

State Immunity in International Investment Disputes: Role of State Immunity in Resolving Investment Disputes and Adjudication Implications

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Abstract

The surge in international investment activities has led to a corresponding increase in international investment disputes, presenting significant challenges for states. State immunity serves as a fundamental concept designed to shield sovereign states from being subjected to lawsuits or foreign court jurisdiction. By affording this protection, state immunity permits states and their representatives to carry out crucial public functions without undue interference. Against this backdrop, this review article undertakes a comprehensive analysis of the role of state immunity in resolving international investment disputes and explores its implications for adjudication processes. The study critically examines the intricate interplay between state immunity and international investment disputes, elucidating how this legal principle influences the resolution of such conflicts. It explores the mechanisms through which state immunity operates, highlighting its impact on the ability of investors to pursue legal actions against states in international tribunals or national courts. By delving into relevant case law, international treaties, and legal principles, this review article evaluates the extent to which state immunity can limit or undermine the rights of foreign investors and the implications this has for the effectiveness and fairness of adjudication in investment disputes. Furthermore, the study assesses the evolving international legal framework surrounding state immunity and its implications for the resolution of investment disputes. It analyzes recent developments, including shifts in state practices, treaty provisions, and judicial decisions, to shed light on emerging trends and challenges in this area. By providing a comprehensive examination of state immunity in the context of international investment disputes, this review article contributes to a deeper understanding of the complex dynamics between states and foreign investors and offers insights into the evolving landscape of investment arbitration.

Keywords: state immunity, investment disputes, adjudication, international regime

1. Introduction

State immunity, a fundamental legal concept, plays a pivotal role in safeguarding sovereign states from being subject to lawsuits or held liable in foreign courts, particularly in the context of international investment disputes. The issue of state immunity holds significant implications for the resolution of disputes and the adjudication of claims. By affording protection to states and their representatives, state immunity allows them to carry out vital public functions without undue interference (Crawford and Brownlie, 2019).

State immunity holds paramount importance in the realm of international law and relations. It is widely recognized

in both common and civil law jurisdictions as an established rule of international law (Fox and Webb, 2013). Nevertheless, there exists no universal international regime governing state immunity, leading to variations in its application across states and even within individual states. Consequently, the interpretation and application of state immunity laws can differ significantly, thereby impacting the outcome of international investment disputes.

This review article aims to delve into the intricate dynamics surrounding state immunity in the resolution of international investment disputes and its far-reaching implications for the adjudication process. By examining relevant case law, international treaties, and legal principles, this study seeks to shed light on the role played by state immunity in shaping the rights and remedies available to foreign investors.

Furthermore, the article recognizes the inherent complexities associated with the application of state immunity, considering the absence of a uniform international framework. It will analyze the diverse approaches taken by states and highlight the resulting challenges and potential inconsistencies that arise in practice. By exploring the role of state immunity in resolving international investment disputes, this review article aims to contribute to a deeper understanding of the multifaceted dynamics between states and foreign investors, while also shedding light on the evolving landscape of investment arbitration.

2. Role of State Immunity in Resolving International Investment Disputes

State immunity is the basis of sovereign justice of states, that prevents one state from applying control over another (Gaeta et al., 2020). However, in reality, state immunity application necessitates stability between the host state and the foreign state sovereignties conflicts (Douglas, 2011).

