SOVEREIGN IMMUNITY: COMPARATIVE PERSPECTIVE

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I. INTRODUCTION

A. Sovereign Immunity

Foreign sovereigns and foreign governments have for centuries been privileged subjects of international law. Before the twentieth century, hardly any country in the world would permit its courts to entertain actions brought by a private citizen against foreign sovereigns. Although various theories and arguments have been advanced to rationalize and support the immunity which foreign sovereigns have enjoyed before national courts,[1] the traditional view, as illustrated by Lord Campbell in the English case of *De Haber v. The Queen of Portugal* (1851) 17 Q.B. 171, has been: "to cite a foreign potentate in a municipal court . . . . is contrary to the law of nations and an insult which he is entitled to resist."

This "absolute" rule of immunity which one sovereign accorded to another evolved in the context of sovereign participation in activities which were clearly governmental in nature and purpose and has, thus, been justified on doctrines of independence or dignity. In practice, the immunity which one sovereign accorded to another in his own court was probably more a matter of comity or goodwill – sovereigns extended to other sovereigns the same jurisdictional immunity as they enjoyed themselves in their own courts on the basis of expediency in order to gain reciprocity for themselves.[2]

However, as states have become increasingly involved in ordinary commercial activities, such as buying and selling goods and borrowing money, as contrasted to purely governmental activities, such as the levying of taxes, the "absolute" rule of sovereign immunity has resulted in substantial injustice to private parties contracting with sovereign states. Thus, the "restrictive" theory of sovereign immunity developed. According to this theory national courts will arrest suit or prevent execution against a sovereign only where the activity is of a governmental nature (acts *jure imperii*), but not for acts of a commercial or private nature (acts *jure gestionis*). This is the descent to the market place doctrine.[3]

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B. European Jurisprudence

The restrictive view of sovereign immunity was formulated in Italy as far back as 1886 when the Court of Cassation assumed jurisdiction in respect of an action concerning services rendered for the Bey of Tunis, and, in another case, rejected a plea of state immunity put forward by the Greek consul, acting on behalf of his government, in a suit for the payment of maintenance expenses of a Greek subject in a municipal asylum.[4]

In Belgium, as long ago as 1903, the *Cour de Cassation* affirmed the jurisdiction of the Belgian courts in proceedings brought against the Netherlands in respect of work executed for the enlargement of a Dutch railway station; what was material, in the view of the court, was whether the activities in which the State engaged were activities involving the use of public powers or whether, as the court found, the State had simply been doing what private individuals could do, that is to say, acting as a private person.[5]

In France, the distinction between acts *jure imperii* and acts *jure gestionis* found clear expression in 1926 in *Societe de Gostorg et Union des Republiques Socialistes Sovietiques* v. *Association France Export,* where the Court of Paris held: "(t)ransactions of a commercial character extending to all fields are only to be regarded as ordinary commercial transactions having nothing in common with the principle of sovereignty of States."[6]

In the Dralle case in 1950, the Austrian Supreme Court broke definitively with the former rule of absolute immunity and embraced the principle that Austrian courts could entertain proceedings against foreign states in respect of acts *jure gestionis.*[7]

C. U.K. Jurisprudence

For almost a hundred years, the English Courts had followed a doctrine of absolute sovereign immunity irrespective of claims made against foreign sovereigns. The doctrine was anchored upon the decision of the Court of Appeal in *The Parlement Belge.*[8] The action was one *in rem* against a mail packet running between Ostend and Dover, belonging to and being in the possession and control of the King of the Belgians and officered by officers of the Royal Belgian Navy. The Court of Appeal held that it lacked jurisdiction "over the person of any sovereign . . . of any other State, or over the public property of any state which is destined to its public use." Forty years later, the Court of Appeal decided *The Porto Alexandre,*[9] another Admiralty action *in rem.* The ship, either the property of or requisitioned by the Government of Portugal, carried a cargo of cork shavings to Liverpool under a bill of lading from which it appeared that the cargo was shipped by and consigned to a private company. The argument that the ship was engaged in an "ordinary commercial undertaking as an ordinary trading vessel carrying goods for a private individual" was held not to be capable of displacing what was believed to be the rule laid down in *The Parlement Belge.* Such was the case which established the English doctrine of absolute immunity, which doctrine was followed in a long line of cases.[10]

As recently as 1975, in *Thai-Europe Tapioca Service Limited* v. *Government of Pakistan, Directorate of Agricultural Supplies,*[11] the Court of Appeal again asserted that immunity would be granted to a foreign sovereign in an *in personam* action, even where the state had been engaging in commerce. But, in November 5, 1976, the Privy Council, in *The Philippine Admiral,*[12] found that immunity did not lie, in an action *in rem,* in respect of a vessel owned by a foreign sovereign where the vessel had been used for purely commercial purposes. Thus, English Courts would appear to have finally brought English law on sovereign immunity in conformity with those of other Western European states. This apparent change of heart was further illustrated when, in 1977, before the passage of the State Immunity Act, the Court of Appeal decided *Trendtex Trading Corporation* v. *Central Bank of Nigeria.*[13] In that case, the plaintiff brought an action against the Central Bank of Nigeria in respect of letters of credit issued by the latter covering shipments of cement intended to be used for the construction of army barracks in Nigeria. The Central Bank of Nigeria had declined liability on the letters of credit and, when sued in the English courts, had raised the plea of sovereign immunity. The Court of Appeal denied the plea of sovereign immunity.

