

January 1972

The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading

Clive M. Schmitthoff

Frank Wooldridge

Follow this and additional works at: <https://digitalcommons.du.edu/djilp>

Recommended Citation

Clive M. Schmitthoff & Frank Wooldridge, The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading, 2 Denv. J. Int'l L. & Pol'y 199 (1972).

This Article is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, digitalcommons@du.edu.

The Nineteenth Century Doctrine of Sovereign Immunity and the Importance of the Growth of State Trading

Keywords

Immunity, Sovereign Immunity, State Trading, States

THE NINETEENTH CENTURY
DOCTRINE OF SOVEREIGN IMMUNITY AND THE
IMPORTANCE OF THE GROWTH OF
STATE TRADING

CLIVE M. SCHMITTHOFF*

FRANK WOOLDRIDGE**

It is well known that the principle of sovereign immunity finds no support in classical international law.¹ It is not referred to by Grotius, is deprecated by Bynkershoek, and Vattel² is only prepared to admit it with regard to the person of the sovereign. The historical origin of the doctrine is bound up with the personal immunity of heads of state, and it was with regard to this that the distinction between acts *juri imperii* and *jure gestionis* first attained prominence in Germany in the eighteenth century.³

The evolution of the doctrine of sovereign immunity is thus comparatively recent and it was not until the nineteenth century that the doctrine could have been said to be established in a majority of states.⁴ In the Anglo-Saxon countries the growth of the doctrine of sovereign immunity has been influenced by the immunity of the local sovereign. In the United States, a further influence appears to have been the Constitution.⁵ The classic formulation of the doctrine of sovereign immunity was set forth by Marshall, C.J. in the case of *The Schooner Exchange v. M'Faddon*.⁶ The most relevant paragraph of his judgment appears to be as follows:

*Clive M. Schmitthoff, LL.M., LL.D. (London), Dr. jur. (Berlin), Barrister, Visiting Professor of International Business Law at the City University and at the University of Kent at Canterbury, Hon. Professor of Law at the Ruhr-Universität Bochum. © 1972 Clive M. Schmitthoff.

** Frank Wooldridge, LL.B., LL.M., Ph.D. (Law), Lecturer in Law at the University of Kent at Canterbury.

¹ See Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 223 (1951).

² Vattel, however, recognized the principle of independence, sovereignty and equality of states. IIE. VATEL, *LE DROIT DES GENS* (1758). It seems Marshall, C.J. derived the doctrine from the writings of Vattel. *Id.* at ch. III, § 36, and ch. VIII, §§ 78, 79, 81.

³ For the history of the doctrine of sovereign immunity, see E. GMUR, *GERICHTSHARKEIT UBER FREMDEN STAATEN* (1948).

⁴ S. SUCHARTKUL *STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW* 4 (1959).

⁵ See *Principality of Monaco v. Mississippi*, 292 U.S. 313 (1934).

⁶ *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being capable of conferring extra-territorial powers, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another and being bound by obligations of the highest character not to degrade the dignity of the nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication and will be extended to him.⁷

It seems that the Courts of most countries, apart from Holland and Scandinavia, recognized the doctrine of sovereign immunity in the nineteenth century. By that time, it had become a generally accepted principle of international customary law, and is the basis for the doctrine in Hackworth's Digest of International Law.⁸ While some would argue that the doctrine of absolute immunity still prevails in international law,⁹ it may be doubted that all states applied it to commercial transactions, even in the nineteenth century.¹⁰ That was the era in which state trading functions were generally minimal, and in which the principle of laissez-faire was generally in vogue. It lasted until the coming of the economic depression in the last quarter of the century.¹¹

Although the volume of state trading increased in the twentieth century,¹² this increase has not always been reflected in judicial decisions by a modification of the doctrine of absolute state immunity. The problem of state trading has sometimes been dealt with by treaties. In a 1948 treaty between the United States and Italy,¹³ both states agreed not to raise the issue of sovereign immunity with respect to any "enterprise of either High Contracting Party which is publicly owned and controlled, and engages in commercial manufacturing, processing, supplying or other business activities within the territories

⁷ In another part of his judgment, Marshall, C.J. expressed the opinion that the above principles do not apply to state trading. One may usefully compare the above doctrine of Marshall, C.J. with that of Lord Atkin in *The Cristina*, [1938] A.C. 485, in which the learned Law Lord expressed the opinion that to implead a foreign sovereign would be to act contrary to a rule of international law.

⁸ G. HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW 393 (1963).

⁹ See Fitzmaurice, *State Immunity from Proceedings in Foreign Courts*, 14 BRIT. Y.B. INT'L L. 101-124 (1933).

¹⁰ See *Gutteriez v. Elmelit*, [1886] FORO ITAL. I 913.

¹¹ As is well known, the doctrines of the Fabians and of the Oxford Hegelians then suggested a larger role for the State.

