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Swedish Supreme Court Weighs in on Immunity of Sovereign Wealth Fund Assets Under Central Bank Management

Maria Fogdestam-Agius, Ginta Ahrel (Westerberg & Partners) · Monday, March 7th, 2022

When States participate in investor-State arbitration and lose, they become award debtors like any other losing party in for instance international commercial arbitration. When it comes to execution against States, however, the plea of sovereign immunity presents a serious obstacle to award-creditors. Assets available for execution (i.e., such used for non-governmental commercial purposes) are not easily identified. In this post, we address a novel and contemporary aspect of award-enforcement and sovereign immunity, namely that of attaching and executing against assets held or controlled by a sovereign wealth fund (SWF). Nowadays, many States choose to manage their excess wealth on commercial terms through SWFs operating on regular capital markets in ways comparable to those of any other economic actor.

These issues have come to the fore through a recent decision of the Swedish Supreme Court ([Case No Ö 3828-20, “Ascom”, Decision of 18 November 2021 \[Swedish\]](#)), ruling on whether SWF assets held by central banks on behalf of their State are covered by sovereign immunity from execution. The Court expressly relied on customary international law in deciding the issue. Thus, its decision constitutes an important contribution to the international case law on the immunity of State property. It is a precedent of interest to anyone with a favourable arbitral award against a sovereign State as well as to governments seeking to confirm to what extent their property enjoys immunity under current arrangements. In addition, the case amounts to an instance of State practice, i.e., an expression of a legal position that could be used to consolidate the customary international law that States believe to be binding in this field.

The Court considered whether the seized funds were subject to immunity, either by virtue of being property of a national central bank or by virtue of being in use or intended for use for other than governmental non-commercial purposes. The Court, in construing the customary international law underpinning Article 21 of the [2004 United Nations Convention on Jurisdictional Immunities of States and their Property](#) (‘UNCIS’), ruled that special protection for central bank property under customary international law only extends to assets functionally connected to central bank activities and the realisation of States’ monetary policy. It thus weighed in on an issue where national courts have diverged and aligned with a strain of international jurisprudence taking a nuanced approach to central bank immunity. The decision means that enforcement may take place against SWF assets designed to manage State wealth more generally. Where SWF assets are merely managed so as to ensure the prosperity and future needs of a country’s population, this is, in the Court’s opinion, too vague and remote a purpose to justify immunity in accordance with Article 19 of the UNCIS. The decision also clarifies the status of SWFs under the law on State immunity, a surprisingly

underexplored issue given the vast amounts of money managed by such funds worldwide.

Background

The precedent now delivered by the Court came in the context of an enforcement action in Sweden, brought by Moldovan investors seeking payment under an international award against the Republic of Kazakhstan, as rendered in *Stati, Ascom and others v. Kazakhstan*. Kazakhstan was found liable for breaches of the fair and equitable treatment standard under the ECT. The tribunal awarded damages of close to USD 500 million plus interest.

Enforcement action ensued in numerous jurisdictions, including Belgium, the Netherlands and Sweden. At the investors' request, the Swedish Enforcement Agency in 2017 attached and in 2018 seized assets in the form of shares in listed Swedish corporations, worth approximately USD 90 million and forming part of the National Fund of Kazakhstan ('NFK'). The NFK is a SWF owned by the Kazakh Finance Ministry but placed under management by the National Bank of Kazakhstan ('NBK'). Kazakhstan and NBK challenged the seizure, arguing inter alia that the funds belonged to the NBK, its central bank, and therefore enjoyed immunity.

After a Swedish District Court upheld the Enforcement Agency's decision, the Svea Court of Appeal found that the assets were entitled to sovereign immunity as assets of a central bank, in a decision previously covered on the [blog](#). Taking guidance from the UNCSI, the Court of Appeal held that the immunity of central bank property under Article 21(1)(c) applied to all assets handled by a central bank and was "categorical" in the sense that immunity did not depend on the use made of the assets in question.

A Functional Approach to Central Bank Immunity

The Supreme Court, by contrast, opted for a functional approach. It affirmed that the restrictive theory of immunity applies to enforcement against State assets. Although such immunity is more extensive than sovereign immunity from jurisdiction, creditors have a legitimate interest in enforcing an award, even where the debtor is a State, as long as customary international law does not bar enforcement (see para 13).