The divergence of English jurisprudence from the jurisprudence in the countries of continental Europe in relation to the State immunity has been traced by one writer[14] to the fact that "English law knows nothing of the distinction between public and private law". According to this view, it is this very distinction which has been used on many occasions by the courts in civil law countries as the principal criterion to determine whether an act is to be classified as an act *jure imperii* or as an act *jure gestionis.* Thus, to the courts of States which recognize the public law/private law distinction, it is conceptually easier to categorize the activities of foreign States as "sovereign" or "non-sovereign" acts than it is for the courts of States which knows nothing of such distinction.[14a]

D. U.S. Jurisprudence

American jurisprudence on the matter of foreign sovereign immunity begins with the establishment of the absolute doctrine in *The Schooner Exchange* v. *McFaddon,* 11 U.S. (7 Cranch), 116 (1812). In this case, Chief Justice Marshall upheld a plea by immunity, supported by an Executive Branch suggestion, by noting that a recognition of immunity was supported by the law and practice of nations. This reliance upon the suggestions and policies of the State Department continued for the ensuing century and a half and culminated in two Supreme Court decisions in the early 1940's. In the case of *Ex Parte Republic of Peru,*[15] Chief Justice Stone concluded that it was the "duty" of the judiciary to accept the Executive's determination as to sovereign immunity. This duty was to be founded "upon the policy, recognized by both the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsions of judicial proceedings." In the case of *Mexico v. Hoffman,*[16] the Court explicitly enunciated a political question restriction on the court's jurisdiction by stating that: "(i)t is . . . not for the courts to deny an immunity which our government has

seen fit to allow or to allow an immunity on new grounds which the government has not seen fit to recognize. The judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune."

Thus, by the 1940's, the United States' doctrine on sovereign immunity was characterized by: (i) a retention of the absolute theory, and (ii) an announced duty of judicial deference to executive determination of foreign sovereign immunity.

The shift from the absolute theory to the restrictive theory came on May 19, 1952 when the Department of State issued the famous "Tate Letter". In that letter, then acting legal advisor Jack B. Tate noted that "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. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." He also observed that the "classical or virtually absolute theory . . . has generally been followed by the courts of the United States, the British Commonwealth" and several other countries but that "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity." As a result, courts in the United States found that sovereigns were not entitled to immunity in cases arising out of private or commercial transactions.[17] Thus, in 1976, the U.S. Supreme Court was able to conclude:

> "Indeed, it is fair to say that the 'restrictive theory' of sovereign immunity appears to be generally accepted as the prevailing law in this country . . ."[18]

E. Legal Issues

Although, as previously discussed, courts in western Europe, the United Kingdom and the United States have, in various degrees, adopted the restrictive theory of foreign sovereign immunity, several legal issues remained to be clarified.

First, given the diversities of governmental structures and the fact that, in some circumstances, public functions may be carried out by entities which do not form part of the central machinery of government of the state concerned, one of the most difficult questions in the doctrine of sovereign immunity relates to actions brought against these entities. The issue here is whether these entities are sufficiently imbued with the attributes of sovereignty to benefit from the shield of immunity.

Secondly, there appears to be no universally accepted canons for the characterization of an activity as being commercial or private as opposed to being governmental or public. Divergent views have been propounded by national courts as to whether one has regard to the *purpose* of the transaction or to its *nature*. Will a loan to construct public roads be regarded as an act *jure gestionis*

on grounds of its intrinsic nature as a commercial transaction or must courts take into account the fact that the transaction is associated with an activity which is essentially governmental? Italian courts have held that a contract made by a foreign state for the purchase of shoes for its army was an act of private-law nature and therefore outside the principle of immunity, whereas a court in the United States decided that the same transaction constituted for the State "the highest sovereign function of protecting itself against the enemies".[19]

Lastly, obtaining jurisdiction and judgment is one thing, enforcing the judgment is another. While it may be true that at present most legal systems have permitted an action against foreign sovereigns in their local courts based on commercial activities, restrictions are still placed upon the enforcement of that judgment against sovereign assets situated within the territorial jurisdiction of the courts.