¹² This increase may be direct, or through a state controlled corporation, as with the U.S.S.R. and other socialist countries.

of the other High Contracting Party." There has also been a shift in the position of national courts concerning the doctrine of sovereign immunity in regard to increased state trading. It seems that only the United Kingdom, India,¹⁴ the Soviet Union and some Eastern European countries now favor the absolute rule of sovereign immunity.¹⁵ The writings of publicists, as well as the practice of states, have led many to concur with Professor O'Connell¹⁶ that there is no international law regarding sovereign immunity, or, that if there is, it only covers a narrow field.

The Three Theories Regarding Sovereign Immunity

1. The Absolute Theory

According to this theory, the plea of immunity is available in all cases in which the person or property of a foreign sovereign is impleaded in the courts of another sovereign. The fact that it is the sovereign's person or property gives rise to this immunity notwithstanding the nature of the act of the foreign sovereign. As will be noted later, British courts adopt this view although it is open to the House of Lords to adopt a different one.

2. The Theory of Limited Immunity

This theory provides that the foreign sovereign may arrest suit or prevent execution only where the activity involved is that of the government. Immunity thus covers acts *jure imperii*, but not *jure gestionis*. Some would argue that the former are distinguished from the latter as a result of their objects, while others would argue, following Weiss, that the juridical nature of the transaction is decisive,¹⁷ and that if the transaction could be entered into by an individual, it is one *jure gestionis*.¹⁸

¹³ See Schmitthoff, *The Claim of Sovereign Immunity in the Law of International Trade*, 7 INT'L & COMP. L.Q. 452-53 (1958).

¹⁴ See *Dulerai and Co. v. Pokedas Mengraj*, 39 ALL INDIA RPTR. 335 (1952); *In re Commissioner for Workers' Compensation*, 38 ALL INDIA RPTR. 880 (1951).

¹⁵ The U.S. Supreme Court abandoned the doctrine of absolute immunity in the case of *Republic of Mexico v. Hoffmann*, 324 U.S. 30 (1945), before the issue of the Tate Letter by the State Department in 1952.

¹⁶ D. O'Connell, 2 INTERNATIONAL LAW 918 (1965); see also I. BROWN-LIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 282 (1966) and M. SORENSEN, *MANUAL OF PUBLIC INTERNATIONAL LAW* 426 (1963).

¹⁷ *Compétence ou l'incompétence à l'égard des états étrangers*, Hague Academy of International Law, *Recueil des Cours*, (1923). The distinction between acts *jure imperii* and *jure gestionis* finds apparent expression in the provisions of the CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE, 1958, 516 U.N.T.S. 205; CONVENTION ON THE HIGH SEAS, 1958, 450 U.N.T.S. 825.

¹⁸ The Austrian Supreme Court case of *Dralle v. Republic of Czechoslovakia*, I.L.R., 1950, Case No. 41, treats the distinction between acts *jure imperii* and *jure gestionis* as one accepted by international law.

The distinction between acts *jure imperii* and *jure gestionis*¹⁹ is difficult to make especially if the first argument is adopted. There is, according to the U.S. Supreme Court case of *The Pesaro*, "no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a natural force."²⁰

3. The Theory Which Denies the Existence of Sovereign Immunity

Sir Hersch Lauterpacht argued that the doctrine of sovereign immunity has no sound basis in international law.²¹ He contends that absolute immunity has largely been abandoned in state practice because criteria for so limiting immunity are not uniform and have become unworkable. He suggests that foreign States should be submitted to the jurisdiction in the same way, and to the same extent, as is the sovereign.²² He qualifies this statement with four specific rules which he thinks should be universally adopted; (a) that executive acts of the foreign sovereign in his own territory should enjoy immunity; (b) that legislative acts should likewise enjoy immunity; (c) that governmental contracts should be treated according to the private international law rule of the *lex fori*, which may provide that there is no jurisdiction; and, (d) that traditional diplomatic immunities in regard to warships and other foreign property should be preserved.

In his judgment in *Rahimtoola v. Nazim of Hyderabad*,²³ Lord Denning agreed in principle with Lauterpacht's exceptions. He said:

If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country; but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried out by its own departments or agencies or by setting up separate legal entities), and it arises

¹⁹ Which distinction has not applied in English Law. *But see* the cases cited by Mann, *Law Governing State Contracts*, 21 BRIT. Y.B. INT'L L. (1944).

²⁰ 277 F. 473 (1921).

²¹ Lauterpacht, *supra* note 1, at 226-36. *See also* Schmitthoff, *supra*, note 13, at 452.

²² As O'Connell correctly points out, *supra* note 16, at 919, this would be capable of being interpreted as, where the sovereign of the forum submits himself to the jurisdiction only in matters *jure gestionis* the problem of distinguishing these from acts *juri imperii* is not avoided.

