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Cairn Moves to Seize Air India Assets to Recover Hefty Award against India: Worthwhile Choice or a Futile Exercise?

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In May 2021, Cairn Energy PLC filed a **lawsuit** before a New York Court to enforce a USD *1.2 billion* investor-State **arbitral award** against India passed by the Permanent Court of Arbitration. It sought, in particular, a **proclamation** that State-owned entity (SOE), Air India "should be held jointly and severally responsible for India's debts, including from any judgment resulting from recognition of the award" (Complaint, ¶ 31). A detailed account of the facts of this case can be accessed **here**.

The protection of States' assets against enforcement actions has remained an insufficiently explored area of international law, even though the doctrine of sovereign immunity is central to this discourse. This post compares and analyses cases where States have invoked sovereign immunity to resist attachment of assets of SOEs like Air India and the rationale adopted by courts towards piercing the corporate veil to ascertain whether they may be treated as the State's "alter ego".

Sovereign Immunity and Executing against SOEs

The doctrine of sovereign immunity, emanating from the principles of comity and equality of States, forms an integral part of customary international law in State practice. This doctrine acts as a procedural bar, ensuring that governments remain protected from the burden of defending lawsuits overseas. Its narrow object is to keep properties of States and their representatives immune against enforcement measures in foreign courts.

The **United Nations Convention on Jurisdictional Immunities of States and their Property** (UNCSI) has been the only sustained endeavour to develop a uniform framework of international guidelines, aiming to provide a comprehensive code for the immunity of State assets. This Convention, however, has only been ratified by 22 States and is awaiting entry into force since 2004. Thus, the lack of a widely-ratified international convention on this topic has resulted in a situation where domestic courts must interpret and determine the issue of immunity by reference to customary international and domestic law, including potential immunity for SOE assets against coercive measures like attachment in execution proceedings.

Precedential Analysis

Although the doctrine of sovereign immunity is adopted by both common and civil law jurisdictions, much inconsistency lies in the treatment of an immunity plea in execution matters. This has prompted award-creditors to painstakingly select the forum that is most likely to execute an award. Through the years, several attempts have been made by investors (much like Cairn) to satisfy their awards against the State assets located in jurisdictions considered to be "pro-execution", such as the United States. Thus, this section examines two significant American judgments that may influence the outcome in Cairn's proceedings. To draw a comparison with how civil law jurisdictions have dealt with similar facts, this section also discusses a prominent and contemporary Dutch case.

In a discussion regarding the separability of State debts from SOEs, the 1983 case **First National City Bank (now, Citibank) v. Banco Para el Comercio Exterior de Cuba ("Bancec")** is important. The question was whether Citibank could recover its dues from Cuba by expropriating the assets of Bancec, a known organ of the Cuban government. The US Supreme Court pierced the corporate veil and, in the process, formulated the 'Bancec factors' to determine, in effect, whether a corporation was functioning as the wholly-owned instrumentality of a foreign government. The factors were: (1) the extent of the government's economic control in the entity; (2) whether the government is the beneficiary of the entity's profit-making; (3) the extent to which government officials manage the daily affairs of the entity; (4) whether the entity's conduct supplements the government in any way; and (5) whether separating identities from the entity would facilitate the State to avoid obligations in US Courts. These factors were later crystalized in **Rubin v. Islamic Republic of Iran**. More recently, in the 2019 decision **Crystallex International Corporation v. Bolivarian Republic of Venezuela**, the Venezuelan government was found to be the real beneficiary of the shares and profits generated from its SOE, Petróleos de Venezuela SA (PDVSA). To adjudicate, the US Court of Appeals for the Third Circuit relied heavily on the Bancec factors while also recognizing that they do not purport to create a 'mechanical' formula and should only be applied on a case-by-case basis. Incidentally, in the context of enforcement of awards, the Third Circuit reformulated the Bancec factors as follows: (1) the extensive control prong need not automatically entail a nexus between the aggrieved investor and the entity against which enforcement was sought; (2) a formal principal–agent relationship was not necessary as a mandatory requirement to establish extensive control; (3) consideration of third-party interests was not a pre-requisite when determining asset attachment; (4) the court cannot adjudicate upon later events but may only rely on the subsisting record while evaluating the status of the entity; (5) the appropriate burden of proof was the 'preponderance of evidence', as opposed to a 'clear and convincing' standard; and (6) the equitable component in treating one entity as the alter ego of another need not be determined by the court.

