The State Immunity Act of 1978: An English Update

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The State Immunity Act of 1978:
An English Update

Introduction

One of the idiosyncrasies of English law, and one of the few places where an analogy can be drawn between the separation of powers under the American Constitution and the exercise by Her Majesty of her various powers under the unwritten British Constitution, is the way in which international treaties are regarded or, rather, disregarded by the English courts. In England, the making of treaties is an exclusively executive act of the Crown, subject to review by neither Parliament nor the courts; treaties do not, therefore, form part of the law of the land, and are susceptible to interpretation or enforcement by the courts only when they are incorporated into domestic law by ratification or re-enactment by Parliament. This explains why, notwithstanding the signature by the United Kingdom of the Brussels Convention of 1926 (relating to immunity of State-owned ships) and the European Convention on State Immunity in 1972, the courts continued to accede to requests of States for an immunity to which they were not entitled under those treaties and, in some cases, to which they were not entitled under their own laws.

One reason which can delay the ratification by Parliament of a treaty or convention, particularly one dealing with private rights, is that the treaty may be concerned with concepts or ideas which are unknown to English law or contrary to established English law. Consequently, before ratification can take place, it is necessary to change the English law itself. The United Kingdom has still not ratified the Brussels or the European Conventions

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'The Brussels Convention for the unification of certain rules concerning the immunity of state owned ships, January 5, 1926, 176 LNTS 199.

because English common law, as interpreted and applied by the courts, did not fully recognize restrictions on the "absolute theory" of sovereign immunity. The State Immunity Act of 1978 is the first, necessary step for bringing English law into conformance with the laws of other countries who are party to those Conventions, thereby clearing the way for ratification.

I. Background

By 1978, the English common law on state immunity had foundered in its attempts to reconcile two fundamental principles: the law of nations and the doctrine of precedent.

In 1764, in giving his judgment in Triquet v. Bath, Lord Mansfield, C.J., one of the greatest common lawyers, quoted from the opinion of Lord Chancellor Talbot in Buvot v. Barbuit, "that the law of nations in its full extent was part of the law of England." The "law of nations" is assumed to have an objective reality which can be proved, for the purposes of English law, by taking judicial notice of "international treaties and conventions, authoritative text books, practice and judicial decisions" which demonstrate that a particular law has "attained the position of general acceptance by civilized nations."

For many years it was a principle of international law that a foreign sovereign—an expression which includes states, governments and state entities of most kinds—was absolutely immune from legal process and that the property of a sovereign or state was absolutely immune from execution or attachment. This rule was restated in 1880: "The exemption of the person of every sovereign from adverse suit is admitted to be a part of the law of nations... so also his property... The universal agreement which has made these propositions part of the law of nations has been an implied agreement."

However, in the latter part of the nineteenth century and throughout the twentieth century, states and their governments have gradually increased the...
States began to enter into trading contracts as if they were private individuals and, occasionally, to break those contracts. Beginning with Russia in 1917, some states took over the entire ownership and operation of many businesses previously carried on by private individuals and corporations, and the injustice of allowing a defaulting contracting party to be excused from the performance of that contract solely on the grounds that it was a sovereign state became increasingly apparent. Gradually, but coincidentally, the courts of many western European countries began to restrict sovereign immunity to those cases where the state had been engaged in a public rather than commercial activity. That this development did not take place in England and, indeed, that the absolute theory seemed for a time to be gaining ground, can be attributed to two causes—the doctrines of precedent and of Crown immunity.12

In England, the courts are bound more tightly by the doctrine of precedent than their counterparts in the United States. Indeed, it was only in 1966 that the House of Lords recognized that it had the power to depart from its own previous decisions, and even then, only in those cases where it expressly decides to review such a decision. The Court of Appeal must always follow previous decisions of the House of Lords and despite the efforts of Lord Denning, its own previous decisions:

On a careful examination of the whole matter we have come to the clear conclusion that this court [i.e., the Court of Appeal] is bound to follow previous decisions of its own as well as those of courts of coordinate jurisdiction. The only exceptions to the rule (two of them apparent only) are . . . (1) The Court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The Court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The Court is not bound to follow a decision of its own if it is satisfied that the decision is given per incuriam.13

In those areas where society, social customs, and economic patterns are changing, many disputes will reach the courts. Consequently, the law will evolve, albeit a little more slowly, to suit the changing world, since both counsel and judges are skilled in distinguishing those precedents which have outlived their original purpose and context. In some areas, however, where

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12 In the United States, the courts seem to have been prevented from giving full effect to the restrictive theory by the belief that questions of sovereign immunity were matters of foreign policy to be dealt with, under the Constitution, by the State Department to the exclusion of the courts: "it 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 to recognize." Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945). See generally, HOUSE REPORT ON THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 (Report No. 94-1487) [hereinafter cited as HOUSE REPORT].

the cases are few and far between, the pace of change will be slower, making it more difficult to distinguish those decisions which, however out of touch they may be with contemporary life, seem to contain rules of common law which by the very reason of their longevity are not susceptible to change.

Furthermore, in looking at older decisions on sovereign immunity, English lawyers and judges were conditioned by the position of their own Sovereign in English law. For many years it was an axiom of English law that the King could do no wrong and could not be sued in the king's own courts, an immunity which extended to Ministers of the Crown, to all government departments and subdivisions, to all Crown property, and, in many cases, to many Crown employees as well.

This position became more and more untenable as the activities of the government extended into all areas of the daily life of the country, but it was not until the passing of the Crown Proceedings Act in 1947\textsuperscript{14} that it became possible to bring an ordinary common law action against a government department.\textsuperscript{15} It is hardly surprising, therefore, that the judges approached precedents on the immunity of foreign sovereigns from the position that those sovereigns were entitled to the same immunity as their own, and they were consequently reluctant to distinguish away those old precedents in favor of the new rule emerging in Western Europe. Thus, \textit{Parlement Belge}\textsuperscript{16} in 1880 was followed and even extended in \textit{Porto Alexandre} in\textsuperscript{17} 1920. Although doubt was cast on both those decisions by the House of Lords in \textit{Cristina}\textsuperscript{18} in 1938, neither of them was overruled. Indeed, it was in \textit{Cristina} that the absolute rule of state immunity was forcefully restated by Lord Atkin, one of the most distinguished common lawyers of his age.\textsuperscript{19}

\[T]\textit{wo propositions of international law [are] engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the Courts of a country will not implead a foreign Sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.}

\[T]\textit{he second is that they will not, by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.}\textsuperscript{20}

\textsuperscript{14} The Crown Proceedings Act, 1947, 10 & 11 Geo. 6, c. 44.