²³ *Rahimtoola v. Nizam of Hyderabad* [1957] 3 W.L.R. 884.

properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.²⁴

It is difficult to support the doctrine of absolute immunity under modern conditions. It is doubtful whether the dignity of the sovereign State is a suitable basis for the doctrine, since the courts of most States now adhere to the doctrine of limited immunity. Article 11 of the *Draft Convention Respecting the Competence of Courts in Regard to Foreign States* prepared by the Harvard Law School in 1932 suggested the adoption of this doctrine. As was stated in an earlier article,²⁵ the test which provides a workable distinction between acts *jure imperii* and *jure gestionis* turns on the nature of the transaction. The third theory of Judge Lauterpacht would seem to lead to a similar conclusion, given that the distinction between public and private acts depends upon the nature of the transaction.²⁶

One must surely agree with Sucharitkul that ". . . the only hopeful approach to the problem of jurisdictional immunities of States in regard to trading activities appears to be to assimilate as far as possible the position of foreign State traders to that of private merchants or ordinary foreigners and foreign corporations."²⁷ He also believes that there is room for modification of the doctrine outside the sphere of trading activities, and a need for a broad definition of the concept of "trading activities."²⁸ The doctrine of sovereign immunity should be abolished in this area in relation to process, attachment, and execution.

The Treatment of the Plea of Sovereign Immunity in Commercial Transactions by National Courts

It is not finally settled in the United Kingdom whether a foreign sovereign, acting directly or through the medium of a state trading corporation, can claim immunity. The question has not yet arisen directly in the House of Lords,²⁹ however,

²⁴ See *id.* at 913.

²⁵ Schmitthoff, *supra* note 13, at 456.

²⁶ Note that, as Judge Lauterpacht points out, it may be argued that some contracts can only be made by a state, *i.e.*, the purchase of provisions for the services.

²⁷ S. SUCHARITKUL, *supra* note 4, at 313-14.

²⁸ Note that the activities exercised by the New Brunswick Corporation as described by the judges in *Mellenger v. New Brunswick Corporation*, [1971] 1 W.L.R. 604 were perhaps not trading, but for the promotion of the industrial development of the province. The decision, nevertheless, appears to be unsatisfactory.

²⁹ It seems clear that English law has not committed itself to the position of granting immunity to state trading vessels, and in view of the general development in favour of restrictive immunity, it seems unlikely that it will. The opinions of Lord Maugham, Thankerton and Macmillan in *The Cristina*, [1938] A.C. 485 were in favour of limited im-

Lord Denning expressed that he was in favor of the denial of the principle of immunity in *Rahimtoola v. Nizam of Hyderabad*³⁰ as mentioned above. It may be that if the question were now to arise in the House of Lords, their Lordships might decide in favor of the limited principle of immunity, or even in favor of the denial of the principle altogether with exceptions as already enumerated. There is nothing, it would seem, in international customary law which need dissuade them from so doing. Furthermore, the Court of Appeal has decided in favor of absolute immunity.³¹ Its decisions relevant to state trading corporations will be considered in the next section of this article. It is clearly open to parliament to legislate on the question of sovereign immunity, and restricting it, at least as far as trading transactions are concerned, would not be contrary to international law.

In the United States, one must distinguish between the judicial and the administrative views of sovereign immunity in commercial transactions. The "Tate Letter"³² was the culmination of a policy which had been pursued by the State Department for many years. In this statement a survey of the practice regarding immunity in various countries was made, and it concluded that only English and Soviet law recognized the doctrine of absolute immunity. Other countries tended toward the restrictive rule which distinguishes *acta gestionis* from *acta imperii*. The letter indicated the intention of the Department of State to follow the restrictive view of sovereign immunity. In concluding certain commercial treaties³³ with other countries, the United States has expressly provided that state owned or controlled enterprises of these countries shall not be entitled to sovereign immunity when engaged in business activities in the territory of the other.

State Department certification has much directive impor-

munity, as was the decision of the Irish Supreme Court in *The Ramava*, [1941] 75 IR. L.T.R. 153 and the Canadian decision of *Flota Maritima Browning de Cuba S.A. v. SS. Canadian Conquerer*, [1962] 30 D.L.R. 2d 172 (Can.). See D. O'CONNELL, *supra* note 16, at 943.

³⁰ *Rahimtoola v. Nizam of Hyderabad*, [1957] 3 W.L.R. 884, 913.

³¹ *The Parlement Belge*, (1880), 5 P.D. 197; *The Porto Alexandre*, (1920), 23 P.D. 30; *Krajina v. Tas Agency* [1949] 2 ALL E.R. 274; *Baccus S.R.L. v. Servicio Nacional Del Trigo*, [1957] 1 Q.B. 438; *Mellenger v. New Brunswick Development Corp.*, [1971] 1 W.L.R. 604.

³² 26 DEPT. STATE BULL 984 (1952).

³³ See Schmitthoff, *supra* note 13, at 452-53.

tance in the U.S. courts.³⁴ In *The Republic of Mexico v. Hoffmann*,³⁵ the State Department refrained from certifying that it recognized Mexican ownership, without possession of a ship, as a ground of immunity. The Supreme Court held that the vessel was not immune from jurisdiction, because the vessel was not in possession of the Mexican government. In his concurring opinion, Frankfurter stated that the concept of possession was a tenuous one for the purpose of distinguishing between vessels which are entitled to immunity and those which are not, and that the decision of the court constituted the overruling of earlier decisions. In *National City Bank of New York v. Republic of China*,³⁶ the Supreme Court's deferral to the Tate Letter may be described as the basis of the decision. The State Department seems to now recognize sovereign immunity on a case by case basis.

