CHAPTER 8

Execution of Arbitral Awards Against Sovereign Wealth Fund Assets: Enforcement Against States and the Supreme Court's Decision in *Ascom*

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§8.01 INTRODUCTION

A party alighting victorious from arbitration realises soon enough that if payment is not forthcoming, the award will only be as effective as its opportunities for being enforced. If the award is against a sovereign State – as it commonly will be in investment treaty arbitration – this complicates things. Enforcing in the respondent State's jurisdiction may present difficulties. However, the competence of foreign courts and authorities to enforce the award is subject to the respondent's sovereign immunity. An award creditor seeking to enforce its claim against a sovereign State must, therefore, not only ensure the recognition of its title to execution in a jurisdiction that is the location of suitable assets but must also ensure that these assets are not protected by State immunity.

In November 2021, the Swedish Supreme Court (the 'Swedish Supreme Court' or 'Court') issued an important clarification of the law on sovereign immunity from execution in *Ascom and Others v. Republic of Kazakhstan and National Bank of*

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Kazakhstan (the '*Ascom*' case).[1] Adhering to the restrictive theory of sovereign immunity in respect of enforcement measures, the Court acknowledged the legitimate interest of an award debtor to have the award satisfied and denied immunity from execution of assets held for purposes of general State saving and investment. The decision confirms that Sweden is a favourable jurisdiction for the enforcement of arbitral awards against States.

The Court's decision arose in an enforcement action in Sweden, brought by Moldovan investors seeking payment under an arbitral award against the Republic of Kazakhstan. The award was given in 2013, in an arbitration under the Energy Charter Treaty (ECT).[2] A Stockholm-seated tribunal operating under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) found Kazakhstan liable for breaches of the fair and equitable treatment standard under the ECT and awarded damages of close to USD 500 million plus interest for Kazakhstan's seizure in 2010 of the investors' petroleum and gas operations in Kazakhstan. Enforcement action ensued in numerous jurisdictions, including Belgium, the Netherlands and Sweden.

In 2018, at the investors' request, the Swedish Enforcement Agency seized assets in the form of shares in listed Swedish corporations valued at approximately USD 90 million. These assets formed part of a savings portfolio[3] of the National Fund of Kazakhstan (NFK), a sovereign wealth fund (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.

The District Court upheld the Enforcement Agency's decision to seize the assets to satisfy the award. Upon appeal, the Svea Court of Appeal found that the assets were indeed protected by sovereign immunity based on its finding that the assets were the property of a central bank and consequently could not be seized.[4] The Swedish Supreme Court granted leave to appeal in respect of the issue of whether sovereign immunity barred execution against the seized assets and found, overruling the Court of Appeal on this issue, that this was not the case. Accordingly, the Court concluded that

1. *Ascom Group S.A. and Others v. Republic of Kazakhstan and National Bank of Kazakhstan*, Sweden, Supreme Court, Case No. Ö 3828-20, Decision, 18 November 2021.
2. *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan*, SCC Case No. V 116/2010, Award, 19 December 2013.
3. A Decree of the President of the Republic of Kazakhstan No. 385 on the Concept for Creating and Using Funds of the Republic of Kazakhstan's National Fund, 8 December 2016 ('Decree No. 385'), establishes that the NFK shall have two portfolios: a stabilisation portfolio capped at USD 10 billion, with the aim of maintaining an adequate level of liquidity for the fund, and a savings portfolio, with the aim of accumulating and preserving funds generated through the sale of non-renewable energy for future generations to ensure long-term returns with an appropriate level of risk. Excess funds of the stabilisation portfolio are transferred to the savings portfolio and funds of the savings portfolio can be transferred to the stabilisation portfolio. Only funds from the stabilisation portfolio may be withdrawn to boost the government budget and meet public expenses.
4. The ownership of the shares remains contentious. At the time of writing, this issue is still being examined by the Svea Court of Appeal, to which the case was remanded following the Swedish Supreme Court's decision.

execution could take place on the condition that certain criteria under Swedish execution law were met.[5]

This article analyses the Swedish Supreme Court's decision in the *Ascom* case in light of public international law and the comparative jurisprudence of national courts from other jurisdictions.

The precedent set by the Court in the *Ascom* case provides useful guidance to any party seeking to enforce an arbitral award against a sovereign entity through execution in Sweden. The decision is, however, also of wider interest, being one of the first in international jurisprudence that explicitly addresses SWF assets under central bank management. SWFs are ambiguous investment vehicles with both public and private characteristics. As a result, they are poorly understood in the context of sovereign immunity. SWFs and their property have been considered to exist in an 'international law black hole'.[6] The article will therefore focus particularly on the immunity of SWFs and the effect of management arrangements involving central banks.

The extent to which States recognise enhanced immunity to central bank property differs considerably.[7] In particular, the legal effect of various arrangements to place SWF assets under central bank management has so far been uncertain.[8] By weighing in on this issue, the Court has arguably contributed significantly to the development of the law in this field.

§8.02 SWFS UNDER INTERNATIONAL LAW

Over the past few decades, States have increasingly used SWFs as vehicles to manage their excess funds. As a result, SWFs are now major participants in the global financial markets.[9]

However, this is not without its problems. SWFs are sparsely regulated. Although they are subject to a certain degree of self-regulation through the so-called Santiago

5. The case was remanded to the Svea Court of Appeal to address these criteria, discussed in the footnote immediately above. As a result of the finding of sovereign immunity, the Court of Appeal for reasons of judicial economy did not consider these criteria.
6. *See* Shu Shang & Wei Shen, *When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds in the Post Financial Crisis Era: Is There Still a Black Hole in International Law* (2018) 31 Leiden Journal of International Law 915 ('Shang and Shen, *When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds*').
7. *See*, generally, Ingrid Wuerth, *Immunity from Execution of Central Bank Assets*, in: The Cambridge Handbook of Immunities and International Law, ed. Ruys, Angelet and Ferro (Cambridge University Press, 2019) 266 ('Wuerth, *Immunity from Execution of Central Bank Assets*').
8. *See* Wuerth, *Immunity from Execution of Central Bank Assets*, n. 103 ('The extent to which a state can protect the assets of sovereign wealth funds by administering them through their central bank is unclear. The purposes and functions of the sovereign wealth funds differ somewhat from those of central banks.').
9. *See* Victorino J. Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds* (2016) 25 University of Miami Business Law Review 1 ('Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*'), p. 7.

Principles,[10] there is no general regulation of SWFs under international law. Moreover, their treatment in national and international jurisprudence varies to a large degree.

Arguably, this is (at least in part) a result of the fact that there is no common design for SWFs. Historically, SWFs were set up to: (i) manage surplus revenue from, for example, the extraction of natural resources such as oil and gas; (ii) diversify the economy of States overly dependent on singular commodities; and (iii) ensure inter-generational equality in the benefits to the population from natural resources (i.e., that current generations do not deplete such assets without ensuring that also future generations benefit from the gains therefrom).[11] The first SWF was established by Kuwait already in 1953.[12] In the decades that followed, a limited number of other resource-rich countries followed suit and pursued ways to invest excess revenue and foreign exchange reserves.[13] Over time, countries with large foreign exchange reserves began using SWFs to hedge currency risk as well as generate equity returns as opposed to fixed income returns.[14] Since 2000, the use of SWFs has spread considerably.

SWFs may generally be understood as special purpose investment funds or arrangements owned by the government.[15] SWFs hold, manage, and/or administer assets to achieve financial objectives, and employ a set of investment strategies to do so, including investing in foreign financial assets.[16] However, SWFs may be set up in quite diverse ways. While it is common to speak of SWFs as 'investment vehicles'[17] which may be set up as entities endowed with separate legal personality, either in incorporated form or functioning as an instrumentality of the State, SWFs may also be virtually formless and consist merely of a pool of assets owned or managed directly or indirectly by governments, government agencies or central banks.[18]

SWFs are publicly funded and therefore composed of wealth raised through sovereign activities. Such activities may include the accumulation of foreign exchange reserves or balance of payments surpluses, privatisations of public entities, collection

