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**THE CURRENT CONCEPT OF SOVEREIGNTY
ANALYSED THROUGH THE CHANGE
IN THE JUDICIAL POWER OF STATES**

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THE CURRENT CONCEPT OF SOVEREIGNTY ANALYSED THROUGH THE CHANGE IN THE JUDICIAL POWER OF STATES

"With the ending of the frigid Fifty Years' War between Soviet-style communism and the West's liberal democracy, some observers – Francis Fukuyama, in particular – announced that we had reached the 'end of the history'. Nothing could be further from the truth. In fact, now that the bitter ideological confrontation sparked by this century's collision of 'ism' has ended, larger numbers of people from more points on the globe than ever before has aggressively come forward to participate *in* history".

Kenichi Ohm

"As described over two hundred years ago by Adam Smith, the often-misrepresented hero of contemporary Western self-congratulation, the rich men follows 'the vile maxim of the masters of mankind': 'All for ourselves, and nothing for other people.' They naturally use states power to achieve their ends; in his day, the 'merchants and manufacturers' were the 'principal architects' of policy, which they designed to assure that their interests would be 'most peculiarly attended to, 'however 'grievous' the impact on others, including the general population of their own societies. If we do not adopt Smith's method of 'class analysis', our vision will be blurred and distorted. Any discussion of world affairs that treats nations as actors is at best misleading, at worst pure mystification, unless it recognizes the crucial Smithies footnotes."

Noam Chomsky

I – INTRODUCTION

The world is moving fast. The end of the cold war and the lack of faith toward an equal world transformed by politics, have put on the table the need of a trade market opening among states. The international order, whose rules were developed as a consequence of the two World Wars, has breathed again in the process of uniting nations. But instead of having peace as a major goal, the international organisms seek now the strengthening of economic relations among nations. The World Bank, the International Monetary Fund and the World Trade Organization set the political framework in order to increase economic relations among countries. To be capable of participation in the international economy the state must comply with that political framework and commit giving up part of its sovereignty.

The administrative counsel Kenichi Ohmae, who is a writer of successful books about globalization, formulates the following question: "What kind of boundaries do make sense? In other words, exactly what, at the bottom, are the natural business units – the sufficient, correctly sized and scaled

aggregation of people and activities – to which to tap into that economy?" He answers the question calling the attention for what he denominates the four "Is". The first "I" refers to Investment, which is no longer geographically constrained. Capital, no longer public but private, will go wherever the good opportunities are. The second "I" – industry – is not shaped anymore and conditioned by reasons of state but rather by the desire to serve attractive markets. Tax breaks offered by Governments are now old-fashioned and have become irrelevant as a decision criterion. As a corporation moves, it transfers technology and managerial know-how. The third "I" concerns information technology, which makes it possible for a company to operate in various parts of the world. Capability can reside in the network and made available – virtually - as needed. Finally, the fourth "I" – individual consumers – are now demanding more than ever the cheapest and best products, no matter where they come from. The four "Is", thus, will determine the flow of the economy worldwide without the intervention of the nation states.

Professor Noam Chomsky, drawing the contour of the New World Order, wrote:

"Structures of governance tend to coalesce around domestic power, in the last few centuries, economic power. The process continues. In the *Financial Times*, BBC economics correspondent James Morgan the 'de facto world government' that is taking shape: the IMF, World Bank, G-7, GATT, and other structures designed to serve the interests of TNCs banks, and investment firms in a "new imperial age". At the other end of the bludgeon, the South Commission observes that 'the most powerful countries in the North have become a 'de facto' board of management for the world economy, protecting their interests and imposing their will on the South', where governments 'are then left to face the wrath, even the violence, of their own people, whose standards of living are being depressed for the sake of preserving the present patterns of operation of the world economy' – that is the present structure of wealth and power."

