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Enforcing Arbitral Awards Against States and the Defense of Sovereign Immunity from Execution: A U.S. Perspective

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**ENFORCING ARBITRAL AWARDS
AGAINST STATES AND THE DEFENSE
OF SOVEREIGN IMMUNITY FROM
EXECUTION: A U.S. PERSPECTIVE**

*By Ylli Dautaj**

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I. INTRODUCTION

For a dispute resolution regime to be reliable and to function effectively, the decision-making process should be legitimate, and its product must be sanctioned with necessary coercive force.¹ Thus, international arbitration, like any other dispute resolution regime, must guarantee the quality of its means as well as offer effective sanctioning of its ends. The enforceability of foreign arbitral awards represents one of the central pillars upon which the international arbitration system rests.² International arbitration has been the preferred means of settling transnational disputes precisely because arbitral awards are generally treated as final, binding, and directly enforceable.³ The legitimacy of the decision-making in international arbitration is further supported by parties treating recourse to arbitration as an implied engagement to honor the outcome of the award in good faith.⁴ Therefore, award-creditors expect that foreign arbitral awards are final, binding, and directly enforceable. There is no different expectation where the

¹ See Alan S. Alexandroff & Ian A. Laird, *Compliance and Enforcement*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1172 (Peter Muchlinski, Federico Ortino, & Christoph Schreuer eds., 2008).

² The New York Convention has been held to be “the pillar on which the edifice of international arbitration rests.” J. Gillis Wetter, *The Present Status of the International Court of Arbitration in the ICC: An Appraisal*, 1 AM. REV. INT’L ARB. 91 (1990); see also Loukas A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement*, 28 ICSID REV. 64, 66 (2013).

³ Put differently, the enforcement of foreign arbitral awards distinguishes the arbitral procedure from other means of dispute settlement. Foreign arbitral awards can be enforced without engaging in a cumbersome legal procedure, such as that of enforcing foreign judgments. See, e.g., Paul Friedland, *2018 International Arbitration Survey: The Evolution of International Arbitration* (May 9, 2018), <https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration>; Matthew Saunders & Claudia Salomon, *Enforcement of Arbitral Awards Against States and State Entities*, 23 ARB. INT’L 467, 467 (2007).

⁴ See Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2 ICSID REV. 287, 289 (1987).

award-debtor is a sovereign state. In this light, renowned arbitration scholars and practitioners rightly noted that:

Unless parties can be sure that at the end of arbitration proceedings, they will be able to enforce the award, if not complied with voluntarily, an award in their favor will be only a pyrrhic victory. Further, the high degree of voluntary compliance is due to there being an effective system for the enforcement of awards in case of non-compliance.⁵

It is my position that any obstacle with respect to award enforcement and post-award proceedings should be dealt with seriously and with heightened scrutiny. Only if the product of the regime receives a strong currency can the system remain reliable and effective. This paper deals with the obstacle of sovereign immunity in the execution of arbitral awards in the U.S., specifically, as pleaded before U.S. courts and pursuant to the 1976 Foreign Sovereign Immunities Act (the “FSIA”).

The U.S. has an old arbitration act (the “1925 Federal Arbitration Act”), which is not based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law (the “Model Law”). However, a pro-arbitration attitude has been developed by the courts through case law.⁶ Moreover, many individual states in the U.S. have adopted the Model Law such as California, Florida, Ohio, and Texas.⁷ Furthermore, the U.S. is a signatory to the two leading multilateral enforcement treaties—the New York Convention and the ICSID Convention. Adding to that, the U.S. has also signed many international investment agreements containing

⁵ JULIAN D. M LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 688 (2003).

⁶ See William F. Fox & Ylli Dautaj, *The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act*, 21 *CARDOZO J. CONFLICT RESOL.* 1 (2019); Ylli Dautaj, *The Act Is Not the Entire Story: How to Make Sense of the U.S. Arbitration Act*, *KLUWER ARBITRATION BLOG* (Apr. 4, 2018), <https://arbitrationblog.kluwerarbitration.com/2018/04/04/act-not-entire-story-make-sense-u-s-arbitration-act/>.

⁷ TIBOR VÁRADY ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION – A TRANSNATIONAL PERSPECTIVE* 85-88 (7th ed. 2019).

ISDS clauses referring investor-state disputes to arbitration. The U.S. can indeed be said to be a “pro-arbitration jurisdiction” overall.

Based on the presumption that arbitration is a favorable venue for transborder disputes between investors and sovereign states and that the arbitral process is only as strong as its weakest link (the arbitral award), an outstanding and unresolved issue of international arbitration sometimes plays out in U.S. courts—i.e., the plea of sovereign immunity. Sovereign immunity is often invoked at the end of a dispute when an award-debtor state seeks to shield its assets in the execution stage. The doctrine of immunity has evolved from the absolute immunity theory that treats sovereign immunity as a relationship between states under which a forum court is unable to hear or enforce a judgment against a foreign state without the state’s consent. The prevailing theory is the restrictive theory which offers states immunity only with respect to transactions involving the exercise of governmental authority (“*acta iure imperii*”) and not for commercial or other transactions that are not unique to the state (“*acta iure gestionis*”).⁸ The treatment of immunity from jurisdiction, on the one hand, and immunity from execution, on the other, has developed differently.

This paper examines how U.S. courts have interpreted and applied the sovereign immunity plea at the award execution stage of international arbitration. This paper looks at whether U.S. courts facilitate award-creditors in executing their arbitral awards against non-complying award-debtor States.

The U.S. is not a signatory to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (“UNCJIP”), which embraces the restrictive theory for jurisdictional immunity as well as immunity from execution. The UNCJIP has not yet entered into force anyways but is an indication of customary international law in parts. In the U.S., the move away from the absolute theory of immunity to the restrictive one came much earlier and through the so-called “Tate Letters.” These were essentially a series of

⁸ JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 1935 (2012); *see* HAZEL FOX & PHILIPPA WEBB, *THE LAW OF STATE IMMUNITY* 32-38 (2015).

communications by which the State Department explained that it would align with the restrictive theory on immunity moving forward.⁹ The move was further entrenched with the enactment of the FSIA in 1976.¹⁰ The act effectively codified the international law on sovereign immunity for jurisdictional and execution purposes. It should be noted that the Tate Letters referred only to immunity from jurisdiction and it was first through the FSIA that the restrictive theory of immunity was embraced also vis-à-vis execution in the U.S.

The law on sovereign immunity in the U.S. is subject to statutory interpretation, and its direction is embedded in case law. Through case law, pragmatic judicial attitude has supplemented substantive law, culminating in liberal and progressive decisions. U.S. courts have indeed aided award-creditors against award-debtor states when seeking to attach and execute against state assets. However, the plea of sovereign immunity still presents a serious obstacle to award satisfaction; this obstacle can be overcome in the U.S.

II. AWARD ENFORCEMENT AGAINST SOVEREIGN STATES

There are primarily two enforcement regimes in place with respect to international arbitral awards: the New York Convention and the International Centre for Settlement of Investment Disputes (“ICSID”) Convention.¹¹ Both essentially guarantee that international

⁹ See generally Letter from Jack B. Tate, Acting Legal Adviser, Dept. of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 DEP’T ST. BULL. 984, 984-85 (1952) (explaining that the state department was from now on aligning with the restrictive theory on immunity); see also David P. Stewart, *International Immunities in U.S. Law*, in CURTIS A. BRADLEY, THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 625 (2019) (“Over time, the U.S. approach evolved significantly, not least by adopting the so-called ‘restrictive’ theory in 1952.”); Ylli Dautaj, *Immunity from Suit for International Organizations: The Judiciary’s New Que of Separating Lamsuit Sheep from Lamsuit Goats*, 27 IND. J. GLOB. LEGAL STUDS. 207 (2020).

¹⁰ See also *Jam v. Int’l Fin. Corp.*, 139 S. Ct. 759, 766 (2019); Stewart, *supra* note 9, at 625-26 (“The rules for sovereign (or state) immunity were codified . . . in the 1976 [FSIA] and are now applied directly by the courts rather than the executive.”).

¹¹ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3; Convention on the Settlement of

arbitral awards are to be treated as final, binding, and directly enforceable (with limited recourse to challenge the awards through post-award proceedings).¹² Both conventions are widely adopted and implemented in letter as well as in spirit.¹³ Even though a robust enforcement regime exists, award-creditors seldom need to pursue post-award proceedings. Generally, award-debtors—including award-debtor states—voluntarily comply with adverse awards.¹⁴ This is perhaps a result of the relative ease of enforcing arbitral awards, in combination with the reputational harm of defaulting without a valid cause.¹⁵ In fact, the expectation of voluntary compliance has been so strong that when the ICSID Convention was drafted, there was a general expectation that award enforcement “would not be a practical

Investment Disputes Between States and Nationals of Other States, Oct. 14, 1966, 575 U.N.T.S. 159.

¹² Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 3, June 10, 1958, 330 U.N.T.S. 38; Convention on the Settlement of Investment Disputes between States and Nationals of Other States arts. 53-55, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter the *N.Y. Convention*].

¹³ See *Contracting States- Implementing Acts*, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/countries/implementing+acts> (last visited Mar. 30, 2023) (listing links to the implementing acts of all contracting states of the New York Convention); *List of Contracting States and Other Signatories of the Convention*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES (Jan 18, 2023), <https://icsid.worldbank.org/sites/default/files/ICSID%203/ICSID-3--ENG.pdf> (updated as of October 25, 2022). For a reference on voluntary compliance, see *N.Y. Convention*, *supra* note 12; NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 608, n. 10 (2015); Saunders & Salomon, *supra* note 3, at 467; CHRISTOPH H. SCHREUER, SCHREUER'S COMMENTARY ON THE ICSID CONVENTION, 1107-08 (2d ed. 2009); Mark M. Cymrot, *Enforcing Sovereign Arbitral Awards – State Defences and Creditor Strategies in an Imperfect World*, in THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 351 (Tom Ruys, Nicolas Angelet, & Luca Ferro eds. 2019).

¹⁴ NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 608, n. 10 (2015); Saunders & Salomon, *supra* note 3, at 467; SCHREUER, *supra* note 13; Mark M. Cymrot, *supra* note 13.