\textsuperscript{15} Before 1947, the only remedies were a Petition of Right for a breach of contract and, in tort, an action against the individual wrongdoer for whom the Crown could not be made vicariously liable. Even today, the only remedies for maladministration are the old prerogative writs of certiorari, mandamus and prohibition whose highly problematical chances of success depend on the exact wording of the statute or regulation conferring the powers allegedly misused or on identifying a procedural defect in the use of those powers.

\textsuperscript{16}[1880] 5 P.D. 197

\textsuperscript{17}(1920) at 30 (immunity allowed for a ship used wholly for commercial purposes).

\textsuperscript{18}[1938] A.C. 485.

\textsuperscript{19} Lord Atkin ensured his place in English legal history by his enunciation of the duty of care, the foundation of the modern law of negligence, in \textit{Donaghue v. Stevenson} [1932] A.C. 562, the snail in the bottle case.

\textsuperscript{20}[1938] A.C. at 490.
Lord Atkin allowed no exceptions to this rule, declaring that it was "well settled" that exceptions could not be made for property used for commercial purposes. Although three other members of the Court, Lords Maugham, Thankerton and Macmillan, pointed out that the decision in *Parlement Belge* did not say that state-owned vessels used exclusively for commercial purposes were immune from arrest, and Lord Maugham went so far as to suggest that the decision in *Porto Alexandre* was wrong, it was the emphatic statement of the absolute rule by Lord Atkin which found its way into the text books and into the subconscious of many lawyers. As a result, the argument in subsequent sovereign immunity cases centered more on the identity of the defendant and whether it was entitled to the immunity rather than whether the activities in which it was engaged restricted that immunity. Even then, no clear rule could be deduced from the cases as the status of each defendant was decided as a fact on the evidence before the court. In *Krajina v. The TASS Agency* for example, the Soviet news agency was found to be a department of state although the Russian Ambassador's certificate as to its status under Russian law was not regarded as being conclusive. Similarly, in *Baccus S.R.L. v. Servicio National del Trigo*, the fact that the trading arm of the Spanish Ministry of Agriculture was established as a separate entity was not fatal to its claim for immunity.

Then, in 1972, the United Kingdom signed the European Convention on State Immunity and agreed, in effect, that the restrictive rule of immunity would be followed. Absent the ratification or reenactment of that convention, the courts were not able in 1976 to give effect to its provisions, or even to take judicial notice of the principles it incorporated. The "Philippine Admiral" was a ship owned by the Philippine government and sold by it under a conditional sale agreement to the Liberation Steamship Company, Incorporated (hereafter "Liberation"). Liberation operated the ship entirely for its own commercial purposes until it ran out of money and could not pay a Hong Kong shipyard for repairs. The shipyard arrested the ship in an action in rem and the court in Hong Kong ordered the ship to be

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1 The use of property for commercial purpose was not in issue in *The Cristina*, as the ship had been requisitioned by the legitimate Spanish Republican government to assist in putting down a rebellion, clearly a public purpose.

2[1949] 2 All E.R. 274.


5Articles 4 to 7 inclusive of the European Convention on State Immunity provide that a contracting state cannot claim immunity from the jurisdiction of a court of another contracting state if

(a) the proceedings relate to an obligation of the state which, by virtue of a contract (including a contract of employment) that is to be discharged in the territory of the other state, or

(b) it participates with private persons in a company, association or other legal entity in the other state, or

(c) if it has an office or agency in the other state through which it engages in a commercial, industrial or financial activity which gives rise to the proceedings.

Article 30, however, excludes from the Convention proceedings relating to seagoing ships and cargoes and passengers, the ground covered by the 1926 Brussels Convention.
sold. The Philippine government then terminated the conditional sale agreement, as they were fully entitled to do, and applied to the court to have the writ and order set aside on the ground that the ship, being state owned, was immune from arrest. The case eventually reached the Privy Council, which reviewed the growth of the restrictive theory outside England and concluded that the ship was not immune as it had been used exclusively for commercial purposes. To arrive at this decision, the Privy Council had to specifically decide not to follow the precedent of Porto Alexandre (which, although a decision of the Court of Appeal and not technically binding on the higher court, had remained unchallenged for over fifty years). This was accomplished by concluding that the present case was not covered by the earlier Parlement Belge, which the Court of Appeal in 1920 had thought it was following and applying.

Although the Privy Council decided immunity would not extend to a state-owned ship being used for commercial purposes, it was reluctant to go the whole way and hold that the restrictive theory, however much they favored it, had general application under English law. Indeed, the Privy Council went out of its way to suggest that such a result should not be implied.

The rule that no action in personam can be brought against a foreign Sovereign State on a commercial contract has been regularly accepted by the Court of Appeal in England and was assumed to be the law even by Lord Maugham in The Cristina. It is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so.

The opportunity, declined by the Law Lords, to conform English law to the modern theory of immunity applied in other countries was seized with apparent eagerness by the Court of Appeal two years later in Trendtex Trading Corp. v. Central Bank of Nigeria. There, the Central Bank of Nigeria had simply refused to honor a confirmed irrevocable letter of credit opened to pay for shipments of cement purchased by the Ministry of Defense. The only possible defense, sovereign immunity, was rejected by all three judges who decided that the Central Bank was not a department of state. The real

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27. . the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions . . . their Lordships themselves think that it is wrong that it should be so applied. In this country . . . the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued there in respect of such transactions.
29There is no obvious explanation for this strange dichotomy between endorsing the restrictive theory on the one hand and simultaneously refusing to apply it. It should be observed that the House of Lords is composed of virtually the same judges in the same court, but wearing different hats. The answer may lie in the fact that the Judicial Committee of the Privy Council (which advises her Majesty how to decide appeals from the Commonwealth rather than actually deciding them itself, as does the House of Lords with domestic English cases) renders only one judgment and the language used may have covered wide differences of opinion between the five judges.
interest of the case lies in the fact that two of the three judges flatly declared that the restrictive theory had become part of the law of England, even though virtually every previous decision of the Court of Appeal and the House of Lords had said that it was not. The judges accomplished this by looking at the way in which international law, or the law of nations, becomes part of English law. They identified two theories: the "doctrine of incorporation" and the "doctrine of transformation." Under the doctrine of incorporation the mere existence of a rule of international law—once it can be "collected from the practice of different nations and the authority of writers"—was sufficient to make it also, by osmosis as it were, a part of English law. The contrary view, the doctrine of transformation, rejected the idea of automatic incorporation and argued that a positive act—legislation or a decision of the House of Lords—would be required to complete the transformation.

