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Analysis of State Immunity versus State Property Seizure in Enforcement of Judgment on International loan Agreement: Analytical Study of Some Eac Member States Debt Status for Recovery

Alexis Ndayisabye

Law School, University of Nairobi, Park Land, Kenya
Email: alexisndayisabye@students.uonbi.ac.ke

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Abstract

The aim of this study is the problem posed by State immunity in case of attachment of State's property as a result of a judgment or award against a State which has been highly indebted and defaulted to honor its loan obligations. The study seeks to analyze and elaborate two majors issues including examination the degree to which a judgment or an award can be enforced against a sovereign State by seizing its property, whether State immunity matters in loan agreement and the exit strategy in case a Sovereign State defaults on its loan. The study is broken down into sections, mainly Section 1 sets out the background to international loan agreement when it comes to State property seizure in execution of judgments against State, explaining why State immunity matters, Section 2 sets out the analysis of Sovereign debt and State immunity in international law as well as explaining the conceptual legal framework of Sovereign loans and State Immunity and issues attached to it. Section 3 sets out critical analysis of selected case law on State's immunity from enforcement of judgments or awards and will provide discussion on illegalities and its legal basis and wrap up with conclusion and recommendation of the way forward. The study concludes that a judgment can be enforced against Sovereign State's property by the way of attachment most especially in case the seized property has been used or intended for use for commercial purposes and in that regard the State loses immunity and this allows the lender, as a judgment creditor, to enforce a judicial decision rendered against a sovereign State.

Keywords

Sovereign Debt, Immunity & Attachment

1. Overview of the Current Situation of the World Sovereign Debt

From IMF perspective, Sovereign debt, is viewed as an important way for governments to finance investments in growth and development but also entering into debt distress, may threaten macro-economic stability and also a way crucial way to boost the State's economic development[1].

From the report published by IMF in July 2023, concerning making public debt, public on-going initiatives and reform options, the report developed and assessed options to improve public debt transparency by examining factors hindering transparency, including capacity and governance gaps, and borrower and creditor incentives and made a review of existing initiatives to improve public debt transparency, identifying priorities for progress and policy gaps and lastly presented the merits of a range of options to improve public debt transparency, drawn from reform proposals gaining prominence in policymaking circles while reflecting on Fund policy priorities.[2]

However, it was explained that, Sovereign debt transparency goes with processes and outputs by which on time are given accurate and right meaningful information on public debt including its procedure and policies in place. It was dealt that sovereign debt brings forth a clear meaning of contracted and outstanding stocks of public debt and public contingent liabilities, their key financial and legal terms, creditor profile, and debt service payments and risks that can result in future debt increases.[3]

It was further expressed that the IMF's Fiscal Transparency Code (FTC) and Public Sector Debt Statistics Guide (PSDS) showed that international statistical standards meant that sovereign debt includes general government, all central bank liabilities, not just those contracted on behalf of the general government, and liabilities of all public corporations as part of the public sector debt and highlighted that covering of sovereign debt should at least include explicit contingent liabilities, for example government guaranteed and non-guaranteed debt of public non-financial corporations that are market producers which are state-owned enterprises or SOEs, and liabilities that concern private public partnerships (PPPs).[4]

From the above findings, the World Economic Forum (WEF) argues that Global Debt (GD) found above $300 trillion in 2021 this includes borrowing

[1]IMF, https://www.imf.org/en/Topics/sovereign-debt reviewed on 15 August 2023.
[2]https://www.imf.org/en/Publications/Policy-Papers/Issues/2023/07/28/Making-Debt-Public-Debt-Ongoing-Initiatives-and-Reform-Options-537306, reviewed on 15 August 2023.
[3]Ibid.
[4]Supra note 3.

from governments, businesses and households which was pushed by COVID-19 and a shift from the war in Ukraine and this is a high level of borrowing which is risky as reported done by IMF, as being affected to Low-income countries (LIC) and households.[5]

It is reportedly proved by IMF that **147 governments have defaulted on their debts from 1960, and currently** Russia could fail to pay $117 million in interest payments to foreign investors, coupled with their sanctions in response to the invasion of Ukraine, it has strongly affected Russia's access to the $630 billion in foreign currency reserves it uses to pay foreign debt which is a default by the legal terms.[6]

The International Monetary Fund identified, that when a government borrows money from foreign and domestic creditors, obliges to pay back the principal and the interest on those loans. If any payment is missed, as contractually agreed up on, it is what is meant a governmental default.[7] It is mostly understood that Defaults happen when factors like weakening economies and unreasonable spending are manifested and when Countries borrow in a currency other than their own, that in case the budget falls short, and the central bank becomes unable to print out more money to fill the gap, it is also understood as a government defaults.[8]

IMF further reportedly argued that, **the world debt** was recorded at **$226 trillion** in 2020, with many sovereign States and governments amounting debt over for more than half of the increase[1]. And COVID-19 has limited different States and Government financial capacities to cpe up with their economic and social challenges to repay their debt obligations and also to achieve the restructuring policy, they ended defaulting, then the debt increased from 28% to 256% of the total GDP in 2020.[9]

For that reason, they have been unbearable **sovereign debts crisis** that occurred in 2020 and many countries failed to pay their loans as evidenced by IMF Global Debt Database (GDD) and also world public debt was recorded to 99% of the total GDP.[10]

However, earlier period like in 2007 borrowing by debt percentage for non-financial corporations and households also increased particularly from around 70% of GDP, to 124% of GDP, in 2020, in contrast, private debt, on the other side, increased at average level from 164% to 178% of GDP, in the same time frame.[11]

In Contrast from the Word Bank perspective, it is argued that debt is an im-

[5]Global debt: https://www.weforum.org/agenda/2022/05/what-is-global-debt-why-high/#:~:text=Global%20debt%20passed%20%24300%20trillion%20in%202021%2C%20the,warns%20that%20it%20is%20at%20dangerously%20high%20levels, reviewed on 16th August 2023.