The case of *Al-Adsani vs United Kingdom*¹ in 1990 is a relevant case to illustrate the implementation of state immunity outside investment arbitration. In this case, Al-Adsani was abducted by the British forces in Kuwait during the Gulf War. The person filed the case against the British forces for the violation of the European Convention on Human Rights (ECHR) in the court of the United Kingdom. The court decided the matter based upon the legal provision of state immunity and purported that for the crime committed in another state, the British forces could not be tried in the court. In the case of *Jones vs. Saudi Arabia*², against the alleged torture of four people in Saudi Arabia, the Court of Appeal gave its verdict following state immunity. Later the House of Lords retained the verdict of the Court of Appeal and upheld the state immunity in the matters of civil proceedings. These two goals' precedents arouse a backlash from the numerous international human rights organization that demanded to review of these laws that determined impunity not immunity of the states against using their sovereign status against anyone. Such narratives gave birth to the idea of restrictive immunity. Resultantly, two models of state immunity have emerged: 1) the absolute model, and 2) the more commonly practiced restrictive model. The former is about exercising extraterritorial jurisdiction over foreign states without their consent. While the latter provides immunity from the jurisdiction of local courts to foreign states in matters about private or commercial activities, as well as sovereign acts (Van Alebeek, 2008). On the ground of justice and accountability, the restrictive model has been justified, especially when there are transactions by the states like those private people. Therefore, the comprehensive theoretical foundation lacks an explanation, causing problems in deciding the beneficiaries of state immunity. An important query is in case immunity extends to its sovereign activities in general or concerns the "person" of the state. Advocates argue with state immunity on the matter of subject that the exercise of jurisdiction over outsider activities is the key factor, instead of defenders of status (Hafner, 2006). Therefore, adopting an extreme stance on the restrictive model could result in conflicting outcomes, the defendant's status is regardless of the potential beneficiary's number expanding, thereby diminishing the scope of immunity concerning private acts under the law.

The restrictive model is agreed upon by most authorities, the defendant's status remains while comprising components of the subject immunity matter. To find out the framework under international law of customary for state immunity aligns, examine *opinion juris*, especially addressing immunity questions focusing on national court judgments and state practice (Patel, 2000). In several instances, the lack of a uniform application of laws concerning state immunity has been observed which pinpoints the absence of a single and unanimously-adopted regime to enforce state immunity (Winch, 2021).

To begin the investigation, the Convention of the UN for Jurisdictional Immunities of their Property or States is referred to. The Article 6(1) status-based approach was supported by UNCIS, where practicing jurisdiction is prohibited by the state "in a proceeding before its courts against another State." For further clarification, the central organ includes "state", or some area, agencies, instrumentalities, representatives, and state immunity depending on

¹ *Case of Al-Adsani v the United Kingdom*, 34 E.H.R.R. 273 (2001).

² *Jones v. Saudi Arabia*, 2006 U.K.H.L.L. 26, 2007 A.C.1 270 (2006).

the defendant's sovereign status reinforcing the notion presents by Article 2(1)(b). But, particularly subsection Article 6(2)(b), presents an important exception by separating from immunity the defendant's status and emphasizing the subject matter:

“A proceeding before a court of a State shall be considered to have been instituted against another State if that other State ... is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State”

Overall, why state immunity should register cases without naming opponents is unclear. Criticism has been drawn by the provision of vagueness. The limited recognition of other common law and English law concept jurisdictions in civil law systems or virtually. The indirect impleading may be more than a customary international law rule to specific common law peculiarities. Furthermore, the common law concept of indirect impleading with the narrow situations associated with the broad text of Article 6(2)(b) is debatable that accurately reflected.

To cover the specific cases including the attachment of properties or the seizure of belongings to a foreign state was first considered by article 6(2)(b) under the control or possession indicated for travaux préparatoires and commentary by the International Law Commissions (ILC). There is a classic example that aligns, avoiding impleading: A state's actions against a ship held or used in rem. The House of Peers (lords) presents this concept to resolve a pattern that acts against where actions were distinct in personam against property proprietors. It was assumed that ‘the owner [was] accidentally answered the impleaded, in proceedings against state-owned ships, the state/owner was not considered a party, the judgment of the court is influenced. This is a unique approach to common law. The state/owner is the defendant that's why state immunity arises against its property, in the structure of civil law systems, where rem does not exist in actions. In English law, actions for impleading in rem were incidentally employed and accompanied by certain procedural requirements. In such proceedings, the ship owners were deemed necessary parties. The rationale behind this approach was to prevent the inclusion of obsolete and ultimately irrelevant parties, as dictated by the principle of the hour of peers (lords).

