriate foreign forum for trial. The *forum non conveniens* reflects the principle of facilitation during the establishment of jurisdiction in an indirect way.

The principle of facilitation, however, was never absolute. While the convenience may be the rationale for jurisdiction, it is not necessary the criterion for its existence.

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## 1.4 THE FUNCTION OF JURISDICTION

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Jurisdiction plays a significant role in international civil proceedings. Its functions are expressed in these aspects.

First of all, the jurisdiction is the sublimation of the principle of sovereignty in the international proceedings. Jurisdiction, both relating to international law and municipal law, is a fundamental right of States origin from the principle sovereignty. According to the international law, the States contains these elements: (a) a permanent population; (b) defined territory; (c) a government; and (d) capacity to enter into relations with other States.<sup>206</sup> So any sovereign States ought to possess the personal jurisdiction and territorial jurisdiction based on the population and territory. As the extent of sovereignty, the citizenship, domicile and territory are usually considered as the foundation for a forum State to establish its competence. Also, a State radiates its sovereign impact on the legal action mainly via the exercise of jurisdiction. It has been confirmed by the international convention, for example, the Article 2 of *Draft Declaration on Rights and Duties of States*, 1949 declared that,

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<sup>206</sup> See: Article 1, *Montevideo Convention on the Rights and Duties of States*, 1933, 165 LNTS 19; and see: Oppenheim, *International Law*, 9<sup>th</sup> edition, London (1992), pp. 120~123.

*“Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.”*

It is obvious to find that jurisdiction embodies the sovereignty of States in the judicial field.

Secondly, the issues of jurisdiction are the precondition for a court to accept and hear a case. Generally, international law admits of a State exercising competence over persons or things in its territory, and sometimes abroad. When a claim is sued to a court, the court has to check and determine whether it possess the eligible jurisdiction pursuant to the international treaties and its municipal law. Only after being the jurisdiction established did the court have the right to start legal proceedings.<sup>207</sup> On the contrary, a court lacking of jurisdiction could not hear a claim legally, and thus the proceedings would not to be initiated.

Thirdly, in some cases, the exercise of jurisdiction has certain causalities with the verdict of a case. There is no uniform rule of jurisdiction in international level, and every sovereign State has the right to design the rule of jurisdiction by itself as to the cases involving foreign elements. As a result,

*“Domestic jurisdiction takes two main forms: prescription (the making of law) and enforcement (implementation of the law by the judiciary or the executive). Having been developed over the years, mostly by judgments of domestic courts, the principles are fairly well established. Conflicts of jurisdiction in civil matters are generally resolved by applying rules on conflict of laws.”*<sup>208</sup>

From this perspective, when a court established its jurisdiction, its conflict rules will be applied. Accordingly, in the light of the conflict rules the court will decide on what applicable law should be used to resolve the disputes in the case. It can be concluded that the jurisdiction has an indirect effect on the verdict of a case, and to a certain extent it resolves the substantive rights and obligations between litigants.

Last but not least, the jurisdiction to adjudicate is influential in reaching the recognition and enforcement of a judicial decision. In some circumstances, the objects of enforcement are situated abroad. Only if a judgment is recognized by the court

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<sup>207</sup> See: 杜新丽主编:《国际民事诉讼与商事仲裁》,中国政法大学出版社2009年版,第54页。

<sup>208</sup> See: Anthony Aust, *Handbook of International Law*, 2<sup>nd</sup> edition, Cambridge University Press (2010), p. 42.

where the objects are located can the judgment have the chance to be executed. One of the important conditions to recognize and enforce a judgment is that the court of State of origin should have the eligible competence: the jurisdictional requirement. If the court of origin lacks the sufficient close connection, the court of the requested State would not admit the legal force of that judgment.<sup>209</sup> Certainly, it will compel the court of origin to perform its jurisdiction on the prudence, otherwise, its judgment may be denied by the court of the requested State in the phase of recognition and enforcement. For example, in the case foreign State involved, a court has to consider that are there any properties of the foreign State in domestic, other than determining whether it enjoys eligible jurisdiction pursuant to the municipal law. Because if there is no properties of defendant foreign State, the judgment of the court must be applied to enforce in other States, and there are some risks to be rejected, so in the case the court should be very cautious to exercise its jurisdiction. As it turned out, there is a close relationship between the jurisdiction to adjudicate and the jurisdiction to enforcement, especially in the issue of State immunity.

## 2. THE ESTABLISHMENT OF ADJUDICATORY JURISDICTION OVER STATES

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### 2.1 THE TWO PHASES IN DETERMINING JURISDICTION

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Generally, it is an acknowledged rule that a sovereign State could not be sued in the court of another State. However, if a State acts in the same manner as a private person, the State cannot invoke State immunity in an international proceeding, since no sovereign power is involved in the activity. At this time, even though a State participates, the lawsuit should be regarded as a civil proceeding between the equal bodies. Therefore, a court should determine whether exercise its judicial authority not only pursuant to the international law of State immunity, but also to the municipal rule of jurisdiction.

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<sup>209</sup> See: 徐冬根: 《国际私法》, 北京大学出版社 2013 年版, 第 530 页。

State immunity is an exception to territorial jurisdiction,<sup>210</sup> so some scholars argues that ‘if jurisdiction itself does not exist in the first place, then no issue of immunity arises.’<sup>211</sup> However, this argument confuses the presumed jurisdiction and the jurisdiction itself. It is the fact that, if a national court does not believe that it has competence to hear and decide a private suit against a foreign State, it will not take the State immunity into account. But at this time, the jurisdiction of the national court is just a hypothesis, since it is a feeling rather than reasoning in law. Actually, in this stage, the court does not specifically examine a number of connections relating to the establishment of jurisdiction. The stage can be named as presumption of jurisdiction which is different from the formal stage of establishment of jurisdiction.

It is complicated for a court to establish its jurisdiction in an international proceeding in which States are involved. The court has to resolve a preliminary question whether the defendant enjoys the immunity in international level. If the answer is negative, and then the court is entitled to take further actions, which means the court is given right to determine its competence according to the domestic law about jurisdiction.

There are two phases of establishing jurisdiction over sovereign States: the first is to exclude the international law of State immunity; the second is to review the general rule of jurisdiction according to respective legal institutions.

The reasons why divide the establishment of jurisdiction into two stages largely depend on the peculiarity of the defendant status. Concretely, in general international civil proceedings, though the foreign factors exist, the parties are all equal civil entities, in which no sovereignty power involves, so it would not cause substantial obstacles to the jurisdiction of a court. While in legal proceedings a sovereign State involves, however, as a sovereign entity, the State is the subject of international law, it is regulated only by international law. Due to the sovereign status of a State, a court should not only comply with the national procedural law, but also follow the guidance of the international law. Because the issue of jurisdiction related to sovereignty, the court must verify whether the commencement of the proceeding is conformity with international law, when a State involves in a lawsuit.

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<sup>210</sup> See: 赵建文:《国家豁免的本质、适用标准和发展趋势》,载《法学家》2005年第6期。

<sup>211</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 58.



Currently, the law of State immunity is manifested as the customary international law. On the basis of this customary law, accepting an action against a foreign State, a national court should examine whether it enjoys the eligible jurisdiction according to international law. If, in the international level, a foreign State complies with the conditions of jurisdictional immunity, the national court should avoid exercising its jurisdiction. Otherwise, it may violate the international obligations and cause international wrongful acts, thereby incurring State responsibility under international law.

In the light of the principles of law, the sovereign acts of State should be regulated and adjusted by international law. Until now, however, the international community did not make a uniform procedural rule, so the development of international civil proceeding, in practice, also depends on the national civil procedures. Under such circumstance, a court has to determine the jurisdiction of international cases according to its national procedural rules. Ordinarily, this is feasible, but in the action against a foreign State it becomes more complicated. If a court applies its procedure in the case where a foreign State involves, it is the same as impose its national will on the foreign State, which may infringe the doctrine “*par in parem non habet jurisdictionem*”. Nevertheless, as mentioned in Chapter 2, if a foreign State performs or acts in the same manner as a private person without exercising its sovereign authority, it will not be considered as a sovereign entity in line with the restrictive principle of immunity. As a result, before determining the jurisdiction, a court of a State should review whether the conduct or transaction of another State in an action is sovereign or not.

In the action against States, the two phases of fixing of jurisdiction is from the distinction between international norms and municipal norms. In the context of restrictive immunity, the State is not always the sovereign. If a defendant does not have the sovereign identity or its conduct or act is not in the exercise of sovereign authority, thus a court gets access to exercising its jurisdiction in international level. After that, the court will inspect whether it has the general jurisdiction according to the jurisdictional connections of its procedural law in national level.

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## 2.2 THE EXCLUSIONARY RULE OF IMMUNITY IN INTERNATIONAL LEVEL

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Normally, invoking State immunity in an international proceeding requires two conditions: first of all, the defendant has the State status, namely “status standard”; secondly, the conduct of the defendant is sovereign, namely “conduct standard”.

In these States who insist on absolute immunity, the defendant can invoke immunity only by satisfying the status standard. In these States who practice restrictive immunity, however, the conduct of the defendant is more important. The courts pay more attention to whether the act of the defendant is sovereign for its nature or purpose.<sup>212</sup> In some instances, it is even possible to infer the sovereign status from the defendant’s acts, accordingly to determine whether it is entitled to immunity.

The absolute doctrine of immunity often emphasizes the status or the identity of the defendant. In these countries who observe absolute immunity, the courts of these countries are seldom to accept litigations involving the State as the defendant, and accordingly they have few opportunities to argue their claims about the issue of State immunity in their own country via judicial process. But when these countries or their enterprise appear in the court of another country, they usually advocate their sovereign status or identity as the defense, and the court of forum State would take full account of the defendant’s claim before determining the jurisdiction.

In practice, it seems not easy to distinguish the State status or identity, especially as the defendant is a State-owned enterprise. For example, in the case *Satya Capital Limited v. China Aviation Oil (Singapore Corporation) and its Holding Company*, China Aviation Oil (Singapore Corporation) (CAO) and Satya Capital Limited (SCL) reached a transaction of share transfer in August 2004. According to the agreement, CAO would buy 88 million ordinary shares of SGX-listed Singapore Petroleum Company Limited (SPC), representing approximately 20.6% of SPC’s issued share capital, from SCL. But subsequently, CAO was forced to default because of its heavy losses in the options trading of oil derivatives, so CAO had no choice but breached of the Share Purchase Agreement. For this reason, SCL has commenced a lawsuit against CAO and its holding company, China Aviation Oil Holding Company (CAOHC) in Singapore.<sup>213</sup> The amount of the claim against CAO and CAOHC is

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<sup>212</sup> 赵建文：《国家豁免的本质、适用标准和发展趋势》，载《法学家》2005年第6期。

<sup>213</sup> The claim against China Aviation Oil Holding Company is for alleged conspiracy with the China Aviation Oil to break the Share Purchase Agreement, because China Aviation Oil Holding Company is the largest single shareholder of China Aviation Oil (Singapore Corporation), which holds about 51% of the total issued shares of CAO.

\$47,160,000 and damages. In the litigation, the CAOHC proposed immunity from Singapore's jurisdiction, because it is owned by Chinese central government and subject to its supervision.

Although Singapore practiced the restrictive immunity after the *State Immunity Act* of 1979,<sup>214</sup> by virtue of China abided by absolute immunity, the Singapore Court considered the CAOHC's defense and analyzed its identity and status. However, after careful consideration, Singapore's High Court held that CAOHC was a State-owned enterprise indeed, but it had an independent legal personality and did not perform sovereign authority in the deal. Consequently, through distinguishing the State and State-owned enterprise, Singapore High Court rejected CAOHC's attempt to claim State immunity in the lawsuit. As a matter of fact, the Singapore court established its legitimate jurisdiction over CAOHC in international level by denying its State identity.

Different from absolute doctrine of immunity, the restrictive doctrine of immunity emphasizes the conduct of States. A court deduces the sovereign status of defendant from the purpose or nature of its conduct. Therefore, regardless of the status of defendant, as long as the conduct of defendant was found non-sovereign authority in its purpose or nature, a court was permitted establishing its jurisdiction in the international level. In practice, most of countries' legislation has adopted the nature approach to determine the qualification of immunity. For example, the Article 1603 (d) of *Foreign Sovereigns Immunities Act* of US, 1976 stipulated that,

*"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."*

The *State Immunity Act* of Canada, 1980 shared the similar provision in Article 2, according to its expression:

*"Commercial activity means any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character."*

The *State Immunity Act* of UK, 1978 applied the enumeration in Article 3 (3) to define the commercial transaction. This approach was still supported by the nature of conduct. In other countries' judicial practice, their courts were also inclined to

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<sup>214</sup> See: Andrew Dickinson, Rae Lindsay, James P. Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), pp. 504-512.

identify the sovereign authority through analyzing the conduct of the defendant. For example, French courts were announced that immunity was based on ‘the nature of the activity’ in many cases.<sup>215</sup> While in some cases French courts applied ‘the purpose of the activity’ as the basis for determining immunity. As in the case *Entreprise Pérignon v. Gouvernement des États-Unis*,<sup>216</sup> Court of Cassation pointed out,

“An act is ..... regarded as an act of public power if its purpose is the performance of a public service.”

As matter of fact, in a case where a State was sued, the court must deliberate both the identity and the conduct of that State in order to determine whether the defendant State is immune from its jurisdiction. In the event the defendant “shall not invoke the immunity of jurisdiction”, the court is justified in exercise of its jurisdiction in international level. Subsequently, the court will also need to determine whether it has an eligible general jurisdiction on the basis of the jurisdictional connections of the procedural law.

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## 2.3 THE GENERAL RULE OF JURISDICTION IN DOMESTIC LEVEL

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Pragmatically ‘the rules of jurisdiction were based on the exercise of physical power by States’.<sup>217</sup> Roman law established the principle of jurisdiction that was expressed as *extra territorium ius dicenti impune non paretur*. It follows that a State was bound and affected in exercise of its power by the persons and property within its territory. A State usually exercises its sovereign authority in its territory. It is inclined to cause the conflicts of sovereignty, if a State performs its sovereignty outside its

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<sup>215</sup> See: *Administration v. Soci à é*, France, (1969) 52 ILR 315. Also See: *Montefiore v. Congo*, France, (1955) 22 ILR 226; *Soci à év. Gouvernement Turc*, France, (1965) 47 ILR 155; *Spanish v. Soci à é*, France, (1973) 65 ILR 61; *Iran v. Soci à éEurodif*, France, (1984) 77 ILR 513; further confirmed, *Iran v. Soci à éEurodif*, France, (1989) 89 ILR 31; *Coco v. Argentina*, France, (1996) 113 ILR 491.

<sup>216</sup> *Entreprise P érignon v. Gouvernement des États-Unis*, France, Court of Cassation, (1964) 45 ILR 82.

<sup>217</sup> Beale 274: “Jurisdiction ... is power of a State to create right such as will be recognized by other states as valid.” See also Holmes’s famous dictum “The foundation of jurisdiction is physical power”, *McDonald v. Mabee* (1917) 243 US 90; *Castel Canadian Conflicts of Law* 189; cf Baxter *Essays on Private Law, Foreign Law and Foreign Judgments* 6~7.

territory. Consequently, the territorial control lays the foundation of sovereign States to establish jurisdiction.

Once this proposition is accepted, it is ready for the venerable rule that a defendant ought to be sued where he is domiciled (*actor sequitur forum rei*<sup>218</sup>), for the State is in good position to restrict such a defendant within its territory. Similarly, it was provided in Roman law that where the subject-matter of a suit was property, the proper court should be the place where the property was situated.<sup>219</sup> The plaintiff had a choice whether to bring his action at the *forum domicilii rei* or *forum rei sitae*.

The design of the rule of jurisdiction is not in an arbitrary way. Usually, it should be found on the territorial-based jurisdictional connections, especially in those civil law countries that were deeply influenced by Roman law tradition.

#### (1) The Jurisdictional Rule in Civil Law System

The State is territorially conceived in international law, and the authority of the courts, being derived from the sovereign power of the State, is limited to the same territorial boundaries.<sup>220</sup> For practical purpose, the design of jurisdictional rule should guarantee that the court is in a position to adjudicate a dispute and to give a meaningful judgment. It is difficult to imagine that a court will hear a dispute between the alien plaintiff and the alien defendant<sup>221</sup> concerning a breach of contract, if the transaction and the cause of action had not been entered into the court's territory, since the dispute bears no relation to the court. The rules of jurisdiction of the Roman law demand for the links between the territory where the court is situated and the parties or the facts. These links between the territory and the dispute are termed *rationes jurisdictionis* or 'jurisdictional connecting factors'.

##### (a) Domicile and Residence

The concept of domicile refers to a person resides in a country without any intention of at present removing from it permanently. It includes two principal respects: the intention of permanent residence and the facts of residence. The domicile is considered to be a permanent home. Every person should have a domicile, so even

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<sup>218</sup> *Actor sequitur forum rei* is a legal maxim in Latin. It states that the plaintiff should follow the forum of the property in suit, or the forum of the defendant's residence.

<sup>219</sup> See: C. F. Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court*, p. 170.

<sup>220</sup> See: C. F. Forsyth, *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the Supreme Court*, p. 169.

<sup>221</sup> The alien plaintiff and the alien defendant mean these foreigners who are neither domiciled nor resident within the court's territory.

a person may have no home indeed, but the law nonetheless attributes a domicile to him. Domicile is ‘an idea of law’ with a bit abstract. While the notion of permanent home can be interpreted largely in the light of commonsense principles, the same is certainly not true of domicile.<sup>222</sup> The term domicile, by virtue of its abstract, has been written in legal documents to very little purpose. Therefore, in some legal instruments it was gradually replaced by the term ‘residence’.

As mentioned above, domicile is that place where one actually resides with the intention of always remaining there. As a simplified concept, residence refers to the objective aspect of domicile. It, including ordinary residence and habitual residence, are increasingly used both by legislature and by the judiciary.<sup>223</sup> The term residence has different meanings in different branches of law. Essentially, the concept of residence only requires the fact of presence, the state of being found in a country, rather than the intention of permanent habitation, so it resolves the identification difficulties existed in ‘domicile’.

Both the domicile and the residence, as territorial factors, have played the legal effect of linking litigants and a court, thus providing a practical basis for the jurisdiction of a court.<sup>224</sup>

#### (b) Nationality

Nationality is the legal relationship between a person and a State.<sup>225</sup> According to the international custom and principles of law generally recognized, it is for each State to determine under its own law who are its nationals.<sup>226</sup> ‘Nationality affords the person the protection of the State and affords the State jurisdiction over the person’,<sup>227</sup> so the nationality constitutes an important ground for the court performing its jurisdiction.

A State may exercise the jurisdiction on the basis of nationality of the plaintiff or the defendant.<sup>228</sup> The maxim holds that ‘*actor sequitur forum rei*’ which means the

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<sup>222</sup> See: Dicey, Morris & Collins, *The Conflict of Laws*, 14<sup>th</sup> edition, Sweet & Maxwell (2006), p. 123.

<sup>223</sup> See: Dicey, Morris & Collins, *The Conflict of Laws*, 14<sup>th</sup> edition, Sweet & Maxwell (2006), pp. 164~165.

<sup>224</sup> See: 林欣: 《论国际民事诉讼中当事人的住所与国籍》, 载《法学研究》1989年第3期。

<sup>225</sup> See: Vonk Olivier, *Dual Nationality in the European Union: A Study on Changing Norms in Public and Private International Law and in the Municipal Laws of Four European Union Member States*, Martinus Nijhoff Publishers (2012), pp. 19~20.

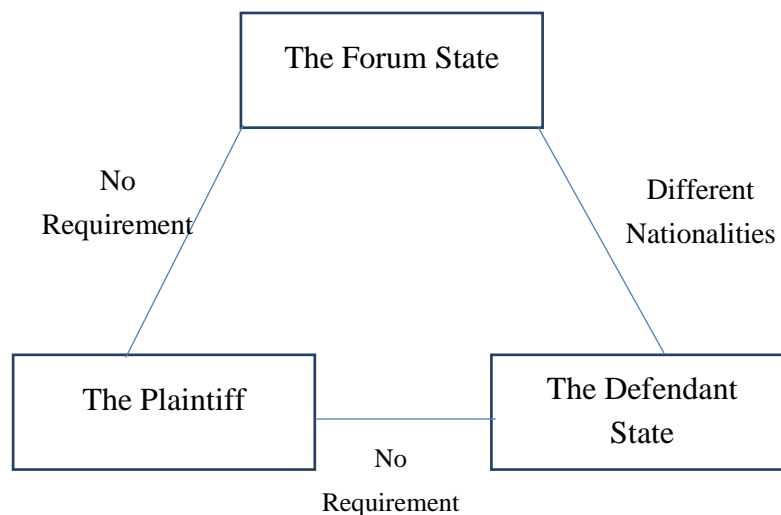
<sup>226</sup> See: Article 1, *Convention on Certain Questions Relating to the Conflict of Nationality Law*, The Hague (12 April, 1930).

<sup>227</sup> See: Kadelbach Stefan, ‘Part V: Citizenship Rights in Europe, Selected from Ehlers Dirk, *European Fundamental Rights and Freedoms*, Berlin: De Gruyter Recht (2007), pp. 547~548

<sup>228</sup> See: 林欣: 《论国际民事诉讼中当事人的住所与国籍》, 载《法学研究》1989年第3期。

plaintiff goes to the court of the defendant. Therefore, the common nationality between a court and a defendant underlies the standing reason for the court exercise its jurisdiction.

But the issue of State immunity is different. The essential structure of the actions regarding State immunity decides that the forum State and the defendant State cannot share the same nationality, so the jurisdictional principle '*actor sequitur forum rei*' has not been implemented here. In practice, in order to avoid the institution of State immunity, the plaintiff usually goes to the court of the defendant State to file a lawsuit.



In other respects of the action regarding State immunity, the effect of nationality on the determination of jurisdiction is faint and limited. In fact, reviewing the legislations on State immunity, no tangible provision demands for the court to establish its jurisdiction by the nationality.

(c) *Loci Rei Sitae*

*Loci rei sitae* refers to 'the place where the property is situated', consisting of the location of object of the action and the location of the defendant's property. Generally speaking, a court would find it difficult to perform its jurisdiction, if there is no property to which the action is directed in its territory. In this case, even if the court exercised its jurisdiction according to other connections, it may be intractable to collect the evidence and to enforce its judgment later.

The object of the action refers to the things to be settled in an action or the property to which an action is directed. Since the property is in dispute, the court where the property located may make it easy to ascertain the facts. So it is a reasonable choice that the proceeding is governed by the court where the property is located.

When it comes to the issues of State immunity, ‘the object of the action’ lays the main foundations of a court in exercise of jurisdiction in international practice. This rule of jurisdiction is not merely a matter of Civil law system, even some Common law countries are also influenced by it. An obvious example is the US *Foreign Sovereign Immunities Act* of 1976. Its Article 1605 (a) (3) prescribes that,

*“A foreign State shall not be immune from the jurisdiction of courts of the United States or of the States in any case:*

*.....*

*(3) 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 activity in the United States.”*

The Article 1605 (a) (3) pointed out an important case in which the courts of US perform their jurisdiction over the foreign sovereign. The provision has been interpreted in an official document as follows:

*“Rights in property taken in violation of international law are in issue. The first category involves cases where the property in question or any property exchanged for such property is present in the US, and where such presence is in connection with a commercial activity carried on in the US by the foreign State, or political subdivision, agency or instrumentality of the foreign State. The second category is where the property, or any property exchanged for such property, is (i) owned or operated by an agency or instrumentality of a foreign State and (ii) that agency or instrumentality is engaged in a commercial activity in the US. Under the second category, the property need not be present in*



*connection with a commercial activity of the agency or instrumentality.”*<sup>229</sup>

It demonstrates that ‘property in the US’ underlies the cornerstone for the courts of US performing its jurisdiction.

In fact, the place where the property is situated, namely *loci rei sitae*, is a very important connection for a court to establish its jurisdiction appropriately in an international proceeding.

