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**Master Thesis**

**Application of immunity to state property and recent developments in international law**

**Valstybės turto imuniteto taikymas ir naujausi tarptautinės teisės pokyčiai**

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Vilnius

2025

## **Abstract**

This thesis analyzes the application of immunity to various types of State property and debates whether the current legal system fits the recent developments in international law. Based on the central-bank reserves, the sovereign wealth funds, and the State-owned enterprises, the research examines the classification of these assets in the courts where the enforcement is sought, and the issues surrounding such enforcement. In particular, the case of Russian reserves is analyzed.

**Keywords:** State Property, Russian reserves, wealth funds, State-owned enterprises, central-bank reserves

## **Santrauka**

Šiame darbe bus nagrinėjamas imuniteto taikymas įvairių rūšių valstybės turtui ir sprendžiama, ar dabartinė teisinė sistema gali būti pritaikyta prie naujausių tarptautinės teisės pokyčių. Remiantis centrinių bankų rezervais, valstybiniais turto fondais ir valstybės valdomomis įmonėmis, tyrime nagrinėjama šių turtų klasifikacija teismuose, siekiant sprendimų vykdymo, ir su tokiu vykdymu susiję klausimai, įskaitant Rusijos rezervų įšaldymą.

**Raktiniai žodžiai:** valstybės turtas, Rusijos rezervai, turto fondai, valstybės valdomos įmonės, centrinio banko rezervai

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## List of abbreviations

CSD – Central Securities Depository

EU – European Union

FSIA – Foreign Sovereign Immunities Act (United States)

G7 – Group of Seven

ICJ – International Court of Justice

ICSID – International Centre for Settlement of Investment Disputes

ILC – International Law Commission

IMF – International Monetary Fund

SIA – State Immunity Act (United Kingdom)

SOE – State-Owned Enterprise

SWF – Sovereign Wealth Fund

UN – United Nations

UNGA – United Nations General Assembly

UNSC – United Nations Security Council

US – United States of America

VCDR – Vienna Convention on Diplomatic Relations (1961)

VCCR – Vienna Convention on Consular Relations (1963)

## **Introduction**

This dissertation concerns a tug of war between the conventional State immunity doctrine and the contemporary financial practices of States that act via the central banks, the sovereign wealth funds and the State-owned enterprises. Classical principles of immunity were established when the activities of the sovereign and government property were distinctly separated as opposed to the commercial ones. However, today, central banks, state-owned enterprises, and sovereign wealth funds are functioning across borders in a manner that makes it hard to distinguish between the powers of the sovereign and the market. This is particularly evident in modern conflicts of enforcement of assets linked to States, and has exceeded any historical level in the current controversy about immobilisation of the Russian reserves in Europe. The main question that is explored in this thesis is whether the current system of immunity can remain consistent with all the pressure of modern financial sanctions and asset-freezing practices.

This Object of research is the framework of legal provisions on immunity of State property against execution concerning central-bank reserves, sovereign wealth funds, State-owned enterprises, and the peculiarities of recent geopolitical developments. The paper analyses the interaction between the domestic courts, international law, and financial-market structures in deciding whether particular classes of State property should be immune to enforcement and how the interaction of those structures unveils structural vulnerability in the current structure.

The relevance of this topic is threefold. To begin with, sovereign assets enforcement disputes are no longer extraordinary, but a routine practice of international investment, sovereign debt litigation, and sanctions practice. Second, the incorporation of sovereign actors in the global marketplace has increased the number of assets and institutions that can fall under creditor claims, and the legal mechanisms available to categorize assets have not changed much. Third, international law has been pushed to a dialectic by recent freezes of major reserves, particularly following the Russian invasion of Ukraine: States are faced with a legal framework that was applicable in a different epoch, but that has to address unprecedented political and economic demands. The above developments render the analysis not only scholarly but also practically important in the eyes of courts, policymakers, and financial institutions.

The novelty of this research lies in the fact that it combines three analytical levels--(i) the doctrinal foundations of State immunity, (ii) the classification and immunity of central-bank assets, sovereign wealth funds, and State-owned enterprises, and (iii) the legal challenges created by modern sanctions practice--while critically examining whether the traditional conservative division of immunity law can still be maintained after the freezing of the Russian central bank's reserves. Rather than treating a single institution or a single jurisdiction, the thesis treats immunity as a changing mechanism, the logic of which is proving itself in the new financial and geopolitical crises. This viewpoint enables the work to cast light on the new inconsistencies in the old law and its present application in the State.

This thesis is aimed at critically evaluating whether the doctrine of immunity against execution continues to offer a consistent balance between protection of sovereign and accountability.

To accomplish this goal, the thesis will follow the following research endeavors:

1. To explore the historical development of State immunity between the absolute and the restrictive model and find out the principles of immunity against execution.
2. To examine the special legal protection granted to assets of the central bank and why these assets are at the heart of the execution immunity.
3. To assess the treatment and classification of the assets of sovereign wealth funds and State-owned enterprises by the courts, focusing on separateness, control and veil piercing.
4. To determine whether the existing exceptions to the immunity of execution are sufficient to provide solutions to contemporary enforcement challenges on the hybrid sovereign entities
5. To investigate state practice and opinions with regard to the frozen Russian reserves and determine whether they are an indication of a new norm or an outright attack on the existing immunity principles.

The study uses a number of approaches that are suitable for the analysis of international law.

The structure of immunity in treaties, customary law, and domestic legislation is analyzed with the help of the logical and systematic analysis method.

The comparative approach is used to draw parallels between the practices in key jurisdictions such as the United States, the United Kingdom, Canada, and a few courts in Europe.

The method of case-law analysis is necessary in the interpretation of the use of the immunity doctrines in practice, especially on a case involving the central banks, sovereign wealth funds, and the enforcement of the central bank on the State-linked assets.

The study of the transition of absolute to restrictive immunity and its doctrinal implications is supported by the historical approach.

Last, an empirical, contextual aspect is also brought as the modern-day practice of sanctions is examined, and financial-market infrastructure like Euroclear is discussed, which exemplifies the systemic pressures on the immunity regime.

The primary sources include treaties of the international community, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property; customary international law as expressed in *United Nations Germany v Italy*; domestic law and regulations including the United States Foreign Sovereign Immunities Act and the State Immunity Act of the United Kingdom; decisions of national courts concerning the enforcement of judgments on sovereign property; literature on the topic of State immunity, sovereign debt, central-bank independence and financial stability; and recent legal commentaries on the freeze of Russian property under the EU sanctions. Considered in combination, these sources constitute the basis of doctrine and practice on which the thesis studies the application of immunity to the property of modern States.

## PART I – FOUNDATIONS OF STATE IMMUNITY

### 1.1 From Absolute to Restrictive Immunity:

Many courts followed the doctrine of absolute State immunity through much of the nineteenth and early twentieth centuries. A foreign State was considered completely immune to the jurisdiction of the authorities of home courts and the restraint of its property. The maxim *par in parem non habet imperium* - one sovereign has no right over another - summed up the prevailing conception of the sovereign equality and dignity, and was reckoned necessary to the equal action in international relations. The courts usually refused to hear the acts against foreign States and to seize the State property without their consent.<sup>1</sup> The traditional approach to common-law systems is linked with the reasoning of the Chief Justice Marshall in *The Schooner Exchange v McFaddon*, where the immunity was seen as a sign of comity and equality among the States; the same approach could be found in the jurisprudence of the common law.<sup>2</sup> The cause in both legal families was that any meddling of the courts with the resources or behavior of a different sovereign could be viewed as an ominous takeover. This is why total immunity was not only justified in terms of doctrines but also in terms of political wisdom and diplomacy. States were dependent upon the hope of reciprocal goodwill: when one State would not meddle with the property of another, the same would be returned.

This model did not meet the economic reality, however, by the middle of the twentieth century. The functions of the modern State had increased manifold: the States became more active in markets, they bought and sold goods and services, made construction and purchasing contracts, engaged in running State-owned enterprises, borrowed in the private markets, issued securities, and formed long-term business relations. The actions of these activities were at times comparable to the actions of the individual business players. The interpretation of such conduct as immunity resulted in extreme maladjustments: the individuals suffered damages without any compensation,

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<sup>1</sup> J. Crawford, *Brownlie's Principles of Public International Law*, 9th edn (Oxford, Oxford University Press, 2019), pp. 494–498

<sup>2</sup> *The Schooner Exchange v McFaddon*, 11 US (7 Cranch) 116 (1812).

and immunity posed systematic risks to transnational trade as well as transnational finance.<sup>3</sup>This also created a legal uncertainty in that legal immunity could be invoked whenever the State wanted to do so, having conveniently taken advantage of a commercialization that would otherwise have been subject to domestic private law. This change in history cannot be explained as just a practical adaptation to economic transformation. Based on my opinion, the shift to restrictive immunity, in contrast to absolute immunity, represents a more fundamental normative change in international law: the reestablishment of the equality between sovereign dignity and the equality of private law. Since the States had voluntarily entered into commercial markets as regular traders, it became harder to justify full immunity on the basis of princely grounds and not based on the convenience of politics only.

In response to these tendencies, State practice and doctrine resorted to the concept of restrictive immunity, the establishment of a distinction between acts *jure imperii* (acts which are performed on behalf of the State, i.e. legislation, taxation, diplomacy or armed forces) and acts *jure gestionis* (commercial or otherwise, privately practicable, activities of a kind). In this model, States are not liable for their sovereign acts; thereof may be liable for commercial acts.<sup>4</sup> The difference became slowly adopted as a pragmatic trade-off whereby States could pursue the global economy while preserving the fundamental safeguards required to carry out their governmental operations. During the development of comparative practice, the courts in various legal systems came to reasoning that was similar in nature despite the language of their statutes or the formulations of their doctrines being different.

The restrictive turn did not just constitute a policy decision; it solidified into conventional international law as State practice fused together. The Jurisdictional Immunities of the State (*Germany v Italy*) case by the International Court of Justice (ICJ) made it clear that the contemporary practice recognizes a difference between sovereign and non-sovereign actions, and immunity is no longer an absolute quality.<sup>5</sup> Meanwhile, the ICJ also emphasized a second, no less significant distinction: the distinction between jurisdictional immunity (may a court hear the case) and immunity against execution (may measures of constraint be taken against specific

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<sup>3</sup> Crawford, *Brownlie's Principles*, pp. 494–498.

<sup>4</sup> H. Fox and P. Webb, *The Law of State Immunity*, 3rd edn (Oxford, Oxford University Press, 2015), pp. 113–123

<sup>5</sup> ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, paras 56–60

assets of a State). A State can be subject to jurisdiction over a commercial dispute but enjoy immunity over particular property.<sup>6</sup> The ICJ stressed that sovereignty is more relaxed about adjudication in some forms of commercial relationships, but coercive actions against State property are much more obtrusive thus need greater protection. Although consistent as doctrines, this difference creates an imbalance in the structure, as it enables States to engage in commerce freely without experiencing the most efficient method of accountability, which is execution against assets.

The major codifications are now based on this dual structure. The Foreign Sovereign Immunities Act (FSIA) of 1976 of the United States assumes immunity but offers jurisdictional exceptions, the most famous of which are the commercial-activity exception and arbitration exception, and governs execution of judgments on a separate basis.<sup>7</sup> In the United Kingdom, the formula followed by the State Immunity Act (SIA) 1978 is rather different: it lists the exceptions concerning jurisdiction (commercial transactions, employment, immovables, and so on) but puts strong restrictions on the application of these exceptions to State property, especially central-bank assets.<sup>8</sup> The Canadian and Australian laws also abide by the same trend and are usually viewed in similar ways.<sup>9</sup> The statutes vary in form, but the reasoning remains the same: in spite of the commercial character of an action of a State, and the fact that it may be sued, the UK public property of the State, namely reserves, diplomatic property, military equipment, etc., cannot readily fall into the hands of a business creditor.

Jurisdictional immunity has now been made quite narrow and is modeled after the commercial-activity test. Execution immunity, in its turn, is left as the hard part of sovereignty: it is extraordinary to permit any such attachment or sale of State property, and the operation of the latter is accompanied by substantive and procedural protection. Courts are thus willing to hear cases in which there is a dispute between the States and the Privy Council but are very reluctant when they are requested to meddle with assets that can be of diplomatic, military, monetary, or any other critical governmental business. The overt distinction in the treatment of adjudication and

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<sup>6</sup> *Ibid.*, paras 77–93.

<sup>7</sup> Foreign Sovereign Immunities Act 1976 (United States), 28 USC §§ 1605(a)(2), 1605(a)(6), 1610–1611.

<sup>8</sup> State Immunity Act 1978 (United Kingdom), ss 3–6, 13(2)(b), 14(4).

<sup>9</sup> Canada State Immunity Act 1982; Foreign States Immunities Act 1985 (Australia).

enforcement is not without purpose but reflects a policy decision: although States are happy to recognize the validity of commercial litigation, they are highly guarded in using measures that directly encroach upon their sovereign operations. These current controversies explain why the historical logic of immunity remains to determine the limits of the allowable enforcement, particularly in cases where State property borders world financial architecture.

In this thesis, the restrictive immunity model is taken to hold the view that, in its formally dominant form, is no longer adequate to regulate contemporary sovereign financial activity. Specifically, the traditional *jure imperii* and *jure gestionis* dichotomy cannot describe the central banks, sovereign wealth funds, and State-owned enterprises as hybrid entities. This structural conflict is most apparent at the point of execution immunity, at which courts are at a loss as to how to balance the protection of creditors and financial stability in the system.

## **1.2 Sources and Customary Character of State Immunity**

The modern State immunity is based on a combination of the sources, including the long-standing principles of customary international law, rules of the treaties, and national legislation pursuing the codification of the standards. Its starting point is customary law, which is reflected in the practice of national law and in *opinio juris*. In *Germany v Italy*, the ICJ expressly considered the issue of State immunity to fall within the scope of customary international law and interpreted the substance of the latter based on domestic law and judicial rulings.<sup>10</sup> What matters is the approach of the Court: it did not use any abstract ideas of sovereignty, but it looked at what the States do and what they consider they should legally do. This proves that State immunity is not an imaginary concept but a set of rules that developed over the course of practical application.

On the jurisdictional front, the Court embraced the fact that the restrictive approach has now become the new norm: the Court permits immunity on sovereign acts but not on commercial or private-law acts. In the area of enforcement, though, another, more conservative stance was accepted by the ICJ, with a heavy presumption against constraint measures.<sup>11</sup> The

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<sup>10</sup> *Germany v Italy*, paras 55–57.

<sup>11</sup> *Ibid.*, paras 113–118.

characterisation of enforcement was the area in which the practice of the State was most protective, since the use of coercion against property strikes at the very heart of the financial freedom and the administrative procedures of a State. In this way, the jurisdiction immunity was limited, but the execution immunity has been strong.

The 2004 UN Convention indicated:

- a definition of State which contains organs and some entities which perform that role;
- a set of jurisdictional immunity and exceptions (commercial transactions, employment, personal injury, immovable property, intellectual and industrial property, and others); and
- the presence of an independent set of rules of constraint, containing a default prohibition (Article 18), limited after-judgment gateways (Article 19) and a list of especially especially-protected types of property (Article 21).<sup>12</sup>

What is notable is that this structure has provided excessive preference to the State financial security at the expense of individual enforcement interests. Substantively, the Convention makes a presumption constitutional, that execution is the extraordinary, rather than the ordinary. This introduces a systemic enforcement gap, particularly in cases of sovereign debt dispute, investment arbitration and large-scale State commercial operations. The architecture of the Convention reflects the differences already highlighted by most national courts in a very close way. The structure of the Convention has been the focus of EJIL scholarship, with Reinisch showing that European Courts increasingly have their arguments structured in line with the Convention regarding the distinction between jurisdiction and enforcement and its strictness towards execution action.<sup>13</sup>

Moreover, the immunity regime is also interacting with a group of other treaties. Under the Vienna Convention on Diplomatic Relations (VCDR) and the Vienna Convention on Consular Relations, a hard outer ring of inviolability is created over the premises of the missions, archives, and limited funds.<sup>14</sup> These are not just immunities against execution, but categorical taboos

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<sup>12</sup> Ibid., Arts 18–21.

<sup>13</sup> A. Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures', *European Journal of International Law* (details of volume, year and pages to be completed).

<sup>14</sup> Vienna Convention on Diplomatic Relations (1961); Vienna Convention on Consular Relations (1963).

based on diplomatic need, and national courts take them to mean absolute limitations against enforcement. *The House of Lords in Alcom Ltd v Republic of Colombia* declined to authorize the seizure of an embassy account which was expended on mission costs, and it decided that the inviolability and the immunity against execution should co-exist to ensure the effective operation of diplomatic missions.<sup>15</sup> This argument is found in other jurisdictions, with courts holding embassy bank accounts, mission cars, and official premises to be immune to the dispute underlying them. Far as this complete protection is functionally justified, it, however, permits States to strategically direct funds, by means of mission accounts, in manners that, in effect, may impede lawful enforcement.

In the domestic arena, customs and expressions are found in both statutes of the country, like the FSIA and the SIA. They are expressions to the extent that they formalize current conceptions of immunity; they are sources to the extent that the way they are applied in courts helps to create and elucidate customary rules.<sup>16</sup> Where these statutes are consistently interpreted by the courts in a certain manner, their decisions become a source of custom that helps to give a boost to international law. The process can be seen as the influence of the law of State immunity being developed at the same time, both on the top (by use of treaties and international jurisprudence) as well as on the bottom (by domestic legislations and court practice).