[6]https://www.weforum.org/agenda/2022/03/russia-default-debt-crisis, reviewed on 16th August 2023.

[7]Ibid.

[8]Ibid.

[9]https://www.imf.org/en/Blogs/Articles/2021/12/15/blog-global-debt-reaches-a-record-226-trillion, reviewed on 16th August 2023.

[10]Ibid.

[11]https://www.brookings.edu/articles/managing-developing-countries-sovereign-debt/, reviewed on 16th August 2023.

portant tool kit for development in case it is transparent, well-managed, and when it's actual purpose is credibly utilized for growth but, most of the time, it is the opposite case in the sense that high public debt can inhibit private investment, mark usually an increase of fiscal pressure, reduce somehow social spending, and bring forth limitations against different governments' being able to bring about implementation of various reforms.[12]

In 2019 World bank showed that Debt the total external debt of low and middle income countries reached $8.1 trillion of which a third was owed to private creditors and more than half of IDA countries are in debt distress or at high risk of it and it was finally found that less than half the countries reviewed met minimum requirements for debt recording, monitoring, and reporting.[13]

World Bank report, suggested that policy makers, creditors, donors, analysts in borrowing countries need to have credible debt information to make reasonable borrowing decisions. Creditors, donors, analysts, and ratings agencies need full information to assess country debt and assess investment opportunities. Citizens can hold governments accountable if they have transparency on the terms and purpose of debt.[14]

The World Bank and the International Monetary Fund urged G20 countries to establish the Debt Service Suspension Initiative (DSSI) to help countries focus their resources to be able to fight the pandemic and safeguard the lives and livelihoods of most vulnerable people which amounted to more than $5 billion in debt relief to more than 40 eligible sovereign countries.[15]

It was reportedly argued that, 73 countries are temporarily qualified to have a suspension of debt towards their creditors which suspension was closed at the end of December 2021 due to COVID 19 outbreak which pushed and before the latter a big number of countries were seen into debt distress and mostly World Bank Group prime focus is to encourage comprehensive debt solutions that caters for debt suspension, debt reduction, debt resolution, and debt transparency.[16]

On my point of view to pave the way to failure to pay sovereign debt, the untold stories or research is that the big cause that overstruck world countries economies is the world war I and World War II, whereby at the fore front were brought strategies to elaborate financial restructuring schemes for sovereign debt for long period of time, to be able to make rehabilitations of economies and infrastructures destroyed by the WWI and WWII as affected by all nations.

After the World wars and the subsequent effect of decolonization, they arose again also typical wars at different dimension levels mostly caused by developed countries at the fore front for finance which found most countries economies affected including third countries, and developing countries which currently are also facing economical development difficulties, and also difficult to repay sove-

[12]https://www.worldbank.org/en/topic/debt/overview, revised on 20th August 2023.
[13]Ibid.
[14]Supra note 13.
[15]Ibid.
[16]Ibid.

reign loan offered due to COVID-19 pandemic and the current war in Ukraine which has seen the dollar currency is amounting to high level every day and the sovereign debt becomes too high to repay and ends in defaults for a lot of countries be in Africa, Asia, South America and Northern America, so many sovereign loan were offered but accountability failure part has seen a lot of countries failing to pay back their loans as agreed upon and it has led to a financial constraint to many countries, where the cost of living is too high to cope up with every people and transfer pricing has become a difficult economical aspect to solve with the level of inflation that is too high to many countries at large.

It is in this respect that this study seeks to assess and address the problem of sovereign debt recovery in the event of default of Sovereign States, which even some countries face attachment of their properties outside their respective countries, having forgotten long time of their financial loan obligation to repay the debt or having wrongly contracted at different occasions and some countries behaves economically as if they are on receivership mechanism to honor the commitment made to the creditors which has seen China becoming a big creditor to third countries and a big number of developing countries, including Russia being the ally to china's economical and political strategy enhanced to take over the world economies as a big number of sovereign debt currently belongs to China and this has led to the global current debt (Word Bank, August 2023) equal to $59,430,748, 919,452.