#### (d) Cause of Action

A court in exercise of jurisdiction in the light of the cause of action is also a common phenomenon. Normally, a cause of action is a series of facts or circumstances that give rise to a litigation. There are many specific causes of action such as statutory causes of action, creation or breach of contract and torts, etc.

As to the commercial transactions, often involving contract business, a court would take contract-based action as the cause of action to determine jurisdiction. A widely accepted practice is that the court where a contract was performed had the competence in commercial transaction proceedings. The *European Convention on State Immunity* of 1972 elucidated the legitimacy of the exercise of jurisdiction by courts of the country where the contract is performed. Its Article 4 (1) provides that,

*“Subject to the provisions of Article 5, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the State, which, by virtue of a contract, falls to be discharged in the territory of the State of the forum.”*

The prerequisite of a Contracting State performing the jurisdiction is that the performance of the contract, a kind of cause of action, located in the territory of the State.

#### (2) The Jurisdictional Rule in Common Law System

The contemporary legal systems of the world are generally divided into two basic systems: the Common law and the Civil law. The Common law system is different from the Civil law system in many respects. The most important feature of Common law system is that Common law is characterized by case law developed by judges, when giving decision in individual cases that have precedent effect on the future

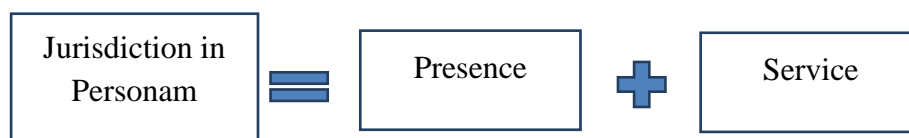
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<sup>229</sup> HR Rep No. 94-1487, *Jurisdiction of United States Courts in Suits Against Foreign States*, 94<sup>th</sup> Cong. (9 September 1976) at 19 (reprinted in 1976 USCCAN 6604, 6618).

cases.<sup>230</sup> As a matter of fact, judicial practice plays an important role in the development of Common law. The Justice Oliver Wendell Holmes in his book *The Common Law* had pointed out: ‘The life of law has not been logic; it has been experience.’<sup>231</sup> Influenced by the long-term judicial experience, Common law developed a set of distinctive rules of procedure. On the issue of jurisdiction, the Common law system has shaped its own jurisdictional rules different from the Civil law system.

English law is the typical example in Common law system. According to the English law, the jurisdictional rules are classified as the jurisdiction in personam and the jurisdiction in rem, respectively, corresponding to different forms of action.

An action in personam<sup>232</sup> aims to settle the right of the parties between themselves. For example, an action for possession of tangible property, an action for damages for breach of contract, or an action for an injunction in tort case. The most obvious feature of the jurisdictional rules in actions in personam is their strictly procedural character, which implied that the courts have not been concerned with the connection that the parties to the dispute have with England. Anyone may invoke or submit to the jurisdiction, provided only that the defendant has been present in England and served with a claim form. For instance, the courts may perform the judicial authority, even if a foreign defendant who is only transiently in England and the cause of action may have no factual connection with England.



An action in rem<sup>233</sup>, originated in Roman law, was designed to vindicate a jus in rem, for example such as ownership available against all persons. Distinguished from in personam, the action in rem directs to property or ‘the entire world’ instead of a specific person.

<sup>230</sup> See: <http://www.duhaime.org/LegalDictionary/C/CommonLaw.aspx>, visited on 16<sup>th</sup> November, 2016.

<sup>231</sup> See: Oliver Wendell Holmes Jr., *The Common Law*, 1<sup>st</sup> edition, Macmillan (1882), p. 1.

<sup>232</sup> The action in personam is equal to the action against the person.

<sup>233</sup> The action in rem is equal to the action against the thing.

As some articles mentioned, the distinction between action in personam and action in rem is fundamental to determine where to file a lawsuit and how to serve a defendant. Technically, the action in rem must be filed where the property is situated and is only enforceable there.<sup>234</sup> However, the only ‘action in rem existed in English law is that which lies in an Admiralty court against a particular ship or its cargoes.’<sup>235</sup>

It must be admitted that currently traditional rules of jurisdiction still have an important effect on the litigation. But as to the field of State immunity, many of Common law countries enacted the statute laws which established the general rules of jurisdiction. To a certain extent, they offset the influence of traditional jurisdictional rules.

The US constructed the rules of jurisdiction over a defendant State in the *Foreign Sovereign Immunities Act* of 1976. The Article 1605 provides the general conditions the US courts exercise of its jurisdiction. Subject to the tradition of Common law system, it distinguished two cases in determining the jurisdiction according to the classification between action in personam and action in rem. On one hand, it regarded a defendant foreign State as a person; on the other hand, it set out the action against ship or cargoes separately. In spite of this, it did not observe traditional means to design the jurisdictional rules strictly. Indeed, the general rules of jurisdiction in *Foreign Sovereign Immunities Act*, to some degree, were influenced by the thought of Civil law system. An obvious example is in the commercial activity, the Article 1605 (a) (2) provides that,

*“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.”*

Firstly, Article 1605 (a) (2) clarified that the exception to immunity, ‘a foreign State engages in a commercial activity’, underlay the competent jurisdiction of US courts in international level. Then, it demonstrated that the territorial links with the US established the foundation for US courts performing the jurisdiction in domestic

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<sup>234</sup> Henry Campbell Black, *Black's Law Dictionary*, 2<sup>nd</sup> edition, West Publishing Company (1910), p. 606.

<sup>235</sup> Cheshire, North & Fawcett, *Private International Law*, 14<sup>th</sup> edition, Oxford University Press (2008), p.

level. Here, it shook off the constraints of the traditional jurisdiction in personam of Common law system, and emphasized the significance of territory for the determination of jurisdiction.

Besides, in this Article ‘a direct effect’ is also used as a basis for US courts performing jurisdiction. It can be seen as a strategy for expanding jurisdiction. By this means, on the issue of State immunity relating to the commercial activity, US courts was granted a wide discretionary power to determine whether to exercise jurisdiction via interpreting what is ‘a direct effect’. But this long arm jurisdiction does not comply with the principles of the design of jurisdiction, whether in Civil law system nor in Common law system. It embodies a kind of unilateralism on the issue of jurisdiction.

Also, UK formulated the rules of competence over a defendant State in its *State Immunity Act* of 1978. The Act did not simply divide the legal proceedings into action in personam and action in rem. In fact, it sets up various jurisdictional rules according to different exceptions to immunity. Although these rules are sketchy, most of them share one thing in common: pay attention to the function of territorial connections in determining jurisdiction. For instance, pursuant to Article 3 (1) of *State Immunity Act*, a State is not immune as respects proceedings relating to,

“(a) *A commercial transaction entered into by the State; or*  
*(b) 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 the United Kingdom.*”

The Article 3 (1) (b) demonstrates that a contract to be performed in the territory of UK is necessary for UK courts exercising jurisdiction.

But the influences of Common law tradition have not disappeared. In Admiralty proceedings, especially the action against ships used for commercial purposes, UK courts have the competent jurisdiction over a foreign State, if

“(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.*”

In its wording, the Article 10 (2) does not mention the territorial factors. Actually, it conveys very traditional Common law thoughts on the issue of jurisdiction.

As a consequence, from their respective judicial traditions, countries have different provisions in determining jurisdiction in domestic level. Additionally, the issue of jurisdiction is largely a matter relating to sovereignty and international relations, by virtue of its complication, it is difficult to shape a set of uniform rules of jurisdiction that can coordinate the interests among different States. In spite of that, it is worth noting that territorial connections increasingly become the important factors that must be considered by States in the design of jurisdiction.

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## 2.4 APPLICABLE RULES OF PRIVATE INTERNATIONAL LAW ON JURISDICTION

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As mentioned above, there are different views on the criteria for determining jurisdiction at domestic level. In order to reconcile the conflicts on this issue, the *UN Convention on Jurisdictional Immunities of States and Their Property* proposed a compromise solution in proceedings relating to commercial transactions. The Article 10 (1) of the Convention provides 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.”*

In terms of content, the Article 10 (1) includes two meanings: Firstly, it makes clear that jurisdictional immunity cannot be invoked in proceedings relating to commercial transactions, which is the central idea of the Article and even of the whole Convention. Secondly, it points out that the exercise of jurisdiction is based on the applicable rules of private international law. The provision is premised on the ‘underlying competence under the law of the forum State of the court before which the proceeding is brought.’<sup>236</sup>

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<sup>236</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 10, paras. 3~5.

By comparison, the relevant wording of Article 10 (1) is remarkably different from that in other provisions of the Part 3 of the Convention. The Article 10 (1) refers to ‘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’, whereas, from the Article 11 to the Article 17, they employ the formula ‘a court of another State which is otherwise competent in a proceeding’. Now it is hard to conjecture why the Convention employed such a different wording in Article 10 (1). But the difference in the wording does not result in appreciable substantial differences. As a matter of fact, none of the provisions intend to restrict or otherwise specify the jurisdictional basis on which the court may rely in proceedings under the Convention.<sup>237</sup>

The Article 10 (1) does not regulate the issue of how to design the jurisdictions, but merely illuminates the issue of how to perform the existing jurisdiction. This may lead to an embarrassing situation that States may compete to revise their jurisdictional rules in behalf of themselves for the purpose of expanding their jurisdiction. So it is just an expedient.

### 3. THE CONSENT OF THE FOREIGN STATE

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#### 3.1 THE DEFINITION OF CONSENT

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The consent in State immunity, named as the subjective exception to immunity,<sup>238</sup> refers to a foreign State submit to the national court’s jurisdiction. In other words, a foreign State determines to disclaim its right to immunity. By its waiver, national courts may exercise their jurisdiction in proceedings against a foreign State.<sup>239</sup>

It is generally accepted that jurisdictional immunity is a right entitled to sovereign States by international customary law, so States may unilaterally waive this right before the court of another State. No matter whether giving consent or not, it is a

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<sup>237</sup> See: Roger O’keefe, Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press (2013), p. 175.

<sup>238</sup> See: 黄进、杜焕芳：《国家及其财产管辖豁免立法的新发展》，2005 年第 6 期。

<sup>239</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 477.

rational choice made by a State according to its own will, in a manner of speaking, ‘consent to jurisdiction’ is a method for the State to perform its sovereignty. In view of this, ‘the obligation to refrain from subjecting another State to its jurisdiction is not an absolute obligation’.<sup>240</sup> Immunity is not an obligation but a right that can be waived.

By virtue of the function of consent, immunity has never been totally absolute.<sup>241</sup> Even in the period dominated by absolute immunity, the consent of States has always been a method of removing the block of immunity. Indeed, the ‘waiver of immunity’ is very crucial for determining jurisdiction in the age of absolute immunity. The absolute doctrine of immunity holds that the ‘State’ identity underlies the immunity, and all of the State conducts are sovereign, so national courts may exercise jurisdiction only with the consent of a defendant State. Under the circumstances, where there is no consent, there is no immunity.

However, the restrictive doctrine of immunity advocates inferring the sovereign identity from State conduct. If a State acts in the same manner as a private person, its conduct cannot be recognized as sovereign act, so it would not enjoy immunity before the courts of forum State. At this time, the court can impose the jurisdiction directly without the consent of a foreign State. That implies the consent is no longer a necessary avenue for the court of forum State to obtain its jurisdiction over a foreign State.

In fact, the importance of ‘consent’ in the establishment of jurisdiction has been declining as a result of the universal recognition of restrictive immunity by the international community. In spite of this, the consent remains indispensable for the issue of State immunity, because (i) When sovereign acts of a foreign State involve in proceedings, the consent is still the only method of removing the bar of immunity; (ii) Even in the case where the act of a foreign State has been attributable to the commercial activity, the consent can effectively simplify the examination of the matter of fact for the courts in the course of determining its jurisdiction; (iv) a survey of the history of State immunity demonstrates that, the consent from a State’s participation in commercial activities promotes the shift from the absolute doctrine to

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<sup>240</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 5, para. 1.

<sup>241</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 10.

the restrictive doctrine was achieved.<sup>242</sup> At the very beginning, some national courts counted the participation in commercial activities of foreign States as an implied waiver of immunity; (iv) Even though in the frame of restrictive immunity, there are some ambiguities in distinction between sovereign and non-sovereign act, for instance whether a commercial transaction for the sovereign purpose can be attributed to sovereignty, the waiver of immunity is an important method of solving that intractable problem.

As a result of exercise of sovereign authority by States, consent must satisfy two conditions. On the one hand, consent should be in accordance with the principle of autonomy. Consent is a rational choice made by the State on the basis of the national will. That means whether a State has waived the jurisdictional immunity and to what extent it has consent to the jurisdiction is entirely a matter for its own discretion. Based on the principle of sovereignty equality, the national courts should not offend the sovereign immunity reserved by a foreign State, so they are required of determining their jurisdictional scope by the genuine consent meaning of the foreign State.

On the other hand, the consent must be clear and specific. Indeed, consent may be delivered in different forms, such as expressing consent, instituting or taking part in a proceeding, but no matter what forms a foreign State adopted should convey a definite intention of waiving the immunity. ‘The waiver of immunity can be either express or implied, but must be definite.’<sup>243</sup> Otherwise, it should not be regarded as consent. For example, the Article 7 (2) of the UN Convention provides 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.”*

Also, the Article 8 (3) of the UN Convention provides that,

*“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.”*

The meaning of consent to jurisdiction should be made in a specific proceeding. A State expressly adopts restrictive immunity in its legislation, which proves that it

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<sup>242</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 477.

<sup>243</sup> 龚刃韧：《国家豁免问题的比较研究》，北京大学出版社 2005 年版，第 168 页。



endorses the inadmissibility of jurisdictional immunity in the field of commercial transactions. However, once the State becomes a defendant in a proceeding relating to commercial transactions, this does not mean it automatically waive the right to immunity nevertheless. The reason is that the legislation merely shows a universal attitude about uncertain cases in future rather than a specific consent to certain cases. As ILC Commentary indicated

*“The consent of a State with regard to a matter could be confined to a particular case only and consequently would not affect the immunity of the State with regard to a similar matter in another case.”*<sup>244</sup>

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### 3.2 EXPRESS CONSENT TO EXERCISE OF JURISDICTION

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Jurisdictional immunity is ‘conditional upon the absence or lack of consent on the part of the State against which the exercise of jurisdiction is being sought’.<sup>245</sup> In international practice, a State may express its consent to the jurisdiction of the court of another State in many forms. But consent could not be taken for granted. A national court should not presume that a foreign State is willing to waive its immunity or has the tendency of submission to its jurisdiction, if the court does not get a clear indication of waiver of immunity from the foreign State. The plaintiff must provide sufficient evidence to certify that the defendant State has consented to the court’s jurisdiction.

The international practice for a long period suggests that the consent of a State constitutes an important reason for impeding jurisdictional immunity. It was also confirmed by statutory law. The *European Convention on State Immunity* of 1972 provided the issue of consent in Article 1, 2 and 3.<sup>246</sup> The US *Foreign Sovereign Immunities Act* of 1976 defined the cases of consent in Article 1605 (a) (1) ‘general exceptions to the jurisdictional immunity of a foreign state’.<sup>247</sup> The UK *State*

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<sup>244</sup> International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 7, para. 7.

<sup>245</sup> International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 7, para. 3.

<sup>246</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), pp. 10–11.

<sup>247</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 246.

*Immunity Act* of 1978 introduced the meaning of consent in Article 2 ‘submission to jurisdiction’.<sup>248</sup> The *Canada State Immunity Act* of 1980 pointed out ‘immunity waived’ in Article 4.<sup>249</sup> The *Australia Foreign States Immunities Act* of 1985 enumerated the cases of ‘submission to jurisdiction’ in Article 10.<sup>250</sup> Although its provision is a little simple, the *Argentina Immunity of Foreign States from the Jurisdiction of Argentinean Courts* of 1995 also stipulated the express and implied consent in Article 2 (a) and (b).<sup>251</sup> In 2004, the *UN Convention on Jurisdictional Immunities of States and Their Property* confirmed the rule ‘consent blocks immunity’ from Article 7 to Article 9. Then, the *Israel Foreign States Immunity Law* of 2009 described the waiver of immunity from Article 9 to Article 12. The *Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc* prescribed the ‘consent of a foreign State’ and ‘constructive consent’ in ‘cases of non-immunity from judicial proceedings’ from Article 5 to Article 7.<sup>252</sup> It can be concluded that many international documents and national legislations are considered the consent as a very important exception to State immunity.

In general, consent can be divided into two parts: express consent and implied consent. Express consent, sometimes referred to as express waiver, means that a foreign State explicitly submits to the jurisdiction of the national court in written or oral forms. The specific content of express consent varies slightly with different countries. The Article 7 (1) of the *UN Convention on State Immunity* enumerated the ‘express consent to exercise of jurisdiction’ which represents an international consensus. Pursuant to Article 7 (1),

“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:

(a) by international agreement;

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<sup>248</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 346.

<sup>249</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), pp. 489~490.

<sup>250</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), pp. 472~473.

<sup>251</sup> See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), pp. 461~462.

<sup>252</sup> 日本国「外国等に対する我が国の民事裁判権に関する法律」平成二十一年四月十七日。

*(b) in a written contract; or*

*(c) by a declaration before the court or by a written communication in a specific proceeding.”*

It is worth noting that waiver of immunity must be have been authorized by the State concerned. Otherwise, it will cause the waiver invalid. By virtue of the intractability of this issue, several legal documents evaded it. Even the UN Convention on State Immunity did not give a provision about how the consent would be given or expressed. The ILC delivered itself of an opinion as follows:

*“It remains to see how such consent would be given or expressed so as to remove the obligation of the court of another State to refrain from the exercise of its jurisdiction against an equally sovereign State.”* <sup>253</sup>

But the Common Wealth’s legislations provided a method for identifying who should be the competent representative of a State for submission of the consent. A pragmatic example of such a special rule is Article 2 (7) of UK *State Immunity Act*, which reads:

*“The head of State ‘s diplomatic mission in the United Kingdom, or the person for the time being performing his functions, shall be deemed to have authority to submit on behalf of the State in respect of any proceedings; and any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract.”*

Other Common Wealth Countries, such as Pakistan, Singapore and Australia, also applied mutatis mutandis to this provision.

In practice, a State may consent to the application of the law of another State, but according to the Article 7 (2) of the UN Convention on State Immunity it shall not be interpreted as consent to the exercise of jurisdiction by the courts of that other State. So the question of jurisdiction shall be distinguished from the question of applicable law to the case.

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### 3.3 IMPLIED CONSENT TO EXERCISE OF JURISDICTION

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<sup>253</sup> International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 7, para. 8.

Implied consent, also known as constructive consent, refers to a State present its submission to the exercise jurisdiction to a court of another State via implementation of specific conducts.

The expression of consent or its communication must be explicit. Although consent cannot be presumed to exist by sheer implication, nor by mere silence, acquiescence or inaction on the part of the State, but it could be evidenced by positive conduct of that State.<sup>254</sup> In point of fact, the expression of consent either in writing or by conduct entails practically the same results. However, in view of the fact that implied consent is not expressed in written or oral form, but rather by the court's determination on the conduct of the State, it usually demands strict statutory circumstances, such as 'participation in an action' and 'making a counterclaim'.

A precedent conveys the view that once a foreign State engaged in the activities of private-law character, it could be regarded as waiver of immunity in an implied way. Obviously, this view misunderstood what a real implied consent is. Because the conduct of private-law character a foreign State performed usually happened before the litigation, but the implied consent happened in the process of the litigation. Moreover, while a foreign State does not have the intention of submission to jurisdiction of a national court when it performs the conduct in the same manner as a private person, but if a foreign State carries out certain actions in litigation, it proves that the State intends to waive its immunity before a national court. As the international practice shows that,

*“The State against which jurisdiction is to be exercised does not consent, or is not willing to submit to the jurisdiction. This unwillingness or absence of consent is generally assumed, unless the contrary is indicated. The court exercising jurisdiction against an absent foreign State cannot and does not generally assume or presume that there is consent or willingness to submit to its jurisdiction. There must be proof or evidence of consent to satisfy the exercise of existing jurisdiction or competence against another State.”*<sup>255</sup>

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<sup>254</sup> International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 8, para. 1.

<sup>255</sup> International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 7, para. 4.

There are slight variations in the expression of implied consent in different countries. However, the content of the implied consent is broadly the same. The UN *Convention on Jurisdictional Immunities of States and Their Property* provides the cases of implied consent in Article 8 ‘effect of participation in a proceeding before a court’ and Article 9 ‘counterclaims’.

(1) Institute Proceedings

The Article 8 (1) (a) of the UN Convention on State Immunity prescribes that,  
“*A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has instituted the proceeding.*”

This provision points out one evident form of conduct amounting to the expression of consent consists of the act of bringing an action or instituting a legal proceeding before a court of another State. By becoming a plaintiff, a State intends to seek judicial relief from the forum State. It manifests that the claimant State willingly put its sovereignty under the jurisdiction of the court of another State, which clearly constitutes clear evidence of that Court’s exercise of jurisdiction.

In international litigations, sovereign States usually appears as the defendant rather than plaintiff. In history, however, there have been some cases where an authority has filed a lawsuit in the court of another State. For instance, in 1955, the case *Republic of China v. Chuka Newspaper Co. Ltd.*<sup>256</sup>, the claimant Republic of China (Taiwan) brought an action against Chuka Newspaper for a loan repayment before a court of Japan. But the defendant Company objected the jurisdiction of the court and to the claim of the Ambassador to represent the Republic of China, contending that ‘under customary international law a State cannot exercise jurisdiction over another’. The District Court of Tokyo, Japan holds that the plaintiff Republic has waived its immunity by commencing the action. The Court said:

“*Under customary international law, a State is immune from the jurisdiction of foreign courts, unless it voluntarily submits to the jurisdiction of the court concerned. Such exception is generally made by a treaty or by express consent of the State concerned. .... In the instant case plaintiff waived this privilege by appearing voluntarily before this Court. Therefore the Court may properly exercise jurisdiction over the case.*”

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<sup>256</sup> See: *Republic of China v. Chuka Newspaper Co Ltd*, Japan, District Court of Tokyo, (1955) 23 ILR 210.

It demonstrated that instituting a legal proceeding constitutes the implied consent which can remove the bar of immunity.

## (2) Intervene Proceedings

The Article 8 (1) (b) of the UN Convention on State Immunity provides that,

*“A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has intervened in the proceeding or taken any other step relating to the merits.”*

This provision illustrates that a State is precluded from invoking immunity in relation to a particular proceeding if it has intervened in the proceeding or taken any other step relating to the merits. The type of intervention to which Article 8 (1) (b) refers is specifically intervention on the merits.

Perhaps a State would be unfamiliar with certain facts on which a claim to immunity can be based until after it intervened in the proceeding or took any other step relating to the merits. In such cases, the State still has the opportunity to invoke immunity. It depends on the two conditions. First, the State must satisfy the court that it could only have acquired knowledge of the facts justifying a claim of immunity after it had intervened in the proceeding or had taken steps relating to the merits of the case. Secondly, the State must provide such proof at the earliest possible moment.

Generally, a State enters a conditional appearance or appears expressly to contest or challenge jurisdiction on the grounds of sovereign immunity cannot be construed as implied consent to the exercise of jurisdiction of courts of another State. In accordance with the consensus formed by international practice, the following exceptions shall not be deemed to be consent.