It is a multi-layered system of sources that creates a relatively homogenous image; a multi-layered lock-out immunity in the jurisdiction tier; a robust, property-backed presumption of immunity in the execution tier; and a blanket of immunity over certain types of property, namely diplomatic, military, and central-bank property.<sup>17</sup> The three layers with jurisdiction, enforcement, and categorical protection are the conceptual construct on which the contemporary arguments are to be viewed. It is here that the domain of enforcement of the State reserves, State wealth funds, and State-owned enterprises should be placed; it is here that it will be seen that later chapters in the analysis of the treatment of State-linked assets and the scandals of massive asset freezes will be guided.

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<sup>15</sup> *Alcom Ltd v Republic of Colombia* [1984] AC 580 (HL); E. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th edn (Oxford, Oxford University Press, 2016), pp. 240–245.

<sup>16</sup> Crawford, *Brownlie's Principles*, pp. 499–503

<sup>17</sup> United Nations, *Convention on Jurisdictional Immunities*, Arts 18–21.

### 1.3 The Architecture of Immunity from Execution

Jurisdictional immunity does not just extend to immunity against execution. It is a separate matter and it, has its logic, organization and defense. Whereas jurisdiction refers to the authority of the court to hear a dispute, execution refers to the right of the holder of the judgment security to access certain assets of the State by the method of attachment, garnishment, seizure or sale. There are more stringent conditions that are enforced at this second level with the law since coercive actions aimed at property are in direct conflict with the operational autonomy of a sovereign. In contrast to jurisdiction, which influences only the venue on which a conflict is settled, implementation may interfere with the financial administration of a given State, international relations, or its capacity to play its governmental duties. This is why the enforcement is considered to be an exceptionally sensitive matter by the contemporary law and is exposed to an enhanced level of protection.<sup>18</sup> Although it is a doctrinally sound notion that the strict division of jurisdiction and execution immunity creates a serious accountability gap. States are able to become more involved in transnational business and stay in the enforcement tier well insulated. This puts into serious question the practical usefulness of judicial protection of the private creditors.

Article 18 of the UN Convention gives an overall ban on the use of measures of constraint of the property of a State in relation to a judicial proceeding.<sup>19</sup> Article 19 then identifies three very specific post-judgment gateways:

1. the measure of constraint has been expressly approved by the State;
2. the property of the claim specified by the State has been set off; or
3. the property is under or intended to be used by the State, other than to governmental non-commercial purposes.<sup>20</sup>

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<sup>18</sup> Fox and Webb, *The Law of State Immunity*, ch. 9.

<sup>19</sup> United Nations, *Convention on Jurisdictional Immunities*, Art. 18.

<sup>20</sup> *Ibid.*, Art. 19.

These gateways are indicative of a thinking: the imposition of enforcement against State property must only take place where that property has been taken on by the State in a way that shows it has acceded to the risk (by consent or by earmarking) or where the specific asset is so commercial as to make immunity against it a way of encouraging unbalance between sovereignty and legal responsibility. In other words, enforcement is permitted only when it does not interfere with the sovereign core.

Article 21 includes subdivisions of property that receive a special protection, which in fact means almost absolute impunity: diplomatic mission property, military property and warships, central-bank or monetary-authority reserves, and some cultural or archival property.<sup>21</sup> The reserve portfolios maintained by central banks, such as those, are said to be essential to monetary stability and are thus secured even in the event that they are invested in commercial instruments or maintained through commercial custodians. In my opinion, such an almost perfect insulation of central-bank liquidity is the most difficult aspect of the modern-day sovereignty. Although the justification in financial stability is strong, it implies that the central banks have turned into the most-secure place to shelter State property against judicial recovery even in cases where the conduct resulting in liability is entirely commercial or illegal. Diplomatic asset is also safeguarded in the same way since their susceptibility would undermine diplomatic representation and communication.

Local legislation is also of this form. Under the FSIA, action is limited to property that is in use of a commercial activity in the United States, and section 1611(b) (1) expresses a powerful picket of property owned in its own name by a foreign central bank or monetary authority.<sup>22</sup> The UK SIA also makes execution subject to express consent or commercial use and gives greater protection to the central-bank properties in section 14(4).<sup>23</sup> The two statutes underline that waivers of any form of immunity against execution must be unambiguous, clear, and execution-specific. The courts always declare that the general waivers, jurisdiction clauses, or arbitration

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<sup>21</sup> *Ibid.*, Art. 21.

<sup>22</sup> FSIA 1976, 28 USC §§ 1610–1611.

<sup>23</sup> State Immunity Act 1978 (UK), ss 13(2)(b), 14(4).

agreements are never enough to waive immunity at the point of enforcement unless they expressly state that it is subject to measures of constraint.<sup>24</sup>

**There are three practical implications of this architecture.**

To begin with, issues of enforcement are intensive in fact and asset-specific. To prove the identity of a specific asset, its legal situs, and that it is the State property to an extent that the relevant rules are applied, the judgment creditor should demonstrate that one of the gateways is present. Widespread statements that the State conducts business or is commercial in nature are often denied in the courts since they do not answer the important question: was this specific piece of property, or was it supposed to be, used or to be used commercially? Creditors are thus put with a heavy evidentiary burden: they need to produce documents, accounting records, or histories of transactions that make out their commercial use of the asset in question.<sup>25</sup> This is mainly strict when the asset is in a reserve portfolio at the central bank or a sovereign wealth investment vehicle.

**Secondly**, the law uses categorical shields to keep safe the central functions of sovereignty. Even accounts of the diplomatic mission spent on rent and salaries, warships, and central-bank reserve portfolios are ordinarily non-attachable, even when they earn interest or are in the possession of commercial intermediaries. The courts are interested in the role of the asset and not in superficialities like the shape of the investment or the type of custodian. The most critical question is whether the implementation of the rule would disrupt the basic State functions: ensuring monetary stability, carrying out diplomatic activity, retaining defence resources, or national cultural heritage.<sup>26</sup>

**Thirdly**, courts use comity and proportionality principles to develop discovery and relief. Under even technically qualified complaints of a gateway, judges can order in a dribble, or reduce the scope of discovery, or demand more assurances in order to prevent systemic danger to financial markets or grave disruption of foreign relations.<sup>27</sup> This is of more particular application,

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<sup>24</sup> Fox and Webb, *The Law of State Immunity*, pp. 571–603.

<sup>25</sup> *Ibid.*, pp. 571–603, 666–690

<sup>26</sup> United Nations, *Convention on Jurisdictional Immunities*, Art. 21; *Alcom* [1984] AC 580.

<sup>27</sup> Fox and Webb, *The Law of State Immunity*, pp. 614–640.

particularly in instances in which enforcement is on assets possessed under major financial market infrastructures to ensure that a single order of attachment would lead to the breakdown of custodial chains or a worldwide retaliation. The case of *NML Capital v Republic of Argentina* by the US Supreme Court sees this balancing, as the Court did permit wide post-judgment discovery, but saw that comity-based restrictions can be exercised on a case-by-case basis, particularly in situations where sensitive types of property are involved.<sup>28</sup>

One of the modern trends is the practice of European courts. According to Reinisch, the European case law of enforcement against assets of the State, including the decision of the European Court of Human Rights (ECtHR) and the topmost national courts, has reached a model that largely aligns with the UN Convention.<sup>29</sup> Even though the European courts have maintained a high presumption against enforcement, there have been instances where the human-rights-based proportionality review has been incorporated by the European courts, particularly when the delivery of judgments overlaps with the individual rights of the critics of the ECHR.

This broad outline preconditions the more detailed questions: what to do with assets owned by central banks and sovereign wealth funds; what to do with mixed-purpose accounts and custodial arrangements; and, most importantly in the context of this thesis, to what extent the strict execution regime can be compatible with the suggestions at seizing frozen reserves in the case of severe violations of international law. Such institutional inflexibility of the execution immunity is what explains why the modern proposals to seize Russian central-bank reserves is not an incidental adjustment, but a direct attack on the very roots of the status quo of the current immunity regime. In the following chapters, these problems will be discussed using the developed doctrinal framework.

#### **1.4 State Property, Separateness, and Special Actors**

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<sup>28</sup> *NML Capital Ltd v Republic of Argentina* 573 US 134 (2014).

<sup>29</sup> Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures'.

Immunity of execution is attached to State property, and the issue of what constitutes such property is thus paramount to the workings of the enforcement regime. State property is addressed in this thesis in terms of a functional and asset-specific approach. It does not necessarily just consider formal designations of ownership but the actual exemplification of the use of an asset in reality, the degree to which the State is controlling the entity in which it is held, and the risks generated more broadly by its enforcement. The chapters that follow are based on these criteria in the analysis of the central-bank assets, sovereign wealth funds, and State-owned enterprises. The concept of a State used in the UN Convention extends beyond the State to cover not only the organs of the State but also some entities that exercise sovereign power in the place of the State. Meanwhile, it assumes that numerous State-owned organizations possess different legal personalities and are not necessarily, coextensively, subject to the immunities of the State.<sup>30</sup> This two-fold appreciation, of the general State structures on the one hand, and of corporate separateness on the other, forms one of the most intricate fields of present immunity law. The courts are required to determine whether a certain asset is formally under the ownership of the State or a separately legal organisation, whether or not the entity holding the asset is in fact under independent operation, and whether the purpose of using the property is in a sovereign or commercial purpose.

As a way of dealing with this complexity, courts and commentators traditionally apply three filters, namely, (a) situs and the character of the property, (b) ownership and control, and (c) function and special status. A court can accept that an asset is situated within its territorial jurisdiction (situs), but where the asset is of an SOE with separate personality (ownership) and the purpose of the use of the asset is sovereign (function), immunity will nearly always be awarded. On the other hand, an asset may be owned by a State-owned entity (ownership) and be situated in the forum State (situs), but it may be enforced in case its purpose is purely commercial. It is a cumulative and very fact-dependent analysis.

#### **1.4.1 Situs and the nature of the asset**

The initial filter is the situs of the property, which is its legal site as an object of attachment. Regarding bank accounts, the general rule is the position of the debt of the bank to its customer

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<sup>30</sup> United Nations, *Convention on Jurisdictional Immunities*, Arts 2, 10–14, 18–21.

as situated in the branch in which the account is operated. In the case of receivables, the domicile of the debtor; in the case of immovable property, the *lex situs*.<sup>31</sup> The process of determining *situs* is not an ordinary technical process. In the absence of a jurisdiction over the *situs*, a court is simply unable to grant an order of attachment, which will be recognised or enforceable by the custodian, intermediary, or debtor.

*Situs* has increased in importance in the contemporary financial markets, whereby State assets are commonly held in complex custodial structures and cross-border infrastructures. As an example, sovereign bonds or reserve assets can be frozen in depositories of central securities and the legal location of the asset can be in a jurisdiction completely different from the location of the dispute. Equally, bank accounts in foreign currency can be associated with correspondent banks in two or more jurisdictions which begs the question of where exactly the enforceable debt is actually situated. These complications categorize *situs* analysis as a preliminary factor, but an irrevocable part of any enforcement dispute that deals with public assets.

#### **1.4.2 Ownership, control and separateness**

The second filter deals with ownership and control. Modern law draws an essential difference between the State on the one hand and its own State-owned enterprises (SOEs) or sovereign wealth funds (SWFs) on the other hand. The US Supreme Court in the case of *First National City Bank v Banco Para el Comercio Exterior de Cuba 2 (Bancec)* stated that a corporate veil may be lifted in exceptional cases, such as the widespread State control and abuse of the corporate form resulting in injustice.<sup>32</sup> Through this alter-ego or reverse-veil-piercing method, the approach has had an impact outside of the United States.<sup>33</sup> The European and Asian courts have also demanded that the separate personality of an SOE can only be disregarded through the use of strong and specific evidence. Fox and Webb point out that before SOE assets can be subject to enforcement of State debts by the means of treatment as State property, most systems demand clear indications of commingling of funds, instrumentalisation of funds in the service of the

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<sup>31</sup> Fox and Webb, *The Law of State Immunity*, pp. 666–676.

<sup>32</sup> *First National City Bank v Banco Para el Comercio Exterior de Cuba (Bancec)* 462 US 611 (1983).

<sup>33</sup> Fox and Webb, *The Law of State Immunity*, pp. 231–244.

State, or other types of abuse.<sup>34</sup> The standard is a purposefully high one in order to not erode the separation between States and their business units.

A new development by the *Supreme Court of Sweden in Ascom Group S.A. and Others v Republic of Kazakhstan* can introduce a valuable European case. The Court was forced to determine whether the assets owned by a foreign nation fund and administered by a foreign bank could be attached to fulfill an arbitral award. The Court, whilst looking into the legal structure and ownership set up, also looked at how the assets were actually used, the level of control by the ministry, and the investment mandate of the fund and the level of autonomy of the entity, even though the fund was closely related to the State. The ruling confirms two things, the first is that European courts are ready to view certain State-related assets as attachable in case commercial use and State ownership are evident; and the second is that the presumption of separateness is strong and cannot be defeated by merely holding shares or political pressures which the European courts will need specific evidence-based arguments to overcome corporate separateness and will not consider a State ownership solely on the basis that the State is economically or politically interested.<sup>35</sup> This case is an indication that European courts are demanding evidence-based, specific arguments to overcome the separateness of corporations and that will not find that the fact that the State has an economic or political interest will be considered the State to be the owner of the corporation.

Despite the fact that the *Ascom v Kazakhstan* decision is the significant contribution of the European jurisprudence related to the issues of separateness and sovereign financial structures, it cannot be viewed as the break of the traditional doctrine. Swedish Supreme Court neither stated a new principle of law, nor eroded the old principle that State owned organizations have separate legal personality. This is an evidentiary burden, which is high, as is the case with *Bancec* and European practice thereafter.

What *Ascom* shows is not any movement in the law, but a movement in judicial candour when it comes to questioning the factual structures underlying complex sovereign wealth and investment

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<sup>34</sup> Ibid.

<sup>35</sup> *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd v Republic of Kazakhstan*, Supreme Court of Sweden, Decision of 18 November 2021.

structures. Swedish Court did not undermine immunity; instead, it demanded that Kazakhstan would provide detailed internally consistent documentation of how the fund was run, how the assets were run, and whether commercial uses were incidental or not part and parcel. That is, the case strengthens the current framework but is indicative that the courts are demanding greater transparency where the States are resorting to separateness in multi-layered financial structures of the current day.

It affirms that the courts are only going to lift the veil of incorporation under extraordinary events, but also demonstrates that the courts have an anticipation that the States cannot operate under only an abstract notion of sovereign intent where the financial arrangements at issue are similar to the hybrid, State-affiliated investment vehicles. This implication is quite germane in the subsequent chapters, specifically in the examination of sovereign wealth funds and State-owned enterprises, where the line between a government directive and a business operation may be more disputed than in the central-bank case.

### **1.4.3 Function and special status**

The third filter is the asset use. Although the State ownership or ownership by a central bank may be defined, the position of the property will take it under a categorical shield. The central bank-held reservations to administer the exchange rate, the lender-of-last-resort facilities or reserve-buffer facilities are normally assumed to be non-commercial, even in the possession of the private custodians or marketable securities.<sup>36</sup> Mission expenses that are covered by embassy accounts are also considered non-attachable due to the inviolability of diplomats, an absolute immunity by its derivation out of the Vienna Convention and commonly regarded as customary law.<sup>37</sup>

However, the assets of SOEs, SWFs or monetary authorities are not immune in every case. In other cases where an entity is, in fact, a commercial actor, such as conducting profit-making businesses, renting out real estate, or lending (or borrowing) money, or actively managing a portfolio that is not part of monetary policy, its assets may be described as commercial at the

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<sup>36</sup> FSIA 1976, 28 USC § 1611(b)(1); State Immunity Act 1978 (UK), s 14(4); Fox and Webb, *The Law of State Immunity*, ch. 10

<sup>37</sup> Vienna Convention on Diplomatic Relations (1961), Arts 22–24; *Alcom* [1984] AC 580.

enforcement stage, should the creditor be able to do so by the means of documentary evidence.<sup>38</sup> The creditor has the onus of proving that a particular asset is used in commerce, and not through the broad assertions about what the entity does in the market. Judicial bodies are wary of the use of functional analysis due to the possibility that the States may hide sovereign assets as such as commercial assets or vice versa, basing on the litigation approach.

It is this system of situs, separateness, and functional analysis which provides the courts with an organised system of decision upon the question whether a certain account, receivable, security, or immovable is State property and whether it can be reached notwithstanding the broad presumption of immunity. It also has areas of pressure within the law: mixed-purpose accounts, pooled reserve arrangements, treasury single accounts and funds, which are both stabilisation and investment purposes, such as certain sovereign wealth funds. Such grey areas constitute the perplexing edge of contemporary enforcement practice and will prove it important to assess how central-bank reserves are treated, and how State-linked investment structures are in later chapters.