10. International Working Group of Sovereign Wealth Funds, *Generally Accepted Principles and Practices* ('Santiago Principles'), October 2008. *See* further Régis Bismuth, *The 'Santiago Principles' for Sovereign Wealth Funds: The Shortcomings and the Futility of Self-Regulation* (2017) European Business Law Review 69.
11. *See* Hussein Haeri, Yarik Kryvoi, Camilla Gambarini and Robert Kovacs, *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, Withers LLP/British Institute of International and Comparative Law, September 2021 ('Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*'), pp. 10–11.
12. *See* website of the Kuwait Investment Authority, available at: http://www.kia.gov.kw.
13. *See* EU Commission, *A Common European Approach to Sovereign Wealth Funds*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 27 February 2008, COM(2008) 115 ('*Common European Approach to Sovereign Wealth Funds*'), p. 2.
14. Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 10.
15. *See Santiago Principles*, p. 27 (Appendix I. Defining Sovereign Wealth Funds).
16. *See Santiago Principles*, p. 27 (Appendix I. Defining Sovereign Wealth Funds).
17. *See*, e.g., *Common European Approach to Sovereign Wealth Funds*, p. 2.
18. *See*, e.g., Adrian Blundell-Wignall, Yu-Wei Hu and Juan Yermo, *Sovereign Wealth and Pension Fund Issues*, OECD Working Papers on Insurance and Private Pensions No. 14, January 2008. In 2008, approximately half of SWFs were established as pools of assets whereas the other half were set up as entities endowed with separate legal personality. *See* Cornelia Hammer, Peter Kunzel and Iva Petrova, *Sovereign Wealth Funds: Current Institutional and Operational Practices*, IMF Working Paper No. WP/08/254, November 2008, p. 4.

of tax, granting of concessions and earnings from commodity exports and natural resource exploitation.[19] Although SWFs regularly are kept under State ownership and control,[20] they are usually managed separately from the official reserves of the State[21] as well as from the official reserves of central banks or monetary authorities.[22] The funds are invested domestically or internationally, with a long-term investment outlook and with the chief objective of generating returns.[23]

SWFs clearly engage in commercial activities by investing directly or indirectly in a wide range of asset classes, such as shares and securities, fixed income, structured products, private equity, real estate, hedge funds and derivatives for the purpose of optimising their portfolios and hedging unwanted risks. Through SWFs, States have thus come to engage in transactions in international financial markets very different from commercial operations of the kind that States have traditionally engaged in.[24]

The dual status of SWFs as commercial investors in financial markets and State-controlled entities has led to some uncertainty as to whether SWFs are protected by sovereign immunity from execution.[25] It has often been assumed that SWFs should enjoy immunity from execution.[26] However, the limited jurisprudence that exists on this issue is diverse and there are known examples where execution has been ordered against SWFs.[27] For example, in 2019, the Paris Court of Appeal denied immunity to two Libyan SWFs on the basis that the assets were not used or intended to be used for governmental non-commercial purposes.[28] Moreover, in certain jurisdictions, the

19. *See Santiago Principles*, p. 27 (Appendix I. Defining Sovereign Wealth Funds). *See also* Locknie Hsu, *Sovereign Wealth Funds: Investors in Search of an Identity in the Twenty-First Century* (2015) International Review of Law 1 ('Hsu, *Sovereign Wealth Funds: Investors in Search of an Identity*'), p. 5.
20. *See* Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, p. 11.
21. *See Common European Approach to Sovereign Wealth Funds*, p. 3.
22. *See* Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 10.
23. *See* Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, p. 11.
24. *See* Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 7; *see also* Joel Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA* (2009) 11 University of Pennsylvania Journal of Business Law 967 ('Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA*'), pp. 976–977 (noting that whereas SWFs traditionally invested their assets in conservative investments, SWFs today have come to develop a greater appetite for risk, shifting, e.g., towards investments in flagship international corporations and stakes in global businesses in a variety of sectors).
25. *See* Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, pp. 16–17; Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA*, p. 996.
26. *See*, e.g., Claire Milhench, *Kazakhstan's frozen billions sound alarm for sovereign funds*, Reuters, 20 February 2018; Abdullah Al-Hassan et al., *Sovereign Wealth Funds: Aspects of Governance Structures and Investment Management*, IMF Working Paper No. WP/13/231, November 2013, p. 9.
27. *See* Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, p. 34.
28. *See Société Mohamed Abdel Moshen Al-Kharafi et Fils v. Société Libyan Investment Authority and Société Libyan Arab Foreign Investment Company*, Paris Court of Appeal, Case No. 18/17592, 5 September 2019. The French enforcement action arises out of a substantial award rendered against Libya, awarding USD 935 million plus interest in damages, *see Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. the State of Libya and Others*, Award, 22 March 2013.

extent of SWF immunity may vary depending on its structure, as funds organised in different ways may be treated differently under domestic law.[29]

The immunity of States and State entities is generally determined based on the nature of the conduct in which the State has engaged. A key distinction in this respect is that between *acta jure imperii* (acts that only a sovereign entity is capable of undertaking) and *acta jure gestionis* (acts that any private party could equally undertake). By contrast, State immunity from execution is governed primarily by for what purpose the property against which execution is sought is used or intended to be used.[30] In the context of SWFs, this has led to considerable uncertainty, as SWF assets are used or intended for different purposes. Some may be created to achieve certain national objectives while others may buy, hold and sell securities and assets on behalf of their citizenry but ultimately in the pursuit of generating profit (with little or no direct connection with sovereign purposes).

SWFs themselves may have contributed to this uncertainty. SWFs are often prone to underline their commercial (rather than sovereign) nature to avoid burdensome investment screenings motivated by suspicions about foreign State interference.[31] A guiding objective of the Santiago Principles is that SWF investments should be made solely on the basis of economic and financial considerations and not further political objectives. The Santiago Principles further provide that SWFs must have a sound governance structure, which ensures that the fund is operationally independent and that investment decisions and operations are free of political influence.[32] At the same time, SWFs or their owner States have sometimes asserted immunity in enforcement actions on the basis that the purpose and activity of SWFs are inextricably linked to the fulfilment of public functions and core economic sovereign responsibilities.[33]

Some SWFs have very clearly defined goals and manage assets that are earmarked for special expenditures. This may include macroeconomic stabilisation schemes, programmes to guarantee the State's future wealth and offset the effects of dwindling natural resources, pension schemes, plans for regional development or

29. *See*, generally, e.g., Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*.
30. *See* August Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures* (2006) 17 European Journal of International Law 803 ('Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*'), p. 807.
31. *See further* Shang and Shen, *When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds*, p. 932 (describing ways in which SWFs may pursue political rather than economic goals in host States). *See also* Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA*, pp. 967, 980 and 986.
32. *See* Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 11; *Santiago Principles*, p. 27 (Appendix I. Defining Sovereign Wealth Funds).
33. *See* Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA*, p. 1000 ('SWFs will likely argue that the SWFs' activity is inextricably linked with basic essential public functions, and therefore, the nature of their activity is the same as the purpose – a sovereign governmental function.'); *but* cf. Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, pp. 22–24. *See* moreover Wuerth, *Immunity from Execution of Central Bank Assets*, n. 103 (observing, with reference to *AIG v. Kazakhstan*, discussed below, that where courts emphasise the overall purpose of SWF funds, there is a better chance at such funds enjoying immunity from execution).

industrialisation, and similar strategic and political objectives.[34] Others, however, are intended to manage funds for uses not yet defined and have no particular assigned purpose beyond generating returns and diversifying assets. SWFs may serve a number of these potential objectives at the same time, and it is not always easy to attribute a particular objective to a particular fund.[35] Because the objectives, structures and management models are so diverse, one must evaluate, in each individual case, 'whether the nature of the SWF's conduct really reflects a basic governmental duty to its citizens'.[36]

The matter is not only of academic interest. In the context of enforcement, award creditors with claims against States have begun to view SWFs with increasing attention due to their wealth, accessibility and ambiguous nature.[37] At the same time, for the past twenty years, there has been a notable surge in the establishment of SWFs. The number of SWFs has increased from around 20 worldwide in the year 2000 to more than 140 as of today.[38] The assets currently under management by SWFs are estimated to be around USD 10 trillion.[39] SWF assets increased by over 200% between 2008 and 2021, according to a report published in 2021.[40] When compared with reports from the late 2010s, it is suggested that assets held by SWFs have increased sharply even in the last few years.[41] With SWFs accounting for about one-tenth of the world's total assets

34. *See* Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 11; Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, pp. 10–11.
35. *See* Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA*, p. 981 (accounting for five types of SWFs identified by the International Monetary Fund: stabilisation funds, savings funds, reserve investment corporations, development funds and contingent pension reserve funds) and 999 ('SWFs may have more than one purpose: These objectives may be multiple, overlapping, or changing over time.').
36. Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA*, p. 1000, *see also* at p. 981 ('Courts will need to examine the purpose of the SWF to determine whether a claim of sovereign ownership is colorable or merely a label invoked to avoid liability.').
37. *See* Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 16; Anne-Catherine Hahn, *State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds* (2012) 2 Swiss Review of Business and Financial Market Law 103 ('Hahn, *State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds*'), p. 105.
38. Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, pp. 11–12. The Sovereign Wealth Fund Institute reports 143 SWFs, *see* at: https://www.swfinstitute.org/.
39. Shang and Shen, *When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds*, p. 917, report that SWFs in the early 2000s managed approximately USD 0.5 billion, whereas in 2018, the assets under management were approximately USD 7 trillion. In December 2020, a practice note published for Herbert Smith Freehills by Andrew Cannon and Hanna Ambrose, *Dealing with Sovereign Wealth Funds: Immunity Concerns and Practical Steps to Mitigate Them*, estimated assets under management in SWFs across the world at USD 15 trillion. Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, reported in September 2021, with reference to Global SWF listings, just over USD 10 trillion in assets under SWF management. A lack of transparency may contribute to the somewhat disparate reporting, but the trend towards considerable growth in managed assets is clear.
40. *See* Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, p. 12.
41. *See* Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 7; Shang and Shen, *When the State Sovereign Immunity Rule Meets Sovereign Wealth Funds*, p. 917.

under management,[42] this category of State property is no doubt of increasing importance for the enforcement of investment awards.