(i) A State enters an appearance or intervenes in a proceeding before a court of another State for the purpose of invoking immunity;

(ii) A State intervenes in a proceeding for the purpose of asserting a right or interest in property at issue in the proceeding;

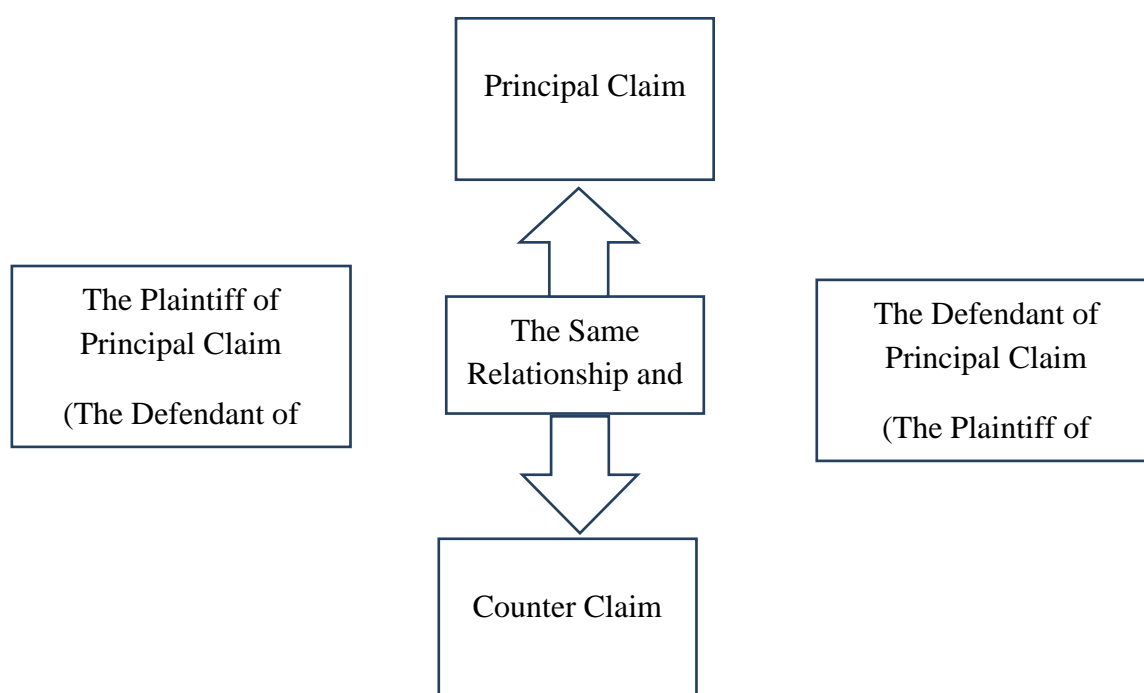
(iii) A representative of a State appears before a court of another State as a witness;

(iv) A State fails to enter an appearance in a proceeding before a court of another State.

The exceptions confirmed by the Article 8 (2) (3) (4) of the UN Convention on State Immunity effectively safeguard the immunity rights of the defendant State and prevent the forum State from expanding its jurisdiction by interpreting the implied consent.

### (3) Make Counterclaims

The counterclaim refers to, in the same action, a claim for relief filed against an opposing party after the original claim is filed.<sup>257</sup> Commonly, it is a claim brought by a defendant in response to an original or principal claim. The notion of ‘counterclaim’ presupposes the prior existence or institution of a claim. The structure of counterclaim can be illustrated by the diagram as follows,



Making a counterclaim can be considered as taking a step relating to the merits of the proceeding within the meaning of Article 8 (1). Therefore, most of legislations on State immunity provide that counterclaims constitute a kind of implied consent. It has basically become an international shared understanding, so the UN Convention on State Immunity gives two circumstances about this issue. The Article 9 (1) and (2) mainly introduce ‘counterclaims against a State’, and the Article 9 (3) is about ‘counterclaims by a State’.

The counterclaims against a State argues that a State cannot invoke immunity from the jurisdiction of the court of another State in respect of any counterclaims caused by

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<sup>257</sup> See: 张卫平：《民事诉讼法》，法律出版社 2009 年版，第 298 页。

the same legal relationship or facts as the principal claim which is instituted or intervened by the former State . In fact, when a State institutes a proceeding or intervenes to present a claim in a proceeding, it has voluntarily waived the immunity from jurisdiction of court of another State according to Article 8 (1). By virtue of the concept of counterclaims, it is not difficult to understand that Article 9 (1) and (2) follows logically from Article 8 (1).

The counterclaims by a State describes where a State itself makes a counterclaim in a proceeding instituted against it before a court of another State, the former State is deemed to consent to the exercise of jurisdiction by that court with respect not only to the counterclaim brought by the Stats itself, but also to the principal claim against it.<sup>258</sup>

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### 3.4 THE EFFECT OF CONSENT

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The consent of a foreign State will lead up to certain legal consequences, affecting the subsequent proceedings.

First of all, the consent to the exercise of jurisdiction means that a State waives its right access to immunity in an action against it before the court of another State. Indeed, once the defendant State expresses the meaning of waiver of immunity, it removes the normative obstacles to the exercise of jurisdiction of that court. In such cases, the court may determine whether or not it enjoys competent jurisdiction only on the basis of the jurisdictional connections in the domestic level, without concerning its identity or conduct. For instance, according to the consensus of international practice, a foreign State is not immune from jurisdiction in the proceedings relating to commercial transactions, but there are different understandings of what is commercial transaction, so even in commercial transaction proceedings, how to establish competent jurisdiction over that State is still an intractable problem for the court of forum State. Indeed, where there is a waiver of immunity of that State, there is no necessity to determine whether its act involves in commercial transactions or not, because the waiver blocks the access to immunity and clears away the bars of exercise of jurisdiction of the court.

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<sup>258</sup> International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 9, para. 7.



Secondly, the consent indicates an intention to accept the jurisdiction of the court of another State throughout all of course of litigation. It not only covers the exercise of jurisdiction in first instance, but also ‘covers the exercise of jurisdiction by appellate courts in any subsequent stage of the proceeding up to and including the decision of the court of final instance, retrial and review.’<sup>259</sup> But most importantly, the jurisdiction to adjudication is different from the jurisdiction to enforcement, so the consent to the exercise of adjudicatory jurisdiction does not signify the acceptance of the measures of constraint. As the Article 20 of the UN Convention on State Immunity mentioned,

*“Where consent to the measures of constraint is required under article 18 and 19, consent to the exercise of jurisdiction under article 7 shall not imply consent to the taking of measures of constraint.”*

Thirdly, in general the consent is irrevocability. It means once a foreign State expresses the waiver of immunity before the court of another State, it must be bound by this expression and cannot withdraw it, which is the inherent requirement of equitable estoppels.

At last, the jurisdiction is a sovereign authority of forum State as well, so it has the right to decide whether or not to perform its jurisdiction. It implies that only a foreign State’s unilateral consent does not necessarily result in the exercise of jurisdiction of a national court. Even though the foreign State consent to the exercise of jurisdiction of the court of forum State, the court still reserve the discretion to determine whether it perform its jurisdiction according to the jurisdictional rule of the municipal law.

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<sup>259</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 7, para. 12.



## CHAPTER 5

# THE COMMERCIAL TRANSACTION EXCEPTION TO IMMUNITY FROM ENFORCEMENT

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The enforcement refers to the processes by which the orders or judgments of a court may be implemented by sovereign power. It is the final stage of proceedings, also the important approach to achieve the purpose of litigation. In the case that the losing party does not fulfill the obligation imposed by that judgment, the application for enforcement has become a necessary method access to legal remedies. However, once the object to be executed is the property of a State, the courts of another State shall be very cautious about the enforcement. In fact, the court of requested State<sup>260</sup> generally refrains from the measures of constraint against property owned by States unless that property is specifically in use or intended for use for other than government non-commercial purposes, and is in the territory the State of the forum. It has been established by international practice that immunity from enforcement is often more absolute, and the court of requested State may take measures of constraint only if the appointed constituent items by law are satisfied.

## 1. THE REGIME OF IMMUNITY FROM ENFORCEMENT

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### 1.1 THE CONCEPT OF IMMUNITY FROM ENFORCEMENT

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Generally speaking, the immunity from enforcement means that a State is exempt from the jurisdiction of courts of another State in the execution stage of proceedings.

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<sup>260</sup> The Requested State refers to the State in which recognition and enforcement of the judgment is being sought.

Currently a foreign State's immunity from enforcement 'continues as an effective principle of the law of State immunity.'<sup>261</sup> Because the enforcement is a measure of constraint ensuring the performance of judicial decisions, a court may exercise the coercive power against a foreign State in enforcement. Such enforcement may affect the interest, legal or social, of that State, so international practice reveals much greater caution in restricting the immunity from enforcement.<sup>262</sup> For example, the *European Convention on State Immunity* forbade the measures of constraint against the property of a contracting State without its consent.<sup>263</sup> The US *Foreign Sovereign Immunities Act* and UK *State Immunity Act* declared the principle of immunity from execution of all State property before enumerating restricted exceptions.

The object of the enforcement is merely the property of a State rather than its conduct. As a matter of fact, it is almost impossible for a court of another State to attach measures of constraint to a State's behavior. Because according to the principle of sovereign equality, no State is a vassal of another State, so a State could not impose its will upon another State. If the court of a State has the right to order another State, it may deny the sovereign will of the latter. In view of the fact that has been just mentioned, it is not difficult to understand why the enforcement cannot be directed to the conduct of States. The Part 4 of *UN Convention on Jurisdictional Immunities of States and Their Property* sets out the measures of constraint only against the property of States.

In terminology, the UN Convention on State Immunity applies the term 'immunity from measures of constraint', not the 'immunity from enforcement or execution'. The expression 'measures of constraint' has been chosen as a generic term encompassing all of the coercive measures in respect of both pre-judgment and post-judgment. These measures, such as attachment or arrest, are taken by the competent court either to restrain the defendant State from unfairly disposing of its property in the adjudication phase, or otherwise to seize or execute the property of that State for accomplishing the judicial decision in the enforcement phase.<sup>264</sup> Therefore, the

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<sup>261</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.599.

<sup>262</sup> See: 龚刃韧: 《国家豁免问题的比较研究》, 法律出版社 2005 年版, 第 270 页。

<sup>263</sup> The Article 23 of the *European Convention on State Immunity* provides that 'No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.' However, such prohibition is without prejudice to the optional regime for limited execution.

<sup>264</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 343.

expression of ‘immunity from measures of constraint’ may be more comprehensive than the ‘immunity from enforcement’. From the pragmatic perspective, the UN Convention on State Immunity adopts the term ‘measures of constraint’.

However, as mentioned above, ‘measures of constraint’ may exist in the different phases of litigation, so it does not convey the distinction of compulsive measures between the adjudication phase and enforcement phase fairly. In fact, litigation can be easily divided into two phases: the adjudication and the enforcement. Correspondingly, the jurisdiction consists of jurisdiction to adjudication and to enforcement. The regime of immunity refers to ‘be immune from jurisdiction’, so it is more logical and rational to separate the ‘immunity from adjudicatory jurisdiction’ from the ‘immunity from executive jurisdiction’ according to the stages of proceedings. Moreover, even in the UN Convention on State Immunity, the application of pre-judgment measures of constraint is limited only in a very narrow range. As mentioned in the Article 18 of UN Convention on State Immunity, ‘no prejudgment measures of constraint against property of a State may be taken in connection with a proceeding before a court of another State’, unless the State has expressly or implicitly consented to the taking of such measures. It indicates that the international community holds general attitudes in the negative towards such prejudgment measures. The immunity from measures of constraint provided by the UN Convention largely pay attention to the phase of post-judgment, namely enforcement. That is the reason why the title of this Chapter is named as ‘immunity from jurisdiction to enforcement’, not ‘immunity from measures of constraint’.

At present, immunity to enforcement increasingly becomes the key issues of State immunity in practice. As the ILC commentary mentioned,

*“Immunity in respect of property owned, possessed, or used by States is more meaningful for States in view of the recent growing practice for private litigants, including multinational corporations, to seek relief through attachment of property owned, possessed or used by developing countries, such as embassy bank accounts or funds of the central bank or other monetary authority, in proceedings before the courts of industrially advanced countries.”*<sup>265</sup>

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<sup>265</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Part IV, para. 1.

Therefore, it is necessary to discuss and clarify that in what circumstances and to what extent should the immunity be reserved by the State against which judgment is given in enforcement.

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## 1.2 THE RELATIONSHIP BETWEEN IMMUNITY FROM ENFORCEMENT AND IMMUNITY FROM ADJUDICATION

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### (1) The Distinction between Adjudication and Enforcement

Generally, the procedure of adjudication and the procedure of enforcement have the essential differences as well as the close connections.

The procedure of adjudication and the procedure of enforcement are located at different stages of proceedings. Logically, the adjudication precedes the enforcement. The judgment formed by adjudicative procedure constitutes the basis for the enforcement, and one of the prerequisite for a court to enforce the judgment is that the court has competent jurisdiction to adjudication. Once the jurisdiction to adjudication of a court exist flaws, the judgment is bound to be affected, and accordingly the subsequent procedure of enforcement will lose the valid foundation. Indeed, the adjudication and enforcement both are the organic components of proceedings. On the one hand, the adjudication lays the foundation of enforcement; without the adjudication procedures, the court cannot render an eligible judgment. On the other hand, the enforcement to a judgment is the logical extension of the adjudication; without the enforcement procedure, the purpose of adjudication cannot be fulfilled.

In international proceedings, the procedure of adjudication and the procedure of enforcement may exercise by the courts of different countries, so the relationship between adjudication and enforcement becomes further intricate. In general, judicial decisions are regarded to be an important carrier of the sovereignty of a State, so these decisions are usually enforced in the territory of that State whose court issued them. But in the context of international proceedings, the judgment of State of origin<sup>266</sup> may need to be executed abroad. On this occasion, the court of the requested State should recognize the effect of the judgment of the court of State of origin first, transforming that judgment into a national judgment by the ‘recognition’, and then put

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<sup>266</sup> The State of origin refers to the State whose court issued the judgment.

it into execution. Here, the recognition plays an important part in the enforcement. Without it, a foreign judgment cannot be carried out by the court of the requested State. In practice, one of the necessary conditions for recognition of foreign judgments is that ‘the courts of State of origin have the right to exercise of jurisdiction’, but how to determine whether the courts have the right, to some extent, depends on the requested State court’s understanding of competent jurisdiction.<sup>267</sup> In view of this, the court of State of origin, in the phase of establishing the adjudicative jurisdiction, must take into account the fact whether its judgment can be executed in the subsequent phase of ‘recognition and enforcement’. It implies that the subsequent enforcement may affect the determination of adjudicative jurisdiction, even though the effect is limited. For instance, in these cases where a foreign States is sued, if no property of that defendant foreign State is situated in the territory of the forum State, the court of the forum State would be reluctant to exercise its adjudicative jurisdiction, since it may be apprehensive that its judgment cannot be effectively implemented abroad.

In the regime of State immunity, the relationship between the jurisdiction to adjudication and jurisdiction to enforcement is even more complicated. Generally, once a national court grants a foreign State immunity from jurisdiction to adjudication, the proceedings would be blocked, and thus the judgment and enforcement will not appear. That means there is some degree of causality between immunity from adjudication and immunity from enforcement. For example, State A invokes the immunity from adjudication in the proceeding before the court of another State B. The B’s court admits A’s right to immunity, so it avoids to adjudicating the case. In the case, the proceeding is terminated so there is no judgment to be executed. Hereby, the immunity to enforcement becomes illusory.

However, on the occasion that a national court does not permit of the immune request of a foreign State, the relationship between adjudication and enforcement becomes somewhat obscure. As a matter of fact, it has always been a controversial question whether ‘lack of the right to invoke immunity in adjudication’ is bound to arise out of ‘lack of the right to invoke immunity in enforcement’. The international practice has formed two different positions about it: ‘the integration theory’ and ‘the separation theory’.

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<sup>267</sup> See: 沈涓主编：《国际私法》，社会科学文献出版社 2006 年版，第 449 页。

## (2) The Integration Theory

The integration theory means that in international proceedings if a State was not immune from adjudicative jurisdiction before the court of another State, it cannot invoke immunity for its property in the phase of enforcement.<sup>268</sup> This doctrine holds that the adjudication and the enforcement have logical links, so if the adjudicative immunity is denied, the executive immunity is also denied accordingly. Obviously, the purpose of a court exercising its jurisdiction to adjudicate cases is to determine the rights and obligations of the parties, and implement its decisions for justice. If the court's decisions cannot be put into effect via enforcement, then all the works in adjudication will be in vain.

Also, when a national court exercises jurisdiction over a foreign State in a case, both parties must spend a lot of resources on the proceeding. If, however, the court does not execute the judgment at last by virtue of immunity, it may impair the reasonable expectations of parties. In addition, when the private parties engage in commercial transactions with a State, they tend to appoint the settlement of disputes via agreement. Under the circumstances, the State often expresses its consent to the exercise of jurisdiction of certain courts or arbitration tribunal. However, if the requested State rejects to exercise its jurisdiction in the enforcement on the pretext that the State's property is protected by immunity from measures of constraint, it would unrightfully increase the risks of private parties in commercial transactions. In the sight of integration theory, the separation of adjudicative immunity from the executive immunity may result in unfair outcomes for private parties.

However, the Article 20 of UN Convention on State Immunity provides that,

*“..... consent to the exercise of jurisdiction (to adjudication) shall not imply consent to the taking of measures of constraint.”*

This provision points out that the adjudication on a State does not underlies the reason for the enforcement to the property of that State. Indeed, the UN Convention rejects to acknowledge the causality between immunity to adjudication and immunity to enforcement. Undoubtedly, this is a denial of ‘the integration theory’.

## (3) The Separation Theory

According to the separation theory, although there are some connections between adjudication and enforcement, however, the adjudicative immunity and executive

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<sup>268</sup> See: 龚刃韧：《国家豁免问题的比较研究》，北京大学出版社 2005 年版，第 268 页。



immunity are issues in different phases of litigation after all, so they should be treated in different way.<sup>269</sup> In international proceedings, the fact that a State waives or does not invoke the immunity from adjudicative immunity does not necessarily imply that the court of another State is authorized the right to take measures of constraint.

Although there were some scholars who argued that ‘allowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution might put them into the doubly frustrating position of being left with an unenforceable judgment with expensive legal costs,’<sup>270</sup> the practice of States has evidenced several theories in support of immunity from execution as separate from and not interconnected with immunity from adjudication.<sup>271</sup>

Historically, some countries had accepted the principle of restrictive immunity early, but in the field of enforcement they adhere to the principle of absolute immunity. For example, Before the World War 2, French courts had a tendency to restrictive immunity from adjudication in the proceedings relating to commercial transactions, but they persisted in absolute immunity in enforcement until the 1980s. Similarly, the US government began to implement the policy of restrictive immunity from the Tate Letter, but in practice the executive immunity was not affected by the letter. In fact, until *Foreign Sovereign Immunities Act* was adopted, the US recognized the practice of implementing the property of States.

The *European Convention on State Immunity* of 1972 established the distinction principle between adjudicative immunity and executive immunity. The Chapter 1 ‘immunity from jurisdiction’ illustrated the cases in which a Contracting State cannot claim immunity from jurisdiction of a court of another Contracting State. It proved that the Convention adopted the principle of restrictive immunity in adjudication. However, in the Chapter 3 ‘effect of judgment’, the Article 23 requires that,

*‘No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the States has expressly consented to thereto in writing in any particular case.’*

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<sup>269</sup> See: 龚刃韧: 《国家豁免问题的比较研究》, 北京大学出版社 2005 年版, 第 269 页。

<sup>270</sup> See: The 2<sup>nd</sup> Report of the Special Rapporteur, Document A/CN.4/422 and Corr.1, paragraphs 26-28.

<sup>271</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 18, para. 2.

In other words, the *European Convention on State Immunity* basically adhered to the principle of absolute immunity in the enforcement, which denied the possibility to take measures of constraint against the property of States.<sup>272</sup> It took the position that adjudicative immunity was separate from executive immunity.

The *Foreign Sovereign Immunities Act* of US and *State Immunity Act* of UK did not accept the position of absolute immunity in enforcement, but both of them adopted the approach to the division between the immunity from adjudication and from enforcement, and insisted that, in the field of State immunity, implementing judgment should have stricter conditions. In particular, the Article 1610 (a), *Foreign Sovereign Immunities Act* of US, strictly restricted the ‘exceptions to the immunity from attachment or execution’. The Article 13 (2) (b), *State Immunity Act* of UK, provided that, except ‘with the consent of a State’ or ‘the property which is for the time being in use or intended for use for commercial purposes’,

*‘The property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.’*

As mentioned above, the UN Convention on State Immunity expressed that the waiver of immunity from adjudication by a foreign State does not amount to the consent to the enforcement against its property. Indeed, the UN Convention on State Immunity adopts the separation theory, distinguishing the adjudicative immunity from executive immunity, and strictly limits the exceptions to immunity from enforcement.

As a result, the international shared understandings largely support the separation theory of State immunity:

*“The immunity from enforcement is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation.”*<sup>273</sup>

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<sup>272</sup> But in the optional provisions of *European Convention on State Immunity*, it allowed an optional attachment of property in use or intended use for commercial purposes where both foreign and forum States were contracting parties and had made a declaration under Article 24. See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.606.

<sup>273</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 18, para. 1.

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### 1.3 THE ABSOLUTE FEATURE OF IMMUNITY FROM ENFORCEMENT

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The jurisdictional immunity from enforcement of States' property is one of important aspect of the principle of State immunity. Under the circumstances that the jurisdictional immunity becomes increasingly relative, the immunity to enforcement remains absolutism. The enforcement procedure is a set of coercive measures by which the court of the requested State compels the losing party to perform the duty recognized by judgments. Obviously, it may have a clear and present influence on the dignity and interests of the State executed. Therefore, most of countries usually holds a prudent attitude towards the immunity from enforcement, and will not take initiative in attaching, arresting or seizing the property of a foreign State.

Generally, several reasons constitute the account for the absolute feature of immunity from enforcement.

#### (1) The Considerations for Diplomatic Relations

In the cases where the immunity to adjudication cannot be invoked, the court of forum State is entitled to accept and hear a case against a foreign State. Its judgment can confirm the rights and obligations of the parties in writing. But if the defendant State does not voluntarily fulfill the obligations of judgment by the excuse of immunity, the adjudication may not actually harm the interests of that State.

However, once the court of a State takes measures of constraint against property of the defendant State, such as attachment, arrest and execution, it may cause serious impacts on the diplomatic relations between the State executed and the requested State, because the measures directly affect the rights and interests in property of the State executed. It may incur the hostility and countermeasures of that State. For the reason, immunity from enforcement is rightly regarded as the most sensitive part of the regime of State immunity.

Take *Jackson v. People's Republic of China*<sup>274</sup> as an example. The Imperial China (Qing Dynasty) issued bearer bonds to finance building of a section of Hu-Kuang railways in 1911. 'The loan was for 6,000,000 of pounds, negotiated and participated in by a consortium of British, German, French and American banks. The loan

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<sup>274</sup> *Jackson v. The People's Republic of China*, United States Court of Appeals for the 11<sup>th</sup> Circuit, 794 F. 2d 1490 (1986).

agreement authorized the issuance of bonds for sale in the US and bonds were sold to purchasers in this country.’<sup>275</sup>

But after a set of revolutions, the new Chinese government, People’s Republic of China, declined to pay on the bonds, because PRC deems the bearer bonds issued by Qing Dynasty as ‘odious debt’<sup>276</sup>. Russell Jackson et al. believe he, as well as others in his position, deserve payment from the PRC as he contributed to bonds that did not pay off. Therefore, Russell Jackson et al. filed an action against China before the court of US. China claimed the odious debt theory and refused to appear. By diplomacy, China declared that sovereign debt should not be transferable to a successor government if it was incurred without the consent of, and without benefiting, the people.

In the first instance, the district court of US found jurisdiction and entered a default judgment in September 1982. The court of US alleged that if Chinese government turns its back on the judgment, the court will enforce it by attaching the property of China in the territory of US. But Chinese government insisted on the invalidity of that judgment and made several representations with the State Department of US. In February 1983, the Ministry of Foreign Affairs of China in a memorandum handed to the US reaffirmed China’s position,

*“If the United States disregards international law, taking measures of constraint against China’s property located in the United States, Chinese government reserves the right to take measures of retorsion.”*

Since the case occurred shortly after the resumption of diplomatic relations between China and the United States, taking into account the Sino-America relations and the common interests, the State Department of US had to intervene in the case by providing the diplomatic suggestions for the courts. At the same time, China accepted the proposal of US, and requested revocation of the default judgment in the appeal. China claimed that the United States has no jurisdiction over any claims against PRC as a sovereign nation. Ultimately, the United States Court of Appeals overturned the judgment of first instance on the grounds of sovereign immunity in July 1986. The

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<sup>275</sup> See: <https://law.resource.org/pub/us/case/reporter/F2/794/794.F2d.1490.84-7744.htm>, visited on 31<sup>st</sup> May, 2017.

