SOVEREIGN IMMUNITY OF GOVERNMENTAL TRADING ENTITIES

BACCUS S.R.L. v. *SERVICIO NACIONAL DEL TRIGO*

The doctrines of absolute sovereign immunity were developed in an era of *laissez faire*, when international lawyers did not envisage State entry into trading, especially export trading on a great scale.[1] Now that States have assumed this role, these doctrines are under attack from many quarters.[2]

The Court of Appeal in the Baccus Case[3] allowed these doctrines (contrary to the general trend) to be still further extended. The plaintiffs were an Italian corporation trading in Italy; the defendants a Spanish corporation trading in Spain. Under the contract between them, any disputes were to be determined by the "technical courts at London". On September 9, 1954, plaintiff issued a writ out of the jurisdiction claiming damages for breach of contract; on October 20, 1954, an appearance was entered for the defendant corporation by their solicitors in London. After statement of claim was delivered and a consent order made for security for the defendant's costs, defendant asked that the proceedings be stayed and that the writ and statement of claim be set aside on the ground that the defendants were a department of the State of Spain and that that State through its Ambassador claimed soverign immunity. The defendants admitted that they were a separate legal person, with power to contract, sue and be sued in their own name. It was not disputed that, apart from the effect of incorporation, the defendants would be a department of the sovereign State of Spain, that the Spanish Minister of Agriculture, to whom the head of the defendants' directorate was directly subordinate, was the only person (apart from the Cabinet or head of the State) who had authority to decide whether to submit to the foreign jurisdiction, and that the above procedural steps were taken without that authority.

Sovereign immunity as affecting a department of State separately incorporated as a legal entity was thus for the first time before the English courts.[4] The majority[5] in the *Baccus Case*[6] held that the defendant government-organised trading corporation was still entitled to sovereign immunity. Jenkins, L.J. considered the important point to be that the defendants' separate legal personality was accorded only for the import and export of grain for the Government in accordance with directions of the Spanish Ministry of Agriculture under Spanish Government policy.

> In these days the government of a sovereign State is not, as a rule, reposed in one personal sovereign: it is necessarily carried out through a complicated organisation which ordinarily consists of many different ministries and departments. Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or unincorporated body seems to me to be purely a matter of governmental machinery.[7]

He thought it was an answer to the contrary view that once it is found on the evidence that the corporate party sued, and in which the foreign State is interested, is in truth a department of a sovereign State, although also a

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[1] See B. Fensterwald, "Sovereign Immunity and Soviet State Trading" (1950) 63 *Harv. L.R.* 614.

[2] See H. Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States" (1951) 28 *B.Y.B. Int. L.* 220. *Cf.* the recent U.S. cases discussed in D. C. Jackson, Note (1957) 2 *Sydney L.R.* 327-332.

[3] *Baccus S.R.L.* v. *Servicio Nacional Del Trigo* (1957) 1 Q.B. 438 (C.A.).

[4] In *Krajina* v. *Tass Agency (of Moscow)* (1949) 2 All E.R. 274, Cohen and Tucker, L.JJ. reserved for future consideration "the question whether or not the mere fact of a separate legal existence is necessarily inconsistent with the entity being part and parcel of a sovereign independent State."

[5] Jenkins and Parker, L.JJ. [6] (1957) 1 Q.B. 438. [7] *Supra*, at 466.

corporate body, then the suit must be seen as in effect one between the plaintiff and the foreign State or its department concerned. He conceded that not every such corporation is in truth such a department of State; whether it is depends on the nature of its activities, and the foreign sovereign's interest. He distinguished the *Ulen Case*[8] as involving a corporation with ordinary trading purposes, as to which there was no intention of constituting it a department of State, from the present case of a corporation "whose operations consist of purchasing and selling or importing and exporting staple commodities in the interest of the public for whom the foreign sovereign State is responsible".[9]

Singleton, L.J.'s dissent took the different tack that the international rule of immunity claimed must be shown to have been generally accepted by States before it will be applied by the English courts. He offered the *Ulen Case*[10] and cases there cited to negate such acceptance, and distinguished the *Tass Case*[11] from the instant case since the defendants there were not shown to be a separate legal person.[12] This dissenting approach, and the absence of square English authority, draws the attention of British lawyers to the different principles as to sovereign immunity generally, already long familiar among foreign courts and jurists.