The majority accepted the doctrine of incorporation and that enabled them to distinguish all earlier precedents on the ground that they were merely declaratory of international law as it was at the time of those decisions and they were, therefore, no longer binding on an English court since international law had itself changed: "international law knows no rule of stare decisis."

What is immutable is the principle of English law that the Law of Nations (not what was the Law of Nations) must be applied in the courts of England. The rule of stare decisis operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had effect in international law of extinguishing the old rule.

The only problem, of course, was that this very reasoning was contrary to the recent decision of the Court of Appeal in *Thai-Europe Tapioca Services Limited v. Government of Pakistan*, which emphatically upheld the "doctrine of transformation." And there the law remained: the Privy Council suggesting that the House of Lords would not follow the restrictive theory of immunity, and the Court of Appeal, refusing to follow its own previous decision, saying that the restrictive theory had already arrived and become part of English law. The English lawyer found himself entangled with the whole jurisprudential basis of precedent and whether there was any precedent for a precedent overruling a precedent, and, if so, whether that meant there were no precedents after all. Fortunately, the problem was soon resolved by Parliament, which passed the State Immunity Act eighteen months later in July 1978.

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30Lord Denning, M.R and Lord Justice Shaw. Lord Justice Stephenson dissented on this point.
32Id. at 578-79 (Shaw, L.).
34State Immunity Act 1978 Ch. 33.
II. The Act

One of the more remarkable features of the United Kingdom statute, is the strong resemblance which it bears to the Foreign Sovereign Immunities Act of 1976 of the United States. Apart from the varying detail of the procedural aspects of each statute and the exclusion from the United States statute of actions in rem against ships, the statutes are virtually interchangeable. Further, the similarity cannot be fully explained by the fact that each of the countries share a common law and a common language, for the United States statute was first introduced in 1961, after *Rich v. Naviera Vacuba, S.A.*, only to be withdrawn and reintroduced later, while the United Kingdom statute is largely modelled on the European Convention of 1972. Perhaps the true explanation lies in the fact that however much practicing lawyers may deride their academic colleagues and the authority of writers, there is, after all, a single law of nations which is part of the common law and, indeed, of the civil law.

A. The General Rule

The English statute opens with a restatement of the absolute rule and then proceeds to abolish that rule, for most practical purposes, by the exceptions which follow. Although the exceptions following the absolute rule leave little scope for its application in the future, there will still be cases which do not fall within those exceptions. Those cases will require a determination of whether a particular entity is a "State" or a "foreign state," and here differences appear between the two statutes. For unknown reasons, the United Kingdom legislature has traditionally hidden its definitions in the less obvious places, and this statute is no exception, some appear in section 14, under the general heading "Supplementary Provisions," whereas others are grouped together in section 22, under the heading "General Interpretation." In addition, the statute fails to provide a complete definition and relies, instead, on that evasion much loved by legislators: the use of the word *includes*. The statute provides:

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39The Act applies, as do virtually all public Acts of Parliament, throughout the United Kingdom, special language being used to accommodate the differences between the English and Scottish systems. See, for example, section 13(6)(c) which provides that references to the English "process" and "the issue of process" shall be construed in Scotland as "diligence" and "the doing of diligence" respectively. "Diligence" in Scottish law does not, of course, have the same meaning as it does under certain SEC rules in the United States.


3776. 295 F.2d 24 (4M Cir. 1961)

36Section I(i) of the State Immunity Act declares that "a State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of this Act." This provision is mirrored in section 1604 of the Foreign Sovereign Immunities Act of 1976, which reads:

Subject to international agreements in which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in Sections 1605 to 1607 of this chapter.
14(1) ... references to a State include references to:
(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 to any entity (. . . a "separate entity") which is distinct from the executive organs of the state and capable of suing or being sued.

(2) A separate entity is immune . . . 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.19

The corresponding definition in the United States statute, which appears in its correct place at the beginning, but which also uses includes, states:

1603 (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . .
(b) An "agency or instrumentality of a foreign state" means any 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 subdivision thereof, and
(3) which is neither a citizen of a state of the United States . . . nor created under the laws of any third country.20

In the United Kingdom, the question of whether a state is a "State" has never been open for decision by the courts, which have relied upon a certificate of the Foreign Office.21 This practice now receives statutory force under section 21:

21. A certificate by or on behalf of the Secretary of State shall be conclusive evidence on any question—

(a) whether any country is a State for the purposes of Part I of this Act, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head of a government of a State;22

To an English eye, the American definition seems to go further than required, although the effect in practice would seem likely to be the same. The odd inclusion is an organization a majority of whose shares is owned by a foreign state.

In England, large areas of the economy—coal, steel, transport, and public utilities, for example—have been in public ownership since their nationalization, although none of them, being separate entities, ever enjoyed the old

21Difficulties may arise in the future, as they have in the past, both as to the creation of a new state following a secession or revolution, and as to the overthrow of a government by revolution, but these questions, which do not come before the English courts, will not be discussed here except to note in passing the ingenuity of the Foreign Office. When the Zeiss trademark proceedings began in England, the German Democratic Republic had not been recognized in the United Kingdom, but the Foreign Office could certify that the Russian government was recognized, as was its jurisdiction over the GDR under the postwar settlements.
Crown immunity. It is ironic that they are now afforded an immunity in the United States which they do not enjoy at home. The only light shed on this by the House Report\textsuperscript{43} is that the emphasis is on the word "majority," so that joint ventures or jointly owned corporations in which a foreign state held only a minority interest would not be entitled to claim the immunity, a point which would not normally occur to an English lawyer practicing in an environment where nationalization is all-or-nothing and where little importance is attached to the ownership of shares in ascribing the status or control of a company.

