# Sovereign Immunity *vis-à-vis* the Municipal Legal Remedy of Specific Performance

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> *Of course, even after entering the market place, a government may need to act as a government and not as a trader. But why should it have immunity from suit on the trading transaction? Let it pay if its actions have caused damage — all said and done, there is no specific performance in international law, and the government will still be perfectly free to take whatever action it feels it needs to for the public good. But it cannot expect an innocent private party to bear the costs of that liberty.*
>
> *In the distribution of benefits and burdens in the international legal system, there is no reason why private traders should pay for the freedom of states to pursue their political and foreign-policy objectives.*
>
> - Rosalyn Higgins[1]

## I. INTRODUCTION

In the realm of public international law, the sovereignty of states has given rise to the general rule that international laws are binding only upon the consent of states.[2] Sovereignty means each individualized state is the highest law-giving authority within its own territorial jurisdiction and, thus, is possessed with certain sweeping powers and rights. One such power is the

1. Rosalyn Higgins, *Exceptions to Jurisdictional Competence: Immunities from Suit and Enforcement*, *in* PROBLEMS AND PROCESS — INTERNATIONAL LAW AND HOW WE USE IT 81 (1994).

2. *See*, the case of the S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sep. 7) (the Permanent Court of International Justice ("PCIJ") ruled that "[t]he rules of law binding upon states ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law."); *see also*, The Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, at 277, 293-94, 316 (Nov. 20) (it was considered that the ICJ came close to reaffirming what was known as the consensual theory by recognizing the existence of regional customs applying such a theory among groups of states in Latin America.).

power and/or right to jurisdictional immunity[3] which has been the source of much controversy in international law and of major difficulties in state contracts entered into between the public and private sector, as the latter is continually left at a disadvantage given the prevailing state of law.

The continued growth of commercial dealings between states and the private sector had the international community facing the dilemma of ensuring the protection of foreign investment in various jurisdictions (a substantial part of international business relations involved vast economic exchange),[4] while at the same time, safeguarding the inherent sovereignty of states.

In its effort, therefore, to resolve issues essentially concerning the breach by a state of its obligations, the Permanent Court of International Justice (PCIJ), in the 1928 seminal ruling of the *Chorzów Factory Case*,[5] decisively

3. *See,* Sompong Sucharritkul, Special Rapporteur, *Preliminary Report on Jurisdictional Immunities of States and Their Property*, [1981] 2 Y.B. INT'L L. COMM'N, U.N. Doc. A/CN.4/323 at 238 (1979) [hereinafter ILC Y.B., *Jurisdictional Immunities*]. The term "jurisdictional immunity" refers to the right of sovereign states to exemption from the exercise of another sovereign state of the power to adjudicate as well as all other administrative and executive powers, by whatever measures or procedures. The concept covers the entire judicial process, including investigation, examination, rendering of judgment, and also of execution of the judgment rendered. The term "jurisdictional immunities" is thus understood to cover both types of immunities — "immunity from jurisdiction" and "immunity from execution."

4. MYRES MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY, CASES AND MATERIALS 46 (1981).

5. Case Concerning the Factory at Chorzów (Ger. v. Pol.) (Merits Judgment No. 13), 1928 P.C.I.J. Rep. (ser. A) No. 17 (Sep. 13); *See also,* Michael Lynk, *The Right to Compensation in International Law and the Displaced Palestinians*, Jan. 2001, 2002 Palestinian Development Research Net (PRRN), http://www.arts.mcgill.ca/MEEP/PRRN/papers/mlink.html (last accessed Mar. 15, 2007) [hereinafter Lynk, *The Right to Compensation*]. In the aftermath of World War I, the Polish government expropriated a German-owned factory on Polish territory and the German government sought reparations on behalf of the owners. In its leading ruling on the merits, the World Court stated that state responsibility applies in the case of an act or omission in violation of an international obligation. Regarding damages, the Court endorsed the principle of restitution and full compensation for the property owners where restitution was unobtainable. Although the *Chorzów Factory* case was decided as a commercial property action in private international law, its articulation of the principles on compensation have since been widely endorsed in various public international law decisions. These endorsements include leading judgments on damages for injuries to United Nations personnel and reparations for human rights violations as well as a seminal United Nations study on compensation for human rights violations.



shaped the modern basis for compensation and restitution in international law by directly acknowledging the duty to compensate — declaring such a part of "the general conception of law" and an "indispensable complement" to breaches of international norms.[6] In *Chorzów Factory*, the PCIJ ruled that "any breach of an engagement invokes an obligation to make reparation"[7] or restitution in kind, thereby wiping out all the consequences of the breach and re-establishing the situation which would have, in all probability, existed if the act had not been committed.[8]

As may be culled from the *Chorzów Factory*, the principles of compensation and restitution have long been considered as the cornerstone features of most domestic legal systems for centuries, thus comprising the primary remedial response to the repair of proven damages and instances of unjust enrichment.[9] Proceeding then from the PCIJ's decision, the Committee on Nationalization of Property of the American Branch of the International Law Association, in applying this ruling to the impasse involved in deciding (1) whether a remedy could even be afforded to a foreign individual in the case of a state's breach of its contractual obligations with the latter; and (2) what type of remedy could be afforded, stated that, "the remedy for breach by a State of a contract with an alien ... is in *the nature of specific performance*."[10]

Notwithstanding this general recognition that restitution, be it in the form of specific performance or reparations, is an indispensable remedy to a state's breach of obligations,[11] doubts persisted in both the municipal and international spheres as to whether ordinary municipal remedies such as specific performance or restitution may be availed of when faced with a contractual dispute between a private claimant as against a state. The prevailing notion was that since "governments, tend, in their municipal law,

6. Case Concerning the Factory at Chorzów (Ger. v. Pol.) (Indemnity), 1928 P.C.I.J. Rep. (ser. A) No. 17, at 29 (Sep. 13).

7. *Id.*

8. *Id.* at 47.

9. Lynk, *supra* note 5.

10. AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, PROCEEDINGS AND COMMITTEE REPORTS, 72 (1957-1958) [hereinafter AMERICAN BRANCH OF THE ILA, REPORTS] (emphasis supplied).

11. *See, id.* at 72-73. The American Branch of the International Law Association noted that 'arbitrary' breaches by a state of its contractual obligations should be accorded specific performance: "[w]here performance actually is no longer possible, then the foreign contractor must be placed as nearly as possible in the position he would have enjoyed absent the breach, that is to say, he is entitled to the profits he would have earned had not his contract rights been taken."

to be accorded a freedom of action which that law does not grant other parties whose responsibilities are not governmental ... [this] *freedom of action could not be constrained unduly by compelling governments specifically to perform their contracts.*"[12]

When a state breaches its contract with its national by reason of public interest, the state is accorded by municipal law a peculiar immunity from the imposition of specific performance, being justified on the ground that the private contracting party, as a subject of the state, will undoubtedly share in the 'public good' assumed to flow from the state's action which resulted in the contractual breach.[13] Thus, though the private party's particular rights may be prejudiced, giving rise to a personal injury on his part, the public of which he is a constituent, gains and, in a larger sense, he benefits from such in some measure. This theory, however, may not hold true for a foreign individual since his property or contractual interests usually lie within another state's jurisdiction, precluding him from sharing in any form of national social advantage.[14] This becomes all the more true considering that government contracts (between a state and its national)[15] differ from state contracts (between a state and a foreign entity)[16] in terms of the relief to be afforded the injured claimant as well as the corresponding defenses that may be raised by the defendant state. As such, municipal contract law remedies, such as specific performance or even rescission, may not be accessible to a foreign claimant, most especially when pegged against a state invoking the

12. STEPHEN M. SCHWEBEL, *Speculations on Specific Performance of a Contract between a State and a Foreign National, in* JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF STEPHEN M. SCHWEBEL, JUDGE OF THE INTERNATIONAL COURT OF JUSTICE 419 (1994) [hereinafter Schwebel, *Specific Performance*] (emphasis supplied).

13. ROBIN W. BROADWAY, PUBLIC SECTOR ECONOMICS 31, 33 (1979); *see also, id.* at 421-22. Here, Broadway posits that 'public goods' are goods shared by society as a whole and simultaneously provide benefits to more than one individual at the same time; 'private goods,' on the other hand, are not equally shared by all.

14. AMERICAN BRANCH OF THE ILA, REPORTS, *supra* note 10, at 67.

15. *See,* People v. Palmer, 35 N.Y.S. 222, 14 Misc. 41, *cited in* BARTOLOME C. FERNANDEZ, JR., A TREATISE ON GOVERNMENT CONTRACTS UNDER PHILIPPINE LAW 5 (1991) (adopting and applying the concept of "public contracts" in defining a government contract as one entered into by a public officer for and on behalf of a government within the concept of his authority and in his official capacity, in which the people are interested, the subject-matter of which is of public concern and affects private rights only insofar as the law confers such rights when its provisions are carried out by the officer to who it is confided to perform).

16. HANS SMIT, INTERNATIONAL CONTRACTS 43 (1981) [hereinafter SMIT].



defense of immunity from suit or even when confronted by its international counterpart — the act of state doctrine.[17]

States, no less than individuals, are bound by their contracts, and thus, the flow of international capital will certainly be maximized by a mutual respect for international contracts and an observance of the obligations flowing from them.[18] The contractual obligations freely assumed by a state are no less binding than its treaty obligations[19] under the universal principle of *pacta sunt servanda.*[20] This concept, deemed a general principle of law of most, if not all, municipal legal systems,[21] dictates that states perform their obligations with utmost honesty and good faith, respecting the other contracting party's expectation of satisfactory performance on their part.[22] Thus, a good faith observance of international contracts imports a fulfillment of the terms of the contract by *both* parties, that where there is a breach of

17. *See generally,* Underhill v. Fernandez, 168 U.S. 250 (1897); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1963); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

18. G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, at, U.N. Doc. A/S217 (1962) ("Foreign investment agreements freely entered into by, or between, sovereign states shall be observed in good faith.").

19. STEPHEN M. SCHWEBEL, *Report of the Committee on Nationalization of Property of the American Branch of International Law Association, in* JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF STEPHEN M. SCHWEBEL, JUDGE OF THE INTERNATIONAL COURT OF JUSTICE 392 (1994) [hereinafter Schwebel, *Report*].

20. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 155 U.N.T.S. 311; *see also,* Rights of U.S. Nationals in Morocco (Fr. v. U.S.), 1952 I.C.J. Rep. 176 (Aug. 27); North Atlantic Coast Fisheries Arbitration (Gr. Brit. v. U.S.), 10 R.I.A.A. 188 (1910).

21. *See,* BIN CHENG, GENERAL PRINCIPLES OF LAW 112 (1953).

22. U.N. CHARTER art. 2 (2); *see also,* Timor Case (Neth. v. Port.), 1 H.C.R. 354, at 365 (1914); GERHARD VON GLAHN, LAW AMONG NATIONS 171 (1970). Glahn states:

> [o]ne of the oldest principles of international law is the doctrine of *pacta sunt servanda* (treaties must be observed), even though there are differences of opinion as to the absolute nature of the rule and the possible conditions under which it can be set aside lawfully. The duty of honoring obligations in good faith is an essential and basic condition for a legal order, and there can be no doubt as to its existence.

*See generally,* SMIT, *supra* note 16, at 218. Smit explains that sovereign immunity cannot bar the legitimate interests of those who would unjustly suffer a deprivation of their property rights. In order to carry out its objectives, Smit insists that the state must establish and maintain, on a daily basis, regular relations, governed by that good faith that should underlie all business relations.

contract by a state that may lack the capacity to pay monetary damages, the good faith demanded by the *pacta sunt servanda* rule may *require that the contract be performed specifically.*[23]

Clearly, though essentially governing treaty obligations entered into between states, the *pacta sunt servanda* rule is equally applied to and demanded of states whether dealing with treaties between states or contracts between states and private entities.[24] As such, both municipal law and international law uphold the rule that states entering into contracts with their own nationals or with foreigners are necessarily bound by the obligations arising from such a contract and, more importantly, that domestic exigencies (such as that of immunity) do not free a state from its international obligations. This was the tenor of *Chorzów Factory*, which provided guidance with respect to a state's compliance of its obligations — that it may not invoke its municipal law (and, thus, its legislatively-conferred privilege of jurisdictional immunity) as a defense to a violation of international law: "the rules of law governing the reparation are *the rules of international law in force between the two States concerned*, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage."[25]

Both international and municipal law acknowledge that immunity from suit is not absolute, or even mandatory, but can be waived by the state concerned either expressly or by conduct.[26] This exception to the absolute rule to sovereign immunity is what is deemed the 'restrictive immunity rule,' a rule which most states, especially developing states like the Philippines, have been relatively reluctant to adopt possibly due to the "emotional concern for a newly regained national sovereignty, rather than from a doctrinal stand on ideological grounds."[27] Another reason for such disinclination is that distinctions between governmental and commercial acts are not always precise. This ambiguity often leads to greater confusion in the application by courts of the restrictive immunity rule than when faced with

23. Schwebel, *Specific Performance*, *supra* note 12, at 422.

24. The Losinger & Co. Case (Switz. v. Yugo.), 1936 P.C.I.J. (ser. C) No. 78, at 32 (Jan. 7); R. Y. Jennings, *State Contacts in International Law*, 37 B.Y.I.L. 156, 175 (1961) (citing Professor Wehberg, 53 A.J.I.L. 775, 786 (1959)).

25. Case Concerning the Factory at Chorzów (Ger. v. Pol.) (Indemnity), 1928 P.C.I.J. Rep. (ser. A) No. 17, at 28 (Sep. 13) (emphasis supplied); *see also*, Norwegian Shipowners' Claims (Nor. v. U.S.), I U.N. R.I.A.A. 338 (1922).

26. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 340 (1990) [hereinafter BROWNLIE]; JOAQUIN BERNAS, THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY 1279-80 (2003) [hereinafter BERNAS, COMMENTARY].

27. D. J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 287 (1998) [hereinafter HARRIS] (citing Gamal Moursi Badr, II-1 Y.B.I.L.C 36-37 (1986)).



the clear-cut, yet outdated, absolute immunity theory.[28] As a result, though the enormous increase in the extent to which foreign sovereigns have become involved in international trade made essential "a practice which will enable persons doing business with them to have their rights determined in the courts,"[29] state practice suggests that there is still continuing disagreement between supporters of absolute immunity as against those of restrictive immunity.[30]

May a state be imposed the decree of specific performance in the event it breaches its contractual obligations? More importantly, may a private claimant hail a state before its own courts, or the courts of a foreign jurisdiction, so that the latter may be subject to judgment over issues concerning restitution for its breach? These questions, dealing essentially with the suability of a state and eventually its potential liability, delves directly into the international legal issues of jurisdictional immunity and immunity from execution. The answers to these questions certainly prove significant to developing states such as the Philippines whose own Constitution, possibly in view of the government's lack of financial resources, encourages its entry into contracts with the private sector in a joint effort to provide for the basic needs of every Filipino.[31]

Doubts as to where exactly courts should draw the line between what state acts are *jure gestionis* and *jure imperii* are best resolved by: (1) determining the sources of the rules on sovereign immunity, (2) understanding the purposes behind upholding the inherent immunity of states as a necessary attribute of their sovereignty and a derivative of due respect and comity between nations, and (3) surveying the history behind sovereign immunity

28. H. Steinberger, *State Immunity*, 10 E.P.I.L. 443 (1987) *cited in* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 120 (1997) [hereinafter MALANCZUK].

29. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, Appendix II, 714 (1976).

30. BROWNLIE, *supra* note 26, at 329-30 (citing Sucharitkul, 149 HAGUE *RECUEIL* 87-216 (1976, I); Sinclair, 167 HAGUE *RECUEIL* 113-284 (1980, II); and in reference to Fitzmaurice, 92 HAGUE *RECUEIL* 187 (1957, II); O'Connel, ii. 844-46; Emanuelli, 22 CANADA YRBK. 26, 96-97 (1984)). Brownlie based his observance of state practice pertaining to the adherence to either the restrictive or absolute theory of immunity on the comments of governments relating to the Draft Article on the Immunity of States and Their Properties, as expressed by delegates to the ILC (citing *The Report of the International Law Commission on the Work of its Fortieth Session*, U.N. GAOR, 43rd Sess., Supp. No. 10, at 258-59, ¶¶ 298-503, U.N. Doc. A/43/10 (1988)).