### **1.5 Customary Law, ICJ Practice and the Procedural Nature of Immunity**

Jurisprudence on the part of the ICJ provides valuable point of clarification to the normative nature of the described rules. The Court, in *Germany v Italy*, reiterated that State immunity is a bar to proceedings and not an excuse to the conduct that it is based upon. A court which refuses on a jurisdiction basis to decide the immunity of an act does not decide that the act of the State is legal; it simply acknowledges a restriction on its power to adjudicate.<sup>39</sup> This characterisation of a procedure is necessary.

The Court also found three things to be directly relevant to this thesis.

**First**, it affirmed that restrictive approach to jurisdictional immunity in which sovereign acts are separated into commercial or private-law acts have become the customary international law, despite different domestic formulations.<sup>40</sup> The rationale of the ICJ represents the practice of the

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<sup>38</sup> Fox and Webb, *The Law of State Immunity*, pp. 571–603.

<sup>39</sup> *Germany v Italy*, paras 93–97.

<sup>40</sup> *Ibid.*, paras 56–60.

States in many decades: the courts all over the world became more and more unwilling to protect the States when they were involved in common business operations. The Court pointed out that such practice was common enough, consistent, and with *opinio juris* to be considered as custom. Notably, the Court did not impose a strict interpretation of the term commercial act, and the domestic courts were left with room to make the notion flexible to their own legal culture, although the fundamental difference was viewed as settled law.

**Secondly**, the Court acknowledged the fact that the law contained in the measures of constraint is conservative and still very protective of State property. Although the ICJ did not fully re-establish the full customary regime on the execution, it was clear that immunity over some of the types of assets, particularly the property utilized by the government in non-commercial purposes, is deeply rooted.<sup>41</sup> This makes up embassy accounts, military property and, most importantly to this thesis, central-bank reserves and property of the monetary authority. The rationale of the Court is heavily suggestive in nature that even though Article 21 of the UN Convention is not in force, it resembles the custom to the large extent. The assumption is that assets utilised in sovereign functions is immune unless an exception of the recognised exceptions is used. This ground gives immunity much greater resistance to evolution than jurisdictional immunity and developments of doctrine in this field are generally gradual.

**Thirdly**, the Court refused to admit hierarchies of rules to justify the dismissal of immunity on the procedural level, even in cases in which the underlying injustices were the most egregious violations of international humanitarian law.<sup>42</sup> The applicants said that breaches of *jus cogens* ought to prevail over procedural bar but the Court did not approve this and asserted that the issues of immunity should be considered in isolation of the substantive seriousness of the conduct involved. The ICJ assumed that the presence of a peremptory norm does not necessarily enable domestic courts to take jurisdiction and impose judgment on a sovereign State. This element of the judgment has provoked a scholarly furor, (especially within the EJIL )some commentators having argued that the Court has taken an over-inflexible approach to procedure that can impair accountability in instances of serious violations. The scope of the approach of

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<sup>41</sup> *Ibid.*, paras 113–118.

<sup>42</sup> *Ibid.*, paras 106–110.

the ICJ offers the domestic courts very few areas of exception even when there are good moral or political reasons in favor of enforcement. Attaching or confiscating the sensitive types of sovereign property should therefore be justified either by waivers in good faith, or the clear evidence of commercial use, or by demonstrating that States themselves are altering customary rules in common and through a course of action and *opinio juris*. One cannot easily assume any of these conditions.

Any effort to revoke the established scheme of execution-immunity even the suggestion of seizing frozen assets of a State guilty of gross violations of international law is heavily overloaded with the justification necessary. Proponents of these actions should show that there is a new special regime that is developing in respect of some forms of assets, or that the current customary rules are being redefined in terms of novel conditions. The possibility of such arguments being successful against the Russian deposits frozen in Belgium, and on what legal and factual grounds, is one of the items which the subsequent chapters of this thesis are going to survey.

## **1.6 Conclusions**

This chapter laid the basic structure on the immunity of the States and their property. What will be considered as a State property is determined by a number of factors: the legal place of location of the property, the extent of State ownership or control of the property and the purpose that the property serves. Put together, these are a constrained foundation of constraint measures. They also disclose the location of the modern pressure points. The ownership, control, and function issues of mixed-purpose assets, intermediated securities, and pooled reserve structures are complicated. Freezing of foreign-exchange reserves, such as that which is kept in major financial market infrastructures, has raised debate on whether the traditional rules are adaptable enough to deal with major violations of international obligations.

The following chapters are based on this analytical framework. The fourth chapter takes into consideration the monetary authority assets and their special leadership in the enforcement practice. The following chapter assesses the position of State-owned enterprises and sovereign

wealth funds and then uses the doctrinal framework constructed in this paper to analyze the present-day scandal about the frozen Russian reserves stored in Belgium and other jurisdictions.

## PART II – CENTRAL BANK ASSETS AND IMMUNITY FROM EXECUTION

### 2.1 Why Central-Bank Assets Receive the Strongest Legal Protection

The exceptional status of the assets of the central bank is based on a very simple fact: when such assets can be exposed to the enforcement of personal interests, the whole financial system of a State can be at risk of disruption. The central banks should be in a position to respond swiftly to currency pressure, market fluctuations, or liquidity crunch. They are unable to carry out these functions where their reserves are encrypted, seized, or set aside to meet individual creditor claims. Even the provisional disruption of reserve resources might compel a central bank to postpone urgent measures or inquire about the emergency borrowing of foreign partners, which may not be timely.<sup>43</sup>

The structural rationale is a complementary factor to the economic one. When the courts start doubting this defense, the central banks could pull out of international markets, they could then diversify into other non-traditional assets or even restrict their exposures to jurisdictions perceived as legally uncertain. Such responses would decrease the liquidity in the market, compromise the stability of reserve currencies, and add novel volatility to international capital flows.<sup>44</sup> Central-bank immunity in this sense is a benefit to the issuing State, as well as to the international financial system in general.<sup>45</sup>

These are dangers that courts have been aware of. Even if a State declines a commercial debt or loses an arbitral award, judges are reluctant to go into the central-bank accounts. They consider the monetary-authority assets to be qualitatively distinct to those of a ministry, or of a

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<sup>43</sup> Claudio Borio, 'The Financial Crisis of 2007–09: Ten Questions with Some Answers' (BIS Working Paper No 345, 2009)

<sup>44</sup> Michael Waibel, 'The International Monetary System and Immunity of Central Bank Assets' (2008) 9 JIEL 653.

<sup>45</sup> August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 EJIL 803.

commercial wing of the State. Creditors cannot just point to the fact that the State has entered into a commercial transaction; they have to demonstrate that the particular asset in question has lost its sovereign nature because it has been put to commercial use. This exception is an expression of a wider rule; enforcement against a State should never diminish the fundamental capacity of the sovereign to conduct or to provide financial stability.<sup>46</sup> This is also the strength of central-bank immunity due to mutual understanding between the States. All central banks are aware that they might one day be involved in a crisis that would involve foreign reserves. And there is, therefore, a common interest between them in maintaining a rigid rule: in refusing to seize the reserves of the central bank on less than the most obvious legal ground.

It is due to these reasons that central-bank immunity is not a technical oddity, but an important part of the international legal and financial order. The protection has decades of habit, judicial precedents, and legislative decisions made again and again across the various legal traditions. The central bank assets are regarded as a sovereign core, which is immune to the daily enforcement even with the nature of the underlying conflict being a commercial activity. Intrusion into these assets threatens to disrupt the monetary policy, financial stability and provokes further geopolitical effects.<sup>47</sup> I think the remarkable security of assets of central banks cannot be justified only by the economic need. It is more appropriately termed as legal crystallisation of a political agreement between States that the monetary sovereignty is the final untouchable core of the State power. In contrast to common State property, reserve assets serve a role which cannot be substituted by the means of the private law, that is why the immunity of execution acquires its most absolute form here in particular.

That background is why the discussion of how to attach assets of central banks, particularly so when it comes to frozen Russian reserves, is oddly controversial. The idea of seizing these assets not only put the immunity of a single State into question but also the underlying premises of international financial collaboration. The question that the later chapters of this thesis will attempt to answer is whether or not the law can cope with such pressures and under what circumstances. Nevertheless, this classical defense presupposes that enforcement interests should never be subordinated to financial stability, irrespective of the character of the background of the

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<sup>46</sup> Iain Brunk, 'Central Bank Immunity, Sanctions and Sovereign Wealth Funds' (2023) 91 *Geo Wash L Rev* 1616.

<sup>47</sup> Stephan Schill, 'Systemic Implications of Sovereign Asset Seizures' (2022) 71 *ICLQ* 1.

wrongful act. The recent discussion of the Russian central-bank reserves shows that this assumption is no longer a monopoly. This, in my opinion, does not only indicate a legal conflict, but also a change of the way how the States understand the precedence of sovereignty over responsibility.

## **2.2 The Legal Framework Behind Central-Bank Immunity.**

### **2.2.1 A. International law**

Chapter 1 provided the general framework of State immunity. The point here is that in the classification of the most secure forms of State property, international law considers the central-bank assets. The Convention on Jurisdictional Immunities of States and Their Property by the UN sees the property of central banks as a special group, which is specially safeguarded. Article 21(1) (c) specifically refers to property of the central bank or other monetary authority of the State as being exempt from the action of constraint.<sup>48</sup> This makes such assets and diplomatic premises, military equipment, and culturally significant property, all of which are historically believed to be extensions of sovereign authority.<sup>49</sup> It is remarkable that, unlike most other forms of State property, assets of central banks are not only assumed to be beyond the reach, but located above ordinary balancing processes, at all.

The history of drafting indicates that the immunity of the central bank was not perceived as a controversial emerging concept. Rather, it was an attempt at codifying popular State practice and defining principles which had long been applied in the courts.<sup>50</sup> The Convention considers central-bank property to be sovereign in character since the assets serve the purpose of central-bank functions, which are essentially in the nature of government: currency level, supervision of the financial system, and emergency liquidity assistance.<sup>51</sup>

Although the International Court of Justice has never specifically addressed the central-bank assets, its reasoning, in more general terms, is in favor of such high protection. The Court in *Germany v Italy* restated that immunity against execution is more rigid than immunity against

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<sup>48</sup> UN Convention on Jurisdictional Immunities of States and Their Property (2004), Art 21(1)(c).

<sup>49</sup> Fox & Webb, *The Law of State Immunity* (3rd edn, OUP 2015) 563–570.

<sup>50</sup> ILC Draft Articles (1991–2004) UN Doc A/CN.4/SER.A/1991–2004.

<sup>51</sup> Rosa Lastra, *Central Banking and Financial Law* (2nd edn, 2015).

jurisdiction, and the immunity against property that is employed in governmental non-commercial purposes has the greatest protection.<sup>52</sup> Although central banks were not specifically mentioned, there is very little doubt that reserve portfolios, gold holding, liquidity buffers and foreign currency accounts are included under this category. They are there to enable the State to do the necessary monetary-policy work, and not to make commercial profits.<sup>53</sup>

The central banks of nations would thus have a clear platform through international law: assets of the central bank would be deemed as the core part of the sovereign property which is not to be subjected to personal delivery.<sup>54</sup> The only thing that is not clear of course is whether this higher protection was ever meant to sustain such a case when the international law is scraped by the systemic level, like an aggression. This point is not prescribed anywhere in the Convention, making current practice normatively under-determined.

### **2.2.2 National laws**

The principles are augmented and expounded by domestic legal systems. In the case of the UK, two pieces of legislation in particular influence contemporary conceptualizations of the immunity of central banks: the UK State Immunity Act (SIA), and the US Foreign Sovereign Immunities Act (FSIA).

A separate and highly strict rule on the property of central-bank appears in the United States FSIA. Section 1611(b) (1) is that the property of a foreign central bank or monetary authority maintained by it in its own account is absolutely immune to attachment and execution unless very special exceptions in statute are applicable.<sup>55</sup> The US courts have a narrow and consistent interpretation of this rule. They continually rebuff the applications to alienate the assets of the central bank even where creditors have made bona fide judgments as to the State and stress that assets held to serve monetary ends cannot be so regarded. On the side of the American judges,

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<sup>52</sup> *Germany v Italy* (ICJ, 2012) paras 113–118.

<sup>53</sup> Waibel, 'Immunity of Central Bank Assets' (2008) 9 JIEL 653.

<sup>54</sup> Buchheit & Lastra, *Central Bank Assets and Sovereign Immunity* (BIS/IMF, 2022).

<sup>55</sup> 28 USC § 1611(b)(1).

there is no uncertainty as to the difference between creditors suing the State and suing the monetary authority of the State.<sup>56</sup>

The UK takes a parallel approach in the State Immunity Act 1978. Section 14(4) expresses the fact that property vested in a central bank or other bank of monetary authority shall be so as not to be considered property of the State to be enforced against, except that the bank has expressly and explicitly assented.<sup>57</sup> The UK courts have mentioned severally that such consent should be clear, particular and definitive. They do not receive jurisdiction clauses, commercial transactions or arbitration contracts as implied waivers. The reasoning is the same one that underlies the FSIA: the assets of the central bank are different to the property of the State in general due to their systemic and purpose of being public.

The point that is remarkable in the context of both the FSIA and the UK SIA is not the protection itself but the choice of the legislators not to allow a balance of power between the rights of creditors and the systemic interests of the money. The State Immunity Act of Canada encompasses the robust sets of protection of central-bank property; Australia enshrines the same in both statutory and common-law concepts.. Even in European jurisdictions where an elaborate statutory wording is not used, such efforts at attaching central-bank accounts are regularly dismissed by the courts as an innate sovereign holding.<sup>58</sup>

The coincidence of legal systems does not presuppose the absence of probability. Courts and legislators in other areas have made the same decision, in lack of coordination: assets of the monetary-authority are to be positioned behind a high barrier of immunity to ensure financial stability

### **2.2.3. Customary practice and academic views**

Under the customary international law, the argument of intense central-bank immunity is based on both components of the doctrine: the State practice and the opinion juris. A general trend of

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<sup>56</sup> *NML Capital v Banco Central de la República Argentina* 652 F.3d 172 (2d Cir 2011).

<sup>57</sup> State Immunity Act 1978, s 14(4).

<sup>58</sup> Cour de Cassation (France), 6 July 2011; Austrian Supreme Court, 2006.

the States to treat central-bank assets as non-attachable, and a common view that this treatment is not only legally authorised but also legally obligatory, exists.

According to Lastra, immunity is a central-bank independence ingredient. Without independence being meaningless, the fact that the reserves could be collected in a foreign jurisdiction at every time that the State had a commercial dispute was unthinkable.<sup>59</sup> She further points out that the effectiveness of the monetary policy functions is contingent on the credibility of the reserve assets; the markets develop the perception that deposits are going to be frozen or attached, the confidence in the central bank to protect the currency is lost.

Reinisch finds the same tendency in the European court case law. In Germany, in France, in Austria and elsewhere, courts frequently refuse to enforce against assets of central banks, and they do so clearly not on grounds of judicial discretion but on grounds of legal necessity. Numerous of these decisions imply the uniqueness of central-bank assets and their significance in terms of sovereign functions.<sup>60</sup>

A much-needed systemic dimension is introduced by Waibel and Buchheit. According to them, the reserve portfolios have the stabilising effect on the economies not only of a single country, but also of the global monetary system overall.<sup>61</sup> In case central-bank assets became liable to seizure in the financial centres then the States would respond by initiating the transfer of the reserves to other jurisdictions or these reserves could be transferred to gold or any other non-seizable forms. This would lower global liquidity, undermine the trust behind reserve currencies and bring instability to international finance.

Combined, these academic standpoints demonstrate a powerful overlap of the legal doctrine and macro-financial risk management. This convergence, in my view, warrants the general resistance to the general restrictive tendency in State immunity which central-bank immunity seems to have enjoyed. It belongs to a larger and more widely held view that certain types of sovereign property in particular that are related to the monetary power should not be subject to enforcement privately. The rule weighs up the legitimate interests of creditors against the larger societal

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<sup>59</sup> Lastra (n 5).

<sup>60</sup> Reinisch (n 15).

<sup>61</sup> Waibel & Buchheit (n 8).

interest with securing the stability of the financial system and the effective operation of the global monetary system.

### **2.3 How Courts Decide What Counts as “Central-Bank Property”**

The second thing to do would be to find out which of the assets are effectively covered by the special immunity that central banks have. Central banks possess numerous categories of assets including foreign-exchange reserves, gold, government bonds, securities portfolios, deposits, swap-line balances and clearing and payments accounts. These not necessarily all qualify to heightened immunity. The three fundamental questions that are normally considered by the courts include: (a) who has possession of the asset, (b) the manner in which the asset is possessed and registered and (c) in what capacity the asset is possessed. This three step analysis assists courts to make the distinction between true monetary-authority property and the rest of property that is not really sovereign in nature.<sup>62</sup>

Various States structure their monetary authorities differently. The central bank in certain nations is legally a part of the central government and does not have a separate corporate existence. In other ones, the central bank is a separate body that has its own capital structure, internal decision-making units, and is legally independent of the executive branch. There are even central banks that have private shareholders, like the Federal Reserve System part of it. Under monetary unions, e.g., in the euro area, power is divided between the European Central Bank and the national central banks.

