THE FOREIGN SOVEREIGN IMMUNITY QUESTION

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The doctrine of sovereign immunity as extended to foreign states has posed many problems. The rule in international law, as reflected in the general practice of states, has changed illustrating the inadequacy of the traditional absolute theory. Prior to a consideration of the explanations behind foreign sovereign immunity, which are lacking in the modern situation, it is as well to recall a quotation from Professor Lillich, who placed the theoretical background to the sovereign immunity issue in its proper perspective:

"... the rule's (origin) is important only because debate thereon has obscured the fact that the rule is grounded upon practical considerations rather than abstract conceptualism."

The fundamental reason why sovereigns have been granted immunity is comity. To allow process would "vex the peace of nations". In addition, the granting of immunity on a reciprocal basis placed the sovereign in a position above the judiciary in foreign jurisdictions; the same privileged platform as within his own kingdom. This practice became developed as a rule of customary international law. It will be apparent that an attractive feature of the comity theory is that the degree of immunity granted a foreign sovereign may vary according to the nature of the particular act, without admitting inconsistency. The restrictive theory of immunity and a comity explanation are not mutually exclusive.

An alternative explanation is the concept that immunity has been founded upon independence. That to implead a foreign sovereign would be to damage the independence inherent within Sovereignty. The independence theory is most apparent today in the Soviet legal system,

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1 The classic statement of the rule in the absolute form was given by Lord Atkin in The Christina [1938] A.C. 485 at 490.


which justifies the sovereign immunity doctrine on the ground that it rests upon a fundamental tenet of international law; the sovereignty of the State. 6

Sovereign immunity is explained in terms of dignity; that submission to jurisdiction would harm the dignity of sovereignty. This explanation is inadequate. Within the municipal sphere, many governments have submitted to the jurisdiction of their own legal systems. The sovereign has become accountable to the courts in definitive contractual and tortious fields7 without, it is submitted, consequent loss of dignity8. Several states maintain consular and diplomatic representation in Uganda. Within their own jurisdictions, these states grant immunity to Ugandan legislative acts and other features of sovereignty exercised by the Amin government. It cannot be claimed that this grant of immunity with respect to acta jure imperii would be made for reasons of dignity.

Professor Lauterpacht explained foreign sovereign immunity in terms of the maxim par in parem non habet imperium; that states are independent equals sharing a sovereign dignity9. Lauterpacht denied the existence of a rule of international law, which forbade the courts of one state to assume jurisdiction over another government. It seems that whenever a foreign government communicated with the state exercising jurisdiction over an act of the former, that communication has not taken the form of protest but the form of pleas.10 Further evidence suggests that states have not protested when another has claimed jurisdiction with respect to their activities, acta jure gestionis, but have submitted to application of the restrictive theory of sovereign immunity. It is notable also that classical jurists have failed to provide authority for the foreign sovereign immunity principle. One might conclude, as Lauterpacht has done, that there is no authority for this proposition as applied in the absolute form to the acts of foreign states.11 That although there may have been a rule of sovereign immunity, which has applied absolutely, this can be deduced no longer from the general practice of states12.

6 Boguslavskij, Staaltliche Immunitat(1965).
8 It seems that the contrary is true; that a sovereign sheltering under cover of the immunity doctrine may incur loss of dignity. See Porto Alexandre [1920] P.C. 30; Rahimtoola v. Nizam of Hyderabad [1958] A.C. 379 at 418 per Lord Denning.
10 Id. at 227.
11 Id. at 272.
IMMUNITY AND EXECUTION OF JUDGMENT

There can be no purpose in permitting jurisdiction over the goods of a foreign sovereign if immunity from execution is granted subsequently. This point, of considerable practical importance, was thought to support the retention of the immunity principle. There is evidence however, which suggests that the practice of states does admit execution of judgment and that any rule of immunity in relation to execution has been eroded. A Greek law of 1938 permitted execution of judgment given the consent of the Ministry of Justice. This version of interplay between the executive branch of government and the judiciary makes for a suitable solution to the immunity question. It is the executive that is in a position to predetermine the effect that execution might have on a state’s relationship with the foreign country against whom execution is to be levied.