The House Report also clarifies a difference in language in the two statutes. Traditionally in England, the suability of an entity has been one of the tests of its separateness. The same is true in the United States: "The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name . . ."\textsuperscript{44}

B. The Exceptions

As indicated above, although both statutes begin by restating the absolute rule, their true effect is to introduce formally into the laws of each country the restrictive theory which is now the established international practice. This is accomplished by a string of exceptions. Although the list in the United Kingdom statute seems longer, some of the exceptions are really only subdivisions of commercial transactions, and the only significant difference between the two countries is the special treatment afforded state-owned ships by the United States statute. The United Kingdom exceptions, which closely follow the European Convention, are submission to the jurisdiction, commercial transactions, employment contracts, certain torts, property claims, patents, trademarks and copyrights, membership of companies, arbitrations, and ships used for commercial purposes.

C. Submission to the Jurisdiction

Anyone familiar with sovereign risk Euro-currency agreements governed by English law has seen the comprehensive clauses whereby the state or state-entity agrees to the jurisdiction of the English courts and waives all claims for immunity. That individual has also seen the supporting opinions of English legal counsel stating that such clauses have no effect whatsoever since the only effective submission to the jurisdiction is by entering an appearance, and even then, the assets can not be taken in execution. It is surprising, therefore, that the statute does not cover this point in more detail. It states only that

\textsuperscript{43} House Report, supra note 12, at 15.

\textsuperscript{44} Id.
A state is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

A state may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement;...

The American statute however, covers the point with pleasing conciseness:

1605 (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case -

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

The example of the United States statute was available to the United Kingdom legislature and its apparent refusal to follow that example is concealed in the deceptive simplicity of the language used in section 2(1). Until the Act was passed, the law of England, although heavily criticized, remained as stated in Lord Atkin's two propositions, the first of which was that "the courts of this country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings. . . ." All that was required to change that rule was a statement by Parliament that a state is not immune and that the courts will implead a foreign sovereign. As a result, almost eight hundred years of legal history had vanished.

The remaining four subsections of section 2 of the State Immunity Act contain the detail and the mechanics whereby a state submits, or is deemed to submit, to the jurisdiction by starting, or joining in, proceedings. They closely follow the European Convention and, although much longer than Section 1605(a) of the Foreign Sovereign Immunities Act of 1976, they do not add much to it. It may now be assumed, for all practical purposes, that the United Kingdom and the United States law are the same so far as submissions and waivers are concerned.

D. Commercial Transactions

If, by agreement, a state submits to jurisdiction or waives its immunity, there is no need to look further. But many states, whether because of national pride, political reasons, or a suspicion of foreign lawyers and legal systems, are not always willing to do this. Even where a state will not voluntarily waive its immunity, neither the United Kingdom nor the United States will grant that immunity in proceedings which arise out of "commercial transactions" or, in the United States, "commercial activity." Fortunately, both countries have provided clear and precise definitions of these terms.

"State Immunity Act, 1978, § 2(1)-(2)."
"It will be remembered that the Statute of Westminster of 1275 fixed, apparently for all time, "time whereof the memory of men runneth not to the contrary", in 1189. It is surmised that the old rule must go back to the very limits of legal memory."
In the United Kingdom, commercial transaction means:

(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;

Although this definition is comprehensive, the statute also includes separate provisions for contracts of employment, patents, trademarks and copyrights, and for proceedings arising from a state's membership in United Kingdom companies, partnerships, and the like, all of which would fall within the definition but have been separated out to conform with the European Convention.

It is appreciated that there will always be a gray area where states may seek immunity on the basis that they are exercising sovereign authority, and it may be a weakness that the statute does not give more guidance. To a limited extent, the United States statute is more helpful:

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.

In addition, the reference to "the exercise of sovereign authority" in section 3(3) of the State Immunity Act does not appear in Article IV of the European Convention, which provides that "...a Contracting State cannot claim immunity from the jurisdiction of the courts of another Contracting State if the proceedings relate to an obligation of the state which, by virtue of a contract, fails to be discharged in the territory of the state of the forum." No reference is made to the commercial nature of the contract or to its purpose, so it would seem to include contracts of all kinds which contain obligations to be performed in another country. With this clue, it should be recognized that the restriction of sovereign authority in section 3(3) of the State Immunity Act is limited only to the "other" transactions identified in paragraph (c). Consequently, no immunity can be claimed for the sales or loan contracts referred to in paragraphs (a) and (b).

Further, the explanation for the omission of the United States reference to the purpose of the activity can be found in existing case law. Although until the Trendtex case none of the judges considered the commercial activity exception to be a part of English law, many of them had stated what the commercial activity exception would have been were it a part of English law, and

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"State Immunity Act, 1978, § 3(3).
"Id. §§ 4, 7, 8
"European Convention on State Immunity, art. IV."
in so doing, had already used the test of "purpose." The clearest example of this is Lord Justice Stephenson's dissent in Trendtex:

If it were necessary, or permissible, to look at that underlying contract of sale, or below it at the purpose for which the cement was required, namely to build barracks for the Nigerian Ministry of Defense, I would still regard the whole transaction as commercial . . . There are those who regard the purpose of the transaction as determining the question whether it is public and governmental or private and commercial; I prefer the view incorporated in the Bill introduced into the U.S. House of Representatives in 1975 . . .

He then quoted section 1603(d), thereby introducing it into English law before the bill had completed its own legislative process and become part of American law!