31. *See*, PHIL. CONST. art II, § 20 ("The State recognizes the indispensable role of the private sector, encourages private enterprise, and provides incentives to needed investments."); *see also*, Marine Radio Communications Association v. Reyes, 195 SCRA 205 (1990).

in order to arrive at an understanding of why, from the very outset, the immunity of states was absolute and all encompassing, and why it ultimately gave way to policies of restrictive immunity.

## II. THE SOURCES, ATTRIBUTES, AND PURPOSES BEHIND THE LAW ON STATE IMMUNITY

The law on the jurisdictional immunity of states, viewed either from an international or municipal legal perspective, is often fraught with uncertainty insofar as the rules for its application are concerned. This void, therefore, appropriately became one of the focal points during the International Law Commission's ("ILC") 29th session in 1977, prompting it to recommend the question of "jurisdictional immunities of states and their property" for their active consideration in view of its "day-to-day practical importance and suitability for codification and progressive development."[32] This was not the first time, however, that the ILC took the matter of jurisdictional immunity into consideration. As far back as 1948, during its first session, the ILC conducted a survey and noted that the topic of jurisdictional immunity was contemporary enough to be suitable for study and eventual codification. Due to states' increased economic activities and their assumption of the management of transportation and principal industries, a comprehensive regulation of such is needed. Nevertheless, application has been divergent not only across states but within states as well.[33]

Aside from the ILC's steadfast efforts in surveying the rules and practice on the jurisdictional immunities of states, this legal issue has, in fact, attracted the attention of the international community from the early days of the League of Nations. In 1928, the League of Nations Committee of Experts concluded that some aspects of the subject of state immunities were already ripe for codification.[34] Other international efforts included those of the

32. ILC Y.B., *Jurisdictional Immunities*, *supra* note 3, at 228 (¶ 8 refers to [1977] 2 Y.B. INT'L L. COMM'N 130, U.N. Doc. A/32/10, ¶110 (1977).

33. UNITED NATIONS PUBLICATION, ¶52, U.N. Sales No. 1948.V.I (I); *see* U.N. GAOR, 32nd Sess., Annexes, Agenda Item 112, U.N. Doc. A/32/433, ¶¶ 214-15, U.N. Doc. A/CN.4/L.279/Rev.1; 2 Y.B. INT'L L. COMM'N 153-55, U.N. Doc. A/33/10, Chapt. VIII, Sect. D, Annex (1978). In fact, during its 32nd session, the U.N. General Assembly considered the ILC's recommendation and, after due deliberation in the Sixth Committee on Dec. 19, 1977, adopted its Resolution No. 32/151, ¶7, invited the ILC to commence work on the topic of the Jurisdictional Immunity of States and Their Property, especially in light of the latter's progress on the Draft Articles on the Responsibility of States. Soon after and in response to the General Assembly's invitation, the ILC set up the Working Group to consider the question of jurisdictional immunities.

34. *See*, U.N. GAOR, 32nd Sess., Annexes, Agenda Item 112, U.N. Doc. A/32/433, ¶ 50, U.N. Doc. A/CN.4/L.279/Rev.1.



Institut de Droit International,[35] the International Law Association,[36] the Harvard School: "Research in International Law,"[37] and the International Bar Association,[38] whose studies on the topic have collectively demonstrated their keen awareness of the problems associated with state immunity as well as its legal developments through the years.

Indeed, despite the gradual evolution of state immunity from absolute immunity to contemporary theories best suited to govern the commercial dealings of nations, such as rules on acts *jure imperii* and *jure gestionis*,[39] problems with the application of these theories persisted. This did not, however, impede the tendency of most states to lean towards the adoption of the restrictive immunity rule. It was primarily for this reason that the court in *Alfred Dunhill v. Republic of Cuba*[40] made the critical pronouncement disregarding the absolute cloak of immunity where commercial matters were concerned, *viz.*: "In their commercial capacities, foreign governments do not exercise powers peculiar to sovereigns. Instead, they exercise only those powers that can also be exercised by private citizens."[41]

This certainly was not the first time that courts encouraged a movement from the absolute immunity rule to that of restrictive immunity. As far back as 1812, in *Schooner Exchange v. McFaddon*,[42] the rule of the absolute

35. L. de Bar & J. Westlake, Rapporteurs, "Projet de règlement international sur la competence des tribunaux dans les process contre les Etats, souverains ou chefs d'Etat étrangers," 11 Annuaire de l'Institut de Driot International at 436-37 (Brussels 1891-1892); 44 Annuaire de l'Institut de Driot International 36, et seq., No. 1 (Basel 1952); 45 Annuaire de l'Institut de Driot International 293-94, No. II (Basel 1954).

36. International Law Association, Report of the Thirty-Fourth Conference, held at Vienna, Aug. 5-11, 1926, at 426 (London 1927).

37. P.C. Jessup, Reporter, Research in International Law of the Harvard School, *Draft Convention and Comment on Competence of Courts in Regard to Foreign States*, 26 A.J.I.L. SUPP. No. 3 (1932).

38. *See*, 44 AMERICAN BAR ASSOCIATION JOURNAL 521-23 (1958).

39. SIR ROBERT JENNINGS & SIR ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 357 (1996) [hereinafter OPPENHEIM'S INTERNATIONAL LAW].

40. Alfred Dunhill of London. Inc. v. Republic of Cuba, 425 U.S. 682 (1976).

41. *Id.* at 704.

42. Schooner Exchange v. McFaddon, 11 U.S. 116 (1812) *cited in* W. CRANCH, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES (3rd ed. 1911). In this case, two American citizens who claimed that they owned and were entitled to possession of the ship brought a libel suit against the Schooner Exchange. They alleged that the vessel had been seized on the high seas in 1810 by forces acting on behalf of the Emperor of France and that no prize court of competent jurisdiction had pronounced

immunity of the state, as a personification of the King, seemed unshakeable. The territorial jurisdiction of a nation, being exclusive and absolute, can only be limited by the state itself and any restriction upon the territorial jurisdiction would result in a diminution of its sovereignty. Exceptions to such must thus be traced to the consent of the nation.[43]

As a clear sign, however, of the difficulties that beleaguer courts when resolving issues of jurisdictional immunity, the same decision went on to rule that though the jurisdiction of every nation was exclusive and absolute, since the world was "composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other[,] ... *every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be an attribute of every nation.*"[44]

What one can be sure of, however, is that, on the municipal level, 'state immunity' may be understood to contemplate shielding governments from suit for monetary damages filed before *their own domestic courts* without the government's prior consent to be sued.[45] On the international level, 'sovereign immunity' rests on identical principles which similarly work to shield foreign governments from the exercise of jurisdiction by *another state's courts* in cases in which the sovereign has not given its consent to the assumption of such jurisdiction.[46] More often, however, since they both

judgment against the vessel. No one appeared for the vessel but the U.S. Attorney for Pennsylvania appeared on behalf of the U.S. Government to state that the United States and France were at peace, that a public ship (known as the Balaou) of the Emperor of France had been compelled by bad weather to enter the port of Philadelphia, and was prevented from leaving by the process of the court. The U.S. Attorney argued that, even if the vessel had in fact been wrongly seized from the libellants, property therein had passed to the Emperor of France. It was therefore requested that the libel be dismissed with costs and the vessel released. The District Court dismissed the libel case, but the Circuit Court reversed the dismissal.

43. *Id.*

44. *Id.* at 137.

45. THOMAS R. VAN DERVORT, INTERNATIONAL LAW AND ORGANIZATIONS: AN INTRODUCTION 304 [hereinafter VAN DERVORT].

46. *Id.* at 304. *Cf.* REBECCA M. M. WALLACE, INTERNATIONAL LAW 121 (1997) (for an alternative definition to sovereign immunity). Wallace notes that sovereign immunity, along with diplomatic immunity for that matter, is one of the principal exceptions to the exercise of territorial jurisdiction — sovereign immunity referring to the restriction on the exercise of jurisdiction by one state over another state without the latter's consent.

*See also,* Burkhard Heß, *The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property*, 4 E.J.I.L. 269 (1993) [hereinafter Heß, *ILC Draft Convention*]. Under international law, the focal point of immunity is the exercise of jurisdiction. Hence, jurisdictional immunity concerns questions of the extent to which states, or their organs or state enterprises, can be sued in civil courts of other states, and how far there can be execution on property of a foreign states.

These definitions, being essentially grounded on public international legal principles, are similar to municipal law's definition of immunity. State immunity from suit concerns issues on the exercise of jurisdiction by a court over the government, be it through any of its instrumentalities, agencies, or officers.



have the same effect of foreclosing jurisdiction, these two concepts of state immunity and sovereign immunity are used interchangeably regardless of whether a defendant is hailed before its own courts or before the courts of another nation.

Be that as it may, as a fundamental rule widely accepted by the entire international legal community, jurisdictional immunity is inherent in every state as sovereign[47] and, thus, it is incorrect to assert that immunity is conferred upon states by courts. What is correct is that when courts are faced with issues of immunity, the trial judge is invariably called upon to decide on the limits of his own jurisdiction[48] and not to decide whether a state should be entitled to its inherent right of sovereign immunity.

Though generally regarded as a subsidiary means for the determination of rules of law,[49] the jurisprudence or case law of principal legal systems of the world provide an inexhaustible source of rules of international law on state immunities. Usually, international and municipal judicial bodies, when faced with a question of international law, engage in an examination of the practice of courts of civilized countries in order to ascertain whether from such practice, they can deduce a uniform view.[50] Unfortunately, owing to the divergence of judicial practice varying from system to system and from time to time, courts are more successful in finding an inconsistency, rather than uniformity, of judicial practice.

In contrast, the practice of the executive branch provides a rich supply of rules on the law of state immunity, since its primary responsibility is not only the duty to advise the state, but also to take the necessary action in any given

47. U.N. CHARTER art. 2, ¶ 1; *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), Oct. 24, 1970.

48. ILC Y.B., *Jurisdictional Immunities*, *supra* note 3, at 231-32, ¶¶ 22-23.

49. Statute of the International Court of Justice, art. 38(1)(d), 15 U.N.C.I.O. Docs. 355 (1945).

50. *See,* Dralle v. Republic of Czechoslovakia (Case No. 41), 17 INT'L L. REP. 155, 157-58 (Supreme Court of Austria 1950). Here, the Supreme Court of Austria, in 1950, reviewed a large number of Italian, Belgian, Swiss, Egyptian, English, American, German, French, Greek, Romanian, Brazilian, as well as Austrian, decisions on the matter of the jurisdictional immunity of foreign states.

situation to either claim or disclaim a state's immunity from jurisdiction.[51] The executive branch of governments, therefore, has at least three distinctive roles in the evolution of state practice: (1) it can play the central role in initiating, introducing, and assuring the passage of a legislative enactment on state immunities in line with the views and policy of the government in power;[52] (2) it can give advice to the judiciary on matters of state immunities or issue certificates or statements to its own courts on any question of fact or of international law having a bearing on a defendant state's claim to immunity;[53] and (3) the views of the executive appear to be final, if not decisive, on the question of whether a state should claim or waive its own sovereign immunities in a given set of circumstances.[54] Thus, the critical function of the executive in shaping the law on state immunity may be attributed to matters of public policy (such as observing either comity or due respect to a co-equal branch of government),[55] and political considerations of expediency through friendly international intercourse between states as

51. ILC Y.B., *Jurisdictional Immunities*, *supra* note 3, at 234, ¶ 32.

52. *Id.* The ILC cites as an example the revised bill (H.R. 11315) on foreign state immunities submitted to the House of Representatives on Dec. 19, 1975 on behalf of the Department of State and the Department of Justice (*see* H.R. 11315, 94th Cong., 121 U.S. Cong. Rec. 42017 (Dec. 19, 1975)). Usually, the policy followed by the executive with regard to the jurisdictional immunities of foreign states, more often than not, reflect the extent to which the state itself would wish to be accorded the same extent of immunities from foreign courts in like circumstances.

53. *Compare*, the Second Hickenlooper Amendment (22 U.S.C. § 2370(e)(2) (1964)) *and* the United States Senate Foreign Relations Committee's Report on the Hickenlooper Amendment (S. REP. NO. 118, pt. I, 88th Cong., 2d Sess. 24 (1964)), with the famous "Tate Letter" of May 19, 1952 (Letter from Jack B. Tate, Acting U.S. Legal Adviser, to Philip B. Perlman, Acting U.S. Attorney General, 26 DEP'T STATE BULL. 984 (1952) [hereinafter Tate Letter]. The Tate Letter states:

> It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of Government charged with responsibility for the conduct of foreign relations.

54. *See*, [1978] 2 Y.B. INT'L L. COMM'N 153-54, U.N. Doc. A/33/10, Chapt. VIII, Sect. D, Annex, ¶¶ 13-14 (1978).

55. Buck v. A.-G. [1965] Ch. 745, 770-71; INT'L L. REP. 42, 11; 41 BY (1965-66), 43.



prime factors that have lent to the growing recognition of exceptions to the absolute immunity rule.[56]

Insofar as the legislative branch of government is concerned, the jurisdiction of a municipal court is typically defined by the law establishing the court itself alongside provisions delimiting its own competence. Some noteworthy pieces of national legislation are the 1976 United States Foreign Sovereign Immunities Act ("FISA"),[57] the 1978 United Kingdom State Immunity Act,[58] and the 1985 Australian Foreign Sovereign Immunities Act.[59] The Philippine counterpart is encapsulated in a single sentence plainly expressed in section 3, article XVI of the 1987 Constitution: "The State may not be sued without its consent."[60] In the Philippine jurisdiction, therefore, seeing as our Constitution embraces the restrictive immunity rule recognizing exceptions to state immunity, our judicial practice consists mainly of courts being summoned to the task of determining whether immunity should lie and whether sovereigns should be granted the exercise of such a privilege in an action submitted for their adjudication.

Considering, however, the delicate political nature of issues on sovereign immunity, some argue that when dealing with matters of foreign affairs, it is the executive branch which is imbued with exclusive competence over and above that of the judiciary[61] — "the President [being] the sole organ of the nation in its external relations, and its sole representative with foreign nations."[62] This opinion was shared by English courts in the classic case of *Luther v. James Sagor & Co.*,[63] where Lord Justice Scrutton stated that:

56. *See generally*, Hannes v. Kingdom of Roumania Monopolies Institute (Case No. 72), ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 1938-1940 198, *et seq.* (London 1942).

57. 28 U.S.C. §§ 1330 & 1603(d) (1976); *see also*, A.S.I.L., XV International Legal Materials 1388, No. 6 (1976).

58. U.K. The Public General Acts, Part I, Ch. 33, at 715 (1978). Part I, §3(3) provides a definition of "commercial transaction." Asian countries such as Singapore, in the Singaporean State Immunity Act of 1979, as well as in Pakistan, with the Pakistani State Immunity Ordinance of 1981, subscribe to the same definition of a commercial transaction adopted by the United Kingdom.

59. The Australian Foreign State Immunities Act of 1985, Act No. 196 of 1985, *reprinted in* 25 I.L.M 715, 718 (1986). Art. 11(3) provides for a definition of "commercial transaction."

60. PHIL. CONST. art XVI, § 3.

61. *See generally*, United States v. Belmont, 301 U.S. 324 (1937).

62. United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936) (quoting the statement of John Marshall when he was a member of the House of Representatives).

63. Luther v. James Sagor & Co., 3 K.B. 532 (1921).

> [i]t appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become *casus belli*; and should in my view *be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign is recognized ... . The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges.*[64]

The concurring opinion, however, of Justice Powell in *First National City Bank v. Banco Nacional de Cuba*,[65] expressed a contrary view in reference to the issue on "the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign relations."[66] He stated that the judiciary, in avoiding to act in all cases in relation to foreign affairs, abdicates its responsibility to resolve the grievance of persons through the judicial process — an abdication unwarranted by the doctrine of separation of powers. To be in favor of abdication would argue that international law is inexistent as only international political disputes resolved by the exercise of power exist.[67] "Until international tribunals command a wider constituency, the courts of various countries afford the best means for the development of a respected body of international law."[68]

Notwithstanding these conflicting views, whether one considers either the judiciary or the executive as the most appropriate body for the proper resolution of sovereign immunity issues in the midst of delicate foreign relations, at least one can be sure that the shared roles of these branches of government provide a rich source of evidence of state practice for the further development of the law on sovereign immunity and, ultimately, international law as a whole.