In Italy, execution may be levied against the property of a sovereign state where the Italian Ministry of Justice authorizes the execution.[20] The French view appears to be that enforcement may be made against property intended for commercial purposes.[21] The Dutch view appears to be similar.[22]

But in the United Kingdom, prior to the passage of the State Immunity Act 1978, the view was: "Such execution might imperil our relations with that country and lead to repercussions impossible to foresee".[23] In the United States prior to the passage of the Foreign Sovereign Immunities Act of 1978, the Department of State's view was more equivocal. In a letter to the court in the case of *Weilaman v. Chase Manhattan Bank*[24] the Department said:

> "The Department is of the further view that even when the attachment of the property of a foreign sovereign is not prohibited for the purposes of jurisdiction, nevertheless the property so attached and levied upon cannot be retained to satisfy a judgment ensuing from the suit because, in the Department's view, under international law the property of foreign sovereign is immune from execution even in a case where the foreign sovereign is not immune from suit."[25]

F. Codification of Restrictive Theory

Against this backdrop of law and jurisprudence, the Council of Europe took up the subject of sovereign immunity and, after innumerable meetings in Strasbourg, succeeded in elaborating the European Convention on State Immunity and Additional Protocol[26] ("Convention") which was opened for signature at Basle on May 16, 1972. Almost simultaneously the United States produced a Draft Bill,[27] which on October 21, 1976 became the Foreign Sovereign Immunities Act of 1976[28] ("FSIA"). The following year, on November 22, 1978, the State Immunity Act 1978[29] ("SIA") came into force in the United Kingdom. Its principal purpose was to bring into effect in the United Kingdom certain provisions of the Convention and also to bring English law in line with the trend of international law on the subject of sovereign immunity.

G. Paper Limitations

The paper is restricted to a comparative study of how the European Convention, the FSIA and SIA, as the first attempts at codifying the restrictive theory of

sovereign immunity, dealt with the issues of (i) sovereignty, (ii) the characterization of an activity as commercial or governmental, and (iii) enforcement of a judgment against a foreign sovereign.

II. COMPARATIVE DISCUSSION

A. Generally

The Convention and the SIA apply only to transactions entered into after their entry into force.[30] The FSIA, on the other hand, applies to transactions whenever entered into. The Convention, of course, applies only as among contracting States, whereas both the FSIA and SIA apply to *all* States. Thus, the two statutes have worldwide implications and of broader significance than the Convention.

Further, in its basic structure, the Convention differs from the FSIA and SIA. In enacting rules on adjudicatory jurisdiction the Convention eliminated, as among contracting States, some "exorbitant jurisdictional concepts" such as those based on the nationality of parties, the presence of property, or the domicile of the plaintiff, within the jurisdiction.[31] Thus, in resolving the basic issue of fixing the borderline between those cases in which immunity could be claimed and those cases in which immunity could not be claimed, the Convention starts by listing cases in which immunity cannot be claimed (Articles 1 to 14), and it is only in cases not so enumerated that immunity can be claimed (Article 15). This drafting technique has led some writers to view the Convention as embodying the *residual* rule of sovereign immunity.[32]

In contrast, both the FSIA and SIA begin by restating the general principle of sovereign immunity,[33] and then each statute sets our exceptions to the rule. The action must be within one of the exceptions for the State to lose its immunity. Whether or not there is a legal significance to this difference in drafting technique, in that an exception to the rule is more strictly applied, is an open question.

B. Sovereignty

As stated, one of the most difficult questions in the doctrine of sovereign immunity relates to actions brought against public bodies which are not sovereign governments but are separate legal entities which are owned by the State. The question is whether all public bodies which carry out administrative functions or are owned by the State can borrow sovereign immunity by virtue of their sovereign connections. Many jurisdictions have not developed a criteria to determine whether or not an organ of State is a potential benefactor of immunity. One of the main criteria which is employed is to distinguish between organs of State which are separate legal entities and contract on their own name, and those which are merely arms of the State, part of the government. The arms of State enjoy immunity; the separate legal entitles do not.

The Convention's treatment of the question of sovereignty is provided for under Article 27, which contains three distinct propositions. First, that

the expression "Contracting State" is defined for the purposes of the Convention as not including "any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued in its own name, even if that entity has been entrusted with public functions".

Second, that proceedings may be instituted against such legal entity before the courts of another Contracting State in the same manner as against a private person, but the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (*acta jure imperii*). The qualification is a recognition of the fact that entities of this kind may have been entrusted with the exercise of functions which are, in reality, governmental, and that the courts should not seek to exercise their jurisdiction with respect to *acta jure imperii* performed in the exercise of these governmental functions. Thus, the Convention has made the test act specific in that acts performed by these entities in the exercise of sovereign authority are immune whereas acts performed outside the scope of sovereign authority, even if the entity is entrusted with public functions, are not granted immunity.