A coinciding trend is that certain States have assigned the management of their SWFs to their monetary authorities.[43] The motivations for doing so are not clear, but it cannot be excluded that, at least in some instances, the objective is to shield these funds from enforcement on the basis of sovereign immunity. Whether or not merely assigning the management to, for example, a central bank is enough to confer immunity on SWF assets has long been unclear.[44] The Swedish Supreme Court's decision in *Ascom* has now offered a helpful clarification. Following a brief summary of the Court's findings in section §8.03, we highlight in section §8.04 the major points of precedent.

§8.03 THE *ASCOM* DECISION

In the *Ascom* case, the Swedish Supreme Court declared that enforcement may take place against SWF assets designed for the general management of State wealth.

When assessing whether the purpose of the State's possession of the property was of a qualified character – i.e., used for sovereign activities or similar acts of an official nature[45] – the Court held that 'long-term state saving for future needs – not yet defined – in itself cannot be regarded a sovereign activity'.[46] While accepting that SWF assets sometimes may relate to macroeconomic or monetary policy goals, the Court required a showing of a 'concrete and clear connection to a qualified purpose of sovereign character' to justify immunity.[47]

In this case, Kazakhstan and NBK had offered only 'very general' information about any future State purposes of the assets and the regulation of the NFK was not sufficiently concrete as to what those purposes might be. Furthermore, the seized assets – i.e., the listed shares – were not immediately available for unequivocally sovereign activities. They could only be allocated to finance sovereign activity following liquidation and transfers in multiple steps appropriating them 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'.[48]

Both sources, published in 2018, reported a total of USD 7 trillion in SWF assets. The estimates reported in 2021 suggest an increase of about 50% or more just in the last few years.

42. *See* Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 6.
43. *See Santiago Principles*, at pp. 11 and 15 (noting that certain SWFs are set up as pools of assets held by the central bank, naming, e.g., Chile, Norway, Timor-Leste and Trinidad and Tobago).
44. *See* Wuerth, *Immunity from Execution of Central Bank Assets*, n. 103, quoted above in fn 8. Cf. Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, pp. 60–62.
45. This is what is required under the test devised by the Swedish Supreme Court in *Sedelmayer v. Russian Federation*, NJA 2011 p. 475 ('*Lidingöhuset*' or '*Sedelmayer*'), para. 14. For a discussion of the *Sedelmayer* case, *see* Pål Wrange's Case Note in (2012) 106 American Journal of International Law, pp. 347–353.
46. *Ascom*, paras 44–45 (unofficial translation from Swedish).
47. *Ascom*, paras 45–46.
48. *Ascom*, para. 46.

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. The Court further stated that immunity from enforcement is 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 their monetary policy activities and, therefore, protection should be afforded only to funds that serve this purpose.[49] The Court found 'no clear support in customary international law' for any wider immunity for funds controlled by central banks and also found such wide immunity unjustified.[50] The seized property did not have the requisite connection to monetary policy, since the funds were used exclusively for wealth management on commercial terms. In the Court's view, 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'.[51]

§8.04 IMPLICATIONS OF THE *ASCOM* DECISION

[A] Confirming the Restrictive Theory of Immunity from Execution

First, the *Ascom* decision confirms that the restrictive theory of immunity from execution applies in Sweden, in keeping with the attitude held today by most Western States.[52]

Under international law, State immunity from execution is distinct from immunity from jurisdiction. Even where a foreign court finds itself competent to adjudicate a claim against a sovereign, it is not necessarily competent to execute the same against the property of that State. Sovereign immunity from execution must be determined separately[53] and it remains the case that, generally, 'the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts'.[54]

The precise scope of immunity from execution afforded by States, however, varies considerably. As noted by the Spanish Constitutional Court in 1992: 'the degree

49. *See Ascom*, para. 23.
50. *Ascom*, para. 24.
51. *Ascom*, para. 41.
52. Cf. *Ascom*, paras 13 and 18.
53. *See Ascom*, para. 12. Cf. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99 ('*Jurisdictional Immunities*'), para. 113. *See also* Chester Brown & Roger O'Keefe, *Article 19*, in: The United Nations Convention on Jurisdictional Immunities of States and Their Property, ed. O'Keefe et al. (Oxford University Press, 2013) 308 ('Brown and O'Keefe, *Article 19*'), at p. 315 (referencing the legislation of several States).
54. *Jurisdictional Immunities*, para. 113; *see also Ascom*, at para. 12. *See further* Hazel Fox, QC and Philippa Webb, *The Law of State Immunity* (Revised and Updated 3rd ed., Oxford University Press, 2015) ('Fox and Webb, *The Law of State Immunity*'), pp. 484 et seq.; *see also* Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*.

to which property held by a foreign State in the State of the forum [is considered immune from execution] varies from refusal to recognize even the slightest exception to immunity, on the one hand, to notably advanced positions which require that such property be unequivocally allocated to activities *jure imperii*, on the other'.[55]

The major jurisdictions have now embraced the so-called restrictive doctrine on State immunity in respect of both jurisdiction and enforcement,[56] and few States today recognise absolute immunity of foreign States from execution measures within their territory.[57] This is also the principle informing the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (UNCSI or the 'Convention').[58]

As noted above, the restrictive doctrine distinguishes between acts performed in the exercise of sovereign authority, which are immune, and acts of a private or commercial nature, in respect of which the State may be subjected to the jurisdiction of national courts in foreign States. The distinction derives from an understanding that when a State enters the marketplace and acts commercially, it does not enjoy sovereign immunity in respect of those acts. Equally, when its property is used for commercial purposes, that property is not protected from execution measures through decisions by foreign courts.

As for measures of post-judgment constraint, such as attachment, arrest or execution, the UNCSI prescribes that States in connection with a proceeding before a court of another State may be subjected to such measures by the forum State's authorities in the circumstances described in Article 19 of the Convention.[59] Article 19(c) exempts from immunity property which the State uses for commercial purposes.[60]

The UNCSI is often used as a starting point for judicial analysis by domestic as well as international courts.[61] However, this instrument is not yet legally binding. In the 18 years since it was adopted, the Convention has attracted only 22 of the requisite 30 ratifications in order to be effective under its own terms and so has not entered into force. Sweden ratified the UNCSI in 2009 and has passed legislation which, once it

55. *Abbott v. Republic of South Africa*, Spain, Constitutional Court (Second Chamber), 1 July 1992, 113 International Law Reports 411 ('*Abbott v. South Africa*'), p. 420.
56. *See* Fox and Webb, *The Law of State Immunity*, p. 487.
57. *See* Reinisch, *European Court Practice Concerning State Immunity from Enforcement Measures*, p. 804.
58. The UNCSI was adopted by the General Assembly of the United Nations on 2 December 2004. *See* United Nations General Assembly resolution 59/38.
59. Article 19 of the UNCSI allows for execution of a judgment or award against State property when the State has given its consent, when the State has earmarked property for the satisfaction of the claim, or when the property is used for commercial purposes.
60. Article 19(c) of the UNCSI allows for post-judgment measures of enforcement such as seizure and execution against State property specifically in use or intended for use by the State for other than government non-commercial purposes, if such property is located in the territory of the forum State and has a connection with the entity against which the proceeding was directed.
61. *See*, e.g., *Sedelmayer*, paras 12–14 (noting that the UNCSI is not in force, and not in all aspects a codification of customary international law, but nevertheless expresses certain commonly recognised principles). *See also Republic of Kazakhstan and the National Fund of Kazakhstan v. Ascom et al*, Svea Court of Appeal, ÖÄ 7709-19, Decision, 17 June 2020, p. 10.

enters into force, will incorporate the Convention into Swedish law.[62] Since the Swedish law on State immunity will not enter into force until the UNCSI does, sovereign immunity in Sweden is, at present, only regulated through customary international law.[63]

It is widely considered that the UNCSI only partially reflects customary international law.[64] Specifically, as to the status of Article 19(c), this provision gave rise to long and difficult discussions during the drafting process. State practice on immunity from execution remains diverse and the scope of the customary international law obligation to refrain from execution measures against States is not well-defined. In the 2012 *Jurisdictional Immunities* case, the International Court of Justice declined to decide 'whether all aspects of Article 19 reflect current customary international law'.[65] However, it confirmed that measures of constraint may be taken against property belonging to a foreign State, but only if the property is 'in use for an activity not pursuing government non-commercial purposes' (or the State has consented to execution or allocated property for satisfying the claim).[66] This statement preserves immunity for property used for sovereign activities and confirms the customary international law status of the rule that commercial State property may be subject to enforcement measures by other States.