Coming to the civil law perspective, Dutch courts follow the **General Provisions Act 1829** *in matters of sovereign immunity of foreign State properties.* Section 13a has enshrined that enforceability (of awards) shall be regulated as per restrictions recognized under international law, thus limiting the jurisdictional powers of national courts. In **Anatolie Stati v. Kazakhstan,** the Dutch Supreme Court took a strikingly dissimilar stand compared to US Courts in enforcement of the award passed in favour of the claimant. Initially, the Amsterdam Court of Appeal allowed seizure of Kazakhstan's shareholding in a Dutch company, held through the Kazakh sovereign wealth fund, Samruk-Kazyna. The rationale behind the decision was Samruk's lack of "factual economic independence" from the sovereign in invoking its legally separate nature, formulating its own policies and digressing from State policies. It was emphatically clarified that due to Samruk's purpose of incorporation and business being commercial in nature, the shareholding could not be brought within the purview of sovereign immunity. However, the claimant's victory was short-

lived as, in December 2020, the Supreme Court of the Netherlands **set aside** this decision, adjudging it "erroneous in law" (Judgment, ¶ 3.2.4). In doing so, the apex court demonstrated allegiance to the UNCSI as customary international law, applying its Article 19 as the basis of deciding immunity over foreign States' assets (elaborated **here**). Thus, countries like the Netherlands, which shift the onus of proof onto the award-creditor to prove that State assets should be attached or that they do not have a public purpose, have notably dissuaded such parties from approaching these jurisdictions and steered them in the direction of the more favourable American courts.

Concluding Remarks

Usually, arbitral awards against States are not enforced against SOEs due to the presumption that corporations have independent identity and operate separately from the sovereign. For instance, recently in a December 2020 **ICSID case**, the British Virgin Islands High Court was required to determine whether assets belonging to Pakistan International Airlines (PIA) including the iconic Roosevelt Hotel in New York could be attached in settlement of a claim made by Tethyan Copper Co. against the Pakistani government. The court, in its **decision**, disallowed such attachment on the ground that Tethyan had failed to satisfactorily establish that PIA can be "assimilated into the State for all purposes" (Judgment, ¶ 99) and expounded that the assets of a company listed on an international stock exchange could not be seized as to hold otherwise would disadvantage its body of independent shareholders. Seeing that these circumstances are akin to those in Cairn v. India, it is fair to speculate that obtaining control over assets of Air India will also be an uphill battle for the award-creditor. Nonetheless, it is not uncommon for this presumption to be refuted on the basis that governments exercise substantial control over the day-to-day affairs of SOEs. For instance, in **Walter Bau AG v. Kingdom of Thailand**, the German investor was able to impound a royal aircraft against a **UNCITRAL award** directing the Thai government to clear its debts owed to the said investor.

In other news, Cairn in an attempt to seize other Indian assets, has filed lawsuits in eight other countries, including France. On July 8, 2021, it was widely **reported** in global media that the Tribunal Judiciaire de Paris had ordered to freeze State-owned properties of India in France. Interestingly, on the same day, India's Ministry of Finance released an official **statement** claiming that the government had not received any notice regarding such freezing thus indicating that it may have been an ex parte order. This statement also clarified that while India intends to challenge any adverse order, talks of settlement may not be entirely off the table either. Coming back to the instant US lawsuit, the principles originating in Bancec and later clarified in Crystallex may play a definitive role in deciding India's fate. This includes looking closely into the constitution of Air India, the extent of governmental control and whether the sovereign is the real beneficiary of the company's profit-making. Thus, it remains to be seen if Cairn can establish that these requirements are met in the case of Air India.

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This entry was posted on Sunday, August 8th, 2021 at 8:39 am and is filed under Enforcement, Piercing the Corporate Veil, Sovereign Immunity, state-owned
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