¹⁵ States engage in diligent cost-benefit analysis, often tilting in favor of compliance. See LEW ET AL., *supra* note 5, at 803. Moreover, I say “a valid cause” because at times defaulting states have been in some form of “sovereign insolvency.” It is not my position to claim the moral high ground for either investors or states in such situations. It is simply an unfortunate situation.

problem and that voluntary compliance would be a natural consequence of the treaty obligation.”¹⁶

In investor-state dispute settlement (ISDS), however, the idea of a final, binding, and directly enforceable arbitral award becomes more cumbersome than in international commercial arbitration (ICA). The difficulty stems primarily from the fact that one party is a state, and therefore, can invoke sovereign immunity in the execution phase. Thus, there is an inherent public-private tension embedded in the regime. In fact, it was the redressing of this tension which motivated ISDS to begin with. One of the underlying purposes of the regime was to depoliticize disputes between private parties and states. Such depoliticization helped move the rule of law away from a state-centric world view “towards a rule of law-based international law that takes individuals and their protection seriously.”¹⁷

“Sovereign immunity remains a significant obstacle to obtaining forced satisfaction of [foreign arbitral] awards against states.”¹⁸ Stephan Schill, Professor of International and Economic Law and Governance at the University of Amsterdam, underscored the issue as follows:

Despite the common trajectory in international investment law and the law of State immunity towards embedding States in a rule of law framework for investor-State cooperation, international investment law still falls short of providing efficient investment protection in one important aspect: the enforcement of arbitral awards that determine that the host State

¹⁶ SCHUREUER, *supra* note 13, at 1107 (this position was partly so because non-compliance would lead to inter alia adverse reactions by other states and “would affect the standing of the state concerned with the international business community”).

¹⁷ Stephan W. Schill, *Cross-Regime Harmonization through Proportionality Analysis: The Case of International Investment Law, the Law of State Immunity and Human Rights*, 2 ICSID REV. 87, 87, 91 (2012).

¹⁸ MANNE AIRAKSINEN, ET AL., OSAKEYHTIÖLAKI II 637 (ALMA TALENT 2018).

breached commitments made to foreign investors in investment treaties or investor-State contracts.¹⁹

It is this problem, in the U.S. context, that created the basis for this paper; that is, the enforcement of foreign arbitral awards against sovereign states and, in particular, the obstacle of sovereign immunity from execution.²⁰ The sovereign immunity obstacle is complicated by the fact that neither of the two major multilateral enforcement regimes—the New York Convention and the ICSID Convention—handle questions of sovereign immunity in a meaningful way.²¹

III. SOVEREIGN IMMUNITY AND ARBITRAL AWARDS

The substantive law of sovereign immunity falls under the broader realm of public international law. Thus, the sources of law on sovereign immunity will be those of public international law as enumerated in Article 38 of the ICJ Statute, namely, (a) international conventions (i.e., treaties); (b) customary international law; (c) general principles of law; and (d) judicial decisions and scholarly work.²²

Notwithstanding this, sovereign immunity law is an area of substantive (and in part procedural) law that has developed in its own right, even though it forms part of public international law. This is primarily the case given that the law on sovereign immunity has

¹⁹ Schill, *supra* note 17, at 101.

²⁰ E.g., Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, U. Ill. L. Rev. 67 (2014); Saunders & Salomon, *supra* note 3, at 467.

²¹ See Kaj Hobér & Joel Dahlquist, *Investment Treaty Arbitration – Problems And Exercises*, 1 (2018); Phoebe D. Winch, *State Immunity and the Execution of Investment Arbitration Awards* 61, in PUBLIC ACTORS IN INTERNATIONAL INVESTMENT LAW (Catharine Titi ed., 2021); Weidemaier, *supra* note 20, at 77. Another serious obstacle to award enforcement through execution is the separate legal personality of state entities and sovereign wealth funds, which often hold title over states' commercial assets. See Gaillard & Penusliski, *supra* note 2, at 50-51; see generally Emmanuel Gaillard, *Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities: Three Incompatible Principles*, in STATE ENTITIES IN INTERNATIONAL ARBITRATION (Emmanuel Gaillard & Jennifer Younan eds., 2018).

²² THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW IN A NUTSHELL 23 (West Academic, 5th ed., 2013) (“[A] rule cannot be deemed to be international law unless it is derived from one of these three sources.”).

developed mostly through municipal case law. Having said that about the substantive law aspect, the practical effect of the doctrine is highly dependent on procedural law aspects such as decisions on burden of proof, discovery, and pre-judgment attachment.

Moreover, even though sovereign immunity is a field within public international law, it is an area that is mostly interpreted and applied by domestic courts and hence a doctrine that develops “locally.”²³ Thus, immunity law is at the intersection between international law and national law, making it “imperative to examine how the international legal framework is further refined and implemented at the level of national legislation and case law.”²⁴ And apart from applying the substantive law of sovereign immunity, domestic courts apply procedural rules of the forum, which naturally affect the scope and effect of the sovereign immunity defense. In short, “[i]mmunity exists as a rule of international law, but its application depends substantially on the law and procedural rules of the forum.”²⁵

Today, the law on sovereign immunity is far from uniform. This is primarily because there is no binding multilateral treaty in force, and the law is developed locally. Adding to that, municipal practice has developed differently, and divergent viewpoints exist. The differences are both substantive and procedural but especially so in the procedural features enabling or preventing the execution of an arbitral award or judgment against a state invoking immunity. Despite this divergence, there is some level of consensus on broader substantive law points, reflected in customary international law, highlighted by the ICJ, and found in case law from municipal courts. The consensus being that there is a general rule of immunity but that there are accepted exceptions to the rule—as partly codified in the UNCSI. Moreover, there seems to be a general consensus that immunity from jurisdiction

²³ CRAWFORD, *supra* note 8, at 1934.

²⁴ Tom Ruys et al., *Introduction – International Immunities in a State of Flux?*, in *CAMBRIDGE HANDBOOK ON IMMUNITIES AND INTERNATIONAL LAW 3* (Tom Ruys, Nicolas Angelet, & Luca Ferro eds., 2019).

²⁵ CRAWFORD, *supra* note 8, at 1934; *see also* FOX & WEBB, *supra* note 8, at 104-108.

is to be treated separately and differently from immunity from execution.²⁶

In most jurisdictions, the absolute immunity theory has surrendered to the restrictive theory on immunity.²⁷ The absolute immunity theory treats sovereign immunity as a relationship between states. Under such theory, a forum court is unable to hear or enforce a judgment against a foreign state without the foreign state's consent. This approach became impracticable in an increasingly interconnected and interdependent global world order. The restrictive theory emerged, which required the treatment of a state as immune only with respect to transactions involving the exercise of governmental authority (“*acta iure imperii*”) and not for commercial or other transactions that are not unique to the state (“*acta iure gestionis*”).²⁸ This distinction in the so-called “restrictive theory” nowadays reflects the generally accepted rule on sovereign immunity pursuant to customary international law.²⁹ To enable the restrictive theory of jurisdictional immunity to work, the second phase of immunity evolution (i.e., the restrictive theory era having replaced absolute immunity) developed a crucial legal mechanism: the implied consent doctrine (or waiver doctrine). It is my position that without this development, the transition to a restrictive theory of immunity would have been less likely—especially in the arbitration context.³⁰

The major outstanding issue with respect to the law on sovereign immunity from jurisdiction is how to determine what constitutes a commercial act or another exception to the general rule (e.g., due to human rights, torts, terrorism, etc.). The two most common exceptions are the “commercial activity” exception and the implied waiver doctrine.

²⁶ See generally Dautaj, *supra* note 9, at 210; see also Fox & Webb, *supra* note 8, at 12; XIODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 343 (2012).

²⁷ With notable exceptions, such as China.

²⁸ See Fox & Webb, *supra* note 8, at 32-38.

²⁹ See, e.g., *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)*, Judgment, 2012 I.C.J. 99, ¶¶ 56-61 (Feb. 3).

³⁰ In states with legislation addressing sovereign immunity, there are certain exceptions to the general rule of immunity, which most often include waivers and commerciality.

However, early in the life of the restrictive theory, a debate emerged on whether the commercial activity should be determined on the basis of the “nature of the act” (the “Nature Test”) or on the basis of the “purpose of the act” (the “Purpose Test”). A third standard, the “context approach” has emerged in some jurisdictions.³¹ A court tasked with determining whether to grant immunity can look either at its nature or its purpose. The test to decide the action at the jurisdictional phase is the Nature Test. In this paper, I will not go down to the nitty gritty of immunity from jurisdiction. Immunity from jurisdiction is of less importance in the international arbitration context (albeit of some importance and complications) because it is a generally held view that when a State has signed an arbitration clause or is a signatory to a multilateral arbitration-enforcement treaty, it has waived its immunity from jurisdiction.³² However, it is important to be aware of this in order to have a more informed view on the debate of execution immunity. Lew, Mistelis, and Kröll noted that:

The fact that a state cannot claim immunity from jurisdiction does not necessarily mean that the state is not immune from the actual execution of the award. In most laws the exceptions to immunity from execution are narrower than the exceptions to immunity from jurisdiction.³³

Such jurisdictional waiver is mostly considered to extend to ancillary enforcement matters, including recognition and the turning of the award into a judgment. In some jurisdictions though—e.g., Switzerland—if the court exercises jurisdiction over an action to determine rights and obligations, “one must admit also that a foreign State may in Switzerland be subjected to measures intended to ensure

³¹ See Katherine Reece Thomas, *Enforcing Against State Assets: The Case for Restricting Private Creditor Enforcement and How Judges in England Have Used “Context” When Applying the “Commercial Purposes” Test*, 2 J. Int’l & Compar. L. 1 (2015).

³² See, e.g., Ylli Dautaj & Maxime Chevalier, *A Liberal Push and the Sovereign Pull: Recognition, Enforcement, and Execution in the ICSID Convention*, in AMERICAN REVIEW OF INTERNATIONAL ARBITRATION (2022).

³³ LEW ET AL., *supra* note 5, at 750.

the forced execution of a judgment against it.”³⁴ For such an extension of the waiver, the activity of the dispute and the property must have a close connection to Switzerland and to the dispute at hand. Meanwhile, the waiver does not extend to certain property used for public purposes.

As of today, it is a generally held view that an arbitration clause does not represent an implied waiver of immunity from execution.³⁵ The different treatment of immunity from execution rests on the understanding that “[e]nforcement against State property constitutes a greater interference with a State’s freedom to manage its own affairs and to pursue its public purposes than does the pronouncement of a judgment or order by a national court of another State.”³⁶ The evolution and approval of the restrictive immunity theory has not been as prevalent with respect to measures of constraint, including execution.³⁷ The doctrine of immunity from execution allows for certain qualification (i.e., exceptions) to the general rule of immunity. Notwithstanding this, the doctrinal development of execution immunity has grown separately from the evolution seen with respect

³⁴ FOX & WEBB, *supra* note 8, at 492; Tribunal fédérale [TF] [Federal Supreme Court] 1979, *République Arabe d’Egypte c. Cintel* (Switz.).