According to O'Keefe (2013), Article 6(2)(b) is another falling case by UNCSI that parties disputing interest and rights attracts in effect, in the same effects or a third-party state asserts an interest. But State immunity applies to all proceedings it is not known. This proposition comes from a problem of common case support for whose reasoning has been criticized. State-owned or controlled effects may be considered equal while proceeding involved among them by the state, where local courts exerted their cases to claim a property despite third-party state jurisdiction between disputes of private parties (Aziz, 2020)

There is practically no implementation carrying the extension in any event for avoiding impleading the situations for third-party states that are outside. In proceeding only a few unusual suggestions were discovered concerning their official acts against former state representatives. The foreign states impleaded indirectly against their administration in proceedings and they expected to attain any award for damages. But the so-called "functional" immunity of the state is an abnormal view, to identify its officials under international law the lack of state duty is given (Douglas, 2011). The state is the basis for this type of impunity due to international law official acts of state representatives are imputable. The state as a mechanism for diverting responsibilities in this sense operates by functional immunity, in a proceeding that is the actual defendant (Douglas, 2011).

The interests of third-party states that recommend local court procedures or immunity should be granted due to proceedings involving the activities. In these terms, Article 6(2)(b) UNCSI is overinclusive if UNCSI penetrates power that would exacerbate confusion and does not reflect customary international law. The fundamental logic governing state immunity that is ignored is the main issue. States prevent courts from exercising jurisdiction because of independence and equality the foreign states in a manner that exercises their authority require or compels compensation for damages caused by sovereign powers (Van Alebeek, 2008). However, practicing jurisdiction in cases precluding local courts involving sovereign activities courts would limit the forum sovereign state. Generally, the local court's judicial function must make judicial determinations for individuals within their jurisdiction or entities on the sovereign acts of foreign states to fulfill.

The Jurisdiction over non-state defendants' local courts is exercised frequently when determining the third-party state responsibility. Such as, The Hague district court accepted jurisdiction for a businessman that is guilty of genocide and war crimes by supplying solutions to Iraq, the responsibility of principal Iraqi state officials is first to establish it. In *Peat Marwick vs Davison* (1997)³, the inquiry needs documents related to transactions between Cook Islands Government and New Zealand. The Cook Island involvement was dismissed as an immunity objection by the Court of Appeal of New Zealand, as they were not the subject to potential judgment execution or

³ *Imprimis Investors, LLC v. KPMG PEAT MARWICK LLP*, 868 N.E.2d 143, 69 Mass. App. Ct. 218 (App. Ct. 2007).

not the focus of the inquiry. In *British Columbia v Mexican States*, an agriculture employer was accused by a Canadian union with Mexico of conspiring to stop the representation vote improperly. Mexico's immunity plea was rejected by the British Columbia Supreme Court, and the legal consequences of 'Improper Interference' establishing, union and employees, 'exposed to no legal consequence' leaving Mexico. In the US court to jurisdiction the NSO an Israeli tech company objected; they express that the spyware software utilized by the overseas for enforcement of law activities that covered by immunity. The appeal was rejected by the Court of California while stating that overseas clients are not forced to pay if prevailed by WhatsApp (Buchan and Franchini, 2020).

The UK Supreme Court's ruling in the *Belhaj and Straw*⁴ aligns with the reasoning that dismisses the UK government to investigate complicity in unlawful detention and mistreatment by foreign officials, as foreign states would involve impleading. Both Lord Sumption and Lord Mance admitted the relief sought would not affect their legal rights, the foreign states were not parties to the case or restrict their ability for exercising their rights. Furthermore, there was no risk to the property in question.

In cases involving collaboration between a foreign entity/state or an individual in the jurisdiction, a compelling policy argument exists when relief is sought exclusively from the latter for exercising jurisdiction. Granting immunity does not absolve the entitled party of their responsibility; in fact, it often becomes the sole means of ensuring accountability. However, if such immunity were to be granted, as was the case with the British government defendant in *Belhaj*, it would effectively impede any legal action against them worldwide, thereby eliminating their accountability in other state courts where state immunity is enjoyed.⁵ Dautaj (2022) intended to address the issue of public international law which is observed as interacting or intersecting the internationally accepted arbitration law. In the case of the Federal Court of Australia which adjudicated a case that aroused the debate of the ICSID Convention related to the immunity of states. Citing the case law between *Eiser Infrastructure vs the Kingdom of Spain*⁶ that invoked the question highlighting the possibility of bias. Moreover, in the light of the court's proceedings, the issue of constituting an improper tribunal came into the legal ambit that the questionability or doubt over the formation of an arbitration tribunal could lead to the annulment of the ICSID award and resultant proceedings. After it, the integrity of the tribunal led to imply the disclosure of information to the parties concerned whether by formulating an effective information system for averting the rise of conflicts of interest that could damage the entire arbitral process. Such conventions are progressive concerning the questionability and integrity of the arbitration tribunals universally as sophistication and specification in the arbitration law and related procedure will pave the way for strengthening arbitration within and outside territories.