The accepted English theory of absolute immunity allows the plea of immunity to be raised in every instance in which the foreign sovereign is impleaded, irrespective of the nature of the act of the sovereign which gave rise to the proceedings.[13] An alternative theory, however, is the principle of qualified immunity, which distinguishes between those acts of state, which are of a "public"[14] and those which are of a "private"[15] nature and denies the plea of immunity in respect of the latter acts.[16] This is the theory that has been formulated and adopted by continental courts and jurists;[17] and the courts of the United States, which previously recognised the doctrine of absolute immunity, have now decided to restrict the plea of immunity in accordance with this principle.[18] It has also been suggested[19] that the correct principle is that the sovereign is not entitled to any immunity, but that this principle is subject to important exceptions. These exceptions would include legislative, executive and administrative acts and measures, transactions over which the courts of the *lex fori* under private international law have no jurisdiction, and acts contrary to principles of international law in the matter of diplomatic immunities.

In the *Baccus Case*,[20] Jenkins, L.J. seemed to favour the second principle[21] as he distinguished the *Ulen Case*[22] on the ground that the body there was set up for "ordinary trading purposes". However, if the purpose of the "functions"

[8] *Ulen & Co.* v. *Polish National Economic Bank* (1940) 24 N.Y. (2d.) 201. (Court of Appeal of the State of New York).

[9] (1957) 1 Q.B. 438, 467.

[10] (1940) 24 N.Y. (2d.) 201. [11] (1949) 2 All E.R. 274. [12] (1957) 1 Q.B. 438, 456.

[13] The theory is based on such arguments as (i) the equality of States, (ii) a rule of customary international law, (iii) the impossibility of otherwise conducting foreign relations, (iv) the difficulty of distinguishing between "public" and "non-public" functions.

[14] *Jus imperii.* [15] *Jus gestionis.*

[16] Its proponents claim that the doctrine of immunity is not needed when the sovereignty of the State is not involved, that the old precedents should not be strictly interpreted and that it is possible to distinguish between "public" and "private" acts of the State on the basis either of their purpose or their nature. See H. Lauterpacht, *op. cit. supra*, at 221.

[17] Thus these States decline to grant immunity in regard to the operation of railways, trading monopolies, the purchase of arms and the sale of excess supplies and acts of private nature, but still grant immunity in respect of acts truly sovereign, e.g. claims for damages for requisition of ships and injuries caused by a foreign State's army. See H. Lauterpacht, *op. cit. supra*, at 222.

[18] In 1952 the Department of State announced that it would no longer favour claims for immunity on the part of foreign governments in respect of their commercial transactions, and the Supreme Court had prepared the way for a reconsideration of the problem. Inferior courts in America have openly adopted the principle of limited immunity.

[19] See H. Lauterpacht, *op. cit. supra*, at 228.

[20] (1957) 1 Q.B. 438.

[21] The theory of limited immunity.

[22] (1940) 24 N.Y. (2d.) 201.

test is to distinguish between "governmental" and "trading" operations of a State, then the principles laid down by Jenkins, L.J. seem of little assistance in solving the problem of immunity of States. All that would be required for operations to be not "ordinary trading operations", would be for the State to assume responsibility for them and for the operations to be pursued "under the supervision of the State". To apply this principle would allow immunity for the operations of all public corporations, suggesting that the "functions" test is not a satisfactory solution of the problems. Parker, L.J. distinguished the American cases on the ground that the bodies there concerned were companies limited by shares in which the State held the whole or a controlling interest. A test which distinguishes corporations according to their mode of nationalisation, is even more unsatisfactory and, it is submitted, should not be adopted. It seems that the majority in the *Baccus Case*[23] were prepared to accept the principle of absolute immunity and to allow the plea of immunity to every board and body, as to which the foreign government shows any intention to connect them with its machinery of government.