2. Background

So many countries in East African Community have faced a backload of debt defaulted and are inconveniencing the well fare of the people and the cost of living has been too high and tax rates have been an issue to cater for.[17] It is reportedly said that, in March 2023 Kenya National Government Debt has amounted to 71.0 USD Million, whereas the country's Nominal GDP tackled 26.9 USD bn in Sept. 2022.[18]

Government Budget Value:	−432267.00	−388513.00	KES million	May 2023
Government Revenues:	2102.43	1913.57	KES Billion	May 2023
Fiscal Expenditure:	2534.70	2302.08	KES Billion	May 2023
Government Debt:	9634.85	9390.69	KES Billion	Apr 2023

However Kenya current Government debt per GDP is calculated as follows in chart below:[19]

[17]https://www.ceicdata.com/en/indicator/kenya/government-debt--of-nominal-gdp, reviewed on 22nd August 2023.
[18]https://www.ceicdata.com/en/indicator/kenya/national-government-debt#:~:text=In%20the%20latest%20reports%2C%20Kenya%20%20Consolidated%20%20Fiscal%20Balance,GDP%20%20reached%2026.9%20%20USD%20bn%20in%20%20Sep%202022, Reviewed on 22/08/2023.
[19]https://tradingeconomics.com/kenya/government-debt-to-gdp, reviewed on 22/08/2022.

No	Country	Last	Previous	Reference	Unit
1	Burundi	14.5	16.8	Dec/22	%
2	Kenya	67.3	67.3	Dec/22	%
3	Rwanda	64.4	66.6	Dec/22	%
4	Tanzania	40.13	37.3	Dec/22	%
5	Uganda	48.6	45.5	Dec/22	%

EAC some member States Debt per GDP as of December 2022.[20]

For example reports continue to argue that Kenya's public debt burden was rated high but not excessive, with the external and domestic components each amounting for about 34% of GDP at end 2022, but the structure of external debt means servicing costs are relatively high.[21]

Concessional multilateral borrowing from the IMF, the World Bank and the African Development Bank, for assistance to be able to deal with the impact of the covid-19 pandemic it has embarked on a 38 month IMF programme from April 2021, to mid 2024, with a support of US$2.34 bn funding envelope, to strengthen fiscal and debt management.[22]

However, the budget deficit declined from 7.8% of GDP in fiscal year 2020/21 from June to July to 7.3% of GDP in 2021/22 and is projected to ease to 5.8% of GDP in 2022/23, reducing borrowing needs.[23]

Therefore, debts owed through multilateral agreements escalated to US$13.7 bn in 2020, to US$17.9 bn in 2022, whereas bilateral debt went to US$9.8 bn in 2022, and commercial debt went to US$10.1 bn.[24]

It was meant that the fall in bilateral debt reflects a drop in obligations to China, from a peak of US$7 bn in 2021 to US$6.6 bn at end-2022, as amortization outpaced new borrowing.[25]

Mainly the overall debt stock increased in 2021 and 2022, due to new multilateral borrowing strategies put in place, but remained stable at 34.5% of GDP. Indeed, it is reported that the national debt of Kenya is projected to continuously increase between 2023 and 2028 by in total 37.6 billion U.S. dollars that means plus 48.89 percent. According to this projection in 2028, the national debt will have increased for the fifth consecutive year to 114.52 billion U.S. dollars. For sure, the national debt was continuously increasing over the past years.[26]

For Rwanda it is argued that the national debt of Rwanda is also projected to continuously increase between 2023 and 2028 by in total 6.5 billion U.S. dollars (+70.73 percent).

The national debt is estimated to amount to 15.67 billion U.S. dollars in 2028,

[20]https://tradingeconomics.com/country-list/government-debt-to-gdp, revised on 22/08/2023.
[21]Ibid.
[22]Ibid.
[23]Ibid.
[24]Ibid.
[25]Ibid.
[26]Supra note 25.

whereas the national debt of Tanzania is projected to continuously increase between 2023 and 2028 by in total 16 billion U.S. dollars (+47.07 percent). The national debt is estimated to amount to 49.97 billion U.S. dollars in 2028.

The indicator describes the general government gross debt consisted of all liabilities that require payment or payments of interest and/or principal by the debtor to the creditor at a date or dates in the future.

According to the International Monetary Fund (IMF), the general government gross debt consists of all liabilities that require payments of interest or principal by the debtor to the creditor at a date or dates in the future.

According to United Sates, (Foreign Sovereign Immunities Act, Oct 21, 1976) "FSIA", there are four main exceptions to immunity from adjudication which matters connected to commercial transaction and contracts matters, personal injuries and damage to property caused by a State, ownership and use of property matters whereby a State is not immune if interest of the State on movable or immovable has been raised by the way of succession, gift, or bona vacantia and the fourth exception is that the State is not immune in case of patent right, trade mark, design or plant breeders belonging to the State.

A State may have lost its entitlement to immunity from suit unless one of the exceptions to immunity from enforcement or execution applies, the State will be able to claim immunity from enforcement/execution in respect of any judgment or award against it and the easiest and most efficient way of dealing with state immunity is to seek an express waiver of that immunity.

According to Blackman & Mukhi, there exist two categories of sovereign immunity protection for foreign States which are immunity from suit which means that a sovereign cannot suffer the indignity of being hauled into court against its will; whereas immunity from execution provides stem from long standing on disruption and political ramifications that can result from a foreign state property.

This research will analyze the progression of sovereign debt case laws as enhanced by professional suers of defaulted sovereign States referred to as Vulture funds as of their strategy to buy a sovereign debt at a deep discount from its face value and attempt to enforce the full claims on States, whether on the state property and how state property will pray around immunity from execution and also other prayers on enforcement against sovereign property by way of attachment.