³⁵ The most notable exception to this presumption was presented in France in *Creighton v. Qatar* Case (Court of Cassation, 2000) where the court held that the arbitration agreement constituted a waiver for purposes of execution because the ICC rules provided for a duty to carry out the award and waive any appeal of it. In other words, the court accepted the theory on a “double waiver of immunity.”

³⁶ FOX & WEBB, *supra* note 8, at 481.

³⁷ Measures of constraint “encompass the full variety of pre- and post-judgment measures available in national legal systems” including injunctions, attachment, and execution. *See* CRAWFORD, *supra* note 8, at 1962. *See also* XIODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 343 (2012):

Measures of constraint” is a generic term covering both interlocutory, interim or pre-trial measures prior to final judgments and the execution or enforcement of judgments. In the context of State immunity, these are coercive or enforcement measures taken by the court either to restrain the foreign State in the disposition of its property, normally in the form of interlocutory injunctions, or otherwise to attach, arrest or seize the property of the foreign State.

to immunity from jurisdiction. Execution immunity is more state-friendly. Yang observed that:

An examination of relevant State practice shows that, even though, as a general rule, preventive measures and measures of forced execution against foreign States and their property are permitted, such measures are subject to a number of conditions and limitations. First, a clear distinction has been drawn between immunity from the adjudicative process and immunity from measures of constraint. . . . Secondly, the ‘purpose’ test, much discredited in the context of adjudicative jurisdiction, resurfaces as a determinative factor in the context of measures of constraint. Generally speaking, the property of a foreign State enjoys immunity from attachment, arrest and execution when it is used for sovereign or public purposes, but not when it is used for commercial purposes. Thirdly, the territorial nexus requirement is adhered to even more strictly in the process of enforcement and execution of judgments against foreign State property. Finally, certain categories of property still enjoy absolute immunity, even where the foreign State has expressly waived its immunity from execution.³⁸

Thus, despite the Purpose Test being discredited with respect to immunity from jurisdiction, the test serves as the main test for articulating a limitation on sovereign immunity from execution. In the execution context, the court looks at whether the property or assets were used for a commercial purpose. “There is a general rule that, even if judgment against a State based on an act *jure gestionis* has been entered, measures of execution against that State’s property may not be taken without the foreign State’s consent if the asset in question serve governmental purposes.”³⁹ Put differently, the prevalent test to decide

³⁸ YANG, *supra* note 37, at 343.

³⁹ ROY GOODE, ET AL., *TRANSNATIONAL COMMERCIAL LAW, TEXT, CASES, AND MATERIALS* 522 (2015).

whether the asset is commercial is the Purpose Test and not the lower threshold Nature Test as with immunity from jurisdiction.

This dichotomy in approach is problematic for award-creditors in arbitration because execution, like for a court judgment, is the final step of enforcement, without which a victory remains largely pyrrhic, and the Purpose Test has a burden difficult to overcome. Even though the restrictive doctrine has “laid open a wide area of procedural and substantive law to enable national courts to exercise jurisdiction over foreign states,” sovereign immunity “continues to bar to a very large extent the enforcement of judgments given by such courts against foreign states.”⁴⁰

Thus, oftentimes award-creditors find themselves in a situation where they can indeed recognize and enforce the award but can, nevertheless, face serious obstacles when seeking to attach and execute against the award-debtor state’s assets. As Professors Fox and Webb rightly noted, “again and again thwarted judgment creditors have sought to attach assets of foreign States within the forum State territory, only to be refused orders for execution by national courts.”⁴¹ And even though most trade-friendly jurisdictions have transitioned to embrace the restrictive theory of immunity in the execution phase too, the exceptions to the general rule of immunity in the execution context are narrower compared to jurisdictional immunity—largely due to the Purpose Test but also due to *inter alia* the use of SOEs and the treatment of certain property as immune *ipso facto*.⁴² Ultimately, whether an award-creditor is successful against a reluctant award-debtor state will depend on the domestic court’s readiness to apply public international law liberally and pragmatically. Courts are, in fact, less likely to grant coercive measures against states. Fox and Webb observed that:

The application of coercive measures to a state and its property involves different and more directly intrusive mechanisms than the ruling of a national court as to liability. In consequence, the bar against coercive

⁴⁰ FOX & WEBB, *supra* note 8, at 484.

⁴¹ *Id.*

⁴² LEW ET AL., *supra* note 5, at 745.

measures against a foreign state remains largely absolute, subject at the present time to the state's consent.

It is for this reason that sovereign immunity from execution remains largely unresolved and why it is still considered “the last fortress, last bastion of [sovereign] immunity.”⁴³ Andrea Bjorklund, the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law, stated that “[s]tates do not appear interested in dismantling the last bastion of state immunity.”⁴⁴ One should not overplay the pessimism; many jurisdictions have indeed qualified the rule of immunity from execution in a liberal, and some even in a pragmatic, manner, resulting in the enabling of award satisfaction through execution.

IV. SOVEREIGN IMMUNITY FROM EXECUTION OF ARBITRAL AWARDS IN U.S.

In the U.S., the doctrine of sovereign immunity initially grew out of common law and was a matter of grace and comity.⁴⁵ Chief Justice Marshall struggled with the justification of sovereign immunity as early 1812.⁴⁶ At that time, courts typically looked to the State Department for a recommendation on whether a foreign government should enjoy immunity. The courts normally deferred to the State Department's determination and incorporated its decisions into their own.

⁴³ *Draft Articles on Jurisdictional Immunities of States and Their Property*, [1991] 2 Y.B. Int'l L. Comm'n 13, 56, U.N. Doc. A/CN/SER.A/1991/Add.1 (Part 2).

⁴⁴ Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 230 (2011).

⁴⁵ *See, e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 311-12 (2010).

⁴⁶ *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136-37 (1812) (emphasis added). For a more recent pronouncement, see generally, *Playa Larga v. I Congreso del Partido* [1983] 1 AC 244, 262 (displaying a more recent pronouncement of the above case and displaying that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate).

Fast-forward to today, the U.S. has not signed the UNCSI but has codified the law of sovereign immunity through FSIA, enacted in 1976.⁴⁷ Although FSIA was initially adopted in 1976, it has been amended several times since. Furthermore, U.S. courts have been highly influential in applying the law. This is largely due to the high number of cases litigated before U.S. courts; therefore, the frequency of the doctrine's application combined with the fact that foreign states typically have assets in the U.S., makes the U.S. court system a lucrative enforcement venue for foreign arbitral awards.

A. Foreign Sovereign Immunities Act 1976 (FSIA)

The FSIA was enacted in part to rectify some of the shortcomings from the common law era. The purpose and objective of enacting the FSIA was to (1) codify the restrictive theory of sovereign immunity; (2) ensure the application of the doctrine by courts and not by the State Department; (3) provide a statutory service procedure to establish jurisdiction; and (4) remedy the inability to obtain execution of a judgment obtained against a foreign state.⁴⁸ The FSIA also transferred “the primary responsibility for immunity determinations from the Executive to the Judicial Branch.”⁴⁹ Prior to the enactment of the FSIA, a foreign state enjoyed nearly absolute immunity from execution of its property in the U.S. The restrictive theory of immunity as laid out in the Tate Letters applied only to jurisdictional immunity. Nowadays, the FSIA is “the sole basis for obtaining jurisdiction over a foreign state in [U.S.] courts”.⁵⁰ Thus, the FSIA places any decision on immunity in the hands of the judiciary instead of the executive branch.⁵¹ Notwithstanding this, the FSIA “was

⁴⁷ See Stewart, *supra* note 9, at 627 (“[W]hile the [U.S.] is not party to the [UNCSI], the FSIA is largely consistent with its approach and (together with the many judicial interpretations of the statute) is generally reflective of, and helps to contribute to, the relevant rules of customary international law.”).

⁴⁸ See FOX & WEBB, *supra* note 8 at 241.

⁴⁹ Republic of Austria v. Altmann, 541 U.S. 677, 691 (2004).

⁵⁰ Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433 (1989).

⁵¹ See Stewart, *supra* note 9, at 626. Today, however, courts sometimes consider the executive branch's views in certain cases. See Schermerhorn v. Israel, 235 F. Supp. 3d 249 (D.D.C. 2017), *aff'd*, 876 F.3d 351 (D.C. Cir. 2017).

expressly understood to reflect and codify principles of international law.”⁵²

Due to the move toward the restrictive theory of immunity as entrenched in the FSIA, a foreign state is nowadays neither absolutely immune from suit nor from the execution of its assets following a judgment or award.⁵³ Prior to the FSIA and even post Tate Letters, a state was considered absolutely immune from execution; that is, even though a state was not absolutely immune for jurisdictional purposes.⁵⁴ This shortcoming in the execution phase was rectified with the FSIA. Professor Brower rightly noted that in order to “ensure a greater coincidence of moral and practical victories for the vast run of cases, the FSIA’s drafters established a closer alignment between the rules on immunity from jurisdiction and the rules of immunity from execution of judgments.”⁵⁵

The FSIA has separate regimes for immunity from jurisdiction and immunity from execution. Both regimes articulate a general rule on immunity and qualify the rule with exceptions. Moreover, the FSIA has a different handling of pre-judgment attachment and post-judgment execution as well as different principles relating to execution against state property or against property of state agencies or instrumentalities.⁵⁶ Immunity from jurisdiction is regulated in §§ 1604, 1605, 1605A, and 1605B, which include, in part, the commercial activity exception, waiver, arbitration exception, and the terrorism

⁵² Stewart, *supra* note 9, at 626.

⁵³ See *Walters v. Indus. & Com. Bank of China*, 651 F.3d 208 (2d Cir. 2011) (The Circuit Court clearly articulated that there is a distinction between immunity from jurisdiction and immunity from execution.).

⁵⁴ Charles H. II Brower, *Mitsubishi, Investor-State Arbitration, and the Law of State Immunity* 20 AM. U. INT’L L. REV. 907, 923 (2005) (“For example, before the enactment of the FSIA, the United States applied the doctrine of restrictive immunity to *claims* against foreign states, but the doctrine of absolute immunity to the execution of resulting *judgments*. . .”).

⁵⁵ *Id.* at 924. However, due to the fact that property used for governmental purposes is protected, the theoretical proximity has less practical effect. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 460 cmt. B (AM. L. INST. 1987).