There is authority for the view that immunity should not extend to execution of judgment. Property belonging to a foreign sovereign should be employed to compensate an injured plaintiff. In the best interests of harmony between governments, perhaps consular and diplomatic premises might be excluded from the general principle. As an additional safeguard, a minister of executive government should possess the necessary authority to veto executionary measures.

It would follow that a municipal court should be able to award costs against a state. The United Kingdom courts, once strictest adherents to the absolute application of sovereign immunity have ordered a foreign state to provide deposit for security of costs. The United States and France were ordered to deposit funds within the Court’s jurisdiction in Dollfus Mieg et Companie S.A. v. Bank of England. In the Trendtex Trading Corporation case, Mocatta J. at first instance granted an injunction ensuring that the Central Bank of Nigeria continued to maintain funds within the United Kingdom. In this instance, the order restrained movement of almost fourteen million American dollars.

THE LAUTERPACHT ALTERNATIVE

The adoption by some states of an alternative restrictive immunity doc-

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13 The Consular Premises Case reported in 1931 Annual Digest (case 187). Greek court held that there shall be a presumption that the foreign state would submit to jurisdiction with regard to acta jure gestionis.
14 Lauterpacht op. cit. 242.
15 Id. Courts have exercised jurisdiction and subsequent execution of judgment against a foreign government in France, Italy, The Netherlands and Switzerland. The U.S.S.R. has submitted to execution of judgment through bilateral agreements.
trine\textsuperscript{18}, recognition that the absolute immunity rule was productive of injustice, has not been without difficulties.\textsuperscript{19} The municipal decisions characterising the nature of an act as private or public lack consistency.\textsuperscript{20} It is essential in a world economy so dependent upon international trade that those involved in commerce with a sovereign state should be able to ascertain the risks faced when entering into a contract with a government. A further problem is whether the character of a contract should be decided in accordance with the law of the foreign state party to the agreement or according to the law of the lex fori, that is the law of the state in whose jurisdiction the contract has been made.\textsuperscript{21}

The major defect in the application of the restrictive immunity principle has been that the characterisation of a particular act has been decided in an arbitrary manner. Upon one view, which has been approved in the House of Lords, the determining factor has been the nature of the dispute.\textsuperscript{22} In contrast, other courts have concluded that it is the purpose of the act that constitutes the crucial element.\textsuperscript{23}

Professor Lauterpacht considered the restrictive theory inadequate because it failed to provide a workable basis for a regulation of the problem of jurisdictional immunities by reference to rules capable of general application. Lauterpacht proposed by way of improvement the abolition of the absolute-restrictive distinction; to be replaced by a scheme whereby the foreign state was granted sovereign immunity on

\textsuperscript{18} To the effect that immunity from suit should only be granted the foreign sovereign in respect of acts of a public nature (acta jure imperii) as opposed to commercial activities (acta jure gestionis).


\textsuperscript{20} Compare an American decision, Kingdom of Roumania v. Guaranty Trust Co. of N.Y. 250 F. 341 (1918), when it was held that a contract to supply army boots constituted a public act and the opposite conclusion of an Italian court in Governo Rumens v. Trutta, Guir. It., Pt. I(1), 774.

\textsuperscript{21} It appears that there are alternative views: (a) that international law has no preference: O'Connell, \textit{International Law} (1970) v.2 at 845. (b) that the character of the act should be decided according to the lex fori: Sinclair, "The European Convention on State Immunity", 22 \textit{International and Comparative Law Quarterly} (1973) 254 at 261. (c) that the decision should be made in the context of the law where the dispute arises: Trendtex Trading Corporation v. Bank of Nigeria [1977] 1 All E.R. 881 at 907 per Shaw L.J.

\textsuperscript{22} Rahimtoola v. Nizam of Hyderabad [1957] 3 All E.R. 441 at 465—464 per Denning L.J.