The study will also tackle other selected case laws that are relevant for the subject matter covered by this research and brings forth potential result for the enforcement of a judgment against state property to prove strongly how the sovereign debt influences in one way or the other the economy development and social security.

3. Feasibility of Enforcing a Judgment against State's Property and Potential Result Thereof

Sovereign States that are at high risk of debt distress, are required to normally resort to debt management strategy to reduce default for economy development

and social security resources.[27]

Strategies in place for debt management including primarily debt reprofiling which makes, modifications of the aggregate schedule of future country repayments by doing debt refinancing, debt substitution, or debt renegotiations.[28]

The second strategies that Sovereign States use, is debt restructuring to be able to make, modifications of the financial structure of their liabilities to reduce their net present value.[29]

However, a debt reprofiling operation helps government or States that have several loans that are due in the same year or other kinds of accumulation in exposure, such as in the currency composition of liabilities and inflation, it also helps to fix currency risk to be able to issue new debt in another currency.

Moreover, other alternatives for debt management include preemptive negotiations with their creditors to reach a debt restructuring, which requires transparency in the terms and ownership of the debt to provide evidence indicating that preemptive restructurings are resolved more quickly than post default restructuring, which lead to shorter exclusion periods from global capital markets, which are associated with a smaller output losses.

International financial institutions such as the International Monetary Fund and World Bank often play an important role in the debt restructuring process in emerging economies. They conduct the debt sustainability analyses needed to understand the problem fully, and they often provide financing to make the deal viable.

For example, Nigeria and Poland, each underwent seven debt restructuring deals before finally resolving their unsustainable debt.

Different scholars such as (Katherine Reece Thomas, 2015) have, a professor from the *University of London, in her Journal Article entitled*: ***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*, *it was* proved how sovereign defaults for instance in Europe have limited right for redress in domestic courts against private creditors mainly banks and bond holders because of that lack of international law establishing an insolvency regime for States unable to pay their debts, and consequently States in default cannot go into liquidation, or receivership, and it looks like a one way advantage to the debtor in the process of recovery. And this gives legal protection to States defaulters of their loans due.

Unfortunately, as (Katherine Reece Thomas, 2015) proved that, it appears to be less examples of successful enforcement actions taken against state assets to some extent due to the fact that most extra territorial state assets are deposited in central banks which are generally and absolutely immune from seizure or those

[27]WDR 2022 Chapter 5 (https://worldbank.org/) revised at https://www.worldbank.org/en/publication/wdr2022/brief/chapter-5-managing-sovereign-debt, reviewed on 23/08/2023.

[28]Ibid.

[29]Ibid.

state assets are held in the name of separate state entities to the other aspect.

The above mentioned author gives a typical example of vulture funds which mostly purchased discounted Sovereign debt, aiming to recover substantial sums against the debtor state and the only way to go about it, was to sue in order for the court to allow enforcement against state assets and as result to limit State immunity claims.

The actual result of attachment as a mechanism of enforcement of a judgment against a State's property, is founded in the case of (***Alcom v The Republic of Colombia*, 1984)** *in which it was held* that a Colombian embassy bank account in London could not be attached by a judgment in favor of a creditor as the State enjoyed immunity from enforcement in respect of accounts not solely in use for commercial purposes.[30]

In the above case reports were meant to say that the (UK State Immunity Act of 1978), its primary purpose is enshrined in part I, to comprehensively deal with the jurisdiction of courts of law in the United Kingdom(UK) both to adjudicate upon claims against foreign states and (Legal enforcement judgments against foreign States.[31]

It was argued that there is a clear distinction between the above two options in place, in the sense that the case of a bank account referred to in this study, the objective was basically to the judgment creditor to show that the use or intended use of the account is, apart from exceptions raised, for commercial purposes within the meaning of the Act.[32]

The legal issue in the above case law was whether a sovereign debt which has characteristics falling under Section 13(4) of Immunity Act above referred to, the property which is for the time being in use or intended for use for commercial purposes whether attachment is possibly feasible for the recovery.' It was meant then, 'commercial purposes' enshrined in Section 13(4) is what would be its ordinary and natural found in the context of which a debt representing the balance standing to the credit of a diplomatic mission in a current bank account used for meeting the day-to-day expenses of running the mission would fall outside the subsection.[33]

It was further explained that Commercial purposes, under Section 17(1) of UK Immunity Act has the actual meaning of commercial transaction within Section 3(3). Paragraph (a) which refers to any contract for the supply of goods or services, without making any exception for contracts in either of these two classes that are entered into for purposes of enabling a foreign state to do things in the exercise of its sovereign authority either in the United Kingdom or elsewhere which on the face of it would be understandably fair to include all transactions into which a state might enter, was it not that it does specifically preserve immunity from adjudicative jurisdiction for transactions or activities into which

[30]Alcom Ltd v Republic of Colombia: HL 1984, reviewed from https://swarb.co.uk/alcom-ltd-v-republic-of-colombia-HL-1984/ on 24/08/2023.

[31]Ibid.

[32]Ibid.

[33]Ibid.

a state enters or in which it engages in the exercise of sovereign authority, other than those transactions that are specifically referred to either in paragraph (a) or in paragraph (b), with the latter of which the instant appeal is not concerned.