⁵⁶ See Sun Jin, *Immunity from Execution of Judgments under the FSIA – Moderate Balance to the New UN Convention*, 4 US-CHINA L. REV. 13, 14-15 (2013).

exception. Immunity from execution is dealt with separately under §§ 1609-1611.⁵⁷

As a general rule, the property of a foreign state is immune against execution in the U.S. (§ 1609), unless an exception applies (§ 1610), and the property is not immune *ipso facto* (§ 1611).⁵⁸ Section 1610(a) deals with immunity from execution of property belonging to a foreign state, while § 1610(b) deals with immunity from execution of property belonging to an agency or instrumentality of a foreign state. Section 1610(a) deals with property that is both in the U.S. and is used for a commercial activity or purpose in the U.S. Section 1610(b) deals with property that is in the U.S. but does not require it to be used for a particular purpose. There is no need to identify the purported use of the assets to be attached pursuant to Section 1610(b). The court in *Connecticut Bank of Commerce v. Republic of Congo* established that there is a distinction between the commercial activity requirements in sections 1610(a) and 1610(b) in the FSIA.⁵⁹

The “execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the sovereign itself.”⁶⁰ The Ninth Circuit Court of Appeals has noted that the statutory construct “reflect[s] a pivotal purpose of the FSIA,” specifically, “to limit execution against property directly belonging to a foreign state.”⁶¹ The situation for an award-creditor and a judgment-creditor is significantly different. For judgment-creditors, the only assets available are those used for the commercial activity upon which

⁵⁷ See, e.g., *Walters*, 651 F.3d at 288 (“First, the FSIA’s provisions governing jurisdictional immunity, on the one hand, and execution immunity, on the other, operate independently.”).

⁵⁸ See, e.g., *Brower*, *supra* note 54, at 920 (“Consistent with the procedural, substantive, and practical justifications for incremental deference to foreign states, the FSIA’s drafters intentionally adopted a presumption of immunity as a means of protecting foreign states from liability in doubtful cases.”).

⁵⁹ *Ct. Bank of Com. v. Congo*, 309 F.3d 240 (5th Cir. 2002), *as amended on denial of reh’g* (Aug. 29, 2002); see *Walters*, 651 F.3d at 289-90 (“Third, the property of an agency or instrumentality of a foreign state is afforded narrower protection from execution than the property of the foreign state itself.”).

⁶⁰ *Walters*, 651 F.3d at 289.

⁶¹ *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1089 (9th Cir. 2007) (citing *Ct. Bank of Com.*, 309 F.3d at 253).

the claim was based. The award-creditor is not subject to the same obstacle, which in turn makes the international arbitration regime more effective as compared to international litigation. Despite this lax enforcement, even award-creditors face some difficulties in U.S. courts at the execution phase. An award-creditor must demonstrate both that the property is in the U.S. and that the property is being used for a commercial activity in the U.S. These pre-requisites narrow the category of properties subject to attachment and execution.

The award-creditor must then either seek to attach and execute against state assets on the basis of confirming an arbitral award or on the basis of a waiver, if applicable. According to § 1610(a)(1), the waiver can be either “explicit” or “implicit.” An express waiver “must be clear, complete, unambiguous, and [an] unmistakable manifestation of a sovereign’s intent to waive its immunity.”⁶² The express waiver can be found in contracts or treaties, while implicit waivers are typically deduced from conduct that implies an intention to waive the right to invoke immunity.⁶³

The “arbitration exception” is dealt with both in the jurisdiction and execution context. Section 1605(a)(6) represents an exception to jurisdictional immunity, which cannot be considered a “waiver” from execution immunity. However, § 1605(a)(6) deals with some arbitration-related matters. As the ICSID stated in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, when a party has established an exception to immunity from jurisdiction, the same party does not have to demonstrate yet another exception for the “ancillary jurisdiction” of enforcing the award by registering it as a judgment.⁶⁴ As stated in *First City, Texas Houston, N.A. v. Rafidain Bank*, the court’s jurisdiction sustains through proceedings to aid the collection of a money judgment.⁶⁵ Thus, when a party seeks to

⁶² FOX & WEBB, *supra* note 8, at 258.

⁶³ *Id.*

⁶⁴ *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 136-37 (3rd Cir. 2019) (citing *Peterson v. Islamic Republic of Iran*, 627 F.3d 1117, 1123 (9th Cir. 2010)); *IFC Interconsult, AG v. Safeguard Int’l Partners, LLC.*, 438 F.3d 298, 311 (3d Cir. 2006); *Peacock v. Thomas*, 516 U.S. 349, 356, 359, n.7 (1996).

⁶⁵ *First City, Texas Houston, N.A. v. Rafidain Bank*, 281 F.3d 48, 53-54 (2d Cir. 2002).

recognize and enforce an arbitral award pursuant to the arbitration exception to jurisdictional immunity, the ensuing action is considered a “continuation of the action” in the district court that confirms the award.⁶⁶

When it comes to actual execution of an arbitral award, § 1610(1)(6) becomes relevant. In order to prevail as an award-creditor, you need to demonstrate an order confirming an arbitral award, and identify and locate assets to attach that are used for commercial activity in the U.S. When the award-debtor is a sovereign agency or instrumentality, demonstrating that the award-debtor engaged in commercial activity, irrespective of whether the property is used for such purpose, is sufficient.

Moreover, as seen in § 1611, some property is considered immune *ipso facto* such as property of a central bank or monetary authority held for its own account, or property that is used or intended to be used in connection with a military activity. Section 1610(1)(4)(B) renders property used for purposes of maintaining a diplomatic or consular mission, or the residence of the chief of such mission, immune from execution.

In short, the exceptions are “more liberal with respect to post-judgment execution, and as regards post-judgment execution, more liberal to the property of agencies and instrumentalities with respect to execution than to that of foreign States.”⁶⁷

B. Federal Rules of Civil Procedure (FRCP)

This article does not deal with the process of attaching and executing against assets under domestic rules. This article deals with whether property can be executed against, or conversely, whether and when sovereign immunity presents itself as an obstacle. However, such a focus invites not only a substantive law analysis but also a focus on the procedural aspects enabling execution. Once an award-creditor meets the commercial activity standard under the rules on sovereign

⁶⁶ *Crystallex Int’l Corp.*, 932 F.3d at 138.

⁶⁷ FOX & WEBB, *supra* note 8, at 281.

immunity, it must nevertheless satisfy the relevant domestic requirements to attach the assets at issue, even when all sovereign immunity law requirements have been met.⁶⁸ For that reason, state procedural laws can indeed represent a final obstacle to execution.⁶⁹ Adding to that, different states can have different rules on attachment and execution with respect to royalties, debt, taxes, securities, trusts, and so on.

V. CASE LAW ON SOVEREIGN IMMUNITY FROM EXECUTION

Even though the FSIA is the steppingstone for further analysis, the FSIA cannot be understood without engaging in a doctrinal study of case law. Although the law on sovereign immunity has been codified, the area remains dynamic and continues to evolve.⁷⁰ The FSIA has been the subject of both statutory amendments as well as judicial interpretation;⁷¹ so, to distill meaning from the statute, we must analyze case law. For example, former Diplomat Leigh observed that the legislative branch had “decided to put [their] faith in the U.S. courts to work out progressively, on a case-by-case basis . . . the distinction between commercial and governmental” activities.⁷² In so doing, the Supreme Court reasoned that a judge must consider that the rules on sovereign immunity as found in the FSIA expressly reflect and codify principles of international law.⁷³ Moreover, not only was the FSIA based on principles of international law, but it “continues to reflect

⁶⁸ See Brian King et al., *Enforcing Awards Involving Foreign Sovereigns*, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 413, 433 (James Carter & John Fellas eds., 2010).

⁶⁹ See *id.* at 433.

⁷⁰ David P. Stewart, *Recent Developments in U.S. Law on Foreign Sovereign Immunity*, in 18 YEARBOOK OF PRIVATE INTERNATIONAL LAW 171, 172 (Andrea Bonomi & Gian Paolo Romano eds., 2018).

⁷¹ *Id.*

⁷² *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before Subcomm. On Admin Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong. 24, 53 (1976) (statement of Monroe Leigh).

⁷³ *Bolivarian Republic of Venezuela v. Helmerich et al.*, 581 U.S. 170, 179 (2017) (“The Act for the most part embodies basic principles of international law long followed both in the United States and elsewhere.”); see Stewart, *supra* note 3, at 626.

basic principles of international law.”⁷⁴ One could say that it is a living statute.

Here, I focus on case law dealing with the statutory exceptions to execution immunity, which have been the subject of extensive judicial interpretation. The cases below deal with the interpretation and application of the substantive law of sovereign immunity, meaning the waiver and implied waiver doctrines, the commercial activity exception, and certain property specifically protected. The case law in this article deals with procedural features enabling and facilitating the remedy that the exception sets out, for example, piercing of the corporate veil, discovery, and lowering or reversing of the burden of proof.

However, the obstacle of immunity from execution exists because of the FSIA. Leaving certain award or judgment creditors without remedy is foreseeable and intentionally designed in order to protect states. By way of illustration, in *De Letelier v. Republic of Chile*, the Second Circuit heard a matter where a judgment-creditor sought to attach and execute against the Chilean national airline, *Línea Aérea Nacional-Chile* (“LAN”), for Chile’s debt.⁷⁵ The district court had reasoned that if jurisdictional immunity is lifted, the presumption is that immunity from execution should be lifted too. The rationale being that a statute should not be interpreted to create a right without a remedy.⁷⁶ The Second Circuit held otherwise and explained that “when drafting the FSIA[,] Congress took into account the international community’s view of sovereign immunity[;]” therefore, “Congress did in fact create a right without a remedy” in some circumstances.⁷⁷ It is an intentional design that “the execution immunity afforded sovereign property is broader than the jurisdictional immunity afforded the

⁷⁴ *Bolivarian Republic of Venezuela*, 581 U.S. at 180.

⁷⁵ *De Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984).

⁷⁶ *Id.* at 792.

⁷⁷ *Id.* at 792, 798-99. The court also engaged in a comparative analysis, comparing, among other things, the SIA 1978 and the ECSP’s execution regime.

sovereign itself.”⁷⁸ Remedy is the wheat that needs to be separated from the chaff of liability.

A. The Waiver Doctrine

The FSIA requires separate waivers for submitting a case to the U.S. courts and to pursue execution of judgment.⁷⁹ An explicit waiver of immunity from jurisdiction is not considered an implied waiver of immunity from execution⁸⁰ In *Walters v. Industrial and Commercial Bank of China*, the Second Circuit reasoned that nothing in the FSIA signals that Congress intended a low standard for a waiver of sovereign immunity and, to the contrary, the legislative history of § 1610(a)(1) indicates that “Congress contemplated that waiver of execution immunity would be accomplished by some affirmative act of the foreign state.”⁸¹

In *Liberian Eastern Timber Corporation v. Liberia*, Liberia waived its sovereign immunity with respect to enforcement.⁸² Such a waiver meant that the award-creditor could recognize and enforce the award but that did not translate to a waiver from execution. Thus, the tonnage fees, registration fees, and other taxes were out of reach for the award-creditor because they were considered to be used for the “support and

⁷⁸ *Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011); *see also* *Ct. Bank of Com. v. Congo*, 309 F.3d 240, 246-55 (5th Cir. 2002), *as amended on denial of reh’g* (Aug. 29, 2002) (“[A]t the time the FSIA was passed, the international community viewed execution against a foreign state’s property as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action.”); *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866 (2008) (“[P]re-FSIA common-law doctrine dictated that courts defer to executive determination of immunity because ‘the judicial seizure’ of the property of a friendly state mat be regarded as ‘an affront to its dignity and may [therefore] affect our relations with it.’”).