<sup>276</sup> See: Robert Howse, *The Concept of Odious Debt in Public International Law*, United Nations Conference on Trade and Development Discussion Papers, No. 185, (July 2007), p. 2.

Court of Appeals reasoned that giving *Foreign Sovereign Immunities Act* retroactive effect before 1952 would violate due process.

As a result, on account of diplomatic relations, States are inclined to impart a greater degree of absoluteness to the immunity from enforcement in practice.

## (2) The Demands for State Interests

Although the reciprocity theory has been criticized, most of countries abide by the principle of reciprocity in international intercourse. At least so far, the international community is far from a multilateral scheme, but a reciprocity system based on bilateral benefit mechanism. It is not strange for the international practice that should the courts of a State impose restrictions on the litigation rights of citizens, legal persons or other organizations of another State, the courts of the latter may follow the principle of reciprocity regarding the litigation rights of the citizens, legal person or organizations of the former. Therefore, if the court of a State takes measures of constraint against the rights or property of a foreign State, the foreign State may take actions in retaliation or reprisal for the similar acts perpetrated by that State's court. Obviously, the enforcement of judgment against the property of a foreign State may jeopardize not only the diplomatic relations but also the core interests of the forum State.

Sometimes there is a common phenomenon that the court of adjudication does not have the same State identity as the court of execution. In other words, the adjudication and the execution are separated into different States. Under the circumstances, the judgment is not from the court of execution, so it must be recognized by the court of execution, and then can be enforced. But why the requested State takes the risk of offending a foreign State to implement the judgment from the State of origins for the interests of a private party in litigation?

In reality, the requested State, in most instances, is unwilling to enforce a judgment or award against the property of a foreign State, not only for the reason that the judgment or the award is not made by its court, but also for the enforcement may incur the reprisals of the State executed which will cause the loss of its national interests. By virtue of the fact, many countries take a cautious attitude towards the enforcement of the judgment against the property of a foreign State.

## (3) The Requirement of Functions of States

Generally, the State undertakes the mission of social management and public service, so its property usually serves the sovereign functions and has evident public

attributes. Once the State's property suffered the measures of constraint such as attachment, arrest, detention or execution, it may endanger the operation of State.

Different States have different national situations. The international community needs a governance system that takes all of States' interests and concerns into account no matter how powerful the State is. It is not very difficult for the big powers such as the US, China, Japan, Germany, Britain and France to accept the exceptions of immunity from enforcement, because these States have strong economic strength, even though their property was executed, it has little influence on the realization of the States' function. These powers need not to be worried that the enforcement of judgment against their property brings about the fatal hit on their national economy. However, the small States are not so lucky in view of the worrying state of their economy. If one of State-owned property was executed, it perhaps brought the State to the verge of bankruptcy or paralysis. In fact, the practice of international community ought to respect the sovereign status of the small States and concern their feelings and interests. Therefore, in some cases the absoluteness of immunity from enforcement is not from the adherence to the sovereignty principle, but from the realistic considerations. For some small States, immunity is an effective method to get self-protection in international competitions.

As a result, the regime of State immunity is not, as some scholars criticized, an obstacle to the justice of international law. In practice, it undertakes the positive task in shaping a fair international order via balancing the interests between the big States and the small States. For this reason, it is necessary, to a certain extent, to preserve the absolute nature of immunity from enforcement. For instance, despite adopting the restrictive doctrine of immunity, the UN Convention on State Immunity still provides special protection for 'specific categories of property of States' in its Article 19. 'Each of these specific categories of property, by its nature, must be taken to be in use or intended for use for governmental purpose removed from any commercial considerations.'<sup>277</sup> In any case, no measures of constraint by way of execution or coercion can be exercised by the authorities of one State against the property assuming the sovereign functions of another State.

The international practice accepted a basic consensus that State immunity should be restricted in some field, though no matter which State involves in an international

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<sup>277</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 19, para. 2.

proceeding is reluctant to submit to the jurisdiction of the court of forum State, even if it accepted restrictive doctrine of immunity. In consideration of the sensitivity of enforcement, the court of a State must be very cautious of enforcing the judgment or award against the property of another State.

## 2. THE RESTRICTIVE APPROACH OF IMMUNITY FROM ENFORCEMENT

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### 2.1 THE TRANSITION OF IMMUNITY FROM ENFORCEMENT

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If it is admitted that no sovereign State can exercise its sovereign power over another equally sovereign State, a State has no authority to take measures of constraint against the property of another State. However, with the development of international practice, the immunity from enforcement is increasingly losing the absolute feature in certain fields.

As above mentioned, the current States' practice universally distinguishes immunity from execution measures from immunity from adjudication.<sup>278</sup> The international customary law of State immunity does not accept 'the integration theory' that emphasizes the correlation between immunity from adjudication and immunity from enforcement. However, in practice, the immunity from enforcement is more or less affected by the relativism of immunity from adjudication. On the one hand, 'the question of immunity from execution does not arise until after the question of jurisdictional immunity has been decided in the negative and until there is a judgment in favor of the plaintiff.'<sup>279</sup> On the other hand, the immunity from execution is the bar for the performance of judgment. If the judgment of a court cannot be enforced, its jurisdiction in the phase of adjudication would become meaningless. The persistence of absolutism in immunity from enforcement may cause the invalidation of the application of restrictive principle of immunity. It seems a bit unreasonable to deny the judgment of the court of forum State by immunity in the stage of enforcement

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<sup>278</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 361.

<sup>279</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 18, para. 2.

while granting a court the exercise of jurisdiction over a foreign State in the stage of adjudication. Therefore, the persistence of absolute immunity in enforcement has received increasing criticism.

By 1970s, by the influence of restrictive tendency of immunity in adjudication, the immunity from the enforcement shows increasingly an inclination of relativism in practice, especially about the State property to be enforced in use for the commercial purposes.

In history, the Model law of Institut de Droit International and of Harvard University established the principle of immunity from enforcement for the property of States, permitted certain exceptions. For example, the Institut de Droit International of France in the *Hamburg Resolution* of 1891 provided that

*“There should be no attachment of movables or immovable directly in use of service of the State but execution was allowed in respect of property expressly given as security for payment of a debt.”*<sup>280</sup>

The Harvard Research Project of 1932 proposed that

*“Restricted enforcement was permitted against the property of a State, not used for diplomatic purpose, where it was an immovable or used in connection with the conduct of a business enterprise.”*<sup>281</sup>

The *Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships* of 1926, Brussels, for the first time by the form of treaty shook the absolute immunity in the procedure of enforcement. The Article 1 provided that,

*“Sea-going ships owned or operated by States, ..... shall be subject, as regards claims in respect of the operation of such ships, to the same rules of liability and the same obligations as those applicable in the case of privately-owned ships, cargoes and equipment.”*

According to the provision, the State vessels operated for commercial activities are subject to the same liabilities as the privately-owned vessels, they were not entitled to the immunity from the procedure of enforcement. However, the Brussels Convention of 1926 failed to receive wide adoption.

At early stages, Italy and Greece’s judicial practice endorsed execution of State property in use for the commercial purposes to satisfy the judgments in respect of

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<sup>280</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.196.

<sup>281</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.195.



commercial or private law activities were given by their courts. However, their following ordinances broke with precedent by a procedural regulation: the enforcement of the court against the property of a foreign State must be authorized by their governments. Concretely, the Minister of government enjoyed the discretionary power to decide whether to approve the procedures of enforcement in line with the principle of reciprocity. Neither the government of Italy nor of Greece has been authorized their judicial system to take measures of constraint against property of a foreign State in practice, so, in effect, such procedural regulation amounted to retention of the absolute immunity of foreign States' property in the procedure of enforcement.<sup>282</sup>

In the case *Socobélge v. Greece*,<sup>283</sup> Brussels Civil Court allowed the attachment of funds designated by the US as Marshall Aid for the rehabilitation of Greece. Despite the fact that the case was settled by diplomatic negotiations with the intervention of the US, the Belgian court expressed the standpoint that the principle of State immunity is without prejudice to the enforcement of judgments or awards relating to commercial transactions.<sup>284</sup> Similarly, the Hague Court of Appeal, in the case *NV Cabolent v. National Iranian Oil Company*,<sup>285</sup> declared valid the attachment of the assets of a trading State entity located in the forum State, because the agreement for exploitation of petroleum resources in which National Iranian Oil Company engaged was of a commercial nature.

Admittedly, State practice was very varied, but most countries practiced absolute immunity to State property in the procedure of enforcement before 1970s. In fact, so long as the international practice observed absolute immunity from jurisdiction,

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<sup>282</sup> See: *Romanian Government v. Trutta*, Italian Cour de Cassation, 14 February 1926, 3 ILR 176. Decree 13 May 1926; Condorelli and Scoli, 'Measures of Execution Against the Property of Foreign States: The Law and Practice in Italy' (1979) 10 NYIL 197. *Soviet Republic (Immunity in Greece)* case, Ct of Athens (1928), 4 ILR 172; Greek Law of 1938 No. 1519, Greek rev IL (1950) 331; *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, Areios Pagos (Hellenic Supreme Ct), 4 May 2000; 123 ILR 513, cited in *Lechouritou v. Dimosio*, ECJ Case C-292/05 (2007) 2 ALL ER 57.

<sup>283</sup> See: *Socobélge v. Greek State*, Belgium, Tribunal Civil de Bruxelles (1951), 15 ILR 3.

<sup>284</sup> It dismissed an argument based on the inability of the court to order enforcement against its own forum State since the forum State without compulsion made proper allocation in its national budget for commitments which, unlike the Greek debts, were clearly incurred for public purpose. It disposed of other arguments based on independence, comity, and reciprocity; execution was the necessary consequence of jurisdiction to which the foreign State consents by entering into a commercial transaction and placing funds within the forum State; discharge of a legal liability in no way disturbs good relations between States, and to permit the foreign State to avoid discharge would confer an advantage which the forum State itself did not enjoy with regard to its private law creditors. See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 605.

<sup>285</sup> See: *NV Cabolent v. National Iranian Oil Co.* (1968) Court of Appeal, The Hague, (28 November 1968), 47 ILR 138. UN Legal Materials 344.

immunity from enforcement followed as a matter of course, so until the treaty and legislation of the 1970s introducing a restrictive approach, it is hard to imagine the execution against the State's property.

The substantive changes appeared in *European Convention on State Immunity* of 1972. Although the Convention reiterated its conformity to absolute principle of immunity from enforcement, however, by the 'optional provisions', it began to introduce restrictive theory in the procedure of enforcement.

*"Notwithstanding the provisions of Article 23,<sup>286</sup> a judgment rendered against a Contracting State in proceedings relating to an industrial or commercial activity, in which the State is engaged in the same manner as a private person, may be enforced in the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity."*<sup>287</sup>

Subsequently, more and more States' practice allowed the execution or attachment of States property in use or intended use for commercial purposes. The international rule was formulated by the German Constitutional Court in *Philippine Embassy Bank Account case*. After an extensive review of legislation, treaty practice, court decisions and international law theory, the Constitutional Court concluded that, on the one hand, the general rules of international law did not impose thorough interdiction on execution by the forum State against a foreign State; On the other hand, the common custom among States prohibited the forum State from levying execution on property of a foreign State in use for sovereign purposes.<sup>288</sup> The decision was far-reaching whereby a frame of reference was established that a State was entitled to immunity from execution for property in use for sovereign purposes but no general immunity from execution for property in use for commercial purposes.

Until 1980s the practice of French courts was hesitant and inconsistent in respect of the issue of immunity in enforcement. The reduction of the absolute rule was achieved in the *Eurodif Case* where the Court of Cassation introduced a new exception in favor

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<sup>286</sup> The Article 23 provides that 'No measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State except where and to the extent that the State has expressly consented thereto in writing in any particular case.'

<sup>287</sup> The Chapter 4 'Optional Provisions', Article 26 of *European Convention on State Immunity* (1972). See: Andrew Dickinson, Rae Lindsay, James P Loonam, *State Immunity: Selected Materials and Commentary*, Oxford University Press (2004), p. 20.

<sup>288</sup> See: *Philippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, Case No. 2 BvM 1/76, (1977) BVerfGE 46, 342. 65 ILR 140. UN Legal Materials 297, 13 December 1977, p. 395.

of the private party to the general rule of immunity.<sup>289</sup> In 1970s, France government and Iran Government reached a cooperative agreement on the construction and operation of the enriched uranium nuclear reactor. The French corporation Eurodif was involved as a contracting party in supply of the raw materials of uranium and capital loan. Unfortunately, Islamic Revolution in 1979 overthrew the Pahlavi Dynasty who was supported by the Western powers, and eventually replaced with the Iran Islamic Republic, which led to cancellation of the previous nuclear utilization program. For this reason, the corporation Eurodif initiated a proceeding in ICC in line with the arbitration clause of the agreement. Meanwhile, Eurodif also applied for the Paris Commercial Court to attach a total of 1 billion dollars loan controlled by the Atomic Energy Commission. The Paris Commercial Court, in accordance with Eurodif's request, took preservation measures against the Iran's property in October 1979. In April 1982, however, the Court of Appeal in Paris revoked the writ of attachment since the Court held that the property seized by the Commercial Court was the Iranian public assets in use for sovereign purposes, and thus it ought to be exempted from forcible measures. Eurodif refused the verdict, and appealed to the Court of Cassation. In March 1984, the Court of Cassation overturned the decision rendered by Court of Appeal, and declared that,

*“The Immunity from execution of the State might be set aside where the property seized was connected to a private law economic or commercial activity which was the subject-matter of the proceedings before the court.”*<sup>290</sup>

In the opinion of Court of Cassation, the execution on States' property had to satisfy two conditions: '(i) The property sought to be attached had to be in use for commercial purposes; (ii) the debt for which the attachment was sought must arise out of commercial transactions.'<sup>291</sup>

Spanish Constitutional Court in *Abbott v. Republic of South Africa* argued that the property held by a foreign State in the forum State is not immune from execution, if

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<sup>289</sup> See: Jeremy Ostrander, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgements*, Vol. 22, Berkeley Journal of International Law 541, (2004).

<sup>290</sup> See: *Islamic Republic of Iran v. Eurodif*, Ct of Appeal, Paris, 21 April 1982, 65 ILR 93. Also, Ct of Cassation, 14 March 1984, 77 ILR 513.

<sup>291</sup> See: Giorgio Bernini and Albert Jan Van den Berg: *The Enforcement of Arbitral Awards against A State: The Problem of Immunity from Execution*, *Contemporary Problems in International Arbitration*, Edited by Julian D M Lew, The Eastern Press (1986), pp. 359~373.

such property is unequivocally allocated to *acta jure imperii*.<sup>292</sup> At present, many countries in Civil law system have embraced the exceptions to immunity in the procedure of enforcement.

The countries of Common law system changed their attitude towards immunity from enforcement mainly through national legislation. In 1976, the US *Foreign Sovereign Immunities Act* introduced the restrictive rule of immunity from jurisdiction in Article 1602:

*“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.”*

While the Article 1609 pronounced the general principle of immunity from attachment and execution of property of a foreign State, the Article 1610 explicated the exceptions to immunity from attachment or execution, according to which the property in the US of a foreign State used for a commercial activity in the US shall not be immune from attachment in aid of execution or from execution. It is remarkable that the US *Foreign Sovereign Immunities Act* implemented the restrictive principle of immunity in enforcement procedure.

The UK *State Immunity Act* of 1978 provided that ‘the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale’ in Article 13 (2). And then, the Article 13 (4) of the Act made the property in use or intended use for commercial purposes subject to attachment or execution.

The UK *State Immunity Act* has greatly affected the national legislation of the Commonwealth countries, such as Singapore, South Africa, Pakistan, Canada and Australia. It effectively promoted the international community to approve the rule that immunity from measures of constraint shall not be invoked in commercial transactions.

As far as 1990s, the States practice increasingly constituted a shared understanding: a foreign State property that is in use or intended for use for commercial purposes

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<sup>292</sup> See: *Abbott v. Republic of South Africa*, Spain Const Ct (2<sup>nd</sup> Chamber), 1 July 1992, 113 ILR 413, at 420.

should be subject to the execution of the court of forum State, because it did not assume sovereign and public functions.<sup>293</sup>

The *UN Convention on Jurisdictional Immunities of States and Their Property*, 2004, recognized ‘immunity from pre-judgment measures of constraint’ and ‘immunity from post-judgment measures of constraint’ in Article 18 and 19 respectively. More importantly, it weaved the fragmentary consensus into a normative system, and established the rules of exception to immunity in line with the international practice. In conclusion, the Convention has witnessed the transition of immunity from enforcement from the absolute position to the restrictive position.

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## 2.2 THE DIVISION OF ENFORCEMENT MEASURES AGAINST THE STATE AND ITS PROPERTY

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The enforcement to a claim against a State may be divided into two manners: the measure of constraint against the State as a person and that against the property of the State.<sup>294</sup>

As mentioned above, currently the immunity from enforcement is increasingly restricted by international practice. It has been an international consensus that the property of foreign States in use for commercial transactions shall not be immune from the execution. However, so far the coercive orders against a foreign State and its officials are prohibited by international law. The reasons are apparent. On the one hand, the international community is an equal society, and no State enjoys higher sovereign status than any other States. The court of a State, therefore, cannot require other States to act in line with its will. A State is also under no obligation to comply with the orders from other States. On the other hand, the act of States is inextricably linked to their territory, so it is very difficult for the court of forum State to transcend its territory to order the conduct of a foreign State. The measures of constraint against the State as a person, such as issuing an injunction not to do an act and giving an order for specific performance, imply the use of actual physical force. It may seriously hurt

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<sup>293</sup> See: Hazel Fox CMG QC and Philippa Webb, *The Law of State Immunity*, 3<sup>rd</sup> edition, Oxford University Press (2013), p. 486.

<sup>294</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.618.

the relations between States, even to the extent of war. In reality, most of countries are very cautious about taking the coercive measures. As a result, the immunity remains absolute from measures of execution against State as a legal person.

The Article 24 (1) of *UN Convention on Jurisdictional Immunities of States and Their Property* confirmed the absolute customary rule formed by international practice.

*“Any failure or refusal by a State to comply with an order of a court of another State enjoining it to perform or refrain from performing a specific act or to produce any document or disclose any other information for the purpose of a proceeding shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.”*

The provision is somewhat similar to the Article 18 of *European Convention on State Immunity*. It demonstrates the unenforceability of the State as a person. Actually, the identity of State is very different from the property of State. The State, for reasons of national dignity or security, may sometimes be prevented from obeying the order or the judgment of the court of another State. When the State appears as a person, it must have the sovereign will. It hereby should not be subject to interference and coercion from another State.

Consequently, the State immunity from enforcement is experiencing a transition from the absolute approach to the restrictive approach. It is mainly reflected in the State's property in use for the commercial transactions. But even so, the enforcement immunity maintains absolute position in the case of State as a person.

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## 2.3 THE DOMINANCE OF PURPOSE APPROACH IN ENFORCEMENT

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Although States practice shows much caution in restricting the immunity from execution of States and their property, at present it has to admit the fact that State immunity in enforcement contains certain exceptions in respect of the property of States.

Legal issues have a normative character. In the context of the restrictive trend of State immunity, how to determine whether the defendant State and its property enjoy immunity or not? It demands for a certain criterion in law. In the long-term practice, the international community gradually accepted ‘the nature approach’ to identify the commercial activities in the regime of State immunity. The most important example is the Article 3 (2) of *UN Convention on Jurisdictional Immunities of States and Their Property*, which provides that,

*“In determining whether a contract or transaction is a ‘commercial transaction’, references should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account .....”*

Most of States embraced the nature approach, but the approach is generally used in determining the jurisdictional immunity from adjudication, not immunity from enforcement. In fact, it is nearly impossible to employ the nature approach as criterion to settle the issue of immunity from enforcement. Why does not the nature approach work in enforcement stage? Two reasons may be attributed to the phenomenon. Firstly, as mentioned, ‘the measures of execution cannot be imposed on State as a person’, which means the conduct or act of State is not the object of execution. Under the circumstance, the nature approach loses the subject, namely conduct of State, upon which it depends. The other reason is that, the characteristic of the property of State is very different from that of the conduct of State. As well known, property does not have personality, also cannot act on its own. It is impossible, merely with reference to the nature of property, to classify the property into the scope of public law or the scope of private law. Because of the object of immunity converted from the conduct to the property, the nature approach is deprived of the decisive status in the issue of State immunity of enforcement. Logically, the property cannot be incorporate into the category of commercial activities. The only way to determine whether the property has a commercial attribute is the use or the purpose of that property. As a result, the purpose approach emerges in the practice of determining of enforcement immunity.

The purpose approach suffered much distrust in the stage where the court of forum State decides whether it is entitled to the adjudicatory authority over a foreign

State.<sup>295</sup> But by virtue of the characteristic of the property to be executed, the nature approach cannot undertake the task of identifying the State's property available for attachment or execution. The purpose approach hereby gets its revival. With regard to State immunity from enforcement, the purpose approach has two styles of expression. Sometimes it was expressed by the phrase 'for the purpose' in an explicit way. Most of times, it was expressed in an implicit way, in which the phrases 'in use' or 'used for' was put as substitute for the phrase 'for the purpose'.

In the countries that endorsed restrictive immunity, the purpose approach was broadly applied in the procedure of enforcement. The optional provision Article 26 of *European Convention on State Immunity* in 1972 pointed out,

*"A judgment rendered against a Contracting State in proceedings relating to an industrial or commercial activity ..... may be enforced in the State of the forum against property of the State against which judgment has been given, used exclusively in connection with such an activity."*

The Article 1610 (a) of US *Foreign Sovereign Immunities Act* in 1976 provided that,

*"The property in the United States of a foreign State ..... used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution."*

The Article 13 (4) of UK *State Immunity Act* in 1978 stipulated that,

*"..... does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purpose."*

The Commonwealth States, such as Singapore, Pakistan and South Africa, imitated the expression: 'for the time being in use or intended for use for commercial purpose', of UK *State Immunity Act*.<sup>296</sup> Despite use of different wording, other Commonwealth States, such as Canada and Australia, inherited the spirit of purpose test from UK respectively.<sup>297</sup> For example, the Article 32 (3) (a) of Australia *Foreign States Immunities Act* in 1985 provided that,

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<sup>295</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 362.

<sup>296</sup> See: The Article 15 (4) of Singapore *State Immunity Act*, 1979; The Article 14 (2) (b) of Pakistan *The State Immunity Ordinance*, 1981; The Article 14 (3) of South Africa *Foreign States Immunities Act*, 1981.

<sup>297</sup> See: The Article 12 (1) (b) of Canada *State Immunity Act*, 1980; The Article 32 (3) (a) of Australia *Foreign States Immunities Act*, 1985.



*“Commercial property is property ..... that is in use by the foreign States concerned substantially for commercial purposes.”*

The purpose approach with regard to enforcement can also be discovered in the case law from the Continent countries such as France, Germany, Italy, Spanish, Netherland, Austria and Switzerland.<sup>298</sup>

The 2004 *UN Convention on Jurisdictional Immunity of States and Their Property* adopted the purpose approach, the Article 19 (c) provided that no post-judgment measures of constraint against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that,

*“The property is specifically in use or intended for use by the State for other than government non-commercial purpose and is in the territory of the State of the forum .....”*

After that, the purpose approach was widely recognized as a recommendable method to determine the availability of enforcement against the property of State.

The Israel *Foreign States Immunity Law*, 2009 demanded that the assets of a foreign State shall not benefit from immunity if they are commercial assets according to the Article 16 (1). The provision did not indicate how to determine a property is a commercial property, but indeed it seems no more appropriate approach than the purpose approach.