The actual exception of commercial transactions from the absolute rule of sovereign immunity is contained in section 3(1) of the State Immunity Act:

A State is not immune as respects proceedings relating to
(a) a commercial transaction entered into by the State; or
(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

Note that paragraph (a) does not require that the commercial transaction have any connection with the United Kingdom, the "or" between the two paragraphs being disjunctive rather than conjunctive. In contrast, the corresponding exception in the United States statute is limited to commercial activity carried on in the United States (that is, an activity having a substantial contact with the United States), an act performed in the United States in connection with commercial activity of the foreign state elsewhere, or an act outside the United States in connection with commercial activity elsewhere which causes a direct effect in the United States. This elision is deliberate, since the point is well covered by the English long-arm statute, more properly known as Order 11 of the Rules of the Supreme Court.

Under those Rules, the consent of the Court must be obtained before process may be served on any defendant (whether a State or not) which is outside the jurisdiction. The relevant rules are (1) and (4), which provide:

1.(1) Service of a writ . . . out of the jurisdiction is permissible with the leave of the Court in the following cases—
(f) if the action begun by the writ is brought to enforce, rescind, annul or otherwise effect a contract or to obtain other relief in respect of the breach of a contract being (in either case) a contract which—
(i) was made in the jurisdiction, or
(ii) was made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or

2State Immunity Act, 1978, § 3(1).
(iii) is by its terms or by implication governed by English law;
(g) if the action begun by the writ is brought in respect of a breach committed within the jurisdiction of a contract made within or out of the jurisdiction.\textsuperscript{36}

In case it is thought that some of these connections with England are unreasonably tenuous (governed by English law for example), Rule 4 provides:

4.(1) An application for grant of leave must be supported by an affidavit stating the grounds on which the application is made.
(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.\textsuperscript{37}

Two points are to be emphasized. First, the granting of leave, even in cases falling within the listed permissions, is entirely within the discretion of the Court. It alone will decide whether it has been made "sufficiently to appear" that the case is a proper one to be tried by the English courts. Those courts are already overburdened and, are unwilling to render judgments which cannot readily be enforced. It is unlikely, therefore, that leave would be given for service of process abroad in a dispute between two nonresidents, neither of whom had any assets or business presence in England, solely because they had chosen English law to govern their contract. Second, the list in Rule 1 is exclusive, so that leave cannot be given for a case not specifically mentioned. An example of such a case is the unlikely event of a contract containing a specific consent to the jurisdiction but no address for service, provided that none of the other criteria were satisfied.

It is beyond the scope of this paper to discuss in detail the other specific exceptions mentioned above. These are basically commercial, and are afforded separate treatment in the statute primarily because they are so treated in the European Convention. However, it may be noted in passing that, although a state may not claim immunity in proceedings arising out of a contract of employment where the work or services are wholly or partly to be performed in the United Kingdom, the exception does not apply if the other party to the contract is a national of the state concerned. If, therefore, an American working under a government contract requiring him to work or travel to the United Kingdom were improperly dismissed while present there, he could not obtain redress through the English courts.

E. Torts

One difficulty which can arise in private international law in connection with a tortious act crossing national boundaries is deciding in which country proceedings may be brought and, as a consequence, which law should govern. The choices are between the place where the act occurs and the place where the damage is incurred, a libelous radio broadcast being the most often quoted example.

\textsuperscript{36}Rules of the Supreme Court [R.S.C], Order 11, Rule 1 (U.K.).
\textsuperscript{37}R.S.C., Order 11, Rule 1 (U.K.).
The English statute does not attempt to reconcile this problem and comes down firmly in favour of the place of commission.

5. A state is not immune as respects proceedings in respect of—
   (a) a death or personal injury; or
   (b) damage to or loss of tangible property caused by an act or omission in the United Kingdom.\(^\text{19}\)

This is consistent both with the English long-arm statute, which allows service outside the jurisdiction if a tort is committed within the jurisdiction,\(^\text{19}\) and with article XI of the European Convention (although the latter contains an unusual further requirement in that not only must the acts occasioning the injury occur in the state of the forum, but the doer of the injury or damage must be present in the territory when the acts occur).

Section 5 mentions only injury or damage to tangible property, rather than torts in general. As a result, states would retain their absolute immunity if a tort were concerned with intangible property, such as contractual rights, or industrial property, such as trade secrets and know-how. At a time when old concepts of integrity are being redefined in terms of political or religious ends by newly evolving social, economic, and philosophical systems, it is, perhaps, appropriate that new ways of waging war or of overthrowing older, established systems should be the subject matter of foreign policy rather than of litigation in the courts.

Similarly, in the United States, absolute immunity is preserved for interference with contractual rights, although not out of any nicety of foreign policy: it is one of the exceptions to section 1605(a)(5) which correspond to the immunities of the United States Government under the Federal Tort Claims Act.\(^\text{60}\) Possibly because the legislature was focusing upon traffic accidents,\(^\text{61}\) where such questions do not frequently arise, it took the opposite side in the debate about where a tort happens, choosing the place where the damage occurs. Section 1605(a)(5) reads:

1605 (a) A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the states in any case—
   (5) not otherwise encompassed in paragraph (2) above [i.e. commercial activity], in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—
   (a) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or
   (b) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.\(^\text{62}\)

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\(^\text{19}\)R.S.C., order 11, Rule 5 (U.K.).
\(^\text{19}\)R.S.C., order 11, Rule 1(1)(h) (U.K.).
F. Real Property

Unfettered by the European Convention, the United States' exception is commendably brief and precise: "A foreign state shall not be immune . . . in any case—(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue."63

Although the corresponding section in the United Kingdom statute contains four subsections, two of which are further subdivided, it is no more precise. Thus, there is reference to any interest in, or possession or use of immovable property in the United Kingdom, all of which are encompassed by the word "rights," and a separate reference to "obligations" of the state arising out of its interest in such property which obligations, one would have thought, must have corresponding "rights." And subsection (3), which confirms that the courts will continue to have jurisdiction in relation to trusts and estates, insolvencies, and the dissolution of companies, notwithstanding that another State may have an interest in them, does no more than remove any doubt that the existing English law would continue unchanged.