⁷⁹ *Jin*, *supra* note 56, at 14.

⁸⁰ *See, e.g., Walters*, 651 F.3d at 288 (referring to Restatement (Third) of Foreign Relations Law of the United States “a waiver of immunity from suit does not imply a waiver of immunity from attachment of property, and a waiver of immunity from attachment of property does not imply a waiver of immunity from suit.”). *See also* *Jin*, *supra* note 56, at 14.

⁸¹ *Walters*, 651 F.3d at 295-96.

⁸² *Liberian E. Timber v. Gov’t of the Republic of Liberia*, 650 F. Supp. 73, 76 (S.D.N.Y. 1986).

maintenance of governmental functions” and as such, were “an exercise of powers particular to a sovereign.”⁸³

In *Af-Cap Inc. v. Republic of Congo*, the Fifth Circuit agreed with the district court who had reasoned that “even when a foreign state purports to waive completely its immunity, the FSIA only permits execution on property that is ‘commercial.’”⁸⁴ The Ninth Circuit, in *Af-Cap Inc. v. Republic of Congo*, agreed with the Fifth Circuit, holding that an explicit waiver of immunity from “suit, execution, attachment, or other legal process” was an exception, per § 1610(a)(a), to the general rule of immunity found in § 1609 and a “waiver merely triggers the exception to the immunity from execution that would otherwise be in effect.”⁸⁵ So, the waiver means that the court’s inquiry continues regardless of whether the property is in the U.S. and whether the property is used for a commercial activity in the U.S. In other words, a waiver does not necessarily constitute a waiver with respect to all of the state’s property in the U.S.⁸⁶ The explicit waiver of immunity from execution was not treated as going above and beyond § 1610(a). In *Corporacion Mexicana De Servicios Maritimos, S.A. De C.V. v. M/T Respect*, the Ninth Circuit held that the waiver provisions in the FSIA must be construed narrowly.⁸⁷ In *Export-Import Bank of China v. Grenada*, Grenada had signed a waiver of immunity from execution with the following terms:

[Grenada] represents and warrants that this Agreement and the Loan being made hereunder is a commercial . . . act and that the Borrower is not entitled to claim immunity from legal process with respect to itself or any property owned by it . . . on the ground of sovereignty . . . [and] [t]o the extent that [Grenada] or

⁸³ *Id.* at 78.

⁸⁴ *Af-Cap Inc. v. Congo*, 383 F.3d 361, 365 (5th Cir.), *decision clarified on reb’g*, 389 F.3d 503 (5th Cir. 2004).

⁸⁵ *Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1087 (9th Cir. 2007).

⁸⁶ *See Inna Uchkunova & Oleg Temnikov, Enforcement of Awards Under the ICSID Convention—What Solutions to the Problem of State Immunity?*, 29 ICSID REV. 187, 203 (2014).

⁸⁷ *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996).

any property owned by it . . . has or hereafter may acquire any right of immunity from . . . attachments or execution of judgment . . . [Grenada] hereby irrevocably waives such right to immunity for itself and such property⁸⁸

So, the question is whether a waiver adds anything at all for an award-creditor since there is already an arbitration exception in the execution. A waiver does not displace the execution regime in the FSIA. Put simply, a waiver is one of the exceptions pursuant to § 1610(a) and nothing above and beyond that.⁸⁹ This was clearly stated by the Fifth Circuit in *Connecticut Bank of Commerce v. Republic of Congo*, where it reasoned that “[e]ven when a foreign state completely waives its immunity from execution, courts in the U.S. may execute only against property that meets these two statutory criteria.”⁹⁰

Thus, a waiver of immunity from execution applies only against property that is used for a commercial activity in the U.S. and is in the U.S.⁹¹ One can say that the waiver doctrine is merely a commercial activity exception in the arbitration context. But because a judgment-creditor has it more difficult in the U.S. than in many other jurisdictions due to § 1610(a)(2), meaning that the property was “used for the commercial activity upon which the claim is based,” the waiver plays an important role for judgment-creditors. In the arbitration context, § 1610(a)(6) renders the issue moot.

B. Commercial Purpose Exception

Pursuant to § 1610(a) of the FSIA, a court can only withhold or condition immunity from execution with respect to a state’s property if the property is in the U.S. and is used for a commercial

⁸⁸ Exp.-Imp. Bank of the Republic of China v. Grenada, 768 F.3d 75, 78 n.1 (2d Cir. 2014).

⁸⁹ See also Exp.-Imp. Bank of the Republic of China v. Grenada, 876 F. Supp. 2d 263, 264-65 (S.D.N.Y. 2012), *aff’d in part, vacated in part sub nom.* Exp.-Imp. Bank of the Republic of China v. Grenada, 768 F.3d 75 (2d Cir. 2014).

⁹⁰ Ct. Bank of Com. v. Congo, 309 F.3d 240, 247 (5th Cir. 2002), *as amended on denial of reh’g* (Aug. 29, 2002).

⁹¹ Af-Cap Inc. v. Congo, 383 F.3d 361, 365 (5th Cir.), *decision clarified on reh’g*, 389 F.3d 503 (5th Cir. 2004).

activity in the U.S. “Used for” means more than “in connection with,” “related to,” “integral to,” or equivalent.⁹² The property must be “put into action, put into service, availed or employed for a commercial activity” and must be so by the state and not a private third party.⁹³ Thus, where one of the exceptions applies, the property must be used for a commercial activity in the U.S., and the property must also be located in the U.S. (a nexus requirement). This can be problematic where the property is intangible in nature.⁹⁴

In the U.S., as in other jurisdictions, under the execution regime, the Purpose Test is prevalent as opposed to the Nature Test. The focus in *Export-Import Bank of China v. Grenada* is not on how a state generates the assets but on how the state uses them.⁹⁵

In *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, the Republic of Congo (the Congo) had asserted immunity from execution for attachment of property held by Chevron Texaco Corp. in intangible obligations (bonuses, taxes, and royalties from extraction of natural resources).⁹⁶ The Ninth Circuit concluded that the property was not used for a commercial activity in the U.S. and was therefore “not subject to execution or collection under § 1610(a) of the FSIA.”⁹⁷

However, whether property is used for a commercial or non-commercial governmental purpose is not always that easy to discern.

⁹² See *Af-Cap Inc. v. Republic of Congo*, 475 F.3d 1089 (9th Cir. 2007).

⁹³ *Id.* at 1090-91; see also *EM Ltd v. Argentina*, 473 F.3d 463, 484 (2nd Cir. 2007) (“Because a nation state’s borrowing relationship with the IMF takes place outside of the commercial marketplace, it cannot be considered ‘commercial’ in nature.”).

⁹⁴ See, e.g., *Af-Cap Inc. v. Congo*, 383 F.3d 361 (5th Cir. 2004). The complications are even more cumbersome where the state can choose to be paid in royalties or “in-kind.” Such latter payment could be, for example, barrels of oil instead of royalties. However, the task has been lessened since the holding in *U.S. Industries, Inc v. Gregg*, 540 F.2d 142, 157 n.5 (3d Cir. 1976), where the court held that the attaching of a situs to intangible property is context-specific and requires embodying a common-sense appraisal of the requirements of justice and convenience in the particular circumstances and conditions.

⁹⁵ *Exp.-Imp. Bank of the Republic of China v. Grenada*, 768 F.3d 75, 89 (2d Cir. 2014).

⁹⁶ *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d at 1084.

⁹⁷ *Id.* at 1095.

In fact, Af-Cap Inc. had already litigated a similar matter in the Fifth Circuit, where the Court held that property held by the oil company (CMS in that case), in the form of debt (also tax and royalty obligations), was used to pay a commercial loan and was therefore used for commercial purposes in the U.S.⁹⁸ In the Fifth Circuit, the judgment-creditor sought to execute, through garnishment, actions for intangible property held by third parties and due to the Congo for payment of taxes and royalties. The third-party (CMS) was the successor and now the operator of a joint venture to extract oil in the Congo in exchange for payments of royalties and taxes.⁹⁹ The property to be attached were these payments. In that case, whether property was to be considered as used for a commercial purpose was to be determined through a “holistic approach” that examined the “totality of circumstances.” The court reasoned as follows:

Like the district court, we have similar reservations about defining property use as commercial in nature solely by reference to past single and/or exceptional commercial uses. Instead, we agree that determining the commercial (or non-commercial) status of a property’s use requires a more holistic approach. Specifically, we think that an analysis applied to such a question should examine the totality of circumstances surrounding the property. This analysis should include an examination of the uses of the property in the past as well as all facts related to its present use, with an eye toward determining whether the commercial use of the property, if any, is so exceptional that it is “an out of character” use for that particular property.¹⁰⁰

The court entertained evidence of past use in order to inquire into the predominant use or future use of the property as either sovereign or commercial. Moreover, the court went as far as stating that it would be appropriate to consider whether the property has been manipulated by a sovereign in order to avoid being subject to

⁹⁸ Af-Cap Inc. v. Congo, 383 F.3d 361 (5th Cir.), *decision clarified on reh’g*, 389 F.3d 503 (5th Cir. 2004).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 369.

garnishment.¹⁰¹ Thus, the property of the Congo was amenable to execution pursuant to the commercial activity exception in the Fifth Circuit. The Fifth Circuit also concluded that the situs for the tax and royalty payments was in the U.S. and refused arguments such as the one that the Congo often elected payments in-kind instead.¹⁰²

However, as already stated, in *Af-Cap Inc. v. Republic of Congo*, the Ninth Circuit was faced with a similar plea of immunity from execution as a defense to the attempted execution of property held by a third party (in that case, Chevron-Texaco).¹⁰³ The Ninth Circuit did not agree with the Fifth Circuit. The property, as in the Fifth Circuit, included intangible obligations owed to the Congo for various taxes, bonuses, and royalties related to the extraction of natural resources. The Ninth Circuit, however, refused to adopt the same holistic inquiry and totality of the circumstances test that looked to include “past single and/or exceptional commercial uses.”¹⁰⁴ The court focused strictly on the “use” of the property. The Ninth Circuit concluded that the “nexus or connection to a commercial activity in the [U.S.] is insufficient” for the purposes of execution.¹⁰⁵ The court held that “in order to satisfy § 1610(a), the property must have been ‘used’ [for a commercial activity in the U.S.]; the mere fact that the property has a ‘nexus or connection to a commercial activity in the [U.S.]’ is insufficient.”¹⁰⁶

Both circuit courts focused on the difference between the narrower terminology “used for a commercial activity” in § 1610(1) dealing with execution immunity as opposed to the broader language of “in connection with” found in § 1605(a)(2) with respect to jurisdictional immunity. Moreover, both courts arrived at the same test to determine whether property was used for a commercial activity in the U.S. The Ninth Circuit reasoned as follows:

¹⁰¹ *Id.* at 373 n.8.