### *A. The Purposes behind Sovereign Immunity under International Law*

The main purposes for the grant of sovereign immunity are two-fold. First, it is grounded on the Latin maxim *par in parem non habet imperium* — one cannot exercise authority over an equal — all states being equal such that no state may exercise jurisdiction over another without its consent.[69] In 1978,

64. *Id.* at 559 (emphasis supplied).

65. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

66. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427-28 (1963).

67. *First National City Bank*, 406 U.S. 773, 775 (1972).

68. *Id.*

69. U.N. CHARTER art. 2, ¶¶ 1 & 7; *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), Oct. 24, 1970; *see also*, Underhill v. Hernandez, 168 U.S. 250 (1987).



the ILC Working Group on the Jurisdictional Immunities of States and Their Property described state immunity as a "result of an interplay of two fundamental principles of international law: the principle of territoriality and the principle of state personality, both being aspects of state sovereignty."[70]

As a consequence then of the sovereign equality and independence of states, municipal courts must accept the validity of the acts of a sovereign (whether of its own government or that of a foreign state) and that of its agents.[71] In *Gouvernement Espanol v. Lambège et Pujol*,[72] the French Court of Cassation ruled that, given the universality of the reciprocal independence of states, "*a government cannot be subjected to the jurisdiction of another against its will.*"[73] Jurisdiction over cases arising from its own acts is inherent in its sovereignty; the seizure of such by another government would impair their mutual relations.[74]

70. 2 Y.B. INT'L L. COMM'N 153, U.N. Doc. A/33/10, Chapt. VIII, Sect. D, Annex, ¶ 11 (1978).

71. BROWNLIE, *supra* note 26, at 322. Brownlie further notes that under international law, it is common practice for courts to refuse to exercise jurisdiction in cases involving foreign acts of state on the ground that to pass on the question would embarrass the Executive in arriving at an appropriate diplomatic settlement (*see, Banco* Nacional de Cuba v. Sabbatino, 84 Supp. Ct. 943 (1964)).

72. *Gouvernement Espanol v. Lambège et Pujol*, Cour. Cass. Jan. 12, 1842, Dalloz R.P. 1849. This case arose out of a contract for the supply of shoes by Messrs. Lambège and Pujol to the Spanish government who refused to pay them. The lower courts ruled against Spain, declaring it a debtor and attaching its property in order to satisfy its debt to the plaintiff. On appeal, the Court of Cassation ruled that the lower courts, in permitting the garnishment, violated the principle in the law of nations which consecrated the independence of states, exceeded its powers and falsely applied a provision of the French Civil Code which could not be relied upon to extend the jurisdiction of French courts over the public assets of a foreign government.

73. *Id.* at 7; *see also*, SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY 20-21 (1963) *cited in* BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 596 (emphasis supplied); Gustavo Adolfo Olivares Marcos, The Legal Practice of the Recovery of State External Debts 50-52 (2005) (unpublished Ph.D. thesis, Université de Genève, Institut Universitaire des Haute Etudes Internationales) (on file with the Université de Genève, Institut Universitaire des Haute Etudes Internationales), http://www.unige.ch/cyberdocuments/theses2003/OlivaresG/these.pdf (last accessed Mar. 15, 2007).

74. *Gouvernement Espanol v. Lambège et Pujol*, Cour. Cass. Jan. 12, 1842, Dalloz R.P. 1849, at 7; *see also* SWEENEY, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY 20-21 (1963) *cited in* BARRY E. CARTER & PHILIP R. TRIMBLE, INTERNATIONAL LAW 596; Gustavo Adolfo Olivares Marcos, The Legal Practice of the Recovery of State External Debts 50-52 (2005) (unpublished

Second, sovereign immunity essentially draws from the belief that the grant of immunity is a matter of privilege intimately related to the principle of comity,[75] whereby the municipal courts of one state would not, and should not, interfere with the internal affairs of another.[76] This was expressed by Chief Justice Marshall when commenting on the general principle of sovereign immunity, *viz.*: "sovereigns are not presumed without explicit declaration to have opened their tribunals to suits against other sovereigns."[77] This theory, it should be noted, likewise provides support for the application of the act of state doctrine for purposes of effectuating general notions of comity recognized among nations,[78] and ensuring that the courts of one state are effectively precluded from assuming jurisdiction over another state and subjecting the latter to judgment over its own acts.[79] The United Kingdom Court of Appeal, through Lord Diplock, further clarified that a state, being a member of the family of nations observes the rules of comity.[80] "*One of these rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent State,* or to apply measures of coercion to it or its property, except in accordance with the rules of public international law."[81]

Ph.D. thesis, Université de Genève, Institut Universitaire des Haute Etudes Internationales) (on file with the Université de Genève, Institut Universitaire des Haute Etudes Internationales), http://www.unige.ch/cyberdocuments/theses2003/OlivaresG/these.pdf (last accessed Mar. 15, 2007).

75. *See generally,* Hannes v. Kingdom of Roumania Monopolies Institute (Case No. 72), ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 1938-40, 1998, et seq. (London 1942) (where the Appellate Division of the Supreme Court of New York observed that questions of immunity were ordinarily determined under international law as matters of comity.); *see also,* Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will on the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

76. *See,* Buck v. A.-G. [1965] Ch. 745, 770-71; INT'L L. REP. 42, 11; 41 BY (1965-66), 435.

77. Schooner Exchange v. McFaddon, 11 U.S. 116, 146 (1812).

78. *See,* First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), *reh. den.* 409 U.S. 897, *on remand* 478 F.2d 191 (2d Cir. 1973).

79. MALANCZUK, *supra* note 28, at 118.

80. *Buck,* 41 B.Y. (1965-66), at 770-71.

81. *Id.* (emphasis supplied).



*B. The Purposes behind State Immunity under Municipal (Philippine) Law*

Drawing primarily from the principles behind the law on state immunity as they are applied on the international level, it becomes readily apparent that the purposes behind state immunity on the municipal level are fundamentally similar in terms of their basis and the objectives sought to be achieved by the sovereigns who invoke them to those in international law. To illustrate, sovereign immunity recognizes the equality of states, grounded on the principle of comity, thereby demanding a show of respect for one's inherent sovereignty and its attributes, such as that of jurisdictional immunity. State immunity (on the municipal level) also recognizes the equality and independence of the different branches of government under the 'separation of powers' doctrine,[82] such that a private party cannot use the judicial arm of a government against the entire instrumentality absent the latter's consent to be sued.

Initially, however, Philippine jurisprudence subscribed to the theory that state immunity proceeded from the idea that the sovereign was above the law.[83] As pointed out by Justice Wendel Holmes, the exemption of a sovereign from suit is not due to any theory but rests "on the logical and practical ground that *there can be no legal right as against the authority that makes the law on which the law depends.*"[84]

With regard to the correlative principle behind the law on state immunity as embodied in the *par in parem* maxim holding supreme the independence of a co-equal state, the independence and equality deemed to exist between states may be considered akin to, if not the international offshoot of, the municipal concept of 'separation of powers,' a quality inherent in any republican system of government.[85] In fact, in the case of *Metropolitan Transportation Service v. Paredes,*[86] the Philippine Supreme Court justified the disinclination of a lower court to assume jurisdiction on the ground of immunity as being elemental in any Republican State; that is, since the people allowed the government to represent them, its immunity from suit is deemed an indispensable corollary to the representative capacity bestowed by the people themselves.[87] "In ... agreeing [to allow the

82. Myers v. United States, 272 U.S. 52, 293 (1926); BERNAS, COMMENTARY, *supra* note 26, at 52, 655-56.

83. *See generally,* BERNAS, COMMENTARY, *supra* note 26, at 1268.

84. *Id.* (citing Wendell Holmes, J., in Kawanakoa v. Polybank, 205 U.S. 349, 353 (1907)) (emphasis supplied).

85. *Id.* at 52, 655-56.

86. Metropolitan Transportation Service v. Paredes, 79 Phil. 819, 826-27 (1948).

87. *Id.* "In a republican state, like the Philippines, government immunity from suit without its consent is derived from the will of the people themselves in freely creating a government 'of the people, by the people, and for the people ... .'"

government to represent them and exercise powers and discharge duties of their sovereignty], the citizens have *solemnly undertaken to surrender some of their private rights and interests which were calculated to conflict with the higher rights and larger interests of the people as a whole.*"[88]

As may be gleaned from the foregoing, the policy adhered to by the Philippine legal system with respect to the issue on immunity was that republicanism, being essentially a product of democracy, is imbued with the necessary attribute of jurisdictional immunity if only to better serve the greater interests of society as a whole and to safeguard the dignity of the state as a representative of the very individuals that created it.[89] On the practical side, however, quite a number of legal scholars have also posited the view that immunity is necessary to prevent judicial interference with executive discretion in order to avoid the risk of the government being unable to accomplish its work because its citizens continually hail it to court to account for its actions.[90]

Clearly, jurisdictional immunity on the municipal level was mainly justified in order to allow the governmental authority to act within its legitimate area of discretion without fear that its actions will lay subject to adjudication by its own courts and subject to the whims of private citizens.[91] Considering, however, that the rationale to the grant of governmental immunity did not sit well with many due to the seemingly unrestricted and involuntary surrender of private rights and interests, the Philippine Supreme Court later arrived at a more justifiable explanation for the grant of immunity. The Court, in *Providence Washington Insurance Co. v. Republic of the Philippines*,[92] wisely opted not to focus on what the Filipino people must inevitably surrender, but rather, on what will be sacrificed in terms of governmental efficiency if their right to seek judicial redress is not somehow curtailed. As compared to the inconvenience to private parties, far greater consequences would ensue from the loss of governmental efficiency and the

88. *Id.*

89. *See generally,* Jacinto Jimenez, *State Immunity from Suit,* 35 ATENEO L.J. 27, 31-32, (1991) [hereinafter Jimenez, *State Immunity*] (citing Fitts v. Mcghee, 172 U.S. 516, 528 (1899))

90. Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 124 (1996) [hereinafter Monaghan, *The Sovereign Immunity "Exception"*] (citing Ann Woolhandler, *Patterns of Official Immunity and Accountability,* 37 CASE W. RES. L. Rev. 396, 398 (1987). Professor Wollhandler who points out that the purpose for immunity is to protect "the decision-making process of the officials.").

91. VAN DERVORT, *supra* note 45, at 304.

92. Providence Washington Insurance Co. v. Republic of the Philippines, 29 SCRA 598 (1969).



hindering of the performance of its multifarious functions that would result from the loss of time and energy from defending itself against suits.[93]

Through time, many other theories and principles were proposed in order to further account for the existence and application of state immunity. It should be noted, moreover, that these modern philosophies were born from the dynamic evolution of customary international law, municipal legislation, judicial decisions, and from the continuing efforts of various entities to codify international law by means of the treaty process.[94] The more notable international agreements codifying the rules on immunity include: (1) the 1958 Geneva Conventions on the Law of the Sea, comprising of the Convention on the Territorial Sea and the Contiguous Zone,[95] and the Convention on the High Seas;[96] (2) the 1961 Vienna Convention on Diplomatic Relations;[97] (3) the 1963 Vienna Convention on Consular Relations;[98] (4) the 1969 Convention on Special Missions;[99] and

93. *Id.* at 601-02. *See also,* Jimenez, *State Immunity, supra* note 89, at 32. Jimenez cites numerous Philippine cases which explain the inevitable inconvenience that will be caused to the public if the government were continuously exposed to suit from private individuals:

> [p]ublic service will be hindered and public safety will be endangered if the State can be sued at the instance of everyone. The State will thus be controlled in the use and disposition of the means required for the proper administration of the government. Its time and energy will be dissipated in the endless suits against it. This is subversive of public interest.

94. VAN DERVORT, *supra* note 45, at 304.

95. Geneva Conventions on the Law of the Sea, 516 U.N.T.S. 205 (1958) (includes comprising of the Convention on the Territorial Sea and the Contiguous Zone). Both the Convention on the Territorial Sea and Contiguous Zone and the Convention on the High Seas tend to assimilate for purposes of both Conventions the position of government ships operated for commercial purposes to that of non-government merchant ships. The Convention on the Territorial Sea and Contiguous Zone, in dealing with the right of innocent passage through the territorial sea, distinguishes the position of "government ships operated for commercial purposes" from that of "government ships operated for non-commercial purposes."

96. Convention on the High Seas, 450 U.N.T.S. 11 (1958), art. 9 ("Ships owned or operated by a state and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any state other than the flag State.").

97. Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95 (1961).

98. Vienna Convention on Consular Relations, 596 U.N.T.S. 261 (1963).

99. Convention on Special Missions, Annex, 1400 U.N.T.S. 231 (1969).

(5) the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.[100]

As the Philippines (together with the rest of the international community) began to embrace one of the most fundamental principles of law in the modern nation-state system, the foundation and evolution of state immunity can be traced through the use of international as well as municipal sources. For a more thorough understanding of the complexities and controversies surrounding the development of the immunity rule, a chronicle of how the doctrine unfolded (acquiring its roots essentially from customary international law) should be undertaken, beginning with the emergence of the absolute immunity rule — a system wherein immunity was first thought of as a divine right belonging to the original sovereign, the king, the earliest personification of what we now deem the nation-state.

## III. THE RULE OF ABSOLUTE IMMUNITY FROM SUIT

The traditional theory of immunity from suit was originally considered as absolute, admitting of no exceptions — meaning that a state could easily invoke its jurisdictional immunities regardless of the nature of the subject matter or activity in question and solely by virtue of its identity as inherently sovereign.[101] During this time, this theory of absolute immunity from suit was exclusively grounded on the aforementioned maxim *par in parem non habet imperium*.[102]

100. Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, OFFICIAL RECORDS OF THE UNITED NATIONS CONFERENCE ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS, VOL. II, DOCUMENTS OF THE CONFERENCE at 207, U.N. Sales No. E.75.V.12 (1975).

101. *See infra*, the "*Prins Frederik*" Case and the "*Parlement Belge*" Case; *see also*, LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW, CASES AND MATERIALS 891 (1987) [hereinafter HENKIN, PUGH, SCHACHTER & SMIT]; VAN DERVORT, *supra* note 45, at 305.

102. GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 89 (1984) [hereinafter BADR, STATE IMMUNITY]. Badr notes that this maxim was formulated by the 14th century Italian jurist by the name of Bartolus. Cited in full, the maxim reads *non enim una civitas potest facere legem super alteram, quia par in parem non habet imperium* (citing BARTOLUS, TRACTATUS REPRESSALIUM, Questio 1/3, ¶ 10 (1354)). With the mention of the word "*civitas*," Bartolus, who at the time he composed the maxim, must have only had in mind state-to-state relationships and further explains that every state is doubtless the peer of every other state at the level of the interaction of supreme political authorities, and no jurisdiction may or can be exercised by one state over another at that level.



### *A. The History behind the Absolute Immunity Rule*

Ordinarily, customary international law adhered to the rule of absolute immunity, covering all areas of state activity and recognizing only the narrowest of exceptions.[103] The unqualified nature of this immunity was historically grounded on the fact that, in the past, the sovereign figurehead and the state were treated as one and the same, most especially during medieval times in England where society was ruled under the feudal system which was anchored on the well-entrenched philosophy that "the King can do no wrong."[104]

Eventually, this aphorism came to mean that the king was incapable of doing wrong,[105] primarily because the king claimed a divine right to his throne on the belief that political power came from God and those who were elected to exercise it were the "chosen ones."[106] The king was, therefore, considered to be ultimately answerable to God. Being at the pinnacle of the feudal system, the king had no superior lord, and though he was not regarded as above the law, it was believed that there was no court above him, such that it was unthinkable that he could be subjected to the jurisdiction of his own court.[107]

The controversial English adage thus laid the foundation for what would ultimately be deemed the inherent infallibility of the king or sovereign leader, thereby paving the way for the theory of absolute immunity which came to eventually mean that the king must not be (and was not) allowed to do wrong.[108] This, further, led to the issue, not so much as to whether a king's subject was left without remedy (since adequate remedies were afforded him during those times) or whether the doctrine of absolute sovereign immunity was even "correct," but led one to ponder on whether, as a practical matter, absolute sovereign immunity even existed at all.[109]

103. MALANCZUK, *supra* note 28, at 119.

104. Jimenez, *State Immunity*, *supra* note 89, at 28 (citing Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 447-78 (1935); Pugh, *Remedies Against the United States and its Officers*, 70 HARV. L. REV 829 (1957).