Although there exist these institutional differences, it is not the formal structure of the corporate structure that counts to immunity but rather the functional role of the institution. In my view, practically, such a functional analysis is hardly ever a neutral political procedure, especially in cases where the attaching creditors are commercial investors and the defendant State is a litigant in a transnational dispute. Functional tests are applied formally by courts, however, in the background of such determinations, the geopolitical of the situation is usually working. The

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<sup>62</sup> Iain Brunk, ‘Central Bank Immunity, Sanctions and Sovereign Wealth Funds’ (2023) 91 Geo Wash L Rev 1616.

source of the legal personality of the institution is second as long as the institution is conducting these sovereign monetary functions.

The drafting team realised that central banks are very diverse in terms of their legal structure. Their sovereign purpose is what brings them together. Therefore, even an institution that has a private or hybrid corporate structure can be a monetary authority, and the assets can be provided with all the immunity as long as the assets take part in monetary-policy activities.<sup>63</sup> The resultant effect is that the courts willingly give preference to functional reality, at least to the detriment of less predictability among creditors, to functional reality that is much closer to the surface than to the formal law. This is a judicial decision that is intentionally made to trade of enforcement certainty with systemic financial security.

Manipulation is also avoided in this approach. In case immunity is pegged on the internal corporate style or shareholder structure, then the States can game the system by altering the legal form of their central bank. Courts discourage such strategic behaviour by ensuring that they see the functionality instead of the form.<sup>64</sup>

### **2.3.1 Asset holding and recording.**

The following is a question regarding the place and the legal form of the assets. The central banks today hardly keep their assets at a single place. The international financial system is instead run by the middlemen, by the correspondent banks, custodians, brokers, and central securities depositories (CSDs) like Euroclear or Clearstream. The foreign-exchange reserves could be deposited at other central banks or at the large commercial banks. In international clearing systems securities can be frozen and just denoted by book-entries.

Due to this complexity, courts have interest in the legal recognition of an account holder and whether that party may give binding instructions. By the name of the central bank so appears in the books of the custodian, and he is empowered to transfer, to sell, or pledge the, the asset, courts are in general held to think it is the legal owner;--although the title may be brought to

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<sup>63</sup> UN Convention on Jurisdictional Immunities (2004), Art 21(1)(c).

<sup>64</sup> Fox & Webb, *The Law of State Immunity* (3rd edn, OUP 2015) 563–570.

bear, through a host of intermediate dealing.<sup>65</sup> The fact that there is a separate financial institution in the chain is not a breaking of the connection between the central bank and the asset.

This principle is essential. Otherwise, by being a mere possessor of assets on ordinary market platforms - nearly all central banks are - States lose their immunity. A majority of the reserves are not held physically, they are held as a claim or credit at the intricate financial systems. In case the immunity was undermined by the use of these infrastructures, the central-bank protection would be in practice of no use.<sup>66</sup>

The law that applies to the account is also a matter of concern to the courts, as the law of legal situs of financial assets may frequently be determined by the location of the intermediary. As an example, an account at Euroclear is usually governed by the Belgian law, whereas an account at Clearstream can be governed by the Luxembourg law. These law environments establish the way which courts establish ownership and the determination whether the asset can be tapped into. In such a way, courts do not simply consider the person possessing the account but the contractual and statutory regulations, which organize the custody arrangement.<sup>67</sup>

Lastly, the courts look at the true holder of the asset in what interest. A central bank is not necessarily acting on behalf of itself. It frequently keeps books on behalf of the State treasury, of the authorities of a State, or of banks within the country. It can also act as a custodian to foreign institutions or international organisations. When the asset is simply being held by the central bank on behalf of a third party then the property is not regarded as property held in its own right.

This difference is important since such clauses as FSIA SS1611(b)(1) condition special immunity to the property possessed on behalf of the central bank itself.<sup>68</sup> The immunity of assets held on behalf of other entities is not necessarily immunized by the central bank even though they may flow through the balance sheet of the monetary authority. Rather, they are safeguarded by other provisions - such as the general State immunity, trust law or sovereign-immunity doctrines where the real beneficial owner is concerned.

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<sup>65</sup> *NML Capital Ltd v Banco Central de la República Argentina* 652 F.3d 172 (2d Cir 2011).

<sup>66</sup> Michael Waibel, 'The International Monetary System and Immunity of Central Bank Assets' (2008) 9 JIEL 653.

<sup>67</sup> Euroclear Terms & Conditions (Belgian Law); Clearstream Banking Rules (Luxembourg Law).

<sup>68</sup> Foreign Sovereign Immunities Act 1976, §1611(b)(1).

Courts thus examine internal records, ledger accounts and account instructions in order to establish whether an asset is held by the central bank itself or the bank was a custodian. This may necessitate an inquiry that is quite detailed and fact-based. As a case in point, a central bank of a government using a government-treasury account has money which, in fact, does not belong to the central bank itself, but to the State; such an account is not treated by a court as a reserve portfolio. Where also a central bank manages a pension fund or a sovereign wealth fund on behalf of another party, then such holdings cannot be considered as part of the central-bank property, unless they are directly connected with the activities of monetary policy.<sup>69</sup>

This ability-based difference means that the central banks are not able to extend their immunity to a very large group of pubs or privates by merely holding their reserves. It makes sure that the special protection is restricted to those assets that are actually needed in monetary authority and financial stability.

#### **2.4 Can Central-Bank Assets Ever Be Treated as Commercial?**

The most controversial issue of the sphere is whether the central-bank assets can ever lose their special immunity due to their evident use in the commercial manner. As it was explained in Chapter 1, the law of State immunity identifies the existence of acts *jure imperii* (sovereign acts) and acts *jure gestionis* (commercial acts). This difference is the focus of most State entities: the immunity of a ministry or a State-owned enterprise can be lost by making transactions with the private market. The case is far more limited as far as central banks are concerned. The burden placed on courts to come up with a central-bank behavior that they consider commercial is much greater.

The reason is that, despite the fact that financial instruments tied to activities of private participants are often the tools employed by the central banks to achieve a certain goal, the goal of the central banks activities is essentially a government one. The central banks do not deal in financial markets as a commercial investor to make profit but to achieve policy objectives like regulating liquidity, affecting interest rates, controlling exchange rates or ensuring the safety and

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<sup>69</sup> Cour de Cassation (France), 6 July 2011; Austrian Supreme Court (2006).

operation of payment systems.<sup>70</sup> Courts are therefore likely to consider the activity as being sovereign although the form may appear commercial.

This difference is well depicted in the litigation in *NML Capital v Banco Central de la Republica Argentina*. Bondholders attempted to say that the central bank reserve operations were commercial activities due to the fact that they entailed deposits and securities accounts in the United States. The US courts did not accept this argument as they believed that the transactions by the central bank were related to monetary-policy issues and thus they came under the special immunity rule in FSIA SS1611(b)(1).<sup>71</sup> The NML litigation, in my opinion, provides an understanding of the extent to which courts can go in applying the meaning of sovereign purpose when monetary policy is at issue. Even instruments which are blatantly market-oriented are recoded in court as sovereign in case systemic stability is threatened. The court pointed out that the nature of the deal, which is either a deposit or a securities account is not the sole determinant of its legal character; it is the purpose of the existence of the asset and its practical application that is important. I believe this argument is convincing with respect to systemic financial risk, but issue based on private enforcement. The collapse of most central-bank financial operations to sovereign purpose by the courts, in effect, makes the exception on commercial activity almost inapplicable in the financial domain.

This concept will be even more crucial in such situations as mixed-purpose accounts, in which central banks have a frequent use. Most reserve requirements have similar purposes: they keep foreign-currency reserves, pay central-bank debts to the treasury, provide liquidity in the market when it becomes stressful, or pay central-bank operations with local banks. An outsider can view some of the movements on these accounts as commercial particularly when the central bank is earning interest or undertaking short-term market operations. Courts have however realised that it is not viable or legally valid to divide an account into commercial and sovereign parts. This would be the case in case the immunity relied on the ability to trace each sub-transaction as this would be creating ambiguity and compromising the operational freedom of the central bank.

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<sup>70</sup> Rosa Lastra, *Central Banking and Financial Law* (2nd edn, Edward Elgar 2015) 115–130.

<sup>71</sup> *NML Capital Ltd v Banco Central de la República Argentina* 652 F.3d 172 (2d Cir 2011).

Due to this reason, there is a tendency of most courts to center their attention on the primary or dominant purpose of a given account as a whole. Even where the main object of the account is to render the operations of monetary policy easy, or to hold reserves in a sovereign sense, ad hoc applications of a commercial kind will not change their character.<sup>72</sup> This is the reason why judges tend to utilize this dominant purpose test, they have a manageable rule that safeguards financial stability without actually barring legitimate application of the rule against assets which actually are not a central bank sovereign mandate.

Though they are very few, there are some exceptional cases where the central-bank assets could be regarded as commercial. An example that can be used hypothetically is where a central bank takes over a commercial company and runs it as a normal profit-making enterprise. The other one is where a central bank voluntarily undertakes a commitment of a particular asset to give rise to a private law obligation, e.g., giving a guarantee that is on behalf of a third party.<sup>73</sup> In such instances, the central bank has actually moved beyond its sovereign mandate and has been involved in the behavior of a normal economic player. The courts can then be ready to consider such a specific asset, that is, one and nothing more, as commercial.

Even at the time, courts do this with caution. They tend to limit the enforcement only to the particular property that takes place in the commercial transaction and leave completely unaffected the overall reserve portfolio of the central bank. This rationale can be seen as the overall rationale in central-bank immunity: courts would like to see that exceptions are not threatening to pose systemic risks or undesired consequences on the financial stability. Central banks themselves would rather not engage in behaviour that would lead to confusion of sovereign and commercial activity, which is the precise reason why they would not wish to have their core assets exposed.

On the whole, even though the commercial-activity test has a decisive role in several cases involving State immunity, it has a restricted and exceptional role in central banks. The default assumption is that the assets of central banks are used as sovereign purposes unless there is abnormally clear evidence that the central bank has voluntarily renounced the public role and is

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<sup>72</sup> Michael Waibel, 'The International Monetary System and Immunity of Central Bank Assets' (2008) 9 JIEL 653.

<sup>73</sup> Lee Buchheit & Rosa Lastra, *Central Bank Assets and Sovereign Immunity* (BIS/IMF Joint Note, 2022).

acting as a market participant. In reality, these cases can hardly occur, and that is why property of central banks is among the best secured groups in the whole immunity regime.

## **2.5 Freezes and Confiscation**

The immunity of central banks has received a new sense of urgency with the financial sanctions being among the most important instruments whereby States react to a grave breach of international law. In the past ten years, the target of sanctions has changed to focus on the financial systems of States, rather than individuals and companies. These measures have targeted central banks particularly due to their large and identifiable assets that are usually based overseas. The seizure of billions in Libyan assets in 2011, Venezuelan assets in 2019 and most recently Russian reserves in 2022 have shown how the property of central banks became the central issue in geopolitical conflicts.<sup>74</sup>

### **2.5.1 Freezes**

An asset freeze usually does not allow any movement, conversion or use of the asset, but the ownership remains formally unaffected. The funds are still owned by the central bank and it cannot exercise its rights without permission.<sup>75</sup> This is the key point of why lots of scholars say that asset freezes as such are not necessarily the immunity violation: freezes do not constitute judicial and immunity-prohibiting actions of a sort. Rather, they are imposed by executive or legislative authority under sanctions regimes, more likely coordinated by coalitions, like the EU, G7 or UN.<sup>76</sup>

This difference demonstrates that the logic of the private enforcement and the logic of the public sanctions have a structural gap. The use of domestic courts to seize assets to pay a judgment by creditors is known as the private enforcement. This situation is directly controlled by immunity against execution. On the contrary, public sanctions, which are run by international law on countermeasures or collective security, are pursuing foreign-policy goals. In this sense, immunity

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<sup>74</sup> UN Security Council, Libya Sanctions Committee (2011); US OFAC, Venezuela Sanctions (2019); EU Council Decision 2022/329 (Russia).

<sup>75</sup> Brunk, 'Central Bank Immunity, Sanctions and Sovereign Wealth Funds' (2023) 91 Geo Wash L Rev 1616.

<sup>76</sup> EU Council Regulation 269/2014 (Russia Sanctions); G7 Statements on Asset Freezes (2022).

of central banks limits the courts rather than governments who operate under sanctions laws.<sup>77</sup> According to this, an asset freeze is never immunity-relevant, until and unless it is converted into a judicial act of attachment or seizure.

However, in those cases when freezes are extended or open-ended this difference is less compelling. When a central bank is unable to utilize its reserves over a span of years, the effect, in practice, is similar to a constraint. An inaccessible reserve resource is functionally identical to one which has been appropriated, even though legal ownership might have stayed the same.<sup>78</sup> The freeze of currency in the long run might also disrupt the central bank in its efforts to keep the currency stable, in order to extend emergency liquidity, or make cross-border payments.

Brunk also points out that the line between sanctions and enforcement is starting to blur when the freezes are accompanied with political rhetoric on the part of the politicians that the assets will eventually be used as reparations, or as leverage.<sup>79</sup> In this situation a freeze can develop out of a momentarily reversible act into a dispossession act. When the political players start their discussion on how to utilize the frozen reserves and not whether to freeze them, the essence of the act becomes difficult to justify in accordance with the old immunity theory.

It is among the main contradictions of the existing discussion of Russian reserves: the actions begin as freezes but are being more and more addressed in the context of a permanent transfer. I think that any freeze which is combined with the formal political utterances of the future seizure or restitution use can no longer be warranted as a non-partisan measure of sanctions. There, the line between the temporary paralyzation and illegal execution starts to break. Such a change begs the question whether we are now witnessing the emergence of a new category of sanctions, which is sanctions in form but enforcement in substance.<sup>80</sup>

### **2.5.2 Confiscation**

Taking away is a qualitatively new action. It is not a limitation but a sale of property. Under central-bank assets, confiscation might be in the form of transferring the reserves to a different

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<sup>77</sup> ILC Articles on State Responsibility (2001), Arts 49–54.

<sup>78</sup> Waibel, ‘The International Monetary System and Immunity of Central Bank Assets’ (2008) 9 JIEL 653.

<sup>79</sup> Brunk (n 2).

<sup>80</sup> Sichevlyuk, Transparency International Ukraine (2024).

State, making a deposit in some sort of international compensation scheme, or making a deposit in order to finance rebuilding of the victim State. Confiscation involves the transfer of legal ownership of the asset, in contrast with a freeze, which only suspends the right of possession of the asset.<sup>81</sup>

Seizure is an outright violation of the dictated rule on execution immunity, which secures central-bank property on the list of the most delicate types of sovereign assets. Lastra and Buchheit caution that seizing of reserves would sabotage decades of experience where the States had believed in the security of storing their assets in foreign financial centres.<sup>82</sup> When the central banks lose faith that their reserves are secure, they might transfer funds into either gold, offshore jurisdiction, or politically obedient nations and disrupt the global monetary system.

Waibel also highlights that reserve assets are a key factor in responding to a crisis and the fragility of such assets may lead to a collapse in liquidity in the global markets.<sup>83</sup> Should the States redistribute reserves beyond the financial centres that are already in place such as Belgium, France or the United States, the functionality of the major currencies as well as the efficiency of the world payment systems might be compromised. Confiscation thus not only increases issues of the legal structure of immunity, but also of the reliability of the international financial structure.<sup>84</sup> Seizure can thus not be made out to be an extension of sanctions logic. It involves a head-on collision with the ultimate zone of the execution immunity and would mean either the explicit treaty regime or an evident change of the customary international law.

### **2.5.3. The Legitimacy Debate**

The advocates of confiscating contend that in cases where a State engages in exceptional acts of violating international law, i.e., aggression, systematic war crimes or gross violations of peremptory norms ordinary immunity rules need not offer protection of central-bank reserves of such States. The writers like Tom Ruys and Pierre d'Argent suggest that grave violations of Article 2(4) of the UN Charter can be used as justification to extraordinary financial action, such

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<sup>81</sup> Fox & Webb, *The Law of State Immunity* (3rd edn, OUP 2015).

<sup>82</sup> Buchheit & Lastra, *Central Bank Assets and Sovereign Immunity* (BIS/IMF Joint Note, 2022).

<sup>83</sup> Waibel (n 5).

<sup>84</sup> BIS Annual Report (2022).

as redistribution of sovereign assets, provided it has a reparatory or punitive purpose.<sup>85</sup> They also note that international law enforcement mechanisms are also traditional: international courts lack jurisdiction over States, execution against non-immune properties is restricted and victim States have enormous reconstruction expenses. In this view, the immunity of central-bank should not create the scenario where a rogue State will be able to retain its own riches, and it is the victim State that may bear the financial burden of the trespass. It is the confiscation in this camp then that is perceived as an instance of a lawful, corresponding countermeasure that can restore the equilibrium that was upset by the wrongful act behind it.<sup>86</sup>

Those who oppose confiscation, however, maintain that immunity whenever executed, and particularly when it is of the assets of a central bank, is preserved, even in the event of flagitious offences, unless by the formal revision of the law by States in new treaties or by customary usage.<sup>87</sup> They caution that the creation of a wrongdoing exception will put decades of established doctrine and predictability of the international monetary system at risk. Experts like Andrea Bianchi and Stephan Schill contend that the linkage of immunity to political judgement of misconduct, is seen as a threat to undermine legal certainty and could lead to a similar response by the competing States.<sup>88</sup> The same is also echoed by Lastra, Buchheit and Waibel who note that undermining reserve immunity would be a catalyst to global reserve flight, disintegration of international financial markets and less confidence in the currencies on which international business is conducted.<sup>89</sup> It is not merely a moral or doctrinal issue: as soon as there is one confiscation, the political authorities and the other interested parties in the matter are going to strive to make the exception apply in the circumstances that are not so extreme, which leads to the slippery slope, which will devalue the special status of the monetary authority property. To the opponents, the legitimacy of the international system lies in opposing politically motivated exceptions and maintaining the maxim according to which the serious wrongful acts do not necessarily terminate immunity protections.<sup>90</sup> To my judgment, the confiscation argument reveals a clash between two incompatible rationalities: the classical theory of monetary

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<sup>85</sup> Tom Ruys, *Armed Attack and Article 51* (CUP 2010); Pierre d'Argent, EJIL (2019).