¹⁰² *Id.* at 372-73.

¹⁰³ *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1084 (9th Cir. 2007).

¹⁰⁴ *Id.* at 1091 (citing *Af-Cap Inc. v. Congo*, 383 F.3d at 369).

¹⁰⁵ *Id.* at 1094.

¹⁰⁶ *Id.* (citing *Ct. Bank of Com. v. Congo*, 309 F.3d 240, 254 (5th Cir. 2002), *as amended on denial of reh'g* (Aug. 29, 2002)).

The Fifth Circuit emphasized that “what matters under the statute is how the foreign state uses the property, not how private parties may have used the property in the past . . .”, reasoning that, “[i]f we were to allow a private party’s commercial use of the property to count for § 1610(a), we would erase the commercial/noncommercial use distinction for almost all of a foreign state’s tangible property.” We agree that to allow a private party’s commercial use of the property to waive a foreign sovereign’s immunity would not only frustrate “one of the principal goals of the FSIA” — to restrain, to the extent practicable, “judicial interference with the *jus imperii*, or sovereign acts, of a foreign state,” — but would also effectively eviscerate the protections of the FSIA by essentially placing the power to waive the foreign sovereign’s immunity in the hands of private parties.

....

Like the Fifth Circuit, we conclude that property is “used for a commercial activity in the United States” when the property in question is put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity or in relation to a commercial activity.¹⁰⁷

The Second Circuit has joined the reasoning shared by the Fifth and Ninth circuits: “[we] understand the word ‘used,’ read literally, to require not merely that the property at issue relate to commercial activity in the [U.S.], but that the sovereign actively *utilize* that property in service of that commercial activity.”¹⁰⁸ The Ninth Circuit, however, disagreed slightly with the Fifth Circuit:

We expressly decline, however, to incorporate the Fifth Circuit’s articulated “reservations about defining

¹⁰⁷ *Exp.-Imp. Bank of the Republic of China v. Grenada*, 768 F.3d 75, 90 (2d Cir. 2014).

¹⁰⁸ *Id.* at 80.

property use as commercial in nature solely by reference to past single and/or exceptional commercial uses.” Af-Cap, 383 F.3d at 369. In our view, attempting to quantify the number of commercial uses associated with the property, or to embark upon characterizing property use as exceptional or unexceptional, would unnecessarily complicate the determination to be made under § 1610(a).¹⁰⁹

Later, in *Export-Import Bank of China v. Grenada*, the judgment-creditor sought to restrain taxes, fees, and other charges from certain private entities to be made to state entities for use of facilities located in Grenada.¹¹⁰ Grenada claimed that the state entities are separate legal entities that cannot be held responsible, and that the funds are immune from attachment anyway. The issue of piercing the corporate veil is discussed in Part V.E of this article; this section deals with Grenada’s second argument and the issue of immunity of commercial property. The district court held that the funds were immune because the funds were not property in the U.S. and were not used for a commercial activity in the U.S.¹¹¹ The Second Circuit agreed and also found that the property was not “used for commercial activity in the [U.S.]”¹¹² It was reiterated that the analysis of the commercial activity exception must focus on how the state uses its money and not on how it was made.¹¹³ The court reasoned that:

For the most part, the application of this framework to the facts presented here is relatively straightforward. We do not consider the nature of the services provided in Grenada by the Statutory Corporations in exchange for the Restrained Funds, because the source of the property is irrelevant to the section 1610(a) analysis. Instead, we focus on the use to which Grenada puts—

¹⁰⁹ *Chevron Overseas (Congo) Ltd.*, 475 F.3d at 1091.

¹¹⁰ *Exp.-Imp. Bank of the Republic of China*, 768 F.3d at 80.

¹¹¹ *Exp.-Imp. Bank of the Republic of China v. Grenada*, 876 F. Supp. 2d 263, 264-66 (S.D.N.Y. 2012).

¹¹² *Exp.-Imp. Bank of the Republic of China*, 768 F.3d at 78.

¹¹³ *Id.* at 89 (quoting *Ct. Bank of Com. v. Congo*, 309 F.3d 240, 251 (5th Cir. 2002), as amended on denial of reb’g (Aug. 29, 2002)).

or clearly intends to put, by virtue of some formal designation or other specific means—the funds at issue. Even if, as Ex-Im Bank argues, the services provided by the Statutory Corporations are “precisely the kinds of services purchased from private vendors around the world,” funds that the Restrained Entities pay to the Statutory Corporations for those services in Grenada are immune from attachment because they are not used by the Statutory Corporations for commercial activity that takes place in the United States. As the District Court found and the record supports, the Restrained Funds (with the possible exception of the IATA Funds, as discussed below), are devoted to “carrying out public functions in Grenada,” and “used for the maintenance of facilities and services in Grenada.” They fail both the “commercial use” and the “in the United States” prongs. They therefore do not meet the “commercial activity” exception to attachment provided by section 1610(a).¹¹⁴

In this case, the funds that the creditor sought to execute the judgment against were considered to be used for public purposes and used for the maintenance of facilities in the home state. For a part of the funds, the court held that they were not used for commercial activity in the U.S. Therefore, the property to be attached and executed against was either not commercial, not used commercially in the U.S., or not in the U.S. at all.

C. Mixed-Use Assets

In *Birch Shipping Corp. v. The Embassy of the United Republic of Tanzania*, the District Court of D.C. held that:

The only significant question, then, is whether it is proper to attach an account which is not used solely for commercial activity. Certainly the statute places no such restriction upon property which may be attached,

¹¹⁴ *Id.* at 90-91.

nor is there anything in the legislative history indicating that Congress contemplated such a limitation. Central bank accounts are exempt, but that exception is not applicable to accounts used for mixed purposes. Indeed, a reading of the Act which exempted mixed accounts would create a loophole, for any property could be made immune by using it, at one time or another, for some minor public purpose. Defendant asserts, however, that failure to find this property immune will make it impossible for foreign countries to maintain embassies. Even if it could be shown this was actually a problem, the solution would not be the broad immunity defendant asks, but segregation of public purpose funds from commercial activity funds. Holding otherwise would defeat the express intention of Congress to (provide, in cases of commercial litigation such as this, that a “judgment creditor” [would have] some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.” Accordingly, the property at issue here is not immune from attachment, and the motion to quash the writ is denied.¹¹⁵

Here, the court clearly stated that property predominantly used commercially can be executed against or the commercially used property can be severed out. In *Af-Cap Inc. v. Republic of Congo*, the Fifth Circuit was not directly dealing with so-called mixed-use assets, but the reasoning may nevertheless prove helpful in such context.¹¹⁶ In reasoning whether property was used for commercial or sovereign purposes, the court outlined a holistic approach focusing on the “totality of circumstances.”¹¹⁷ Such a test included looking both at past use, and whether the state has manipulated the use to avoid garnishment.¹¹⁸ The court cited to the district court of D.C. in *Eastern*

¹¹⁵ *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F.Supp. 311, 313 (D.D.C. 1980).

¹¹⁶ *See generally Af-Cap Inc. v. Congo*, 383 F.3d 361, 365 (5th Cir.), *decision clarified on reb'g*, 389 F.3d 503 (5th Cir. 2004).

¹¹⁷ *Id.* at 369.

¹¹⁸ *Id.*

Timer Corp. v. Republic of Liberia, where the court found that the property was a bank account primarily used to fund diplomatic and consular activities, but some portions had been used for commercial activities.¹¹⁹ However, the court held that a state does not lose its immunity because a portion of the property is used for a commercial activity.¹²⁰ In *Af-Cap Inc. v. Republic of Congo*, the Fifth Circuit reasoned that Congo had “used at least fifty percent of [the property in question (i.e., royalties and taxes)] to repay a commercial debt” and had at least once contemplated doing so again.¹²¹

It appears that the test for mixed use property is whether the property is predominantly used for a commercial or sovereign purpose. There appears to be no doctrine describing how to separate out what is commercial for the purposes of attachment and execution.

D. Certain Property and Property Immune Ipso Facto

Certain categories of property are considered immune *ipso facto* pursuant to § 1611. Such property includes funds held in the name of a foreign central bank or monetary authority for its own account and property used for certain military activities.

As an important caveat, however, certain property is considered open to execution due to the nature of the preceding action. This means that if a judgment is entered under § 1605A (the terrorism exception), the property of the state is subject to execution regardless of, among other factors, the level of economic control over the property by the foreign state, whether the profits of the property go to that government, and or whether that government is the sole beneficiary.

E. Piercing the Corporate Veil

A judge may be asked to address under what circumstances—if any—agencies, instrumentalities, or even state-owned entities may

¹¹⁹ *Id.* at 370 n.9 (citing *E. Timer Corp. v. Liberia*, 659 F. Supp. 606 (D.D.C. 1987)).

¹²⁰ *E. Timer Corp.*, 659 F. Supp. at 610.

¹²¹ *Af-Cap Inc. v. Congo*, 383 F.3d at 370.

be held liable for the debt of a foreign state. Put differently, when should the separate juridical existence be ignored, thereby treating its property as that of the debtor state?

It is important to understand that where an award has been rendered and confirmed as a judgment in the U.S. against a state, the award is entered against that state only—not against any of its agencies or instrumentalities. In *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, the Supreme Court held that “government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.”¹²² This presumption of affording separate legal status to agencies, instrumentalities, and state-owned enterprises is known as the “*Bancec* rule”.¹²³ This is a rigorous presumption that must be overcome and can only be overcome under exceptional circumstances.¹²⁴

However strong the presumption may be, in the *Bancec* case the Court outlined two exceptions to the rule: (1) where the “corporate

¹²² *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-27 (1983).

¹²³ *See generally id.*

¹²⁴

Under the [FSIA], there is a strong presumption that a foreign sovereign and its instrumentalities are separate legal entities. But the Supreme Court made clear in *Bancec* and *Rubin* that in extraordinary circumstances—including where a foreign sovereign exerts dominion over the instrumentality so extensive as to be beyond normal supervisory control—equity requires that we ignore the formal separateness of the two entities.