105. *Id.*

106. Madeline Tolentino Soriano, Juan Dela Cruz v. Uncle Sam, *et al.*: The Codification of the Restrictive Theory of Foreign Sovereign Immunity in the Philippines 8 (2001) (unpublished J.D. thesis, Ateneo de Manila University, School of Law) (on file with the Ateneo Law Thesis Center, Ateneo de Manila University, School of Law).

107. Jimenez, *State Immunity*, *supra* note 89, at 27-28.

108. BERNAS, COMMENTARY, *supra* note 26, at 1268 (citing LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 197 (1965)).

109. Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 1 (1963) [hereinafter Jaffe, *Suits Against Governments and*

Since the rule that the king could not be sued in his own courts inevitably gave rise to problems for himself and for his people, there emerged a variety of procedures for obtaining relief against the Crown. One of these took the form of suits against the king himself, brought as 'petitions of right' requiring his consent and which later on became over-generalized into the broad abstraction of what is currently known as sovereign immunity.[110] From this relaxation of the absolute immunity rule, the concept of sovereignty as personified in the monarch eventually gave way to the concept of sovereign nation-states.[111]

Earlier decisions of national courts appeared to have linked State immunity to the principles of diplomatic immunities and the immunities personal to sovereigns.[112] Later on, however, came the transition from the principle of immunity of the local sovereign to that of the foreign sovereign with the case of *"Prins Frederik,"*[113] where it was held that the foreign state (as personified by the foreign sovereign ruler) is equally sovereign and independent, such that to implead him in a suit would insult his "regal

*Officers*]. Jaffe comments that one should not question the propriety in granting sovereign immunity as a matter of right which the King was believed to be entitled to; rather one should question whether such immunity, as a privilege, ever existed in view of the fact that, even in the medieval times, private subjects were never left without a remedy against the Crown.

110. *Id.* at 2-3. The King, though not suable in his own court (since it was perceived as an anomaly to issue a writ against oneself), nevertheless endorsed on petitions of right the words "let justice be done," thus empowering his courts to proceed to hear actions filed against him. The petition of right, a writ by which suit could be brought against the monarch, required the King's consent and, was entertained routinely. Thus, for all practical purposes, it became non-discretionary. Such petition of right, as endorsed by the King himself, became the first form of express consent on the part of a sovereign to be exposed to suit from a private citizen.

At present, as will be discussed in later portions of this article, consent to be sued comes in the form of legislative enactments.

111. MALCOLM N. SHAW, INTERNATIONAL LAW 373 (1986) [hereinafter SHAW].

112. *See* ILC Y.B., *Jurisdictional Immunities*, *supra* note 3, at 239 (citing as an example Société Générale Pour Favoriser L'industrie Nationale v. Sindicat D'amortissement, Gouvernement des Pays-Bas et Gouvernement Belge Case (1840): II PASICRISIE BELGE — RECUIEL GÉNÉRALE DE LA JURISPRUDENCE DES COURS ET TRIBUNAUX ET DU CONSEIL D'ETAT BELGE 33, et seq. (Brussels 1841) (where the Brussels Court of Appeals ruled: "the principles of human rights applicable to ambassadors are all the more applicable to the nations that they represent." (*Id.* at 52-53 (translation by the Secretariat))).

113. J. Dodson, *Reports of Cases Argued and Determined in the High Court of the Admiralty*, 2 Dod. 451 (1820) (London 1811-1822).



dignity."[114] Such transition from the absolute immunity of the local sovereign to the immunity of the state he represented was noted by Lord Justice Brett in *The "Parlement Belge"* case.[115] As a consequence of each sovereign authority's absolute independence, though another sovereign, diplomat, or property be within its jurisdiction, each state declines to exercise its territorial jurisdiction, through its courts, over the person of such sovereign or such ambassador of another State, or over the public property of any state destined for public use.[116]

A judicial pronouncement of this measure was soon followed by a number of cases affirming the strict application of the absolute immunity rule. A case commonly regarded as the most extreme expression of this rule is that of the *Porto Alexandre*,[117] involving a Portuguese requisitioned vessel against which a writ was issued in an English court for the non-payment of dues for services rendered by tugs near Liverpool. Though exclusively engaged in private trading operations, the court felt itself constrained by the terms of the *Parlement Belge* principle to dismiss proceedings against the vessel in view of the Portuguese government's interest in it. In the United States, the U.S. Supreme Court ruled in a similar fashion in *Berizzi Brothers Co. v. Steamship Pesaro*;[118] where it rejected an argument in favor of limiting the scope of sovereign immunity to allow judicial jurisdiction when it came to claims arising from commercial vessels operated by foreign governments.

This fundamentalist approach to the absolute immunity rule did not last long, however, as the House of Lords began to reveal differences in opinion as to the application of immunity rules in *Compania Naviera Vascongado v.*

114. *Id.*; *see also*, de Haber v. Queen of Portugal, 17 Q.B. 206-07 (1851).

> [I]t is quite certain, upon general principles ... that an action cannot be maintained in an English Court against a foreign potentate .... To cite a foreign potentate in a municipal court for any complaint against him in his public capacity, is contrary to the law of nations, and an insult which he is entitled to resent.

115. The "Parlement Belge" case, U.K. The Law Reports, Probate Division, 5 P.D. 197 (1880).

116. *Id.* at 214-15.

117. The "Porto Alexandre" case, U.K. The Law Reports, Probate Division, 5 P.D. 30 (1920).

118. Berizzi Brothers Co. v. Steamship Pesaro, 271 U.S. 562 (1926) (the U.S. Supreme Court rejected the argument, accepted in a prior stage of the case by the District Court, that Italy was not entitled to immunity in an *in rem* proceeding brought to enforce a claim for cargo damage against a merchant vessel owned and operated by Italy).

*S.S. Cristina.*[119] In this case, the Spanish Republican Government took possession of *The Cristina* upon its arrival in Cardiff, prompting its owners to proceed to issue a writ claiming possession. When the proceedings turned on the argument to dismiss the case, as raised by the Republican government, in view of its sovereign immunity, the majority of the House of Lords accepted this in view of the requisition decree taking over the ship. Lord Justice Maugham, however, commented that "if governments or corporations formed by them choose to navigate and trade as shipowners, they ought to submit to the same legal remedies and actions as any other shipowner."[120]

### *B. Political Changes in the International Legal Order Leading to an Abandonment of the Absolute Immunity Rule*

With the inevitable collapse of the feudal system and the departure from the days of the monarchs, the concept of sovereignty of the nation-state arose.[121] The fact that the king customarily could not be sued in his own courts laid the foundation for the doctrine of sovereign immunity as it is commonly known today.[122] For instance, the immunities currently enjoyed by sovereigns and ambassadors belong ultimately to the state they represent and is further reflected in the case of diplomatic agents as diplomatic immunities can only be waived by an authorized representative of the foreign government and with the latter's authorization.[123]

The source of a great extent of the disagreement surrounding the law on sovereign immunity may be attributed to the fact that the principles underlying it were fashioned during an era dominated by the *laissez-faire* philosophy of political economy. During this age, lines were clearly drawn between political activities generally reserved for sovereign states, and activities of a commercial and economic sort usually performed by and

119. Compania Naviera Vascongado v. S.S. Cristina, (1938) A.C. 485 (this followed a Spanish Republican Government decree requisitioning ships registered in Bilbao, issued while "The Cristina" was on the high seas).

120. *Id.* at 520-21.

121. Jimenez, *State Immunity*, *supra* note 89, at 28 (citing JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 199 (1965)).

122. *Id.*

123. ILC Y.B., *Jurisdictional Immunities*, *supra* note 3, at 240 (citing as an example *Dessus v. Ricoy* (1907), where the court said: "[T]he immunity of diplomatic agents not being personal, but rather an attribute and a guarantee of the State they represent ... the waiver of such an agent is invalid, especially if no authorization from his government is produced in support of that waiver." (JOURNAL DU DROIT INTERNATIONAL PRIVÉ 1087-86 (1907) (translation by the U.N. Secretariat))).



reserved for private persons.[124] The end of the *laissez-faire* economic system became one of the central reasons for the abandonment of the absolute immunity rule. The other more important reason was the entry of the state into the international commercial market: states started occupying economic and social domains that had long been considered as exclusively "private" and began trading through public corporations. The unparalleled growth in the activities of the state especially with regard to commercial matters thus led to problems, and in most countries, a modification of the absolute immunity rule.

The growing number of governmental agencies, public corporations, nationalized industries, and other state organs gave rise to a reaction against the concept of absolute immunity, partly because it would enable state enterprises to have an undue advantage over private companies.[125] At present, socialist, industrialist, and developing countries all trade in the international market through state-owned and -controlled corporations.[126] With the prevalence of state trading, therefore, came a shift from an adherence to the absolute immunity rule to a rule of 'qualified' or 'restricted' immunity — a privilege-defense conferred upon states that admitted of exceptions and adjusted to a state's progressive trading activities.

As states became increasingly involved in commercial activities, pressure from private entities toward limiting immunity grew. This led to numerous legal actions in domestic courts over questions of sovereign immunity, thus explaining why current international legal rules on the subject are still a topic of much debate and skepticism. Contentions centered primarily on the fact that states should not be allowed to invoke the traditional absolute immunity rule as a shield against the enforcement of its commercial or contractual obligations which it voluntarily undertook with a private party. In an appeal for the relaxation of the absolute immunity rule, it was posited that: "the State may be a creditor or debtor, and just as the doors cannot be closed to it when it exercises its legal rights in court, *so also it would be improper to allow the State to protect the nonperformance of its obligations by allowing the shield of immunity as an absolute defense.*"[127] This was also the theory shared by the U.S. Supreme Court long ago in the 1824 case of *United States v. Planters*

124. Max SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW 424, 425 (1968) [hereinafter SORENSEN].

125. SHAW, *supra* note 111, at 374.

126. M. Sornarajah, *Problems in Applying the Restrictive Theory of Sovereign Immunity*, 31 INT'L. COMP. L. QUART. 661, 662 (1982) [hereinafter Sornarajah, *Problems in Applying the Restrictive Theory*] (citing W. Friedman, *Changing Social Arrangements in State Trading and Their Effect on International Law*, 24 LAW & CONTEMP. PROBLEMS 350 (1959)).

127. SMIT, *supra* note 16, at 220-21 (emphasis supplied).

*Bank of Georgia*,[128] where Mr. Chief Justice Marshall pointed out that when the state enters into commercial activities, "it divests itself ... of its sovereign character, and takes that of a private citizen ... . [I]t descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted."[129] The state, being an ethical entity, must make effective its own acts when claiming its rights or performing its obligations, when bringing suit or being sued as immunity should only be a regulatory device to accommodate private interests and the public good.[130]

As states then began to gradually take on the role of "trader" in the commercial market, it became unacceptable for them to use their jurisdictional immunities as justifications for disrespecting the legitimate contractual and business interests of private sector individuals who would unjustly suffer a deprivation of their property rights. Hence, though states still respected each other's equality and independence and municipal courts acknowledged the need for governmental authority to properly perform its functions unrestrained by numerous court actions, the foundation of sovereign immunity as it was traditionally recognized nevertheless began to wane. As was noted in *Ohio v. Helvering*,[131] a state has the right to go into the business of buying and selling commodities, but the exercise of such is not pursuant to a governmental function — "*it divests itself of its* quasi *sovereignty* pro tanto, *and takes on the character of a trader,* ... [drawing] a constitutional line between the State as government and the State as trader ... ."[132]

### *C. Preserving the International Legal Order through the Acceptance of the Restrictive Immunity Rule*

One well knows, however, that even a universally accepted principle such as sovereignty is not unfettered, but rather, a condition heavily restricted by international legal rules in the form of treaty or customary obligations.[133] Aside from the sovereign equality and independence of states, the more fundamental basis of immunity focuses on the international legal order not only as being decentralized, but also of being a horizontal legal order founded on equality.[134] With the passing of the monarchy came the reality that the world was without a supranational central authority, and that efforts

128. United States v. Planters Bank of Georgia, 9 Wheat. 904 (1824).

129. *Id.* at 907.

130. SMIT, *supra* note 16, at 218.

131. Ohio v. Helvering, 292 U.S. 360 (1934).

132. *Id.* at 369 (emphasis supplied).

133. ANTONIO CASSESE, INTERNATIONAL LAW 88, 91 (2001) [hereinafter CASSESE].

134. Sornarajah, *Problems in Applying the Restrictive Theory*, *supra* note 126, at 664.



by one sovereign entity to subject another to its decisions would result in upsetting this horizontal international order.[135] Thus, the international community acknowledged the fact that state immunity could not be discarded altogether.[136]

There were those who argued, however, that a vertical legal order was being unilaterally imposed upon the international community through the assumption of jurisdiction over fellow states by local courts and that there was a need to resolve conflicts between states through other means.[137] This imposition, however, by local courts of a vertical order was not deliberate on their part. In order to maintain the balance of interests between a state and those seeking relief against it, a theory or remedy consistent with the preservation of the horizontal legal order was necessary. This came about with an acknowledgment that states could, either expressly or through their conduct, give their consent to be sued, laying the basis for the restrictive 'qualified' theory of immunity.

Prior to a departure from the absolute immunity rule, the international community had to first accept two conclusions: (1) in the horizontal legal order, immunity from suit cannot be completely disregarded; and, more importantly, (2) it would not be inconsistent with the horizontal legal order to require a state which carries on trading relations and activities to submit to the jurisdiction of domestic courts under certain clearly defined

135. *Id.*

136. *See,* HARRIS, *supra* note 27, at 290. Harris notes that although the progression from the absolute to restrictive immunity is now well-established in the practice of many states, state practice does not suggest that sovereign immunity should be abolished altogether.

137. Sornarajah, *Problems in Applying the Restrictive Theory*, *supra* note 126, at 664. Sornarajah began by explaining how these arguments came about by providing a modern example of how this horizontal order was upset by the acrimony that attended the several American statutes attempting to enforce U.S. anti-trust laws extra-territorially. This acrimony, he adds, could lead one to infer that U.S. efforts to transplant the horizontal legal order with a vertical one would likely fail, if the efforts were made unilaterally through the agency of local courts (in reference to A. V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act*, 75 A.J.I.L. 357 (1981)). Sornarajah then goes on to quote the words of Justice Goff in *I Congresso del Partido* (1 All E.R. 1192 (1978)) to illustrate how this type of argument came about. Justice Goff pointed out that in the category of claims, these "would be more approximately dealt with through diplomatic channels than through courts of another country."

In analyzing these arguments, Sornarajah, in turn, points out that the plea of sovereign immunity could be treated as a technique where a local court could avoid pronouncing upon a dispute on the contention that more appropriate methods of conflict resolution existed other than relief from local courts.

circumstances centering mainly on the fact of consent. These conclusions led to the well-anticipated adoption of the restrictive immunity rule.

## IV. THE RESTRICTIVE RULE TO A STATE'S IMMUNITY FROM SUIT: ITS HISTORY AND NECESSITY UNDER INTERNATIONAL LAW

Foreign governments, in their commercial capacities, exercise only powers than can be exercised by private individuals, not those that are peculiar to sovereigns. "[S]ubjecting foreign governments to the rule of law in their commercial dealings presents a much smaller risk of affronting their sovereignty than would an attempt to pass on the legality of their governmental acts."[138]

As states became increasingly involved in commercial activities, the pressure towards limiting their jurisdictional immunities likewise grew considerably. At present, a pragmatic functional approach has largely taken the place of a conceptual absolute one. Under this functional approach, the problems attendant to exercising jurisdiction over a foreign state are balanced against the propriety of denying individuals the benefits they would have enjoyed if their claims were asserted against a private person rather than against a foreign state.[139] This functional approach thus led to the emergence of the restrictive or relative doctrine. Verily, the study of the law on sovereign immunity reveals the existence of two conflicting concepts of immunity. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign.[140]According to the contemporary or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with respect to sovereign or public acts (*jure imperii*) of a state, but not with respect to its private acts (*jure gestionis*).[141]

138. Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682, 703-04 (1976); *see also,* I Congreso del Partido [1978] 1 All E.R. 1192, at 1193 (quoting the opinion of Justice Goff: "more fundamentally, certainty in commercial transactions is not in my judgment the true reason why in certain circumstances the doctrine of sovereign immunity is restricted. *The true reason is that it is restricted where the foreign sovereign does not act as such,* i.e., *where he acts as any private citizen may act.*") (emphasis supplied).