<sup>86</sup> Milanovic, EJIL:Talk! (2022).

<sup>87</sup> Iain Cameron, 'State Immunity and Serious Violations of International Law' (2011) 78 Nordic J Intl L 1.

<sup>88</sup> Andrea Bianchi, JICJ (2012); Stephan Schill, ICLQ (2022).

<sup>89</sup> Buchheit & Lastra (n 9); Waibel (n 5).

<sup>90</sup> Reinisch, EJIL:Talk! (2023).

sovereignty and the new anticipation of material responsibility over serious international evils. Also, there is nothing in the present practice to indicate that the confiscation of central-bank reserves is a widespread tool of enforcing international law. What we are observing is rather a piece meal, politically motivated trial with rules that did not even have such purposes. Currently, the immunity law system is well-defined to favour the sovereignty. The main controversy that is being raised by the issue of the Russian reserves is whether this balance is normatively sustainable.

## **2.6 Conclusion**

This chapter has demonstrated that the assets of the central banks hold a privileged position under the law of State immunity. Their operations of stabilising prices, liquidity, administration of reserves and protection of payment system are directly related to the fundamental role of the sovereign. Since interference with such assets might cause currency instability, shortage of liquidity or systemic financial pressure, courts have never considered them as qualitatively equivalent to the property of ministries or State-owned enterprises.

This logic is reflected in the international structure. UN Convention marks out central-bank property as a special category, and the domestic regimes of the FSIA and SIA have constructed an even stronger wall by insisting on a specific and special waiver of execution immunity. The judicial practice then applies such principles into practical test where the identity of the holder, manner of recording of the assets, and the capacity under which such assets are held is examined. In all jurisdictions the same tendency prevails, but so long as an asset has not been evidently removed out of the sphere of monetary policy, and put into a commercial position, it is sovereign.

Sanctions have made this image complex because they try to limit the practical application of reserves but do not transfer legal title. Seizure would go a third step higher and call into question the immunity as well as integrity of the international financial system. Such tendencies demonstrate that the discussion of central-bank reserves is impossible to decompose into the wider issues of State-oriented financial institutions. The case of Russian reserves is not an

isolated case of deviation by the past practice; it is an outright test of the capability of the traditional monetary-immunity structure to resist the geopolitical pressures of enforcement.

## PART III – SOVEREIGN WEALTH FUNDS AND STATE-OWNED ENTERPRISES

### **3.1 Sovereign Wealth Funds and State-Owned Enterprises as State-Linked Actors**

Nowadays, SOF and State-owned enterprises have become the key actors in global finance. They are the owners of big pools of money, they invest internationally, and are frequent faces in commercial conflicts. Meanwhile, they are directly related to people's funds and policy decisions of the State in which they were established. This two-sided nature of governmental mission and corporate action makes them indispensable in knowing the extent to which the immunity of execution is attained in relation to the traditional heart of ministries and central banks. I think this dual nature forms the main enforcement issue of the new regime of immunity, namely: creditors are subjected to more and more corporations with a State character, which in appearance are purely commercial, but in actual operation are political. It is this structural ambiguity that enables immunity cases in relation to SWFs and SOEs to become more controversial than the ministries or the central banks.

It gives them the right to contract, sue, and be sued, and to separate their assets and liabilities as separate to the State budget. The challenge comes when judgment creditors are trying to enforce awards or court decisions with respect to States and trying to get into the assets of such entities. The main issue is whether, and on what circumstances, their property ought to be regarded as a State property, in order to have immunity against execution.

The international practice has been dealing with this issue through a conglomeration of presumptions and specific exceptions. There has already been a fundamental assumption that the assets of separate legal personality entities are not necessarily the assets of the State, even in cases where the State can hold all of the shares.<sup>91</sup> The leading expression of this view is the decision of the US Supreme Court in *First National City Bank v Banco Para el Comercio Exterior de Cuba (Bancec)*, which held that the corporate veil of a State-owned entity should be respected in principle and pierced only in exceptional circumstances, such as fraud, abuse of the corporate form or complete lack of independent decision-making.<sup>92</sup> Even though Bancec is US law-based, its rationale has had an impact on US and non-US courts and commentators.<sup>93</sup>

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<sup>91</sup> August Reinisch, 'State-Owned Entities and Immunity from Execution' (2006) 17 EJIL 803

<sup>92</sup> *First National City Bank v Banco Para el Comercio Exterior de Cuba* 462 US 611 (1983).

<sup>93</sup> Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015) ch 7.

Although Bancec formally upholds corporate separateness, the effect of this in practice is to impose a huge evidentiary burden on creditors. This burden can be nearly prohibitive in my opinion in situations where opaque sovereign investment vehicles are at play, and internal control arrangements are not subject to popular scrutiny.

The European practice is directed that way. It is a standard practice among courts to assume that a sovereign fund and a State-owned enterprise are separate of the State, and that their assets cannot be sold just because they happen to belong ultimately to the State.<sup>94</sup> Meanwhile, they are prepared to inquire, in terms of substance, whether a certain entity has been employed as an instrumentality of the State in a manner that supports an exemption of considerateness. Among the factors to consider are the amount of control that the State has on the day-to-day decisions, the amount of resources consumed by the entity to meet the public demands, and the genuineness of the commercial activities conducted by the entity to be independent or highly integrated into the State policy.<sup>95</sup>

Sovereign wealth funds occupy a very sensitive spot along this spectrum. On the one hand, they are long-term investors that act in a way comparable to big institutional funds, and thus should be enforced like ordinary commercial actors. On a different perspective, they represent an appendix of the fiscal and macroeconomic apparatus of the State, administering the resources, which would otherwise belong to the general reserves of the State.<sup>96</sup> The truth is that it is frequently of the composite: certain money is doing relatively passive, portfolio-based strategies in overseas markets, but by still strongly incorporated in national fiscal planning; others are a sort of national champions or strategic investors in major areas at home and overseas. Such a variety makes it hard to consider sovereign wealth funds as one category when it comes to immunity.

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<sup>94</sup> *ibid*; Reinisch (n 5).

<sup>95</sup> Reinisch (n 5) 815–820

<sup>96</sup> Michael Waibel, ‘Sovereign Wealth Funds in International Economic Law’ in Schafer and Zimmermann (eds), *Sovereign Wealth Funds and the Global Economy* (2017).

The same is the case with the diversity of state-owned enterprises. Others are on the competitive markets with professional management and little political intervention; others, on the other hand, are a virtual extension of the State and serve to execute policy, spread subsidies, or manage strategic resources. It is not uncommon to see legal and policy documents emphasize that the State should be an active and informed owner but not intervene with the day-to-day operations of commercially oriented SOEs.<sup>97</sup> Such separation in practice is of serious importance, in which case a creditor claims that the property of the SOE should be assignable to serve any State debt; or the State is also a question, in which case it claims that such property should have the same protection as central-bank reserves or other sovereign property.

To conduct immunity analysis, these entities thus lie between two poles. The hard core of sovereign property, which consists of assets directly consumed in any of the governmental, non-commercial purposes, e.g., central-bank reserves or embassy accounts, lies at one pole. On the other pole are purely commercial organizations which are owned by the State, but are involved as ordinary market players. Depending upon their mandate, governance and actual use of assets, sovereign wealth funds or State-owned enterprises can be brought to one side or the other. They are not discussed by the law as immune or non-immune in the abstract, but how they operate in particular situations and whether the creditor can overcome the presumption of separateness.

Such a functional and evidence-based approach can be explained by the recent case law, as the example of *Ascom v Kazakhstan* in the Supreme Court of Sweden shows. Instead of presuming the extension of immunity to the assets of the sovereign funds, the courts examine the factual connections between the State and the entity and the assets. They determine the degree of control the State has been using to such a great extent that the fund or business is an alter ego, and whether the specific assets targeted have been used in a commercial manner.<sup>98</sup> It is only in this case where these elements are well defined that the courts contemplate disregard of separateness and the treatment of the assets as available- even in this case, they are usually limited to the enforcement of the particular property with regard to the commercial activity. In my opinion, *Ascom* confirms that the current immunity controversies with the SWFs are no longer

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<sup>97</sup> OECD (n 3) 18–21.

<sup>98</sup> *Ascom Group S.A. and Others v Republic of Kazakhstan*, Supreme Court of Sweden, 18 November 2021.

adjudicated in terms of abstract doctrine. They are determined by forensic analysis of governance, financial flows and internal controls, which is a change in approach to legal formalism to evidentiary realism.

Such a conceptual framework of sovereign wealth funds and State-owned enterprises, as being state-linked but not necessarily sovereign, offers the conceptual beginning point of the rest of the chapter. These are then discussed separately as to how these entities are in practice organized, how the presumption of separateness works, and in what circumstances the courts will be prepared to lift the corporate veil and allow execution to be enforced against the assets of such an entity. These are the main concerns in evaluating the wider extension of execution immunity in the world, where States are increasingly operating as complex financial vehicles instead of necessarily through central banks and ministries. This change is the reason why the immunity regime can no longer be viewed through the traditional State apparatus, but now has to take into consideration financial institutions which act at the border between sovereignty and business.

### **3.2 Typologies and Structures of Sovereign Wealth Funds and State-Owned Enterprises**

Sovereign wealth funds (SWF) and State-owned enterprises (SOE) are not a homogenous group. Although both are State-linked actors, the mandates, governance models and financial behaviour of each of them vary greatly across jurisdiction. Such differences are significant when one considers that the viability of immunity is usually determined by the proximity of an entity to the very center of activities of the State and the distance that it travels to commercial operations. In reality, the internal constitution of such organisations is of primary interest to the courts, and not only their labels. Enforcement-wise, this implies that typologies of SWFs are important not as economic classifications, but as a proxy of legal risk: the more a fund is related to fiscal stabilization or to treasury substitution, the lesser is its assertion to commercial separateness.

The notion that SWFs must come up with transparent requirements and be operational outside the day-to-day political decisions is reinforced in the Santiago Principles (IWG 2008).<sup>99</sup> Although

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<sup>99</sup> International Working Group of Sovereign Wealth Funds, *Santiago Principles* (2008).

the principles are not legally binding, they have adopted an excellent reference standard and is frequently used when courts or academics consider whether a fund qualifies as operating at arm-length of the State.

The internal arrangement of the SWFs differs astronomically. Others are run directly by central banks or finance ministries, such as in Norway, where the Government Pension Fund Global is a part of the system of state-owned public financial institutions. Some, such as Temasek in Singapore, are incorporated as corporations, but with the ultimate owner being the State, boards, and shareholders.<sup>100</sup> These differences are legally determinant of immunity: the funds which are internal to sovereign budgetary management are functionally nearer to central banks, and such corporatized SWFs with independent boards and external managers are more functionally commercial.

Immunity is dependent on these differences. Money that remains in the financial management of the State is easier considered sovereign. Conversely, corporate SWFs that have their own governance systems are usually assumed to be distinct. Recent efforts by Setser and Ziemba indicate that many contemporary SWFs function via numerous levels of retaining firms and external asset administrators, thereby complicating the legal makeup to be clear externally.<sup>101</sup> This complication may introduce actual uncertainty in judicial proceedings in that the exterior appearance does not invariably display the internal control associations.

The variation between SOEs is even broader than that one of SWFs. As stated in the OECD Guidelines on Corporate Governance of SOEs (2015), these entities can be either commercial SOEs (which are run like regular corporations) or statutory SOEs (which perform public functions), and also hybrid SOES (which perform both functions of the state and business activities).<sup>102</sup>

This variety presents legal challenges. A commercially based SOE that is incorporated as a joint-stock company will be assumed to possess a distinct personality. Its liabilities and assets are not simply considered to be liabilities and assets of the State. Comparatively, a statutory SOE

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<sup>100</sup> Temasek Holdings (Private) Limited, *Temasek Review 2024* (Temasek 2024) 10–12.

<sup>101</sup> Brad Setser and Rachel Ziemba, 'How Sovereign Wealth Funds Invest' (Council on Foreign Relations 2020).

<sup>102</sup> OECD, *Corporate Governance of SOEs* (2015).

established to undertake regulatory or other public roles may be considered to be part of the sovereign apparatus, even though it may be officially granted a legal personality.

A large number of contemporary SWFs and SOEs are not easily categorized into one or another category. Often, Development funds, however, will make commercial investments abroad, as well as achieve strategic policy objectives within the country. Scholars (e.g. Hafner and Binder) have stated that such structures, known as hybrids, are difficult to analyze in the context of immunity as they integrate aspects of sovereignty and commerciality in a way that is hard to tell apart by the courts.<sup>103</sup> In terms of immunity, hybrid design is the worst construction to States. It is too sovereign to activate automatic protection, too private to be treated predictably commercially.

This issue is more evident in legal cases. It is possible that a fund will retain the legal structure of a corporation but will be conducting operations far beyond the abilities of an average private investor. Courts have to consider internal documents, investment policy and degree of political control to determine where the dividing line is. In reality, the State has the responsibility of demonstrating that a given asset is not a commercial asset, but a sovereign one.

Two general lessons can be learned out of this typology. To begin with, form is hardly sufficient to resolve the immunity issue. The courts look at what is really done by the entity, the manner in which it makes decisions and whether the State uses its control to achieve the objectives of the State. Second, the less unitary and more commercial the structure, the less the assumption of sovereign character. This is more so with development funds and hybrid SOEs which in many ways mimic the players of a private market despite the fact that they are close to the government. That is why, typology is not enough to resolve immunity conflicts: structure can be legally involved into the conflict only after the translation into the patterns of control, decision-making and financial dependence, which can be demonstrated.

### **3.3 The Presumption of Separateness and When Courts Pierce the Corporate Veil**

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<sup>103</sup> Gerhard Hafner and Caroline Binder, 'Hybrid Sovereign Wealth Funds' (2018) *Austrian Review of International and European Law*.

The biggest issue of concern regarding sovereign wealth funds and State-owned enterprises is whether their assets can be considered as "State property" and, in what circumstances, to be immunized against execution. Under normal company law, such entities possess their own legal person and own assets in their own name. In the situation of immunity, the question is more delicate. The courts need to make a determination as to whether the State can rightly invoke this distinct personality as a screen, or in specific situations, creditors may pierce the veil and access assets, tightly wrapped up in the funds and policies of the State. This tension in my opinion is indicative of a more fundamental structural trade-off to international enforcement: predictability of commerce on one hand, and the effectiveness of creditor protection on the other. Veil piercing is the slit between these two causes.

It is also in accord with this presumption of separateness that the UN Convention on Jurisdictional Immunities of States and their Property divides the State and separate entities with the power to exercise sovereign power. The Convention presupposes that these entities do not necessarily enjoy the immunities of the State even when they are dominated by it.<sup>104</sup> In the case of SWFs and SOEs, this implies that a creditor may not just make the simple claim of the State owns the fund or the State owns the enterprise and thus have access to its assets. Something more is required. In the case law, there is no one and all-purpose test that is commonly used in all jurisdictions and contexts, but three elements are widespread.

First, the courts take into consideration the nature and the degree of State control of the entity. Political impact in general sense like the appointment of the board or the consent of the long-term strategy is typical and, by itself, is hardly adequate. The cause of concern is evidence that the State drives day-to-day decisions, provides binding orders to particular transactions, or daily overrides the corporate organs of the entity.<sup>105</sup> It is not formal ownership but operational command that matters here. Judicial bodies are becoming more hesitant to establish alter-ego in cases based on the political oversight, but are far more responsive in cases where the possibility of transaction-level instruction by ministries can be demonstrated. In an evidentiary perspective,

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<sup>104</sup> UN Convention on Jurisdictional Immunities of States and Their Property (2004) arts 2, 21.

<sup>105</sup> OECD, *Guidelines on Corporate Governance of State-Owned Enterprises* (2015).

this is usually the most perilous factor to States as there are documentary traces of financial flows. In contrast to policy rhetoric, balance-sheet integration can be objectively checked in front of the domestic courts. This doctrine, in practice, does not permit States to retroactively re-package assets into corporate vehicles after the exposure to enforcement has come into actual being.

Secondly, courts enquire about how actually the resources of the entity are used. Reinisch argues that there is more scepticism of the separateness of corporations in some decisions of Europe where an SOE or fund is recurrently employed to meet public debts, fund the ordinary budgetary requirements or to execute governmental policies that exceed commercial remit.<sup>106</sup> The more the balance sheet of any given entity is regularly accessed to carry out operations that should, in theory, be the prerogative of the State, the more difficult it becomes to establish its formal independence in the enforcement process.