However, it was as well argued that, the debt owed by the bank to the foreign sovereign state and represented by the credit balance in the current account kept by the diplomatic mission of that state as a possible subject matter of the enforcement jurisdiction of the court is, then, one and indivisible; it is not susceptible of anticipatory dissection into the various uses to which moneys drawn upon it might have been put in the future if it had not been subjected to attachment by garnishee proceedings.

In addition, it was pointed out that in 2012, the Supreme Court as well decided in (*SerVaas v Rafidain Bank*, 2012) also decided that monies in an account in London representing a debt due to the Republic of Iraq could not be attached because the debt was not "currently in use" for commercial purposes.

It was argued that the terms "solely" and "currently" are not in the relevant legislation used in the judgment but the courts have arguably imported them purposely to give effect to international policy considerations.

Discussing on how the above two cases reflect the test for enforcement against state assets has raised questions of interpretation, and explains how courts have resolved the question by bringing in the preservation aspect towards State assets from attachment by the time it is arguably politically or diplomatically inappropriate to allow seizure.

I opine that though most findings proved that States which failed to honor their loan obligations within debt distress situation rankings and were not able to successfully restructure their loan or reprofiling them, they should not invoke their immunity in any way whatsoever over any of their property attachment, rather any States' asset outside the debtor State jurisdiction should be attached in case there is a judgment allowing enforcement for the loan recovery to provide justice to creditors and also so that other States who need also to get loans, shall be able to get them once their turn arrives for catering of their social security and welfare for economic development for all countries.

However much proved or what judgments were decided, I don't support them while arguing that only default States property are to be attached once they were involved into commercial activity, I don't believe in the definition given for commercial activity for a loan itself rendered to a Sovereign States it's a commercial activity referring to commercial transaction done by the lender, there is no way in it's a way of recovery against the country defiant, it can lose it's original meaning against the property to be attached of a Sovereign State as was argued in the Embassy 's case of bank account attached.

4. Protection of State's Property against Attachment

Sovereign debt recovery by attachment is understandingly a legal process whereby a creditor has the ability to seize the assets or property of a debtor which is a sovereign State to satisfy its debt obligations. It normally happens in case the

debtor which a Sovereign State defaults on its sovereign debt or fails to reach an agreement with its creditors on debt restructuring or reprofiling.[34]

To some extent, it is proved that sovereign debt recovery by attachment is often difficult and controversial, as it may involve issues of sovereign immunity, international law, human rights, and political interference and some creditors proceed to litigation or arbitration to enforce their claims against debtors which are Sovereign States.[35]

On this level the property owned by a foreign State is generally immune from seizure or attachment, except if it is used for a commercial activity for example in the United States and meet other enumerated conditions in (Foreign States Immunities Act, 1976) "FSIA".

However, the immunity is extended as well to the property belonging to a State-owned company or financial institution only if that company or financial institution is engaged in commercial activity in the United States.

In support of the above findings, the case of (*First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 1983) "*Bancec*" is of a tremendous reference. It was decided in that regards that in order to attach the State's property owned by a company or financial institution, there needs to prove that the State referred to, has interest within that property or has control over it.

However, in order exception towards attachment, was referred to in the case of (*Bennett v. Islamic Republic of Iran*, 2010), whereby a group of 90 plaintiffs involved in terrorism related judgments against Iran as a basis for attaching money the that two American companies contractually owed to Bank Melli, which is an Iranian state bank.

In this case, the analysis says that Bank Melli objected the attachment, arguing that, although § 1610(g) eliminates Bancec's presumption of separateness in certain cases, that subsection in question did not create a new exception to immunity from attachment.

The United States also intervened in that case as amicus curiae arguing that the exemption of immunity is primarily required by the commercial activity element lacked by the judgment holder.

Therefore, the analysis showed that the Court of Appeal allowed the attachment, supporting the reasoning that "subsection (g) contains an independent provision for attachment and is not related to the commercial activity requirements found elsewhere in § 1610.

A different Court decision came up in another case *of* (*Rubin v. Islamic Republic of Iran*, 2018), whereby the victims of a Hamas suicide bombing and their relatives sought to enforce a $71.5 million default judgment against Iran by bringing in attachment allegation of several collections of ancient Persian artifacts allegedly owned by Iran but held by the Chicago Field Museum of Natural History and the University of Chicago. Unfortunately, the court reached a dif-

[34]https://www.worldbank.org/en/publication/wdr2022/brief/chapter-5-managing-sovereign-debt, revised on 23/08/2023.

[35]Ibid.

ferent decision as above mentioned reasoning that the prior case referred to, that § 1610(g) is not an exception to execution of immunity in relation to terrorism matters and the court directed that the plaintiff should have proven that Iran was using the artifacts as part of commercial activity in the United States, hence attachment is not allowed.

In this case attachment is allowed when the property was subject to involvement in terrorism activities.

In the case of (*Rubin v. Islamic Republic of Iran*, 2018), is impossible result of enforcement against a Sovereign States property through attachment to the Islamic Republic of Iran since it was an act of terrorism but not a commercial transaction. Which in my view is a right reasoning since terrorism attack is a criminal activity not a commercial transaction by nature.