Third, that proceedings may in any event be instituted against such entity before the courts of another Contracting State if, in corresponding circumstances, the courts would have jurisdiction if the proceedings had been instituted against a Contracting State. In other words, an entity may not enjoy more favorable treatment as regards a claim to immunity than the State itself.

The overall effect of Article 27 of the Convention is to deny to a legal entity, distinct from the State and capable of suing or being sued in its own name, any right to treatment different from that accorded to a private person, except when the entity is exercising public functions and the suit relate to acts performed in the exercise of these public functions.

This treatment is reflected, albeit more explicitly, in Section 14(1)(2) of the SIA. According to Section 14(1), the State immunity rule, subject to exceptions,[34] applies to any foreign or Commonwealth State (other than the United Kingdom), and references to a State include:

(a) the sovereign or other head of that State in his public capacity;
(b) the government of that State; and
(c) any department of that government.

but not . . . any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

Thus, the SIA adopts the dual test enunciated in the Convention: (i) distinct existence separate and apart from the executive organs of the State, and (ii) capacity to sue and be sued. Under Section 14(1), if an entity falls within the ambit of the dual test it is to be considered a separate entity, generally not accorded immunity.

As to a separate entity, Section 14(2) provides that a separate entity is immune from the jurisdiction of the courts of the United Kingdom, if and only if:

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State . . . would have been so immune.

These exceptions to the rule of non-immunity for a separate entity is consistent with those provided for in the Convention.

Further, under the Convention[35] and the SIA,[36] constituent states or provinces of a federal state are not entitled to immunity. But this rule is qualified in certain respects. Under Article 28(2) of the Convention, a Contracting State may, by proper notification, declare that its constituent states may be assimilated to the State itself and invoke the immunity rules. Under Section 14(5) of the SIA, an Order in Council may provide for the other provisions of the SIA, including State immunity provisions, to apply to constituent states as these apply to a State.

In contrast to the Convention and the SIA, the FSIA initially grants immunity not only to the central government of a State but also to its political subdivisions, agencies and instrumentalities.[37]

Under Section 1604 of the FSIA a foreign State is immune from the jurisdiction of the courts of the United States. And, under Section 1603(a), a foreign State "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . ." An agency or instrumentality of a foreign State, under Section 1603(b), means an entity:

(1) which is a separate legal person, corporate or otherwise, and
(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivisions thereof, and
(3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

Thus, under the FSIA, these political subdivisions, agencies and instrumentalities are assimilated into the State itself and are, subject to certain exceptions, in no worse or better situation than the State itself insofar as the issue of immunity is concerned.

C. Immunity from Jurisdiction

As previously stated, the Convention begins from the premises that there are situations (which it cataloques) in which a State should have no immunity. This catalogue incorporates connecting links regarded as sufficient to found jurisdiction for the purposes of the international recognition and enforcement of judgments. It seeks to formulate criteria which will justify the exercise of jurisdiction against a foreign State by the courts of the State of the forum and which are consistent with the concept that jurisdiction can be exercised with respect to acts *jure gestionis*. This contrasts with the FSIA and the SIA which start out by restating the general principle of sovereign immunity and later list down exceptions to the rule.

i. Waivers of Immunity

Articles 1 to 3 of the Convention incorporate general rules of non-immunity which do not depend upon the notion of acts *jure gestionis*. These cover situa-

tions in which the conduct of the State rather than the nature of the transaction is the paramount consideration. Thus, a Contracting State which institutes or intervenes in proceedings before a court of another Contracting State submits, for the purposes of those proceedings, to the jurisdiction of the courts of that State (Article 1). The other rules of non-immunity concern cases in which a Contracting State has expressly submitted to the jurisdiction of the courts of another State (Article 2); and cases in which a Contracting State has impliedly waived its immunity by participating in the proceedings on the merits before claiming immunity (Article 3). These Convention provisions have their counterparts in Section 1605(a)(1) of the FSIA and Section 2 of the SIA.

On implied waivers, the SIA is unique in that it states that "a provision in any agreement that it is to be governed by the law of the United Kingdom is not to be regarded as a submission."[38] In contrast, the FSIA itself does not provide for any criteria regarding the waiver of immunity "by implication" but, in its legislative history, the Judiciary Committee has noted that "the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or *where a foreign state has agreed that the law of a particular country should govern a contract.*"[39] Thus, a governing law provision in a contract may have divergent interpretations as an implied waiver of immunity.