The Swedish Supreme Court came to the same conclusion the year before, in the 2011 *Sedelmayer* case, where it applied 'the principle now recognised by many States that enforcement can take place at least in certain State-owned property, namely in property used for other than governmental non-commercial purposes'.[67] The Court declared that 'immunity from enforcement measures may be invoked at least in respect of property used for the official functions of a State'.[68] It was, however, quick to add that the rule 'should not be regarded as conferring immunity from measures of constraint already on the basis that the property in question is owned by a State and used by it for a non-commercial purpose'.[69] The Court instead set the bar higher, requiring that the property was in use or intended for use in connection with sovereign activity (i.e., *acta jure imperii*).

In *Ascom*, the Court referenced and elaborated on its stance in the *Sedelmayer* case,[70] confirming that Swedish courts apply a relatively high threshold for State

62. Sweden signed the Convention on 14 September 2005 and ratified it on 23 December 2009. On 10 December 2009, Sweden passed act (2009:1514) on the immunity of States and their property, incorporating the Convention into domestic law. The law will enter into force upon executive decision.
63. *See Ascom*, para. 16.
64. *See Sedelmayer*, para. 12.
65. *Jurisdictional Immunities*, para. 117.
66. *Jurisdictional Immunities*, para. 118.
67. *Sedelmayer*, para. 14. *See further* UNCSI, Art. 19(c).
68. *Sedelmayer*, para. 14.
69. *Sedelmayer*, para. 14.
70. *See Ascom*, para. 19.

immunity from execution and providing further guidance on what constitutes sovereign activity or 'official functions of a State'.[71]

[B] Denying Immunity *Ipso Facto* for SWFs

Second, the Court declared that the fact that the seized assets formed part of a SWF did not, as such, affect whether they were immune from enforcement, thereby denying any categorical immunity to this class of State assets.[72] In other words, the very fact that the funds belong to the State or have been accumulated through sovereign activities does not confer immunity.

In confirming that State saving for future needs in itself is not a sovereign activity,[73] the Court overturned the decision of the Court of Appeal, which held that the management of State finances through a SWF should be regarded as *acta jure imperii* and that already on this ground should SWF property be immune.[74]

The Court also departed from similar views adopted by courts in the United Kingdom and the Netherlands. The Dutch Supreme Court held in a decision in late 2020 (pertaining to a related enforcement action but concerning a different Kazakh SWF, Samruk) that increasing the national prosperity of the State constitutes a sovereign purpose in itself.[75] Importantly, the Dutch court held that whether or not the funds were intended for public use had to be ascertained by assessing the fund as a whole and not the specific holding that was subject to seizure.[76] An earlier, much-commented, decision rendered by the English High Court in 2005, *AIG v. Kazakhstan*, took the same view of State saving.[77] This decision also related to the NFK and its arrangement within the NBK but was taken in the context of enforcing an award rendered under the Arbitration Rules of the International Centre for Settlement of Investment Disputes. In its decision, the English court held that the aim 'to enhance the National Fund' was 'part of the overall exercise of sovereign authority'.[78]

Neither the Dutch nor the English decision was referenced in the Swedish Supreme Court's decision, but both cases were pleaded by the parties and submitted as

71. *See* below in section §8.04[C].
72. *See Ascom*, paras 30–33.
73. *Ascom*, para. 45.
74. *Republic of Kazakhstan and the National Fund of Kazakhstan v. Ascom and Others*, Svea Court of Appeal, ÖÄ 7709-19, Decision, 17 June 2020, p. 24.
75. *Republic of Kazakhstan v. Ascom and Others*, Netherlands, Supreme Court, Judgment, 18 December 2020, ECLI:NL:HR:2020:2103, paras 3.2.2–3.2.5.
76. *See Republic of Kazakhstan v. Ascom and Others*, Netherlands, Supreme Court, Judgment, 18 December 2020, ECLI:NL:HR:2020:2103, para. 3.2.4 (rejecting the Dutch Court of Appeal's approach to consider the immediate purpose of the seized assets). *See* further below in section §8.04[C].
77. *See AIG Capital Partners, Inc. and Another v. Republic of Kazakhstan*, England, High Court of Justice, 20 October 2005 [2005] EWHC 2239 (Comm) ('*AIG v. Kazakhstan*'), para. 92 ('Management of a State's economy and revenue must constitute a sovereign activity.'). For discussion of this case, *see*, e.g., David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors*, OECD Working Papers on International Investment No. 2010/02, 2010, pp. 21–23.
78. *AIG v. Kazakhstan*, para. 92.

part of the record. The fact that the Swedish Supreme Court came to a diametrically different conclusion must therefore be viewed as a conscious departure from the position taken by these other courts on this point.[79]

[C] Determining the Purpose for Which Assets Are Used

Third, the Court elaborated on relevant factors for determining the purpose of invested financial assets.

Applying the test devised in *Sedelmayer* to the SWF funds at issue,[80] the court observed that the use for which financial assets are intended may not be immediately apparent.[81] In its analysis of the purpose, the Court considered four related elements: (1) the risk assumed by the State in making the investment; (2) the objective sought with the holding of the specific assets; (3) the expressed objective of the portfolio of which the assets formed part; and (4) the ease with which funds could be withdrawn from the fund to be assigned for clearly sovereign activities.

As to the risk assumed by the State when investing the SWF assets in question, the Court observed that when a State invests in listed shares and similar securities (as was the case with the property in *Ascom*), it becomes 'exposed to the same commercial risks as the undertakings in which the investments are made'.[82] According to the Court, 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. This, the Court held, could not be seen as 'an outflow of the State's sovereign activity'.[83]

The Court's position finds support in findings of Belgian courts in related proceedings. In 2018, a court in Brussels denied immunity to the NFK savings portfolio, noting that the 'attached securities and cash must be considered to be long term investment objects' and that the 'increase of the profitability of the assets in the long term is a commercial activity'.[84] In June 2021, a Belgian Court of Appeal concurred that '[p]ure investments do not fall under the protection of state immunity'.[85]

The Swedish Supreme Court was, however, more pronounced in considering how the nature of the property, the inherent risk profile and the kind of transactions the property was involved in could reveal the purpose for which it was intended.

79. Cf. *Republic of Kazakhstan and National Bank of Kazakhstan v. Stati et al*, Belgium, Brussels Court of Appeal (Seventeenth Division), Cases Nos 2018/AR/1209 and 2018/AR/1214, Judgment, 29 June 2021, p. 39 (arriving at a similar conclusion to the Swedish Supreme Court and insisting that it was not bound by the December 2020 decision of the Dutch Supreme Court and did not find references to this case law helpful).
80. *See Ascom*, para. 19; cf. *Sedelmayer*, para. 14.
81. *See Ascom*, para. 25.
82. *Ascom*, para. 28.
83. *Ascom*, para. 28.
84. *Republic of Kazakhstan v. Stati et al*, Belgium, Brussels Court of First Instance, Case No. 2017/4282/A, Decision, 25 May 2018, p. 15 (unofficial translation from Flemish).
85. *Republic of Kazakhstan and National Bank of Kazakhstan v. Stati et al*, Belgium, Brussels Court of Appeal (Seventeenth Chamber), Cases Nos 2018/AR/1209 and 2018/AR1214, Judgment, 29 June 2021, p. 40 (unofficial translation from Flemish).

