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**IFSWF**  
International Forum of Sovereign Wealth Funds

# The State of State Immunity

**Sovereigns Series: Worlds in Motion**



## The state of state immunity

Sovereign actors play an integral role in the global economy. Their ability to raise, access and deploy significant amounts of capital place sovereign actors at the heart of major global paradigm shifts. They are savvy market participants, holding a highly diversified range of assets and investments across the world. Sovereign actors have been key stakeholders in seismic global economic events, ranging from the aftermath of the global financial crisis to international efforts to respond to the global pandemic. Sovereign actors will play a significant part in helping major economies meet ambitious climate change and other sustainability goals in the immediate and medium term.

Have state immunity laws kept pace with this rate of change? State immunity is a doctrine rooted in principles of Public International Law that a sovereign state would have its sovereignty infringed if, without its consent, it became subject to the jurisdiction of the national courts of another sovereign state. Many of the granular rules of state immunity developed over the past century. Are the principles fit for purpose in a world where sovereign actors are an ingrained feature of international commerce (which inevitably gives rise to disputes), or are they an anachronism of a bygone age where there were fewer sovereign actors, who were less active and less prevalent in international business?

## The current state of play

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State immunity jurisprudence in different jurisdictions has tended to evolve against the backdrop of “cat-and-mouse” attempts of private parties to sue their state counterparties and/or enforce against assets owned by their state counterparties in different jurisdictions across the world, with the state seeking to invoke state immunity defenses in different national courts. This has resulted in state immunity laws in many jurisdictions being complex, with different jurisdictions often taking different and nuanced approaches:

- At its broadest, a distinction can be drawn between the “absolute” and “restrictive” approaches to state immunity. Under a fully “absolute” approach, a foreign state enjoys total immunity from being sued or having its assets seized or enforced against by a foreign court, even in commercial matters. Under the “restrictive” approach, a foreign state is only immune in relation to acts of state involving an exercise of sovereign power.
- Generally, there is an accepted distinction between immunity from suit and immunity from enforcement recognized in both common law and civil law jurisdictions. Immunity from suit refers to a sovereign actor’s immunity from having a dispute adjudicated upon by a court or arbitral tribunal. Immunity from enforcement operates to prevent a successful litigant from enforcing a court judgment or arbitral award against assets owned by the sovereign actor. It is also generally the case that immunity from enforcement “goes further than jurisdictional immunity.”<sup>1</sup> Chatham House explains this distinction as being due to “the recognition that the seizure and sale of a state’s assets in order to satisfy a judgment against it constitutes a particularly dramatic interference with its interests and could damage

its ability to function properly.”<sup>2</sup> Therefore in circumstances where there is no immunity from suit, it will not necessarily follow that there is no immunity from enforcement.

- What amounts to a “state” for the purposes of state immunity is a complex issue and in many jurisdictions, is wider than just sovereign states and extends to other instrumentalities of a state. Many jurisdictions, including developed jurisdictions, do not set out a precise definition of a “state.” Since sovereign actors in the modern commercial world could include: state agencies, central banks, public pension funds, national development banks, sovereign wealth funds, state owned entities and supranational organizations — as well as sovereign states — it is crucial for both private companies doing business with sovereign actors as well as sovereign actors themselves to be aware of the extent of state immunity protection.
- Many exceptions to state immunity have developed over the years, such as where the sovereign actor has submitted to the jurisdiction of the relevant courts or to arbitration, provided prior written consent to enforcement or, importantly, where the sovereign actor is engaging in commercial activities rather than sovereign acts of state (although the distinguishing line between them is not always clear, and often provides ample scope for disputes between parties seeking to rely on state immunity and those attempting to bring proceedings against entities that might otherwise benefit from state immunity).

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<sup>1</sup> International Court of Justice in *Jurisdictional Immunities of the State (Germany v. Italy)* — judgment of 3 February 2012 at [113].

<sup>2</sup> *State Immunity: The United Nations Convention and its Effects*, Joanne Foakes and Elizabeth Wilmschurst, Chatham House, May 2005.

Below, we summarize and compare the approaches in different key financial centers.

State immunity - Key principles from key financial centers					
Issue		England & Wales	USA	UAE	Hong Kong
Is state immunity “absolute” or “restrictive”?		Restrictive	Restrictive	Restrictive	Absolute
What is the main source of state immunity law?		State Immunity Act 1978	Foreign Sovereign Immunities Act	UAE Civil Procedures Law (Federal Decree No. 42 of 2022)	The Central People’s Government of the People’s Republic of China <sup>3</sup>
Can state immunity cover immunity from (i) suit; (ii) enforcement; or (iii) both?		Both	Both <sup>4</sup>	Enforcement <sup>5</sup>	Both
Can state immunity extend to state instrumentalities?		Yes	Yes	Yes	Yes
Main exceptions to state immunity:	Submission to court’s jurisdiction	Yes	Yes	N/A	Yes
	Submission to arbitration	Yes	Yes	Yes <sup>6</sup>	No
	Written consent to enforcement	Yes	Yes	No	No
	Commercial activities	Yes	Yes	Yes	No

As the above demonstrates, there are important idiosyncrasies in state immunity law in different jurisdictions. Local law advice on state immunity will remain a key consideration for entities in the sovereign universe (and companies dealing with them) when planning investments and structuring transactions.