Further, the SIA, in conformity with the Convention, provides that it does not apply to proceedings in matters that occurred prior to its entry into force, particularly to waivers of immunity made before that date.[40] On the other hand, the FSIA does not contain any such limitation and is deemed to apply to waivers entered into prior to its entry into force. The FSIA is also, in a sense, stricter in that it provides that waivers of immunity may not be unilaterally withdrawn.[40a] The absence of a similar provision in the SIA has resulted in divergent views on whether, under the SIA, a waiver may unilaterally be withdrawn.[41]

Lastly, under the Convention, once a State has submitted to the jurisdiction of the courts of another State, either by instituting or intervening in the suit, its submission extends to any appeal and to any counterclaim arising out of the legal relationship involved, or the facts on which the principal claim is made.[42] To the same effect is the SIA.[43]

In contrast, Section 1607 of the FSIA makes a distinction between counterclaims arising out of the transaction in dispute, as to which there is no limitation on the amount of the counterclaim, and any other counterclaim, as to which the relief sought cannot exceed the amount sought by the foreign State.

ii. Acts jure gestionis

The Convention's second group of rules of non-immunity is the codification of the restrictive theory. It is based on the concept that immunity will not attach to State activities in the nature of acts *jure gestionis.* Thus, under the Convention, a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State in the following cases:

(a) where the proceedings relate to an obligation of the State which, by virtue of a contract, falls to be discharged in the territory of the State of the forum, except where the contract is concluded between States,

or the parties to the contract have otherwise agreed in writing, or the contract is concluded on the territory of the State claiming immunity and the obligation of the State is governed by its administrative law;[44]

(b) where the proceedings relate to a contract of employment between the State and an individual where the work has to be performed on the territory of the State of the forum, subject to certain exceptions designed among others, to ensure that immunity may be claimed where the employee is a national of the employing State or is a foreign worker recruited locally;[45]

(c) where the proceedings concern the relationship between the State and an entity or other participant in matters arising out of the participation of the State with one or more private persons in a company, association or other legal entity having its seat, registered office or principal place of business on the territory of the State of the forum, unless it is otherwise agreed in writing;[46]

(d) where the proceedings relate to an industrial, commercial or financial activity of an office, agency or other establishment of a Contracting State situated on the territory of the State of the forum through which that Contracting State has engaged, in the same manner as a private person, in that activity, unless all parties to the dispute are States, or the parties have otherwise agreed in writing;[47]

(e) where the proceedings relate to a patent, industrial design, trade mark, service mark or other similar right of which the State is the applicant or owner and which has been applied for, registered or deposited or is otherwise protected in the State of the forum, or to an alleged infringement by the State, in the territory of the State of the forum, of such a right belonging to a third person and protected in the State of the forum, or to the right to use a trade name in the State of the forum;[48]

(f) where the proceedings relate to the rights of a State in, or its use or possession of, immovable property, or its obligations out of such rights or interests, use or possession, where the property is situated on the territory of the State of the forum;[49]

(g) where the proceedings relate to a right in movable or immovable property arising by way of succession, gift or *bona vacantia*;[50]

(h) where the proceedings relate to redress for injury to the person or damage to tangible property, where the facts which occasioned the injury or damage occurred in the territory of the State of the forum and the author of the injury or damage was present in the territory at the time when those facts occurred;[51] and

(i) where the proceedings relate to the validity or interpretation of an arbitration agreement, or the arbitration procedure or the setting aside of the award, in cases where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, and the arbitration has taken or will take place on the territory or according to the law of the State of the forum, unless the arbitration agreement otherwise provides or unless it is an arbitration agreement between States.[52]

Lastly, it is provided that nothing in the Convention shall be interpreted as preventing a court of a Contracting State from administering or supervising or arranging for the administration of property such as trust property or the estate of a bankrupt, solely on account of the fact that another Contracting State has a right or interest in the property.[53]

These Convention provisions on non-immunity have their counterparts in the SIA,[54] and, to a limited extent, in the FSIA.[55] But the FSIA and the SIA go one step further in that, instead of merely listing *specific* exceptions to the principle of immunity, both incorporate provisions of a *general* character, provisions which characterize and define the "commercial transactions" of a State.

The FSIA provides that a foreign State shall have no jurisdictional immunity from the courts of the United States in any action "based upon a commercial activity carried on in the United States by a foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere."[56] The phrase "commercial activity", is in turn defined in relation to the *nature* of the activity:

> "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[57]

On the above definition, the Judiciary Committee has stated:

> "Section 1603 defines the term 'commercial activity' as including a broad spectrum of endeavor, from an individual commercial transaction or act to a regular course of commercial conduct. A 'regular course of commercial conduct' includes the carrying on of a commercial enterprise such as a mineral extraction company, an airline or a state trading corporation. Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed. At the other end of the spectrum, a single contract, if of the same character as a contract which might be made by a private person, could constitute a 'particular transaction or act'."
>
> "As the defintiion indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs to an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function."[58]