As per the statistics of the Investment Dispute Settlement Navigator under the aegis of the United Nations Conference on Trade and Development (UNCTAD), 327 cases related to the investment arbitration proceedings, 327 cases have been decided in favor of states in comparison with 297 cases in favor of investors (Investment Policy Hub, 2023). State immunity averts the likelihood of extraterritorial jurisdiction (Yang, 2012). In the Sharon case, when Belgium filed a case against then Prime Minister of Israel, Ariel Sharon, and start officials in 1999. The case was filed against the human rights violation and war crimes committed by them on Lebanese and Palestinians under the Belgian Laws i.e., Universal Jurisdiction Laws or 'Anti-Atrocity Laws about the Punishment of Grave Breaches of International Humanitarian Law. This law further went through the amendments as adopted as the Punishment of Grave Breaches of the Geneva Conventions in 1949. More specifically, Article 7 of this law reinstated that Belgian courts could exercise their jurisdiction regardless of territory. Also, in the same law, Article 5(3) underscored that immunity to any official or state would be withheld to enforce this law. It is notable in this case that the Court of Appeal of Brussels first declared its decision in light of state immunity and stated the case as outside the jurisdiction of the court. This is how they decided the matter as per the laws and conventions of state immunity. However, this judgment was reversed after the decision of the Court of Cassation which drew lines and exemptions regarding the application of the laws of the state immunity. It validated that extraterritorial jurisdiction could be exercised upon the matters of the members and signatories of the member countries of the laws and related conventions about human rights or commercial activities. The Court of Cassation granted immunity to Sharon under state immunity. More importantly, the ICJ intervened and made it explicit that neither a sitting government nor a past government could be tried by a foreign state against war crimes.

Overall, state immunity requires the idea of exercising jurisdiction abstention because the interest and activities of third-party state's claims may affect is wrong and the matter of customary international law or may lead to a lack

⁴ *Belhaj v. Straw*, 2017 U.K.S.C. 3 (2017).

⁵ *ibid*.

⁶ *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r. l v Spain*, ICSID Case No ARB/13/36.

of accountability for entities not entitled to immunity. These results are more supported by case activities with a relation of third-party states: the acts of a state that is not a party to the proceedings in which the two private parties' legal relationship is resolved, which are analyzed in the following section.

2.1 The Unsuitable Doctrine of the Monetary Gold Case to Local Courts

The fundamental to international adjudication is the principle of consent. The Monetary Gold case consequences, they would not adjudicate the dispute because a state is not a party to the proceedings of the dispute 'very subject matter' stated by the international court of Justice (ICJ). Additionally, the international court of Justice clarified that "doctrine could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case" (Lissitzyn, 1954).

The gold monetary case doctrine has suggested that state immunity involves the rights and interests of application in cases of an arbitrator. In *Belhaj*, before the High Court of South Africa, this argument was presented. Also in the *Cherry Blossom* case, the Polisario Front and the Saharawi Arab Democratic Republic⁷ try to link cargos phosphorus exports from the western Sahara part that is Moroccan controlled, the natural resource that the people of Western Sahara owned claiming that sovereignty. The ship owner and the private company raised objections to the jurisdiction of the South African courts, where the cargo had been sold. They argued that Morocco's interests and rights were indirectly implicated in the matter, employing an analogous approach and relying on the aforementioned issues before the International Court of Justice.⁸

These cases demonstrate the ongoing discourse surrounding the state immunity application when interest and rights are involved by the third party. The argument to apply the Monetary Gold doctrine in such instances seeks to ensure that international adjudication respects the principles of consent and avoids implicating the conduct of states not party to the proceedings. This perspective contributes to the evolving understanding of the role of state immunity and its interplay with the interests of third-party states in international disputes.