5. Commercial Activity Exception to Immunity from Attachment

It is reported that the US Supreme Court has come up with the view of qualifying a commercial activity carried out by a State or a State-owned corporation. In the context of when, a foreign government acts, conducts itself not as regulator of a market, rather as a private party, this conduct is considered to be sovereign's commercial activity in accordance with the FSIA.

To support the above consideration, it was argued that the US Supreme Court relied on the case of (*Argentina v. Weltover*, *June* 12, 1992) whereby Weltover and Argentina had engaged in commercial activity in the United States by is suing negotiable debt instruments denominated in United States dollars and payable in New York and they had appointed a financial agent in that city.

The above mentioned decision also referred to in the case of (*Greylock Global v. Province of Mendoza*, Feb. 8th, 2005) in the sense that the Province of Mendoza and Argentina, had engaged in commercial activity in the United States by issuing bonds denominated in dollars subject to an Indenture governed by New York law and appointing a New York bank as trustee.

It was as well analyzed that, sovereign State have been found engaged in commercial activity while entering into contracts for services or for the purchase and sale of goods like in the case of (*Texas Trading & Milling Corp. v. Nigeria*, *April* 16, 1981), whereby Nigeria's commercial activity was viewed in there as a private contract for the purchase of goods purposely to build roads, army barracks and immunity from attachment as defense was denied.

Furthermore, the analysis showed that FSIA is very clear on the above that the state's intended use of the goods and services through entering into contracts and purposely to get profits to be used for public interest or for also the State to buy equipment for its armed forces construct a government building, or make repairs on an embassy building do not matter and that all such conducts should be qualified to be commercial, even if their direct objective is to serve a public function in way the immunity shall issue as a defense from attachment.

In the same vein, the commercial activity exception was not retained as a defense in the case of (*Aurelius Capital Master Ltd v. Argentina*, Jan 7. 2020) whereby as regards actions based on the Sovereign's investment publically carried out on American exchange, it was decided that investments in publicly traded American securities on behalf of Argentine state pension fund was counted as commercial activity, and ultimately no immunity should be allowed in case of attachment.

This was decided by denying Argentine's argument that it had used the funds for continuous deposits and withdrawals purposely to pay pension benefits or any other States expenses but no evidence provided, hence it was decided that funds in question were invested purposely to get the profits as any other investor would do, thus allowing attachment.

On the appeal level, the analysis showed that the above decision on State securities investment fund was based on an unrelated ground by finding out that the funds in question had been managed by private corporation on behalf of Argentina and that the attachment order was in violation of *FSIA* due to the fact that the above corporation had not used the funds purposely for commercial under *FSIA* and nowhere proved that the corporation acted for Argentina to be able to determine whether they are in a position to incur liability for Argentina's debt. Unfortunately, the analysis proves further that the court did not determine whether the investment of social security assets was a government activity and not commercial, the question therefore remained unclear. But the most noted thing was that it was allowed that in case State or Government institution was involved in commercial activity then attachment is due.

6. Discussion of NML Capital Ltd. V. Republic of Argentina (2014), A Leading Case of State Property Attachment against State Immunity for the Loan Recovery: The Potential Result for the Enforcement of a Judgment against State Property

In this case, the main issue dealt with was whether the proceedings for the recognition and enforcement of the New York court's judgment were proceedings relating to a commercial transaction within the meaning of the State Immunity Act 1978 to enable attachment to take place.

The Court of Appeal based its interpretation on Section 3(1) of the 1978 Act which provides: that a State is not immune as respects proceedings relating to a commercial transaction entered into by the state. The court went on to interpret Section 3(3)(b) of the above Act that a commercial transaction includes any loan or other transaction for the provision of finance basing on the above provisions the Court reasoned that, it is obvious that the grounds under which NML obtained judgment in New York was a "proceeding relating to a commercial transaction in accordance with the meaning of Section 3(1)(a) of the Act mentioned above".

From the above court decision, the reasoning was based on Section 3(3) (b) of

the 1978 Act that provides that a commercial transaction includes loan or finance acts, but in deciding the Court relied on Section 3(1) (a), and nowhere did the court explain that the relationship between NML and the Republic of Argentina was based on loan or finance; the court only said it was a commercial transaction referring to Section 3(1)(a) and no other explanation was given.

Regarding the provision of Section 3(3) (b), the court didn't either explain whether it matched with the case substantially and one may wonder why it was relied upon in the judgment and this led to the conclusion that the decision lacks motivation, because there is no clear indication by the court that the deal between NML and Argentina was a commercial activity.

Another issue presented, was whether Argentina was prevented from claiming state immunity in respect of the proceedings in question by Section 31 of the Civil Jurisdiction and Judgments Act 1982.

From this issue, based on the interpretation of Section 31 of Civil Jurisdiction and Judgments Act 1982 that as far as foreign judgments were concerned, section 31 in some extent replaces the exemptions from immunity contained in the 1978 Act.

The court explained that words if, and only if in Section 31 are important words for the sake of interpretation, in that parting from the example given Section 31 provides for the recognition and enforcement of a New York judgment against a State in respect of a personal injury caused in New York and consequently it would not permit recognition of a New York judgment against a State in respect of a personal injury caused by the State in the United Kingdom unless, there was an alternative basis for recognition that satisfied Section 31, such as submission to New York jurisdiction by the foreign state which was the case.