Kenichi Ohmae, as does Noam Chomsky, foresaw the end of the nations as major agents of the international relations. But if the first one seems enthusiastic with the results of the market dynamics, the second one is very much concerned with the consequences of the nation's loss of power. Noam Chomsky is also worried with the decrease of the United Nations' importance in the international scenario. And he quoted partly the speech of the Chairman of the Group of 77, Luis Fernando Jaramillo:

"The strategy of the rich, he observed, is 'clearly directed at strengthening more and more the economic institutions and agencies that operate outside the United Nations system', which, with all its serious flaws, remains 'the only multilateral mechanism in which the developing countries can have some say'. In contrast, the Bretton Woods institutions (World Bank, IMF, etc.) that are being made 'the center of gravity for the principal economic decisions that affect the developing countries', are marked by 'their undemocratic character, their lack of transparency, their dogmatic principles, their lack of pluralism in the debate of ideas and their impotence to influence the policies of the industrialized countries' – whose dominant sectors they serve, in reality. The New World Trade Organization established by the latest GATT Agreement will align itself with the World Bank and IMF in 'a New Institutional Trinity which would have as its specific function

to control and dominate the economic relations that commit the developing world', while the industrialized countries will make 'their own deals... outside normal channels', in G-7 meetings and elsewhere."

The concern of Noam Chomsky about the gradual loss of importance of the United Nations seems very reasonable. And not only because of the fostering of the multilateral economic institutions (in a world that is not fearing war as it used to in the past), but also because of the rise of regional economies, that are not institutionally represented in the United Nations. And he is also right when he observes that developing countries have very little influence on those economic international institutions in comparison with the United Nations.

The concept of sovereignty is understood as the legal competence of a state in terms of its territory and its population. Professor Ian Brownlie distinguishes, in few words, the difference between "sovereignty" and "jurisdiction"; concepts that are very frequently mixed up:

"In brief, 'sovereignty' is legal shorthand for legal personality of a certain kind, that of statehood; 'jurisdiction' refers to particular aspects of the substance, especially rights (or claims), liberties, and powers."

One of the most important aspects of the framework now imposed by the new international order refers to the judicial jurisdiction of states. In the next two chapters this study will focus on the various way in which a state has to submit itself to a judgment not produced by its own national institutions and how the concept of state immunity has changed.

II – SETTLEMENT OF DISPUTES AMONG STATES

1. THE INTERNATIONAL COURT OF JUSTICE (ICJ)

After World War I, as a result of an effort to create an international forum of decisions among states, the Permanent court of International Justice (PCIJ) was established, in The Hague, in 1921. This Court handed down thirty-two judgments in contentious cases and twenty-seven advisory opinions, which assisted in clarifying rules and principles of international law. The Court was dissolved in 1946, at the same time as the League of Nations. Then the International Court of Justice (ICJ) was created in a very similar way, annexed to the United Nations Charter. Seated at the Peace Palace in The Hague, the ICJ is one of the six principal organs of the United Nations, but it has a special position as an independent court and is not integrated into the hierarchical structure of the other organs.

The ICJ has the double function of setting legal disputes submitted to it by states in accordance with international law and giving advisory opinions on legal questions referred to it by international organs and agencies. The court jurisdiction goes beyond of that of United Nations in the sense that not members of the United Nations may appear before the Court and may even become part of its Statute, as in the case of Switzerland and Nauru. The ICJ jurisdiction is, however, dependent on the consent of the states. In 1945, at the San Francisco Conference, many of the smaller states wanted to provide for compulsory jurisdiction in the Charter, but there was opposition from the most powerful countries about the issue.

Article 94 of the United Nations Charter authorizes the Security Council to "make recommendations or decide upon measures to be taken to give effect to the judgment", although these powers have not yet been used to enforce a judgment. In 1986, a request by Nicaragua was sent to the Security Council to enforce the Court's decision in the *Nicaragua* case. The request was vetoed by the United States.

There are criticisms about a supposed lack of respect by states toward the ICJ due especially to cases of non-appearance of defendant states or to decisions often simply ignored. But it's important to take in consideration the increase in the number of cases into the Court's account as well as the fact that they are being brought from all parts of the world, including developing countries which have criticized the ICJ for its Western-orientated composition and bias.