2.2 The State Ideology Is the Eminent Act for State Immunity

Several jurisdictions in provincial courts have established different techniques to avoid examining the legality of foreign states' actions abstain. Usually, these are in two classes: 1) The act of state doctrine or known as the 'political question' doctrine encompassed in sometimes non-justiciability principle that is recognized by both common and civil law where certain questions that are politically sensitive for judicial resolution are considered inappropriate 2) The sovereign acts within their territory under the '(foreign) act of state doctrine common law courts mostly avoid examining the validity.⁹

The law of state immunity claims some connection with the act of state and non-justiciability doctrines. Traditionally, all concepts arise from similar deliberation. International law has state immunity condensed into a standard rule premised on the bases of the situation of the defendant and the doctrine of sovereign parity of the states. On the opposite, the non-justiciability and the act of state are substantive that is established on foreign and domestic policy matters, like the powers break, comity, and the propriety of judicial intervention in foreign policy matters or expediency (Barker, 2013). The same reflections of judicial abstention may equally explain politically prudent decisions for the government.

These diverse avoidance techniques reflect the complex interplay between state immunity, the act of state doctrine, and the principle of non-justiciability. While all these concepts emerged from a shared concern for safeguarding the sovereign, they have undergone distinct developments, each guided by unique legal and policy considerations. Recognizing the nuances and divergent paths of these doctrines contributes to a comprehensive understanding of the legal framework surrounding the adjudication of disputes involving foreign states.

2.3 Distinction between State Immunity from Jurisdiction and Execution

Since the immunity possessed by a state is its ability to reprieve or protect itself and its assets from the jurisdiction and execution of another state's courts. The principle of sovereign equality has given birth to this concept which prohibits a state from flexing muscles against the other amid disagreeableness. It is imperative to deliberate upon the two aspects of state immunity aiming to draw a distinction and having a clear understanding of these two parallel concepts; immunity from jurisdiction and immunity from execution. State immunity from jurisdiction is the immunity from suit or immunity from legal process under which protection is granted to a state from being

⁷ *The Saharawi Arab Democratic Republic & The Polisario Front v. The Owner and Charterers of the MV 'NM Cherry Blossom' & others*, 2017 Z.A.E.C.P.E.H.C. 31 (2017).

⁸ *Johnson v. Cherry Blossom Sushi Boat*, No. 5: 16-cv-02808-HRL (N.D. Cal. May 18, 2017).

⁹ *Buttes Gas and Oil Co v. Hammer (No. 2)*, 1975 All E.R.2 51 (1975).