These considerations may be viewed as controversial, walking a fine line between the activity-based test commonly used for the commerciality exception in respect of immunity from jurisdiction and the purpose-based test used for the commerciality exception in respect of immunity from enforcement. Holding stakes in listed companies or other placements on international financial markets is of course an activity that a private individual could equally undertake. However, under Article 19(c) of the UNCSI (and, arguably, customary international law), it is the purpose of the use for which property is intended that is determinative.[86] Indeed, sovereign States may undertake acts that could be undertaken by a private party but with a different, public or sovereign, objective in mind. Interestingly, the Court in *Ascom* expressly drew on the purpose for which a private party would normally hold the same type of assets.[87] Notably, Kazakhstan had not proffered any information about the specific intended purpose of the seized shares.

The basic point of the Court's reasoning is, however, that saving, investment and wealth management per se are not intrinsically sovereign purposes. In line with German jurisprudence, the Court reasoned that the purpose of the property could be determined with reference to the kind of activity in which the property was used.[88] Funds managed through inherently commercial activities can only enjoy immunity if 'qualified purposes of a sovereign nature … come to concrete and clear expression in the State's regulation of how the property is to be used'.[89] In other words, where indications based on risk appetite and investment horizon suggest a purely commercial purpose, the State will need to produce some evidence that the funds are indeed connected to its sovereign activities.[90]

In this case, Kazakhstan did not produce an official statement as to the sovereign purpose of the assets.[91] The question is, however, whether the Court would have been amenable to rely blindly on the State's own (possibly self-serving) *ex post facto* statement as to the intended use. Notably, in Sweden, there is not, as in, for example, the United Kingdom, legislation and case law providing that a statement by the competent authorities that certain property is intended for public use constitutes authoritative proof of the property's purpose.[92] Such legislation considerably raises the

86. *See* Brown and O'Keefe, *Article 19*, p. 323.
87. *See Ascom*, para. 28.
88. Cf. *Central Bank of Mongolia*, Germany, Federal Court of Justice, Decision, 4 July 2013, VII ZB 63/12 ('*Central Bank of Mongolia*'), para. 12 (finding an asset to be in use for sovereign purposes if it is in use for a sovereign activity).
89. *Ascom*, para. 28.
90. Cf. Slawotsky, *Sovereign Wealth Funds and Jurisdiction under the FSIA*, p. 981 ('A record of investments would serve to corroborate whether a stated intended purpose is true. […] If the SWF's investment record established a pattern of investing in highly speculative derivate transactions betting on continuous increases in that nation's export, that would serve to undermine the stated goal.')
91. Cf. *AIG v. Kazakhstan*, para. 25 (where the Ambassador of Kazakhstan to the United Kingdom had produced a certificate under section 13(5) of the State Immunity Act 1978 to the effect that the assets against which enforcement was sought 'have never been used for commercial purposes [and] are not intended to be used for such purposes').
92. *See* s. 13(5) of the State Immunity Act of 1978. Cf. *Alcom Ltd v. Republic of Colombia and Others*, England, House of Lords, [1984] AC 580, at p. 604.

burden of proof incumbent on the party seeking enforcement against that property to show that the funds in question are earmarked, specifically and exclusively, for commercial transactions.[93]

Instead, the Court examined the arrangements within the NFK and in particular the distinction between its two portfolios and their stated objectives.[94] As discussed above, SWFs sometimes have loftier overarching objectives, but in the Court's view, the regulations of the NFK did not identify concrete sovereign purposes;[95] nor was there any decision issued before the seizure of assets specifying Kazakhstan's intention to use the seized assets for any particular sovereign activity.

The Court's approach would seem to allow States to preserve the immunity of SWFs by setting up such funds to serve more tangibly sovereign objectives and by being more precise about the purposes of such funds. However, to merely manage State wealth to ensure the prosperity and future needs of a country's population is too vague and remote a purpose to justify immunity in accordance with Article 19 of the UNCSI. The Court expressly held that 'the mere fact that the State in the future 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'.[96] All funds of a State may in theory be reassigned for sovereign purposes and are in some sense ultimately for the benefit of its people. Immunity for State-controlled assets regardless of whether or not they have been assigned or appropriated for any particular sovereign activity would in essence amount to absolute immunity, negating the restrictive doctrine.

In the final step, the court considered the procedure through which the State could withdraw money from the fund for reallocation, such as, e.g., reinforcing the State budget and financing State actions or public services, and whether this connection was 'sufficiently concrete' to justify immunity.[97] This investigation into the nexus between the seized assets and activities that could be regarded as *acta jure imperii* reflects a sophisticated approach offering reasonable flexibility for the courts to appraise the circumstances that may warrant immunity of State assets in other cases in the future. In *Ascom*, it also allowed the Court to consider not only the purpose of the seized local assets (arguably entirely commercial) or only the objective of the SWF as a whole (which may be more public in nature), but both, and the connection between

93. Cf. the similar situation in the Netherlands, *see* Pieter H.F. Bekker and Jacques F. de Heer, *Enforcement of Arbitral Awards Against Sovereigns: The Netherlands*, in: Enforcement of Arbitral Awards Against Sovereigns, ed. Bishop (JurisNet, 2009) 381, at p. 412.
94. *See Ascom*, para. 32.
95. Pursuant to Decree of the President of the Republic of Kazakhstan No. 402 on the National Fund of the Republic of Kazakhstan, 23 August 2000, the NFK was established 'to ensure a stable social and economic development of the country, accumulation of financial resources for future generations [and] reduce the dependence of the economy on the impact of unfavorable external factors'. Decree No. 385 describes the goal of the NFK as being 'to preserve financial resources by accumulating savings for future generations and reducing the national budget's dependence on global commodity markets'.
96. *Ascom*, para. 28.
97. *See Ascom*, para. 46.

the two. This seems preferable to the approach adopted, for example, by the Dutch Supreme Court in 2020, focusing entirely on the overarching goal of the SWF.[98]

A national court considering immunity will normally do so as part of its investigation into its jurisdiction to issue a certain judgment or order. Under international law, States are permitted to act within their jurisdiction unless they are legally obligated to refrain from doing so.[99] The obligation to recognise the immunity of other States and their property is one such restriction on the competence of States to act within their territory.[100] Since immunity applies in relation to a particular forum State, where immunity is invoked as a jurisdictional defence, it makes sense to focus on the immunity of the property located within that jurisdiction, and thus the ascertainable purpose of the same.[101]

The Court's focus on the immediate purpose of the funds (as opposed to the future use the State may make of the value of the same) echoes the views of courts in other jurisdictions. For example, a German district court concluded already in 1975 in a case concerning enforcement against the respondent State's cash and securities accounts that the assets were not 'in the public service' of the State and held that 'a possible use of these assets in the future to finance state business cannot serve to establish their present immunity'.[102] Similarly, the Swiss Federal Tribunal concluded in 2000, in a case concerning enforcement against a bank account of Kazakhstan, that: 'the aim pursued by the State cannot be decisive, since this aim always aims, in the final analysis, at a State interest. The first thing to be examined is the intrinsic nature of the operation set up by the State: it is a question of determining whether the act is a matter of public authority or whether it is a legal relationship which could, in an identical or similar form, be entered into by two private individuals'.[103] The same point was confirmed by a Belgian court in proceedings relating to *Ascom*, referenced above, noting that 'in the long term, a State will always aim for sovereign goals of public interest' and that consequently the 'starting point for the assessment [of immunity of State funds] is the specific, actual, current use of the funds', with appropriate weight

98. *See* above in section §8.04[B].
99. *See* Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed. Oxford University Press, 1992), pp. 456 et seq.
100. *See Jurisdictional Immunities*, para. 56.
101. Cf., e.g., *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, 13 February 2019, I.C.J. Reports 2019, p. 7 ('*Certain Iranian Assets*'), paras 93–97 (where the International Court of Justice held that in order to examine the status of the Iranian central bank as acting in a sovereign or commercial capacity, it needed to consider the bank's activities within the territory of the United States); *see further* on this case below in section §8.04[E]. Whether or not seized assets in *Ascom* are located in the Swedish jurisdiction remains contentious and will be subject to further proceedings before the Svea Court of Appeal.
102. *Non-resident Petitioner v. Central Bank of Nigeria*, Germany, Frankfurt Provincial Court, 1 December 1975, 65 International Law Reports 131 ('*Central Bank of Nigeria*'), p. 135.
103. *Republic of Kazakhstan and Another*, Switzerland, Federal Tribunal, Judgment No. 1P.581/2000, 8 December 2000, s. 2(c) (unofficial translation from French).

given to the context.[104] What appears in these jurisdictions is a nuanced, functional approach, similar to that adopted by the Swedish Supreme Court.

[D] Reigning in Central Bank Immunity

Fourth, the decision in *Ascom* clarified that SWF assets cannot enjoy immunity simply because the fund and its assets are held, controlled or managed by a central bank.

