

Question of International Rule of Law in Enforcement of Judgment Against Foreign Sovereign

Assets under International Law

Name of the author:

Ferdous Rahman,
Doctoral Student,
Department of Private International Law
University of Szeged, Hungary
Email: ferdous_piash@yahoo.com

Name of the Supervisor

Dr. Vig Zoltan,
Assistant Professor of Law
Department of Private International Law,
University of Szeged, Hungary
Email: jogasz@gmail.com

Abstract:

International law permits private parties to initiate legal proceedings against a sovereign entity for certain violations such as international investment dispute, infringement of international human rights, breach of commercial contract, default in sovereign debt and so on. Regardless of the type of litigations, and/or the deciding authority, once the private parties receive a monetary judgment or award against the state, the judgment creditors target one or more sovereign assets to seek attachment order from a third state's domestic court where the assets are situated. Albeit the absence of any effective uniform international legal instruments, few international conventions are available in this regard.

The European Convention on State Immunity (1972) took restrictive approach to protect the self determination of the states whereas, the UN Convention on Jurisdictional Immunities of States, and their Properties (2004) listed the immune assets but left the question of non-immune assets with the courts to determine based on the commercial or non-governmental use. The draft of International Lawyers' Association (1982) added a list of non-immune asset including the assets in commercial nature, having commercial purpose and also the assets acquired in violation of international law. The academic scholars followed similar trend but with a different approach. The assets are broadly divided into two categories, (a) public holdings of the state (*domaine public*) and (b) property held by state in private capacity (*domaine prive*). The latter may be held as non-immune whereas the former rarely enjoys immunity from execution. In closer view, the immune assets are into three major groups with two newly emerging ones based on the international and national legal instruments, namely (a) diplomatic assets, (b) military assets (c) property central banks and the other two are (d) the cultural heritage of a state or of its archives and (e) property forming part of an exhibition of objects of scientific, cultural or historical interests.

Another part of this paper focuses on the international rule of law and its application in determining the questions of immunity of sovereign assets. The scope of international rule of law is broader than the AV Dicey's definition of rule of law. From the theoretical perspective, unlike the vertical footing of the subjects in domestic legal order, the states, as the actor of international legal order stand on horizontal

relation. Hence, the international legal order demands the rule of law to be defined appropriate to its nature as distinct from the national legal order. From this structural position, international rule of law may have three meanings: application of rule of law principles in relation to the states and other subjects of international law, supremacy of international law over national law and emergence of global rule of law with normative regimes. On the other hand, from more pragmatic view, several approaches are available including the realist, the liberal, the critical and the third world approach. The liberal view assumes international law strong enough to censor the state conducts whenever necessary to make them comply therewith. In contrast, the realist approach brings the question of international policies and the accumulation of power. Hence, except in the rare cases where no national interests are involved, cooperation is found to establish rule of law. Such role of international laws is subject to conflicting interpretations to embrace the national interests from time to time.

Unlike national rule of law, international rule of law values the order more than justice. Such objective of international rule of law corresponds with the thick definition of rule of law which means the substantive notion of justice, distinct from the justice understood relying on a set of ideals or some fixed process. Thus, the rule of law embraced in international legal order has no concrete meaning, but a set of principles varied with the development and economic growth of the international legal order. Such as the foundational principles of sovereignty are no more defined from the perspective of its immunities, exemption, or exclusiveness but from its responsibility to protect its citizen, comply with democratic governance and international human rights laws. Here, rule of law is defined as obedience to existing international laws and its fundamental principles embodied in the UN Charter such as sovereign equality, non-intervention in external and internal affairs, peaceful settlement of international dispute, principles of fulfilling good faith obligation derived from international law. Several non-binding international instruments have also attempted to list them, International institutions brought forward different principles as the standard of international rule of law such as IBRD proposed confidence on law, obedience thereto, quality of contract enforcement as the ideals of rule of law in international legal order.

This paper looks for the coherent understanding of international rule of law in defining the targeted assets based on their legal definitions in international law. It further classifies the conditions to be proved in order to convince the judges to grant a post judgment attachment order and the role of international rule of law in determining the question of immunity of foreign sovereign assets. Finally, it poses certain open questions which are still waiting for scrutinization such as the prejudgment attachment order or conservatory measures against the sovereign and the execution against the assets of the state instrumentalities, followed by the question of international rule of law involved therein.