The Court explained that reference was made to the above both wording of Section 31(1) and provided grounds under which it gave effect. From this case, it is clear that state immunity cannot be raised to bar the recognition and enforcement of a foreign judgment if, under the principles of international law, the state against which the judgment was given was not entitled to immunity in respect of the claim.

The court went on to say that foreign judgment against a State is possibly enforceable in England if the foreign court would have had jurisdiction while applying the United Kingdom rules on sovereign immunity set out in Sections 2 to 11 of the 1978 Act which meant that the State is not immune where it submits to the jurisdiction or when the proceedings relate to a commercial transaction and that under United Kingdom law, the State is not immune from execution by the provisions of Sections 13 and 14(3), (4) of the 1978 Act; which meant as well that if the State in question has not given a written consent for the execution to take place against her property, the State's property remains immune until proved that it was intended for use for commercial purposes.

Some research suggested that the Second Circuit ruled that an order enjoining Argentina from making payments on certain bonds issued under a debt restructuring program unless and until Argentina also made comparable payments to

holders of its defaulted bonds did not contravene the FSIA. The court reasoned that the injunctions did not attach or execute on any property as proscribed by the statute, but rather allowed Argentina to choose which of its assets it wished to use to satisfy its debts.

From these issues as analyzed by courts on the subject matter, there appear some illegalities that are worth analyzing in addition to other analysis made above.

7. Discussion of Illegalities

The Supreme Court by coming up with its interpretation on what looks like a commercial activity, or activity intended for use for commercial purposes in relation to the claim against Argentina, should have based its reasoning on Art 2 point c of United Nations Convention on Jurisdictional Immunities of States and Their Property (2004). The said provision states "that commercial transaction means any commercial contract or transaction for the sale of goods or supply of services; any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction; any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

Paragraph 2 of the above convention goes on to state that in the determination of whether a contract or transaction is a "commercial transaction that reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

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Based on the above article and reasoning made by different courts as discussed above, there are illegalities and irregularities pertaining to the Court's reasoning and interpretation of legal provisions leading to the conclusion that the reviewed Courts' decisions lack vivid or tangible motivation.

We are of the view that the above mentioned article clarifies what is meant to be a commercial activity or sovereign activity carried out for commercial purposes including sale of goods, supply of services, any contract of loans, financial transactions or any obligation of guarantee except contracts employment. Further, the above article guides the Courts in case they want to determine whether such activity is commercial. In this regard, Courts will have to refer to the nature

of the contract or transaction or whether parties or States have agreed or consented whether it is a commercial contract or financial transaction.

Looking at the facts of the case of NML New York-based vulture fund, the latter like any vulture fund on the debts of a sovereign state that was in acute financial difficulty by purchasing its sovereign debt at a discount to face value and then seeking to enforce it.

In relation to this case, NML purchased bonds issued by the Republic of Argentina with all its other debt, valued at US$ 172,153,000. However, in the recovery processes NML, got summary judgment on the bonds for a total, including interest, of US$ 284184632.30, in a Federal Court in New York in the Commercial Court and this judgment was reversed by the Court of Appeal, which ruled that Argentina was protected by state immunity by which at the end the Supreme Court ruled that the immunity claimed by Argentina was not a defense since the relationship between Argentina and NML (2014) was intended for commercial purposes and did not contravene FSIA.

On this case, it was noted that if one considers clause 22 last paragraph of the Fiscal Agency Agreement between Argentina and Bankers Trust Company, Argentina had before waived immunity pertaining to securities claim including bonds; That meant that the agreement or consent as a condition provided by Article 2 para. 2 of United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) was fulfilled and thus, Argentina could not claim state immunity for it had no legal basis.

Basing on Article 2 point c of the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), the bonds contestation coupled with debt pertaining to them against the Government of Argentina by NML; and the consent brought in the Fiscal Agency Agreement, it is clear that the proceeding was based on the commercial activity as provided in the above convention.

One concern however is the reasoning of the Supreme Court on the subject matter because nowhere the issue of attachment was argued and nor did the Court explain what constituted a commercial activity to come up with the conclusion that bonds and debt from the side of Argentina were intended for use for commercial purposes and the Court did consider the consent in agreement given by (Argentina Fiscal Agency Agreement, Jan, 2000), where they had waived immunity from jurisdiction.

If one looks again at the Supreme Court ruling, it looks like it's a judgment enforcement while it was primarily based on bonds issued by Argentina, and interest pertaining with them also with debts bought and the judgment did not show how the payment should be done although the court's reasoning was as if the attachment was going to be done based on the non-existing judgment on Argentina's property that everyone could look for but not find.

In sum, it appears to us that the Supreme Court's judgment is ambiguous, unclear in relation to the subject matter irrespective of the outcome and no enforcement was yet carried out or subject to allegation.

The next case deals with the enforcement procedures of the above judgment in aim for NML to get the money as a judgment creditor And NML Vs the case of Argentina is a good example which show potential result of enforcement of a judgment against State property for loan recovery which has worked successfully and it also shows as a tangible example which proves how sovereign debt influences the social security and economy development at all levels.