Third, the deliberate manipulation of the corporate structure is paid attention to in courts. When the State transfers assets to an SOE or a sovereign fund when the State has known or is about to incur creditor claims, and it seems to be taking assets out of reach, this can be favorable to an alter-ego finding.<sup>107</sup>

Courts are conservative even where one or more of these factors exist. They tend to narrow down any deviation out of separateness to the particular assets or relationships that have been proven to be troublesome rather than submerging the whole corporate personality. Such an asset-specific and cautious approach is especially noticeable in financially sensitive cases that deal with large sovereign portfolios.

Another practical challenge that usually influences such disputes is access to information. Creditors usually obtain public documents, whereas States are in charge of the internal records that may substantiate or disprove the claims of widespread control. Courts thus have the tendency of ruling veil-piercing issues based on whatever facts are presented, as opposed to the

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<sup>106</sup> August Reinisch, 'Execution of ICSID Awards and State Immunity' in Christina Binder and others (eds), *International Investment Law for the 21st Century* (OUP 2009).

<sup>107</sup> Michael Waibel, *Sovereign Defaults before International Courts and Tribunals* (CUP 2011) 62–70.

hypothetical beliefs of how SWFs or SOEs should work. This leads to an unequal playing field, but it is also why there are such varying results to cases: the more transparent and commercially organized something the easier it is to maintain its distinctness; nebulous or combined structures are more tempting to judicial attention.

The rulings of the Swedish Supreme Court in *Ascom v Kazakhstan* can be seen as one of the most advanced recent instances of the veil-piercing doctrine usage with regard to sovereign investment vehicles.<sup>108</sup> The case brought up the issue of whether the assets of the National Fund of Kazakhstan which were deposited in the accounts of a foreign bank could be deployed to settle arbitral awards in favor of the State. According to the creditors, the Fund operated in fact as a continuance of the State treasury and the assets held by it should thus be liable to execution. Unlike in the previous cases of veil-piercing, the difference between *Ascom* and that case is not innovation of doctrine, but intensity of method. The Court did not utilize the tags of sovereignty or ownership. It re-modeled the internal designs of fund governance, transaction authority and segregation of assets with forensic accuracy.

The Court did not reformulate the law. It did not weaken the presumption of separateness, or even devise a radically new test. It did not do so; it made a factual investigation of detail: it looked into the statutory foundation of the Fund, in the distribution of the decision-making powers between government and central bank, in the directives of investment, and in the working of the particular accounts at stake. It so far drew the line between assets and arrangements which were, nevertheless, immune, and those which, in that particular case, might be considered sufficiently near the State to be enforced. The Court did not reject the general rule of corporate separateness, but was ready to look behind formal labels where there were real facts of close State regulation of specific assets and lack of demarcation between sovereign and commercial activities. To my judgment, such a method ascertains that contemporary immunity controversies are never settled at the plane of abstract legal norm, but rather by documentary redaction of control.

Concurrently, *Ascom* has a definite practical implication to States. In the event that they would have courts take into consideration the separation of funds and SOEs, they should be in a

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<sup>108</sup> *Ascom Group S.A. and Others v Republic of Kazakhstan*, Supreme Court of Sweden, 18 November 2021

position to demonstrate, using documents and not mere statements, how these entities are managed and how their resources are utilized. Any reference to the strategic interests or developmental goals which are very vague can barely work when large amount of money and elaborate structures are at stake.

### **3.3.1 Consequences for the immunity regime**

There are three more general implications of this analysis each of which informs the treatment of sovereign wealth funds and State-owned enterprises in modern enforcement conflicts.

First, separate legal personality is still used as a default rule but it is not an absolute defense. The corporate boundary will typically be respected in courts since it promotes predictability in global trade and gives credence to the fact that a lot of SOEs and SWFs are run in a manner similar to the normal market players. Courts will not permit the State to conceal the truth under formal designation where the factual history of operations is direct heavy involvement by the government in day to day decision making, systematic use of the entities assets in paying the public expenses, or intentional sale of assets to thwart creditors. The legal sense of the personality of the entity in such situations is subordinated to the functional sense itself. This implies that separateness is not an absolute rule, it is a refutable assumption that the States must prove that corporate governance is substantial, rather than only symbolic.

Second, the disputes that will occur in the future are definitely more fact-loaded, technologically sophisticated, context-based. The emergence of multi-layered sovereign investment vehicles offshore vehicles, external asset managers, hybrid development funds and special-purpose subsidiaries implies that the traditional immunity notions are no longer easily transferred to the new financial architecture. The evaluation of control or purpose by the courts is turning into a greater need to analyze the balance-sheet information, investment rules, internal risk structure, and the actual flow of funds between the State and the entity. The doctrine terms such as *jure imperii* and *jure gestionis* can only make sense when they are considered with reference to this factual matrix. Consequently, creditors, as well as States, are forced to present far more factual records. The litigation process is no longer an exercise of a purely legal character; it turns to be

an inquiry of a forensic character of the governance practices, financial behaviour, and institutional design.

Third, veil piercing is very special and more realistic in some cases especially where sovereign organization is given mixed sovereign-commercial mandate or where the operation of such organizations is shrouded in secrecy. In the case of the hybrid SWFs and development-oriented SOEs, minor anomalies, including unrecorded ministry instructions, inconsistency in the logic of investments, or the mixing of the government and commercial finances, can open up gaps that can be used by creditors. States will therefore have actual reasons to structure their sovereign investment vehicles in a more transparent and better-documented way, better insulated governance, and more transparent rationales of their investment choice. Funds that are least susceptible to enforcement risks are the poorly structured funds.

### **3.4 The Practical Reach of Execution Against State-Linked Financial Assets**

The practical question of creditors is then not what the abstract doctrine is, but what kinds of assets can be actually attached when there is a judgment or arbitral award in existence. As a matter of fact, the result of the enforcement procedure depends on a combination of legal characterisation, access to evidence, market structure, and the sensitivity of the judiciary to risks. That is why enforcement efforts will frequently focus on portfolio investments (publicly-traded shares or bonds), foreign bank accounts of commercial SOEs, trade receivables issued in a supply or transport contract or real estate that is utilized as an income-generating asset. These classes offer a better business portrait and are more readily separated into the sovereign-function stories.

Another aspect is the nature of the judgment itself. The investment arbitration of modern type has produced a large body of awards against States and creditors often look to enforce their awards against SOE or SWF property. The European enforcement practice studied by Reinisch demonstrates what most creditors have been able to achieve in a few instances, namely persuading courts that the specific SOE should be considered an extension of the State and not a legal person, namely through the application of a broad conception of attribution and a more

limited conception of corporate separateness by the tribunal or the domestic court.<sup>109</sup> Nevertheless, an award of ICSID does not exempt it against execution. The domestic courts still use their immunity statutes and precedents, and an investor will not necessarily be able to jump between proving State responsibility on the one hand to attaching assets of any State-linked entity on the other. Schreuer points out that the enforcement of a post-award is not an independent process, and that it is necessary to demonstrate afresh that the particular asset and the particular party are not subject to the immunity regulations.<sup>110</sup>

The practical realities are not as reflected in doctrinal tests. Courts are extremely conscious that linking sovereign financial portfolios may have more far-reaching ramifications. Systemic financial risk is one of the structural constraints. It is even impossible to sell or freeze even large sovereign assets, especially in strategic sectors or even large corporations to risk destabilizing the markets or lead to diplomatic retaliation. This is not an independent legal principle but it is an expression of judicial discretion in the presence of the possible economic spill-overs. Personally, I believe this elastic feeling of systemic risk works as a latent enforcement barricade, which exists outside the regulations of statutory immunity. Even in those areas where in theory the doctrine would allow such steps to be taken, courts do not seem eager to sanction actions that can disrupt financial markets or lead to a diplomatic spiral.

According to Hafner and Binder, this is of particular concern owing to the fact that sovereign funds are large cross-border investors and typically work in the jurisdiction of one another.<sup>111</sup> The courts are thus reluctant to make generalized statements that all the assets of a state can be seized. They instead maintain confined and factually limited thinking that closing the case does not disrupt the broader structure.

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<sup>109</sup> August Reinisch, 'State-Owned Entities and Immunity from Execution' (2006) 17 EJIL 803.

<sup>110</sup> Christoph Schreuer and others, *The ICSID Convention: A Commentary* (2nd edn, CUP 2009) ch 7.

<sup>111</sup> Gerhard Hafner and Caroline Binder, 'Hybrid Sovereign Wealth Funds and Challenges for Immunity' (2018) *Austrian Review of International and European Law* 113.

It normally means that central banks should hold core reserves, there is apparent separation between fiscal authorities and commercial SOE, no SOE or SWF is an emergency fiscal instrument, and that the institutions of governance are recorded with sufficient precision to disclaim alter-ego assertions. States that do not observe this discipline, especially those that transfer funds to SOEs in times of known legal exposure or ones that use money as kind of quasi-budgetary instruments, do just the fact patterns that prompt courts to consider lifting the veil of incorporation. Put collectively, all these limitations demonstrate that implementation against State-linked financial resources is controlled not only by the prudence dictated by geopolitics but also by jurisprudence. Practically, the issues of immunity in this area are settled at the inter-relations of law, diplomacy, and financial stability instead of the framework of any particular legal system.

### **3.5 Conclusion**

This chapter has demonstrated that sovereign wealth funds and State-owned enterprises are in a halfway and indeterminate status under the law of execution immunity. They are not cushioned under the sovereign core such as central banks but they are not always safe under normal corporate separateness because of their intimate financial and institutional connectivity with the State. As it is shown in the analysis, immunity in the field is determined not so often by legal status but rather by investigations of facts related to control, financial integration, and the real use of assets. The assumption of separateness is thus the initial assumption, which is undermined in cases where factual interdependence of operation or fiscal substitution start to appear, as in the case of *Ascom v Kazakhstan* best exemplified.

This is exactly the compromise that renders them to be the focal point of modern discussions on the implementation of financial sanctions against the States that are involved in the gross breach of the international law. The following chapter extends the analysis here to the biggest and most significant example so far, the Russian state assets, especially reserve funds and fund-related holdings, currently held in European financial infrastructure frozen.

## **PART IV – RUSSIAN STATE ASSETS AND MODERN SANCTIONS PRACTICE**

### **4.1 Introduction: The Exceptional Nature of the Russian Reserves Question**

The Russian foreign-exchange reserves frozen in Europe is not just another case of the enforcement of the assets of the State. The structural nature of this case compared to all the previous cases relating to sovereign assets is that it is not based on the enforcement of the personal creditors but rather on the overall political and financial actions of the long-term accountability and rebuilding. It is not only the magnitude of the assets that have been affected in Russia but the combination of legal, political and systemic pressures that have all been drawn to one specific point that whether the old rules on immunity against executions are able to stand with the requirements they have on them due to an unprecedented geopolitical crisis.

The initial fact is simple. In the wake of the Russian invasion of Ukraine in February 2022, the European Union, the G7, and some other related States have frozen some EUR 300 billion of Russian State-linked reserves, most of which is located in the Euroclear system in Belgium.<sup>112</sup> These actions were enacted under the EU Common Foreign and Security Policy framework and established by national law, and therefore were not a judicial attachment; that is, the legal title to the assets officially belonged to the Central Bank of Russia.<sup>113</sup> Legally, such a difference is fatal: immobilization does not impose any ownership, but only limits control, whereas execution assumes the loss of sovereign title.

The strain on the current structure is based on three points.

To start with, scale and concentration: there have not been large-scale central-bank reserves frozen in one jurisdiction, as it is being frozen. Although the sanctions against Libya (2011), Iran (2012) and Venezuela (2019) were based on large amounts of assets, none of them were on the systemic level of the Russian freeze, and they were not concentrated in one international central securities depository.<sup>114</sup> Scholars like Zimmermann have highlighted those Russian assets are massive in a way that special tensions are placed on the immunity doctrine, as well as financial-market infrastructure.<sup>115</sup>

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<sup>112</sup> European Commission, “*Questions and Answers: EU restrictive measures against Russia*” (2022).

<sup>113</sup> Council Decision (CFSP) 2022/327; Council Regulation (EU) 2022/328.

<sup>114</sup> UN Security Council Res. 1970 (Libya); US Executive Orders on Iran (2012); US Treasury Sanctions on Venezuela (2019).

<sup>115</sup> Andreas Zimmermann, ‘Reparations and the Russian Assets’ (2023) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (ZaoRV).

Second, purpose: political and institutional actors have shifted an increase in focus, from viewing the freeze as a temporary and reversible sanction, to the discussion of the use of the immobilised assets to rebuild Ukraine or as a means of securing future reparations.<sup>116</sup> Such a transition puts the debate at the periphery of the immunity to execution, since these kinds of long-term or permanent uses are more reminiscent of the substantive impacts of confiscation, as opposed to the short-term limitations historically linked to the imposition of sanctions.<sup>117</sup>

Third, institutional environment: the assets are deposited at Euroclear, a systemic critical financial market infrastructure based in Belgium.<sup>118</sup> Contrary to the past where bank accounts or gold deposits were used, the Russian reserves are in book-entry form, in multi-tiered chains of custody, subject to the law of the Belgians and EU financial-market regulation, which has operational, liquidity and risk-management consequences on global markets.<sup>119</sup> Even the euro clearing has recognised that the freezes create huge interest flows and operational exposures that highlight the connection between sanctions and market stability.<sup>120</sup>

Political pressure is not the main source of legal conflict but the issue whether a rule of immunity over execution can potentially survive when its stabilising role in the international financial system is pitted squarely against post-aggression accountability. This thesis holds that the Russian reserves case is the first actual systemic stress-test of the execution immunity whereby monetary stability and liability for aggression now come to head on head.

This chapter assesses the possibility of re-interpretation of the current structure of execution immunity by the Russian reserves case or a structural overload that the case is creating.

## **4.2 The Legal Status of the Immobilised Russian Reserves**

The Russian reserves that are deposited at Euroclear are at the corner of the law that is explained in Chapters 1 and 2 and the practical reality of the sanctions policy. They are technically still an

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<sup>116</sup> European Parliament Resolution of 17 May 2023 on the use of Russian frozen assets.

<sup>117</sup> Erika de Wet, 'Countermeasures and the Frozen Assets of Central Banks' (2023) *Netherlands International Law Review*.

<sup>118</sup> Euroclear, *Annual Report 2022*.

<sup>119</sup> Moloney, Ferrarini & Chiodini, *EU Financial Market Regulation after the Sanctions against Russia* (2023).

<sup>120</sup> Euroclear, *Press Release: Impact of Russian Sanctions on Euroclear Operations* (2023).

asset in central banks: the securities and cash behind them is still on the balance sheet of Central Bank of Russia (CBR), though now it remains indefinitely stuck in Belgian infrastructure. The same assets, on the other hand, have turned into a piece of windfall profits to Euroclear in economic terms, since the cash flows are still being paid out on the underlying securities but the CBR is not able to get the cash flows.<sup>121</sup> Conceptually, this establishes what has never been seen before doctrinally, which is a kind of artificial category of paralysed sovereign property where regulatory intervention severally interferes with ownership and economic control. Such a division is not explicitly precedented in previous cases on immunity.

The point of departure is simple under the State immunity. However, in the general rules which are reorganized in *Germany v Italy* and are found in Article 21 of the UN Convention, central-bank reserves which were retained on monetary basis receive the greatest protection against measures of execution. Their being deposited through an international central securities depository, or their being registered as balances in the books of Euroclear, does not per se transform them into cash balances.<sup>122</sup> This is emphasized in academic studies by Moiseienko and van der Horst in the *European Journal of International Law*: the fact that the CBR assets are frozen with sanctions does not necessarily transform into unprotected commercial assets, even though they are now entrenched within a commercial infrastructure, owned by an individual.<sup>123</sup>

Meanwhile, the EU law has also started considering the case of these disabled reserves as having a legal differentiation to the usual case of central-bank holdings. Council Regulation (EU) 2024/1469 neither seizes the underlying Russian assets but instead seizes nearly all net profits on the cash that Euroclear acquires in connection with the said reserves and transfers it to a Union mechanism to assist Ukraine.<sup>124</sup> The Regulation is well written to prevent a transfer of ownership of the principal; it has it that the underlying assets are to be retained by the approved entities and

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<sup>121</sup> Nicolas Véron, 'Russian Immobilized Reserves' (Peterson Institute for International Economics, 27 June 2024).

<sup>122</sup> Council Regulation (EU) 2024/1469 of 21 May 2024 on the use of windfall profits from immobilised Russian assets

<sup>123</sup> Anton Moiseienko and Ronan van der Horst, 'Freezing the Russian Central Bank's Assets: State Immunity, Countermeasures and Economic Coercion' (2023) 34 EJIL (Legal/Illegal rubric).

<sup>124</sup> European Parliamentary Research Service, *Legal Options for Confiscation of Russian State Assets to Support the Reconstruction of Ukraine* (Study, February 2024).

the EU is just skimming the windfall gain. It is a political choice to remain on the side of the line labelled sanctions, and not to cross openly to the land of confiscation and execution.