Despite the doubts of Hamson,³⁷ France also adheres to the restrictive theory distinguishing *actes de commerce* or *actes de gestion privés* and *actes de puissance publique*. In *Roumania v. Pascalet*,³⁸ the Commercial Tribunal of Marseilles decided that the purchase of goods for resale to nationals was an *acte de commerce* for which immunity would not be granted. Also, in *Chaliapine v. Representation Commerciale de l'U.R.S.S. et société Brenner*,³⁹ the Soviet Union was not granted immunity in a suit for breach of copyright in the publication and sale of books. These cases concerning state trading instrumentalities show the general reluctance of French courts to grant immunity.⁴⁰

At the beginning of this century, German courts firmly supported the absolute theory of sovereign immunity. In 1921, this concept was applied to the *Ice King Case*,⁴¹ in which the court disclaimed jurisdiction in a shipping case involving a for-

³⁴ Note that in *Chemical Natural Resources v. Republic of Venezuela*, (1966), 42 I.L.R. 119, a case heard in the Supreme Court of Pennsylvania, prohibition was granted requiring the lower court judges to accept the State Department's suggestion of sovereign immunity, which was said to be binding on a U.S. court even though it related to a foreign government's commercial transactions.

³⁵ *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945).

³⁶ *National City Bank v. Republic of China*, 348 U.S. 356 (1955).

³⁷ See Hamson, *Immunity of foreign states: the practice of the French courts*, 27 BRIT. Y.B. INT'L L. 293 (1950). See also Lauterpacht's criticism of the article, *supra* note 1, at 262-63 n.9.

³⁸ *Roumania v. Pascalet*, A.D. 1923-4, Case No. 68.

³⁹ *Chaliapine v. Representation Commerciale de l'U.R.S.S. et société Brenner*, Dallos Périodique 1934-2/139.

⁴⁰ It seems that French judges, unlike their British counterparts, are willing to impose and apply their own views of governmental acts, and are predisposed to deny immunity in cases involving the Soviet Union, which has made a state monopoly of its foreign trade.

⁴¹ *Gustaf Selling v. United States Shipping Board*, (1922), 103 R.G.Z. 274.

eign sovereign. However, German courts have recently shown a tendency to adopt the restrictive theory.⁴² In contrast, Italian courts have denied immunity since before the turn of the century. This denial of immunity has been based upon a doctrine of implied waiver. Italian law seems to have developed the most restrictive principle of sovereign immunity and, since it is easy to imply a waiver of jurisdictions,⁴³ the courts take a liberal view as to what constitutes *acta gestionis*.⁴⁴ The Italian Supreme Court, in the case of *State de Rumania v. Trutta*,⁴⁵ applied the "nature of the transaction" test to a contract for the supply of leather to a foreign army. It thus decided that immunity would not be granted since the purpose of the transaction could not alter the private nature of the act of entering into a contract. Belgian and Swiss courts also adhere to the doctrine of restrictive immunity.⁴⁶

A growing number of states also admit the execution of judgments upon state assets which do not serve public purposes. Swiss law permits execution subject to authorization from the Federal Council; and in the *Socobel case*,⁴⁷ a Belgian court subjected Greek assets in Belgian banks to execution. The French decisions regarding executions are in conflict; but in the United States, execution has been allowed against a foreign State's property.

Sovereign Immunity and State Trading Corporations

It is necessary to refer to three English Court of Appeal decisions⁴⁸ before discussing the legal position in the United States, France, Germany, and Italy. The decisions, in at least the second of these cases and perhaps the third, are unfortunate.

⁴² S. SUCHARITKUL, *supra* note 4, at 222-25.

⁴³ Compare the English case of *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438 C.A. and *Kahan v. Federation of Pakistan* [1951] 2 K.B. 1003.

⁴⁴ In the case *Hungarian Papal Institute v. Hungarian Institute (Academy)* in Rome, (1960) 40 I.L.R., 59, the Italian Court of Cassation decided that the Hungarian Academy was exempt from the jurisdiction of the Italian courts, as it was an organ of the Hungarian State, performing cultural activities of a public kind according to an international agreement. This body was not engaging in trading activities.

⁴⁵ *State de Rumania v. Trutta*, [1926] FORO ITAL. I. 584.

⁴⁶ Austria recognizes the doctrine of limited sovereign immunity. See, e.g., the Supreme Court case (*Collision with foreign government-owned motor car (Austria) case*), Feb. 10, 1961, 40 I.L.R. 73.

⁴⁷ *Socobel v. Greek State*, 32 I.L.R. 187, 1951, Case No. 2.

⁴⁸ See Schmitthoff, *supra* note 13, at 463-67; see also Wedderburn, *Sovereign Immunity of Foreign Public Corporations*, INT'L & COMP. L.Q. 290 (1957). The cases are *Krajina v. Tass Agency*, [1949] 2 ALL E.R. 274; *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438, and *Mellenger v. New Brunswick Development Corporation*, [1971] 1 W.L.R. 604.