8. Conclusion

This study has shown that a sovereign property attachment is doable on State's property in case the property was used or was intended for use for commercial purposes or in case the State has waived immunity in agreement that proves the consent for waiver.

Through the analysis of selected cases, the study has also shown how States' properties have been attached in different ways by vulture fund professionals in payment of sovereign loan or debt. It also highlighted some gaps as regards the differentiation of a State's commercial activity from its overall financial activity in carrying out its statutory mandate.

A close scrutiny may indicate that the commercial activity and the financial activity are the same legally speaking but no tangible research has revealed the real definition and right motivation as a guide to differentiate what should be qualified as a State's commercial activity from its financial activity.

A review of several scholars' works in this matter indicates that the enforcement of a judgment against state property can still lead to some complication for the judgment or award creditor as the Sovereign always invokes the state immunity defense in order to avoid attachment of state property in execution of any judgment or award rendered against it.

The study has also found some illegalities and irregularities regarding how courts have handled the matter failing in some instances to set up clear criteria to be taken into account in order to know what should be considered as state commercial activities and thus not subject to the sovereign immunity principle.

Another complication stems from the fact that sovereign defaults are often resolved through sovereign debt restructuring and the very nature of sovereign whereby no liquidation or debt administration mechanism or receivership of State corporation for the recovery of a sovereign debt of any sort cannot be put in place.

In light of the above circumstances, we have come up **with some recommendations that may help in setting up a fair balance in the respective rights and obligations of parties to a sovereign debt contract including.**

Setting up security mechanisms that can cover sovereign debts or loans in case of default by which failure would entail further loans denial by different States or international financial institutions.

Setting up a receivership convention for the recovery from securities provided by sovereign States and an international standardization of securities registra-

tion. Meaning that States or their commercial corporations are commendable to offer mortgages to lenders as securities of their sovereign loans.

Setting up an international mortgage registration organization to register State properties offered as State securities to loan secured from International Organizations.

Setting up a state corporation that shall legally be representing the State in loan transactions or financial transaction and liabilities on the state corporation directly not on the State but for state liabilities to facilitate the recovery where it will be easy to confirm the State corporation insolvent and declare liquidation processes.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

Alcom v The Republic of Colombia, [1984] AC 580, [1984] 2 WLR 750, [1984] 2 Lloyds Rep 24, [1984] 2 All ER 6.
https://swarb.co.uk/alcom-ltd-v-republic-of-colombia-HL-1984

Aurelius Capital Master Ltd v. Argentina, United States District Court Southern District OF New York Jan 7, 2020, 19 Civ. 351 (LAP) (S.D.N.Y. Jan. 7, 2020). Available at Aurelius Capital Master, Ltd. v. Republic of Argentina, 19 Civ. 351 (LAP)|Casetext Search + Citator, Reviewed on September 2023.

Bennett v. Islamic Republic of Iran, No. 09-5147, Decided: September 10, 2010.
https://caselaw.findlaw.com/court/us-dc-circuit/1537764.html#:~:text=The%20Bennetts%20won%20a%20default%20judgment%20against%20Iran,diplomatic%20residence%2C%20as%20well%20as%20two%20parking%20lots

First National City Bank v. Banco Para El Comercio Exterior De Cuba ("Bancec") de Cuba, 462 U.S. 611, 103 S. Ct. 2591, 77 L. Ed. 2d 46, 51 U.S.L.W. 4820 (U.S. June 17, 1983) Journal Article.
https://www.casebriefs.com/blog/law/international-law/international-law-keyed-to-damrosche/chapter-12/first-national-city-bank-v-banco-para-el-comercio-exterior-de-cuba

Fiscal Agency Agreement between Argentina and Bankers Trust Company 2000.

Greylock Global v. Province of Mendoza, 04 Civ. 7643 (HB) (S.D.N.Y. Feb. 8, 2005), Decided on Feb 8th 2005.
https://casetext.com/case/greylock-global-opportunity-master-v-province-of-mendoza

Republic of Argentina v. NML capital ltd, June 16, 2014.

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) Decided on June 12, 1992.
https://supreme.justia.com/cases/federal/us/504/607

Rubin v. Islamic Republic of Iran, February 21, 2018.
https://www.supremecourt.gov/opinions/17pdf/16-534_6jfm.pdf

SerVaas v Rafidain Bank, [2012] UKSC 40 on Appeal from: [2011] ECWA Civ 1256, Decided on 17 August 2012.
https://www.supremecourt.uk/cases/docs/uksc-2011-0247-judgment.pdf

Texas Trading & Milling Corp. v. Nigeria, April 16, (1981) US Court of Appeals for the

Second Circuit—647 F.2d 300 (2d Cir. 1981). https://law.justia.com/cases/federal/appellate-courts/F2/647/300/237798

Thomas, K. R. (2015). 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. *Journal of International and Comparative Law, 2,* 115-140. https://www.jicl.org.uk/journal/june-2015

United Kingdom State Immunity Act 22 November 1978.

United Nations Convention on Jurisdictional Immunities of States and Their Property, on 2 December 2004 Fifty-Ninth Session, A/RES/59/38.

United States Foreign Sovereign Immunities Act May 24, 1976, No. 94-583, 90 Stat 2891.