That line is as frail as is demonstrated in recent policy papers and legal studies. When they decide to allocate the proceeds of immobilised reserves to Ukraine on a long-term, quasi-permanent basis, Zelikow says, the step starts to take the form of an action, at least, less like a classic countermeasure, and more like a quasi-institutional exercise of enforcing the sovereign property.<sup>5</sup> The report on legal options in confiscation of Russian state assets of the European Parliamentary Research Service (2024, 2025) is more critical, finding that any action beyond skimming profits to touch the principal would put the central-bank immunity of customary international law squarely on the spot.<sup>125</sup>

This argument is unsound as it implicitly equates immobilisation to loss of title, which is a finding that directly flies in the face of the main rationale of immunity to execution in both international and domestic legal traditions. Contributions in the *Verfassungsblog* or reports from think-tanks characterize the Euroclear balances as such a part of a wider category of reparation pool, and opine that, given the scale of aggressive actions of Russia, a new regime is forming which permits the utilisation - or even seizure - of immobilised reserves as a lawful response measure on behalf of Ukraine.<sup>126</sup> They suggest that the specificity of the situation (a clearly identified aggressor, a wide sanctions coalition, and unprecedented reconstruction costs) could justify treating these assets differently from ordinary central-bank property in future practice. Euroclear, in their opinion, is not just a neutral custodian, but an important node where an emerging reparations regime can be realised.

In the perspective of this thesis, the Euroclear environment, in its turn, is doubly important. On the one hand, it shows the extent to which the States and the EU are willing to reach into the current system of immunities: they block reserves, seize windfall profits, and use windfall profits to ring-fence them on behalf of Ukraine without actually touching the principal. The Russian reserves case, on the other hand, can be used as a test case on any further use of the law of immunity against execution, once the international community opts to cease to immobilise and to

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<sup>125</sup> Philip Zelikow, *A Fresh Look at the Russian Assets* (Hoover Institution, 2024).

<sup>126</sup> Frozen Russian State Assets' (*Verfassungsblog*, 4 April 2025).

collect profits in the form of reserves, but instead to completely use or otherwise to confiscate the reserves themselves, the legal nature of these assets - sovereign property of the central bank or fund of reparations - will become the focal point.

### **4.3 Can Existing Exceptions to Execution Immunity Justify Seizing the Russian Reserves?**

The above chapters indicated that the law of immunity against being subjected to execution, as manifested in the UN Convention and in State practice, admits very narrow gateways through which State property can be subject to measures of constraint. Article 19 of the Convention, which closely resembles the form of many domestic laws, permits execution because (i) the State has expressly authorized it, (ii) the State has directly designated the property to meet the claim, or (iii) the property has uses other than governmental non-commerce uses.<sup>127</sup> The main issue of consideration is whether one of these highly particularized exceptions can be projected to the Russian reserves at all. This thesis is one that none of them can.

#### **4.3.1 Consent: no waiver in treaties, contracts or practice**

The initial gateway is express consent. This is the most direct way in doctrine: when a State expressly and narrowly relinquishes immunity with respect to the identified property against execution, such courts may permit the attachment. The practice of the FSIA and the UK State Immunity Act, the travaux of the UN Convention all demand that waivers have to be clear and execution specific; jurisdiction clauses and arbitration agreements are insufficient.<sup>128</sup>

With regard to the Russian reserves, there is no grave difference that the Russian Federation or the Central Bank of Russia (CBR) has agreed to be enforced upon the applicable assets. Russia does not adhere to the UN Convention on Jurisdictional Immunities or has concluded no treaty whereby it waives its immunity over its reserves in favour of Ukraine or in favour of any other State. Nor does the standard documentation and account agreements adopted in the Euroclear system include an express waiver of central-bank immunity to perform execution. The very fact

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<sup>127</sup> UN Convention on Jurisdictional Immunities of States and Their Property (2004) arts 19–21

<sup>128</sup> Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2015) 441–470.

that a State avails itself of the instruments of an international financial market, or possesses in foreign securities, has never been construed as assent to be attached implicitly.<sup>129</sup>

According to Lastra, the clauses waiving immunity in relation to particular assets or a particular contract are very rarely accepted by central banks in the course of borrowing, or by signing a derivative contract; but where such clauses are adopted, courts have not been reluctant to enforce them.<sup>130</sup> However, it is not such a financing transaction that leads to the creation of the Russian reserves held by Euroclear. They belong to the reserve book of CBR and not as collateral to a loan or derivative contract. The implied-consent argument in this situation would destroy the rigid distinction between contractual waivers and sovereign reserve management, which is not consistent with the practice of both FSIA and UN Convention.

With the implication of implicit waiver under the mere participation in international clearing systems, the immunity of central-banks would be virtually nullified to all States which hold a reserve. Since even their supporters recognize that the actions under consideration would be non-consensual, they must be justified, in any case, on some other basis.

The second gateway identified in Article 19 of property is the property which has been specially earmarked in order to meet a specific claim. The reasoning is that under such circumstances in which a State has assigned specific assets to satisfy some of its liabilities, its further attachment does not interfere with other sovereign activities. Practically, this gateway has been used under fairly limited conditions, like money in escrow to settle an arbitral award, or bank accounts specifically set up to keep servicing a particular bond issue.<sup>131</sup>

But again, the Russian reserves cannot be easily put in the recognised pattern. Russia has not designated the assets which are held by Euroclear, to discharge any debt to Ukraine, or any international judgment or award. In fact, it challenges responsibility and claims of reparations. The current designation (but not the designation applied by the Euroclear) is imposed by the EU law, according to which Euroclear is forced to segregate and disclose the profits that the

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<sup>129</sup> August Reinisch, 'European Court Practice Concerning State Immunity from Enforcement Measures' (2006) 17 EJIL 803.

<sup>130</sup> Rosa Lastra, *Central Banking and Banking Regulation* (2nd edn, Edward Elgar 2015) 189–210.

<sup>131</sup> Christoph H Schreuer, *State Immunity: Some Recent Developments* (1988) 162 Recueil des Cours 121, 190–196.

immobilised assets generate and according to the current Regulation 2024 /1469 to deposit some of that profits into a Union mechanism that is designed to assist Ukraine.<sup>132</sup> This is not a marking of the State that owns the asset, but rather one that is imposed by the home jurisdiction of a custodian.

Moiseienko and van der Horst note that Article 19 is written on the perspective of the debtor State, rather than the third-party States which impose sanctions.<sup>7</sup> The reason it gives is that a State should be left free to choose to use its own funds to satisfy claims; it does not give an immediate answer to the situation where other States conscript foreign assets to act as a reparation pool. In such a construction Article 19 would be turned inside out: earmarking would cease to be an act of sovereign will, but an act of creditor designation, doing away with immunity by regulatory fiat.

This would enable the States to sanction to make exceptions to immunity by unilateral regulatory labelling, which would not be consistent with the fundamental construction of the Convention. In case article 19 earmarking could be imposed unilaterally by the creditor or sanctioning States, the whole distinction between immunity and enforcement would be lost: any politically motivated designation would instantly produce attachable property. It is just what the authors of the Convention and authors of major commentaries have attempted to prevent.<sup>133</sup> This gateway is not available on a traditional reading as the Russian reserves have not been set aside by Russia to any liability.

The third exception is the State property which is specifically being used or is to be used by the State other than non-commercial governmental purposes.”<sup>134</sup> And in the general law of State immunity this is the connector to the commercial-activity test of Chapter 1: assets involved in the normal operations of the market can be subject to the claim of creditors, despite the protection of sovereign property. The issue is to determine whether the reserves blocked in Euroclear can be described as being used in commercial purposes.

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<sup>132</sup> Council Regulation (EU) 2024/1469 of 21 May 2024 on the use of windfall profits from immobilised Russian assets.

<sup>133</sup> Xiaodong Yang, “Measures of Constraint,” in *State Immunity in International Law* (CUP 2012), ch. 9.

<sup>134</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* [2012] ICJ Rep 99.

The presence of a superficial commercial form of securities custody cannot be used to defeat the useful monetary role of reserves under Article 21. The reserves are held in securities as invested under a private central securities depository and earn interest which is remitted, at least until the time of transfer, to the own accounts of Euroclear. The instruments are not different than those of the private institutional investors. No wonder some political actors and commentators have described the situation as such, where Russian money is being manipulated in the EU and therefore, intuitively, seems to be available.<sup>135</sup>

In principle, however, the current opinion is more moderate. According to Brunk, it is generally accepted by the case law and the scholarly community that property should be categorized based on the role that it plays in the hands of the State, rather than the type of instruments that are employed.<sup>136</sup> Even in cases where the foreign-exchange reserves maintained by a central bank are invested in government bonds or high-grade securities, the reserves are used to effect monetary policy and protect financial stability. Their main intention is to obtain liquidity, control the exchange rate as well as give a buffer against shocks of an external nature. They are non-commercial governmental assets in the meaning of Article 21 on this functional analysis and, therefore, at the heart of execution immunity.

This practical approach conforms to the rationale of courts in other cases like the *NML Capital v Banco Central de la Republica Argentina*, where US courts dismissed efforts to describe the operations of the reserve-management as commercial activity just because the bank accounts and securities holdings were involved.<sup>137</sup> It also echoes Lastra when he points out that central-bank operations, even those of the complex market instruments, should be perceived as part of the collective law of monetary power and not as private investment practice.<sup>138</sup>

Using this rationale on the Euroclear-held Russian reserves, it does not change the purpose of the assets even though the CBR utilized market-based tools and private custody. These investments

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<sup>135</sup> Philip Zelikow, *A Fresh Look at the Russian Assets* (Hoover Institution 2024).

<sup>136</sup> Ingmar Brunk, 'Central Bank Immunity, Sanctions and Sovereign Wealth Funds' (2023) 91 *George Washington Law Review* 1616.

<sup>137</sup> *NML Capital Ltd v Banco Central de la República Argentina* 652 F 3d 172 (2d Cir 2011).

<sup>138</sup> Rosa Lastra, 'International Financial and Monetary Law' in Andreas Zimmermann and Christian Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019).

were and would have been monetary instruments of policy but not profit-driven investments, even in the absence of the freeze. Due to this reason, the commercial-use gateway cannot be applied not on the political grounds, but on the autonomous rationale of the application of foreign-exchange reserves. The fact that the EU voted to seize the profits on those reserves on behalf of Ukraine is arguably a separate category of operations, which may be termed as financial or even quasi-commercial by the eyes of Euroclear, but does not retroactively make the reserves themselves commercially exploited property of Russia.

In case the traditional framework is taken seriously, it is quite clear what the conclusion is. All the three classical gateways to execution immunity do not fit well:

- No written immunity waiver against execution by Russia or the CBR against the reserves in the possession of Euroclear.
- Russia has not earmarked any reserves to cover the payment of liabilities of Ukraine or any other creditor.
- And although central-bank reserves are usually governmental non-commercial property, their location in the core of execution immunity cannot be presupposed without certain evidence that, prior to the freeze, they were utilised as currency-stabilisation and monetary-policy tools as opposed to profit-generation services..

This conclusion does not consider the matter of political confiscation as such, but shows that the redirection of the frozen Russian reserves cannot be put forward as an ordinary exercise of the existing exceptions to the immunity of on-duty execution, to the application of valid arbitral awards, ECHR judgments, or judgments of EU courts. To be justified at all, they should be justified on the ground that some other form of justification is possible--in most instances, in the terms of countermeasures, grave violation of peremptory norms, or the development of a special regime dealing with reparations after aggression.

And whether such a special regime is actually taking shape, and whether they are compatible with the demand of the ICJ in *Germany v Italy* that issues concerning immunity must be perceived as in of a procedural and non-derogable character, is the question addressed in the next section.

#### **4.4 Countermeasures, Reparations and the Idea of a Special Regime**

#### 4.4.1 Countermeasures

The law of State responsibility is usually the beginning point of proponents of confiscation. On the ILC Articles, a harmed State is entitled to counter measures which would otherwise be unlawful in the name of forcing the offending State to abide by its responsibilities yet with a condition of proportionality and reversibility.<sup>139</sup> Freezing foreign assets as a response to a severe breach is now generally accepted as one of such countermeasures. It is not the freeze, but the fact that the assets - or the proceeds thereof - can be held indefinitely and used to pay reparations that makes the freeze such a controversial step.

In an elaborate treatise on the issue of war reparations and countermeasures, Hathaway and co-authors suggest that after the assets have been legitimately frozen in response to gross offenses, international law does not always demand their automatic restoration when the bad act is terminated.<sup>140</sup> They propose that the harmed State can also lawfully offset the worth of frozen funds against the reparation due in particular cases where the liable State has evidently declined to pay. The further non-provision of assets, and even their conversion into a compensation system, may be viewed in that perspective as a component of the reparation process as a whole and not a new, independent violation of immunity.

To my mind, this argument puts moral urgency over procedural constraints and may destroy the line between legal countermeasures and enforcement. Civil-society coalitions in their reports and some think-tanks demand that in the conditions of colossal destruction in Ukraine and the impotence of Russia to cooperate, the conventional enforcement mechanisms are not sufficient.<sup>141</sup> They characterize expropriation of Russian property as a form of punishment, not the traditional version of the judicial execution, but instead a flawed, but necessary substitution of the direct performance of reparation commitments by the aggressor State.

There are three responses made by critics.

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<sup>139</sup> ILC, Articles on Responsibility of States for Internationally Wrongful Acts (2001)

<sup>140</sup> Oona Hathaway, Alejandra Torres Camprubí, Zachary Manfredi and others, “War Reparations and International Law” (2023)

<sup>141</sup> RUSI / Atlantic Council / CEPS reports (2022–2023)

To begin with, they note that the ILC framework on countermeasures was formulated with inter-State obligations on the forefront, rather than the conscious transfer of central-bank reserves in key financial centres. Moiseienko, to give one example, emphasises that the fact that the effect of treating reserves in a countermeasure target was never properly discussed in the work of the ILC, and that mere comparisons with trade bans or suspension of treaties are problematic.<sup>142</sup>

Secondly, countermeasures should be reversible in principle: the measures should be removed then the guilty State adheres to them. When reserves are moved permanently or are used, the measure is no longer reversible in anything useful. The EPRS paper to the European Parliament underlines that it is the most important legal challenge to any scheme that considers the application of the principle of Russian central-bank assets, as opposed to windfall profits only.<sup>143</sup>

Thirdly, and more fundamentally, the counterargument by opponents is that the countermeasures cannot just easily overcome immunity against execution, which, according to *Germany v Italy*, is a procedural rule of application without regard to the severity of the underlying breach. Though a confiscation measure can be viewed as a counteraction within the law of State responsibility, it cannot necessarily prevail over the special regime of execution immunity because international law does not accept contradictory legal qualifications, but instead, the law has to be interpreted under principles, thus, *lex specialis* and proportionality.

#### **4.4.2 Jus cogens, breaches, and procedural immunity**

A second set of arguments appeals to the seriousness of the actions of Russia. The invasion and the subsequent atrocities qualify to be explicit violations of peremptory norms, especially the prohibition of aggression and basic provisions of international humanitarian law. According to some authors, the consequences of these violations must go to the immunity level: it would be unacceptable, they say, that a State should be able to commit such wrongs and still be able to conceal itself behind the procedural veils in case of its sovereign property.<sup>144</sup>

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<sup>142</sup> Andrew Moiseienko, “Russia’s Frozen Assets and International Law” (Journal of International Criminal Justice 2023).

<sup>143</sup> European Parliamentary Research Service (EPRS), “Legal Options for the Use of Russia’s Frozen Assets” (2023)

<sup>144</sup> Andrea Bianchi, “Human Rights and the Magic of Jus Cogens” (EJIL 2008).

This argument is not completely new. Bianchi and others have discussed the issue of whether immunity should be denied to States attempting to rely on gross violations as a defense in civil cases brought against them by victims of the violation in the human-rights context.<sup>145</sup> The reaction of the ICJ in *Germany v Italy* was categorical: immunity is the procedural bar that is applicable even in the situation of the violation of jus cogens; it does not justify the conduct of the violator, but it restricts the authorities of the forum court. It has since been extensively read to affirm that substantive norm hierarchies will not unambiguously be reflected into procedural level hierarchies.<sup>146</sup> The submission of *jus cogens* in the context of suggesting its use to override execution immunity would turn immunity into a privilege and not as a legal protection.

When translated to the Russian holdings, this would indicate that the rudimentary reality that Russia has perpetrated an outrageous violation would not, in and of itself, discharge the principles on execution immunity. Those who argue in favor of expanded enforcement against Russian assets also point to the qualitative difference between the case under *Germany v Italy*: the actions to be taken here are not actions taken against Russia, but against a coalition of States in reaction to a massive armed attack; and are not actions taken to benefit individual citizens but to recompense States. To them, the reasoning of the ICJ concerning individual tort suits that are filed decades after the incident is simply impossible to apply to a modern, synchronized reaction to current aggression.<sup>147</sup>

Nevertheless, several commentators are not sure. Such exceptions to immunity have been criticized by Schill and others as causing the system to become less predictable once exceptions to immunity are subject to disputed determinations of violations of jus cogens.<sup>148</sup> Every camp can boast that it is the real violator and wants to ground its claims on the seizure of assets. The danger of mutual abuse is especially grave in the financial domain, where most States maintain reserves or even have SWFs in the jurisdiction of one another. This, once more, is not so much a matter of the moral justification but rather of the long-term stability of a rule that so far has been so divorced from any political judgment of the merits of disputes.

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<sup>145</sup> Stephan Schill, “Sovereign Immunity and Serious Breaches of International Law” (2017).