### 3. THE ALTERNATIVE CONDITION OF ENFORCEMENT MEASURES AGAINST STATE PROPERTY

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On account of the sensitivity and importance of the process for enforcement of a judgment or arbitration award, States’ practice was inclined to distinguish the executive immunity from the jurisdictional immunity, and attached much strict conditions to the execution against State’s property. Unless the constituent conditions were satisfied, the court of forum State had no opportunity to take execution measures on that property.

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<sup>298</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), pp. 369~372.

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### 3.1 THE CONSENT TO THE EXECUTION

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In general, the ‘consent’ of the immunity from execution refers to the matter that a foreign State expresses the intention of waiver of the right to immunity and submission its property to the execution measures by the court of forum State. It is an important vehicle to the exceptions to the immunity from enforcement. The foundation of consent lies in the sovereign authority of a State. A sovereign State, of course, holds the right of waiver of its immunity by the consent based on its own will.

The consent must have a direction. It means that, a State should express the waiver of immunity as to the question of enforcement. Otherwise, the effect of consent cannot spread to the process for enforcement. As a logical extension of ‘the separation theory’, the consent of a foreign State to the exercise of jurisdiction of the court of forum State does not conclude its consent to the procedure of enforcement. That foreign State must separately agree to the procedure of enforcement for the purpose of reaching the effect of the waiver of immunity from enforcement. It is an international shared understanding. The *UN Convention on Jurisdictional Immunities of States and Their Property* recognized the practice in the Article 20 which provides,

*“Where consent to the measures of constraint is required under article 18 and 19, consent to the exercise of jurisdiction under article 17 shall not imply consent to the taking of measures of constraint.”*

It shows that the foreign State which submits to the adjudicatory jurisdiction of the court of forum State still reserves the right to invoke immunity from enforcement. From the wording of the UN Convention, the consent in respect of the enforcement shall be explicit, without the constructive consent. If the constructive consent in execution is permitted, ‘consent to the exercise of jurisdiction’ may be regarded as a kind of implicit form of ‘consent to the measures of execution’. On the contrary, UN Convention points out that ‘consent to the exercise of jurisdiction shall not imply consent to the taking of measures of constraint’.

The international community has two opposite views on the rule of consent. Some countries hold that the consent to enforcement shall be more specific than the consent to jurisdiction of adjudication, and therefore the consent to the enforcement in general demands for an express approval. For example, the Article 23 of *European Convention on State Immunity* provides that,

*“No measures of execution or preventive measures against the property of a Contracting State may be taken ..... except where and to the extent that the States has expressly consented thereto in writing in any particular case.”*

Similarly, UK *State Immunity Act* in Article 13 (3) demands for ‘the written consent of the State concerned’, and also points out ‘a provision merely submitting to the jurisdiction of the courts is not to be regarded as consent for the purpose of this subsection.’ So, different from consent to jurisdiction, consent to enforcement in UK *State Immunity Act* needs a more stringent condition that rejects the implied manner. Affected by this legislation, some Commonwealth countries’ law on State immunity followed and endorsed British position, such as the Article 15 (3) of Singapore *State Immunity Act*, Article 14 (3) Pakistan *State Immunity Ordinance*, Article 14 (2) South Africa *Foreign States Immunities Act* and Article 31 (2) and (3) of Australia *Foreign States Immunities Act*. The recent legislation on State immunity, Israel *Foreign States Immunities Law*, also accepted the rule that waiver of immunity must be in an expressly manner. As mentioned in the Article 17 (a),

*“Assets of a foreign State shall not benefit from immunity ..... if the foreign State has expressly waived such immunity in writing, or by written or oral notice to the court.”*

However, some other countries hold that consent to enforcement may express in an implicit manner. According to the Article 1610 (a) (1) and (b) (1) of US *Foreign Sovereign Immunities Act*, the waiver of immunity from attachment in aid of execution or execution may express either explicitly or implicitly. A similar approach was taken in Article 12 (1) (a) of Canada *State Immunity Act*. The implied waiver of immunity from enforcement is generally subject to certain qualifications, of which is merely directed to the enforcement of a State’s property in use for commercial transactions. The immunity of a State’s property, like property of the central bank or other monetary authority, must be waived by the explicit expression of that State. But that is not the end. The US *Foreign Sovereign Immunities Act* distinguished ‘preservation measures’ from ‘execution measures’. In line with the Article 1610 (d) of the Act, even if the foreign State give its waiver of immunity of its property in use for a commercial activity in an implicit way, any courts of the US is not permitted to

attach that property before the entry of judgment in any action.<sup>299</sup> It denotes that the courts of the US cannot take preservation measures against the property of a foreign State, even though the foreign State implicitly agrees to these measures. The provision suggests that the US did not go so far on the issue of preservation measures against States' property, and it maintained the due cautiousness and does not endorse the implied waiver of immunity in the pre-judgment process. In US legal system, two basic conditions are crucial to the application of the implied consent: (i) the State's property relating to the commercial activities; and (ii) in the process for enforcement of a judgment or arbitration award, not in the process for preservation. Whatsoever, implied consent constitutes an important reason for the waiver of immunity from enforcement.

The *UN Convention on Jurisdictional Immunities of States and Their Property* provided that a State shall expressly consent to the taking of measures of constraint. And then, the Convention lists specific forms of express consent.

- (a) international agreement;
- (b) an arbitration agreement or a written contract;
- (c) a declaration before the court;
- (d) a written communication after a dispute between the parties has arisen.

Indeed, any execution measures that run counter to the will of a foreign State are likely to jeopardize the diplomatic relations between States. Therefore, the requirements of consent to execution should be more definite than that of consent to adjudication.

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### 3.2 ALLOCATED OR EARMARKED PROPERTY

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Definitely, international community is divided on the issue of the effect of implied waiver of immunity from execution. UN Convention does not directly provide the implied consent in the provisions of measures of constraint. But, in reality, there is a fact that, a State does not express consent to execution in writing, or by written or oral

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<sup>299</sup> The formula of Article 1610 (d) is that, 'The property of a foreign State ..... used for a commercial activity in the United States shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a state, if the foreign State has explicitly waived its immunity .....'. The synonymous substitution of the sentence is that the property of a foreign State used for a commercial activity in the US shall be immune from attachment prior to the entry of judgment in any action brought in a court of the US except the foreign State has explicitly waived its immunity.

notice to the court, but the State is prepared to enforce a judgment or an arbitration award and allocates the property for satisfying the claims established by the judgment or the award. In order to respond to the situation, the Convention gives the waiver of immunity by way of conducts.

According to the Article 19 (b) of UN Convention, a foreign State has allocated or earmarked property for the satisfaction of the claim which is the object of an action brought in a court of forum State, that foreign State cannot invoke immunity for the property.

With regard to the functions of the Article 19 (b), a representative view held that it prescribes the implied consent in disguise. But the International Law Commission made another interpretation. In the *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property*, it argued that,

*“The property can be subject to measures of constraint if it has been allocated or earmarked for the satisfaction of the claim or debt which is the object of the proceeding. This should have the effect of preventing extraneous or unprotected claimants from frustrating the intention of the State to satisfy specific claims or to make payment for an admitted liability.”*<sup>300</sup>

From the commentary, it is obvious that the Article 19 (b) of UN Convention is designed to ensure the implementation of the intention of the State to satisfy specific claims or to make payment for an admitted liability.

The judicial practice of States fashioned the rule that ‘specific allocation of State property’ is not immune from execution measures. As a matter of fact, few countries are willing to designate their property for the use of execution. The establishment of such exception relies largely on the discretionary of the court and its expansionary interpretation to the law of State immunity. Understandably, ‘the question whether particular property has or has not been allocated for the satisfaction of a claim may in some situations be ambiguous and should be resolved by the court.’<sup>301</sup>

For example, in the *Alcom Case*,<sup>302</sup> the House of Lords UK, by interpreting the Article 13 (4) of *State Immunity Act*, regarded ‘the specific allocation of State

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<sup>300</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article.18, para.10.

<sup>301</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article.18, para.10.

<sup>302</sup> See: *Alcom Ltd v. Republic of Colombia*, England, House of Lords, (1984) AC 580; 74 ILR 170.

property’ as a method to remove immunity from execution of State property. The UK House of Lords held that the property ‘documentary credits’ was designated by the diplomatic mission for commercial transaction, because that ‘documentary credits’ were issued by Colombia in the payment of the price of goods. It satisfied the requirements of the provision in Article 13 (4): ‘the property which is for the time being in use or intended use for commercial purposes’, UK judicial authority hereby was entitled to taking measures of constraint on the current account of the diplomatic mission of Colombia.

A set of subsequent cases was affected by *Alcom Case*. Take the *Orascom Case* as an example. The claimant Orascom obtained the ICC arbitration award against the Republic of Chad and sought a third party debt order against a bank account: the Borrower’s Account held by Chad in London. The account was set up under requirements imposed by the World Bank. Chad’s oil revenues were to be paid into a Transit Account of Citibank branch in London, and sums were taken from that account every month to repay Chad’s borrowings from the World Bank. The balance went into the Borrower’s Account. Chad asserted State immunity for the Borrower’s Account, and invoked Article 13 (4) of the UK *State Immunity Act* 1978 under which State property is immune from execution unless it is ‘for the time being in use or intended for commercial purposes’. However, the Commercial Court, Queen’s Bench Division of High Court rejected the Chad’s claims, and held that the Borrower’s Account was in use for the commercial purposes. Because the Borrower’s Account was designated to receive the proceeds of oil revenues and as a guarantee of repaying loans, it was the earmarked property for commercial transactions. As a result, the Borrower’s Account was not immune from execution measures.<sup>303</sup>

The rule that allocated or earmarked State property is not protected by immunity arises from the expansionary interpretation of courts on the use of that property in judicial practice. This exception to the immunity from execution of State property may be seen as ‘a move towards recognizing that identified purpose for which the State property is destined may determine its status as immune or not.’<sup>304</sup>

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<sup>303</sup> See: *Orascom Telecom Holding SAE v. Republic of Chad, Citibank NA (Third Party) International Bank for Reconstruction and Development and Another (Intervening)*, England, High Court, Queen’s Bench Division, Commercial Court, [2008] EWHC 1841 (Comm); 2 Lloyd’s Law Reporter (September, 2008), 396.

<sup>304</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.631.

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### 3.3 STATE PROPERTY IN USE FOR COMMERCIAL TRANSACTIONS

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It is a shared understanding that the immunity from enforcement is increasingly restricted in the field of commercial transactions. In practice, States are inclined to distinguish the State property in use for commercial activities from in service of sovereign or public purposes. Under restrictive doctrine of State immunity, State no longer enjoys the absolute right to invoke immunity for its property. The courts of forum State may impose execution measures on State property in use for commercial transaction. As mentioned in the Article 19 (c), the *UN Convention on Jurisdictional Immunities on States and Their Property*, a State cannot invoke immunity for its property before the court of another State, if ‘the property is specially in use or intend for use by the State for other than government non-commercial purpose and is in the territory of the State of the forum’.

Merely the fact that State property is used for commercial transactions does not constitute the sufficient justification for taking execution measures. In line with the practice of States, the UN Convention puts forwards certain qualifications by which the scheme of enforcement against State property is built.

#### (1) Time Connections

The Article 19 (c) of *UN Convention on Jurisdictional Immunities on States and Their Property* 2004 provides the requirements of execution against State property. Except the use of commercial transactions, it demands for other 3 conditions including time connections, territorial connections and subject connections.

An important task of Article 19 (c) of UN Convention is to identify the time during which State property has ‘commercial use’. As to the tense, the word ‘is’ indicates that State property should be specifically in use or intend for use for commercial purpose at the time the proceeding for attachment or execution is instituted. To specify an earlier time would unduly restrain States’ freedom to dispose of their property. International Law Commission has faith in States’ sincerity. In its opinion, States would not encourage and allow the abuse of this provision, for example by changing their property status in order to avoid seizure, attachment or execution.<sup>305</sup>

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<sup>305</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article.18, para.11.

Although the International Law Commission has a well expectation on the motive of States, it does not preclude some States may use time-lag to change the use of property to circumvent the execution nevertheless. So in some countries, the ‘past use’ for commercial activities of State property served as a condition for execution measures. For example, the Article 1610 (a) (2) of US *Foreign Sovereign Immunities Act* 1976 provides that the property in the US of a foreign State shall not be immune from attachment in aid of execution or from execution, if

“*The property is or was used for the commercial activity upon which the claim is based.*”

It indicates that the use of word ‘commercial use’ contains the past tense. According to the provision, the US courts is entitled to taking measures of constraint against foreign State’s property that in the past was used for commercial activity. However, the UK *State Immunity Act* 1978 and UN *Convention on Jurisdictional Immunities of States and Their Property* 2004 did not mention the situation of State property in past use for commercial transaction. Generally, the property has the feature of liquidity. Not only the ownership of property is frequently transferred, but also the use of property is constantly changing. Therefore, the past ownership and the past use of property shall not form the basis of execution. For example, a property X located in State A that was originally owned by State B becomes the private property of corporation C by virtue of a commercial transaction. Providing that a corporation D applies for the court of State A to enforce a judgment against State B’s property, obviously the court of State A shall not take coercive measures against the property X, because the property X once belonged to, but now does not belong to State B. Take another example. A building W located in State E and owned by State F was originally used for commercial rental. Later, the building W was converted to be an office of consulate of State F. Providing that a person G applies for the court of State E to enforce a judgment against State F’s property, the court of State E shall not take coercive measures against the property W, because it is being used for sovereign purposes at present. As a result, the time criterion ‘past use’ gives too much space of discretion for the courts of forum State on the issue of immunity of enforcement. It is not appropriate as a basis for determining the issue of execution.

In some countries, the ‘intended use’ for commercial activities of State property was used as an important cause for execution measures. The UK *State Immunity Act*



1978 first introduced the criterion ‘intended use’. The Article 13 (4) provides the express,

“..... *property which is for the time being in use or intended for use for commercial purposes*”.

Similarly, the UN *Convention on Jurisdictional Immunities of States and Their Property* 2004 drew on this approach. The State property that ‘is intended for use by the State for other than government non-commercial purposes’ may not benefit from immunity of enforcement.

In contrast, the US *Foreign Sovereign Immunities Act* 1976 did not provide for the ‘intended use’ of State property. Moreover, In *Re Prejudgment Garnishment against National Iranian Oil Company*, the German Federal Constitutional Court addressed that although any credit balances derived from oil revenues in the account of National Iranian Oil Company were required to be transferred to the Iran budget, but it was no bar to proceedings for the attachment of the account in a German bank. The account of National Iranian Oil Company was used as means of transferring the oil revenues to the State budget, but the Constitutional Court did not regard it as a property for sovereign purpose, in that the oil revenues were the commercial profit and before the transfer they did not assume the sovereign functions. Actually, the use of word ‘be intended for use’ is not precise. On condition that the use of property is changing constantly, whether the courts determine the functions of State property by the current use or by the future use is an intractable problem. The expression ‘State property is in use or intended for use’ lurks a logical contradiction which may cause the uncertainty of the application of law.

As a result, the time relationship between State property and commercial use shall be determined by the present formula.

## (2) Territorial Limitation

The Article 19 (c) of UN *Convention on Jurisdictional Immunities on States and Their Property* 2004 further requires that the property against which the execution measures are sought be in the territory of the State of the forum. The territorial connections are necessary for the enforcement. Only the property is situated in the forum State, it is possible for the courts of forum State to take execution measures.

A preconceived opinion argues that the specification of the territory of the forum State may be taken to suggest that measures may not be taken against State property

in one State in execution of a judgment rendered by a court of another.<sup>306</sup> In general, taking measures against a foreign State property has big political risks. The courts of requested State are unlikely to recognize and enforce a judgment against State property rendered by another State at the expense of its national interests. So there is a popular view that the attachment or execution against State property shall be carried out by the court of adjudication. However, closer analysis reveals that is a misunderstanding. For example, the claimant A in the court of State C brought an action against State B, and won the case. But when the claimant A applied to enforcement of the judgment against State B's property, State B transferred its property from State C to State D in order to circumvent the execution measures. Therefore, the claimant A had to apply for the courts of State D to enforce the judgment by a proceeding for the recognition of judgment. It indicates that the court of adjudication may be separated from the court of execution. As a matter of fact, by the process for recognition and enforcement of judgment, a court of one State may take execution measures against property located in its territory on the grounds of a judgment rendered by a court of another State. In this light, the State where the property is located is to be considered 'the State of the forum' for the purpose of Article 19 (c), no matter whether a judgment is rendered by it or not.

According to the wording of Article 19 (c) of the UN Convention, the use of conjunction 'and' signifies the logical relations between the commercial use of property and the territory of the forum: both are indispensable.

### (3) Entity Connections

According to the Article 2 (1) (b) of the UN Convention, the 'State' in regime of State immunity has a rather broad meaning. The definition of State shows an expanding tendency, and accordingly it leads up to the uncertainty of the category of State property. In practice, the State property must be specified in order to turn into the object of execution.

The Article 1610 (a) (2) of US *Foreign Sovereign Immunities Act* 1976 provides that the property being executed 'is or was used for the commercial activity upon which the claim is based.' The use of word 'upon which the claim is based' defines the scope of the property for commercial purposes, which indicates the property used in commercial activity may not be the object of execution, and only the property

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<sup>306</sup> See: Roger O'keefe, Christian J. Tams, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary*, Oxford University Press (2013), p. 323.

related to the commercial activity upon which the claim is based can be executed by the US courts.

International Law Commission has proposed a policy of limiting the scope of State property available for execution by the connecting factors as follows: the property has a connection with the object of claim, or with the agency or instrumentality against which the proceeding was directed.<sup>307</sup> It was finally adopted by International Law Commission in its Article 18, *Draft Articles on Jurisdictional Immunities of States and Their Property* 1991.<sup>308</sup> Some Governments suggested the necessity to clarify the scope of the provision and to avoid unnecessary limitation on the cases in which property might be legitimately be subject to the execution measures, while the other insisted on the importance of the principle of State immunity from execution measures.<sup>309</sup> The official text of UN *Convention on Jurisdictional Immunities of States and Their Property* was clearly defined and simplified. It deleted any reference to subject-matter of proceedings, such as the wording ‘having a connection with the object of the claim’, merely mentioned that,

“..... *provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.*”

Compared with the former, the present provision narrowed the scope of the property that can be executed. Some developed countries considered that it may unwarrantably enlarge the circumstances in which States can invoke immunity for their property in use for commercial activities. But the Convention required a maximum common divisor of international community, so it endeavored to reach a carefully limited execution rather than its total prohibition.

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<sup>307</sup> A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(a) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

See: *Yearbook of the International Law Commission* (1986), Volume II, Part (2), 38<sup>th</sup> session, 7<sup>th</sup> Report, p. 11.

<sup>308</sup> *Report of the International Law Commission: on the work of its forty-third session*, (April 29<sup>th</sup> ~ July 21<sup>st</sup> 1991) General Assembly Official Records: Forty-Six Session, Supplement No. 10 (A/46/10), p. 142.

<sup>309</sup> See: Michael M. Wood, Arnold A. Pronto, *The International Law Commission (1999~2009): Volume IV: Treaties, Final Draft Articles and Other Materials*, Oxford University Press (2011), p. 48.

## 4. THE STATE PROPERTY CATEGORIZED AS IMMUNE

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### 4.1 THE RESTRICTION ON EXECUTION OF SOVEREIGN FUNCTIONS

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As mentioned, with the development of restrictive doctrine of immunity from adjudication in international practice, the immunity in the process for enforcement is increasingly showing a restrictive trend.<sup>310</sup> The accumulated precedents validated a custom that execution measures may be taken against State property relating to commercial transactions. ‘If exercise of jurisdiction is permissible, attachment on the local assets of a foreign sovereign is also admissible.’<sup>311</sup> But the international practice has not gone so far. Even in the field of commercial transactions, the executions measures are still subject to several restrictions, since some State property used for commercial activities may service to the sovereign functions as well. Actually, the use of State property for commercial purpose is not necessarily able to prove that it does not assume the sovereign functions.<sup>312</sup> An important example is the mixed bank account in which part of the account is used for sovereign purposes and the other part is used for commercial activities. In *Philippine Embassy Bank Account Case*,<sup>313</sup> Constitutional Court of Germany addressed that international law conferred a wide area of protection on the foreign State,

*“Any differentiation according to the financial position of the foreign State would infringe the principle of the sovereign equality of States ..... Arguments based on the forum State law’s limitation of the foreign State’s discretion and control of the bank account must not be*

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<sup>310</sup> As some scholar observed, allowing plaintiffs to proceed against foreign States and then to withhold from them the fruits of successful litigation through immunity from execution might put them into the doubly frustrating position of being left with an unenforceable judgment with expensive legal costs, although the majority views of Governments as well as scholars were that immunity from measures of constraint was separate from the jurisdictional immunity of a State. See: Christoph Schreuer, *State Immunity: Some Recent Developments*, Cambridge University Press (1988), p. 125.

<sup>311</sup> ‘Only the property which is dedicated to the public service of the State is exempt from forcible attachment and execution.’ See: *Philippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13<sup>th</sup> December 1977, 46 BverfGE 342; 65 ILR 146.

<sup>312</sup> That is why UN *Convention on Jurisdictional Immunities of States and Their Property* employs the wording ‘for other than government non-commercial purposes’ rather than ‘for commercial purposes’ in Article 19 (c).

<sup>313</sup> See: *Philippine Embassy Bank Account Case*, Federal Republic of Germany, Federal Constitutional Court, 13<sup>th</sup> December 1977, 46 BverfGE 342; 65 ILR 146.

*allowed to abridge the immunity afforded by international law to the mission to enable it to function.”*

The claims against a mixed bank account of the embassy of a foreign State which services to both sovereign purposes and commercial activities are not subject to execution measures by the forum State.

In some cases, the property to be executed is often related to the vitals of national economy such as infrastructure, resource exploitation, international business and trade. For some countries with weak economic situations, once their assets were attached or executed, it is bound to damage the development of national economy, and may cause the paralysis of State operations thereby affecting the realization of sovereign functions. A heavy debt burden is sufficient to cause an undeveloped country to the brink of bankruptcy. Even though the State property is wholly used for commercial purposes, taking execution measures against it should also be prudent, because the inappropriate execution measures would bring the development of a country into a stagnant state, and may endanger public interests and arise out of the chaos of social orders of the country.

Furthermore, private parties and national courts may apply the law of State immunity inappropriately for their own benefits. In some circumstances, the execution measures may be abused by the private party to settle the irrelevant disputes.<sup>314</sup> In the case *Prefecture of Voiotia v. Federal Republic of Germany*,<sup>315</sup> the Greek Supreme Court invoked the exception of personal injuries to State immunity to order reparation for war crimes committed by German military forces during the Second World War. The Court sought to enforce the judgment against Germany by selling the assets of the German Goethe Institute and another German academic institute in Athens. Obviously, the cultural institutes with separate legal personality undertook the task of spreading German culture, and belonged to the property in use for sovereign purposes.

As a result, it is necessary for international law to set up a regime to defend the executed State's sovereign functions and public orders from infringement, as well as to prevent the forum State from abusing the exceptions to immunity in the process for enforcement. The regime is embodied in the Article 21 of the UN *Convention on Jurisdictional Immunities of States and Their Property*, which enumerates specific

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<sup>314</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p. 655.

<sup>315</sup> See: *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 11/2000, Areios Pagos (Hellenic Supreme Court), 4<sup>th</sup> May 2000; 123 ILR 513.

categories of State property that cannot be executed. The specific categories of property for sovereign use are as follows,

*“(a) property, including any bank account, which is used or intended for use in the performance of the functions of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences;*

*(b) property of a military character or used or intended for use in performance of military functions;*

*(c) property of the central bank or other monetary authority of the State;*

*(d) property forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale;*

*(e) property forming part of an exhibition of objects of scientific, cultural or historical interest and not placed or intended to be placed on sale.”*

As commented by International Law Commission, the provision is designed to provide some protection for certain specific categories of property by excluding them from any presumption or implication of consent to measures of constraint.<sup>316</sup>

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## 4.2 SPECIFIC CATEGORIES OF PROPERTY FOR SOVEREIGN USE

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In view of the apparent political function and public purpose of specific categories of State property, its sovereign nature was confirmed in a constructive way by international practice. The property has the superiority status for the sovereign identity, so it shall benefit from immunity of enforcement even if it is used for commercial purposes. Essentially, the specific categories of property is deemed ‘specifically in use or intended for use for other than government non-commercial purposes’ because of its sovereign identity; whereas not because of its use in practice the property is categorized as sovereign property.