It has long been unclear to which extent States can protect their SWF assets by administering them through their central banks.[105]

As State practice has endorsed the restrictive theory on immunity from execution, certain States have carved out exceptions in domestic regulation for certain types of property viewed as by default intended for sovereign use. This practice is reflected in Article 21 of the UNCSI, which preserves immunity for property used for diplomatic missions or military performance, central bank property, cultural heritage or archival property and exhibit objects of scientific, cultural or historical interest. Specifically, Article 21(1)(c) of the UNCSI provides that the property of the central bank or other monetary authority of the State should not be considered as property specifically in use or intended for use by the State other than government non-commercial purposes under Article 19.

However, as set out above, Article 21 is not yet binding; nor is the rule widely regarded as reflecting custom.[106] There is no consistent State practice on central bank immunity from enforcement measures.[107] Certain States treat central bank property as any other property.[108] Others recognise an enhanced or automatic immunity for central banks, albeit in some cases on the condition either that the funds are held by the central bank on its own account or that it is used by the central bank for sovereign purposes or both.[109] Some States grant near-absolute immunity from enforcement against all State property, including central bank property.[110] Consequently, the parties in *Ascom* presented the Court with considerable investigations into State practice and *opinio juris* to establish the customary international law on central bank immunity. The Court, however, concluded that the extent and scope of immunity for central bank property under customary international law is simply unclear, noting in particular the different

104. *Republic of Kazakhstan and National Bank of Kazakhstan v. Stati et al*, Belgium, Brussels Court of Appeal (Seventeenth Chamber), Cases Nos 2018/AR/1209 and 2018/AR1214, Judgment, 29 June 2021, pp. 38–39.
105. *See* Wuerth, *Immunity from Execution of Central Bank Assets*, n. 103.
106. *See* Chester Brown & Roger O'Keefe, *Article 21*, in: The United Nations Convention on Jurisdictional Immunities of States and Their Property, ed. O'Keefe et al. (Oxford University Press, 2013) 334, at p. 347.
107. Wuerth, *Immunity from Execution of Central Bank Assets*, pp. 269–278.
108. For example, Australia, Canada and Israel. *See* Wuerth, *Immunity from Execution of Central Bank Assets*, pp. 276–277.
109. For example, US, Germany, Switzerland, France and Belgium. *See* Wuerth, *Immunity from Execution of Central Bank Assets*, pp. 269–271.
110. For example, Argentina, China and Japan. *See* Wuerth, *Immunity from Execution of Central Bank Assets*, pp. 271–276.

views expressed during the drafting of the Convention and the lack of consistent State practice on central bank immunity.[111]

To complicate things, State practice in this area, such as domestic legislation on State immunity and court decisions applying the same, may often derive from other considerations than complying with international law. National immunity laws commonly reflect policy choices based on political or practical considerations, e.g., to attract foreign central bank investments to the jurisdiction,[112] avoid litigation that would be considered embarrassing or harmful to inter-State relations,[113] or ensure reciprocal treatment by other States. While some jurisdictions grant extensive immunity to central bank property, this is usually the result of national legislation: were it not for that, central bank property would often be viewed as property held for a commercial purpose and not enjoy immunity.[114] Legislation passed or applied out of 'considerations of convenience or simple political expediency' does not express the sense of legal obligation needed to establish customary international law.[115] As noted by the International Court of Justice (ICJ) in the *Jurisdictional Immunities* case: 'While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon [the scope of immunity recognised under customary international law].'[116]

Trends in domestic regulation towards enhanced central bank immunity are tempered by various conditions introduced by States, such as reciprocity requirements that extend immunity only to the property of central banks of States that would equally

111. *See Ascom*, para. 21.
112. *See* Wuerth, *Immunity from Execution of Central Bank Assets*, p. 274 (noting that France in 2015 enacted legislation with the aim of protecting foreign central banks assets and encouraging investment of such assets in France; and equally that Belgium in 2008 enacted legislation designed to make Belgium an attractive place for foreign central banks to deposit their assets). *See also* generally Fox and Webb, *The Law of State Immunity*, p. 486.
113. *See*, e.g., *AIG v. Kazakhstan*, para. 58 ('The assets of a State's central bank (or monetary authority) would be an obvious target for the enforcement process in relation to judgments against the State or its central bank (etc). This might lead to unwelcome and perhaps embarrassing litigation in UK courts. Therefore this possibility was pre-empted by the all-embracing and imperative immunity granted by section 14(4).')
114. *See*, e.g., *AIG v. Kazakhstan*, para. 53 ('if section 14(4) did not exist, then because central banks and other monetary authorities are not excluded from the scope of section 14(1), a central bank (etc) that is a department of the government of a State and is not a "separate entity", (as defined), and its property could be the subject of an enforcement process in respect of a judgment obtained against the relevant State'.). *See also*, as regards US law, Jeremy Ostrander, *The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments* (2004) 22 Berkeley Journal of International Law 541, p. 569 (noting that '[w]ithout section 6011 [of the FSIA], a foreign central bank engaged in almost any investment or deposit in the United States would, by the nature of such an activity be acting as a private player rather than as a regulator, and hence, its property would fall within the commercial exception'.).
115. *Colombian-Peruvian asylum*, International Court of Justice, Judgment, 20 November 1950, I.C.J. Reports 1950, p. 266, at pp. 277 and 286.
116. *Jurisdictional Immunities*, para. 55.

recognise immunity of the forum State's central bank assets[117] or requirements that the property in question is used for typical central banking activities and not for other, commercial, purposes.[118]

In the absence of any customary international law to guide its decision on central bank immunity, the Court in *Ascom* examined the interests involved and the justification for enhanced immunity for central bank property. The court opined that in respect of funds controlled by a central bank, immunity from enforcement should not necessarily be limited to property which the central bank legally owns or holds in its own name. However, nor did it accept that immunity should extend to all assets that a central bank controls regardless of their use.[119] SWF assets that have no specific sovereign purpose would not be immune merely because they are managed by a central bank.

With this functional interpretation, the Swedish Supreme Court again departed from the approach of the Svea Court of Appeal, which had taken an explicitly categorical approach. Guided by Article 21(1)(c), the Court of Appeal held that immunity did not depend on the use the central bank made of the assets in question.[120]

The Swedish Supreme Court's finding also departs from the decision of the English High Court in *AIG v. Kazakhstan* regarding the same arrangement involving the NFK and the NBK. The English court, with reference to provisions under the English State Immunity Act of 1978, found that the central bank held a 'kind of "property" interest', conferring immunity on the property 'irrespective of the capacity in which the central bank holds it, or the purpose for which the property is held'.[121] The Court in *Ascom,* however, having no such domestic legislation to relate to, found no basis for immunity of 'property which the bank controls without there being a connection with the bank's mission in terms of monetary policy'.[122]

Central banks are traditionally responsible for setting and executing monetary policy and overseeing the banking system and financial infrastructure. They do so through interventions that require access to reserve capital and commonly manage funds for this purpose. However, it is less common to entrust central banks with more general wealth management tasks.[123] The fund management that central banks undertake for their own capital is usually guided by a relatively low tolerance for risk

117. *See* Wuerth, *Immunity from Execution of Central Bank Assets*, pp. 266 and 270–276. Professor Wuerth consequently stated in an expert opinion filed in the *Ascom* case that '[i]n practice, [certain] important countries would not afford categorical protection of central bank assets of countries like the United States, Germany, Switzerland and the many other countries that do not give categorical protections'. *See* Ingrid Wuerth, *Expert Report in the Republic of Kazakhstan and the National Bank of the Republic of Kazakhstan v. Anatolie Stati, et al Before the Supreme Court in Case No. Ö 3828-20*, 10 February 2021 ('Wuerth Expert Report'), Exhibit S-95, p. 4.
118. *See* further below in section §8.04[F].
119. *See Ascom*, para. 23.
120. *Republic of Kazakhstan and the National Fund of Kazakhstan v. Ascom and Others*, Svea Court of Appeal, ÖÄ 7709-19, Decision, 17 June 2020, at p. 26.
121. *AIG v. Kazakhstan*, para. 61.
122. *Ascom*, para. 24.
123. *See* survey by Bank for International Settlements, Central Bank Governance Group, *Issues in the Governance of Central Banks*, May 2009, pp. 28–31.

and loss and is not driven by financial outcomes as such, in contrast with the diversified investment strategy and higher level of risk generally accepted by SWFs.[124] This longer investment horizon for SWFs is possible precisely because such assets are normally not used for currency interventions or other realisations of monetary policy.[125] Where central banks manage funds through more volatile investment, such funds have in fact sometimes been viewed as SWFs rather than central bank funds, precisely because the purposes are assumed to differ from traditional central bank investments.[126] In the same vein, the standard definition of SWFs under the Santiago Principles explicitly excludes 'foreign currency reserve assets held by monetary authorities for the traditional balance of payments or monetary policy purposes'.[127]

Arguably recognising these fundamental differences, the Court in the *Ascom* case acknowledged that the seized assets were used exclusively for wealth management on commercial terms with no functional connection to central bank activities and therefore did not enjoy immunity.[128] This approach indeed seems more in line with the structure of the UNCSI as regards the immunity of assets, the purpose-oriented test for immunity from execution in Article 19(c) and the enhanced immunity provided by Article 21.