\textsuperscript{23} Flota Maritima Browning de Cuba S.A. v. The Republic of Cuba [1962] 34 D.L.R. (2d) 628 (Canadian Supreme Court); The Philippine Admiral [1976] 1 All E.R. 78 at 96 per Cross L.J.
the same terms and to the same extent as the domestic state, thus pro-
viding greater certainty as to the rule of law.\footnote{Lauterpacht's solution has been criticised as merely proposing a transposition of the problem of distinguishing between private and public acts. Cf. Sucharitkul, State Immunities and Trading Activities in International Law (1959).}

The Lauterpacht alternative assimilates the position of the foreign state to that of the domestic, while recommending certain safeguards. Broadly, these “cover substantially what is generally intended to be included in the notion of acts \textit{jure imperii} save that, in particular, it specifically excludes from the scope of acts \textit{jure imperii} contracts made and torts committed by a state outside its territory”.\footnote{Id. at 239.}

The major problems which would arise as a result of the Lauterpacht formula would appear to be of a procedural nature. An immediate problem concerns the method by which a writ should be served upon a foreign state for past judicial decisions illustrate that this can be of great complexity.\footnote{e.g. Oster v. Government of Canada, 144 F. Supp. 746 (1956); Purdy Co. v. Argentina, 353 F. 2d. 95 (1964): In re Herman's Estate 198 N. W. 1001 (1924).}

The second problem is whether discovery may be ordered against a state when that state appears as plaintiff. One possible solution would be to permit discovery as against a foreign state on condition of certain precautions, which might be based upon the principle enun-
\footnote{[1942] A.C. 624.}
ciated by the House of Lords in \textit{Duncan v. Cammell Laird and Co.}\footnote{10 & 11 GEO. 6 Ch. 44.}
and repeated in statutory form in section 28, Crown Proceedings Act, 1947.\footnote{Lauterpacht, op. cit. at 250-272.}

The Lauterpacht scheme has not been adopted. Perhaps the greatest importance of his scholarship was to demonstrate that many European states had abandoned the application of an absolute rule of sovereign immunity. In an important survey Lauterpacht showed that by 1951 numerous national jurisdictions had adopted the doctrine of limited immu-
was not until 1975 that the traditional application of sovereign immunity came to be questioned by a superior appellate court. The Privy Council decision in *Philippine Admiral* proved to be a milestone in the law of sovereign immunity as applied in the United Kingdom.

The unanimous opinion of the Board in *Philippine Admiral* was delivered by Lord Cross; a judgment notable for the excellent summary of the sovereign immunity question. The Court held that *Porto Alexandre* should be disapproved on the ground that the Court of Appeal had had no valid reason to adopt the precedent of *Parlement Belge*. Lord Cross found the disapproval expressed by three Law Lords in *The Christina* of importance in that it had been doubted whether sovereign immunity should extend to public ships engaged in ordinary commerce. Notwithstanding the inconsistency of applying the restrictive immunity rule to actions *in rem* and the absolute theory to actions *in personam*, *Porto Alexandre* was overruled. *Philippine Admiral* is authority for the principle that a foreign government cannot claim sovereign immunity when an action *in rem* is brought against a vessel if that vessel is being put to commercial use by either that government or a third party.

The decisions of the Privy Council are not binding of course upon the Court of Appeal, yet the Board had provided the required impetus and *Philippine Admiral* paved the way for the decision in *Trendtex Trading Corporation v. Central Bank of Nigeria*.

The facts of *Trendtex* are as follows. The Central Bank had been established in 1958 to issue legal tender and provide financial services to the Nigerian Government. The Bank had issued a letter of credit (said to be irrevocable) for U.S.$14,000,000 in favour of the plaintiff. This sum was to pay for a quarter of a million tons of cement which Trendtex had sold to a third party. The plaintiff had shipped the cement to Nigeria, where it was to have been used in the construction of army barracks. The ships carrying the cement arrived at Lagos and found, incredibly, almost fourteen hundred other vessels, carrying over twenty million tons of cement, waiting on demurrage! Amidst this chaos, the Central Bank refused to meet the cost of the cement or the demurrage charges.

*Trendtex* issued a writ in November, 1975, claiming against the Bank for payment to cover the letter of credit and demurrage. An injunction was granted against the Bank preventing the removal of funds to a place outside the United Kingdom. The Bank appealed against this order,
claiming that it was a department of state possessing the right to
sovereign immunity and therefore beyond the Court's jurisdiction. Mr
Justice Donaldson agreed.36 Trendtex looked to the Court of Appeal.