The Court accepted that the NBK functioned as the Kazakh central bank but found the scope of immunity for central bank property under customary international law to be unclear. Different views were indeed expressed during the drafting of the UNCSI and State practice on central bank immunity is far from consistent. However, with reference to the interests involved, the Court opined that immunity from enforcement was not necessarily limited to property which the central bank legally owns or holds in its own name, but that immunity also should not extend to all assets that a central bank controls regardless of their use. Special protection for central banks is motivated by its monetary policy activities, wherefore protection should be afforded only to funds connected with this purpose (see para 23).

On the basis of that analysis, it found "no clear support in customary international law that immunity also applies to property which the bank controls without there being a connection with the bank's mission in terms of monetary policy". Such wide immunity would be unjustified in the

Court's view. For immunity to apply, there had to be a "clear connection with the central bank's activities in the area of monetary policy" (para 24). The seized assets in this case were used exclusively for wealth management on commercial terms; their management did not constitute "an instrument for the exercise of the National Bank's monetary policy functions" and "could equally have been entrusted to a State entity without such a function" (para 41).

Whereas [other authors](#) may have traced a trend towards greater State immunity for central banks, the Swedish precedent favours a nuanced approach, aligning with the practice of States such as [Germany](#) and [the US](#). These States recognise a separate, enhanced immunity for central bank property but require that the central bank holds such funds for "sovereign purposes" or "its own account", in practice restricting central bank immunity to funds used for typical or paradigmatic central bank activities and functions.

The Supreme Court was not swayed by references to cases from [England and Wales](#) or [the Netherlands](#) where courts have accepted that SWFs under central bank management can enjoy immunity as central bank property and that increasing the national prosperity of the State constitutes a sovereign purpose in itself. Instead, the Supreme Court took the view that the immunity of sovereign assets must be determined based on what can be immediately ascertained as to the intended use of the specific seized property, disregarding how assets through State procedures may be re-allocated for other purposes in the future. The Court's judgment therefore turned on its analysis of the arrangements within the NFK and in particular the distinction between the fund's different portfolios and the multi-step procedure through which the State could withdraw money from the fund for various purposes, such as financing State actions or public services.

Requiring a Concrete and Clear Connection to a Qualified Purpose of Sovereign Character

The Court's analysis under Article 19 of the UNCSI featured the same requirement of an immediate connection. Citing its decision in the [Sedelmayer case](#), for the status of Article 19 as custom and for guidance on how to determine the purpose for which State property is used, the Court noted that the use for which financial assets are intended may not be immediately apparent. In such circumstances, factors such as the amount of risk assumed in investing the assets become relevant. When a State invests in listed shares and similar securities, it becomes exposed to "the same commercial risks as the undertakings in which the investments are made" and the State's "primary motivation for exposing itself to such risks can typically be assumed to be the same as those of other equity investors", namely return on investment. According to the Court, this could not be seen as "an outflow of the State's sovereign activity" (para 28). In order for such property to be immune, "qualified purposes of a sovereign nature must come to concrete and clear expression in the State's regulation of how the property is to be used" and the "mere fact that the State will have the opportunity to use the value of the property for government activities or that the value of the property shall benefit future generations cannot be considered sufficient" (para 28).

That the assets formed part of a SWF did not, as such, affect whether they were immune from enforcement (paras 30-33). Still, the Court offered some general guidance when it held that "long-term state saving for future needs – not yet defined – in itself cannot be regarded a sovereign activity" (paras 44-45). While sovereign wealth assets can sometimes serve macroeconomic or monetary policy goals, this required a "concrete and clear connection to a qualified purpose of

sovereign character” to justify immunity (paras 44-45). Kazakhstan and NBK had offered only “very general” information about any future State purposes of the assets. The regulation of the NFK did not specify what those purposes might be. Furthermore, the seized assets, i.e., the listed shares, were not immediately available for use for activities that were properly sovereign – they could only be allocated to finance sovereign activity following liquidation and transfers appropriating them in multiple steps to the State budget. In the Court’s assessment, “[t]his connection cannot be regarded as sufficiently concrete to justify assets of this kind being covered by immunity” (para 46).

Final Remarks

As underscored in a previous [post](#) on these proceedings, the decision may prompt States to review their asset management policies and consider restructuring to safeguard critical assets from the enforcement jurisdiction of foreign courts. However, at a more general level, the decision represents a levelling of the playing field where States appear in arbitration, ensuring that an award against a State does not become a worthless scrap of paper.

The authors of this post were instructed by the claimants in the enforcement proceedings discussed in the article, including before the Supreme Court. The views expressed represent the personal analysis by the authors and do not necessarily correspond to the views of any of their affiliations, the firm of Westerberg & Partners or any of its clients.

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