Article 21 does add an extra layer of protection for certain classes of property, but arguably based on the function served by such property and the particular role that it serves in certain sovereign activities. The property classes included in Article 21 have in common that they commonly sit in foreign jurisdictions and may include property that could otherwise be regarded as commercial. Diplomatic missions are by their nature located abroad and may make use of property such as buildings, cars and moneys on account. The property of forces stationed abroad under visiting forces agreements or forces engaged in operations on foreign soil are habitually located in other jurisdictions and may include not just typically military assets but also items such as trucks or supplies. Central banks commonly hold foreign currency reserves to facilitate intervention to stabilise currency rates or inflation and often hold considerable foreign assets to be able to act even if their markets experience volatility or severe downturn. The exceptions for cultural heritage property or other exhibition objects would appear to target museum artefacts on loan to foreign institutions and the like.[129] What is common to the listed items is that this property is of a type that could appear in commercial contexts, but it may also, in a more particular context, allow the State to realise its sovereign or foreign policies, protect its relationships with other States,

124. *See* Haeri et al., *Sovereign Wealth Funds: Transnational Regulation and Dispute Resolution*, p. 11.
125. *See* Hsu, *Sovereign Wealth Funds: Investors in Search of an Identity*, p. 4; and Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, p. 11 (both emphasising SWFs' risk appetite).
126. *See* Khalid A. Alsweilem et al., *Sovereign Investor Models: Institutions and Policies for Managing Sovereign Wealth*, Belfer Center for Science and International Affairs and Center for International Development, Harvard Kennedy School, April 2015, pp. 12 and 91.
127. *Santiago Principles*, p. 27 (Appendix I. Defining Sovereign Wealth Funds).
128. *Ascom*, para. 41.
129. *See Immunitet för utställningsföremål, Betänkande av utredningen om skydd mot processuella åtgärder mot inlånade kulturföremål*, SOU 2021:28, April 2021.

safeguard its ability to deploy its military, preserve its sense of cultural identity, and so on. As highlighted in one of the expert reports presented to the Court: 'the purpose of Article 21(1)(c) is not to provide blanket immunity for categories of property without reference to the nature or use of that property – the purpose of Article 21(1)(c) is instead to make clear that the nature of some property renders it in use for governmental purposes'.[130] Wealth placed in SWFs may certainly be important to States but in much more general ways. In contrast to central bank property, the function of these funds is not to guarantee their country's monetary and financial system.[131] A seizure of such funds would of course affect the State's general resources in a similar way as a voluntary payment under an award, but it would not appear to deprive the State of any immediate means for fulfilling sovereign functions in the same way as a seizure of property listed in Article 21.

[E] Affirming a Nordic Position on Central Bank Immunity

Fifth, in underscoring the connection with the exercise of monetary authority, the Court appears to have embraced the position previously adopted by the Nordic States in the elaboration of the UNCSI.

During the drafting of the Convention, the Nordic countries proposed language to specify that the provision in Article 21(1)(c) was directed only at funds used for monetary purposes. The Nordic countries were concerned that if the property of central banks in the territory of other States was to be unconditionally excluded from execution, this presumed that 'because central banks are instruments of sovereign authority any activity they undertake must be covered by immunity from execution. However, if the foreign property of a central bank is used or intended for use by the State for commercial purposes, it might be logical not to treat it differently from other State property that fulfils this condition'.[132] The Nordic States thus wished to distinguish clearly between *acta jure imperii* and *acta jure gestionis*, underscoring that the doctrine of restrictive immunity was based on the view that 'once a foreign State has entered the market place it should be treated in the same way as others in the market place'.[133]

The proposal was rejected on the view that central banks were regarded as always being 'instruments of sovereign power' which engaged exclusively in sovereign activity, making further clarification superfluous.[134] However, the reason for the rejection of the clarification does not necessarily support a categorical interpretation decoupled from the purpose for which the property is used. It rather conveyed an

130. Wuerth Expert Report, p. 4.
131. Hahn, *State Immunity and Veil Piercing in the Age of Sovereign Wealth Funds*, pp. 116–117.
132. International Law Commission, *Jurisdictional immunities for States and their property*, Yearbook of the International Law Commission (1988), Volume II, Part One, UN Doc. A/CN.4/SER.A/Add.1 (Part 1), p. 78.
133. *See Immunitet för stater och deras egendom*, SOU 2008:2, December 2007, p. 107.
134. *See* International Law Commission, *Jurisdictional immunities for States and their property*, Yearbook of the International Law Commission (1990), Volume II, Part Two, UN Doc. A/CN.4/SER.A/1990/Add.1 (Part 2), p. 42.

understanding (prevailing at the time) of what role central banks play in sovereign governance. By contrast, the pervasive use of SWFs and their some-time management by central banks was arguably not foreseen at the time and, as far as known, not discussed during the drafting of the UNCSI.

State practice shows that central banks today can be given tasks that are not necessarily connected with sovereign activities. For example, in the pending case of *Certain Iranian Assets*, the ICJ undertook to examine the activities of the Iranian central bank Bank Markazi within the territory of the United States (US) in order to determine whether the bank constituted a company for the purposes of the US-Iran Treaty of Amity. The relevant criterion was whether the bank engaged in activities of a commercial nature or whether it carried out exclusively sovereign functions on behalf of Iran. While the ICJ has yet to determine definitively the status of Bank Markazi, it found as a matter of principle that a central bank indeed could pursue not only sovereign but also commercial objectives in the territory of other States.[135]

[F] Aligning with Germany, the US and Switzerland

Sixth, by requiring a connection between the funds under management and traditional central banking functions, the Court aligned Swedish jurisprudence with certain strands of international practice.

Germany and the US are examples of jurisdictions that also, with some nuance, 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', thereby restricting central bank immunity to funds used for typical or paradigmatic central bank activities and functions. Both US and German case law has distinguished between traditional paradigmatic sovereign tasks of central banks, i.e., where the bank acts as a regulatory authority, as opposed to tasks where the bank does not fulfil a public mission and does not act as an emanation of the State.[136]

Under German law, central bank property is immune from execution only when used or intended for non-commercial purposes.[137] Consequently, central bank assets used entirely for commercial investments are arguably not immune from attachment under German law. The connection with a sovereign purpose is a long-standing requirement in Germany, which, like Sweden, has no domestic law on State immunity but applies customary international law.[138] Already in 1977, the German Federal Constitutional Court restricted immunity from execution to property used for sovereign purposes.[139] Pursuant to a 2013 decision of the German Federal Supreme Court,

135. *See Certain Iranian Assets*, paras 87–92.
136. *See*, e.g., *EM Ltd and NML Capital Ltd v. Banco Central de República de Argentina*, United States, Judgment, 5 July 2011, 652 F.3d 172 (2d Cir 2011) ('*NML Capital v. Banco Central de Argentina*'); *Central Bank of Mongolia*, para. 10 (finding that sovereign assets are immune from execution to the extent they serve sovereign purposes).
137. *Central Bank of Nigeria*, pp. 135–136.
138. *See* Art. 25 of the German constitution.
139. *See* the seminal *Philippine Embassy* case, Germany, Federal Constitutional Court, Judgment, 13 December 1977, 65 International Law Reports 146 ('While general rules of international law

currency reserves owned by central banks are considered immune because and to the extent that they serve sovereign purposes and ensure the State's international capacity to act as a public authority.[140] *A contrario*, funds held by a central bank without a connection to such purposes are arguably not immune.