sued or subjected to the jurisdiction of another state's courts. It means that a foreign state cannot be brought before the courts of another state without its consent. This immunity applies to various types of legal proceedings, including civil, criminal, and administrative cases. The purpose of immunity from jurisdiction is to safeguard the sovereignty and dignity of states by preventing them from being hauled into the courts of other states against their will. It allows states to perform their functions without interference from foreign jurisdictions and promotes peaceful international relations. Historically, this concept was an inextricable part of international law since that came into question in the 1920s amid the influx of cross-border transnational trade where these economic activities were barred from the earlier given immunity. Since the concept of state accountability got recognition for ensuring human rights and preventing international crimes. It resulted in the indoctrination of restrictive immunity which made it permissible for the national courts to exercise their jurisdiction beyond respective territorial boundaries. One example when these two contrastive legal concepts of absolute immunity and restrictive immunity from jurisdiction were exercised is *Jones v. Saudi Arabia*.¹⁰ In this case, there was a counterfactual use of the conventions of the United Nations Convention on Immunity. The complainant, Jones sued against torture in Saudi Arabia. The court decided the matter based on state immunity from jurisdiction as the state could not exercise its judicial powers over another until certain instances. However, the Court of Appeal dismissed this decision and stated that it is an international convention that on the matter of violation of human rights, the courts can exercise their jurisdiction over other states. Another recent example of restrictive immunity from jurisdiction can be illustrated by the South Korean and Brazilian courts which have ruled that in the light of jus cogens, no absolute immunity is reserved by any court over the violation of human rights and internationally-recognized crimes.¹¹ Therefore, it can be construed that state immunity is not absolute and can be restricted or waived in certain circumstances, such as when a state engages in commercial activities or when it consents to the jurisdiction of another state (Weidemaier & Gulati, 2018). In addition, the conception of State immunity from execution which is interchangeably known as immunity from the enforcement or execution immunity refers to the protection granted to a state's assets or property from being seized or enforced upon by the courts of another state. It means that the property of a foreign state located within another state's jurisdiction is generally immune from execution or attachment to satisfy a judgment or enforce a legal claim. Similar to state immunity from jurisdiction, the purpose of immunity from execution is to protect the assets and property of states, including diplomatic and military assets, from being seized by foreign jurisdictions. Similarly, immunity is not absolute either and can be subject to certain exceptions or limitations. For example, a state's property may not be immune from execution if it is used for commercial purposes or if the state has expressly waived its immunity. As per the study of Gerlich (2015), immunity from execution is the biggest predicament in the way of the successful adoption of arbitration to carry out investment awards and bars the parties to maintain independence and impartiality from the legal provisions. In the light of the Permanent Court of International Justice (PCIJ), immunity from execution is for safeguarding its subjects from foreign intervention by the other state in the guise of laws.¹² However, substantial is the recent case laws where an opposite concept emerged as a major legal realization to end up the absolute or exploitive immunity from execution for states. For instance, the *Republic of Austria v. Altmann*¹³ which is involved in the claim by Maria Altmann, an Austrian-American citizen, to recover artwork that was confiscated by the Nazis during World War II. The case addressed the issue of whether Austria was immune from jurisdiction in the United States under the Foreign Sovereign Immunities Act (FSIA). The U.S. Supreme Court ruled that Austria was not immune and that Altmann could pursue her claims in U.S. courts. In the case of *NML Capital Ltd. v. Republic of Argentina*¹⁴ similar are the legal precedents to raise doubts about absolute immunity from execution. This case was raised from Argentina's default on its sovereign debt. NML Capital, a hedge fund, sought to enforce its bond holdings by seizing Argentine assets. The case raised issues of state immunity from execution and the interpretation of the FSIA. The U.S. Supreme Court ruled that Argentina's assets were not immune from attachment and execution, allowing NML Capital to pursue its claims. In addition, in the case of *Belgium v. Senegal*¹⁵ the prosecution of Hissène Habré, the former President of Chad was involved in crimes against humanity. Belgium sought the extradition of Habré from Senegal. The International Court of Justice (ICJ) ruled that Senegal, as a state party to the Convention against Torture, was obligated to either prosecute or extradite Habré and that the immunity of a former head of state does not exempt them from prosecution for international crimes. Also, the Italian courts

¹⁰ *Jones v. Saudi Arabia*, 2006 U.K.H.L. 26, 2007 A.C.1 270 (2006).

¹¹ South Korea, Seoul Central District Court, Joint Case No. 2016/505092

¹² *Mavrommatis Palestine Concessions (Greece v. UK)*, 1924 PCIJ (ser. B) No. 3, 30 August 1924, p. 12

¹³ *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir. 2002).

¹⁴ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012).

¹⁵ *Belgium v. Senegal*, 2012 I.C.J. Rep 422 (2012).

allowed the seizure of property owned by Germany in Italy to satisfy a compensation claim by victims of Nazi war crimes. The case involved the interpretation of state immunity and the relationship between international law and domestic law. The International Court of Justice (ICJ) ruled that the principle of state immunity did not preclude the Italian courts from allowing the seizure.¹⁶ Based on the above analysis, it can be asserted that the state has no prerogative of immunity both in terms of jurisdiction and execution with the mere exception of fundamental rights and actions against violence. No single legal precedent has been established yet where the state was given immunity for resolving trade disputes and arbitration.

3. Adjudication under the Aegis of State Immunity

Adjudication, as a dispute resolution mechanism, is still in its nascent stage, with valuable lessons being learned and significant opportunities for further development. This evolving process offers the potential to address numerous payment issues that occur within various industries. Scholars and practitioners have recognized the potential of adjudication as a solution for swift and cost-effective payment recovery. Beh (2017) argues that the expeditious and economical retrieval of payments represents the pinnacle of the adjudication process. Adjudication, as a form of alternative dispute resolution, holds promise due to its efficiency and effectiveness in resolving payment disputes. It offers a streamlined procedure that allows parties to seek resolution promptly, without resorting to lengthy and costly litigation. Through adjudication, parties can obtain a binding decision on payment matters, ensuring the enforcement of their rights and facilitating the timely release of funds.