The role of ICJ does not seem very likely to change due to the globalization, considering that only states may be parties and the Court deals with more political than economic issues.

2. THE ARBITRAL SOLUTION OF CONTROVERSY AMONG STATES

Arbitration between states is always a result of an undertaking voluntarily accepted to the exercise of jurisdiction by the arbitrators. As the Permanent Court of Justice indicated, arbitration in international law is concerned primarily with questions of international law and generates awards that are legally binding on the parties. Once a state has committed itself to arbitration, it is under a legal obligation to give effect to the result. Although there isn't an enforcement mechanism, the majority of arbitral awards are adhered to.

An arbitral procedure among states has the same advantages as settlement by the International Court, in that its awards are binding and made on the basis of international law, with an advantage of having the states the power to nominate arbitrators of their own choice. It's important to note, however, that the ICJ may be used in order to review an arbitration award with which one of the disputants states is unhappy. In this case, the role of the Court is to supervise the compliance of the procedure. In such cases ICJ does not comment the merits of the dispute, but just the legality of the arbitral award.

III - CHANGE IN THE CONCEPT OF STATE IMMUNITY.

1. IMMUNITY FROM SUIT

This section will now analyze the concept of state immunity. It deals with the situation where there's a controversy between a sovereign state and a national (company, entity or individual) of another state. The state immunity's concept is based on the principle of non-intervention in the internal affairs of other state. It means that the judicial power of a sovereign state may not judge another sovereign state's act unless under an express license.

The jurist Martin Dixon explains about the difference between "immunity" and "non-justiciability". When an issue is non-justiciable, this means that the national court has no competence to assert jurisdiction at all because of the nature of the issue. The courts of most states consider as non-justiciable any action of a governmental nature taken by a foreign sovereign state in its own

territory. This is sometimes referred to as the doctrine of non-justiciability for Acts of State and it can arise in a dispute together with the immunity issue.

This used to be an unrestricted concept until the change in the states' activities in the course of the nineteenth century. At that time the states began to act as commercial entrepreneurs and the national public sectors started playing a relevant role in the international economy. In response to that, Belgian and Italian courts developed a distinction between acts of government ("jure imperii") and acts of commerce ("jure gestionis"). When the commercial nature of a state's act was characterized, immunity was denied and the court considered itself able to judge the matter involving a sovereign state. This distinction was called "doctrine of restrictive or relative immunity".

Most of the countries have adopted this doctrine, whether by principle or by its courts. The United States has followed this tendency by enacting the Foreign Sovereign Immunity Act (FSIA) of 1976. There are states that still accept the principle of absolute immunity except if there is consent in the contrary. There are at least sixteen states in the list and Brazil is included among them.

But it's important to point out the fact that states that follow the doctrine of restrictive immunity are not very consistent and do not provide a uniform solution about the matter. Some of the important national legislations that deal with it are: the European Convention of 1972, the United Kingdom State Immunity Act (SIA) of 1978, the Australian Foreign States Immunity Act of 1985 and Canadian State Immunity Act of 1982. They all recognize exceptions to the principle of absolute immunity, but offering different criteria.

It's relevant to say, as the jurist Martin Dixon has pointed out, that "absolute immunity was becoming counter-productive as those countries which adhered to it found themselves facing a decline in their share of world trade because of a failure to safeguard the rights of private citizens and corporations. The result of these changes in the organization of international commerce, combined with some concern for the rights of the individual, led to the development of the doctrine of restrictive immunity".

In order to apply the doctrine of restrictive immunity, the judges worldwide analyze the state's act from one or more of the following three perspectives: considering the purpose of the act, the nature of the act and the subject matter.

If a contract for food supply with a state government, for instance, provides a soldier's meal of the state's army, the act is considered as *jure imperii* because of the purpose of the act. Nevertheless, this criterion is not very much in practice anymore. The courts had considered the purpose of an act rather immaterial in order to decide if the act is *jure imperii* or *jure gestionis*.