Crystalex Int’l Corp. v. Bolivarian Republic of Venez., 932 F.3d 126, 151-52 (3d Cir. 2019); *see also*, *Walters v. Indus. & Comm. Bank of China, Ltd.*, 651 F.3d 208, 298 (2d Cir. 2011) (“The record in this case is bereft of any reason to conclude that the separate legal status of any agency or instrumentality of China should be disregarded for purposes of allowing petitioners to execute the judgment against assets of such entities.”); *Exp.-Import Bank of the Republic of China v. Grenada*, 768 F.3d 75 (2d Cir. 2014) (The judgment-creditor sought to restrain taxes, fees, and other charges from certain private entities to be made to state entities for use of facilities located in Grenada. Grenada claimed that the funds are not subject to attachment since the state entities are distinct legal entities and separate from the state. Such entities cannot be held responsible for the debt of Grenada.).

entity is so extensively controlled by its owner that a relationship of principal and agent is created,” and (2) where the recognition of the legal distinction “would work fraud or injustice.”¹²⁵ Thus, the *Bancec* case allowed for an “alter ego prong” and an “equity prong.” For the former, the Court detailed certain factors to consider. They are, however, not to be treated mechanically.

Conclusively, the *Bancec* case established the following rules: (1) the presumption of separateness (the “*Bancec* Rule”), (2) exceptions to the *Bancec* Rule under two separate prongs (the “*Bancec* Exceptions”), and (3) a fact-intensive inquiry of factors as prerequisites to meet the exception (the “*Bancec* Test”). The *Bancec* Test considers two separate exceptions for when the *Bancec* Rule of separateness can be overcome: the “extensive control” prong and the “fraud or injustice” prong (the “*Bancec* Prongs”).¹²⁶

In *De Letelier v. Republic of Chile*, the Second Circuit heard a matter where a judgment-creditor sought to attach and execute against the Chilean national airline, *Línea Aérea Nacional-Chile* (“LAN”), for Chile’s debt.¹²⁷ Relying on the *Bancec* Rule, LAN moved to dismiss, claiming that it should not be held responsible for the debt of Chile.¹²⁸ The district court had found an abuse of the corporate form and disregarded the presumption of separateness. In this case, the Second Circuit reversed by reiterating that the burden of piercing the corporate veil is a difficult one, and moreover, a burden that the plaintiff (creditor) must bear.¹²⁹ The court concluded that the burden of proving abuse “sufficient to overcome the presumption of separate

¹²⁵ *First Nat’l City Bank*, 462 U.S. at 629.

¹²⁶ *See id.* at 629 (Prong 1: “where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other.” Prong 2: “the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.” These two prongs were affirmed in *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 823 (2018)).

¹²⁷ *De Letelier v. Chile*, 748 F.2d 790 (2d Cir. 1984).

¹²⁸ *Id.* at 792.

¹²⁹ *Id.* at 795 (“A creditor seeking execution against an apparently separate entity must prove ‘the property to be attached is subject to execution.’”).

existence” had not been met.¹³⁰ The court noted that both “*Bancec* and the FSIA legislative history caution against too easily overcoming the presumption of separateness.”¹³¹ Hence, LAN’s assets could not be attached and executed against Chile’s debt.¹³²

In *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, the Third Circuit stated that the *Bancec* doctrine was a “federal common-law outgrowth” of the FSIA and that it can, “in certain circumstances, [be used] to disregard the corporate separateness of foreign sovereigns to avoid the unfair results from a rote application of the immunity provisions provided by the [FSIA].”¹³³ Before that, in *Rubin v. Islamic Republic of Iran*, the Supreme Court had essentially confirmed the *Bancec* Rule, the *Bancec* Exception, and the *Bancec* Test.¹³⁴

Later, in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, the Third Circuit heard a case on whether assets of Venezuela’s state-owned entity, PDVS, should be attachable to satisfy the debt of Venezuela pursuant to an ICSID arbitration award.¹³⁵ The ICSID award of \$1.4 billion had been confirmed in the U.S. As a starting point, the court outlined the *Bancec* Test, namely, that “a judgment creditor of a foreign sovereign may look to the sovereign’s instrumentality for satisfaction when it is ‘so extensively controlled by its owner that a relationship of principal and agent is created.’”¹³⁶ The district court concluded that the control was sufficient to attach PDVSA’s shares to PDVH to satisfy the arbitral award; the Third

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 799.

¹³³ *Crystallex Int’l Corp. v. Bolivarian Republic of Venez.*, 932 F.3d 126, 139 (3d Cir. 2019).

¹³⁴ *Id.*

¹³⁵ *Crystallex Int’l Corp. v. Bolivarian Republic of Venez.*, 932 F.3d 126 (3d Cir. 2019).

¹³⁶ *Id.* at 132 (citing *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983)).

Circuit affirmed.¹³⁷ It did so based on the “alter ego” prong established as one of the *Bancec* Exceptions.

The court’s reasoning in *Crystallex* is of significant interest. The circuit court first found that it had jurisdiction over Venezuela pursuant to the arbitration exception (§ 1605(a)(6)) and that such jurisdiction extends to “ancillary jurisdiction” to enforce their judgments through, for example, attachment and garnishment.¹³⁸ The circuit court then extended its jurisdiction to assets held by the state-owned entity, PDVSA. In light of the reasoning in *Rubin v. Islamic Republic of Iran*, the circuit court then stated that the judgment holder “may reach the assets of the foreign judgment debtor by satisfying the *Bancec* factors.”¹³⁹ Thus, if the state-owned entity is an “alter ego” of the state (i.e., qualifies under one of the *Bancec* Exceptions), the court has jurisdiction to proceed through its ancillary jurisdiction with execution, unless the assets are immune.

Moreover, *Rubin* and *Crystallex* clearly illustrate that U.S. courts have refused to develop a “mechanical formula” for when a state agency, instrumentality, or state-owned entity may be held liable for the debt of the State.¹⁴⁰ Instead, circuit courts have developed a case-by-case analysis on the basis of factors referred to as “the *Bancec* factors”—i.e., the *Bancec* Test—in aiding this analysis.¹⁴¹ The factors to aid courts in their analysis are:

- (1) the level of economic control by the government;
- (2) whether the entity’s profits go to the government;

¹³⁷ See *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp. 3d 380, 414 (D. Del. 2018) (holding that the court had jurisdiction to order attachment against PDVSA and that the court could attach *Crystallex* shares of PDVH to satisfy the judgment against Venezuela.).

¹³⁸ *Crystallex Int’l Corp.*, 932 F.3d at 136-37 (Peacock v. Thomas, 516 U.S. 349, 356, 359 n.7 (1996)).

¹³⁹ *Rubin*, 138 S.Ct. at 823.

¹⁴⁰ See *Crystallex Int’l Corp.*, 932 F.3d at 140; *Rubin*, 138 S.Ct. at 823.

¹⁴¹ See *Rubin*, 138 S. Ct. at 822-23.

(3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs;

(4) whether the government is the real beneficiary of the entity's conduct; and

(5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.¹⁴²

In *Crystallex*, the Third Circuit performed the *Bancec* Test via the extensive control prong and analyzed the factors considering the facts and circumstances at hand. In that case, the factors were satisfied.¹⁴³ However, even then, the last obstacle is still that of sovereign immunity, meaning, whether the assets held by the state-owned entity—now considered assets of the state—are immune from attachment and execution. Put differently, the *Bancec* Exceptions deals with treating the state-owned entity or its assets as part of the state or the state's assets, but the defense of sovereign immunity does not disappear. In *Crystallex*, the award-creditor argued that the property should not be immune pursuant to the commercial purpose exception, and therefore sought to attach the state-owned entity's assets in aid of execution pursuant to confirming an arbitral award against the award-debtor state under § 1610(a)(6).

Even when the corporate veil is pierced, the assets must nevertheless qualify under one of the exceptions in § 1610(a) since the assets are now treated as the state's property for the purposes of execution. In light of this, piercing the corporate veil should be understood more as a "jurisdictional matter," and not as a matter of execution per se. The second step of the analysis is to determine

¹⁴² See *id.* at 823. See *Crystallex Int'l Corp.*, 932 F.3d at 141 ("We use these factors identified in *Rubin* to structure our analysis here. At the same time, we recognize that they, like the other extensive control tests our sister circuits have adopted, are meant to aid case-by-case analysis rather than establish a 'mechanical formula' for identifying extensive control.").

¹⁴³ *Crystallex Int'l Corp.*, 932 F.3d at 152 ("Indeed, if the relationship between Venezuela and PDVSA cannot satisfy the Supreme Court's extensive-control requirement, we know nothing that can.").

whether the property at hand is used for the commercial activity upon which the claim is based (if it is a judgment that is to be enforced), whether a waiver exists, or whether the judgment is entered on the confirmation of an arbitral award. When the immunity can be qualified, the property must also be used for a commercial activity in the U.S. and be located in the U.S. Section 1610(b)—with its lower threshold of merely engaging in commercial activity in the U.S.—is not applicable since the property is treated as that of the state following the veil piercing.

F. Burden of Proof and Post-Judgment Discovery

Post-judgment discovery in aid of execution belongs to a court's jurisdictional ambit. One should also bear in mind that there is a major difference between general discovery and extraterritorial discovery. Historically, U.S. courts were hesitant to approve extraterritorial asset discovery. In *Société Nationale Industrielle Aérospatiale v. United States*, the Supreme Court reasoned that “Objections to ‘abusive’ discovery that foreign litigants advance should therefore receive the most careful consideration” and that U.S. courts “have long recognized the demands of comity in suits involving foreign states.” In essence, the court seems to have opined that extraterritorial asset discovery in cases involving foreign states raises comity concerns, and therefore that courts ordering discovery should demonstrate a heightened respect for the sovereign's interests. This position was reiterated in 2011, in *Rubin v. Republic of Iran*, when the Seventh Circuit held that a general asset discovery against a state's property violates the FSIA.

However, this position changed in 2014 when the Supreme Court rendered a landmark decision in the *Republic of Argentina v. NML Capital, Ltd.*¹⁴⁴ The Supreme Court reasoned that “the FSIA does not restrict the discovery of a foreign state's extraterritorial assets in aid of post-judgment attachment.” It clarified that “[t]here is no . . . provision forbidding or limiting discovery in aid of a foreign-sovereign judgment debtor's assets.”¹⁴⁵ Accordingly, post-judgment discovery should be no

¹⁴⁴ *Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 146 (2014).