139. HENKIN, PUGH, SCHACHTER & SMIT, *supra* note 101, at 892.

140. *See,* Tate Letter, *supra* note 53.

141. *Id.*



In *Dralle v. Republic of Czechoslovakia,*[142] the Supreme Court of Austria concluded that acts *jure gestionis* could no longer be made exempt from municipal jurisdiction, and that the subjection of these types of acts to the jurisdiction of states finds its basis in the development of the commercial activity of states. In view of the increased participation of states in the commercial market, the Court noted that since states unwittingly enter into competition with their own nationals and with foreigners, "the classical doctrine of immunity has lost its meaning and, *ratione cessante,* can no longer be recognized as a rule of international law."[143]

In 1952, in the famous *Tate Letter,*[144] the United States Department of State declared that the increasing involvement of governments in commercial activities, coupled with the changing views of foreign states on absolute immunity, rendered a change necessary and that, thereafter, "the Department [will] follow the restrictive theory of sovereign immunity." This approach was similarly adopted by the U.S. Supreme Court in the case of *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes,*[145]

142. Dralle v. Republic of Czechoslovakia (Case No. 41), 17 INT'L L. REP. 155 (Supreme Court of Austria 1950). In this case, the German cosmetics firm of Georg Dralle had had a branch office since 1910 at Bodenbach, in Bohemia, which subsequently became part of Czechoslovakia. The branch office was the registered owner in Austria of trademarks used by the German firm in connection with the sale of its goods in Austria. When the branch was nationalized by Czechoslovakia in 1945, the nationalized firm claimed the Austrian trademarks and requested the Austrian customers of the German firm not to offer the latter's goods for sale under the trademarks in question. The German firm applied for an injunction to restrain the Czechoslovakian firm from using the trademarks in Austria. The defendant claimed to be immune from the jurisdiction of the Austrian courts and claimed, in any event, to be entitled to use the trademarks in question. The plaintiff was awarded an injunction which was affirmed by the appellate court. The Supreme Court, however, reversed thereby denying the defense of immunity from suit after drawing distinctions between acts *jure gestionis* and acts *jure imperii.*

143. *Id.*

144. *See,* Tate Letter, *supra* note 53.

145. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes 336 F.2d 354 (2d Cir. 1964), *cert. den.* 381 U.S. 934 (1965). The controversy raised before the court pertained to an action filed by an American shipping company against Spanish Ministry of Commerce to compel arbitration of a dispute growing out of a transaction involving wheat purchased in the United States brought to Spanish ports pursuant to an agreement which contained an Arbitration Clause for New York. The ship was delayed and sustained hull damage from discharging its cargo in Spanish ports that were allegedly unsafe for a ship of the Hudson's size. When the appellant failed to pay for the damages or submit the dispute to arbitration, the appellee instituted proceedings to compel

where the Court affirmed jurisdiction after finding that the chartering of a ship to transport wheat was not strictly a political or public act.

Following this ruling was the *Philippine Admiral* case[146] involving a vessel owned by the Philippine government which had writs procured against it in Hong Kong by two shipping corporations. The Privy Council, after hearing the case on appeal from the Supreme Court of Hong Kong, reviewed previous decisions on sovereign immunity and concluded that it would not follow the *Porto Alexandre* case[147] for the following reasons: (1) that the Court of Appeal wrongly felt that they were bound by the *Parlement Belge*[148] decision; (2) that the House of Lords in *The Cristina*[149] had been divided on the issue of immunity for state-owned vessels engaged in commerce; (3) that the trend of opinion was against the absolute immunity doctrine; and (4) that it was "wrong" to apply the doctrine since states could, in the Western world, be sued in their own courts on commercial contracts, so there was no reason why foreign states should not be equally liable to suit.[150]

Soon after, in *Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria*,[151] the Court of Appeal unanimously accepted the validity of the restrictive approach as being consonant with justice, comity, and international practice.[152] The clear acceptance of the restrictive theory of immunity in *Trendtex* was reaffirmed in later cases, particularly by the House of Lords in the case of *I Congreso del Partido*[153] where, after making particular

arbitration. The court, however, denied the claim of immunity raised by the Spanish government.

146. The "Philippine Admiral" case, 2 W.L.R. 241(1976) *cited in* American Society of International Law, 15 I.L.M. at 133-45 No. 1 (Jan. 1976) (Washington, D.C.).

147. The "Porto Alexandre" case, U.K. The Law Reports, Probate Division, 5 P.D. 30 (1920).

148. The "Parlement Belge" case, U.K. The Law Reports, Probate Division, 5 P.D. 197 (1880).

149. Compania Naviera Vascongado v. S.S. Cristina, (1938) A.C. 485.

150. *The Philippine Admiral case*, 2 W.L.R. at 232.

151. Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria, (1977) Q.B. 529; 2 W.L.R. 356. In this case, the purchase of cement for the construction of barracks for the army was held to be commercial in nature and, therefore, not covered by state immunity, irrespective of its purpose or motivation.

152. *The Philippine Admiral case*, 2 W.L.R., at 366-67 (Denning M.R.), 380 (Stephenson L.J.), and 385-86 (Shaw L.J.).

153. I Congreso del Partido case, [1978] 1 All E.R. 1192. In this case, two vessels operated by a Cuban state-owned shipping enterprise and delivering sugar to a Chilean company were ordered by the Cuban government to stay away from Chile after the Allende regime had been overthrown. The Cuban government pleaded sovereign immunity on the grounds that the breach of the contract was



reference to the *Philippine Admiral* and *Trendtex* cases, Lord Justice Wilberforce noted that limitations associated with the absolute immunity doctrine arose precisely from the willingness of states to enter into commercial, or private party transactions, with individuals.

As consistently upheld by the foregoing decisions, the foundation for adherence to the restrictive rule to immunity is, to a large extent, as follows: (a) it is necessary, in the interest of justice, for individuals having transactions with states to be allowed to bring such transactions before the courts; (b) to require a state to answer a claim based upon such transaction will not involve a challenge to, or an inquiry into, any act of sovereignty or any governmental act of that state; it is neither a threat to the dignity of that state, nor an interference with its sovereign functions. It is, therefore, precisely for the main purpose of protecting private traders against politically-inspired breaches or wrongs, that this theory of a qualified rule to immunity allows municipal courts to seize jurisdiction over the commercial, and therefore private, activities of states.

Sovereign immunity was mainly designed to foster the efficient functioning of governments by protecting states from foreign lawsuits founded on its public acts.[154] Nevertheless, when a state acts as a private party or becomes involved in the market, there is no justification for permitting such state "to avoid the economic cost of the agreements it breaches or of the accidents it creates; the law should not permit the foreign State to shift these every day burdens of the marketplace onto the shoulders of private parties."[155]

As a consequence, with the general acceptance by the international community of a policy of restrictive immunity, a distinction was drawn between the private acts — trading and commercial acts or *jure gestionis* — and the public acts — governmental acts or *jure imperii* of a state. The importance of making this distinction between governmental and commercial activities did not lie on the propriety of state acts, but rather on the propriety and necessity of municipal courts assuming jurisdiction and,

occasioned as a result of a foreign policy decision. The House of Lords did not accept this and argued that once a state had entered the commercial trading field, it would require a high standard of proof of a sovereign act for immunity to be introduced.

154. Eleanor C. McDowell, *Contemporary Practice of the United States Relating to International Law*, 70 A.J.I.L. 817 (1976) (citing theTestimony of Monroe Leigh, the then Legal Adviser of the United States Department of State on the Foreign Sovereign Immunities Act of 1976, Hearings on H.R., 94th Congress, 2nd Sess. 24, 26-27 (1976)).

155. *Id.* at 818.

ultimately, resolving disputes arising therefrom.[156] These essentially governmental acts, therefore, by their very nature ministerial on the part of states, were more likely to involve delicate issues of international politics and, thus, unsuitable for adjudication by local courts.[157] By implication, acts which were commercial in nature and which could be easily undertaken by states and private individuals alike (such as entering into contracts) could be passed upon by local courts and an unreasonable hardship would ensue for the other contracting party if these courts were barred from assuming jurisdiction on the sole basis of a government's espousal of state immunity.[158]

On this score, the conclusion usually drawn by courts worldwide when confronted with issues of state immunity is that when a transaction in question is imbued with sovereign character (involving essentially acts of state), such issues are unsuitable for municipal courts to adjudicate upon. Acts of state are, in essence, matters between states not subjected to municipal jurisdiction because, though they may give rise to results falling within the sphere of municipal jurisdiction, they are "essentially an exercise of sovereign power"[159] and their legality or illegality can be judged only by the rules of international law.[160] Municipal courts are perceived, therefore, as more suited to exercise jurisdiction over controversies of a commercial nature impressed with private law, rather than public international law, issues.

Unlike the absolute immunity rule which was centrally founded on the impropriety of domestic courts exercising jurisdiction over the acts of a co-equal state, the restrictive immunity rule was borne of an assessment of the interests involved in the assumption of jurisdiction by municipal courts *vis-à-vis* the latter's competence to adjudicate over politically controversial matters. In this light, a question that may arise is: what should be considered in determining the competence of such courts in order for them to be imbued with the authority to assume and, subsequently, to exercise jurisdiction over a controversy involving a state?

156. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, at 428; Alfred Dunhill of London v. Republic of Cuba, 425 U.S., at 714; MALANCZUK, *supra* note 28, at 120.

157. *See,* Schooner Exchange v. McFaddon, 11 U.S. 116, 146 (1812) *cited in* W. CRANCH, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES (3rd ed. 1911); *see,* Luther v. James Sagor & Co., 3 K.B. 532 (1921).; United States v. Belmont, 301 U.S. 324 (1937); First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

158. MALANCZUK, *supra* note 28, at 120.

159. *See,* Salaman v. Secretary of State for India, (1906) 1 K.B. 613, 639.

160. Sir William Searle Holdsworth, *The History of Acts of State in English Law, in* ESSAYS IN INTERNATIONAL LAW FROM THE COLUMBIA LAW REVIEW 318, at 319 (1965) [hereinafter Holdsworth, *History of Acts of State*].



The answer lies in drawing a distinction between immunity as a plea in bar based on the *status* or *identity* of the defendant as a sovereign state, otherwise termed as jurisdiction *ratione personae,*[161] and immunity affecting the competence of local courts in relation to *the nature of the subject matter* of the action, also known as jurisdiction *ratione materiae.*[162]

Jurisdiction *ratione personae,* which refers to the parties of a particular action, traces its roots from diplomatic immunity and state immunity, such that one of the principal arguments in support of jurisdictional immunity not only rests essentially on the sovereign equality of states, but also on the functional need to leave states and their agents unencumbered in the pursuit of their missions.[163] This principle is more commonly known as functional immunity or the right to immunity of state representatives acting in their official capacities.[164]

A case illustrative of the application of this theory is that of *The Duke of Brunswick v. The King of Hannover,*[165] where the acts performed by the defendant, as the King of Hannover within his own territory, were put to question. The Court of Chancery ruled that, even supposing these acts to be contrary to the laws of Hannover, no action lay because "no Court in this country can entertain questions to bring sovereigns to account for their acts done in their sovereign capacities abroad."[166]

Moreover, this case also demonstrated the significance of the distinction between private and political acts of sovereigns insofar as it conferred upon the defendant the protection of jurisdictional immunity. *The Duke of Brunswick* case placed at issue acts performed by a person possessing two capacities — in the capacity of the King of Hannover, the defendant was sovereign, while in the capacity of the Duke of Cumberland, he was a subject. As a consequence, the case raised the question of what test should be applied to determine whether the acts performed by a person having this double capacity were acts of state or acts which were subject to the jurisdiction of municipal courts. The test, as Lord Langdale, M.R., opined was the capacity in which he carried out the acts, such that, in resolving the

161. SORENSEN, *supra* note 124, at 701; *see generally,* Statute of the International Court of Justice, art. 34.

162. *See generally,* Statute of the International Court of Justice, art. 36 (1) (2); BROWNLIE, *supra* note 26, at 330; SORENSEN, *supra* note 124, at 701.

163. U.S. Diplomatic and Consular Staff in Tehran (U.S. v. Iran) (Provisional Measures), 1979 I.C.J. 7, at 19-20, *and* (Judgment) 1980 I.C.J. 3, at 40.

164. Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95, Preamble; *see also,* CASSESE, *supra* note 133, at 90.

165. Duke of Brunswick v. The King of Hannover, 2 H.L. Cas., 1 9 ENG. REP. 993 (H.L. 1848).

166. *Id.* at 1000 (Lord Cottenham L.C.).

issue of immunity, the identity of the party should be effectively downplayed and must yield to the nature of the activity involved.[167]

Jurisdiction *ratione materiae*, on the other hand, is not concerned with the status or identity of the sovereign defendant, but rather makes clear that it is the very nature of the subject matter involved in a controversy which determines the application of the doctrine of sovereign immunity. Quoting again Lord Diplock in the case of *Buck v. A.-G.*, one cannot ignore that "the application of the doctrine of sovereign immunity *does not depend upon the persons between whom the issue is joined, but upon the subject matter of the issue.*"[168]

By operation of the *ratione materiae* rule, the title or status of a sovereign carried little weight in terms of a state's defense against suits brought against it. International law, through the practice of municipal courts, thus began to bear witness to the growing acceptance of the notion that issues concerning the nature of the subject matter led courts to ascertain: (1) whether or not they were the appropriate forum to adjudicate over a certain matter; and, subsequently, (2) whether by adjudicating on the subject matter brought before them, they could reach a resolution effective or beneficial enough for the parties involved.[169]

Such was the task of the court in the case of *Baccus SRL v. Servicio Nacional del Trigo*[170] when they had to resolve whether the entity, a Nigerian Bank, was entitled to sovereign immunity. The court in doing so, applied the functional approach rather than the personality approach; the former looking at the powers, duties, and control of the entity within the framework of its constitution and activities. Since the bank had failed to prove the legislative intent of the Nigerian government to make it a state organ, the court allowed the appeal, though noting that this case called for a rather difficult borderline decision. Nevertheless, Lord Justice Shaw stated that when faced with such a similar borderline case, "the absence of any positive indication that the body in question was intended to possess

167. *See,* 6 Beav. 1, 57, 49 ENG. REP. 724, 746 (Ch. 1844).

> His majesty the King of Hannover is and ought to be exempt from all liability of being sued in the courts of this country, for any acts done by him as King of Hannover, or in his character of sovereign prince, but, being a subject of the Queen, he is and ought to be liable to be sued in the courts of this country, in respect of any acts and transactions done by him, or in which he may have been engaged as such subject.

168. Buck v. A.-G. (1965) Ch. 745, 770-71; INT'L L. REP. 42, 11; 41 BY (1965-66), at 435 (emphasis supplied).

169. *See,* BROWNLIE, *supra* note 26, at 325.

170. Baccus SRL v. Servicio Nacional del Trigo, (1957) 1 Q.B. 438.



sovereign status and its attendant privileges must perforce militate against the view that it enjoys that status or is entitled to those privileges."[171]

With the basic role of the restrictive immunity doctrine in mind — that of making a distinction between the public and private acts of a state — the connection between the principle of *ratione materiae* and the restrictive immunity rule is most evident. *Ratione materiae*, to reiterate, deals with the nature of the subject matter as determinative of whether municipal courts can, in the first instance, exercise jurisdiction over a particular controversy. Under this principle, courts must first ascertain whether or not they are competent to adjudicate over the subject matter of the controversy brought before them. Applied within the confines of the restrictive immunity rule, municipal courts must ascertain whether their forum (and, thus, the entire body of their domestic laws) is suitable for deciding a dispute arising from a particular activity or transaction of which a state is a party.

Under the restrictive theory, the rule is that municipal courts are only competent to resolve issues involving the private or commercial acts of a state, but are inappropriate fora to preside over issues involving their sovereign or governmental acts. Whether in the international or municipal setting, or whether adhering to the principles of the sovereign equality of states or separation of powers, what is certain is that when it comes to the inherently public or sovereign activities of a state, relief cannot be given to a private claimant by municipal courts through the judicial processes of such state or of a foreign co-equal state. Hence, what must first and foremost be ascertained is whether or not judicial relief is even an available remedy to a claimant, and this involves examining the nature of the state activity in question. With this in mind, the intricacies of the restrictive immunity doctrine must also be examined in order to better ascertain under what particular circumstances it may apply.