In considering the nature of the act, the court examines whether the act in question is essentially a commercial transaction. In this perspective, the purpose is not considered at all, but just the appearance of the act. By this kind of analysis, the act of a developing state that boosts its economy through normal commercial contracts, or by issuance of bonds, would not be considered as *jure imperii* although one may consider as a very clear sovereign activity.

The last criterion is the most pragmatic one. By analyzing the subject matter of a case, the judge consults a previous list with the classification of the acts, irrespective of their purpose or the manner

in which they were concluded. The advantage is to decide accordingly without inquiring into the motives of a foreign state or scrutinizing its domestic policies. The advantage is that it could result in arbitrary or discriminatory choices.

The commercial character of loans contracted by foreign states is acknowledged in an increasing number of legal systems. But there are legal systems that still may characterize the public debts of states as a sovereign act or consider some kinds as commercial and others as sovereign debts. For instance, a judgment was held in France which was analyzed bonds issued by the city of Constantinople with guarantee given by Turkey. In that case, the court has decided that it was a partaking of commercial nature and the immunity was denied. In respect of loans contracted by the account of the sovereign state is not certain that the court would decide likewise. What is not the case of Belgium, where the courts consider those kinds of transactions as falling within the category of commercial acts.

But this kind of issue may arise in the context of the FSIA and the European Convention because neither the definition of "commercial activity", by the first one, and the "obligation", by the second one, makes any mention of the financial transaction of foreign states. Although in most cases the decisions in U.S. courts have considered the financial transaction of the sovereign states as commercial acts, there was an action brought against the People's Republic of China, where the court had demonstrated second thoughts on the subject (the case was inconclusive because the action was dismissed) on another ground. It's also important to keep in mind that certain legal systems limit the application of the restrictive doctrine of immunity to loans contracted or repayable in the forum's territory, as opposed to entirely foreign transaction. That's the case in Switzerland, where the borrowings of a sovereign state is considered to be commercial but where the rule should only be applied if the transaction have some connection with Swiss territory, as the place of issue or the place of payment. Otherwise, the Swiss courts will decline jurisdiction.

In the FSIA there's a similar territorial limitation and it's only to be applied to commercial acts carried on or having a substantial contact with the United States.

The SIA is not silent about the issue and includes, in Section 3(3), the definition of "commercial transaction" as "any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation." The definition is broad enough to include all kinds of financial obligations and does not require any territorial link between the transaction involved and the United Kingdom.

2. IMMUNITY FROM EXECUTION

In this section the execution (or enforcement) of a judicial or arbitral decision will be analysed. It may happen that a judicial or arbitral court decides a case against a foreign country but does not enforce the judgment in its territory because it accepts the immunity of the country from attachment of its assets. In fact, the lawyer Georges Delaume says, the diversity of immunity rules and the constant judicial reappraisal about the issue, makes it difficult to anticipate the outcome of suits brought against foreign states in matter of execution against state property.

There is an unsettled character of the immunity rules applicable to the property of foreign sovereigns, but there's one rule of general application, which is: When immunity does not exist,

only the commercial assets of the foreign state can be subject to execution. And in certain cases, the legal system restrict the availability of the property subject to execution by requiring that such property be used for the purpose of the transaction out of which the claim arises, which is the case of FSIA under Section 1610(a)(2). It's now the case in France, also, as a result of a Court of Cassation's decision, related by the lawyer George Delaume:

"In that case, the new government of Iran decided to terminate a joint venture initiated by the former Imperial government with French entities for the development of Iran's atomic industry. To assist in the project, the Imperial government had made loans to the French atomic agency commission (CEA). Repayment of the loans was guaranteed by French government. Upon termination of the joint venture, the French entities in charge of the project sought to attach the monies due from CEA to Iran for the repayment of the loans. Iran argued that the basic transaction was a governmental act and that its property was immune from execution. The claimants demurred that the transaction constituted a purely commercial venture and that the monies intended for the loan service were, therefore, attachable. This contention failed in the lower court, which held that, even if the proceeds of the loan has been intended to finance a commercial operation, the amounts due from CEA to Iran were general assets of Iran and should be considered as governmental assets falling into the Iranian treasury, and as such were immune from execution. On appeal, the Court of Cassation held that the lower court had erred in completely disregarding the claimants' arguments concerning the commercial nature of the venture and the intended use of the loan made to finance it."