¹⁴⁵ *Id.* at 143.

different when the award-debtor is a sovereign state compared to a private award-debtor. Thus, without an explicit statement to the contrary, the ordinary rules of discovery apply. Any concerns not rooted in statutory interpretation, the Court rationalized, “are better directed to that branch of government with authority to amend the Act—which, as it happens, is the same branch that forced our retirement from the immunity-by-factor-balancing business nearly 40 years ago.”¹⁴⁶ The Court held that “any sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA’s] text. Or it must fall.”¹⁴⁷ The Court reasoned that in the U.S., “[t]here is no third provision forbidding or limiting discovery in aid of execution of a foreign sovereign judgment debtor’s assets.”¹⁴⁸

Not all the justices agreed, however. Justice Ginsburg dissented. She was not in favor of the textual interpretation that, according to her, undercut the purpose of the FSIA and did not fairly consider the consequences of such construction. She wrote that U.S. courts should not “indulge the assumption that . . . the sky may be the limit for attaching a foreign sovereign’s property.”¹⁴⁹

But while the assets may be discovered, that does not mean that the assets identified are automatically executable. Whether the assets in question are immune is a separate matter. In *Aurelius Capital Master, Ltd. v. Republic of Argentina*,¹⁵⁰ the Second Circuit refused a discovery objection on the grounds that the assets would be immune from execution. The court was wrong because relying on immunity becomes an issue when the award-creditor seeks to attach and execute against the assets. The Supreme Court highlighted this in the *NML* case, where it reasoned that:

¹⁴⁶ *Id.* at 148.

¹⁴⁷ *Id.* at 141-42.

¹⁴⁸ *Id.* at 142.

¹⁴⁹ *Id.* at 147.

¹⁵⁰ *Aurelius Cap. Master, Ltd. v. Argentina*, 589 Fed. Appx. 16 (2d Cir. 2014) (“To our knowledge, every court to consider whether awards issued pursuant to the ICSID Convention fall within the arbitral award exception to the FSIA has concluded that they do.”).

[The creditors] ask for information about Argentina’s worldwide assets generally, so that NML can identify where Argentina may be holding property that is subject to execution. To be sure, that request is bound to turn up information about property that Argentina regards as immune. But NML may think the same property not immune. In which case, Argentina’s self-serving legal assertion will not automatically prevail. . . .¹⁵¹

By granting post-judgment—and even extra-territorial—discovery, U.S. courts are truly facilitating creditors procedurally.¹⁵² Put simply, the Supreme Court has made it easier to locate attachable assets and therefore made execution against a defaulting award-debtor state easier than before. The decision in *NML* allows award-creditors to access “previously unavailable legal mechanisms” to seek satisfaction of an outstanding debt.¹⁵³ Some authors have criticized this decision, highlighting that the U.S. Justice Department and the U.S. State Department have taken contrary positions during the proceedings.¹⁵⁴ I would say that the FSIA was meant to achieve exactly this—turn any matter on sovereign immunity to the judicial branch for proper legal interpretation and application, and keep it away from the executive branch.

Circuit courts and district courts have taken note of the precedent. In *Export-Import Bank of China v. Grenada*, the Second Circuit remanded a matter on discovery back to the district court in light of the decision in the *Republic of Argentina v. NML Capital, Ltd.*¹⁵⁵ The court held that “any lingering concern that the FSIA alone might presumptively bar further discovery has been eliminated by the

¹⁵¹ *NML Cap., Ltd.*, 573 U.S. at 145.

¹⁵² See generally Adriana T. Ingenito & Christina G. Hioureas, *Carving Out New Exceptions to Sovereign Immunity: Why the NML Capital Cases May Harm U.S. Interests Abroad*, 30 MD. J. INT’L L. 118 (2015).

¹⁵³ *Id.* at 118.

¹⁵⁴ *Id.* at 129.

¹⁵⁵ *Exp.-Imp. Bank of the Republic China v. Grenada*, 768 F.3d 75, 92 (2d Cir. 2014).

Supreme Court in *NML Capital*.¹⁵⁶ Thus, the court vacated the denial of post-judgment discovery of specific funds and remanded to the district court to reassess whether to permit further discovery in light of the new precedent.

Another interesting development took place in *Walters v. Industrial and Commercial Bank of China*, where the Second Circuit held that where the petitioners had not yet “exhausted their powers of discovery pertaining to the judgment debtor’s assets” pursuant to federal laws of civil procedure, it was not unreasonable for the burden of identifying specific, recoverable assets to remain with the petitioner.¹⁵⁷ One cannot help but wonder what happens when the discovery powers are exhausted? Will the burden of identifying specific, recoverable assets shift to the state or the third-party holding state debt or assets? If so, such a position would be a massive game-changer. It is unlikely that such a precedent will be set any time soon.

G. Injunctive Relief

In *NML Capital, Ltd. v. Republic of Argentina* (Equal Treatment Case I), the Second Circuit affirmed a motion for injunctive relief, requesting that Argentina refrain from making payments with respect to its restructured bonds or payments on the defaulted bonds.¹⁵⁸ The Second Circuit thus affirmed the decision in which the Southern District of New York had held that “whenever [Argentina] pays any amount due under the terms of the [exchange] bonds, it must . . . pay plaintiffs the same fraction of the amount due to them”¹⁵⁹ Specific performance was ordered because no adequate monetary remedy was available.¹⁶⁰ Thus, because monetary damages were ineffective, and because Argentina simply refused to pay despite judgments, the court effectively assisted the judgment-creditor without undercutting the

¹⁵⁶ *Id.* at 93.

¹⁵⁷ *Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 297 (2d Cir. 2011).

¹⁵⁸ *NML Cap., Ltd. v. Republic of Argentina*, 699 F.3d 250 (2d Cir. 2012).

¹⁵⁹ *Id.* at 254-255.

¹⁶⁰ *Id.* at 262.

substantive law on sovereign immunity. The Supreme Court denied a writ for certiorari on the injunction matter.

It is important to note that the injunction should not lead to an attachment, arrest, or execution automatically. For example, in *Thai Lao Lignite (Thailand) Co. v. Government of Lao People's Democratic Republic* (“*Laos*”), the Southern District of New York held that the remedies sought—restraining notices of flying fees—violated the FSIA.¹⁶¹ The court held that the restraints would be “functionally the equivalent to the attachment of [Lao’s] property because they involve court-ordered seizure and control.”¹⁶²

VI. CONCLUDING REMARKS

Generally, the U.S. is considered to be a creditor-friendly forum to enforce and execute against a foreign arbitral award.¹⁶³ There is no difference when the award-debtor is a sovereign state. The FSIA has been a cornerstone in allowing the U.S. to serve as a worldwide financial hub. Two authors rightly noted that:

By making immunity determinations more predictable, the FSIA allows the United States to serve as a financial market to the world, where investors can make contracts knowing that they will be honored under law. The ability to sign agreements that will be enforced benefits sovereigns, especially those whose volatile histories make creditors wary of lending money secured only by the sovereign’s promise.¹⁶⁴

¹⁶¹ *Thai Lao Lignite (Thailand) Co. v. Gov’t of Lao People’s Democratic Republic*, No. 10 CIV. 5256 KMW DCF, 2013 WL 1703873, *4 (S.D.N.Y. Apr. 19, 2013).

¹⁶² *Id.*

¹⁶³ Edward G. Kehoe, *The Enforcement of Arbitral Awards Against Foreign Sovereigns – the United States*, in RAYMOND DOAK BISHOP, ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 241-42 (2009).

¹⁶⁴ Matthew D. McGill & Alexander N. Harris, *NML Capital v. Argentina: Enforcing Contracts in the Shadow of the Foreign Sovereign Immunities Act*, 30 MD. J. INT’L L. 1, 4 (2015).

Today, because immunity from jurisdiction is treated differently from immunity from execution, a foreign state may be immune from the execution of a foreign judgment or foreign arbitral award even when subject to the jurisdiction of U.S. courts.¹⁶⁵ Adding to that, the immunity from execution regime is broader and more difficult to penetrate than that with respect to immunity from jurisdiction.¹⁶⁶ Creditors can at times be left without a remedy; this is because of the FSIA. The Second Circuit hit the nail on the head in *De Letelier v. Republic of Chile*, where it reasoned as follows:

Congress passed the FSIA on the background of the views of sovereignty expressed in the 1945 charter of the United Nations and the 1972 enactment of the European Convention, which left the availability of execution totally up to the debtor state, and its own understanding as the legislative history demonstrates, that prior to 1976 property of foreign states was absolutely immune from execution. It is plain then that Congress planned to and did lift execution immunity “in part.” Yet, since it was not Congress’ purpose to lift execution immunity wholly and completely, a right without a remedy does exist in the circumstances here. Our task must be to read the Act as it is expressed, and apply it according to its expressions.¹⁶⁷

¹⁶⁵ William S. Dodge, *Jurisdiction, State Immunity, and Judgments in the Restatement (Fourth) of US Foreign Relation Law* 19 CHINESE J. INT’L L. 101, ¶ 47 (2020) (“Walters demonstrates that immunity from suit and immunity from enforcement are different, and that a foreign state may be immune from the enforcement of a judgment even if it is subject to suit in US courts.”).

¹⁶⁶ See, e.g., *Walters v. Indus. & Com. Bank of China, Ltd.*, 651 F.3d 280, 289 (2d Cir. 2011); *Ct. Bank of Com. v. Republic of Congo*, 309 F.3d 240, 255-56 (5th Cir. 2002), *as amended on denial of reh’g* (Aug. 29, 2002) (“[A]t the time the FSIA was passed, the international community viewed execution as a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action.”).

¹⁶⁷ *De Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984). See also *Walters v. Industrial and Commercial Bank of China*, 651 F.3d 208, 289 (2d Cir. 2011) (“Indeed, our court has observed that the asymmetry between jurisdiction and execution immunity in the FSIA reflects a deliberate congressional choice to create a ‘right without a remedy’ in circumstances where there is jurisdiction over a foreign

This position was reiterated in ensuing cases.¹⁶⁸ However, even though the FSIA does not altogether alleviate the problem of states shielding their assets by successfully invoking sovereign immunity or operating through distinct entities, the FSIA as interpreted and applied by U.S. courts has made the execution regime liberal and pragmatic. Before the statute was enacted, litigation had near zero value and after its enactment, it had at least a non-zero value.¹⁶⁹ This is evident by the rise in cases post-Tate Letters and FSIA enactment. This enabled the courts to elaborate pragmatic procedural tools and devices to assist the substantive law in achieving its objectives and purposes. The courts' experiences with the FSIA reveal that U.S. judges have given much-needed liberal and pragmatic flesh to the skeleton-like FSIA. This includes immunity from the execution regime.

state for purposes of obtaining a judgment, but its property is immune from attempts to execute the judgment . . .”).

¹⁶⁸ See, e.g., *Walters*, 651 F.3d at 288.

¹⁶⁹ Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, U. ILL. L. REV. 67, 91 (2014).