The recent case of *Rahimtoola* v. *Nizam of Hyderabad*[24] was confined to a decision that, when a State claims sovereign immunity, the court will not investigate the beneficial title of a State to a debt owed to its agent in England. It was, however, remarkable for two things: firstly, Lord Denning's plea for a rationalisation of the law of immunities by the House of Lords and his approval of the principle of general denial of immunity; secondly, the express dissociation of the other Law Lords from the *obiter* remarks of Lord Denning. Lord Denning disapproved of the theory of absolute immunity on the ground that "it is more in keeping with the dignity of the foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decision of a court of acknowledged impartiality than by arbitrarily rejecting their jurisdiction."[25] He justified his acceptance of the principle of the denial of immunity by reference to the fact that since "in all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts . . . there is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant our own. . . ."[26] Sovereign immunity, he said, should not depend on whether a foreign government is impleaded directly or indirectly but on the nature of the dispute. If the dispute concerns the legislative, executive or international transactions of a foreign government, immunity should be granted; if the dispute concerns the commercial transactions of a State and it arises properly within the jurisdiction of the courts, immunity should be refused.[27] It must be admitted that the practical differences between the theories of denial of immunity and limited immunity are very slight.[28] The question of immunity in respect of commercial transactions has not, as yet, arisen directly before the House of Lords. In the *Cristina Case*[29] a majority favoured the principle of limited immunity. In view of this, and of Lord Denning's separate opinion in *Rahimtoola* v. *Nizam of Hyderabad*[30] it seems possible that if the question arises for decision by the House of Lords, whether or not the judges accept the extreme view denying immunity (or indeed address themselves at all to the theoretical basis of decision), the House will refuse the plea of immunity in commercial transactions of a foreign government.

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[23] (1957) 1 Q.B. 438.
[24] (1957) 3 W.L.R. 884.
[25] *Id.* 910. [26] *Ibid.*
[27] *Id.* 913.
[28] Judge Lauterpacht himself admits this, *op. cit. supra*, at 239.
[29] *Compania Naviera Vascongado* v. *S.S. Cristina* (1938) A.C. 485. Lord Wright favoured absolute immunity while Lord Maugham expressed himself in favour of limited immunity. Lord Thankerton and Lord MacMillan inclined to this latter view but Lord Atkin refrained from expressing any opinion.
[30] See K. W. Wedderburn, "Sovereign Immunity of Foreign Public Corporations" (1957) 6 *Int. & Comp. L. Q.* 290.

One solution of the problem, which it is submitted still lies open to the House of Lords and even the Court of Appeal, is to apply the principles which have been laid down in determining whether or not a public corporation comes within the "cloak" of the Crown[30a] It is well established that the most important factors in determining the status of bodies as agents of the Crown is the extent of their independence and exercise of discretion. Is it a corporate body in the departmental structure or is it a commercial body which can be used as a department of state? Both incorporation and the commercial function of a body are but two of many factors to be considered in determining its relationship to the government.[31] It might not be too difficult for the courts to apply these principles, by analogy, to the question of foreign corporations.

The difficulties raised by the question of the immunity of governmental corporations are analogous to the problem of the distinction between the neutral trader and the neutral State in economic warfare. The established rule of international law is that, although a neutral State has no duty to prevent its traders trading in munitions with belligerents, it is an international wrong for the State itself to engage in such trade.[32] The problem has arisen whether this rule can be applied to the conditions of modern economic warfare, in which neutral States are playing an increasingly more important part in foreign trading. Judge Lauterpacht considers that until international law is altered a State having a monopoly of foreign trade is bound by the existing rules prohibiting a neutral State from providing certain goods to the belligerents.[33] Professor Stone thinks that, as State control over the volume and direction of exports is now so universal, if the traditional law is correct it is most unlikely ever to be observed by neutral States.[34] Two possible solutions of the problem are the assimilation of the State trading activities to those of the private trader,[35] and the assimilation of all trading to that carried on by the State.[36] As this part of international law is itself so unsettled, its principles seem of little if any assistance in solving the difficulties of the law of immunities.