### (1) The Diplomatic Property

In general, the diplomatic property shall be vested in the scope of protection of diplomatic immunity. But in view of the trend in certain jurisdictions to attach or

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<sup>316</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 19, para. 1.

freeze assets of foreign States, the protection by the law of State immunity is deemed necessary and timely.

The Article 21 (1) (a) of the UN Convention affirmed the rules of international law for the exemption of diplomatic property from measures of constraint. In practice, the embassy, consulate and other property in which the official duties are performed generally would not be identified as the object of enforcement. Difficulties sometimes arise regarding the ‘mixed bank account’ which is maintained in the name of a diplomatic mission, but occasionally used for commercial activities. The judicial practice of States seems to propose that the balance of such a bank account to the credit of the foreign State should be immune from an attachment order issued by the court of forum State.<sup>317</sup> In reality, it is impractical to classify the funds of bank account of a foreign diplomatic mission, for it may result in a violation of the sovereignty of that foreign State.

## (2) The Military Property

Admittedly, national military shoulders the mission of defending the sovereignty of a State so the military property listed in Article 21 (1) (b) of the UN Convention is assumed to be the property with sovereign functions. Such property is nearly entitled to absolute immunity in practice.

On account of the importance and sensitivity of military, the category of military property is capable of a wider content. In the comment of International Law Commission, ‘military’ includes the navy, air force and army.<sup>318</sup> Some legislation adopted a very wide definition. For example, US *Foreign Sovereign Immunities Act* 1976 in the Article 1611 (b) (2) described the military property which refers to the property is, or is intended to be, used in connection with a military activity and,

“(i) *is of a military character, or*

(ii) *is under the control of a military authority or defense agency.*”

As mentioned by the House Report, the design of wide category of immune property was to avoid the circumstances that a foreign State gave permission for execution measures on military property of the US abroad under a reciprocal application of the Act.

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<sup>317</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 19, para. 3.

<sup>318</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 19, para. 4.

### (3) The Property of the Central Bank

The Article 21 (1) (c) of the UN Convention excludes ‘property of the central bank’ from the exceptions provided by the Article 19 (c). Actually, due to the differences of national economic system, the status and role of central bank in government structure are quite different from States to States. For instance, in the countries with compound central bank system, the central bank is not only responsible for the issuance of currency, financial supervision, money supply, interest rates and exchange control, but also engages in the business of ordinary commercial bank such as loans and savings. So it has the functions both of public law and of private law. Some national courts do not approve of qualifying as immunity by the identity of central bank. The judicial practice of Civil law system does not confer immune protection on property of the central bank in general.<sup>319</sup> In contrast, US *Foreign Sovereign Immunities Act* gives immunity to the property of a foreign central bank in Article 1611 (b) (1). Similarly, the UK *State Immunity Act* in Article 14 (4) provides that property of a State’s central bank shall not be regarded as in use or intended for use for commercial purposes. In addition, China confers the special protection on the property of a foreign central bank by an Act, namely Law of China on Judicial Immunity from Compulsory Measures concerning the Assets of Foreign Central Banks. The Article 1 states that,

*“The People’s Republic of China endow the asset of foreign central banks with judicial immunity of compulsory measures of assets save and implementation, however, in case the foreign central banks or the countries give up in written form, or the assets are appointed to be used in assets save and implementation, the judicial immunity of compulsory measures will be remained.”*

Finally, the UN Convention adopts the approach of US and UK legislation conferring greater and wider immune protection from execution for the property of a central bank.<sup>320</sup>

### (4) The Cultural Property

The Article 21 (1) (d) and (e) of the UN Convention is about the exemption from execution of cultural property. But such property benefits from protection of State immunity when it does not serve for commercial transactions.

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<sup>319</sup> See: 龚刃韧: 《国家豁免问题的比较研究》, 北京大学出版社 2005 年版, 第 291 页。

<sup>320</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.646.



In conclusion, each of these specific categories of property, by its very nature, must be taken to be in use or intended for use for sovereign purposes removed from any commercial considerations.<sup>321</sup> Therefore, the specific categories of property shall be immune from the process for enforcement. It is worth noting that a State may waive immunity for the property for sovereign use by consent.

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<sup>321</sup> See: International Law Commission, *Commentary on Draft Articles on Jurisdictional Immunities of States and Their Property* (1991), draft Article 19, para. 2.



## CHAPTER 6

# THE DEVELOPMENT OF STATE IMMUNITY IN COMMERCIAL TRANSACTIONS AND THE STRATEGIES OF CHINA

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The social idea is changing constantly as time goes by. In modern times, international community is moving towards the system of equalization. In this context, the international general understandings require not only States' sovereignty shall be equal with each other, but also private parties shall be in an equal status with the States when they engage in the non-sovereign activities. The changes of value and idea of international community influence on the evolution of international law, as a result, in the field of private autonomy, a State engaging in commercial activities in competition with a private party shall be answerable in the courts of another State. The practice leads up to the restrictive State immunity. It has increasingly become a customary international law.

However, until recently, Chinese government is still in conformity with the absolute principle of State immunity, and tends to believe the absolute immunity rather than restrictive immunity is a kind of international law. Actually, in view of the intricacies international situation, adherence to absolute State immunity is likely to result to the damage to national interests, and to hinder the realization of international justice. Consequently, China should review the issues of State immunity within the sphere of private autonomy, and accordingly adjusts and improves the political policy and legal choice in line with the emerging international consensus and its own national interests.

## 1. THE PROCEDURAL VALUE OF STATE IMMUNITY

As a principle of international law, State immunity denotes that a sovereign State and its property is exempt from the jurisdiction of the courts of another State, without the consent of the former State.<sup>322</sup> This international law principle is recognized both in judicial practice of international community and in a set of legal instruments.

The United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 reaffirmed the normative status of State immunity in international law. As the Article 5 of the Convention mentioned,

*“A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.”*

However, some jurisprudents hold the view that State immunity is, to a large extent, a strategic means to protect the privilege of sovereign States, and has very little normative elements in law. So they set forth the theory of abolishing State immunity in 1960s.<sup>323</sup> From the perspective of functionalism, the abolition of State immunity will not impair the stability of international order because ‘the rules of private international law relating to *forum non conveniens* or applicable law would in most cases result in the dismissal of the private party’s claim.’<sup>324</sup> So currently an important question appears: has the inherent rationality and value vanished for the system of State immunity? In fact, the International Court of Justice reaffirmed the procedural value of State immunity in the judgment of the case *Jurisdictional Immunity of the State*<sup>325</sup> in February 2012.

The theory causing a significant challenge to State immunity emerges from the field of human rights. From the 1980s, it has been asserted in state practice and in theory that the application of State immunity should not extend to violations of fundamental rights, regardless of whether the violation is ‘*actum jure imperii*’ of States.<sup>326</sup> In the context of the internationalization of human rights all over the world, some courts of forum State are regarded the protection to human rights as ‘*jus cogens*’

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<sup>322</sup>See: 黄进: 《国家及其财产豁免问题研究》, 中国政法大学出版社 1987 版, 第 1 页。

<sup>323</sup>See: Richard A. Falk, *The Role of Domestic Courts in the International Legal Order*, (1964), Chapter vii, pp. 139~145.

<sup>324</sup>See: Elihu Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge University Press (1991), pp. 55~57.

<sup>325</sup>See: *Germany v. Italy: Greece intervening*, <http://www.icj-cij.org/docket/files/143/16883.pdf>, visited on 31<sup>th</sup> May, 2017.

<sup>326</sup> See: 坂巻静佳: 「重大な人権侵害行為に対する国家免除否定論の展開」, 「社会科学研究」第 60 卷 2 号 (2009 年), 33 頁~66 頁。

to overrule the value of State immunity.<sup>327</sup> For example, in the case *Ferrini v. Germany*,<sup>328</sup> the Cassation Court of Italy held that the protection to human rights is within the scope of international *jus cogens*. Human rights, as the core value of the international community, lie at the top of the hierarchy of norms and take precedence over other values of international law. At last, the Cassation Court of Italy denied the jurisdictional immunity of Germany on this ground. Similarly, the court of Greece also overruled State immunity Germany claimed on the ground of the priority of the value of human rights. In view of the increasingly accumulated cases on this issue, more and more States start to question whether or not State immunity is still the principle of international law. The reserved domain of States has been greatly reduced by the compulsory procedures for the responsibility to protection of human rights, and this imposed an unprecedented challenge to the legitimacy of State immunity.<sup>329</sup>

However, in the case *Jurisdictional Immunity of the State*, International Court of Justice reaffirmed the legitimacy of State immunity in its judgment. This international litigation mainly involves the value controversy between States' sovereign interests and human rights protection. In essence, the focus of the dispute is to identify the legitimacy of State immunity in international law. Germany no longer acted as the defender of human rights. On the contrary, based on the national interests, it claimed that the exercise of jurisdiction by the Italian court against Germany is in breach of international obligations and violates the right to immunity of Germany in international law. Correspondingly, Italy contended that Germany failed to provide sufficient and effective reparations to victims of the Second World War, and thus incurred the international responsibility to protect fundamental human rights. The exercise of jurisdiction by the court of Italy constituted the 'last relief' to claimants such as Ferrini.

On the basis of listening to the views of both parties, the International Court of Justice in its judgment held that, in accordance with customary international law, the object of State immunity covers any conducts of a State, and a State's offence against international law and the offence of gravity cannot constitute an obstacle to invoke State immunity. As a result, it is inappropriate for the Italian court to deny the immunity of Germany on the ground that the war crimes of Germany are in serious

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<sup>327</sup> See: 李庆明:《国家豁免与诉诸法院之权利》,载《环球法律评论》2012年第6期。

<sup>328</sup> See: *Ferrini v. Federal Republic of Germany*, Italian Ct of Cassation, Judgment No. 5044 of 11 March 2004.

<sup>329</sup> See: Hazel Fox CMG QC, *The Law of State Immunity*, 2<sup>nd</sup> edition, Oxford University Press (2008), p.738.

violation of international law: *jus cogens*.<sup>330</sup> Moreover, the validity of State immunity derives from international law rather than from the ‘effectiveness of relief measures’, and the ‘last relief’ to human rights cannot be the reasonable ground for the court of Italy to exercise jurisdiction on Germany. In fact, Germany has made just reparations to the victims of the War, so the expression ‘last relief’ is not accurate. More importantly, International Court of Justice pointed out that, the human rights protection is indeed not in conflict with State immunity, because State immunity is a procedural rule in determining whether or not the court of forum State can exercise jurisdiction, while whether the defendant State infringes human rights or not is a matter of substantive law after the jurisdiction being determined. The jurisdictional immunity only bars a proceeding to continue in procedure instead of exempting a State from its liabilities in substantive law. Obviously, the law of State immunity and the law of human rights belong to different systems of international law: State immunity primarily falls into procedural issues, while human rights largely reflect substantive issue of international law. There is no intrinsic conflict between them. The majority of the International Court of Justice denied the past argumentation of holding ‘State immunity’ and ‘protection to human rights’ as opposite to each other, and considered that the protection to human rights did not constitute a general exception to State immunity. Finally, International Court of Justice made a judgment in favor of Germany’s major claims. It decided that the exercise of jurisdiction by the Italian court against Germany is in breach of the obligations of international law and infringes the jurisdictional immunity entitled to Germany.

The influence of the case *Jurisdictional Immunity of the State* is far-reaching. The International Court of Justice in this case emphasizes the procedural values of State immunity for the international legal order. It is a significant refutation of the claim of abolition of State immunity.

Until recent, the criticism on State immunity is largely rooted on that State immunity lacks normative elements, so it is usually regarded as an expedient for the respondent State to acquire privilege. Nevertheless, in the case *Jurisdictional Immunity of the State*, International Court of Justice affirmed the procedural value of State immunity, and reshaped the normative status in the system of international

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<sup>330</sup> See: 谢海霞: 《论豁免权与强行法关系的新趋势——以“德国诉意大利案”为例》, 载《法学论坛》2014年第6期。

law.<sup>331</sup> As far as International Court of Justice concerned, State immunity is neither out of date nor ‘tends to die’, but continues to function in the sovereign-based international order.<sup>332</sup> Even in the era dominated by restrictive State immunity, when a State is accused as a defendant, the court of forum State must first examine whether the case is constituted where State immunity cannot be invoked. Otherwise, the court shall not exercise jurisdiction or take constraint measures against the respondent State. This indicates that, in any international litigation pertaining to States, State immunity, as an important procedural principle of international law, can never be bypassed.

Consequently, even in modern time, the principle of State immunity still plays a very important role in maintaining the order of international law. As the member of international community, every State must demonstrate respect for the international general practice on State immunity.

## 2. THE TENDENCY OF STATE IMMUNITY IN COMMERCIAL TRANSACTIONS AND CAUSES THEREOF

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The procedural priority of the principle of State immunity is not always appropriate and effective in all scenarios. Generally, the law of State immunity is designed to ensure the sovereign functions of a State are not affected by the exercise of jurisdiction of the court of another State.<sup>333</sup> Once the conducts of a State do not have the sovereign in nature, then the intention of the law of State immunity that maintain the normal operation of the sovereign functions of the State will no longer exist. Therefore, in commercial transaction where no sovereign function of State is performed, conferment the immunity on a State is not necessary. Due to reason, it is

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<sup>331</sup> See: 王佳: 《国际法院“国家管辖豁免案”述评》, 载《中国国际法年刊》(2012年), 法律出版社2013年版, 第261页~262页。

<sup>332</sup> See: Paul B. Stephan, *Sovereign Immunity and the International Court of Justice: The State System Triumphant*, from *Foreign Affairs Litigation in United States Courts*, edited by John Norton Moore, Martinus Nijhoff Publishers (2013), p. 69.

<sup>333</sup> See: Paola Gaeta, *Immunity of States and State Officials: A Major Stumbling Block to Judicial Scrutiny?* from *Realizing the Utopia: The Future of International Law*, edited by Antonio Cassese, Oxford University Press (2012), pp.227~238.

widely accepted in international practice that a State cannot invoke sovereign immunity before the court of another State in commercial transactions.

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## 2.1 THE EFFECT OF DIVISION OF PUBLIC LAW AND PRIVATE LAW

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Among proceedings in which State immunity cannot be invoked, proceedings relating to commercial transactions are the most typical private law proceedings. As a matter of fact, if the wording ‘State’ is not mentioned, it is easy for a commercial transaction to be identified as a private law act. However, once a State is involved, the nature of a commercial transaction becomes ambiguous. In the western community, the binary opposition between ‘civil society’ and ‘political State’ leads to the division of private law and public law. But, sometimes it is difficult to distinguish between private law relations and public law relations. Conventionally, the identity of the subject is considered as an important basis for distinguishing private law from public law. As a result, all acts of a State are included in the scope of public law without exception, and therefore have the sovereign nature. This causes the stand of doctrine of absolute immunity. However, in practice, this method cannot accurately reflect the inherent nature of legal relations. For example, a commercial transaction is a transaction relation concluded between equal parties based on autonomy of party. Even if a State participates as a party to a commercial transaction, the ‘structure of equal rights’ remains unchanged, and in essence, such transaction relation is still within the scope of private law.

The idea of private autonomy provides a theoretical support to the ‘denial of resorting to state immunity’ in theory. Generally, the private autonomy derives from the universal principle that ‘an individual enters into legal relations for himself/herself based on his/her will, and should take responsibility for his/her actions in legal relations’. The application of the principle of private autonomy indicates the recognition of an individual’s ‘own will’ in entering into legal relations.<sup>334</sup> When a State participates in a commercial transaction, it does not issue orders as a sovereign; instead, it intends to enter into a contractual relation via the communication and

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<sup>334</sup> See: [德] 维尔纳·弗卢梅：《法律行为论》，迟颖译，法律出版社 2013 年版，第 7 页。



negotiation of equal intentions, which, in essence, is an act of defining rights under the autonomy of private law. On the occasion that the contractual relation is formed, the State, as a party to the transaction, definitely has its prediction of the unfavorable legal consequences that may arise from the contract, that is, a breach of any party may cause a risk of litigation. Despite such a risk, the State still chooses to take part in the transaction. This indicates that the State is willing to bear the legal consequences of being sued, which implies that the State has made the declaration by its action of acceptance of the exercise of jurisdiction of the court of another State. According to the logic of autonomy theory of private law, it may be deduced that non-immunity shall exist in proceedings relating to commercial transactions, because under the framework of private autonomy, the parties to a transaction shall respect for the reasonable predictions of each other, and must be liable to corresponding legal consequences for the acts of defining rights that they promised, even if either party is a State. As a result, the conduct of a State results in the case of non-immunity in commercial transactions. In international practice, the courts of some Civil Law countries developed the doctrine of ‘dual acts of State’ based on the division of public law and private law.<sup>335</sup>

According to the theory of ‘dual acts of State’, the acts of States can be classified into two categories: the *acta jure imperii* for the purposes of political governance and sovereign functions, and the *acta jure gestionis* conducted by States in social administration and commercial transactions. The *acta jure imperii* of a State mainly include political, diplomatic, and military acts, which largely involve political obedience and special power relations. Obviously, they are within the scope of sovereignty of States. Such acts are subject to immunity according to the law of State immunity. On the contrary, the *acta jure gestionis* of a State mainly involve the economy, trade, and social services. A state generally conducts such acts on an equal status with a private party, so such acts are in essence civil legal relations between equal subjects rather than being related to sovereignty affairs.

Logically speaking, the doctrine of absolute immunity decides an act based on identity, which means if acts conducted by States, then they are in sovereignty. While the understanding of restrictive immunity aims to decide a litigant’s identity by its acts, which means when acts conducted by States are not in sovereign, States should

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<sup>335</sup> See: 龚刃韧：《国家豁免问题的比较研究》，北京大学出版社 2005 年版，第 312 页。

be considered as ‘private’ in the act, and in such cases it is unnecessary to grant the immunity to the States.<sup>336</sup> The classification of acts of States, to a large extent, indicates that States does not always appear as the sovereign entities. The theory of ‘dual acts of State’ provides the possibility to relativize State immunity in methodology.

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## 2.2 THE RESULT OF EFFICIENCY OPTIMIZATION

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According to the trade theory in economics, a commercial transaction is a result of bargaining between parties thereto, and the logic of the trade lies in that both parties to the transaction consider it as ‘profitable’. In fact, common understandings usually are reached in communication and cooperation, though sometimes such common understandings need to be adjusted and regulated by laws. However, the agreements reached voluntarily by people are usually more efficient than the rules imposed by external elements. Because laws are unnecessary and meaningless to successful transactions, and become necessary only on the occasion that transactions tend to fail.<sup>337</sup> As a result, if a transaction cannot be realized while no legal redress is available, parties will choose to give up such a transaction due to the huge risk costs.

From the perspective of optimizing efficiency, the design of the system of State immunity actually prevents the legal reliefs in cases to a failed transaction, resulting in that the transaction is out of the control of rule of law. Under the protection of the law of State immunity, States tend to distort the reciprocal trading structure, and sometimes even expect the transaction failed and deliberately breach the agreement. Apparently, this undermines the essence of transaction. Over time, no private party would be willing to take part in the business with States. So, States may benefit from one transaction by taking advantage of the immunity, but States may lose its credibility and result in the decline of the number of transactions, and ultimately damage the overall interests of States. It can be seen that claim to State immunity in commercial transactions is more like a zero-sum game.

According to the principle of *Coase theorem*:

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<sup>336</sup> See: 赵建文：《国家豁免的本质、适用标准和发展趋势》，载《法学家》2005年第6期。

<sup>337</sup> [美] 罗伯特·考特、托马斯·尤伦：《法和经济学》，史晋川、董雪兵等译，上海人民出版社2012年版，第73页。

*“The allocation of resources is invariant to the assignment of private property rights under zero transaction cost and zero income effect.”<sup>338</sup>*

The theorem suggests that in efficiency-oriented commercial transactions, the effectiveness of the transaction must be ensured by reducing transaction costs. However, the law of State immunity expands the moral hazard of transactions, virtually increasing the cost of transactions. It is contrary to the spirit and essential requirements of commercial transactions. Therefore, the application of the law of State immunity must be restricted by possible means so as to maintain the efficiency of commercial transactions. Specifically, two ways are available: one is to reach agreements to ‘waive’ the immunity, or select arbitration as a means of resolving disputes in transactions; the other is to introduce the general rule of non-immunity exists in commercial transactions.

In fact, it is a proper solution to restrict the scope of State immunity in an institutionalized way, since it avoids the transaction costs incurred by additional negotiations and also fits the efficient requirements of commercial transactions. In international practice, despite the existence of the rule of waiver of immunity, more and more States choose to establish the rule in their national legislation: ‘States cannot claim immunity in the proceedings relating to commercial transactions.’

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## 2.3 THE BIAS OF BENEFIT MECHANISM

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While State immunity is a generally recognized principle of international law, in view of whether or not exercise of jurisdiction also relates to the sovereignty, so the principle of State immunity must be subject to the regulation of the municipal law of States. In accordance with State sovereignty theory, an antinomy may appear in the field of jurisdiction. On one side, all States are equal in sovereignty, so no State has the right to impose its own will on other States; in practice, a universal rule is gradually accepted by the international community: States waive a part of jurisdiction with each other so as to avoid the exercise of jurisdiction on other sovereigns. It is the theoretical origin of principle of State immunity. On the other side, State immunity is a general principle that comes from practice and customs. Its content is not as specific

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<sup>338</sup> See: Ronald H. Coase, *The Problem of Social Cost*, Vol. 3, *The Journal of Law & Economics*, October 3<sup>rd</sup>, 1960.

as we imagine. States still need to design jurisdictional rules based on their own conditions. As a matter of fact, in the design of rules of jurisdiction, a State, to what extent, accepts the law of immunity is dependent on its own will, which is a matter of sovereignty.

In practice, States generally formulate and implement jurisdiction policies corresponding to their national interests. Some economic powers tend to relativize State immunity by reducing the scope thereof based on the 'act criterion' in order to protect their enterprises' economic interests abroad, while the undeveloped States prefer the 'identity criterion' to continue the principle of absolute immunity in order to safeguard their economic sovereignty. However, it is largely the plaintiff's right to choose before which State's courts he file a lawsuit. Affected by the utilitarianism, the plaintiff is unlikely to file a lawsuit before the courts of a State that abides by absolute immunity, because it can be imagined that the court of such State will grant jurisdictional immunity to the respondent State. Definitely, the plaintiff must give priority to seeking judicial remedies from the court of States that pursues restrictive immunity.

Because of the fact that the plaintiff has the choice of forum States, the principle of State immunity shows a bias of the benefit mechanism. This means the States that take the lead in transferring to the restrictive State immunity are likely to establish their advantages in jurisdiction competition with the States that adhere to absolute State immunity.

More seriously, since most of cases involving State immunity are filed before the courts of States implementing restrictive State immunity, these States' courts have more opportunity to express their opinions in the judgments, and the judgments may be cited and accepted by the courts of other States in practice and gradually developed into customary international law. As a result, the accumulated judgments would rebuild the rules of State immunity. On the contrary, those States that follow the absolute State immunity are not so lucky. They would lose the opportunity to express their opinions via judgments. Moreover, although they refuse to exercise of jurisdiction over other States, they cannot avoid the cases of being sued as a respondent in the courts of other States. For example, the government of China always insists on the absolute doctrine of State immunity, but this does not prevent the fact from appearing that China is frequently sued in foreign courts as a defendant. Instead, this eliminates the possibility of China becoming the forum State. Objectively,

very few cases involving a foreign State as a defendant were heard by Chinese courts. In 1927, the Joint Hearing Tribunal of Shanghai<sup>339</sup> tried the case *Rizaeff Frères v. The Soviet Mercantile Fleet*, and in 2012, the Hong Kong courts tried the case *FG Hemisphere Associates LLC v. Democratic Republic of Congo and Others*. Strictly speaking, both courts of the two cases are not within the judicial system of China.