Thus, under the FSIA, the court must first determine whether the defendant State is engaged in a commercial activity by considering the nature of the activity before considering whether such an activity is sufficiently connected with the United States to authorize the court to assume jurisdiction. And the House Report makes it clear that the courts will have considerable freedom in determining what a "commercial activity" is:

> "Activities such as a foreign government's sale of a service or a product, its leasing property, its borrowing of money, its employment or engagement of laborers,

clerical staff or public relations or marketing agents, or its investment in a security of an American corporation, would be among those included within the definition."[59]

The above definition is reflected in Section 3 of the SIA. Under subsection (1) of Section 3, a "State is not immune as respects proceedings relating to (a) a commercial transaction entered into by the State". The phrase "commercial transaction" is in turn defined as:

"(a) any contract for the supply of goods or services;
(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
(c) any other transaction or activity (whether of a commercial, industrial; financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority."[60]

But, as an exception, the definition contained in Section 3 does not apply if the parties to the dispute are States or have otherwise agreed in writing, thus leaving the ultimate characterization of the nature of the transactions to the parties.[61]

Although the definitions contained in Section 3 of the SIA and Section 1603 of the SIA appear to be very similar, significant differences between the two provisions exist. Firstly, their scope is not the same. Under Section 1603 (3) and other provisions of the FSIA, the FSIA is intended to apply to the activities of a foreign State taking place, or having a direct effect in the United States.[62] Section 3 of the SIA contain no such limitation. Therefore, the SIA may apply to an activity carried out by a foreign State outside the United Kingdom, but which, by reason of rules of transnational jurisdiction, might be the object of proceedings in the courts of the United Kingdom.

Secondly, Section 3 of the SIA is more specific than Section 1603(d) of the SIA. In effect, the definition found in Section 1603 is no more than admonition to the courts to base their characterization on the *nature* rather than the *purpose* of the foreign State's activity, the ultimate decision being, in each case, in the judiciary. In contrast, Section 3 of the SIA shows no such hesitation. In categorical terms, it solves the issue of characterization in respect of two of the most frequent transnational activities of a foreign State, namely, contracts for the supply of goods or servies and those relating to loans or other financial transactions. Even the "catch all" provision found in Section 3(2)(c), requiring determination by the courts, affords some guidance by listing the types of activities most likely to fall outside the "governmental" category and to be considered as falling within the "commercial" category.

D. Immunity from Execution

The almost perfect symmetry in the provisions of the Convention and the two statutes with regard to immunity from jurisdiction is clearly lacking in their provisions on immunity from execution.

i. The Convention

The Convention adheres to the immunity rule in that, absent an express written waiver of immunity, "(n)o measures of execution or preventive measures against the property of a Contracting State may be taken in the territory of another Contracting State . . .".[63] Instead, the Convention creates an international obligation for each Contracting State to "give effect to a judgment given against it by the court of another Contracting State."[64] There is thus no machinery for direct enforcement by the courts of the State of the forum of the judgment rendered against the Contracting State. But the party in whose favor judgment has been awarded may, if the State concerned does not give effect to the judgment, institute proceedings before the courts of that State in order to have determined the question whether effect should be given to the judgment in accordance with Article 20.[65] Further, if the State against which judgment has been rendered has signed the Additional Protocol, the winning private litigant is given the option of instituting enforcement proceedings before a European Tribunal consisting of seven members of the European Court of Human Rights.[66]

While the principle of immunity from execution is reaffirmed in the FSIA[67] and the SIA,[68] both statutes list a number of exceptions wherein American and English courts may execute on the assets of a foreign State within their respective jurisdictions.

ii. The FSIA

Under Section 1610(a) of the FSIA, the property in the United States of a foreign State used for a commercial activity in the United States is not immune from attachment or execution if, among others, (i) the foreign State has waived its immunity, explicitly or impliedly, or (ii) "the property is or was used for the commercial activity upon which the claim is based".

In addition, the property in the United States of an *agency or instrumentality* of a foreign State engaged in a commercial activity in the United States is not immune from execution if (i) the entity has waived, explicitly or implicitly, its immunity or (ii) the judgment relates to a claim for which the entity is otherwise immune from suit.[69] If all these conditions are satisfied, the entity is subject to execution against all its property regardless of whether the property is or was used for the activity upon which the claim is based.

As an exemption to the above rules of non-immunity from execution, Section 1611(b)(1) provides that the property of a foreign State shall be immune from attachment or execution if "the property is that of a foreign central bank or monetary authority held for its own account," unless the immunity is explicitly waived.