This case didn't solve the following question: who should bear the burden of proving the intended use of allocated funds, the lender or the borrower? The lenders lawyers have considered that lenders face a huge difficulty in overcoming the obstacles in preventing the borrower from switching its priorities as to the use of funds.

Related to that issue, the *Alcom* Case have generated a very important decision, as showed by Georges Delaume:

"In that case, the alleged creditor of the Republic of Colombia for goods delivered to, and unpaid by, the Republic had garnished banking accounts maintained in London by the Colombian diplomatic mission. The Colombian ambassador had submitted to the lower judge a certificate that the funds in question were not for commercial purposes but only to meet expenditures incurred in the day-to-day running of the embassy. On the basis of this certificate, the judge had set aside the garnishee orders. On appeal, the garnishee orders were restored on the grounds that the ambassador's certificate was not conclusive and that the accounts being used for daily expenditures could not be considered as "protected property" (such as the mission's building) and thus were attachable. On appeal to the House of Lords, it was held that, even though the type of accounts involved might be used to pay for the supply of goods or services to a diplomatic mission, such accounts were intended to meet many other expenditures falling outside the scope of the concept of 'commercial purposes', and that, therefore, the monies in these accounts could not be submitted to measures of execution. The

House of Lords also held that certificate of the Colombia's ambassador was conclusive evidence of the intended use of the funds in question."

Thus, the decision establishes that funds used for mixed purposes or not allocated exclusively for a commercial purpose are exempt from execution. According to Georges Dalaume's conclusion, what the decision really means is that no execution can be made against the assets of a foreign state without the consent of the state and that it "seems to restore the blanket protection which the 1978 Act was intended to remove".

Insofar as foreign sovereigns are concerned, pre-and postjudgment measures of execution would appear possible in France, Germany, and Switzerland, subject to the following qualifications: (1) in France, that there is a link between the commercial property subject to execution and the loan out of which the claim arises; (2) in Germany, that the commercial nature of the property involved is established beyond doubt; and (3) in Switzerland, that the loan bears a connection to the Swiss territory.

Waivers of immunity vary in scope and complexity depending on the country. In Switzerland, for instance, the necessary waiver's wording is as follows:

"The Borrower waives its immunity for the purpose of enforcing in Switzerland any judgment rendered by a Swiss court."

In countries such as the United States, where the courts' discretion is considerably high, a waiver of immunity needs to have more refinement, such as to provide, expressly, that the loan, guarantee, or other financial transaction involved is a "commercial and not a sovereign act". That definition would make difficult to the contracting state to challenge at the time of suit or execution a characterization to which it agreed in the first place. Another disposition that lenders may think is advisable is to state expressly that

"The borrower waives its immunity from attachment prior to entry of judgment and from attachment in aid of execution against any of its property and assets irrespective of their use or intended use."

The borrower's assets within the lender's country might not fully satisfy the lenders, since they often seek to widen the scope of waivers of immunity to encompass execution not only at home but also in any country in which the borrower's assets may be found. Assuming that the lender has recovered judgment in his own country and seeks to enforce that judgment abroad, the lender may be confronted with such requirements as proving the final character of the judgment in his favor or those arising out of lack of reciprocity or public policy. A typical illustration of this type of situation is found in the 1977 prospectus relating to the Japanese Yen Bonds of the Kingdom of Spain, as related by the lawyer Georges Delaume. The prospectus provides not only that the Kingdom will waive immunity from both suit and execution in Japan, but also that after recovery of a 'final and conclusive' Japanese judgment, the bondholders may seek recognition and enforcement of the judgment in Spain, in which case the bondholders may obtain satisfaction if certain conditions are met.