<sup>3</sup> As confirmed by an Interpretation by the Standing Committee of the National People’s Congress Regarding the First Paragraph of Article 13 and Article 19 of the Basic Law of the Hong Kong SAR of the PRC, adopted at the 22nd Meeting of the Standing Committee of the 11th National People’s Congress on 26 August 2011.

<sup>4</sup> The Foreign Sovereign Immunities Act is a federal law that provides for original jurisdiction in the federal courts for cases against a foreign sovereign. However, a foreign sovereign can still be subject to the jurisdiction of a state court within the United States if certain exceptions to suit are met.

<sup>5</sup> Article 242 of UAE Civil Procedures Law (Federal Decree No. 42 of 2022) prohibits the attachment of public funds of the State or one of its Emirates, in addition to the funds of the Waqf.

<sup>6</sup> Any agreement to arbitration by a government department is required to be reviewed by the Ministry of Justice, and approved by the Council of Ministers (see Decision of the Council of Ministers No. 406/2003). Further requirements may exist in each Emirate, such as Dubai.

## The future

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It is a commercial reality that many sovereign actors operate within a competitive economic ecosystem. Does the need of sovereign actors to compete with private enterprise signal an increasing marginalization of reliance upon the state immunity doctrine, even in “absolutist” jurisdictions?

There has been a clear movement across the globe towards a more universally accepted restrictive approach to state immunity, with a “commercial activity” exemption existing in one form or another in many jurisdictions, including both civil and common law countries. For instance, three of the four key jurisdictions set out above provide for legal exceptions to state immunity where the activity in question pursued by the sovereign actor is commercial in nature.

In this context, it is important to be aware of the United Nations Convention on the Jurisdictional Immunities of States and their Property 2004 (UNCJI), a treaty aiming to provide uniform rules on state immunity, which took almost 30 years to agree. Whilst the UNCJI is not yet in force as it has only been ratified by 23 of the requisite 30 states, it currently has over 30 signatories including the UK, Switzerland, France, Italy, India, Russia and Spain, and notably the People’s Republic of China, which has historically maintained an absolute approach to state immunity. As the above table shows, the Hong Kong courts have followed the PRC’s absolutist approach.<sup>7</sup> Indeed, the UNCJI represents a significant departure from many of the signatories’ current practices on state immunity and the signing of the UNCJI by the PRC further evidences that a restrictive approach to

state immunity is likely to be the commonly expected international norm for sovereign actors going forward.

The UNCJI includes a “commercial activity” exception, whereby a “State”<sup>8</sup> cannot rely on state immunity if it “engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State.”<sup>9</sup> The UNCJI also includes exceptions to absolute immunity from enforcement where there is an express agreement or where the property is specifically in use or intended for use by the state for purposes other than “government non-commercial purposes and is in the territory of the State of the forum.”<sup>10</sup> This will not include property of the central bank or other monetary authority of the state, embassy bank accounts, military equipment and property forming part of the cultural heritage of the state.<sup>11</sup>

At the same time, we are seeing increasing cases of state entities and state-owned parties being involved in arbitration proceedings. The International Chamber of Commerce reports a 67% increase over the past five years, with 20% of cases involving such entities in 2019.<sup>12</sup> By agreeing to arbitration, the state entities and state-owned parties will usually have waived state immunity, at least in relation to immunity from suit, and most likely also in relation to enforcement, depending on the precise language of the arbitration agreement.<sup>13</sup> Whilst it is impossible to know the reason behind this increase given the confidential nature of commercial arbitration, it is likely that commercial pressure to waive any state immunity

<sup>7</sup> As confirmed in 2011 by the Hong Kong Court of Final Appeal decision in *FG Hemisphere Associates LLC v. DR Congo & Ors* (FACV 5-7/2010).

<sup>8</sup> The references to State in the UNCJI includes the “State and its various organs of government”, “constituent units of a federal State or political subdivisions of the State entitled to perform acts in the exercise of sovereign authority and acting in that capacity”, “agencies or instrumentalities of the State or other entities, to the extent they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State” and “representatives of the State acting in that capacity”.

<sup>9</sup> UNCJI Article 10.

<sup>10</sup> UNCJI Article 19.

<sup>11</sup> UNCJI Article 21.

<sup>12</sup> ICC Dispute Resolution Statistics 2019.

<sup>13</sup> Although this is not necessarily always the case - for instance, in the UAE, immunity from enforcement may still be invoked despite a submission to arbitration or written consent to enforcement.

that might otherwise be invoked coupled with the perceived advantages of arbitration has driven sovereign actors to avoid asserting state immunity when entering into arbitration agreements.

Against this legal backdrop, the circumstances in which sovereign actors assert state immunity may be expected to continue to narrow over the coming years, at a time when the role of sovereign actors in the global economy is expected significantly to expand. The one notable exception is the likely maintenance of immunity from enforcement (except where the sovereign actor has agreed otherwise), in jurisdictions where it is possible, in relation to certain state-owned assets, including assets of central banks. It is therefore essential that sovereign actors,

and indeed those contracting with sovereign actors, familiarize themselves with the specific rules in the jurisdictions in which they are active and consider the best dispute resolution mechanisms in those jurisdictions to maximize the protections that are available and ensure a swift resolution of any disputes that do arise.

***From our 74 offices across 45 countries, Baker McKenzie's state immunity experts are ideally placed to support global businesses and sovereign actors on state immunity issues, whether during the deal structuring stage, in the context of a dispute, or in bringing or defending enforcement proceedings.***

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