In *Krajina v. Tass Agency*, the plaintiff alleged he had been libeled in the Tass Agency, a newspaper published and registered under the U.K. Registration of Business Names Act of 1916. Suit was initiated for damages in the English courts. The defendant entered a conditional appearance and applied to the court to have the suit set aside on the ground that it was a department of the Soviet State and, therefore, immune from suit. They produced a certificate from the Soviet Ambassador stating that Tass "constitutes a department of the Soviet State, i.e., the U.S.S.R., exercising the rights of a legal entity."⁴⁹ The writ was set aside by Birkett, J., and his order was affirmed by the Court of Appeal. Cohen, L.J. and Tucker, L.J. added that the agency has the status of a governmental department and that even if it could have been proved that Tass was incorporated as a legal entity, it would not have been deprived of sovereign immunity. Singleton, L.J., in a brief but interesting opinion, stated that if it had been possible to show that Tass Agency was incorporated as a separate legal entity, the position might have been different. An important factor in the case may have been that the activities engaged in by the Tass Agency are of a propagandist and political nature having little commercial purpose.

The *Baccus* case was a more unfortunate decision. It concerned a Spanish corporation, the Servicio Nacional del Trigo. On one hand, the corporation was held to be a separate legal entity, and on the other, it was held to be a department of the Spanish government and acting in conformity with the instructions of the Spanish Ministry of Agriculture. Servicio entered into two C.I.F. contracts for the sale of 26,000 tons of rye to a private Italian company. The contracts provided that "any divergence which may arise . . . both parties submit to the jurisdiction of the technical courts of London." Dispute did arise, and the plaintiffs issued a writ out of the jurisdiction claiming damages for breach of contract. Servicio entered an unconditional appearance and the plaintiff buyers filed their statement of claim. One year after its apparent submission to the jurisdiction, Servicio pleaded immunity on the ground that it was a department of the Spanish government. It filed an affidavit to that effect, stating that the earlier procedural steps had been taken by a Spanish official who purported to act for Servicio,

⁴⁹ *Krajina v. Tass Agency*, [1949] 2 ALL E.R. 274, 284.

but who did not have authority.⁵⁰ The Court of Appeal upheld this belated plea of sovereign immunity by a vote of two to one. Singleton, L.J., dissenting, elaborated the rationale which he had already outlined in the Tass Agency case.⁵¹ It is unfortunate that the Court of Appeal did not decide that when a separate legal entity is set up by a state for trading purposes, that entity should not enjoy the benefits of sovereign immunity. It is arguable, as Professor Wedderburn has contended, that despite the *Baccus* case, where the evidence may perhaps have been special,⁵² it is still possible for an English court to decide that a foreign state trading corporation is sufficiently independent to not be an agent of the State, and, therefore, not subject to the doctrine of sovereign immunity. It is no longer allowable for the Court of Appeal to state that mere incorporation and having a commercial function suffices to grant this degree of independence.

It would seem, then, that the *Mellenger* case was rightly decided if the test of commercial functions is adopted,⁵³ but wrongly decided if the wide principle of Judge Lauterpacht's denying sovereign immunity is adopted. In this case two industrial consultants, who intended to bring action against the New Brunswick Development Corporation, applied for leave to issue a writ and to serve notice of it on the corporation outside the jurisdiction. They alleged that a two hundred thousand pound commission was owed to them for effecting a business introduction leading to the establishment of a chipboard plant in New Brunswick. The Canadian corporation entered a conditional appearance opposing the application stating that the convenient forum for the trial was New Brunswick. Kilmer Brown, J., granted the plaintiff's request and gave the corporation leave to appeal from his order. It should be noted that the corporation was established under the New Brunswick Act of

⁵⁰ It does, in fact, seem Senor Cavero, a senior civil servant who had instructed that unconditional appearance be entered, did not know the effect of entering an appearance. See Parker, L.J., speech in *Baccus S.R.L. v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438, 473.

⁵¹ The learned Judge, like Cohen, L.J. in *Krajina's Case*, referred to a number of American cases, in particular *Ulen and Co. v. Polish National Economic Bank*, *infra*.

⁵² See Lord Denning's explanation of the decision on this ground in *Mellenger* [1971] 1 W.L.R. 610. It seems that, although according to the affidavit of Snr. Jose Colas, the corporation was subject to the control and supervision of the Spanish Ministry of Agriculture, the corporation was able to effectively exercise the functions of an autonomous body. Perhaps the Master of the Rolls sought to limit the effect of the case drastically in his obiter dictum distinguishing it on its facts. He also stated he was not sure it could be upheld.

⁵³ These functions were adopted by Lord Denning.

1959, which states, "There is hereby constituted on behalf of Her Majesty in right of New Brunswick a body corporate under the name of the New Brunswick Development Corporation. . . ."

It is clear that this corporation is closely connected with the government. The Minister of Industry is an ex-officio director, and the other directors are appointed by the Lieutenant Governor. The corporation has no issued capital, and no stocks or shares. Its principal power under Section 3(1) (a) of the Act is to "assert, promote, encourage and advance the industrial development, prospects and economic welfare of the province," and, although the corporation has the power, with the consent of the Lieutenant Governor in Council, to carry on any business of an industrial, commercial or agricultural nature, it has never exercised that power.