## V. THE INTRICACIES OF THE RESTRICTIVE IMMUNITY RULE

With the movement towards a more pragmatic approach to immunity came a "balancing of interests" of both the private claimant and the state. In applying the restrictive immunity rule, problems from potential interference by municipal courts, threatening to plague the conduct of a state's foreign relations, were assessed against the impropriety of denying citizens the benefits arising from judicial remedies they could have enjoyed had their claims been asserted against a private person rather than against a foreign state.[172]

The Philippine Supreme Court had the occasion to render rulings to a similar effect, geared towards the use of the balancing approach. In *Republic*

171. *Id.* at 384.

172. VAN DERVORT, *supra* note 45, at 305.

*of the Philippines v. Judge Purisima*,[173] the Court ruled that, from an objective perspective, the inconvenience private parties may face is minimal as compared to the loss of governmental efficiency if a state's jurisdictional immunities were not respected. Citing *Switzerland General Insurance Co., Ltd. v. Republic of the Philippines*,[174] the Court upheld the defense of state immunity by ruling: "[i]n the balancing of interests, so unavoidable in the determination of what principles must prevail if government is to satisfy the public weal, the verdict must be, as it has been these so many years, for its continuing recognition as a fundamental postulate of constitutional law."[175]

By grounding its judgment according to the wisdom or public policy behind the principle of state immunity, the Court ruled that the interests of the private claimant were minimal if balanced against the public interests and possible deleterious consequences to the government if immunity were not granted. Hence, in paying due regard to considerations of public policy and public interest, the Court ruled that the government agency should be deemed immune from suit.

In the case of *Santiago v. Government of the Philippines*,[176] the Supreme Court, on the other hand, used the balancing criterion and ruled against the state, not

173. *See,* Republic of the Philippines v. Judge Purisima, 78 SCRA 470 (1977). This case involved a collection for sum of money filed by the private company against the Rice and Corn Administration from an alleged breach of contract by the latter. Judge Purisima rejected the defense of immunity, reasoning that the contract between the contending parties anticipated suits in case a breach of contract arose. The Court, however, reversed the ruling of Judge Purisima and cited previous decisions justifying the grant of immunity under reasons of public policy which outweighed the interests of the private claimant.

174. Switzerland General Insurance Co., Ltd. v. Republic of the Philippines, 32 SCRA 227 (1970).

175. *Judge Purisima*, 32 SCRA at 473, 474.

> Nonetheless, a continued adherence to the doctrine of non-suability is not deplored for as against the inconvenience that may be caused private parties, *the loss of governmental efficiency and the obstacle to the performance of its multifarious functions are far greater if such fundamental principle were abandoned and the availability of judicial remedy were thus restricted.*
>
> Whatever difficulties for private claimants may still exist, is, from an objective appraisal of all factors, minimal .... (emphasis supplied)

176. *See,* Santiago v. Government of the Philippines, 87 SCRA 294 (1978). This case involves an action filed by Santiago against the Director of the Bureau of Plant Industry for the revocation of a deed of donation executed by the former in favor of the government. One of the terms of the donation was that the Bureau would undertake the installation of street lighting facilities and a water system on the property donated, as well as to build an office building and parking lot thereon. Since the Bureau did not comply with its obligations, Santiago filed the action to revoke the donation. The Director of the Bureau argued that he was exempt from such compliance based on the rule that the State could not be sued without its consent.



acceding to the government's claims of jurisdictional immunity; instead the Court stated that a dismissal of the case would result in unfairness and that the equitable and just action would be to presume the state's consent to be sued.[177]

In the *Santiago* case, the Court found the factual scenario to be one where, after assessing both the private and public interests of the parties, justice and equity found that the private interests of the claimant outweighed the public interests of the state. Also, public policy considerations could not justify a ruling by the Court upholding a grant of immunity since this would lead to a dangerous precedent allowing the government to blatantly refuse compliance with its contractual obligations and to raise the convenient defense of jurisdictional immunity in order to avoid enforcement.

In gauging the private and public interests involved in a controversy, a "balancing of interests" of the contending litigants is undertaken. Nevertheless, a true and equitable balance is only possible if a sound determination is first made as to what capacity a state may have performed an act which, consequently, defines the nature of the subject-matter of the controversy brought before the courts. The operation of the restrictive immunity doctrine, therefore, requires a precise investigation into *the quality of the acts* in question, with the view that what is fundamentally at stake is not only the deprivation of a state's right to invoke the defense of immunity, but also the diminution of a private individual's right to secure judicial relief for the reneging of a contract fairly and voluntarily entered into.

Accordingly, the common criterion in the application of the restrictive immunity doctrine is the establishment of a distinction between the governmental and commercial acts of a state — in essence, the former are acts of inherent sovereign authority which cannot be open to judicial inquiry, and the latter are acts of a private law character over which ordinary contract law remedies can be enforced. One may further understand the dynamics of these two types of acts through a study of two decisive factors: (1) the purpose behind the act of a state; and (2) its nature.

In applying the purpose standard, certain litigations arising from state acts — such as the entry of a state into a contract for the supply of cigarettes to a

177. *Id.* at 296-97, 300.

> It would be manifestly unfair for the Republic, as donee, alleged to have violated the conditions under which it received gratuitously certain property, thereafter to put as a barrier the concept of non-suability. That would be a purely one-sided arrangement offensive to one's sense of justice.

foreign army,[178] or a contract for the purchase of army boots[179] — would appear to most likely confer jurisdictional immunity on the ground that the supply of resources to an army is inherently a sovereign and governmental activity. Then again, this was not the view of the West German Supreme Constitutional Court in the *Claims Against the Empire of Iran* case,[180] where it renounced the purpose test by ruling state activities will ultimately serve sovereign purposes and duties, whether wholly or in its broadest sense, and, hence, the distinction between sovereign and non-sovereign acts cannot be delineated according to their purposes. Instead, one should look to the nature of the state transaction or the resulting legal relationship. [181] "It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person that is in private law."[182]

This opinion was shared by the United States Supreme Court in the *Victory Transport* case,[183] when it declared that it would refuse to grant immunity, unless the activity in question fell within one of the categories of strictly political or public acts, *viz.*: internal administrative acts, legislative acts, acts concerning the armed forces or a diplomatic activity, and public loans. Likewise worth mentioning is that, during the time of the *Victory Transport* case, the basic approach of recent legislation was to proclaim a rule of immunity and subsequently list its exceptions, so that the onus of proof fell on the other side of the line. Such a tendency in the enactment of jurisdictional immunity statutes continues to this day. Therefore, in determining the basic characterization of an activity as sovereign (*jure imperii*) or non-sovereign (*jure gestionis*), the test is that of the *nature* of the transaction *rather than its purpose.*[184]

178. Guggenheim v. State of Vietnam, 1 Gazette de Palais 186 (1962).

179. Kingdom of Romania v. Guarantee Trust Co. of New York, 250 Fed. 341 (1918).

180. Claims Against the Empire of Iran, 45 INT'L L. REP. 57 (1963). In this case, a private firm in Cologne sued the Empire of Iran in order to obtain payment of a bill for 292DM rendered to the latter for repairs made on the heating system in the Iranian Embassy at the request of the Ambassador. The question of sovereign immunity was raised before the local court, which decided that the defendant, as a sovereign state, was immune under international law from German jurisdiction. The West German Supreme Constitutional Court, in reference to *Dralle v. Republic of Czechoslovakia,* (Case No. 41), 17 INT'L L. REP. 155 (Supreme Court of Austria 1950), reversed and ruled that the building work conducted on official mission premises of the legation was an *acta jure gestionis.*

181. *Id.* at 80-81.

182. *Id.*

183. Victory Transport, Inc., v. Comisaria General de Abastecimientos Transportes, 336 F.2d. 354 (2d Cir. 1964).

184. *See,* SHAW, *supra* note 111, at 380 (emphasis supplied) (citing as an example the U.S. Foreign Sovereign Immunities Act of 1976, §1603(d); and referring to the



Lord Denning, in the *Trendtex Trading Corp. v. Central Bank of Nigeria* case,[185] rather persuasively explained this growing rejection of the purpose or motive standard behind a state's acts by declaring that when the government goes into the market, then such entity should be subject to all the rules of the market place as "[t]he seller is not concerned with the purpose to which the purchaser intends to put the goods."[186]

Though the application of the purpose test rests primarily on the exercise of judicial discretion, one must remember that there may arise certain situations wherein overwhelming public interests demand that states maintain their jurisdictional immunity against suits filed by private individuals.[187]

Such was the case in *Republic of Indonesia v. James Vinzon,*[188] where the Philippine Supreme Court was faced with the issue of determining whether or not Indonesia was entitled to immunity as opposed to being liable for compliance with the obligations it assumed with a private party under a Maintenance Agreement. In resolving the issue on state immunity, the Court ruled that the ultimate test was the nature test and that one must inquire into

Claims Against the Empire of Iran, 45 INT'L L. REP. 57, 80-81 (1963); Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria, (1977) Q.B. 529; 2 W.L.R. 356; Non-resident Petitioner v. Central Bank of Nigeria, 16 I.L.M. 501 (1977); Planmount Ltd. v. Republic of Zaire, (1981) 1 All E.R. 1110).

185. Trendtex Trading Corporation Ltd. v. Central Bank of Nigeria, (1977) Q.B. 529.

186. *Id.* at 558.

187. *Cf.* Catalina Development, Inc. and Gregory Collins v. County of El Paso, Texas, S.W.3d 704 (Tex. 2003) (which ruled that a county is a governmental unit protected by the doctrine of sovereign immunity. Generally, a governmental unit possesses both immunity from liability and immunity from suit. When the governmental unit contracts with a private party it waives immunity from liability, but not from immunity from suit.); Federal Sign v. Texas State University, 951 S.W.2d 401 (1997); Matter of County of Monroe, 72 NY2d 338, 344-45 (1988).

188. Republic of Indonesia v. Vinzon, 405 SCRA 126 (2003). This case involved a Maintenance Agreement entered into between Vinzon and the Republic of Indonesia, wherein the former would maintain specified equipment at the Embassy building. Such equipment consisted of air conditioning units, generator sets, electrical facilities, water heaters, and water motor pumps. The Agreement likewise contained a provision that it shall be effective for a period of four years and will renew itself automatically, unless cancelled by either party by giving 30 days prior written notice from the date of expiry. Vinzon was later informed, however, that the renewal of the contract would be under the discretion of the incoming Chief of Administration of the Embassy. What gave rise to the action was a pre-termination of the contract by the Embassy on the ground that it was dissatisfied with the performance by Vinzon of his obligations. The Embassy raised the defense of immunity from suit.

whether the state was in pursuit of a sovereign activity or was performing an act that was merely incidental thereto. If such was the case, then the act was *jure imperii* and immunity should definitely be granted.

The *Republic of Indonesia* ruling was rather peculiar, however, in that, although the Court decreed adherence to the nature test, it still applied the ineffective purpose test and granted immunity to Indonesia. Under the basic rules of the nature test, the core activity or "relevant act" as designated in the *I Congreso* case should be considered and not the purpose or the motives behind the activity in question. The *Republic of Indonesia* court, however, did not apply the nature test, but instead ruled that the establishment and maintenance of a diplomatic mission were *jure imperii* and, hence, the Embassy was entitled to immunity from suit. Perhaps in a bid to ensure compliance with its treaty obligations under the Vienna Convention on Diplomatic Relations[189] and in order to foster harmony with the Indonesian government, the Court in this case felt compelled to rule not only according to the identity of the defendant, but also as to the purpose of safeguarding the efficiency of the diplomatic mission.

Comparable to the *Republic of Indonesia* case are the rulings on the *Republic of "A" Embassy Bank Account* case[190] and *Alcom Ltd. v. Republic of Colombia*,[191] both of which involved cases where there were already judgments in favor of the private claimants, who then filed petitions for the attachment of the Embassy bank accounts of the defendant governments for purposes of execution. In both instances, the courts recognized that customary international law was averse to the attachment of funds intended to defray the costs of the day-to-day running of a foreign embassy.[192] Because of the difficulty in determining whether a diplomatic mission's operations are compromised "and because of the potential for abuse, general international law *made the area of protection enjoyed by the foreign State very wide* and determined it *by reference to the typical abstract danger and not the specific threat to such ability to function.*"[193]

In trying to comprehend the rationale behind the *Republic of "A"* ruling, one should bear in mind that issues on immunity from jurisdiction must be distinguished and treated differently from immunity from execution — the two being completely dissimilar, particularly when involving delicate questions of actual seizure of assets belonging to a foreign state. As such,

189. Vienna Convention on Diplomatic Relations, 500 U.N.T.S. 95 (1961).

190. Republic of "A" Embassy Bank Account case, 65 INT'L L. REP. 489 (Supreme Court of Austria 1986).

191. Alcom Ltd. v. Republic of Colombia, 74 INT'L L. REP. 171 (House of Lords 1984).

192. *Id.*

193. *Republic of "A,"* 65 INT'L L. REP. at 493.



when dealing with immunity from execution, there arises a considerable challenge to the relations between states and, accordingly, states have proved unwilling to restrict immunity from enforcement of judgment in contradistinction to situations concerning jurisdictional immunity.[194] The foregoing notwithstanding, the courts in these cases similarly recognized that the protection granted to embassy bank accounts was *not absolute but may be subject to attachment and execution if the funds deposited therein were geared towards financing commercial transactions.*[195] It is, therefore, evident that even foreign courts acknowledged that the restrictive immunity rule could be enforced against foreign diplomatic entities. The court in *Republic of "A"* made the following pronouncement: "From the mere fact that the bank account is in the name of a foreign State, or 'its respective legation,' *it could not be conclusively concluded that the bank account is used only for the execution of sovereign functions of a foreign State* ... and not for private functions also."[196]

*A. The Nature of the State Act: The True Essence of the Restrictive Immunity Rule*

The many difficulties surrounding the purpose standard eventually led to the adoption of a criterion more complex yet less dependent on the identity of the defendant involved — the nature of the activity.

The House of Lords, in the aforementioned *I Congreso del Partido* case,[197] examined the nature approach in distinguishing public and private acts of a state and formulated certain guidelines for this purpose. In *I Congreso*, the House of Lords ruled that, in considering whether state immunity should be granted or not under the restrictive theory, courts must consider *the whole context* in which the claim against the state is made. Lord Wilberforce emphasized that, in considering whether immunity should be recognized, one had to take into account what the "relevant act" was which formed the basis of the claim. In particular, was it an act *jure gestionis* or, in other words, "an act of a private law character such as a private citizen might have entered into?"[198] This very same test was applied in the *Empire of Iran* case[199] and in *Segupta v. Republic of India*.[200]

Moreover, the House of Lords added that this deliberation must ultimately be undertaken by courts with the end in view of deciding whether the act in question should, in that context, be considered as *fairly*

194. Hazel Fox, *Enforcement Jurisdiction, Foreign State Property and Diplomatic Immunity*, 34 (1) INT'L. COMP. L. QUART. 115 (1985); SHAW, *supra* note 111, at 390.

195. An example is U.S. FIS.A., §1609, 1610 (2).

196. *Republic of "A,"* 65 INT'L L. REP. at 493 (emphasis supplied).

197. I Congreso del Partido case, 1 All E.R. 1192 (1978).

198. *Id.* at 1070.

199. Claims against the Empire of Iran case, 45 INT'L L. REP. 57 (1963).

200. Segupta v. Republic of India, [1983] I.C.R. 221 Employment Appeal Tribunal.

*within an area of activity, trading or commercial*, or of an otherwise private law character, or whether the relevant act should be considered as having been done *outside the area and within the sphere of governmental or sovereign activity.*[201] This very criterion adopted in the *I Congreso* case was subsequently referred to and affirmed by the ILC Working Group in its 1999 Report after concluding a survey of relevant case law on the matter:

> [p]ublic, sovereign and governmental acts, which only a State could perform and which are core governmental functions, have been found not to be commercial acts. *By contrast, acts that may be, and often are, performed by private actors and which are detached from any exercise of governmental authority are likely to be found to be commercial acts.* One case has articulated those propositions in the form of a test, namely, *whether the relevant act giving rise to the proceedings was of private law character or came within the sphere of governmental activities.*[202]

This dichotomy between public and private law in *I Congreso* became a topic of deliberation in determining whether immunity could be granted where, while the initial transaction was clearly commercial, the cause of the breach of the contract in question appeared to be an exercise of sovereign authority. As a defense, the Cuban government pleaded sovereign immunity on the ground that the breach of contract was occasioned by compliance with foreign policy. The House of Lords did not reject this contention and ruled that once a state entered the commercial trading field, it would require a high standard of proof of a sovereign act for immunity to be introduced. Lord Wilberforce stressed that, to withdraw an act from the realm of *jure gestionis*, a clearly *jure imperii* act must be pointed to.[203] "[T]he appropriate test ... is not just that the purpose or motive of the act is to serve the purposes of the state, but that *the act is of its own character a governmental act, as opposed to an act which any private citizen can perform.*"[204]

In *I Congreso*, the House of Lords held that courts must not only look to the nature of the contract, but also to the nature of the breach in deciding whether to deny jurisdiction on the ground of the defendant's jurisdictional immunity. If a contract is an act *jure imperii*, jurisdiction cannot be assumed; if it is an act *jure gestionis*, the defense of immunity may still succeed if the act

201. *I Congreso*, 1 All E.R., at 1193.