G. Ships

The Brussels Convention of 1926," which purported to be a unification of certain rules, was probably far ahead of its time in two respects. First, it refused to draw any distinction between ships in public use and those operated for commercial purposes. Second, it envisaged actions in personam:

Sea-going ships owned or operated by States, cargoes owned by them, and cargoes and passengers carried on State-owned ships, as well as the States which own or operate such ships and own such cargoes shall be subject, as regards claims in respect of the operation of such ships or in respect of the carriage of such cargoes, to the same rules of liability and the same obligations as those applicable in the case of privately owned ships, cargoes and equipment.65

Although this convention was signed by the United Kingdom in 1926, it had still not been ratified when the Privy Council decided Philippine Admiral in 1976.66 Consequently, the Court was not obliged to give it effect. The Convention was referred to in their Lordships' review of international law, but their judgment, confining the exemption from immunity to ships used for commercial purposes, did not accept that the Convention, even in 1976, accurately stated the prevailing view of contemporary international law. When the United Kingdom legislature amended the law and thereby enabled the United Kingdom to ratify the Convention, it included the action in personam. But, it is submitted, this action was included to conform as much with the English form of pleading as with the Convention: although known as a

64 The Brussels Convention for the unification of certain rules concerning the immunity of state owned ships, January 5, 1926, 176 LNTS 199.
65 Id. art 1 (emphasis added).
"writ in rem," and effective against the actual res, the writ is always addressed to "The Owners" of the ship. Even in its present form, however, the new statutory exception applies only to Admiralty proceedings which arise from commercial transactions -

10(1) This section applies to—
   (a) Admiralty proceedings; and
   (b) proceedings on any claim which could be made the subject of Admiralty proceedings.

(2) A State is not immune as respects—
   (a) an action in rem against a ship belonging to that State; or
   (b) an action in personam for enforcing a claim in connection with such a ship, if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.67

The purpose of the words "intended for use" is not immediately obvious. They do not derive from article I of the Brussels Convention, which does not distinguish between public and commercial usage, nor do they derive from the European Convention, which excludes ships from its ambit altogether. Perhaps this is a reference to Canadian Conqueror,68 a Canadian case, where seven ships acquired by the Cuban government were laid up in Nova Scotia and not used for any purpose. The Court refused to waive immunity since the plaintiff (a former lessee of the ships) could not show that the government intended to use them for commercial purposes or, indeed, for any purpose at all.

It is unfortunate, however, that the legislature has introduced this subjective test of a government's intention and all the difficulties which it will entail. It is especially inexplicable since the Privy Council enumerated some of those difficulties when rejecting the "intention" test in Philippine Admiral:

It is, of course, possible that a foreign sovereign might base a claim to immunity for a trading vessel on its alleged intention to use her in the future for some different, and undoubtedly, public, purpose. If such a claim were made the Court would be faced with several difficult questions, e.g., whether it would require any evidence of the intention over and above its mere assertion; whether the fact that it was formed in order to defeat the plaintiffs' claim would be a relevant consideration; and at what time such a claim would have to be formulated to be listened to at all.69

How much more futile, then, to give a plaintiff the theoretical right to prove that a ship currently in use, or not in use at all, is intended to be used for commercial purposes.

In the United States, the legislature has approached the question of ships in quite a different manner. It is now one of the very few, if not the only, country which will not allow an action in rem against a state-owned ship, and

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67State Immunity Act, 1978, § 10(1)-(2).
it even goes so far as to penalize anyone who attempts to pursue an action in rem rather than use the now mandatory form of an action in personam.

1605(b) A foreign state shall not be immune . . . in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state which maritime lien is based upon a commercial activity of the foreign state: Provided, that—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person . . . having possession of the vessel or cargo . . . but such notice shall not be deemed to have been delivered, nor may it thereafter be delivered, if the vessel or cargo is arrested . . . and

(2) notice to the foreign state of the commencement of the suit . . . is initiated in ten days . . .

Whenever notice is delivered under subsection (b)(1) of this section, the maritime lien shall thereafter be deemed to be an in personam claim against the foreign state. . . .

The explanation given in the House Report for this independent change is twofold. First, it is said that this procedure is analogous to the manner in which a suit may be brought against the United States, which is eminently reasonable, and then adds that the section "is designed to avoid arrests of vessels or cargo of a foreign state to commence a suit."

This makes no sense at all to an English lawyer who has been accustomed to await the arrival of a ship in a British port as the best way of starting his proceedings. The reason for the difference is that the mischief aimed at is something not known in English law, an attachment of property for jurisdictional purposes. The English courts have jurisdiction over people within their geographic boundaries and for disputes over property within those boundaries. Beyond that, the courts have discretion to exercise jurisdiction over people outside those boundaries only in certain defined cases having an English connection where it is appropriate for the case to be tried in England. The mere ownership of property in England is not sufficient to confer unlimited jurisdiction and, for a country whose growth was through free trade and free seas, it could hardly have been otherwise. To a foreigner, and particularly to a foreign state, the willingness of some American courts to try cases and hand down judgments ostensibly binding outside their jurisdiction is offensive. The House Report gracefully understates this feeling of resentment:

Attachments for jurisdictional purposes have been criticized as involving U.S. courts in litigation not involving any significant U.S. interest or jurisdictional contacts, apart from the fortuitous presence of property in the jurisdiction. Such cases frequently require the application of foreign law to events which occur entirely abroad.

Such attachments can also give rise to serious friction in United States' foreign relations. In some cases, plaintiffs obtain numerous attachments over a variety of foreign government assets found in various parts of the United States. This shotgun approach has caused significant irritation to many foreign governments.

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7Id. at 26-27.
H. Procedure

Nothing could be simpler than the way in which a foreign state may be served with English process; it must be served through diplomatic channels:

12(1) Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign Office of the State and service shall be deemed to have been effected when the writ or document is received at the Ministry.
(2) Any time for entering an appearance (whether prescribed by rules of court or otherwise) shall begin to run two months after the date on which the writ or document is received as aforesaid. This does not prevent the service of process in any manner which the served State has agreed to, and it would still, therefore, be an advantage to obtain the express agreement of the State to the jurisdiction of the English courts coupled with an address for service in that jurisdiction. This would avoid the necessity of applying for leave to serve abroad under Order 11, and would also be much quicker than the Foreign Office. In addition, the usual English time limits would apply, that is fourteen days for the entry of an appearance rather than the two months allowed by the statute, thus speeding up the whole proceedings.

