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CONTENTS

SOVEREIGN IMMUNITY: THE END OF ABSOLUTISM

STEVEN M. SCHNEEBAUM

Two recent United Kingdom decisions show the law of sovereign immunity to be undergoing rapid and perhaps dramatic change in a nation not long ago described as "the only country that persists in the systematic adherence to the archaic view of absolute immunity."[1] What is even more important, however, and not least for its political and diplomatic implications, is the courts' treatment of the rationale of the law. The role of the foreign sovereign in British jurisprudence is not what it once was; and yet the change, even if a desirable and progressive one, seems based upon principles that are eminently in need of further clarification.

I

The relevant facts of *Thai-Europe Tapioca Service Ltd.* v. *Government of Pakistan*[2] are simple. The plaintiffs, a German firm, chartered their vessel, the H., to a Polish company. She was to carry a cargo of fertiliser from Gdansk to Karachi. The Genconform charterparty provided that any demurrage charges were to be the responsibility of the consignees of the goods, and the bill of lading presented to the shippers (who were the charterers) purported to incorporate all charter terms.

Among these terms was an arbitration clause referring to compulsory arbitration in London: this could not be incorporated into the bill of lading by the general reference.[3] When the bill was consigned to the West Pakistani Agricultural Development Corporation, and payment was duly forwarded, property in the goods passed, and the Corporation became liable for demurrage.

The H. arrived at Karachi on 2 December 1971, and gave notice of readiness to discharge her cargo. While waiting for a berth, with lay-time already running, she was seriously damaged during the bombing of Karachi harbour. The H. was a constructive total loss, and unloading her cargo took 67 days after the expiration of laytime. Her owners sought to recover 67 days' demurrage (at £ 400/day) from the consignees of the goods. Meanwhile, the Development Corporation was dissolved, and was replaced by the Government of Pakistan, Ministry of Food and Agriculture Directorate of Agricultural Supplies (Export and Shipping Wing), the instant defendants. Only the Government's application to have the writ set aside on the grounds of sovereign immunity was at issue in this interlocutory appeal.

Led by Lord Denning, M.R., the Court of Appeal accepted as a correct statement of English law Article 15 of the 1972 European Convention on

1. See generally Sucharitkul, *State Immunities and Trading Activities in International Law*, 1959, p. 256; M.K. Nawaz, *The Problem of Jurisdictional Immunities of Foreign States with particular reference to Indian State Practice*, I.J.I.L., (1962), 164.
2. [1975] 3 All E.R. 961; [1975] 1 W.L.R. 1485, C.A.
3. As it would oust the court's jurisdiction: see *The Annefield* [1971] 1 All E.R. 394; [1971] p. 138.
4. Cmnd. 5081; 11 I.L.M. 470. The U.K. is a signatory, but has not ratified this Treaty.

Sovereign Immunity,[4] which is not yet in force. By this formulation, t general rule is *for* immunity and *against* the right to implead a foreign sovereig subject to exceptions. Some of these were listed by the Master of the Rolls.

Only two of them concern us here. There is, said his Lordship, no immuni with respect to debts incurred in England for services rendered to forei property situate in England. With respect, this purported exception is far tc broadly stated. The basis cited for it is the Brussels Convention of 1926,[5] b the Treaty has never been ratified by the United Kingdom, and there is precedent binding on the Court of Appeal to exactly opposite effect.[6] That *Th Porto Alexandre* survived the criticism to which it was subjected by the House Lords in *The Cristina*[7] can be seen in the later authorities, both of which treat as binding: *Krajina* v. *Tass Agency*,[8] and *Baccus S.R.L.* v. *Servicio Nacional d Trigo*.[9]

Lord Denning's final exception must be cited in full: "a foreign sovereig has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of ou courts."[10] Since the instant case clearly failed to qualify under this category fo lack of a sufficient nexus with the English judicial system, any clue that can b derived to assist us in defining the boundaries of the class is, strictly speaking *obiter*. It is interesting to see, however, whence his Lordship derives suppor for this exception.

The sources are three: a matter of comity or usage, the persuasive authorit of an American decision,[11] and a "principle of fairness." It is submitted tha only the last of these is a coherent basis for excluding commercial activitie from the defence of sovereign immunity, and that the assessment of an argumen based on such a principle is a political, and not a legal, problem.