The United States and sixty-seven other countries are parties to the 1958 New York Convention on Recognition and Enforcement of Foreign Awards which facilitates the recognition of the U.S. awards in countries that have signed the Conventions.

Another thing that has become very relevant is the International Center for the Settlement of Investment Disputes (ICSID), which provides arbitrations under its rules. The Convention that has created the ICSID is considered a speedy and effective means of enforcing ICSID awards. The Convention establishes that the proceeding of recognizing an international award by the courts of the country where the award should be enforced is no longer necessary. Nevertheless, this procedure subsists under some domestic laws and under the New York Convention of 1958.

Another important ICSID disposition is that no exception is accepted to the binding character of the center awards to their recognition in contracting states (not even on the ground of public policy). However, the Convention expressly provides that it does not purport to alter or derogate from the rules of immunity that may prevail in each contracting state.

2.1. PUBLIC ENTITIES AND THE CENTRAL BANK

It's important to know that both the SIA and the European Convention have ruled that no entity that is distinct from a sovereign state can claim immunity from either suit or execution. The FSIA starts from the opposite premise and makes the rules applicable to foreign states applicable also to its political subdivision and to agencies and instrumentalities of the state and of any such subdivision. In practice, however, the rules should not lead to a substantially different results considering that the immunity rule set forth in the FSIA is indeed qualified by the consideration that it ceases to apply to the commercial activity of foreign states. Therefore, to the extent that the borrowings of foreign public entities are characterized as commercial transaction, none of these entities would be entitled to plead immunity.

So long as the borrower is an entity distinguishable from the foreign sovereign, as autonomous entities they may enjoy no immunity from execution. The exception of the rule is that when a public entity would manage, on behalf of its own state, assets that are intended for use in connection with governmental activities. In this case, entity has the burden of proving the governmental nature of its acts and the courts are often not prepared to hold as necessarily conclusive self-serving statements made by the entity involved or by its own government.

Continental countries make no distinction between central banks and other public entities. The rule of nonimmunity applies equally to all entities, including the Central Bank. For instance, a judgment obtained against a foreign state enterprise arising out of commercial activities should be enforceable in France but it has to be demonstrated that execution is not sought against property or assets used in connection with "governmental activity", as distinguished from a "private activity". Activities of state-owned enterprises are likely to be characterized as "private activities" and, as explains the lawyer Lawrence W. Newman , sovereignty immunity has been denied in numerous court decisions where the property has not proved to be linked to a state activity.

According to the FSIA, Section 1611 (b)(1), the property of a central bank (or monetary authority) held "for its own account" is immune from attachment and from execution unless such immunity has been waived. The meaning of "its own account" it's not entirely clear. According to legislative

history, this provision would cover "funds used or held in connection with central banking activities, as distinguished from funds used solely to finance commercial transactions of other entities or of foreign States. The authors of the FSIA seem to have disregarded the fact that central banks hold for their "own" account funds intended for their "own" financial or commercial activities (such as funds used for the servicing of their own borrowings in the capital market). In fact, the exception seems to be related to the "nature" of the act performed, such as in other cases, according to the basic philosophy of the FSIA.

The SIA, Section 14(4) provides in substance that the property of a state's central bank (or other monetary institution) should not be regarded "as used or intended use for commercial purposes". This provision appears to protect, in all cases, the assets of central banks from execution.