Therefore, adjudication is introduced as an authorized enforcement channel. The industry needs to fix pending compensation issues that are supported by the Adjudication claim through CIPA Act 2012. The subsequent problem has not been revealed much in its early years of implementation. The judgment of *View Esteem V Bina Puri Holdings* (Ismail, 2018) has finally exposed that is the recent developments prominently exhibited via that case. The theme appears through challenges against adjudications determination in legislation is detected as the exact repetitive. These days adjudication becoming more and more general. the rights the construction players have under the Act lead to numerous claims being referred to adjudication under the Act and the understanding of the CIPA Acts 2012. On the formal procedural laws, it is important to shine a light, on the rights of parties within the quasi-judicial adjudication proceedings as pre-train to believe and that comes within the rules is a subsequent judicial proceeding. The claims that deceive and to avoid it, the decision of adjudicators must be established in the themes of challenges.

To ensure the effectiveness and credibility of adjudication, there is a need for careful examination and refinement of the procedural rules, as well as a comprehensive understanding of the rights and obligations of the parties involved. By addressing the challenges that have surfaced and establishing a robust framework for adjudication, the industry can benefit from a fair and efficient resolution of payment disputes. As the industry continues to navigate the complexities of adjudication, it is vital to foster a clear understanding of the processes and rights involved. This understanding will contribute to the development of a more reliable and transparent adjudication system, thereby promoting confidence and trust among all stakeholders.

4. Implications

The implications of this study are twofold. Firstly, it provides a comprehensive analysis of the role of state immunity in the resolution of investment disputes, enriching the understanding of legal practitioners, policymakers, and scholars engaged in international law and investment arbitration. Secondly, it underscores the importance of establishing robust adjudication mechanisms to effectively address payment issues in the industry. By recognizing the potential of adjudication and gaining experience in its execution, stakeholders can harness its benefits and contribute to the development of best practices in resolving investment disputes.

As international investment continues to grow, the resolution of associated disputes becomes increasingly critical. Understanding the role of state immunity and the implications for adjudication is instrumental in navigating these complex issues and promoting fair and equitable outcomes. Moving forward, further research and practical experience are needed to refine the application of state immunity and strengthen the effectiveness of adjudication mechanisms in resolving investment disputes.

5. Conclusion

In conclusion, this review article has delved into the significance of state immunity in the resolution of international investment disputes and its far-reaching implications for adjudication. Through an examination of notable cases like *Belhaj v. Straw* and *The Saharawi Arab Democratic Republic and The Polisario Front v. The Owner and*

¹⁶ *Germany v. Italy: Greece intervening*, 2012 I.C.J. Rep 99 (2012).

Charterers of the MV 'NM Cherry Blossom,' we have highlighted the intricate interplay between state immunity and the resolution of investment disputes. The cases analyzed in this study shed light on the complex dynamics involved when considering state immunity in investment disputes. They underscore the importance of clarifying the scope and application of state immunity to ensure fair and just outcomes for all parties involved. The exploration of these cases serves to deepen our understanding of the legal principles and considerations at play in adjudicating investment disputes where state immunity is invoked. Furthermore, this review emphasizes the need for the implementation of effective adjudication mechanisms to enhance the resolution of investment disputes. As exemplified in various cases, the utilization of adjudication has the potential to address payment problems and expedite the recovery of funds. By drawing from experiences gained in the execution of adjudication processes, valuable insights can be gained, contributing to the continual improvement of this dispute resolution mechanism.