It was arguable that the contract entered into was not a trading one, because it did not involve buying or selling, but it did involve the introduction of Airscrew Weyrac in New Brunswick instead of in Sweden or Finland. Also, it was apparent that the New Brunswick corporation was closely identified with the New Brunswick government, and that it had never pursued ordinary trade or commerce. On these grounds, Lord Denning, M.R., and Salmon, L.J., with Phillimore, L.J. concurring, decided that the corporation was entitled to sovereign immunity. The reason for the decision was that the New Brunswick Development Corporation was not carrying on any commercial transactions.⁵⁴

Arguably, however, the purchase of information is a commercial transaction, and certainly an ordinary contract was in question. In *Rahimtoola's* case,⁵⁵ Lord Denning used the example of the commercial transactions of a foreign state as an instance of when sovereign immunity should not be granted. The *Mellenger* case was not concerned with the legislation of international transactions by a government, and with due respect it seems that Lord Denning did not follow the logical conclusions which he might have derived from his judgment in *Rahimtoola's* case. Had Judge Lauterpacht's view of sovereign immunity been adopted, or the method of Judge Weiss for distinguishing between acts *jure imperii* and *jure gestionis*, the

⁵⁴ See *Mellenger v. New Brunswick Development Corp.*, [1971], 1 W.L.R. 609.

⁵⁵ *Rahimtoola v. Nizam of Hyderabad*, [1957] 3 W.L.R. 884-913.

case would have been decided differently. In the opinion of the writers it should have been.⁵⁶

In the United States a distinction has been drawn between government departments and corporations. U.S. courts have been consistent in their denial of immunity to private corporations. In 1824, Marshall, C.J.⁵⁷ said that a government divests itself of its sovereign character when it becomes a partner in a trading corporation, and so far as trading transactions, takes on the character of a private citizen.⁵⁸

*Ulen and Co. v. Bank Gospodarstwa Krajowego (National Economy Bank)*⁵⁹ was concerned with a foreign bank in which the majority of the shares were owned by the Polish government, with control therein vested in the Minister of Finance. Net profits were reserved for the State Treasury and municipalities which held shares. The Supreme Court denied immunity, and the distinct legal personality of the corporation was given effect. The principle of the *Ulen* case has been generally followed in the United States. There have been instances, though, in which U.S. courts have granted sovereign immunity to state trading corporations. In one because the court found the primary purpose of the corporation to be that of supplying oil to the British Navy.⁶⁰ In this case it will be noted that the court used the "objects" test as the basis for its decision. As far as state trading corporations are concerned, the principle generally applied by U.S. courts is clearly more in accordance with justice and contemporary economic reality than that applied in the United Kingdom.⁶¹

In France, Germany and Italy it seems that state trading agencies are not now entitled to immunity from jurisdiction although there was fluctuation in France early in this century on sovereign immunity. Soviet state trading agencies have not enjoyed immunity in the French courts.⁶² In Italy, courts have

⁵⁶ For a recent case on sovereign immunity, see *Swiss-Israel Bank v. Salta Times*, April 14th, 1972, at 14, col. 8. In this case McKenna J. declined to set aside a writ against an Argentine bank which was not a department of state, but an independent corporation carrying on a banking business free of government control; by Article 2 the Organic Law of the Provincial Bank of Salta, it was stated to be autarchic.

⁵⁷ *Bank of United States v. Planter's Bank*, 22 U.S. (9 Wheat.) 904 (1824).

⁵⁸ See S. SUCHARITKUL, *supra* note 4, at 120-23.

⁵⁹ See *In re Investigation of World Arrangements*, 13 F.R.D. 280, 291 (1952).

⁶⁰ 24 N.Y.S. 2d 201 (1940).

⁶¹ For recent cases concerning state trading corporations in which sovereign immunity was not granted by the courts, see *Pan American Tankships Corp. v. Republic of Viet Nam*, 296 F. Supp. 361 (D.C.N.Y. 1969); *Amkor Corp. v. Bank of Korea* 298 F. Supp. 143 (S.D.N.Y. 1969).

⁶² See the cases cited in Lauterpacht's article, *supra* note 1, at 260-61.

consistently denied sovereign immunity to state foreign agencies engaging in trading activities,⁶³ and it seems that the German courts now take a similar position.

The Doctrine of Sovereign Immunity and the Concept of the Abuse of Rights

As mentioned previously, the House of Lords and the legislature both have the power to modify the application of the doctrine of sovereign immunity without violating the accepted principles of international customary law.⁶⁴ Some claims of sovereign immunity constitute an abuse of rights or liberties. The "right" to plead sovereign immunity in the forum of a territorial state is a liberty⁶⁵ granted by a state to the foreign state or state trading agency. Although it does not seem to have been contended previously,⁶⁶ under certain circumstances the plea of sovereign immunity might be considered to be abusive by international law. Fitzmaurice has pointed out that the exercise of a liberty by a state may be abusive.⁶⁷ This was also pointed out by the International Court of Justice in the *Norwegian Fisheries Case*.⁶⁸ There the majority opinion held that although Norway, by reason of territorial title and acquiescence by other states, or as a result of the unique character of her coast, might delimit her territorial waters by long straight base lines, they must follow the general direction of the coast. And, though Norway had some freedom in fixing them, the choice of the base lines could not show manifest abuse.⁶⁹

Where a state has agreed to arbitration, or to accepting the jurisdiction of the courts,⁷⁰ and then pleads sovereign immunity,

⁶³ S. SUCHARITKUL, *supra* note 4, at 141; see also *Floridi v. Soveportrfilm*, Nov. 15, 1951, *Annali X* (1954), p. 115.