202. International Law Commission Working Group, 1999 Report of the Working Group on Jurisdictional Immunities of States and Their Properties, U.N. Doc. A/CN.4/L.57, Annex, at 161, http://untreaty.un.org/ilc/documentation/english/a_cn4_l576.pdf (last accessed Mar. 15, 2007 ) (emphasis supplied).

203. I Congreso del Partido case, 2 All E.R. 1075 (1981).

204. *Id.* at 1081.



in breach of the contract is one *jure imperii*.[205] According to the House of Lords, courts must ascertain whether, at any stage of the case, the state acted as a sovereign and, if so, jurisdiction cannot be assumed or even exercised.

In the case of *Segupta v. Republic of India*,[206] the Employment Appeal Tribunal followed the ruling in *I Congreso* by considering the nature of the breach as well as that of the contract, delving into a deeper analysis of the standards which should of necessity be applied under the nature test. The *Segupta* Tribunal ruled that it was critical to look at what is to be done under the contract in order to decide whether the entry into, and subsequently the performance of, the contract was a private act of the state or involved an indispensable participation by the other contracting party in a public act of the state. The Tribunal noted that in resolving this matter, certain questions should be answered:

(a) Was the contract of a kind which a private individual could enter into?

(b) Did the performance of the contract involve the participation of both parties in the public functions of the foreign State, or was it purely collateral to such functions?

(c) What was the nature of the breach of contract or other act of the sovereign state giving rise to the proceedings?

(d) Will the investigation of the claim by the tribunal involve an investigation into the public or sovereign acts of the foreign state?[207]

In its entirety, the essence of the nature standard characterizes as private acts all acts which a private person can similarly engage in and disregards whatever public purposes may have motivated the state in performing these acts. What is ironic, however, about the acceptance of the restrictive immunity rule as well as the nature test, is that even though these guidelines were supposed to provide a remedy to private parties, they have led to even more concerns precisely because the distinction between commercial and sovereign activities is a grey area.

## VI. PROBLEMS IN THE APPLICATION OF THE RESTRICTIVE IMMUNITY RULE

Any serious study of the international law on state immunity cannot fail to take into account the judicial practice of states, which provides an

205. *Id. See also,* HARRIS, *supra* note 27, at 298.

206. Segupta v. Republic of India, [1983] I.C.R. 221 Employment Appeal Tribunal. This case involved an employment contract where the applicant, an Indian national, claimed before the industrial tribunal that he had illegally been dismissed form his low-grade clerical position. Issues on state immunity were tackled by the Tribunal.

207. *Id.*

inexhaustible source of supplies for rules of international law on this topic. The task, however, of examining the judicial practice of all states, large and small, would appear to be virtually impossible, if not undesirable, considering that the main obstacles encountered in finding uniform rules may be said to result from the diversity of legal procedures and the divergence of judicial practice varying from system to system.[208] These days, the law on state immunity presents the international, as well as the municipal, lawyer with extremely complex problems since the entire *corpus* of the law is still largely a creation of local courts and state practice does not interpret the theoretical scope of immunity in a uniform and consistent fashion.[209] In fact, many legal scholars are of the opinion that quite a number of judicial decisions, government policies, and legal writings have failed to reach a consensus as to the distinction between acts *jure gestionis* and acts *jure imperii*.[210]

This problem brings to light some rather unfavorable results. Due to the failure to conceive acceptable criteria for the operation of the restrictive immunity rule, policy implications that play a role in controversies involving issues of state immunity have led to difficulties on the part of courts to formulate adequate standards in differentiating between governmental and commercial acts.[211] Even the nature standard ignores one important basic policy consideration — the fact that one of the parties to the transaction is a

208. ILC Y.B., *Jurisdictional Immunities*, *supra* note 3. at 233.

209. SORENSEN, *supra* note 124, at 426.

210. *See,* Oliver J. Lissitzyn, *Sovereign Immunity as a Norm of International Law, in* TRANSNATIONAL LAW IN CHANGING SOCIETY 195 (1972) [hereinafter Lissitzyn, *Sovereign immunity*]. The available information on the practice of many states, however, is too scanty to permit confident formulation of such a consensus in general terms. A survey of the opinions of many courts, governments and jurists reveal that existence of widely divergent views. Among the adherents to the restrictive theory, there is no real consensus. Many believe that acts of states can be divided into two categories, *acta jure imperii* and *acta jure gestionis*, and that foreign states are entitled to immunity only with respect to the first category.

211. *See generally,* Sornarajah, *Problems in Applying the Restrictive Theory*, *supra* note 126, at 663-68. Sornarajah comments that these policy considerations are the origins of the immunity rule stemming from the Latin maxim *par in parem non habet imperium*, the need to preserve the existence of the horizontal legal order in the international community, the entry by States into the commercial world through trading, the resulting treatment by the international community of these trading activities as an exception to the immunity rule, and the corresponding demand that States fulfill their commercial obligations. Sornarajah, explains that the understanding of these policy implications behind the plea of sovereign immunity is vital to the formulation of any criterion as to distinguishing between governmental and commercial acts.



state and, thus, inherently sovereign.[212] As a result, when a state seeks to change its existing commercial obligations in pursuit of a newly formulated general policy, a political element usually steps into the private commercial transaction and renders futile the distinction between commercial and governmental acts of a state.[213]

One such example is the *Victory Transport* case,[214] which urgently demanded the formulation of clearly defined classifications of certain activities so as to better identify the governmental and commercial activities of a state. In fact, the innate difficulties in attempts to apply the distinction between acts *jure imperii* and *jure gestionis* have led to suggestions that immunity from suit be denied unless the acts out of which the action arises fall into certain defined categories.[215] Despite the categorical pronouncement of the House of Lords in the *I Congreso* case, the Court in *Victory Transport* found inadequate both the purpose and the nature tests by declaring: "[s]overeign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases." The court ruled that a claim of sovereign immunity must first be recognized by the State Department — otherwise, it should be denied by the court — unless it comes "within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive."[216]

There are authorities, however, who are of the opinion that the standards and examples laid down in *Victory Transport* may result in an unnecessary expansion of immunity without really clarifying the scope of the restrictive theory.[217]

At present, finding a solution to this difficulty remains speculative. What is certain is that a state's espousal of its jurisdictional immunity as a defense against suit, either on the municipal or international level, does not make

212. *Id.* at 669.

213. *Id.*

214. Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes 336 F.2d 354 (2d Cir. 1964).

215. Lissitzyn, *Sovereign Immunity*, *supra* note 210, at 197.

216. *Victory Transport*, 336 F.2d, at 360. The categories are:

(1) internal administrative acts, such as expulsion of an alien;

(2) legislative acts, such as nationalization;

(3) acts concerning diplomatic activity;

(4) public loans.

217. *See,* Lissitzyn, *Sovereign Immunity*, *supra* note 210, at 198-99; Lalive, *L'immunité de Jurisdiction des Etats des Organisations Internationales*, 84 HAGUE RECUIEL DES COURS 205, 285-86 (1953-III). Lalive expressed uncertainty regarding the category of public loans.

impervious the case to adjudication by courts provided it is clearly established that the act to be judged is one not sovereign in nature. In view, therefore, of the fact that immunity against jurisdiction is not absolute, this would necessarily lead to the question of whether such exercise of jurisdiction would even result in an award of municipal contract law remedies, such as specific performance, to the injured private contracting party. Surely a right without a remedy, as Justice Holmes declared, is no right at all and the suability of states is merely a prerequisite, not an assurance, of its liability for breaching its contractual obligations. As such, another matter for courts to resolve when confronted with a blatant breach by a state of a governmental contract is: (i) would such a breach give rise to an award on behalf of the private claimant?; (ii) can the state still raise the defense of immunity from execution in order to preclude a decree of specific performance by an adjudicatory body?; and (iii) will the resolution of these issues involve a clash between municipal legal principles and international law?

## VII. THE SUABILITY OF STATES: A MATTER OF MUNICIPAL LEGISLATION

With the substitution of the divine ruler with that of the nation-state, it was only logical that the latter must always act through one of its formal organs. In a republican government, the people's representatives are those they elect to sit in the legislative department. The Legislature thus enacts laws and grants, where necessary, the state's consent to be sued.[218]

In this regard, the restrictive theory to immunity may be approached in two ways, insofar as express waiver is concerned. One approach is unilateral, by expression of the legislative will of the state; the second is through a process of coordination agreed upon with other states.[219] Express waiver may thus come about internationally through the forging of a treaty, a diplomatic communication, or by actual submission to the proceeding of the local court.[220]

On the municipal level, express waiver is conveyed through the enactment of a general or special law. The 1987 Philippine Constitution, for instance, provides: "[t]he State may not be sued without its consent."[221] Under Philippine law, consent to be sued may be given by an express waiver granted by the Legislature, coming either in the form of a special law or a

218. Jaffe, *Suits Against Governments and Officers*, *supra* note 109, at 4-5.

219. SMIT, *supra* note 16, at 223.

220. BROWNLIE, *supra* note 26, at 340. Brownlie asserts, however, that voluntary submission to a local court's jurisdiction does not extend to measures of execution (referring to the *Second Report of Sucharitkul*, Y.B. INT'L L. COMM'N (1980), at 15; and Crawford, 75 A.F. (1981), 860-61.).

221. PHIL. CONST. art XVI, § 3.



private bill authorizing a named individual to file suit on a specified claim; or the express waiver may be through a general law authorizing a person who meets certain conditions to sue the government in accordance with the procedure specified therein.[222]

Aside from an express waiver of immunity, immunity from suit may also be waived by conduct or by an implied consent to be sued. In the international legal community, there is still a proliferation of problems related to implied waiver, mostly involving the extent of immunity, with only some courts employing the doctrine of implied waiver to effectively restrict immunity.[223] Courts of civil law countries, however, especially where the restrictive theory was first articulated, have been liberal in presuming that certain activities constitute an implied waiver. The original rationale for this practice was that it served to facilitate the transition from an absolute to a restrictive theory of immunity by allowing courts to examine the nature of a particular activity and, if its nature was considered as 'non-

222. BERNAS, COMMENTARY, *supra* note 26, at 1279-80. It is pointed out, however, that with regard to waiver through a general law, the governing law under which private citizens may sue and seek settlement by the Philippine government of their money claims was Commonwealth Act No. 327 (citing Carabao, Inc. v. Agricultural Production Commission, 35 SCRA 224, 227 (1970)):

> Sec. 1. — In all cases involving the settlement of accounts or claims, other than those of accountable officers, the Auditor General shall act and decide the same within 60 days, exclusive of Sundays and holidays after their presentation.
>
> Sec. 2. — The party aggrieved by the final decision of the Auditor General in the settlement of an account or claim may, within 30 days after receipt of the decision, take appeal in writing:
>
> (a) To the President of the Philippines, or
>
> (b) To the Supreme Court of the Philippines if the appellant is a private person of entity.

223. BROWNLIE, *supra* note 26, at 340. Brownlie makes reference to English courts which do not correspond to the implied waiver doctrine, but require a genuine and equivocal submission in the face of the court; waiver was not constituted by a prior contract to submit to jurisdiction or by an arbitration clause in the contract, even when an award has been made and the foreign State was applying to have it set aside (in reference to Kahan v. Pakistan Federation [1951] 2 K.B. 1003; INT'L L. REP. 18 (1951), No. 50; Baccus SRL v Servicio Nacional del Trigo, (1957) 1 Q.B. 438; INT'L L. REP. 23 (1956), 160; Duff Development Co. v. Government of Kelantan [1924] A.C. 797. *Cf.* Myrtoon Steamship Co. v. Agent Judicaires du Trésor, INT'L L. REP. 24 (1957), at 205.). *See also*, SORENSEN, *supra* note 124, at 442-43.

public,' to conclude that the foreign state *intended to relinquish its jurisdictional immunity*.[224]

Within the Philippine jurisdiction, courts acceded to the idea that immunity could be waived by the state's implied consent to be sued. The rules under the implied waiver doctrine under Philippine law are essentially similar to the rules followed internationally. Hence, when a state engages itself in business, courts oftentimes conclude that, by stepping down to the status of an ordinary individual, it effectively divests itself of its sovereign immunity and becomes subject to the rules binding upon private business enterprises, thereby making itself amenable to suit.[225]

Going into the constitutional provision on state immunity, it should be noted that the 1987 Constitutional Commission intended that a state's mere entry into private contracts should constitute an implied waiver to immunity from suit.[226]

This application of the implied immunity rule was enunciated in the Philippine case of *Manila Hotel Employees' Association v. Manila Hotel, Co.*,[227] where the Court held that when the state enters into a commercial business or undertakes proprietary activities, it is deemed to have impliedly waived its

224. SORENSEN, *supra* note 124, at 442.

225. Jimenez, *State Immunity*, *supra* note 89, at 45 (citing Manila Hotel Employees' Association v. Manila Hotel Co., 73 Phil. 374, 389 (1941)); *see also*, National Airports Authority Corporation v. Teodor, 91 Phil. 203, 206 (1952); Santos v. Santos, 92 Phil. 281, 285 (1952); Price Stabilization Corporation v. Court of Industrial Relations, 102 Phil. 515, 523 (1957); National Development Co. v. Tobias, 117 Phil. 703, 705 (1963); Philippine National Railway v. Union de Maquinistas, Fogoneros y Motormen, 84 SCRA 223, 226 (1978); Rizal Commercial Banking Corporation v. De Castro, 168 SCRA 49, 60 (1988); United States of America v. Rodrigo, 182 SCRA 644, 661 (1990).

226. *See*, V RECORD OF THE CONSTITUTIONAL COMMISSION 104 (1986). According to Commissioner Maambong:

> [T]he State may not be sued without its consent ... [I]f the State or the government will voluntarily enter into a contract, even though there is no law allowing that the State be sued without its consent, *once the government enters into a private contract, there is already an implied consent.* (emphasis supplied)

Compare this opinion with that of Commissioner Nolledo:

> When I say that the State, for example, can be sued with its consent, which may be given expressly by law — general, special or implied as when the State enters into a contract with an individual — the State goes to the level of the individual as when the State sues the individual, in which case the latter may file a counterclaim against the State

227. Manila Hotel Employees' Association v. Manila Hotel, Co., 73 Phil. 374 (1941).



immunity from suit. If, however, as noted in *I Congreso*, the defense of immunity may still succeed against an activity *jure gestionis* when the act in breach of the contract is *jure imperii*,[228] will this rule still apply in assigning liability for reparations against a state if the breach committed was motivated or carried out by acts *jure gestionis*? As a corollary issue, may a state also, in this regard, invoke its municipally-conferred and internationally-recognized defenses of immunity as a shield against the enforcement of its liability for breaching its otherwise valid contractual obligations to a private contracting party?

In answering these questions, one will soon observe that the law on state immunity operates differently when dealing with jurisdiction as opposed to execution. As it will soon become apparent, acts *jure gestionis*, once opening the doors to suit by private claimants, now forecloses the possibility of assigning liability or engaging the responsibility of states and effectively precludes affording relief to the private injured party, despite considerations of fairness and equity demanding otherwise.

## VIII. STATE LIABILITY FOR BREACH OF CONTRACT

In the international legal order, there is a refusal to accept the contention that a breach by a state of its contractual obligations with a private individual constitutes a breach of international law. The primary reason being that since such a contract is not an instrument of international law, the former's breach will thereby not give rise to a violation of the latter's underlying legal rules and principles. One should bear in mind, however, that the contractual obligations freely assumed by states are no less binding in character than its treaty obligations[229] and that such contracts create obligations for which states will be held responsible in the event of its non-execution.[230] In view of these considerations, the international community conversely does not also accept the position that since a contract between a state and an individual is typically governed by the law of that state, that the latter is free under international law to absolve itself of its obligations by evading the terms of its commitments.[231]

228. *I Congreso del Partido* case, (1981) 2 All E.R., at 1081.