I. Enforcement

It will be remembered that the second leg of Lord Atkin’s classic statement of the absolute rule was that the courts of a country would not seize or detain property owned or controlled by a foreign Sovereign. As a result, English lawyers have often warned their clients that to obtain a judgment is one thing but to obtain payment is another. This rule has also been changed by both the United Kingdom and United States statutes. As in the way the restrictive rule of immunity against suit was introduced, the absolute rule is stated before the exceptions are made. Thus, in the United Kingdom:

13(2) Subject to subsections (3) and (4) below—
(a) relief shall not be given against a state by way of injunction or order for specific performance or for the recovery of land or other property; and
(b) the property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
(3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the State concerned...
(4) Subsection (2) (b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes...

This section of the statute again raises the difficulties of discerning the intention of a State mentioned by the Privy Council in Philippine Admiral and discussed briefly above in relation to ships. This time a much more acute...
question is also at issue. Property of a State may only be taken in execution if that property is in use for commercial purposes. "Commercial purposes" is defined by section 17(1) as meaning "purposes of such transactions or activities as are mentioned in Section 3(3) above," which, it will be remembered, are the supply of goods or services, loan transactions, and any other activities in which a state engages other than in the exercise of sovereign authority.

In many cases there will be little difficulty in seeing whether property is in use for the purposes of a commercial activity, particularly where that activity is carried on by a separate state-trading entity, but the answer may not always be so clear. Even today, many States hold part of their foreign currency reserves in sterling. Those reserves may, in part, have been built up as a result of commercial transactions by the State and its nationals, but few would argue that once they have become part of the official reserves, they are held for anything but the public purposes of the State. Placing those sterling balances on deposit with the Bank of England could hardly be described as a "commercial transaction" for, although it might fall within the definition of "any other transaction of a financial character," it would probably be a transaction entered into in the exercise of sovereign authority.

But suppose the State were to seek a better return on its funds by investing them in government securities, real estate, or shares purchased on the Stock Exchange. No doubt the State would argue that the investment of its reserves, in whatever way it chose to make that investment, was the exercise of sovereign authority. In contrast, a judgment creditor seeking to enforce his judgment would argue with equal force that the acquisition of, say, a large office building and the attendant management and administration could only be a commercial activity since it could be carried on by anybody whether they had sovereign authority or not. On balance, it is suggested that the investment by a State of its foreign currency reserves would be an exercise of sovereign authority, at least so long as it remained a passive investment and did not escalate into active trading—a distinction utilized in those tax cases attempting to distinguish between profits of a capital nature and those of an income nature. A further clue may be found in section 14(4) which provides: "Property of a State's central bank or other 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."¹⁶

This seems to proceed from the premise that a central bank is the proper repository for a country's reserves and that any property held by it in England represents those reserves. As the House Report notes in commenting on the corresponding sections in the United States statute:

If execution could be levied on such funds [i.e., funds used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states] without an explicit

waiver, deposit of foreign funds in the United States might be discouraged. Moreover, execution against the reserves of foreign states could cause significant foreign relations problems."

The corresponding sections are 1610 and 1611 which, as in the case of the United Kingdom statute, are exceptions to the absolute immunity from attachment and arrest conferred on foreign state property by section 1609. The United States exception is somewhat narrower than that in the United Kingdom. Although both statutes permit the attachment of property used for commercial purposes, that attachment is limited in the United States (absent a waiver) to, inter alia, property used for the commercial activity upon which the claim was based and immovable property in the United States if the judgment established rights in that property. This limitation applies only to the property of a foreign state as such: if the defendant is an agency or instrumentality engaged in a commercial activity in the United States then any of its property in the United States would be vulnerable to an attachment in aid of execution, or an execution on a judgment relating to a claim where the agency or entity was not entitled to immunity.

As in the United Kingdom, property of a central bank will be immune but only if it is held by the central bank "for its own account." Whether the words "for its own account" will raise questions in the future remains to be seen. It is not uncommon in international commercial banking for payments to be made "to United States bank, New York for account of English bank, London for account of United Kingdom customer." If the English bank in this example were the Bank of England and its customer were the British government, could an American judgment creditor of the British government attach the deposit in the United States bank? If the answer were yes then the moral for governments and their central banks would be obvious: never designate accounts and always route all international borrowings through the central bank.

J. Other Provisions

Part II of the United Kingdom statute contains provisions relating to the recognition by the United Kingdom courts of judgments given against the United Kingdom in other countries which are party to the European Convention. It also contains the circumstances in which such a judgment would not be recognized. These include judgments which are "manifestly contrary to public policy" in the United Kingdom, and also the interesting situation where "any party to the proceedings . . . had no adequate opportunity to present his case." However, such situations involving the United Kingdom government cannot be readily envisaged.

77House Report, supra note 12 at 31.
79Id. § 1610(a)(4).
80Id. § 1610(b).
81Id. § 1611(b)(1).
Part III, Miscellaneous and Supplemental, is a tidying up operation: it ties in the new statute with the Diplomatic Privileges Act 1964,11 adds a few definitions and repeals, and provides for the commencement of the new provisions. None of these call for specific comment.

III. The Future

The purpose of each statute is to clarify an area of law which, for different reasons in each country, had become uncertain and unpredictable. The goal is to align the law in each country with currently accepted international law, and in this regard, both statutes are successful. In England, it is no longer necessary, before coming to the merits of the case, to have preliminary hearings on jurisdiction, hearings which were largely confined, as in the Trendtex case, to discussion of the more esoteric points of the law of precedent. In the United States, jurisdiction is no longer dependent upon the current state of foreign affairs. Neither statute was intended to, and, indeed it is doubtful if any statute could, provide answers to all the questions which can arise in litigation involving sovereign states. Many of these issues, particularly in the area of succession of governments, are more properly dealt with as questions of foreign policy.

Some of the remaining uncertainties have been mentioned above, and it is no reflection on either statute that they have not all been resolved for many fall within the gray areas which lie on the edge of any definition. Paradoxically, one of these areas was touched upon in a recent English case which began before the enactment of the statute but was decided afterward. Uganda Co. (Holdings) v. Uganda8 concerned a claim by an English holding company following the nationalization of its Uganda subsidiary. Before nationalization, the holding company had guaranteed its subsidiary's debts, and when the subsidiary defaulted the holding company had honored the guarantee. A claim for reimbursement from the Uganda government was met with a plea of sovereign immunity which the court upheld.