The *Baccus Case*[37] also illustrates problems in the application of customary international law as part of municipal law. All members of the Court of Appeal assumed that there was a rule of international law that a foreign sovereign may not be impleaded without the sovereign's consent. However, since precisely comparable facts had never before arisen, it is important to consider whether the decision merely "interpreted an existing rule, or established a new rule." Jenkins, L.J.'s reasoning was that, once the general immunity principle is recognised, the fact that the transaction involved facts not precisely covered by earlier holdings, does not mean that a new rule is being recognised.[38] Singleton, L.J., on the other hand, held that in such a situation a new rule is being incorporated, and that this is only permitted if the rule is generally recognised by civilised States.[39] Another question is whether the House of Lords could overrule, apparently contrary to its ordinary rules of precedent, its own earlier determination that a rule of international law is, or is not, sufficiently established to be recognised as part of municipal law, by later finding

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[30a] J. A. G. Griffith, "Public Corporations as Crown Servants" (1952) 9 *Toronto L.J.* 169. W. Friedmann, "Legal Status of Incorporated Public Authorities" (1948) 22 *A.L.J.* 7 and *id.* "The Shield of the Crown" (1951) 24 *A.L.J.* 275. See *Tamlin* v. *Hannaford* (1950) 1 K.B. 18.

[31] Other factors are "governmental function" test, appointment of members by the Crown, financial dependence on the Crown.

[32] J. Stone, *Legal Controls of International Conflict* (1954) 408-413.

[33] 2 Oppenheim 657-59.

[34] J. Stone, *op. cit. supra* at 410-12. See also W. Friedmann, "The Growth of State Control over the Individual" (1938) 19 *B.Y.B. Int. L.* 118.

[35] J. Stone, *op. cit. supra*, 412-13. The State may trade but subject to belligerent controls of contraband and blockade, etc.

[36] That is, to forbid trading by State instrumentalities, even though the effect is that all foreign trade was thereby forbidden.

[37] (1957) 1 Q.B. 438.

[38] *Id.* at 468.

[39] Adopting the statement of Lord Macmillan in the *Cristina Case* (1938) A.C. 485, 497.

that the rule has since become so established.

Finally, the question arose in the *Baccus Case* whether the defendants, by their acts, had waived their sovereign immunity. The majority held that they had not done so, and relied on the rinciples laid down in *The Jassy*[40] and *In re Republic of Bolivia Exploration Syndicate*[41] that immunity can only be waived by a person with a knowledge of the rights and the procedural effects involved, and with the authority of the foreign sovereign. They conceded that, on first sight, it seemed that the defendants had waived their immunity, but considered that the head of the defendants' directorate had not known of the sovereign immunity, nor that by entering an appearance the defendants might lose their immunity. Nor were his acts done with the authority of his superior, the person entitled to waive the immunity. Singleton, L.J. dissented from this view. He conceded that normally only persons authorised to waive immunity could do so, but thought that in the present case of a State going outside the normal practice by incorporating a department of State, the ordinary rule was not applicable. He thought that it could be assumed (there being no contrary evidence) that a body so created has the powers incidental to its business; and as the head of the corporation would normally have the authority to submit, the State ought not to be allowed to deny that he had the authority. While the majority view, he thought, reflected traditional principles, his own view was directed to the modern practice of States which established incorporated departments of State.

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THE DISTINCTION BETWEEN TRESPASS AND CASE

WILLIAMS v. *MILOTIN*

The High Court in *Williams* v. *Milotin*[1] was faced with a situation which compelled it to give at least some attention to the rules governing the limits of trespass and case as forms of action available for personal injuries. Had the High Court seized the opportunities thus presented it might have done something to clarify these rules as they emerge from the nineteenth-century cases.

The Court had to consider the construction of certain provisions of the South Australian Limitation of Actions Act, 1936-1948, which differentiated between those actions which would formerly have been brought as actions on the case and those which would formerly have been brought as actions of trespass. Section 35 of that Act provided:

> The following actions namely: . . . (c) actions which formerly might have been brought in the form of actions called actions on the case . . . (k) actions for libel, malicious prosecution, arrest or seduction and any other actions which would formerly[2] have been brought in the form of actions called trespass on the case shall, save as otherwise provided in this Act, be commenced within six years next after the cause of such action accrued but not after.

Section 36 provided:

> All actions for assault, trespass to the person, menace, battery, wounding or imprisonment shall be commenced within three years next after the cause of such accrued but not after.

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[40] *The Jassy* (1906) P. 270. [41] (1914) 1 Ch. 139.

[1] (1957) A.L.R. 1145. The Full Bench of Dixon, C.J., McTiernan, Williams, Webb and Kitto, JJ., delivered a unanimous judgment.

[2] 'Formerly' was defined by the Court as meaning prior to the passing of the Supreme Court Act, 1878, of South Australia, by which the Judicature Act system was adopted.