In view of this situation, in order to ensure the competitive advantage in international business and to expand the jurisdiction in international level, many States have implemented a policy of attending litigation, so turned to the position of restrictive State immunity.

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## 2.4 THE COMMON UNDERSTANDINGS OF INTERNATIONAL PRACTICE

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One statistics show that both developed countries and undeveloped countries have similar experiences of being sued in foreign courts. In terms of probability, any State may be in the status of defendant, even US the most powerful State in the world. According to a statistics, ‘the US, whose courts have accepted more actions against foreign States than the rest of States put together, is the State sued most.’<sup>340</sup> It will become a common phenomenon in future that a State is sued in the courts of another State. On this background, all States may face a prisoner dilemma. A state that first adopts the restrictive State immunity is likely to establish, to a certain extent, the advantage in exercise of jurisdiction by virtue of the inertia effect in the choice of the plaintiff.

At the same time, as the States increasingly take part in the domain of private autonomy especially commercial transactions, the phenomenon of States being sued is gradually increasing. By virtue of the effect of bias of benefit mechanism, when some States adopted restrictive principle of State immunity, other States have to accept this principle; otherwise, it would lead to imbalances in the distribution of international jurisdictions. Although it is still hard to conclude that the restrictive doctrine of State immunity has become an international law at present, the repeated State practices

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<sup>339</sup> The organization is a performance of imperialist extraterritoriality, in Chinese named ‘上海会审公廨’.

<sup>340</sup> See: Xiaodong Yang, *State Immunity in International Law*, Cambridge University Press (2012), p. 25.

proved that at least ‘non-immunity in commercial transactions’ has been widely accepted by States. The Article 4 and Article 7 of *European Convention on State Immunity* 1972 established the rule that immunity from jurisdiction shall not be claimed in contractual obligations and industrial, commercial or financial activities. The Article 1605 (a) (2) of US *Foreign Sovereign Immunities Act* 1976 provided that the case of commercial activities is a general exception to State immunity. Moreover, the Article 1610 (a) and (b) further introduced the provision that the property of foreign States used for commercial purposes is not immune from attachment or execution in the US. Later, in order to take the advantageous position in the competition of international jurisdiction with the US, the UK has rapidly enacted its *State Immunity Act* in 1978. The Article 3 confirmed that a State is not immune as respects proceedings relating to commercial transaction entered into by the State. And the Article 13 (4) demonstrated that States’ property which is for the time being in use or intended for use for commercial purpose shall be subject to any process for enforcement of a judgment or arbitration award. The UK *State Immunity Act* promoted the process of legislation on State immunity all over the world. Since then, Singapore, Canada, Pakistan, South Africa, Malaysia, Australia and Argentina promulgated their own laws on State immunity, all of which restated the rule that ‘State immunity cannot be invoked in commercial transaction proceedings’. After the UN *Convention on Jurisdictional Immunities of States and Their Property* was passed in 2004, the rule of ‘non-immunity in commercial transactions’ has become an *opinion juris sive necessitates* through the consistent practice of States.

Certainly, the judgment of the International Court of Justice in the case *Jurisdictional Immunity of the State* indicates that, as a principle of international law, State immunity still has significant procedural value in international legal system. However, such procedural value is mainly to prevent the sovereign conflicts between the forum State and the defendant State arising out of matters of jurisdiction. While in commercial transactions, the cause of action is usually not related to sovereignty or governmental affairs, so the legitimacy ‘procedural value’ of State immunity is vanishing or weakened. In other words, because commercial transactions are not implicated in sovereignty, the law institution ‘State immunity’ designed to avoid the sovereign conflicts becomes meaningless.

### 3. CHINA'S POSITION ON STATE IMMUNITY AND ITS TRANSFORMATION IN PRACTICE

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The practice that State immunity cannot be claimed in the field of commercial transactions is gradually becoming a common understanding of international community. Until recently, Chinese government always claims to insist on the absolute doctrine of State immunity, and advocates that the identity of State plays a decisive role in determining the immunity.<sup>341</sup> However, by virtue of the pressure from international public opinions and China's national interests, Chinese government has shown considerable flexibility in judicial policies in dealing with the issues of State immunity, especially in commercial transactions.<sup>342</sup>

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#### 3.1 THE DIPLOMATIC ATTITUDE OF CHINA

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In diplomatic statements, China always insists on the absolute doctrine of State immunity, and refused to accept the litigation in which foreign States are sued as defendants.<sup>343</sup> However, this position of China does not avoid the fact that China is often sued as the defendant in foreign courts. When China is sued abroad, Chinese government usually protests or negotiates via the diplomatic channel, which conveys China's position on the issue of State immunity indirectly.

In the *Hong Kong Aircraft Case*<sup>344</sup>, in accordance with the injunction of British Privy Council, the Supreme Court of Hong Kong seized the 71 airplanes of Central Air Transport Corporation and China National Aviation Corporation in Hong Kong, and awarded these airplanes to the Civil Air Transport Incorporation of US in the judgment in 1952.<sup>345</sup> The Chinese government protested sternly to the UK

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<sup>341</sup> See: *Democratic Republic of Congo and Others v. FG Hemisphere Associates LLC*, Hong Kong Court of Final Appeal, 8 September, 2011. 香港终审法院于是决定提请全国人大常委会解释宪法。2011年8月26日,全国人大常委会表决通过了关于香港特别行政区基本法第十三条第一款和第十九条的解释。根据这一解释,香港应当遵从中央政府在国家豁免问题上的一贯立场,给予刚果的国家财产以绝对豁免。

<sup>342</sup> See: 何志鹏:《主权豁免的中国立场》,载《政法论坛》2015年第3期。

<sup>343</sup> See: 曾涛:《中国在国家及其财产豁免问题上的实践及立场》,载《社会科学》2005年第5期。

<sup>344</sup> See: *Civil Air Transport Inc. v. Central Air Transport Corp.* [1953] AC 70 (PC).

<sup>345</sup> See: *Civil Air Transport Inc. v. Central Air Transport Corp.*, The American Journal of International Law, Vol. 47, No. 2, pp. 328~331.

government in diplomatic occasions. The Ministry of Foreign Affairs of China affirmed the official attitude about *Hong Kong Aircraft Case*. The Ministry of Foreign Affairs of China pointed out that, ‘British government has absolutely no authority to exercise jurisdiction over property of China in Hong Kong: the aircrafts of Central Air Transport Corporation and China National Aviation Corporation, and also has absolutely no entitlement to infringe, damage and transfer these aircrafts owned by China.’ Further, it requested the UK government to comply with the international law of State immunity, and ‘immediately cease the illegal acts that violated China’s sovereignty, and return the assets of the two Airlines which were seized by Hong Kong Court to the personnel entrusted by Central government of China.’ As a matter of fact, with respect to the *Hong Kong Aircraft Case* and other lawsuits involving State property of China, Chinese government consistently insists on the principle of sovereign immunity, protests any movements of exercise of jurisdiction of foreign courts, and refused to respond to such lawsuits before foreign courts.<sup>346</sup>

In *Jackson v. People’s Republic of China*, Chinese government refused to be present in the US courts from the beginning. With respect to the default judgment against China, the Ministry of Foreign Affairs of China made a solemn representation and protest in a memorandum delivered to the Department of State US in February 1983:

*“State sovereign immunity is an important principle of international law. China, as a sovereign State, is de jure entitled to judicial immunity. The practice of District Court of US to exercise jurisdiction on the litigation against a sovereign State and to make default judgments is in complete violation of the principle of sovereign equality of States, contrary to the requirements of the UN Charter. China resolutely resists the US action of imposing its own domestic law on other sovereigns. It violates China’s sovereignty and damages the dignity of the Chinese nation.”*

Despite that Chinese government held a tough attitude towards the case at the beginning, however after the diplomatic communication and negotiation with the US government, Chinese government took compromise measures by employing local lawyers to make defense on the US Court in the appeal. At last, the US Court of

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<sup>346</sup> See: 周鲠生：《国际法》（上册），商务印书馆 1976 年版，第 162 页。



Appeals for the Eleventh Circuit overturned that default judgment and found that China did have sovereignty away from the US courts and was granted State immunity, because the Court considered that the *Foreign Sovereign Immunities Act* did not apply retroactively to transactions before 1976.<sup>347</sup> This case indicates that, regarding the issue of State immunity, the diplomatic attitude of Chinese government is not immutable, but changes with situations flexibly.

Recently, it is increasingly unpopular to advocate for immunity through diplomatic channels. For example, in *Yang Rong v. Liaoning Provincial Government*<sup>348</sup>, the plaintiffs Yang Rong, Rhea Yeung and the Broadsino Finance Company filed an action against Liaoning Provincial Government in US for expropriation, the violation of international law and unjust enrichment pursuant to the commercial activity and expropriation exception to *Foreign Sovereign Immunities Act*. According to the plaintiff's claim and the *Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters*, the US District Court for the District of Columbia served the summons and complaint of the case to Ministry of Justice of China, and requested the Ministry to forward it to Liaoning provincial government. But the Ministry of Justice of China considered that any State's courts shall not exercise jurisdiction over other States or its governmental departments and political subdivisions pursuant to the international law of State immunity. Meanwhile, the Ministry believed that the case infringes the sovereignty of China, so it categorically rejected the request of US Court in accordance with Article 13 of *Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters*:

*"Where a request for service complies with the terms of the present Convention, the State addressed may refuse to comply therewith only if it deems that compliance would infringe its sovereignty or security."*

Later, in pursuit for judicial relief, the plaintiff's lawyer submitted the judicial documents to the US Department of State, and the US Department of State delivered, via its subordinate Special Consular Service Division, the summons and complaint to Ministry of Foreign Affairs of China. It clarified the position of US in this case: 'the expectancy of China to claim sovereign immunity by diplomatic mediation cannot be

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<sup>347</sup> See: *Jackson v. The People's Republic of China*, United States Court of Appeals for the Eleventh Circuit, 794 F.2d 1490 (1986).

<sup>348</sup> See: *Yang Rong v. Liaoning Provincial Government*, 362 F. Supp. 2d 83 (D.D.C. 2005).

accepted by the US courts.’ Obviously, as a decent constitutional State with the separation of powers, the US Department of State is merely executive branch of government, so it cannot interfere in judicial matters. The Liaoning provincial government had no choice but to appear in the US District Court for the District of Columbia, and requested the Court to dismiss the plaintiff’s claims by virtue of sovereign immunity. The Court is convinced that none of the exceptions to the *Foreign Sovereign Immunities Act* relied upon by the plaintiff are applicable in the case. Accordingly, the defendant’s motion to dismiss is granted. And then, the plaintiff refused to accept the judgment, and instituted an appeal in US Court of Appeals for the District of Columbia Circuit. Finally, the Court of Appeals decided to dismiss the appeal and affirmed the original judgment in 2006, because the Court is without subject matter jurisdiction and therefore may not entertain the appellants’ claims.

Although Chinese government claimed for State immunity via diplomatic channel in *Yang Rong v. Liaoning Provincial Government*, however, the US actually did not pay attention to this defense. Eventually, the Liaoning provincial government invoked jurisdictional immunity by participating in judicial procedure of the US Court. So this case indicates that, in the context of a wide range of restrictive State immunity, it is increasingly unpopular and impractical to claim State immunity by diplomatic mediation.

Furthermore, Chinese government also endeavored to propagate its diplomatic standpoint on State immunity on significant international occasions. In 1986, the International Law Commission’s *Draft Articles on Jurisdictional Immunities of States and Their Property* was adopted on the first reading in the 41<sup>st</sup> General Assembly of United Nations. The Secretary-General transmitted it to governments for comments and observations. The representative of China stated the standpoint about it in the General Observations:

*“In accordance with the principle of national sovereign equality and the legal maxim par in parem non habet jurisdictionem, it is an important principle of international law that States enjoy the right to jurisdictional immunity. A State is not subject to the jurisdiction of the courts of another State without its consent ..... The draft should recognize the general principle of international law in a clear and normative wording, and also should take into account the fact that the*

*implementation of that principle may be subject to certain exceptions, so as to achieve a reasonable balance between State immunity and its exceptions.”*<sup>349</sup>

Chinese government took a flexible attitude towards ‘exceptions to State immunity’ for the purpose of achieving unanimous understandings.

In 1991’s comments on the *Draft Articles on Jurisdictional Immunities of States and Their Property* which was adopted on the second reading in the 46<sup>th</sup> General Assembly of United Nations, Chinese government restated that ‘State immunity is an important principle of international law based on the State sovereignty and sovereign equality’, and point out the followings at the same time:

*“In order to maintain and promote the normal communications and economic and trade relations among States, it is permitted to provide some exceptions to jurisdictional immunity.”*

In 2001, the 56<sup>th</sup> General Assembly of United Nations, item 172 of the provisional agenda, Chinese government made its comments on the *Convention on Jurisdictional Immunities of States and Their Property*,

*“According to traditional international law, States and their property enjoy absolute jurisdictional immunities but, in recent years, the practice of States on this subject differs greatly. Some States apply the principle of absolute immunity, others the principle of restrictive immunity; even for States applying the principle of restrictive immunity, rules of internal laws vary. Therefore, the Government of China considers that for the topic of jurisdictional immunities of States and their property, it is imperative that a uniform rule be adopted.*

*“The Government of China also believes that an international rule adopted for such an important subject should be legally binding and operational, so that it could be applied directly by national courts in dealing with relevant cases. Thus, convening a diplomatic conference to adopt a convention is the best way truly to realize the goal of*

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<sup>349</sup> See: 中国国际法学会主编:《中国国际法年刊》,中国对外翻译出版公司 1987 年版,第 835 页。The original text is Chinese: ‘根据国家主权和主权平等原则以及平等者之间无管辖权的法律格言, 国家享有豁免是一项重要的国际法原则; 一国非经其同意不受他国法院管辖。……条约草案既应以明确的规范性语言确认国家豁免是国际法的一般性原则, 同时又要充分考虑到这一原则的实施可能受到某些例外的限制, 从而达到真正合理的平衡。’

*harmonizing the law and practice of States in the area of State immunity.*<sup>350</sup>

It can be seen that, Chinese government held a wait-and-see attitude on restrictive State immunity, and even at that time China did not oppose the formulation ‘non-immunity in commercial transactions’.

In December 2004, the UN *Convention on Jurisdictional Immunities of States and Their Property* was adopted by the 59<sup>th</sup> Session of General Assembly of United Nations and opened for signature. Later, Chinese government signed the Convention in September 2005. According to the principles of treaty law, besides the certification of treaty text, the signature merely means a party preliminarily agrees with the content of a convention or treaty, but it is not legally binding. A party of a convention or treaty is bound by the Convention only through the approval procedure.<sup>351</sup> Despite that, the signature behavior represents the attitudes of parties to a convention or treaty, so China’s signature to UN Convention on State Immunity shows that, influenced by the dominant practice of international community, China has no intention to oppose the restrictive doctrine of State immunity in a conservative gesture, but rather desire to integrate into international order by adopting a more active and flexible diplomatic policies.

Diplomatic policies definitely need to weigh the pros and cons, and accordingly the diplomatic language has flexibility. For different cases and situations, diplomatic language may have a very different expression. It is obvious that, the attempts to explain States’ position on State immunity by diplomatic language are not in line with the inherent demands of international rule of law for ‘stability’.

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## 3.2 THE LEGISLATIVE MEASURES OF CHINA

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After the UN Convention on Jurisdictional Immunity of States and Their Property passed in December 2004, China has initiated its legislation on the issue of State immunity.<sup>352</sup> In October 2005, *Law of People’s Republic of China on Judicial Immunity from Compulsory Measures concerning the Assets of Foreign Central*

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<sup>350</sup> See: Replies received from States, UN Doc. A/56/291, p. 2.

<sup>351</sup> See: 小寺彰、岩沢雄司、森田章夫編：「講義国際法 第2版」，有斐閣 2010 年，75 頁~77 頁。

<sup>352</sup> See: 齐静：《国家豁免立法研究》，人民出版社 2015 年版，第 132 页。

*Banks* was reviewed and approved in the 18<sup>th</sup> conference of the Standing Committee of the Tenth National People's Congress of China, which is China's first legislation in the field of State immunity.<sup>353</sup>

Chinese government has always maintained that, pursuant to the principle of international law, the property of a State's central bank is the State-owned property relating to the exercise of sovereignty, and thus it is not subject to the jurisdiction of courts of another State.<sup>354</sup> China position is very clear, that is the property of national central bank is entitled to State immunity absolutely.

This legislation is very brief and only contains 4 articles. The Article 1 provides that the China endow the asset of foreign central banks with judicial immunity from compulsory measures of assets save and implementation. However, 'waiver in written form' and 'assets are appointed to be used in assets save and implementation' constitute the exceptions to immunity. From its wording, the Article 1 is obviously influenced by Article 18, 19 and 21 of the UN Convention on State Immunity. Although there are exceptions to immunity, the exceptions are based on consent. Therefore, it can be said that Article 1 conveys the idea of absolute doctrine of State immunity in the legislation.

The Article 2 defines what a central bank is. Generally speaking, a central bank is an institution that manages a State's currency, money supply and interest rates. However, the functions and status of the central bank are very different among States. In many States, the central bank mainly assumes the sovereign functions: the control of money supply. While in the other States, the central bank plays two roles. Besides the sovereign functions, it also constitutes a national commercial bank. The central bank does not exercise sovereign power in any case, so it is necessary to provide a wide contextual interpretation to accommodate the possible meaning of central bank. As a result, the Article 2 provides that, 'foreign central banks refer to central banks and finance administration organs with functions of central bank of foreign countries and organizations of integration of regional economies.' On this basis, the Article 2 (2) introduces the assets of foreign central banks which include cash, bills, deposits, valuable securities, foreign exchanges reserves, gold reserves, real properties and other possession of foreign banks.

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<sup>353</sup> See: 《全国人民代表大会常务委员会公报》2005 年第 7 号。

<sup>354</sup> See: 外交部副部长武大伟: 《关于提请审议对在华外国中央银行财产给予司法强制措施豁免的议案的说明》, 载《全国人民代表大会常务委员会公报》2005 年第 7 号。

The Article 3 provides the coequal and reciprocal principle. That means if foreign countries do not provide assets of central bank of China with jurisdictional immunity, China will deal with in line with the principle of reciprocity. This reflects the defensive mentality of China in dealing with State immunity. Admittedly, Chinese government has recognized that even if China grants absolute immunity to the property of foreign central banks, its central bank's property may still be taken compulsory measures by foreign States who pursue restrictive State immunity. Therefore, China hopes to take advantage of the principle of reciprocity to resist the potential threat from foreign States. This clause shows China's conservative position on the issue of State immunity.

The Article 4 is a procedural statement to the effective date of the legislation.

The purpose of the enactment of *Law of People's Republic of China on Judicial Immunity from Compulsory Measures concerning the Assets of Foreign Central Banks* is to solve the problem of judicial immunity to the property of foreign central bank in Hong Kong. After Hong Kong Reunification in 1997, the UK *State Immunity Act* ceased to apply in Hong Kong, so the property of foreign central banks lacked the protection of written law, which harmed the status of financial center of Hong Kong. In order to maintain and reinforce Hong Kong's status as an international financial center and also consider the fact that immunity issue in respect of central banks involves sovereignty and diplomatic affairs, at the end of 2000, the Hong Kong government proposed to Chinese Central Government the legislative motion to resolve the issue of State immunity on the property of foreign central banks.<sup>355</sup> Chinese government had to consider the legislation issue on State immunity seriously. Together with the influence of UN *Convention on Jurisdictional Immunities of States and Their Property*, China has officially enacted its first statute law on State immunity in 2005: *Law of People's Republic of China on Judicial Immunity from Compulsory Measures concerning the Assets of Foreign Central Banks*.

In summary, this legislation is formulated for a certain aspect of immunity, so its guiding ideology somewhat conservative and the articles are too simple and lack of systematic. On the background of the development of China's national strength and the expansion of national interests abroad, it is difficult to protect China's core interests in international community by virtue of this legislation. China needs to

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<sup>355</sup> See: 外交部副部长 武大伟: 《关于提请审议对在华外国中央银行财产给予司法强制措施豁免的议案的说明》, 载《全国人民代表大会常务委员会公报》2005 年第 7 号。

formulate a more forward-looking and comprehensive law on State immunity in a proactive and aggressive manner.

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### 3.3 THE JUDICIAL PRACTICE OF CHINA

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As China implements the absolute principle of State immunity, Chinese judicial system refused to accept the lawsuit in which a foreign State is sued. Therefore, Chinese courts rarely hear and judge the cases involving State immunity in practice.

In 1927, the Joint Hearing Tribunal of Shanghai in *Rizaeff Frères v. The Soviet Mercantile Fleet*<sup>356</sup> dismissed the plaintiff's claim, because the transportation of the Soviet Mercantile Fleet was part of sovereign acts, the tribunal has no authority to exercise jurisdiction pursuant to the principle of State immunity. However, the Joint Hearing Tribunal of Shanghai, an adjudicatory agency in foreign concessions in Qing Dynasty and Nationalist Government of China, is a product of imperialist infringement and deprivation of China's judicial sovereignty, so this case cannot indicate the standpoint of China towards State immunity in judicial practice at that time.

After that, China often appears as a defendant in foreign courts, but had few opportunities to be the forum State to hear the cases in which foreign States are sued. Until 2008, the Hong Kong courts in *FG Hemisphere Associates LLC v. Democratic Republic of Congo and Others*<sup>357</sup> became the courts of forum State, and therefore China had the opportunity to express its opinions on State immunity in judicial practice. In fact, in accordance with the policy of 'one country, two systems' and the provisions of *Basic Law of Hong Kong*, the Hong Kong government is authorized to 'exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication.'<sup>358</sup> Therefore, the Central Government of China would not have been involved in the judicial affairs and procedure of Hong Kong courts. However, in the instance of appeal, the Court of

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<sup>356</sup> See: *Rizaeff Frères v. The Soviet Mercantile Fleet*, Republic of China, Provisional Court of Shanghai (Civil Division), (1927), 40 ILR 84. In Chinese, the case is '宝元洋行诉苏联商船'.

<sup>357</sup> See: *Democratic Republic of Congo and Others v. FG Hemisphere Associates LLC*, the Hong Kong Court of Final Appeal, 8 September, 2011.

<sup>358</sup> See: 《中华人民共和国香港特别行政区基本法》第2条：全国人民代表大会授权香港特别行政区依照本法的规定实行高度自治，享有行政管理权、立法权、独立的司法权和终审权。

Final Appeal requested the Standing Committee of National People's Congress to interpret the *Basic Law of Hong Kong* pursuant to the Article 158 of *Basic Law of Hong Kong*. Thus, Chinese government for the first time elaborated its position on State immunity in judicial procedure. Later, the Standing Committee of National People's Congress passed the interpretation of Article 13 (1) and Article 19 of the *Basic Law of Hong Kong*. According to such interpretation, State immunity involves sovereignty, so Hong Kong must be in line with the Central Government of China. Considering the fact that China insists on the position of absolute doctrine of State immunity consistently, as a result, the Hong Kong Court applied absolute principle of State immunity in this case.

In conclusion, although signed the *UN Convention on Jurisdictional Immunities of States and Their Property*, China still holds a conservative attitude towards State immunity. It makes China rarely accept cases in which foreign States are sued as defendants. In result, China has less chance of expressing its position on the issue of State immunity in judicial practice.

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### 3.4 THE TRANSITION OF CHINA'S ATTITUDE TO STATE IMMUNITY IN FUTURE

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Since 1840s, China had suffered the aggression and bullying of the Western powers. The fate of State was on the verge of destruction. In the situation, the struggle for State independence and national liberation has been the most important mission for people from all ranks of Chinese society for a long time. In view of the unpleasant experience, China distrusts the international orders and habitually regards it as the yoke of the Western powers. For this reason, China has a special passion for the concept of sovereignty, and intends to employ it as a means of resisting old international orders dominated by the West powers. As time passes, China formed a stereotype which is inclined to resist all motions and actions that may weaken State sovereignty. As to State immunity, China holds that sovereignty has unchallenged supremacy in international community. China opposes any tendencies to threat the concept of sovereignty, and regards the restrictive doctrine of State immunity as a legal strategy employed by the Western powers to implement their political and economic hegemony. Hence, China has to thwart the potential threats and trickery of



the Western powers by sovereignty. On this background, it is not difficult to understand why China has consistently adhered to absolute State immunity.