References

- Aziz, D. (2020). The Republic of the Philippines v. Maler Foundation and others: State immunity and intangible property. In *Asian Yearbook of International Law, Volume 13 (2007)* (pp. 295-302). Brill Nijhoff. https://doi.org/10.1163/9789004433786_012
- Barker, J. C. (2013). Decisions of International Courts and Tribunals. *International & Comparative Law Quarterly*, 62(3), 741-752. <https://doi.org/10.1017/S0020589313000298>
- Beh, L. C. (2017). Construction Industry and Payment Adjudication Act (CIPAA 2012) - Messrs Ravindran.
- Buchan, R., & Franchini, D. (2020). *WhatsApp v NSO Group: State Immunity and Cyber Spying*. Retrieved from <https://www.justsecurity.org/69684/whatsapp-v-nso-group-state-immunity-and-cyber-spying/>
- Buttes Gas and Oil Co v. Hammer (No 3)*, 1982 A.C. 888 (1982).
- Crawford, J., & Brownlie, I. (2019). *Brownlie's principles of public international law*. Oxford University Press, USA. <https://doi.org/10.1093/he/9780198737445.001.0001>
- Dautaj, Y. (2022). Eiser Infrastructure Ltd v the Kingdom of Spain: The ICSID Convention, Sovereign Immunity, and the Federal Court of Australia Dealing with a Supposed "Zombie Judgment". *The International Lawyer*, 55(1), 147-165.
- Douglas, Z. (2011). State immunity for the acts of State officials. *The British Yearbook of International Law*, 82(1), 281-348. <https://doi.org/10.1093/bybil/brs002>
- Fox, H. (2003). International law and restraints on the exercise of jurisdiction by national courts of States. *International law*, 357.
- Fox, Q. C., & Webb, P. (2013). *The law of state immunity*. Oxford University Press. <https://doi.org/10.1093/law/9780199647064.001.0001>
- Gaeta, P., Viñuales, J. E., & Zappalà, S. (2020). *Cassese's International Law*. Oxford University Press, USA. <https://doi.org/10.1093/he/9780199231287.001.0001>
- Gerlich, O. (2015). State Immunity from Execution in the Collection of Awards Rendered in International Investment Arbitration: The Achilles' Heel of the Investor-State Arbitration System? *American Review of International Arbitration*, 26(1).
- Hafner, G., Kohen, M., & Breau, S. (Eds.). (2006). *State Practice Regarding State Immunities/La Pratique des États concernant les Immunités des États*. BRILL.
- Investment Policy Hub. (2023). *The Investment Dispute Settlement Navigator*. Retrieved from <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/11/australia>
- Ismail, N. (2018). Ulasan Kes: View Esteem Sdn. Bhd. Lwn Bina Puri Holdings Bhd. [2018] 2 Mlj 22. *KANUN: Jurnal Undang-Undang Malaysia*.
- KPMG Peat Marwick and Others v. Davison. (1997). *International Law Reports*, 104, 526-629. <https://doi.org/10.1017/CBO9781316152331.022>
- Lissitzyn, O. J. (1954). Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question). (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and the United States of America). *American Journal of International Law*, 48(4), 649-655. <https://doi.org/10.2307/2195036>
- O'Keefe, R., Tams, C. J., & Tzanakopoulos, A. (Eds.). (2013). *The United Nations Convention on jurisdictional immunities of states and their property: a commentary*. Oxford University Press. <https://doi.org/10.1093/law/9780199601837.001.0001>

- Patel, B. N. (2000). North Sea Continental Shelf:(Federal Republic of Germany/Denmark; Federal Republic of German/Netherlands). In *The World Court Reference Guide* (pp. 374-380). Brill Nijhoff. https://doi.org/10.1163/9789004481237_106
- Pavoni, R. (2018). Cultural Heritage and State Immunity. *The Oxford Handbook of International Cultural Heritage Law* (OUP Forthcoming).
- Shah, S. (2012). Jurisdictional immunities of the state: Germany v Italy. *Human Rights Law Review*, 12(3), 555-573. <https://doi.org/10.1093/hrlr/ngs023>
- Van Alebeek, R. (2008). *The immunity of states and their officials in international criminal law and international human rights law*. OUP Oxford. <https://doi.org/10.1093/acprof:oso/9780199232475.001.0001>
- Weidemaier, W. M. C., & Gulati, M. (2018). Market practice and the evolution of foreign sovereign immunity. *Law & Social Inquiry*, 43(2), 496-526. <https://doi.org/10.1111/lsi.12274>
- Winch, P. D. (2021). State Immunity and the Execution of Investment Arbitration Awards. *Public Actors in International Investment Law*, 57. https://doi.org/10.1007/978-3-030-58916-5_4
- Yang, X. (2012). *State immunity in international law* (Vol. 89). Cambridge University Press. <https://doi.org/10.1017/CBO9781139016377>

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