Relative to the contractual provision of waiver from "attachment prior to entry in judgment and from attachment in aid of execution against any of the debtor's property and assets irrespective of their use or intended use", George Delaume considers this provision more as an interesting matter for speculation than effective in all cases (specially referring to the case of the central banks). The Section 1611 (b)(1) of the FSIA provides that the property of central bank is immune from attachment and execution except to the extent that the bank and its "parent foreign government" has explicitly waived its immunity from attachment in aid of execution, or from execution." Nothing is said in this provision about waiver of immunity from attachment prior to entry of judgment, and the view has been advanced that no such waiver would be possible. Nevertheless, Georges Delaume thinks that a foreign state is perfectly free to subscribe to insofar as its own property is concerned, and that the disposition should be valid in all cases. He gives an example of a decision that dealt with the issue although had not decided it:

"In *Banque Campafina v. Banco de Guatemala*, a Swiss banking corporation, which held notes issued by instrumentalities of Guatemala and guaranteed by Banco (the central bank of that country), sought to attach Banco's property in a number of New York banking institutions. Banco pleaded immunity, arguing that under Section 1611(b)(1), it could not waive immunity from preattachment. The corporation took the other view and argued that Banco had explicitly waived its immunity. The court held that it need not decide the 'difficult' question of the proper construction of Section 1611(b)(1), because the waiver of immunity in the notes guaranteed by Banco related only to immunity from jurisdiction and did not cover matters of execution. In view of the language of the waiver, this construction presumably was unavoidable."

3. IMMUNITY FROM PREJUDGMENT ATTACHMENTS

An attachment is the legal process of seizing another's property in accordance with a writ or judicial order for the purpose of securing satisfaction of a judgment yet to be rendered . It's thus a very comfortable position to hold security in advance for a judgment that the creditor expects to obtain later.

The lawyer Whitney Debevoise, writing about the issue, explains that until the Foreign Sovereign Immunities Act of 1976 (FSIA), to bring a foreign sovereign into court, plaintiffs resorted to *in rem* litigation, attaching some property of the foreign sovereign that happened to be located within the

jurisdiction. Alternatively, they served a diplomatic mission in violation of U.S. obligations under Article 22 of the Vienna Convention on Diplomatic Relations. These approaches proved annoying to foreign governments and caused diplomatic embarrassment to the United States. One of the principal goals of the FSIA was to replace the *in rem* attachment procedure with a statutory procedure for making service upon and obtaining *in personam* jurisdiction over, a foreign state. The FSIA requires that prejudgment attachment of a foreign state's assets may be obtained only if there has been an "explicit waiver" of its immunity from prejudgment attachment.

In respect to arbitral procedures, there's a tendency in the United States courts to view the application for attachment as inseparable from a lawsuit on the merits in international arbitrations. Those U.S. courts' construction is due to the implementation of the New York Convention for the Recognition and Enforcement of Foreign Arbitral Award (The New York Convention of 1958). As we can see, the attachment of a sovereign nation asset was possible in U.S. courts before the FSIA.

To obtain prejudgment attachment abroad in support of proceedings in another country is a very difficult job for lawyers, since it's frequently difficult to obtain the decision in the absence of any other contacts with the jurisdiction. But there are countries in which attachment proceedings are considered to be separate from the proceedings on the merits and where it thus is not necessary for those proceedings to be held in the same country where attachments are obtained. And there are other countries in which jurisdiction of the local courts over disputes between aliens may be based solely on the presence of assets, as in the cases of the Federal Republic of Germany, France and Switzerland.

IV - WHAT HAS CHANGED IN THE STATE'S JUDICIAL POWER?

As we can see, the change in the doctrine of the state's immunity started to occur at the end of the last century and no major change has happened within the International Court of Justice. What has changed, then, or is about to change, as a result of the globalization phenomenon's process? Firstly, although a protection towards the states immunity in the legal doctrine and in the judicial system of all of the countries seems to subsist, the reality is far different from that. Lenders are becoming more and more exigent in negotiating waivers' contract clauses and a very little room is left for countries to claim immunity.

Secondly, we have to keep in mind that free trade agreements establish new concept of borders. As the judicial jurisdiction power comes directly from a given territory and population, the new territories will naturally have its correspondent change in judicial jurisdiction. The national state is being more and more obliged to give up part of its judicial power to the economic regions created by the trade market's urge. It happened in Europe and it's about to happen worldwide in different degrees. Those regional courts will be much more likely the international forums for deciding disputes among states of its region than will be the International Court of Justice.