‘Time changes cause reality changes, and new realities require corresponding strategies.’<sup>359</sup> Now, the validity of China’s defensive thinking towards international orders is open to question. Since the reform and opening up, China’s economic development obtained remarkable achievements, its comprehensive national strength gradually increased, and accordingly its international status has been greatly improved. Today, China is no longer a poor and weak country. A universally accepted principle said: ‘State strength and interests determine the foreign policy of a country.’ It is necessary for China to reflect on its political defensive mentality in line with current national interests and conditions. In reality, with the increasingly growing strength, China has enough power to project its influence on to international community, so China should reorient its foreign policy based on national interests and should participate in international affairs and global governance in a more aggressive and positive manner.

Specifically, with respect to the law of State immunity, the International Court of Justice affirmed its priority of procedural value in *Germany v. Italy*. Because of the reality of sovereign equality among States, States have to restrict their own jurisdiction in the spirit of comity so as to keep their core interests unaffected. However, certain of issues, such as commercial transactions, are largely within the scope regulated by private law and are not relevant to sovereignty and politics. In such matters, there is no inherent reason: ‘to avoid sovereign conflicts among States’ for supporting the procedural value of State immunity, so at the point it is unfair to claim State immunity.

Moreover, in terms of national conditions, the society of China has changed from the revolution era into construction era. In the revolution era, China usually designed and arranged its policies in a ‘Class antagonism’ thinking mode. By the influence of communist beliefs, China was hostile to the idea that ‘property is an inviolable and sacred right’ and indifferent to private rights, because China at that time believed that so-called rights and freedoms in the capitalism are merely the rights and freedoms of the rich. In order to eliminate the exploiting classes and consolidate the socialist regime, China began expropriate the property from bourgeois even including foreign

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<sup>359</sup> See: 《韩非子·五蠹第四十九》.

capitalist countries. For circumventing the international disputes and litigation arising therefrom, China certainly needs to support the absolute principle of State immunity. But as time alter, circumstances also change. At present, China requires a stable and orderly domestic environment for the purpose of promoting national modernization. With China's development, China has become a capital export country, and a lot of Chinese enterprises explore the markets abroad via foreign investment. In this context, the cases 'Chinese enterprises sue foreign States' is bound to appear. If China insists on absolute State immunity, Chinese courts will not be able to accept such cases. Obviously, it is not conducive to safeguarding China's and Chinese enterprises' interests. Therefore, China should rethink its attitude to State immunity in line with its strength and status in international community.

Until now, it is still hard to say international community has yet reached a consensus on the scope of State immunity, and even UN *Convention on Jurisdictional Immunities of States and Their Property* is exposed to considerable controversy concerning the exceptions to immunity. However, non-immunity in commercial transactions, via repeated practice of States and *opinion juris*, has roughly become a customary international law. As a result, whether from the perspective of national interests or from that of global governance, China should introduce the rule that 'States cannot claim State immunity in proceedings relating to commercial transactions' into its law system.

## 4. CHINA'S CHOICE OF STRATEGY ON STATE IMMUNITY AND THE LEGISLATIVE DESIGN

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With the development of international law, the fairness and justice of international law are got more and more attention. The legitimacy of claim of State immunity, especially in the field of commercial transaction, is going to decline.<sup>360</sup> In this context, China should not stick to the absolute position of State immunity, but should adjust the strategy for State immunity in a timely manner.

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<sup>360</sup> See: 何志鹏: 《对国家豁免的规范审视与理论反思》, 载《法学家》2005年第2期。

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## 4.1 THE PRAGMATISM ORIENTATION IN LEGISLATION

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According to the pragmatism, the effect and function are criteria for evaluation of everything. Whether beliefs or ideas are correct depends on whether they can produce tangible effects.<sup>361</sup> In formulating policy or making decision, a country should analyze whether the performance of that policy or decision can achieve the practical effects and positive influence. In the same way, the criterion for testing the correctness of legal measures or diplomatic strategies is not only dependent on the international reputation but also on the ‘usefulness’ of them by weighing the pros and cons under the direction of national interests. If a legal measure can bring tangible benefits to a State, it should be resolutely implemented. But if the legal measure not only brings no benefit to a State but also ruins the reputation of that State, it must be discarded.

With the development over 30 years after reform and opening, China has become one of the economic powers around the world. In the wake of the continuous increase in the volume of China’s investments abroad, China gradually transfers from a capital import country to a capital export country, and possesses huge overseas interests. As a capital import country, the adherence to absolute doctrine of State immunity may help to safeguard the economic sovereignty of States. For example, when a State faces litigation due to the expropriation, it may avoid being the defendant before the courts of another State by claiming State immunity. However, after years of development China has become an economic power. China’s capital largely flows into foreign countries through overseas investment. In this circumstance, China’s capital as well as Chinese enterprises confronts huge investment risks abroad. In the event of disputes between Chinese enterprises and investment host countries, litigation is still an effective means to safeguard the interests of enterprises. The Analects has a motto: ‘Do not do to others what you would not like yourself.’<sup>362</sup> Pursuant to the principle, claiming absolute principle of State immunity, China should be in any case subject to the absolute principle rather than in the case of being the defendant. Concretely, if China has the right to invoke State immunity before the courts of foreign States by virtue of absolute principle, the courts of China should permit foreign States to invoke

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<sup>361</sup> See: [英] 罗素: 《西方哲学史》(下卷), 马元德译, 商务印书馆 1976 年版, 第 375 页。

<sup>362</sup> See: 《论语 颜渊》。

State immunity based on the same grounds. It will block the proper channel for Chinese enterprises back to home country to bring lawsuits against foreign States. From the perspective of utilitarianism, it is unwise of China to adhere to absolute principle of State immunity currently.

Moreover, the renaissance of China is not only the economic rise, but also the cultural consciousness. For this purpose, China should be committed to building power structure in international community by which its national interests are delivered, and should actively participate in the global governance and take the lead in the development of rules of international law. As the Article 38 (1) of *Statute of the International Court of Justice* provided, besides international conventions, international custom and general principles of law, ‘the judicial decisions and teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law’ are also included in the sources of international law. It can be seen that judicial opinions and decisions play a very important role in the making of international law. However, China’s implementation of absolute State immunity actually suppresses, in a disguised form, the jurisdiction of courts of China. The fact that the courts refuse to accept litigation against foreign States naturally makes China lose the opportunity to express its judicial opinions by judgments, which causes China’s passive state in shaping rules of State immunity. In addition, since UN *Convention on Jurisdictional Immunities of States and Their Property* explicitly adopts the restrictive principle of State immunity, if China practices in line with the UN Convention, it can not only gain a good reputation of respect for international rule of law, but also expand the scope of its jurisdiction.

‘Since it was only recently that China returned to the international community, there will be a learning process and adjustment for China to be familiar with the corresponding mechanism and rules of the international community. Furthermore, China is an undeveloped country, so it has the same understandings to international order as other undeveloped countries: on the one hand, because of the humiliation in recent history, China has a special political emotion towards sovereignty, and generally associates sovereignty with State destiny and national independence; on the other hand, China suspects the impartiality of the existing international order, so keep wary of the system of international law dominated by western powers.’<sup>363</sup> It is

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<sup>363</sup> See: 蔡拓: 《全球治理的中国视角与实践》, 载《中国社会科学》2004 年第 1 期。

understandable that China holds a conservative attitude towards the principle of State immunity which has a close connection with sovereignty, but this is not a proper excuse for China to always reject the restrictive principle of State immunity until now. ‘The ways of governance are many and various. As long as the country can be benefited, it is not necessary to keep to the old approach of governance.’<sup>364</sup> China must be aware that the practice of absolute principle of State immunity in the past is no longer suitable to the times. In order to safeguard national interests as well as promote the stability of international community, China should abandon the obsolete practices in the field of State immunity, gradually accept the new international consensus of exceptions to State immunity, and enact the *State Immunity Law* in consistent with the general practice of international community at the right time.

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## 4.2 THE NECESSITY OF LEGISLATION ON STATE IMMUNITY

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According to Lon Luvois Fuller’s opinion, a legal philosopher from US, law is the cause of obedience to rule.<sup>365</sup> Fuller criticized the core theory of separation of law from morality which is the essential claim of legal positivism, and believed that certain moral standards, deep in the ‘principles of legality’, lay the foundations of the concept of law, so that a law fails to meet these standards cannot be recognized as genuine law. That is the reason why people obey the law. In virtue of the principles of legality, Fuller distinguished the ‘outer morality’ to law from the ‘inner morality’ to law. The outer morality to law, namely substantive natural law, refers to the substantive target or purpose of law, such as peace, safety, equality, freedom and so on. Fuller emphasized the inner morality to law that imposes a minimal morality of fairness. The *Morality of Law*, the important work of Fuller, enumerated 8 elements of the ‘inner morality’ as follows: (i) sufficiently general, (ii) publicly promulgated, (iii) prospective, (iv) at least minimally clear and intelligible, (v) free of contradictions, (vi) relatively constant, (vii) possible to obey, and (viii) administered in a way that does not wildly diverge from their obvious or apparent meaning.<sup>366</sup> All purported rules must meet the 8 minimal conditions in order to count as genuine laws.

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<sup>364</sup> See: 《商君书·更法》。

<sup>365</sup> See: 谷春德、史彤彪主编：《西方法律思想史》，中国人民大学出版社 2007 年版，第 376 页。

<sup>366</sup> See: [美] 富勒：《法律的道德性》，郑戈译，商务印书馆 2009 年版，第 83 页~94 页。

Therefore, according to the theory of ‘inner morality’ to law, if a so-called law is ambiguous and fragmented, it will be harmful to the rule of law.

Although the international law of State immunity has been established by State practice for a period of time, it existed in the form of customary international law. In many States’ practice, the law of State immunity is expressed in ‘diplomatic language’ which is often changes with different cases. This results in that the content and scope of law of State immunity is in the ambiguous state. In reality, States’ hesitation between absolute immunity and restrictive immunity leads to the uncertainty of the law of State immunity. Even for these States that support restrictive immunity, the divergence of scope of State immunity still exists. Apparently, this situation makes the law of State immunity losing ‘at least minimally clear and intelligible’ and ‘impossible to obey’, and jeopardizes the international rule of law. The international community needs a statute law on State immunity. The enactment of UN *Convention on Jurisdictional Immunities of States and Their Property* promotes the formation of consensus on the issue of State immunity, and also provides an important reference for national legislation of States in this regard.

In view of the domestic conditions, the legislation on State immunity is necessary. Since the law of State immunity is manifested in the form of customary law which lacks written text, it is often ambiguous and difficult to capture. In result, the courts of forum States are intractable to apply the unwritten law of State immunity to make convincing judgments in litigation. Further, without the constraint of statute, the judicial process is inevitably intervened by opinions from the administration. It may endanger the independence of judicature. Besides, in regard to the parties to litigation, the lack of definite legislative design on State immunity may impair their reasonable expectations to the results of the litigation. Especially, the private parties are in a disadvantaged status inherently. It is impracticable for them to spend much time in finding and studying the customary rules as well as relevant cases on State immunity. As a result, if the legislation on State immunity is absent from the forum State, it will markedly raise the costs of private parties to take actions against sovereign States before the courts of that forum State. The private parties may seek an alternative forum State to file actions via the necessary jurisdictional connections, and it will make a State lose the opportunity to exercise its jurisdiction in a certain cases.

By virtue of international law development and the national environment of rule of law, it is really necessary to formulate the specific rules of State immunity by

statute.<sup>367</sup> Considering the fact that State immunity is a principle of international law based on the general practice of States, the legislature of a country is required to take the minimum consensus gradually formed in international practice into account in the process of legislation. Meanwhile, the legislature should enact the law on State immunity based on its national conditions, so as to ensure the democracy, scientificity and practicality of the legislation.

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### 4.3 THE OUTLOOK AND SCHEME OF CHINA'S LEGISLATION ON STATE IMMUNITY

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Karl Marx profoundly recognized the decisive role of social existence for the law-making, and expressed a representative opinion in his work *On a Proposed Divorce Law* that,

*“A Legislator should see himself as a natural scientist. He is not in the creation of law, nor in the invention of law, but merely in the formulation of law. He is just expressing the inner laws of spiritual relationships of human beings by statute law based on social realities. If a legislator replaces the essence of things with his imagination, then he should be to blame for his extreme willfulness and caprice.”*<sup>368</sup>

According to Marxism, social existence determines social consciousness. The law exists in the society, and legislators should find it rather than create it. The legislation must reflect and confirm the social conditions.

Likewise, in the making of State immunity law, on the one hand, China needs to have respect for the customary rules on State immunity formed by international practice; on the other hand, China must set a rational legislative program on the basis of national conditions. ‘The lawmaking should conform to the development of the times.’<sup>369</sup> In current situation, China had better to follow the development of international law, and shall introduce the rule of non-immunity in the field of

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<sup>367</sup> See: 齐静:《国家豁免立法研究》,人民出版社2015年版,第135页。

<sup>368</sup> See: [德] 马克思:《论离婚法草案》,选自《马克思恩格斯全集》第1卷,人民出版社1956年版,第183页。

<sup>369</sup> See:《商君书·更法》。

commercial transactions under the guidance of restrictive doctrine of State immunity and make the systemic arrangements on the issues of State immunity in future legislation.

According to my suggestions, drawing morals from UN Convention, China shall make the law of State immunity as soon as possible. The proposed law of State immunity may consist of 3 parts, that is, general provisions, specific provisions and supplementary provisions. The general provisions mainly define the use of term and a set of general principles of State immunity. The specific provisions primarily provide the exceptions to immunity from the perspective of immunity from jurisdiction to adjudication and from jurisdiction to enforcement. The supplementary provisions are about the miscellaneous clauses including the procedure of litigation and execution, the issues of interpretation and amendment, entry into force and so on.

#### (1) The General Provisions

The general provisions are very important to establish the international law principle of State immunity. Firstly, it shall clarify the legislative purpose of the proposed law, and give the applicable scope of State immunity. Then, a set of use of key terms such as ‘court’, ‘foreign State’, ‘sovereign conduct’, ‘commercial transaction’ shall be interpreted. Next, the principle of State immunity as well as the modalities for giving effect to State immunity shall be provided, including the structure of State immunity, the conditions or elements of claiming State immunity. At last of this part, it is necessary to introduce the principle of equality and reciprocity in the proposed law of State immunity so as to withstand the undue restrictions on China’s right to immunity from the courts of a foreign State.

#### (2) The Specific Provisions

The specific provisions consist of two sections: immunity from jurisdiction to adjudication and immunity from jurisdiction to enforcement. This part shall mainly enumerate the exceptions to immunity in the process of adjudication and enforcement.

As to the jurisdiction to adjudication, the UN Convention covers 8 cases in which State immunity cannot be invoked: (i) commercial transactions; (ii) contracts of employment; (iii) personal injuries and damage to property; (iv) ownership, possession and use of property; (v) intellectual and industrial property; (vi) participation in companies or other collective bodies; (vii) ships owned or operated by a State; (viii) effect of an arbitration agreement. Nevertheless, the Convention has not yet entered into force, so it is hard to say international community has formed a



consensus on these cases. But commercial transaction has basically been recognized as the most important exception to State immunity by reference of general practice of States and *opinio juris*. Therefore, China, even if has misgivings about other non-immunity cases, shall at least establish the rule by legislation that State immunity cannot be invoked in proceedings relating to commercial transactions.

In the section of adjudication, the proposed law shall provide the effect of consent to exercise of jurisdiction, and illustrate the cases of express consent and of constructive consent. Subsequently, the proposed law shall provide cases of non-immunity from judicial proceedings in accordance with the restrictive principle of State immunity, especially the case of commercial transaction. In the commercial transaction clause, it shall set forth the determination criteria to commercial transaction: 'reference should be made primarily to the nature of transaction'. In the light of the China's interests and strength, the determinant to the exercise of jurisdiction and jurisdictional connections shall be mentioned in the law. As far as I am concerned, China may draw on the experience of Article 1605 of US *Foreign Sovereign Immunities Act* so as to achieve the effect of expanding its jurisdiction. Because 'China is socialist public ownership of the means of production'<sup>370</sup> and 'State-owned economy is the leading force in the national economy'<sup>371</sup>, the issue of State enterprise in State immunity is very important for China. China is required to carefully reconsider the status and capacity of State-owned enterprises when they participate in commercial transactions. On the one hand, in the circumstance that China's State-owned enterprises are sued before courts of a foreign State, it is necessary to distinguish China as a sovereign and China's State-owned enterprises.<sup>372</sup> In other words, China's State-owned enterprises shall not be regarded as 'State' even 'agencies or instrumentalities of China'.<sup>373</sup> Otherwise, once a State-owned enterprise is sued, other State-owned enterprises may get involved. China has the lessons in this aspect.<sup>374</sup> On the other hand, in the circumstance that foreign State-owned enterprises

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<sup>370</sup> See: Article 6 of *Constitution of People's Republic of China*.

<sup>371</sup> See: Article 7 of *Constitution of People's Republic of China*.

<sup>372</sup> See: 白映福: 《我国关于国家豁免的理论及对策》, 载《现代法学》1987年第2期。

<sup>373</sup> See: 张乃根: 《国家及其财产管辖豁免对中国经贸活动的影响》, 载《法学家》2005年第6期。

<sup>374</sup> See: *Debbie WALTERS, Max Walters, Plaintiffs–Petitioners–Appellants, v. INDUSTRIAL AND COMMERCIAL BANK OF CHINA, LTD., Bank of China Ltd., China Construction Bank Corporation, Respondents–Appellees, The People's Republic of China, Defendant*. Docket No. 10–806–cv (United States Court of Appeals, 2<sup>nd</sup> Circuit, July 7, 2011).

are sued before courts of China, China shall make decisions case-by-case. In most cases, China shall not confuse sovereign States with State-owned enterprises, while in certain cases where State-owned enterprises has deliberately misrepresented their financial position or subsequently reduced their assets to avoid satisfying a claim China shall pierce the corporate veil and ask the holding State to assume corresponding responsibilities. In reference to other cases in which State immunity cannot be invoked, China can decide at the discretion whether or not to incorporate them into the proposed State immunity law in line with national conditions.

In the section of enforcement, the proposed law primarily provides the principle of immunity from execution, and in what cases measures of constraint against State property can be taken. It is generally considered that execution is very sensitive, so measures of constraint must be taken in a prudent way. Some countries' legislation, like Japan, even had intended to skip this issue. Traditionally, unless the express consent to execution of a foreign State, the courts of forum State should not take measures of constraint against that foreign State's property in the process of enforcement. However, the UN Convention extends the scope of execution against State property. In view of the provisions of UN Convention, China shall establish the rule that measures of constraint may be taken against State property which is specifically in use or intended for use by a foreign State for commercial purposes and is in the territory of China. From the perspective of constitutional law, specific categories of property assuming sovereign functions, even used for commercial transactions, cannot be executed, so the proposed law must list the specific categories of State property absolutely immune from execution in order to guarantee the normal operation of States.

### (3) The Supplementary Provisions

Generally, the supplementary provisions are a series of ancillary rules at the end of a law, which are provide as a supplement to the general provisions and specific provisions of a law. In the supplement provisions, the proposed State immunity law shall formulate the issues as follows: the relationship between this law and the UN Convention, the procedural issue such as service of process and default judgment, the authority to interpret and amend, retroactivity, the date of entry into force and so on.

## THE CONCLUSION

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As an extensively recognized principle of international law, State immunity experiences a process of relativization. Although States has always been controversial in terms of the scope of State immunity, however, currently the practice of the international community is increasingly inclined to support the position of restrictive State immunity.

The UN *Convention on Jurisdictional Immunities of States and Their Property* 2004 is a milestone in the development of the law of State immunity. The Convention acknowledged the legitimacy of the customary practice in written law that a State enjoys sovereign immunity from the jurisdiction of the courts of another State, while it also defined the scope of State immunity in the Part ‘proceedings in which State immunity cannot be invoked’, which indicates the Convention has accepted the restrictive theory of State immunity. But limited to the number of ratifying States, the Convention has not yet entered into force and effect until now, so it is hard to ascertain to what extent the common understandings with restrictive State immunity have been achieved by international community. Despite that, national legislation and judicial practice of States have convinced that non-immunity in the field of commercial transactions has basically become a customary international law.

Logically, commercial transaction proceedings in which State immunity cannot be invoked embody implications in two dimensions. First of all, the structure of litigation must meet the essential elements of State immunity. Importantly, the respondent State and the forum State are not the same State, namely the separation of the defendant State from the forum State. Secondly, in the context of restrictive theory of State immunity, the key factor for the courts of forum State in determining whether or not grant the immunity to a foreign State is the conduct criterion rather than the identity criterion, so that when a State engages in commercial transactions not related to sovereignty, a case of exception to immunity occurs due to the private characteristics of the commercial act. Under the circumstances, the respondent State loses the legitimate ground for claim the immunity by virtue of the non-sovereignty in

commercial transactions. The litigation hereby transforms into an international civil proceeding.

In fact, the particularity of the respondent State's identity directly results in the complexity in the establishment of the jurisdiction of the courts of forum State. In litigation, except the case of consent, the courts of forum State must first analyze whether the respondent State is subject to the case of non-immunity so as to confirm the legitimacy of the exercise jurisdiction at the level of international law. If the litigation belongs to the proceeding in which State immunity cannot be invoked, then the courts of forum State would regard it as a civil suit, and accordingly establish its the competence pursuant to the jurisdictional rules of its national law.

After the establishment of jurisdiction, the court of forum State may hear cases in accordance with the rules of private international law<sup>375</sup> and eventually reach judgments. However, given the 'State' identity of the defendant, the recognition and enforcement of the judgments is quite sensitive. As a result, the judgments based on the competent jurisdiction do not necessarily lead to the execution. Moreover, the sovereign identity of State determines the fact that the object of execution is merely the property of States rather than the conduct or State itself, and hereby it is unreasonable to determine whether to enforce judgments by the act criterion. The establishment of enforcement shall apply a different criterion from that of jurisdiction. The general practice of international community is to determine, based on the commercial purposes of State property and the specific association between the property and the forum State, whether or not judgments against State property can be enforced. Despite this, even though in commercial transaction proceedings, specific categories of State property can still be entitled to immunity from execution due to the essential sovereign functions.

In conclusion, while the law of State immunity has its procedural value in the practice of international community, such value is confined to the scope of sovereignty or political matters. In the field of commercial transaction, the legitimacy of claim of State immunity, whether in the process for adjudication or in the process

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<sup>375</sup> Private international law in general tends to organize and regulate social relations between private parties including natural or juridical persons or non-sovereign organizations. Private international law is made up of mechanisms of facilitate the settlement of international disputes between the same. It, at least, answers three questions as follows: (i) the establishment of jurisdiction; (ii) the application of laws; (iii) the recognition and enforcement of judgments. Indeed, after the jurisdiction is determined, the next step is to find out the applicable law under the guidance of conflict of laws. See: Eleanor Cashin Ritaine: *Harmonizing European Private International Law: A Replay of Hannibal's Crossing of the Ales?* Vol. 34 *International Journal of Legal Information*, 2006, pp.419~420.

for execution, is going into decline. With respect to China, from the position of pragmatism, it is inadvisable for China to comply with the absolute State immunity consistently, because this may not only impair the appropriate arrangement of the jurisdiction of China's courts, but also weaken or even jeopardize the interests of Chinese citizens and companies. The adherence to absolute State immunity represses the judicial sovereignty, especially jurisdiction, of China in a disguised way. Therefore, Chinese Government shall adjust the legal measures and political strategies on the issue of State immunity in line with the international development trend, and gradually accept the framework of restrictive State immunity by initially introducing the rule of non-immunity in commercial transaction proceedings.



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