Under the SIA, execution may proceed against the property of a foreign State if (i) the foreign State has waived its immunity explicitly[70] or (ii) the property "is for the time being in use or intended for use for commercial purposes."[71] The latter exception is in sharp contrast to the FSIA provision[72] which permits execution only when the property "is or was used for the commercial activity upon which the claim is based. In other words, under the FSIA, a link

must exist between the property subject to execution and the commercial activity from which the claim arose. No such limitation is found in the above-quoted provision of the SIA. Therefore, a foreign State may be responsible in the United Kingdom for *all* its property used for a commercial purpose.

As to the problem of establishing the commercial or non-commercial use of the property of a foreign State against which execution is sought, the SIA provides that a certificate issued by the foreign State's head of its diplomatic mission in the United Kingdom shall be accepted as "sufficient evidence" of the use or intended use of the property sought to be executed against. But this is subject to permitting the private litigant or the courts, to prove, or to hold, that the certificate does not correspond to the facts of the case.[73] It is unclear though whether, in resolving this issue, English courts would refer to the law of the foreign State or the law of the forum, that is, English law.

Similar to the FSIA,[74] the SIA provides for exemption for the property of a foreign central bank. Thus, Section 14(4) of the SIA provides that:

> "Property of a State central bank or monetary authority shall not be regarded for the purposes of subsection (4) of Section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity, subsections (1) to (3) of the section shall apply to it as if reference to a State were references to the bank or authority."

In other words, the assets of a foreign central bank would, in all cases, be protected from execution. But central banks operating as separate entities may waive their immunity from execution.

The policy reasons for the two provisions seem to be that, in the absence of such an exemption, foreign central banks would be discouraged from depositing and keeping funds in the United Kingdom or the United States to the detriment of the respective economies.[75]

III. CONCLUSION

The convention, as the first attempt at codifying the restrictive theory of sovereign immunity, has significantly improved the situation of private parties contracting with sovereign States. It has definitely paved the way for the development of a modern doctrine of sovereign immunity and has spawned the current wave of various national legislation on the subject.[76] But it is unfortunate, although understandable under the circumstance that the Convention is a multilateral agreement, that it has not carried the restrictive theory as far as the execution of the judgment.

The FSIA, although it provides for the execution of a judgment against a foreign State, is plagued with the uncertainty that arises from the absence of a clear definition of the concept of "commercial activity". It may also be faulted in granting immunity to government agencies and instrumentalities even in cases where these entities are separate and distinct from the central government and not performing governmental functions.

The SIA has increased comprehensiveness and greater certainty of results by virtue of its clearer definition of the concept of "commercial transactions" of a

State. But the SIA is bound by the Convention provisions on execution of judgment and suffers on the same subject.

Overall though, the Convention and the two statutes provide great assistance to the courts and other parties by providing guidance on the threshold problem of characterization. One wonders whether the further development of a modern doctrine of sovereign immunity would result in national statutes or international agreements adopting a (i) specific catalogue of cases of non-immunity embodied in the Convention, (ii) a restrictive definition of sovereignty under the SIA and the Convention, reinforced by a (iii) comprehensive and unequivocal definition of "commercial transactions" under the SIA, and (iv) topped off by the provisions on execution of judgment similar to the FSIA.

FOONOTES:

[1] Lauterpacht, H., *The Problem of Jurisdictional Immunities of Foreign States* (1951) 28 Brit. Year Book Int'l. Law 220, 221-222.
[2] *See* Wood, Philip R., *Law and Practice of International Finance* (Sweet & Maxwell, 1980, Clark Boardman, 1981) on p. 93; also John, William Tudor, *Sovereign Risk and Immunity Under English Law and Practice,* International Financial Law, Robert S. Rendell Ed., Euromoney Publications, 1980, on p. 69.
[3] *See* Wood, *supra* note 2, on p. 95.
[4] *See* Lauterpacht, *supra* note 1, pp. 251-252.
[5] Sinclair, I.M., *The European Convention on State Immunity,* (1973) 22 Int. Comp. L. Q. 254, 265.
[6] Annual Digest, 1925-6, Case No. 125, cited in Lauterpacht, *supra,* p. 260.
[7] Sinclair, *supra,* p. 263, citing (1950) *International Law Reports* 155-166.
[8] (1880) 5 P.D. 197.
[9] (1920) P. 30
[10] *E.g., The Jassy* (1906) P. 207; *The Gagara* (1919) P. 95; *The Jupiter* (1924) P. 236; Compania Mercantil Argentina v. United States Shipping Board (1924) 131 L.T. 388; Bacchus S. R. L. v. Servicio Nacional del Trigo (1975) 1 Q. B. 438.
[11] (1975) 1 W. L. R. 1485.
[12] (1976) 2 W. L. R. 214, 70 A.J.I. L. 364 (1976).
[13] (1977) Q. B. 529.
[14] *See* Sinclair, *supra* note 5, on p. 267.
[15] 318 U.S. 578 (1943).
[16] 324 U.S. 30 (1945).
[17] *See* Von Mehren, Robert B., *The Foreign Sovereign Immunities Act of 1976,* 17 Columbia Journal of Transnational Law 33, 42 on note 40 (1978).
[18] Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976).
[19] *See* Lauterpacht, *supra* note 1, on p. 223.
[20] Law No. 1263 of July 15, 1926.
[21] *See Englander v. Banque d'Etat tchécoslovaque* (Cour de Cassation, 1970, Rev. Crit. 101).
[22] *See N.V. Cabolent v. National Iranian Oil Company,* 5 I. L. M., 477 (1975).
[23] *See, Thai-Europe Tapioca Service Limited v. Government of Pakistan, supra,* on p. 965.
[24] 192 N. Y. S. 2d 469 (Sup. Ct. 1959).
[25] *Quoted* in 6 M. Whiteman, Digest of International Law 709, 712 (1968).