<sup>146</sup> *Germany v Italy* (Jurisdictional Immunities of the State) (ICJ 2012).

<sup>147</sup> Tom Ruys, “The Meaning and Evolution of the Prohibition of the Use of Force” (CUP 2010).

<sup>148</sup> Pierre d’Argent, “Reparations and State Assets” (ASIL Proceedings 2023).

#### 4.4.3 A “special regime” for Russian assets?

There is a third line of argument that is not so dogmatic, and it is rather Darwinian. Instead of posing a question regarding whether the existing law of immunity and countermeasures already allows confiscation, some authors and policy documents inquire as to whether we are seeing the new special regime of reparations emerge in the context of the aggression by Russia towards Ukraine.

There are a number of developments that are applicable. Russia has been identified by the UN General Assembly to pay full compensation in the form of reparations, and the establishment of an international register of damage has been proposed as a preliminary move towards the establishment of a compensation mechanism by the UN General Assembly.<sup>149</sup> Many of the States have indicated political support to use the frozen Russian assets to finance reconstruction, and some have shown the intention of drafting domestic law that would allow transfers under some circumstances. Scholarly suggestions - including those canvassed by Kamminga or Chernohorenko - look into institutional models that could be adopted, including an ad hoc international fund or a standing mechanism of reparation.<sup>150</sup>

As read on this interpretation, the law can be at a crossroads indeed: when sufficiently coherent and consistent State practice had begun to emerge where States would attempt to impose valid international and national judgment on frozen Russian assets, that would in turn force a review of whether execution immunity would still be relevant to such assets in the current law. This argument is under-recognitive of the spillover effect that is systemic: once one of the large reserves holding States loses its immunity in practice, mutual erosion is no longer legally and politically impossible.<sup>151</sup>

The EPRS report is more prudent. Having considered the alternatives, it finds that, as things are, the action to seize the assets of the Russian central bank would leave settled law, and would be hard to defend by reference alone to enforceable practice.<sup>152</sup> It can only be noted that the law is

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<sup>149</sup> UN General Assembly Resolution A/RES/ES-11/5 (2022)

<sup>150</sup> Kamminga, “Reparations for Ukraine: Legal Options” (Netherlands International Law Review 2023)

<sup>151</sup> Olha Chernohorenko, “Towards a Reparations Mechanism for Ukraine” (Just Security 2023)

<sup>152</sup> EPRS, “Russia’s Frozen Assets: Legal and Practical Obstacles” (2024 update)

straining at the seams and that the lineaments of it might be changed in the future. The issue of whether or not States will be prepared to pay the price of that shift - in the form of reciprocity, financial stability and potential litigation - is more a political than a legal one.

#### **4.5 The Limits of Confiscation and the Question of Systemic Stability**

The hardest part of the current discourse about the frozen reserves of Russia is the outer limit of the ability of the international legal system to accommodate them without upsetting its financial grounds. Although asset freezes, though objectionable, may yet be justified under the existing doctrines, as temporary countermeasures or as penalties embraced within collective systems, execution of judgment takes a wholly different place in the law and within the system itself. It does not simply suspend the use; it kills sovereign control. It is because of this that proposals concerning confiscation should not be subjected merely to the doctrine of immunity, countermeasures, and jus cogens, but it should also be applied to the structural motivations that continue to have States willing to maintain reserves in foreign countries.

The international financial system operates under the premise that the reserve holdings at the main financial centres will not be exposed to uncompensated seizure. This is not enshrined in a single treaty; it is maintained by regular usage, common expectation and mutual reliance of States and central banks that the liquidity and stability of reserve currencies are maintained. Lastra notes that the immunity of central banks is entrenched in the institutional fabric of monetary rule in which the credibility of reserve assets of the exchange-rate rule, the supply of liquidity in emergencies and the management of systemic crises.<sup>153</sup> In the case with the European Union, this risk is especially acute because the global reputation of the euro is related to the legal predictability of the protection of assets in the territory of the EU.

When States start to question the legality of their reserves as being legally or politically safe, they need not necessarily question the legality of a confiscation directly, they can simply move assets out of the jurisdictions that they see as uncertain. Waibel points out that any slight modification in the confidence can lead the sovereigns to reallocate their portfolios to gold,

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<sup>153</sup> Rosa Lastra, *Central Banking and Financial Law* (2nd edn, Edward Elgar 2015) 15–20.

domestic or politically-oriented States at the expense of the liquidity of major currencies.<sup>154</sup> The latter is not just theoretical: IMF data post-2022 already indicates the slight yet significant diversification out of the US and European reserve assets by a number of non-Western States.<sup>155</sup>

So, the issue is not only is the confiscation lawful, but will it work in tandem with the incentives that keep the reserve system alive. To the extent that a single precedent undermines such expectations, the ensuing change in portfolios might undermine the monetary autonomy of States that are more dependent on foreign investors and reserve inflows, even the EU Member States themselves.

#### **4.5.1. Legal innovation vs. systemic destabilisation**

Even those scholars who are inclined to support the claims of Ukraine about reparations point out that legal innovation in the field presents a structural danger. Ruys observes that countermeasures should be reversible so as to prevent the spirals of retaliation; execution of judgment is irreversible and as such, may turn the doctrine into a vindictive tool that has lost any sense of purpose.<sup>156</sup> D'Argent also cautions that a reparations-motivated exception to central-bank immunity would, in any case, need to be a multilateral tool, not a multilateral new practice originating over a period--nor unilateral actions on the part of an insignificant number of States.<sup>157</sup>

Schill and Bianchi write, on the contrary, that the immunity should be formally insulated against political judgment, otherwise the States can use the accusations of misconduct to seize the property of strategic competitors.<sup>158</sup> Beyond this point, according to them, the financial system of the world will be on the brink of departing the law-based predictability in favour of politically dependent security of assets, and such a shift would radically change the behaviour of sovereign investors.

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<sup>154</sup> Michael Waibel, *Sovereign Defaults Before International Courts and Tribunals* (CUP 2011) 62–70.

<sup>155</sup> IMF, *Currency Composition of Foreign Exchange Reserves (COFER)*, Annual Report 2023.

<sup>156</sup> Tom Ruys, *The Meaning and Evolution of the Prohibition on the Use of Force* (CUP 2010) ch 15.

<sup>157</sup> Pierre d'Argent, "Reparations and State Assets" (ASIL Proceedings 2023).

<sup>158</sup> Andrea Bianchi, "Human Rights and the Magic of Jus Cogens" (2008) 19 EJIL 491; Stephan Schill, "Sovereign Immunity and Serious Breaches of International Law" (2017).

In the case of the European Union, whose vision is to have the euro as a viable reserve currency, the systemic risk is not virtual. Other EU legal services have specifically stated that such confiscation without an obviously international legal underpinning may catalyze retaliation against European assets overseas and investment exodus on euro-denominated securities.<sup>159</sup> Therefore, although it might be possible to justify confiscation by some normative considerations, the overall systemic implications must still be evaluated on the level of the prevailing normative legal limitations, and cannot be explained merely on the principles of individual moral or political ambitions..

These institutional and ideological boundaries are quite essential in explaining why the controversy surrounding the frozen reserves in Russia has not been resolved. Suggestions include utilising all the interest on the assets (a more legally straightforward path), temporary collateralisation, and ceasing ownership to a reparations mechanism.<sup>160</sup> However, with every stride taken on this spectrum, there is a further distraction of the classical immunity rubric and an increase in unexplored legal waters.

The closer the suggested step is to total deprivation of property, the more significant the systemic protests. Any form of execution of judgments against central-bank reserves without a well-defined multilateral system of the law would pose a risk of establishing a precedent that will ruin the stability of central-bank immunity as such, even in the case of Russia. This, on its part, poses a question, which no State can possibly disregard, whether it once occurs, how can it occur again?

#### **4.6 Conclusion**

The discussion in this chapter proves that the frozen Russian central-bank reserves dispute is not merely an argument over the assets of one State, but a test of the whole structure of execution immunity. There is no provision in the existing system of unilateral seizure of such property, and the line between the provisional freeze and the irreversible loss of title is a point of law.

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<sup>159</sup> European Parliament Research Service (EPRS), *Frozen Russian Assets: Legal and Practical Obstacles* (2024).

<sup>160</sup> Andrii Zharikov, "Using Russia's Frozen Assets for Ukraine: Legal Models and Constraints" (2023) *Journal of International Economic Law*.

The case of Russian reserves reveals a head-on structural clash between two incompatible logics: the logic of stability of execution immunity, and the logic of retribution of post-aggression responsibility. The freeze-based sanctions are in an intermediate position: they are not officially sanctions that impede immunity, but by their long-term and extremely restrictive nature, they undermine the effective capacity of a central bank to conduct the crucial activities. The legal threshold is met at exactly the point at which immobilisation is turned into the permanent deprivation of sovereign title. Even though certain academics propose that extraordinary actions can be taken when there are extraordinary violations of international law, the conventional doctrine of immunity does not offer any system that could be used to integrate such infractions into the analysis of execution. The reasoning in *Germany v Italy* of the ICJ proves that a severe breach of international law does not necessarily lift either the jurisdictional (procedural) immunity, and leaves open the question of immunity against execution of State property separately.

In addition to doctrine, there are significant systemic implications. Execution of judgment would not only sever with inherited security of monetary-authority assets, it would also disrupt the premises, with which States regulate their reserves management. The threat of retaliation, reallocation and fragmentation of financial pathways has more than theoretical probability of occurrence. It is the scenario that the immunity regime is meant to eliminate. The discussions in the EU, G7 and NATO countries reveal that there has been a growing pressure on the policy arguments to the legal boundaries, yet they have not yet produced a sufficiently consistent State practice to solidify a new rule-or even a new exception.

The example of the Russian reserves is thus not a change in the currently existing regulations of execution immunity, but instead a demonstration of the outside pressure to the rules by a combination of unprecedented political and economical conditions. The law regarding the immunity of execution is still formally in place; yet, politics are forcing the States and the courts to address issues on which the law has not yet offered any definitive responses. It is based on this that the current thesis finds that, the expropriation of Russian central-bank reserves, is not compatible with the current law, with the existing rules of the immunity of execution. Any action like this would not constitute an admissible interpretation of the law, but would rather constitute a break with the old established legal order. This is essentially a political question, not a legal

one, whether the States are prepared to incur the financial, legal and systemic costs of such a disjunction. These unresolved tensions are exactly what the analysis of the next chapter is based on since it investigates whether the ongoing efforts in the European Union are indicative of the beginning of a truly new special regime of assets that is associated with word-grave violations of international law, or simply a form of political action that is beyond the already existing paradigm of immunity.

## **Conclusion**

1. In the development of absolute to restrictive immunity, the structural imbalance between jurisdiction and execution has not been removed. Although States can be sued on commercial actions, the security of their property on the enforcement front is exceptionally high, which poses a continuum of responsibility gap in contemporary sovereign litigation.
2. Assets of the central bank are in the safest type of State property. Their immunity is not merely based on the doctrine of law, but on considerations of a system of thinking, of monetary stability, and financial market confidence. The functional nature of these assets is determined by objective criteria including the fact that they are registered as central-bank reserves, incorporated into the operations of the monetary policy, and not deployed in a profit-oriented manner, based upon which they still maintain sovereign nature even when they are held through commercial infrastructures and unrestricted to enforcement by creditors.
3. The challenges to the classical framework are presented by sovereign wealth funds and State-owned enterprises, which are an amalgamation of sovereign mandate and commercial behaviour. Courts thus depend on the factual analysis, i.e., control, purpose, and financial integration, and not on the formal structure of the corporation. This practice indicates that the separateness is assumed but not full, and a veil can be lifted only in situations when there is evidence that there is an alter-ego relationship.
4. The current exemptions to execution immunity are quite limited and do not fit in the modern controversies of financially complex actors that are related to the State. Consent, earmarking, and commercial use are all strictly construed, and this curtails the assets the

creditors can lay their hands on, even in instances of an established liability. The inflexibility of these exceptions speaks to a restriction of the existing legal structure.

5. The Russian reserves are locked up in Europe, and this has created unprecedented legal and structural tensions. The size of the freeze itself, as well as the political pressure to distribute the assets in order to compensate damages, challenges the integrity of the immunity regime, even though the assets are still of a sovereign nature. This state of affairs shows that the current framework was not created to address a crisis which included large-scale reserve portfolios and synchronized sanctions by financial centres.
6. The general framework of the immunity, though remaining unchanged in principle, is growing hard to apply to the financial realities of the present day. The interplay between State immunity and the international markets and geopolitics implies that there may one day be a need to be more explicit in terms of legal response, be it by defining the safeguarding of sovereign financial resources, or by establishing a more specifically limited regime to address exceptional situations of serious violations of international law.

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## **Summary (English)**

### **Application of Immunity to State Property and Recent Developments in International Law**

**Author: Elmar Mahmudov**

This Master thesis explores how the modern world of international law applies the concept of immunity to State property, specifically to the assets of central banks, sovereign wealth funds, and State owned corporations. The study examines the role of the classical doctrine of State immunity developed in an environment governed by the absolute and subsequent restrictive immunity in the current globalized financial system, in which States are now active participants in the commercial markets.

This is the first section of the thesis, which defines the doctrinal basis of State immunity, and gives the meaning of the difference between jurisdictional immunity and immunity against execution. The paper proves that despite the fact that jurisdictional immunity has shrunk considerably due to the narrow scope of restrictive immunity model, the immunity against execution is one of the most fortified domains of sovereignty. The second section examines the extraordinary legal safeguarding of the assets of the central bank, justifying it based on monetary stability, central-bank autonomy and systemic financial risk. It is revealed that international conventions as well as the local legal frameworks offer near absolute protection to such assets.

The third section measures the enforcement opportunities in regards to sovereign wealth funds and State-owned enterprises, where the courts assume the separateness assumption and where the courts may decide to lift the corporate veil subject to exceptional circumstances. The study establishes that the evidentiary standard in use by the courts is very high before it can be enforced against commercial entities linked with States.

The conclusion section evaluates the concept of freezing Russian State property in the modern practice of sanctions and discusses the possibility of the presence of exceptions to the application of the immunity of execution in favor of seizure. The thesis finds that, according to the existing customary international law, the freezing of the central-bank reserves of Russia cannot be legitimized without overhauling the incumbent system of immunity. The research concludes that the recent trends are characterized by an increased tension between State responsibility and financial sovereignty that demonstrates that the traditional immunity paradigm is not the tool that would be used to solve the current challenges in geopolitics.

## **Santrauka (anglų kalba)**

### **Imuniteto taikymas valstybės turtui ir naujausi tarptautinės teisės pokyčiai**

**Autorius: Elmar Mahmudov**

Šiame magistro darbe nagrinėjama, kaip šiuolaikinėje tarptautinėje teisėje imuniteto koncepcija taikoma valstybės turtui, konkrečiai centrinių bankų, valstybinių turto fondų ir valstybės valdomų korporacijų turtui. Tyrime nagrinėjamas klasikinės valstybės imuniteto doktrinos, sukurtos absoliutaus ir vėlesnio ribojamojo imuniteto aplinkoje, vaidmuo dabartinėje globalizuotoje finansų sistemoje, kurioje valstybės dabar aktyviai dalyvauja komercinėse rinkose.

Tai pirmoji darbo dalis, kurioje apibrėžiamas valstybės imuniteto doktrininis pagrindas ir pateikiamas skirtumas tarp jurisdikcijos imuniteto ir imuniteto nuo vykdymo. Straipsnyje įrodoma, kad nepaisant to, jog jurisdikcijos imunitetas gerokai sumažėjo dėl siauros ribojamojo imuniteto modelio taikymo srities, imunitetas nuo vykdymo yra viena iš labiausiai įtvirtintų suvereniteto sričių. Antrajame skyriuje nagrinėjamas ypatingas centrinio banko turto teisinis apsaugas, pagrindžiant jį pinigų stabilumu, centrinio banko autonomija ir sisteminė finansinė rizika. Atskleidžiama, kad tarptautinės konvencijos ir vietos teisiniai pagrindai suteikia beveik absoliučią apsaugą tokiam turtui.

Trečiajame skyriuje vertinamos vykdymo užtikrinimo galimybės, susijusios su valstybiniais turto fondais ir valstybės valdomomis įmonėmis, kai teismai remiasi atskirumo prielaida ir kai teismai gali nuspręsti panaikinti korporacinį šydą išimtinėmis aplinkybėmis. Tyrime nustatyta, kad

teismų naudojami įrodymų standartai yra labai aukšti, prieš juos taikant prieš su valstybėmis susijusius komercinius subjektus.

Išvadų skyriuje vertinama Rusijos valstybės turto įšaldymo koncepcija šiuolaikinėje sankcijų praktikoje ir aptariama galimybė taikyti išimtis dėl vykdymo imuniteto taikymo arešto naudai. Darbe konstatuojama, kad pagal galiojančią tarptautinę paprotinę teisę Rusijos centrinio banko rezervų įšaldymas negali būti įteisintas nepertvarkius esamos imuniteto sistemos. Tyrime daroma išvada, kad pastarojo meto tendencijoms būdinga padidėjusi įtampa tarp valstybės atsakomybės ir finansinio suvereniteto, o tai rodo, kad tradicinė imuniteto paradigma nėra ta priemonė, kuri būtų naudojama dabartiniams geopolitiniams iššūkiams spręsti.