⁶⁴ It would be desirable to regulate the whole matter by an international convention, but difficult to achieve.

⁶⁵ It is analytically a liberty, as international law does not prevent it from being granted, and does not define its extent.

⁶⁶ No mention appears in such important texts which are concerned with, or mention, the concept of abuse of rights as the Hague Lectures of Politics (H.R., 1925, vol. I Pp. 5, 77-109); STOWELL'S INTERNATIONAL LAW (1931); FITZMAURICE'S HAGUE LECTURES OF 1957 (H.R. 1957, vol. 2, pp. 5-54); ALVAREZ, *DROIT INTERNATIONAL NOUVEAU* (1958); and H. LAUTERPACHT, *FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY*, Ch. 14.

⁶⁷ Fitzmaurice, *supra*, note 9 at 53.

⁶⁸ See *Norwegian Fisheries Case*, [1951] I.C.J. 116.

⁶⁹ *Id.* at 412. One of the most interesting judgments in the I.C.J. concerning the abuse of rights is by Judge Alvarez. See also *Second Admission Case*, [1950] I.C.J. 15.

⁷⁰ In *Kohan v. Pakistan Federation* [1951] 2 K.B. 1003, this was held not to constitute a submission to the jurisdiction. The requirements for submission to the jurisdiction are very strict in English law.

the principle of abuse of rights should be applicable.⁷¹ It seems *a fortiori*, in circumstances analogous with those in *Duff Development Co. v. Kalantan Government*,⁷² that the action of the foreign state which had resulted in an injury to a national of the territorial state could be treated as an abuse of rights. One might envisage other circumstances in which the plea of sovereign immunity could be treated as abusive.

It might be that a territorial state accepting the principle of absolute immunity in state trading, and a foreign sovereign pleading sovereign immunity, accepts the jurisdiction of the International Court of Justice, although this is by no means certain. The state may have accepted the jurisdiction subject to many reservations,⁷³ including the doubtfully effective automatic reservation, adopted by the United States in the Connally amendment. It will, however, be remembered that the Optional Clause of the Statute of the International Court provides for jurisdiction in legal disputes concerning questions of international law. These questions may certainly involve the determination of whether a state has committed an abuse of rights and injured a foreign national. The novelty of the claim would, of course, be no bar to its consideration by the International Court, but few states have accepted its jurisdiction, and they have made many reservations thereto.

Abuse of Rights and Public Opinion

As the preceding observations have shown, the International Court of Justice has approached the issue of whether a state, by pleading sovereign immunity in a matter of international trade is committing an abuse of sovereign power. However, it is also necessary to devise a procedure applicable to the frequent cases in which the International Court has no jurisdiction.

Here we are on *terra nova*. However, this should not deter us. A fair and just procedure should be adopted in the interest of creating a healthy climate for investment by countries with

⁷¹ It is thought that the concept of abuse of rights in international law has a wider connotation than it has according to the German Civil Code, Art. 226, where there must be a deliberate intention to harm. (See RGZ 69/380; RGZ 138/373; J.W. 1936, p.3308) and no other object. Some cases in French company law have circumscribed the doctrine in a like way.

⁷² [1924] A.C. 797. In that case there was an arbitration clause in a contract with a foreign sovereign, and an award was made in pursuance thereof. The foreign sovereign unsuccessfully applied to have the award set aside, and upon this application being refused, the Kelantan government successfully pleaded sovereign immunity, which they had not raised earlier.

⁷³ See Waldock, [1955-56] BRIT. Y.B. INT'L. 244.

industrial know-how which are prepared to transfer their technological knowledge to developing countries. It is thought that, where a state tries to avoid its contractual obligations by abusing the plea of sovereign immunity, a procedure consisting of two stages should be adopted.

The first stage would be an authoritative ascertainment that an abuse of the plea of immunity has occurred. The complaining private corporation or state⁷⁴ should address itself to an international jurist of undoubted world reputation. It must be pointed out that, although the proposed procedure would be an *ex parte* one, the state which wishes to plead sovereign immunity would be allowed to appear during the hearing of the case to request the rejection of the application upon certain defined grounds. There would seem to be nothing to prevent a member or ex-member of the International Law Commission from assuming such a function. The position of present members of the International Court of Justice might be more doubtful; the express provisions of Art. 17 of the Statute of the Court would not appear to prevent the assumption of such a role by a member of the Court, and neither would the rules pursuant to the article in 1949.⁷⁵ When, however, a decision of a member of the I.C.J. may be the subject of an appeal to the Court, the judge must, according to the 1949 rules, decline jurisdiction. These rules apply only if a state accepts the jurisdiction of the I.C.J.