[26] *See,* 11 Int'l. Legal Materials 470 (1972) for the text of the Convention. The Convention entered into force on June 11, 1976 upon the ratification of Austria, Belgium and Cyprus. It has also been signed by the Federal Republic of Germany, Luxembourg, The Netherlands, Switzerland, and United Kingdom.
[27] *See,* 15 Int'l. Legal Materials 88 (1976).
[28] *See,* 15 Int'l. Legal Materials 1388 (1976) for the text of the Act.
[29] *See,* 17 Int'l. Legal Materials 1123 (1978) for the text of the Act.
[30] *See,* Article 35, Convention; Section 23 (3) (4), SIA.
[31] *See,* Article 20(3)(a), Article 24(2) and Article 25(3)(b) of the Convention.
[32] *See,* Sinclair, *supra,* note 5, on p. 267; Delaume, G., *The State Immunity Act of the United Kingdom,* 73 Am. J. Int'l. L. 185, 186 (1979).
[33] *Compare,* Section 1604 and 1609, FSIA and Section 1, SIA.
[34] Sections 1-11, SIA.
[35] Article 28(1).
[36] Section 14(5) and (6).
[37] Section 1604, in relation to Section 1603(a) and (b), FSIA.
[38] Section 2(2), SIA.
[39] *See,* H.R. Rep. No. 1487. 94th Cong., 2d Sess. 18 (1976), reprinted in (1976) *U.S. Code Cong. and Ad. News,* at 6604 (hereinafter referred to as the House Report).
[40] Section 23(3)(a), SIA.
[40a] Section 1605(a)(1), FSIA.
[41] *Compare,* Wood, *supra* note 2, on p. 109; *contra,* Delaume, *supra,* note 32, on p. 192 and John, *supra,* note 2, on p. 76.
[42] Article 1(2), Convention.
[43] Section 2(6), SIA.
[44] Article 4, Convention.
[45] Article 5, *Id.*.
[46] Article 6, *Id.*.
[47] Article 7, *Id.*.
[48] Article 8, *Id.*.
[49] Article 9, *Id.*.
[50] Article 10, *Id.*.
[51] Article 11, *Id.*.
[52] Article 12, *Id.*.
[53] Article 14, *Id.*.
[54] Section 3 corresponds to Article 4 of the Convention, except that the third exception will only apply if the contract is *not* a commercial transaction. Section 4 corresponds to Article 5. Section 6 corresponds to Article 11. Section 6 corresponds to Articles 9, 10 and 14. Section 7 corresponds to Article 8. Section 8 corresponds to Article 6. And Section 9 corresponds with Article 12.
[55] Section 1605(a)(b) of the FSIA roughly covers the cases described in Articles 4, 5, 6, 7, 8 and 12 of the Convention. Section 1605(a)(14) corresponds with Articles 9 and 10 of the Convention. And Section 1605(a)(5) roughly corresponds to Article 11 of the Convention.
[56] Section 1605(a)(2), FSIA.
[57] Section 1603(d), *Id.*.
[58] House Report, *supra,* note 39, at 16.
[59] *Id.*.
[60] Section 3(3), SIA.
[61] Section 3(2), *Id.*.
[62] *See, e.g.* Section 1605, FSIA.
[63] Article 23, Convention.
[64] Article 20(1), *Id.*.
[65] Article 21, *Id.*.

[66] Article 1, 4 and 5, Additional Protocol.
[67] Section 1609, FSIA.
[68] Section 13(2), SIA.
[69] Section 1610(b), FSIA.
[70] Section 13(3), SIA.
[71] Section 13(4), *Id.*.
[72] Section 1610(a), FSIA.
[73] Section 13(5), SIA.
[74] Section 1610(b), FSIA.
[75] *See,* John, *supra* note 2, on p. 77; Patrikis, Ernest T., *Foreign Central Bank Property: Immunity From Attachment in the United States,* Vol. 1982, No. 1 University of Illinois Law Review 265, 282.