The judgment is interesting for two reasons. First, the judge5 chose not to follow the Trendtex decision where it sought to incorporate in English law the commercial transaction restriction on absolute sovereign immunity. This was not difficult, since the basis of the Trendtex decision was that the Central Bank of Nigeria was not a state entity entitled to immunity and, therefore, the remainder of the judgment could be distinguished as obiter. Second, he decided that even if the commercial transaction exception was part of English law it would not apply since the cause of action arose from the nationalization decree which was an exercise of sovereign authority. It is thought that the same problem would still arise under the new statute, for while nationaliza-

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11Diplomatic Privileges Act, 1964, c. 81.
13This same judge, Judge Donaldson, had been overruled by the Court of Appeal in Trendtex.
tion took the form of the Uganda government assuming the assets of the subsidiary, the assumption of its liabilities and obligations was dependent upon their ratification by the appropriate Minister.

At first sight a claim by a paying guarantor upon a defaulting debtor would seem only to be a "commercial transaction" and so it might have been if the subsidiary had remained in existence as a viable separate entity able to discharge its obligations. But in order to make the government liable it was necessary to consider the effect of the nationalization decree which was clearly an exercise of sovereign authority. This the judge declined to do:

I am satisfied that the litigation would involve the Court in expressing an opinion on the meaning and effect—and perhaps the propriety—of Ugandan legislation in a suit to which the government of that State would be a party. I do not think that even the most enthusiastic supporter of the restrictive doctrine of sovereign immunity would hold that it extends so far.6

Would the answer have been different under the new statute which removes the immunity in proceedings relating to a commercial transaction entered into by the State or an obligation which by virtue of a contract is to be performed in the United Kingdom, bearing in mind that a "commercial transaction" means, inter alia, any guarantee or indemnity in respect of any loan or other transaction for the provision of finance or in respect of any other financial obligation?7 The answer must be no since the government did not, itself, enter into the guarantee, indemnity or underlying financial transaction, nor did its obligation arise under any contract: without the nationalization decree, the government could not have had any liability at all.

It is submitted that a similar result would have been reached under the United States statute. Under section 1604(a)(2) a foreign state may only lose its immunity if the action is based on a commercial activity carried on in the United States, or an act performed in the United States in connection with a commercial activity elsewhere, or an act outside the United States in connection with a commercial activity elsewhere if that act causes a direct effect in the United States. The act complained of, and giving rise to the action, was the nationalization by the Uganda government. Such an act could hardly be described as "commercial activity." Similarly, even if it could be argued that the nationalization decree amounted to a seizure of property in violation of international law, section 1604(a)(3) would be of no assistance. That section only excepts from immunity seized property which is within the United States in connection with a commercial activity or property owned by a foreign state which is engaged in commercial activity in the United States. Neither of these criteria would seem to have been satisfied.

Another illustration of the distinction between commercial transactions and the exercise of sovereign authority is suggested by the recent English case, Czarnikow v. Centrala Handlu Zagraniczengo Rolimpex,8 also decided be-

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6 The case is not yet fully reported. This passage is taken from the transcript of the judgment.
7 State Immunity Act, 1978, §§ 3(1), 3(b).
8 [1978] 3 W.L.R. 274.
fore the Act. Rolimpex, a Polish State trading organization, had contracted for the sale of sugar to the plaintiff. When the time for delivery arrived, the Polish sugar crop had failed and the Polish government imposed a total ban on sugar exports. Rolimpex did not claim sovereign immunity and the case turned on whether Rolimpex was excused from performance of the contract under the force majeur clause in the Refined Sugar Association's rules. The House of Lords decided that it was.

The plaintiff argued, not very forcefully, that Rolimpex was in reality part of the Polish government, or, alternatively, that it had conspired in some way with the government to cause the export ban, but these arguments failed for lack of evidence. However, had the contract been made directly with the government rather than with the separate exporting entity, the plaintiff might have had a better chance of success; under the new Act, a State is not immune as respects a commercial transaction entered into by the State, and "commercial transaction" means any contract for the supply of goods. Furthermore, the exception for sales contracts is not limited by the exercise of the sovereign authority proviso relating to other commercial transactions contained in Section (3)(c). Clearly, then, the Polish government could not have claimed immunity had it entered into the contract. The English courts could then have addressed themselves to the question of whether the exercise by a State of its sovereign authority is a sufficient defense to a claim for breach of contract.

There is a short line of English cases which indicate that a distinction can be drawn between government action taken for the public good and similar action taken by the government to avoid liability under a contract. In the Rolimpex case, Lord Wilberforce doubted whether this distinction, which he described as a doctrine of English constitutional law, could be automatically transplanted into the constitutional climate of foreign States, although Lord Salmon thought the distinction would apply, which was also the view of Lord Denning in the Court of Appeal.

Finally, it has been suggested that if the Trendtex case had arisen after the passage of the Act, the decision might have gone the other way. Strictly speaking, this is not correct, since the basis of the Court of Appeal decision was that, on the evidence before it, the Central Bank of Nigeria was not an organ of the Nigerian Federal Government entitled to sovereign immunity. There is nothing in the Act which could alter that position since the definition of "State" in section 14(1) now specifically excludes any entity distinct from the executive organs of the government of the State and which is capable of being sued. However, at the time it initiated its proceedings, Trendtex also obtained an injunction blocking a $14 million deposit held by Midland Bank.

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1"State Immunity Act, 1978, § 3(1).
2"Id. § 3(3)(a).
for account of the Central Bank, and that injunction was continued by the Court of Appeal pending a further appeal to the House of Lords. As we have seen, section 14(4) now renders property of a State's central bank immune from any process by enacting that it is not "commercial property" for the purposes of section 13(4). Fortunately, the Act does not have retroactive effect, so that Trendtex, if successful in the House of Lords, may still be able to recover its losses from the Midland Bank deposit. However, one cannot help wondering if Trendtex would have been as willing to commence its action in England today if the eventual outcome would have been a right to collect payment from a bank in Nigeria which had already defaulted on a letter of credit.