US law similarly requires a connection with central bank activity. However, the criterion is differently formulated. Pursuant to the Foreign Sovereign Immunities Act of 1976, central bank property is immune from execution if the funds are held by the central bank 'for its own account'.[141] In practice, this has been interpreted to mean that the funds are used for traditional and paradigmatic central bank functions, like the accumulation of currency reserves or bank reserves intended to facilitate interventions in currency or financial markets.[142]

In requiring a concrete connection to sovereign purposes, the Swedish Supreme Court also aligned with Swiss courts, which have held central bank assets to be immune only if the measures of execution concern assets allocated for the performance of acts of sovereignty[143] and required that assets are earmarked for concrete public goals in order to qualify for immunity.[144] Swiss courts have maintained that '[i]mmunity can therefore only be claimed by reason of the nature of the assets subjected to the attachment where those assets are allocated in an identifiable manner for the performance of a sovereign function. […] [A] plea of immunity is inadmissible, in respect of money and securities, unless the documents or specified sums have been designated for the performance of such tasks'.[145]

[G] Recognising the Award Creditor's Legitimate Interests

Seventh, the Court explicitly acknowledged that the award creditor has a legitimate right of enforcement. State immunity imposes a de facto restriction on the availability of execution measures for parties with a claim against a sovereign entity. Execution measures are recognised as an element of the access to court guaranteed under Article

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thus impose no outright prohibition on execution by the State of the forum against a foreign State, they do impose material limits on execution. There is an established general custom among States, backed by a legal consensus, whereby the State of the forum is prohibited by international law from levying execution, under judicial writs against a foreign State, on property of the foreign State which is situated or present in the State of the forum and is used for sovereign purposes of the foreign State, except with the latter's consent.'). The approach was followed by constitutional courts in, e.g., Spain and Italy. *See Abbott v. South Africa*; *Condor and Filvem v. Minister of Justice*, Italy, Constitutional Court, Case No. 329, Judgment, 15 July 1992, 101 International Law Reports 394.

140. *Central Bank of Mongolia*, paras 10–15.
141. 28 U.S. Code § 1611(b)(1).
142. *See NML Capital v. Banco Central de Argentina*, pp. 194–195.
143. *See Banque Bruxelles Lambert (Suisse) SA and Others v. Paraguay*, Switzerland, Federal Supreme Court, 20 August 1998, ATF 124 III 382, p. 389.
144. Sandrine Giroud, *Enforcement Against State Assets and Execution of ICSID Awards in Switzerland: How Swiss Courts Deal with Immunity Defences* (2012) 4 ASA Bulletin 758, p. 760.
145. *See Libyan Arab Jamahiriya v. Actimon SA*, Switzerland, Federal Tribunal, Judgment, 82 International Law Reports 30, 24 April 1985, pp. 35–36; *Banque centrale de la République de Turquie v. Weston Compagnie de Finance et d'Investissement SA*, Switzerland, Federal Tribunal, Judgment, 15 November 1978, 65 International Law Reports 417.

6 of the European Convention on Human Rights (ECHR) because without adequate opportunities for execution, a right to judicial determination of one's claim amounts to precious little. Consequently, the European Court of Human Rights (ECtHR) has declared that the right to access to court encompasses a right to enforcement of judicial decisions rendered: 'The right of access to a tribunal would be illusory if a Contracting State's legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. Execution of a judgment given by any court must be regarded as an integral part of the "trial" for the purposes of Article 6.'[146]

Admittedly, this right is not absolute but can be legitimately restricted to accommodate the respect for the equality of States, their sovereign functions and activities and to maintain a sense of comity and good relations in the community of nations.[147] Sovereign immunities is an important element to ensure that respect is grounded in the understanding that States have no jurisdiction over other States.[148]

However, pursuant to the case law of the ECtHR, this restriction on the effect of Article 6 is only acceptable as long as the immunity in question is mandated by international law.[149] Since the legitimate purpose that justifies denying access to a court is to ensure compliance with international law, it would follow that anything that goes further in that direction than what international law requires could be regarded as disproportionate. A mere liberty to treat the foreign State as immune could thus not legitimately restrict that access because the denial of access would be a discretionary choice on the part of the forum State.[150] Immunity gratuitously afforded would thus amount to an illegitimate restriction on access to court as guaranteed by the ECHR.[151]

146. *Kalogeropoulou v. Greece and Germany*, pp. 7–8. *See also Golder v. United Kingdom*, European Court of Human Rights, Application No. 4451/70, Judgment, 21 February 1975, paras 28–36. *See also*, in proceedings related to *Ascom*, the decision of the Brussels Court of Appeal in *Republic of Kazakhstan and National Bank of Kazakhstan v. Stati and Others*, Cases Nos 2018/AR/1209 and 2018/AR1214, Judgment, 29 June 2021, p. 37 (holding that the principle of immunity must be assessed against the fundamental right provided for in Article 6 ECHR).
147. *See*, e.g., *Fogarty v. United Kingdom*, European Court of Human Rights, Application No. 37112/97, Judgment, 21 November 2001, paras 33–34 ('*Fogarty v. United Kingdom*'); *McElhinney v. Ireland*, European Court of Human Rights, Application No. 31253/96, Judgment, 21 November 2001, paras 34–35; *Al-Adsani v. United Kingdom*, European Court of Human Rights, Application No. 35763/97, Judgment, 21 November 2001, para. 54; *Sabeh El Leil v. France*, European Court of Human Rights, Application No. 34869/05, Judgment, 29 June 2011, paras 51–54; *Cudak v. Lithuania*, European Court of Human Rights (Grand Chamber), Application No. 15869/02, Judgment, 23 March 2010, para. 60; *Jones and Others v. the United Kingdom*, European Court of Human Rights, Applications Nos 34356/06 and 40528/06, Judgment, 14 January 2014 ('*Jones v. United Kingdom*'), para. 188. *See* further Matthias Kloth, *Immunities and the Right of Access to Court under Article 6 of the European Convention on Human Rights* (Brill/Martinus Nijhoff, 2010), p. 15 ('the Court is usually prepared to consider the granting of immunity as legitimate').
148. Cf. the maxim *par in parem non habet imperium*, 'an equal has no authority over an equal'.
149. *See Fogarty v. United Kingdom*, paras 34–35.
150. *See Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Foreign and Commonwealth Affairs and Libya v. Janah*, United Kingdom, Supreme Court, Judgment, 18 October 2017, [2017] UKSC 62 ('*Benkharbouche*'), para. 34. *See also Jones v. United Kingdom*, paras 189, 196–198 and 201–215.
151. *See Benkharbouche*, para. 34.

For that reason, it is significant that the Court in *Ascom* explicitly rendered its decision with reference to customary international law and with a view to safeguarding the award creditor's rights.[152] Although the court did not refer to the ECHR in its decision, it thus arguably helped clarify the scope of the right to access to enforcement measures under the ECHR by clarifying the scope of immunity legitimately liming that access.

§8.05 CONCLUDING REMARKS

The *Ascom* case is given in the context of several shifts in the way States act in international commerce. First, States are increasingly involved in investments on commercial terms on foreign markets through ambiguous vehicles such as SWFs. Second, in the same way that States' increasing activity in the marketplace justified a more restrictive view of their immunity from the jurisdiction of local courts, States' increasing involvement in arbitral proceedings with private parties seems to demand that the awards resulting from such proceedings can be made effective.

The fact that the Court made its decision on the basis of customary international law makes the *Ascom* judgment all the more interesting. While it is indeed common for domestic courts to consider sovereign immunity objections to the competence of local authorities to order execution against certain assets, domestic courts will often do so with reference to domestic law and practice and may thus base their determination on, for example, foreign policy or reciprocity considerations. This may result in a broader scope of sovereign immunity than what follows from customary international law. In *Ascom*, the Court engaged clearly and exclusively with customary international law for its decision. The decision thereby constitutes an instance of State practice underpinned by an acceptance of that practice as law (*opinio juris*) and helps identify, define and consolidate the international custom on enforcement immunity.[153]

In our view, the *Ascom* decision strikes a sensible balance in its definition of the competing interests involved. By being guided by the immunity which *must* be recognised under international law, as opposed to the immunity that *could* be recognised, the Court navigated well the inherent tension between the respect for sovereign equality and State immunity, on the one hand, and, on the other, the award creditor's legitimate interest in access to enforcement mechanisms allowing it to be paid under the award. An award that cannot be enforced is worth little more than the paper it is written on. By circumscribing the immunity for commercial assets of States,

152. *See Ascom*, paras 13–14.
153. Regarding the formation of customary international law, *see* International Law Commission, *Draft conclusions on identification of customary international law*, YEARBOOK OF THE INTERNATIONAL LAW COMMISSION (2018), Volume II, Part Two, UN Doc. A/73/10, Conclusion 2 ('To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*).'); and *North Sea Continental Shelf*, Judgment, I.C.J. Reports 1969, p. 3, para. 77.

the decision represents a levelling of the playing field for enforcement of awards where States have appeared in arbitration, subject only to the restrictions on enforcement jurisdiction imposed by customary international law.[154] This is an important stance in support of the arbitration process.

154. *See Ascom*, para. 13.