229. Schwebel, *Report*, *supra* note 19, at 392.

230. Ambatielos Case (Greece v. U.K.), 1953 I.C.J. 14, at 84 (JULY 1) (Judgment, Merits).

231. Stephen M. Schwebel, *On Whether the Breach by a State of a Contract With an Alien is Breach of International Law*, *in* JUSTICE IN INTERNATIONAL LAW: SELECTED WRITINGS OF STEPHEN M. SCHWEBEL, JUDGE OF THE INTERNATIONAL COURT OF JUSTICE 425 (1994) [hereinafter Schwebel, *Breach by a State of a Contract*].

Clearly, therefore, where the observance by a state of its contractual obligations are concerned, international law firmly establishes and imposes two rules: (1) adherence to the principle of *pacta sunt servanda*,[232] and more importantly, (2) strict compliance with the settled rule that a state cannot plead its national law in derogation of its international obligations.[233] In view then that the suability of a state rests primarily on the legislative will of its government to regulate the instance and the means by which a state may be subjected to suit, by implication, sovereign immunity becomes more a matter of municipal law while its liability more a matter of state responsibility under international law. As such, the municipally regulated and internationally recognized defense of sovereign immunity cannot be used by a state to defeat its otherwise valid and voluntary contractual obligations to a private individual. Support for drawing such a conclusion may be found in Judge Lauterpacht's separate opinion in the *Norwegian Loans* case.[234] Proceeding from the premise that "[t]he question of conformity of national legislation with international law is a matter of international law," [235] Judge Lauterpacht was of the view that a state cannot shield a matter from control by international law by the mere enactment of legislation and that "[t]here may be little difference between a government breaking unlawfully a contract with an alien and a government causing legislation to be enacted which makes it impossible for it to comply with the contract."[236]

In this wise, it may be fairly argued that section 3, article XVI of the Philippine Constitution declaring that "[t]he State may not be sued without its consent," and relevant jurisprudence on the matter, cannot be used so as to defeat a private individual's claim for specific performance. A contrary finding to this effect will certainly be a direct affront to basic rules governing the international community, such as the good faith observance of both

232. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 155 U.N.T.S. 311; *see generally*, The Losinger & Co. Case (Switz. v. Yugo.), 1936 P.C.I.J. (ser. C) No. 78, at 32 (JAN. 7).

233. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, art. 1, U.N. GAOR 56th Sess., Annex, Agenda Item 162, at 3, U.N. Doc.A/RES/56/83 (2002) [hereinafter Draft Articles on State Responsibility].

> Article 3. Characterization of an Act of State as Internationally Wrongful. The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

234. Case of Certain Norwegian Loans (Fr. v. Nor.) 1957 I.C.J. 9 (JULY 6).

235. *Id.* at 37.

236. *Id.*



contracts and treaties,[237] as well as the *Chorzów Factory* rule imposing a duty to compensate in the event of a state's breach of an engagement.[238]

Notwithstanding, however, the international duty to compensate, one must consider that this duty is only triggered by a finding of state responsibility in that the state concerned committed a wrongful act in breach of international law.[239] The difficulty in applying this rule to breaches of government contracts lies in taking into account the issue of whether a breach by a state of a contract with a private individual is, in fact, a breach of international law. Reference may be made to the submission of Professor Dunn many years ago to the effect that *when a state steps out of its role of commercial contractor and applies its sovereign power to upset the expectations of contractual performance*, which must be assumed to have motivated the parties, *it incurs international responsibility*.[240] This very same rationale was invoked in the *Ambatielos* case[241] by the Greek government in maintaining that its contract with the United Kingdom and Mr. M.N.E. Ambatielos "was one between a State and a foreign national[.]... *[A]ccording to the admitted principles of international law, the Government of the State incurs a direct responsibility on breach of the contract*, for which the Government of the foreign national thereby injured is entitled to seek redress."[242]

Indeed, notwithstanding the earlier observation that a contract between a state and a private individual is not readily perceived by the international community as an instrument of international law giving rise to obligations under the law of treaties, it should be noted that equally applicable principles, such as those pertaining to the arbitrary deprivation by states of an individual's property rights, finds application in assigning liability to a state for breaches of its contractual obligations. Such was the pronouncement of

237. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 155 U.N.T.S. 311; *see also*, Rights of U.S. Nationals in Morocco (Fr. v. U.S.), 1952 I.C.J. 176 (AUG. 27); North Atlantic Coast Fisheries Arbitration (Gr. Brit. v. U.S.), 10 R.I.A.A. 188 (1910); Schwebel, *Report*, *supra* note 19, at 392.

238. Case Concerning the Factory at Chorzów (Ger. v. Pol.) (Indemnity), 1928 P.C.I.J. Rep. (ser. A) No. 17, at 29 (Sep. 13).

239. Draft Articles on State Responsibility, arts. 1 & 2, *supra* note 233.

240. *See*, PROFESSOR F.S. DUNN, THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW 163-69 (1932); Lowell Wadmond, Address in London to the International Bar Association, "*The Sanctity of Contract Between a Sovereign and a Foreign National*," *in* SOUTHWESTERN LEGAL FOUNDATION, SELECTED READINGS ON PROTECTION BY LAW OF PRIVATE FOREIGN INVESTMENTS (1964).

241. Ambatielos (Greece v. U.K.), 1953 I.C.J. 14, at 84 (July 1) (Judgment, Merits).

242. *Id.* at 71.

F.K. Nielsen in *The United States of America on behalf of Singer Sewing Machine Company v. The Republic of Turkey*:[243]

Clearly, although a state is effectively precluded from foregoing compliance of its contractual commitments, either through jurisdictional immunity or immunity from execution, a private claimant must still contend with an additional obstacle to the application of the rules for engaging state responsibility. For instance, there is considerable agreement that, where a state violates a contract with a foreign national, such will constitute a violation of international law only when this breach is performed in an "arbitrary" or "tortuous" manner, or where there has been a "denial of justice" in the courts of the respondent state with respect to the alleged breach.[244]

This rule on the international responsibility of states for contractual breaches has been further qualified, however, such that it is *only when the state acts in a non-commercial* exercise of its sovereign authority in abrogating the contractual rights of a private individual *that its international responsibility arises* for purposes of assigning liability and effecting the process of execution. In the *Shufeldt Claim*,[245] the case turned on the legality under international law

243. *See,* FRED K. NIELSEN, AMERICAN-TURKISH CLAIMS SETTLEMENT UNDER THE AGREEMENT OF DECEMBER 24, 1923, OPINIONS AND REPORT 491 (1937).

> It cannot be said that the law of nations embraces any "Law of Contracts" such as is found in the domestic jurisprudence of nations. International Law does not prescribe rules relative to the forms and legal effect of contracts ... . But ... that law may be considered to be concerned with the action authorities of a Government may take with respect to contractual rights.
>
> *It is believed that in the ultimate determination of responsibility under international law, application can properly be given to principles of law with respect to confiscation, and that the confiscation of the property of an alien is violative of international law. If a Government agrees to pay money for commodities and fails to make payment, the view may be taken that the purchase price of the commodities has been confiscated, or that the commodities have been confiscated.* (emphasis supplied)

244. Schwebel, *Breach by a State of its Contract, supra* note 231, at 426 (*quoting* Sir Gerald Fitzmaurice, *Hersch Lauterpacht — The Scholar as Judge*, I B.Y.I.L. 37, 64-65 (1961), which further cites the Ambatielos case (Greece v. U.K.), 1953 I.C.J. 14 (July 1), ¶ 269).

> It is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, *where the breach is not a simple breach* ... but involves an obviously *arbitrary* or *tortious* (sic) element, e.g. a confiscatory breach of contract. (emphasis supplied)

245. United States of America on behalf of P.W. Shufeldt v. The Republic of Guatemala, II U.N.R.I.A.A. 1081 (1930).



of Guatemala's abrogation, by legislative and executive action, of a concession contract. The Arbitrator, Sir Herbert Sissnet, held that, although the Guatemalan government is free to enact any decree for any reason, "where such a decree, passed even on the best grounds, works injustice to an alien subject, in which case the Government ought to make compensation for the injury inflicted and can not invoke any municipal law to justify their refusal to do so."[246]

In conclusion, Arbitrator Sissnet held that, in the circumstances prevailing in the case, Shufeldt had a right to pecuniary indemnification for Guatemala's taking of his contractual rights, despite the same being impelled by a constitutional act of a sovereign state. The *Shufeldt Claim*, it should be noted, was not alone in drawing this conclusion, namely, that the non-commercial use of sovereign authority to abrogate or violate a contract with an alien gives rise to responsibility under international law. In fact, quite a number of arbitral awards are in accord with the very same rationale of Arbitrator Sissnet[247] and provide a more than ample doctrinal support for the latter's position and that of the earlier opinion of Professor Dunn that international responsibility is incurred when a state applies its sovereign power to upset expectations of contractual performance.[248]

The policy governing the "non-commercial" contractual breaches by states was, furthermore, endorsed in 1986 by the American Law Institute when it revised Section 712 of the *Foreign Relations Law of the United States*,[249] the commentary of which provides:

246. *Id.* at 1095.

247. *See,* Company General of the Orinoco (Fr.) v. Venezuela (1905), *in* J.H. RALSTON, REPORT OF THE FRENCH-VENEZUELAN MIXED CLAIMS COMMISSION 244, 359-65 (1902); George Hopkins case, IV U.N.R.I.A.A. 41, 46 (1926); International Fisheries Company (U.S.) v. United Mexican States, IV U.N.R.I.A.A. 691, 699 (1931); George W. Cook (U.S.) v. United Mexican States, IV U.N.R.I.A.A. 213, 215-16 (1927); Saudi Arabia v. Arabian American Oil Company, 27 INT'L L. REP. 117, 168, 172, 192, 227 (1958); BP Exploration Company (Libya) Limited v. Government of the Libyan Arab Republic, 53 INT'L L. REP. 297, 329 (1972); Texaco Overseas Petroleum Company v. Government of the Libyan Arab Republic, 53 INT'L L. REP. 389, 470-71, 473-77, 479, 480-82 (1977); In the Matter of Revere Copper and Brass, Inc. and the Overseas Private Investment Corporation, 56 INT'L L. REP. 258, 271-75, 282-83, 290 (1978); Agip Company v. Popular Republic of the Congo (1979), 21 INT'L L. REP. 726, 734-37 (1982).

248. *See,* PROFESSOR F.S. DUNN, THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW 163-69 (1932).

249. American Law Institute, Restatement (Third) of the Foreign Relations Law of the United States § 712 (1987).

> [N]ot every repudiation or breach by a State of a contract with a foreign national constitutes a violation of international law. Under subsection (2) *a State is responsible under international law for such a repudiation or breach only if* it is discriminatory ... or if it is akin to an expropriation in that the contract is repudiated *or breached for governmental rather than commercial reasons and the State is not prepared to pay damages*. A repudiation or failure to perform is *not a violation of international law* under this section if it is based on a *bona fide* dispute about the obligation or its performance, if it is due to the State's inability to perform, or *if the State's non-performance is motivated by commercial considerations* and the State is prepared to pay damages.[250]

As may be gleaned from this passage, when a state acts in its sovereign "non-commercial" capacity by employing either its legislative, administrative, or executive powers, as only states can, in order to undo the fundamental expectation on the basis of which parties characteristically contract — performance, not non-performance — its international responsibility is engaged.[251] As such, a necessary element to engaging state responsibility for breach of contract is not only the commission of an arbitrary or tortuous breach, but, more importantly, "only if" this breach is motivated or, carried out through the state's non-commercial or governmental use of its sovereign authority. That is to say that the Restatement of the Foreign Relations Law of the United States gives specific

(1) a taking by a State of the property of a nation of another State that is
  (a) not for public purpose, or
  (b) discriminatory, or
  (c) not accompanied by provision for just compensation...;
(2) a repudiation or breach by the State of a contract with a national of another State
  (a) where the repudiation or breach is
    (i) discriminatory; or
    (ii) motivated by other non-commercial considerations and compensatory damages are not paid; or
  (b) where the foreign national is not given an adequate forum to determine his claim of breach or is not compensated for any breach determined to have occurred;
(3) other arbitrary or discriminatory acts or omissions by the State that impair property or other economic interests of a national of another State.

250. Schwebel, *Breach by a State of its Contract*, *supra* note 231, at 429 (emphasis supplied).

251. *Id.* at 435.



content and authority to the conclusion that an "arbitrary" breach of contract by a state, giving rise to its international responsibility, is precisely a breach carried out "for governmental rather than commercial reasons."[252]

## IX. CONCLUSION

The rule, therefore, governing the imposition of liability, and thus state responsibility, may be synthesized in the following: the breach of contract by a state in ordinary commercial intercourse is not, in the predominant view, a violation of international law, but the use of the sovereign authority of a state, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law.[253] Instances of repudiation or breach by a state of a contract with an alien for governmental rather than commercial reasons are not unusual. In fact, the salient illustration for this occurrence of state breaches is the repudiation by a state of a contract with an alien in the course of the nationalization of an industry or the taking of the particular interests of an alien.[254] Where the state does not pay damages that compensate for the breach of the alien's contractual rights, such a breach of contract certainly gives rise to responsibility under international law. Yet, for a state to be considered amenable to suit, the activity or subject-matter involved must be of an essentially commercial or non-sovereign nature. And, as a corollary rule to this theory, the *I Congreso* case furthermore provides that even if the activity was governmental or *jure imperii*, the jurisdictional immunity of a state may still be defeated if the cause of the breach of the contract in question was done in the exercise of sovereign authority.[255]

Applying the *Chorzów Factory* principle of the duty to compensate[256] to serve the purpose of wiping out all the consequences of the breach and re-establishing the *status quo ante*[257] alongside the general principle of observing good faith under the *pacta sunt servanda* rule, it is clear that the remedy of specific performance may be readily afforded to an injured private party whose contractual rights have been breached by a state. If, however, one should juxtapose the rules on engaging a state's liability for breach of contract with the rules on sovereign immunity, what results is that the private contracting party will be left in an even worse situation than ever before as compared to that of the state.

252. *Id.*

253. *Id.* at 432.

254. *Id.* at 435.

255. *See,* I Congreso del Partido case, 2 All E.R. 1081 (1981).

256. Case Concerning the Factory at Chorzów (Ger. v. Pol.) (Indemnity), 1928 P.C.I.J. Rep. (ser. A) No. 17, at 29 (Sep. 13).

257. *Id.* at 47.

Indeed, proof of suability of the state is a necessary precondition to the adjudication of its liability. For, if at the outset, a state is able to effectively foreclose the assumption of jurisdiction by a court over the subject-matter involved, then any determination on the merits as to its liability will likewise be barred effectively. Conversely, even if suability is possible, but a finding of liability on the part of the state impossible, embarking on an attempt to defeat sovereign immunity will prove to be futile, to say the least, and the remedy of specific performance becomes more apparent than real for the private contracting party.

At present, different legal rules and principles govern issues of state suability and liability and, unfortunately, fail to provide any solution to this current deadlock faced by private claimants. Perhaps a fair conclusion that may be drawn from this noticeable conflict between state suability and sovereign immunity *vis-à-vis* state responsibility and execution through specific performance is that it may be rooted in the prevailing clash between municipal and international legal rules and principles.

This is not to say though that specific performance can never be an available remedy for private claimants in such cases involving the breach of contract by a state. Whether the international community must await a further evolution through state practice of the rules governing state liability and execution for breach of contract, or an assignment of entirely different rules altogether, the widespread recognition of specific performance as a remedy in the face of an arbitrary and tortuous contractual breach cannot be denied. Considering then its acceptance as a form of relief in most civilized municipal legal systems, one may consider that specific performance may well be deemed the remedy more than the cure to this dilemma — a remedy which can certainly give new life to the living law of contractual relationships.[258]

258. Schwebel, *Breach of Contract*, *supra* note 231, at 424.

# Ratification of the Rome Statute at the Crossroads: Issues and Perspectives In Order To Render Philippine Courts Fully Competent To Prosecute Crimes Covered by the Rome Statute

*Edzyl Josef Magante**



*We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.*

- Robert Jackson[1]

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