Thirdly, a big change has occurred in the spectrum of the international litigations involving countries and private parties in economic and financial matters. There's a big tendency of avoiding the countries jurisdiction for the option of international arbitration. The International Center for the Settlement of Investment Dispute (ICSID), created in 1965 under the auspices of the World Bank, is an institutional response to this tendency. The Center has the purpose of promoting foreign investment, especially in developing countries, by offering a neutral method for settling disputes

between states and private foreign investors, and it's based upon a multilateral treaty ratified by more than 100 states. Many bilateral investment treaties have provisions indicating the ICSID in case of a dispute, especially those of Promotion and Protection of Investments (PPIs). Those bilateral agreements enlarge a great deal the situations where a state may have to submit to international arbitration, since they establish the arbitration as an option for all the private national investors of the other country.

V - ADVANTAGES AND DISADVANTAGES OF THE DIMINISHING JUDICIAL POWER OF A DEVELOPING STATE

1. ADVANTAGES

The purpose of the countries for developing the restrictive immunity doctrine was very much to seek a way of protecting investments of its nationals distributed abroad. For countries that aren't huge investment exporters the purpose in adopting the doctrine is to comply with an international tendency in order to preserve its competitiveness facing the trade market and the international loans. Accepting by contract to be judged by the jurisdiction of the lenders' country, or by any other jurisdiction other than their own, those countries give more confidence to their lenders of a easier and less expensive decision in case of controversy among the parties.

Concerning the concession of the arbitral option in cases where the country jurisdiction should be applied (as the cases of PPIs Agreements), this is a way of avoiding the investor's fear of a slow judicial system, also resulting in increased competitiveness in comparison with other countries that also want to attract foreign capital.

The voluntary diminishing of the state judicial power, caused by free trade agreements, will come wrapped in an assemble of other regional institutions that will have the merit of approaching countries and its people. As a consequence of more economic integration, more peaceful and harmonious relations among people is very likely.

2. DISADVANTAGES

For those developing countries that have accepted the restrictive doctrine, and have consequently waived their immunity, there's the disadvantage of weakening their position in foreign courts. The developing countries are those that are very likely to have problems with external payments' administration, and the risk of having their embassy's assets or external banking accounts attached is fearful enough.

In the case of those countries that do not waive their immunity, the issue will be investigated by the court through the nature, purpose, or the act itself. The advent of the restrictive state immunity is clearly disadvantageous for developing countries in their litigation against creditors in foreign forums. Although it seems reasonable that the creditor must have a judicial way in order to be paid, it does not seem reasonable that a public asset, with a public purpose, might be attached for the payment of a commercial collection. The arbitral procedure is being largely accepted by developing countries for assuring a quick solution of a controversial issue. But the problem still remains concerning the lenders' aim for attachment of the countries' assets. Instead of enforcing the award in the countries' jurisdiction, lenders very often seek protection in attachment prior to entry of

judgment and in attachment in aid of execution, what sometimes bring major problems to those countries.

The disadvantages of the arbitral procedure in cases where the state's jurisdiction should be applied are basically two: the state is renouncing one of its major functions in respect of some specific litigation and this renunciation implies an economic cost that would not exist otherwise. The international arbitral procedure is always a costly one compared to state's judicial system.

VI – CONCLUSION

The change in the judicial power of states is a consequence of the national borders weakening. States with a strong notion of sovereignty seem more and more unappealable for international investors. Countries that export investment capital have already made a strong move in order to renounce their domestic power and to foster the international organisms' power. They know that the world is now the scenarium for the exercise of power and international organisms and institutions are the necessary instruments.

The world is moving fast. The changes are being dictated either by major economic countries or transnational corporations. Whether these changes decrease the disadvantages of the southern part of the globe and help to diminish poverty in the world is something that only time will reveal. For developing countries it seems that no alternative has been left except to comply with those changes.

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