The Appeal Court held that the Central Bank was not a government
department but a legal entity of its own right and therefore not entitled
to sovereign immunity. Lord Denning, M.R. and Lord Justice Shaw
ventured so far as to state that even if the Bank had been a government
department that it would not have been entitled to immunity. The
letter of credit, upon which Trendtex had sued, was a commercial
document.37 Through the medium of the doctrine of incorporation, it
was decided that international law was adopted within English law
unless inconsistent. And international law no longer recognised the ab-
solute theory. The Master of the Rolls continued to say that the limited
immunity doctrine should be employed to cover the scope of actions in
rem and in personam in the interests of justice. Thus Lord Denning ex-
tended the decision in the Philippine Admiral.38

In Lord Denning's opinion, English Courts should fall into step with
their foreign counterparts in the interests of comity.39 His Lordship at-
tributed significance to the United States Supreme Court decision in
Alfred Dunhill of London, Inc. v. Cuba40 and the provisions of the
Foreign Sovereign Immunities Act, 1976. It is submitted, with respect,
that insufficient attention was attributed to the English doctrine of stare
decisis.

Trendtex is on appeal to the House of Lords, where it remains for the
Law Lords to settle the foreign sovereign immunity question. Failing
this, legislative action may be required to extend the restrictive theory to
actions in personam.41

THE POSITION WITHIN THE UNITED STATES

One of the earliest reported decisions in the sovereign immunity field
was that in Schooner Exchange.42 Proceeding by analogy, Marshall,
C.J. held that the Exchange was within a plea of immunity, being a
naval vessel of a foreign power. It was stated that immunity was granted
for considerations of comity and practical expediency in friendly inter-
national intercourse.

38 Cf. the more cautious view taken by Stephenson L.J. Id. at 895-905.
39 Particular attention was paid article 3h of the Treaty of Rome.
40 No. 73-1288 U.S. Supreme Ct., May 24, 1976.
41 Trendtex has been applied in Czarnikow v. Centrala Handlu Zagranicznego
42 7 Cranch 116 (1812).
It is unfortunate that *Schooner Exchange* was extended by later American and English decisions, so that the principle of sovereign immunity was applied to commercial situations far beyond the bounds of what had been understood within the meaning of the concept of *acta jure imperii* in 1812. The United States Attorney General had admitted during the proceedings that upon the facts that the Exchange had been entitled to immunity. Although the point was not decided, he argued that "if a sovereign descend from the throne and become a merchant, he submits to the laws of the country". In addition, *obiter dictum* of Marshall, C.J. can be interpreted to mean that sovereign immunity should extend only to public acts. An English court adopted such interpretation in 1878 in *Parlement Belge*. Nevertheless, the Court of Appeal overruled Sir Robert Phillimore and granted immunity to a Belgian packetship engaged in the carriage of cargo, passengers and mail.

The *Schooner Exchange* decision was employed by the United States courts to extend the immunity principle to include all public shipping. In the *Athanasiou*, a District Court in New York dismissed a libel against a ship under requisition by the Government of Greece, which was carrying grain while on charter party to a private company. Many other decisions, justified in the name of Comity, demonstrated that the absolute immunity principle was supreme.

In 1924, the United States instructed foreign governments that it would claim immunity no longer on behalf of Shipping Board vessels, when engaged in commercial ventures. The enlightened approach of the executive branch of government found sharp contrast in that of the judiciary. The Supreme Court held in *The Pesaro* that the absolute immunity of state-owned shipping, whether engaged in commercial or public pursuits should prevail. Despite a growing awareness that the absolute immunity rule was productive of injustice when applied in commercial situations, its application by the courts continued. *Pesaro* found favour in *The Navemar*, the Supreme Court justifying its decision by

43 Id. at 123.
44 [1880] 5 P.D. 197.
45 228 F. 558 (1915).
46 The Pampa, 245 F.137 (1917); The Maipo, 252 F.627 (1918); The Roseric, 254 F.154 (1918); The Carlo Poma, 259 F.569 (1919). The one inconsistent decision of the period may be explained on the ground that the ship involved had been requisitioned by the Italian government, which was not a co-belligerent of the United States at the time of the decision; The Attualita, 238 F.909 (1916).
47 The Suits in Admiralty Act was passed following the English Court of Appeal decision, Compania Mercantil Argentina v. United States Shipping Board [1924] 131 Law Times 388.
48 271 U.S. 562 (1926).
49 303 U.S. 68 (1937).
FOREIGN SOVEREIGN IMMUNITY

reference to precedent and the separation of power doctrine. The Court relied upon executive “suggestion” as to whether immunity should be granted. Stone C.J. stated that it was for the executive branch to conduct foreign policy since it alone was in a position to determine the consequence of execution of judgment upon international relations.50