In addition to members or ex-members of the International Law Commission and the International Court, there are eminent jurists of world repute in the field of public international law prepared to accept jurisdiction. It would obviously be better, in cases of the kind envisaged to nominate a "neutral" jurist, one who is not a national of either state concerned in the dispute. The giving of an opinion by a jurist in circumstances such as these is clearly not a violation of the fundamental principle of international law contained in Art. 2(7) of the Charter of the United Nations, namely, the prohibition of intervention in matters which are essentially within domestic jurisdiction. The presence of an abuse of an international right, such as the plea of immunity, removes the matter from domestic jurisdiction.

⁷⁴ The competence of the state is made clear by the *Mavrommatis Concessions Case*, [1924] P.C.I.J., Ser. A, No. 2, at 12. It is now argued correctly by many that international corporations have likewise some degree of capacity in public international law.

⁷⁵ For these rules, see [1953-54] Y.B.I.C.J. 96.

Also, the giving of such an opinion can scarcely be construed as "intervention."

In the second stage, when the international jurist has come to the conclusion that the defaulting state has committed an act of abuse in its plea of immunity, the question of the consequences of these findings arises. Obviously a coercion of the defaulting state or interference with its internal sovereignty is not involved. The findings of the jurist would be passed on to the world at large, and world-wide publicity would be given them thus making it known that a *prima facie* case of abuse of the plea of immunity has been established against the defaulting state. The findings should also be communicated to international financial circles, such as the World Bank and its related institutions. It will then be left to these financial institutions to decide whether to continue providing financial support to the defaulting state.

In this connection, reference should be made to the statement of President Nixon of January 19, 1972, in which he reaffirmed the long-standing policy of the United States in these matters. President Nixon pointed out that countries which expropriate often fail to attain their own investment goals. He stated that under international law the United States has a right to expect that takings of American private property will be non-discriminatory, for a public purpose, and that prompt, adequate and effective compensation will be paid. He stated that, in face of expropriations which are contrary to international law, the United States would withhold its support for loans to the countries concerned in multilateral investment banks.⁷⁶ In 1972, the U.S. Congress enacted three statutes⁷⁷ requiring U.S. representatives in the World Bank and related agencies to vote against loans where property owned by U.S. citizens or U.S. controlled business associations has been nationalized, expropriated or seized, or where contracts or agreements with U.S. citizens or U.S. controlled business associations have been repudiated or nullified, or where discriminatory taxes, restrictive maintenance, operational conditions, or other measures are imposed which have the effect of nationalization, expropriation, or otherwise seizing ownership or control of property so owned, and where no determination is made by the President that an arrangement for prompt, adequate and

⁷⁶ An exception was made in this statement for humanitarian assistance. For an estimate of the likely success of Mr. Nixon's policy, see *Financial Times*, Jan. 20, 1972, at 5, col. 2.

⁷⁷ Public Laws 92-245, 92-246, and 92-247 of March 10, 1972.

effective compensation has been made; or where the parties have submitted the matter to arbitration under the rules of the Convention on the Settlement of Investment Disputes;⁷⁸ or where negotiations are taking place in good faith with the object of providing prompt, adequate and effective compensation in accordance with the applicable principles of international law.⁷⁹ It is clear that, by reason of the weighted voting system in the World Bank and the International Development Association, a bloc of developed states could prevent a loan to a developing country which expropriated the property of a national of one of the developed states.

As President Nixon pointed out in his statement, the Department of State has set up a special office for the purpose of following expropriation cases.⁸⁰ The emphasis made by the President in his statement on the usefulness of arbitration in the settlement of investment disputes is of great interest. Mr. Nixon also stated that the U.S. government would cooperate with the international financial institutions to achieve a mutually beneficial atmosphere for investment. Such cooperation would include the encouragement of less developed states which have not adhered to the 1966 Convention for the Settlement of Investment Disputes to do so, and it would also include the use of measures such as the legislation already mentioned. In this context, it is noteworthy that the Bank and the International Development Association have a long-standing policy of not lending to countries which have expropriated foreign investments and which have failed to evidence progress toward satisfactory settlement of the matter.⁸¹

Once it is recognized that the Nixon Statement of 1972 is founded on the general principle of international law that an abuse of the right of sovereignty in international trade, although not leading to sanctions, should be taken note of by international public opinion, a solution of a problem which has long impeded the development of a healthy climate for international business and investment is in sight. As was pointed out at the beginning of this article, the old concept of unrestricted sovereignty has no room in the international trade relations of the modern world. In international trade relations,

⁷⁸ See 4 INT'L LEGAL MAT. 524 (1965).

⁷⁹ The OECD has formulated principles with regard to expropriation.

⁸⁰ See 7 INT'L LEGAL MAT 117 (1968).

⁸¹ Note in this context the British opposition to a loan to Tanzania in the IDA, which took place because of a Tanzanian expropriation without compensation; see *Financial Times*, Jan. 31, 1972, at 5, col. 7.

states should be treated in the same manner as ordinary businessmen, and a state that tries to avoid its ordinary commercial obligations by pleading immunity should be regarded in public opinion the same as a businessman who tries to avoid the rules of fair business practices.