Various reasons are given to explain the gradual movement from the absolute rule to the application of a limited principle of immunity.51 Apart from the increasing ownership of shipping by states, which followed the 1914-1918 war, a change was coming about in the relationship of the state vis-à-vis the citizen. The State was becoming more open to suit in the interests of justice. In 1952, the State Department issued the famous Tate Letter, admitting the restrictive theory and effectively rejecting the Pesaro decision.

Although the State Department had admitted formally that it would accept the distinction between commercial and public purposes, it retained control over the immunity question through the medium of executive “suggestion” communicated to the courts. Professor Lillich objected to the reliance that the judiciary placed upon the executive decision on the ground that the conclusion reached by the State Department was attained without attention to due process.52 Perhaps the classic illustration of this complaint was Rich v. Naviera Vacuba.53 In this case, a Federal District Court accepted a telephone message from the State Department to the effect that release of the ship would preserve peaceful relations between Cuba and the United States as a “suggestion” of immunity. The court held, following Ex parte Peru54 and Mexico v. Hoffman55 that the “suggestion” was binding and that because of the separation of powers doctrine the judiciary must assume that the State Department had examined the relevant considerations prior to reaching a decision.

The United Fruit Sugar Company argued before the Court of Appeals that its rights under the Fifth Amendment had been offended; that before being deprived of property, the company was entitled to a fair hearing. The court rejected this contention and in effect concurred with the executive decision to grant immunity, thereby depriving the company of its constitutional rights.

50 Cf. Republic of Mexico v. Hoffman 324 U.S. 50 (1945) where the Supreme Court declined to grant immunity on the ground that the State Department had made no “suggestion” of immunity.
51 See Friedman, supra at n.2.
54 318 U.S. 578 (1942).
55 324 U.S. 50 (1945).
The controversy over the effect of the State Department "suggestion" was whether the force of the "suggestion" should be interpreted as final and binding upon the courts or whether the "suggestion" should be considered by the courts; the latter retaining the ultimate decision to grant sovereign immunity. In a recent case, *Spacil v. Crowe*, the Court of Appeals cited *Schooner Exchange* and *Navemar*, refusing to accept responsibility for the question of immunity:

"The precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch. In the case of these authorities, the plaintiffs ask us to depart from the historic practice of granting unquestioned discretion to the executive. We decline to do so".

The court continued to explain that in matters involving foreign policy considerations, there was no requirement that the executive disclose reasons upon which its "suggestion" was based; that this practice was not akin to the ordinary administrative decision. Wisdom, J. said: "In the narrow band of government action where foreign policy interests are direct and substantial we must eschew even limited 'reasonableness' review".

Although *Spacil v. Crowe* made no headway in the sovereign immunity issue and the role of the State Department "suggestion", the case provoked congressional measures designed to demonstrate the procedure to be adopted when bringing an action against a foreign state, its constituent sub-division or agency. Since the Tate Letter in 1952 and despite the poor decision in *Rich*, the United States has applied the restrictive rule of immunity. This position has been clarified through the introduction of the Foreign Sovereign Immunities Act, 1976.

The Act may be said to have four objectives. Principally, the decision whether to grant immunity has been transferred to the courts, thus causing a decline of executive influence. A second feature is that the Act has codified the international law rules of sovereign immunity. In addition, the new legislation establishes procedure whereby a writ may be served upon a foreign government. Finally, execution of judgment is

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57 Id. at 617.
58 Id. at 619.
59 Alfred Dunhill of London Inc. v. Republic of Cuba 425 U.S. 682 per White J.
60 94th Congress, 90 Stat. 2891.
62 S.1604-1607.
63 S.1608.
permitted to United States citizens. Thus the Act will serve to provide American nationals, both juridical and natural persons, with vastly improved rights vis-à-vis foreign public commercial enterprises. Whether the courts will manage to remain above political conflict remains to be seen. The Act has been described as a Tate Letter in statutory form and like that document its introduction should be welcomed as the foreign sovereign immunity question required solution.

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64 Ss.1609-1611.