It is true that government entities which trade in the City of London ordi narily submit voluntarily to the jurisdiction of the English courts. There are sound reasons for so doing: it is in the interest of such entities to be wholly unexceptional clients. But the very fact that the immunity of commercial enterprises is in issue demonstrates the great difference between acceptance of the court's jurisdiction and the irrevocable loss of immunity.[12]

5. Brussels Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels: 176 L.N.T.S. 199; Hudson, 3 *Int. Leg.* 1837.
6. *The Porto Alexandre* [1920] p. 30 C.A. This case is considered at greater length below.
7. *Compania Naviera Vascongada* v. *S.S. Cristina* [1938] A.C. 485, H.L. The criticism to which Lord Denning, M.R., refers is that of Lords Thankerton and Maugham. Lords Atkin and Wright approved the earlier decision, and Lord Macmillan expressly reserved his opinion.
8. [1949] 2 All E.R. 274, C.A.
9. [1957] 1 Q.B. 438, C.A. Lord Denning, M.R., has previously said that he preferred the dissent of Singleton, L.J., to the view of the majority in this case: *Mellinger* v. *New Brunswick Development Corporation* [1971] 1 W.L.R. 604, C.A.
10. [1975] 3 All E.R. at 966.
11. *Victory Transport Inc.* v. *Comisaria General de Abastecimentos y Transportes*, 336 F. 2d 354 (1964) (cert. denied, 381 U.S. 934 (1965)).
12. For an illustration of this point, see the U.S. case of *Isbrandtsen Tankers Ltd.* v. *President of India*, 446 F. 2d 1198 (2nd Circuit, 1971), cert. denied 404 U.S. 985 (1971).

Nor is the American decision in fact very persuasive. Since the "Tate letter" of 1952,[13] the policy of the U.S. courts has been to deny the defence of immunity *prima facie*, unless the State Department files a "suggestion of immunity" with the court, or the activity in question falls within one of five very limited categories.[14] Indeed, in the United States, "sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded *only in clear cases*."[15] This is exactly the opposite "starting-point" from that used by the English courts; moreover, there is no British analogue to the series of bilateral treaties governing the matter, to which the United States is a party.[16]

The "principle of fairness" that does, it is argued, seem conclusive, is stated by Lord Denning, M.R., in the same terms he used eighteen years earlier, in *Rahimtoola* v. *H.E.H. the Nizam of Hyderabad*.[17] First, it is the nature of the dispute, and not the fact of impleading a foreign sovereign, that is to determine the propriety of invoking immunity.[18] If the dispute is a commercial one, then it is "having one's cake and eating it" for the sovereign to shield himself behind a protection unavailable to his trading partner. A contract is a bargain; a contract that one party need not perform without risk of judicial sanction is no bargain—and hence no contract—at all.

There certainly are objections that can be raised to this argument. Government agencies are fundamentally different from commercial enterprises, in terms of their responsibilities and their goals. In many systems of municipal law, government contracts and private contracts are subject to different systems of rules, and even to different sorts of judicial control. It could be argued that government agencies of developing nations should not be asked to take the risks inherent in the activities of London businessmen: the former are investing hard-gained public resources, while the latter can far more easily absorb their losses. Lawton L.J.'s pronouncement that "those who provide in these contracts that English law shall apply know what they are doing and they know what to expect from our courts"[19] is, with respect, not sufficient: it is precisely the expectation of judicial behaviour that is at issue.

It is not our present purpose to attempt a solution of the problems pointed up within the "principle of fairness." The thesis here is that such a solution

13. Letter from Jack B. Tate, Acting Legal Adviser to the Department of State, to Philip B. Perlman, Acting Attorney General, 19 May 1952; 26 *Dept. of State Bull*, 984 (1952).
14. These categories are indisputably *jure imperii*, as they include only administrative, legislative, military, or diplomatic activity, or transactions involving public loans.
15. *Per* Smith, C.J., *per curiam* in the *Victory Transport* case, note 11, *supra*. (Italics added: these words refer to executive certificates and to the categories in note 14, *supra*.).
16. These are listed in a very interesting and informative analysis of American policy by T. Atkeson, S. Perkins and M. Wyatt in (1976) A.J.I.L. 298 at 309n.
17. [1958] A.C. 379, H.L., especially at 422.
18. Yet in *Rahimtoola* itself, perhaps *ex abundante cautela*, Lord Denning held that this "separate legal entity which carried on commercial transactions for a state was an agent, and not an organ, of the government" (at 417). By his Lordship's reasoning, had it been the very person of the sovereign incarnate, the result should have been the same.
19. [1975] 3 All E.R. at 968.

requires consideration of jurisprudential and ethical/political questions. It is by no means obvious.

Determining the *ratio decidendi* of *Thai-Europe* is complicated further still by the reliance of Lawton and Scarman, L.JJ., on what might be termed more classical reasoning. Scarman L.J., indeed, based his decision for the Government of Pakistan on the "general rule that a foreign soverign is immune from suit;"[20] and both were emphatic in their insistence that the doctrine of *stare decisis* precludes any cavalier treatment of *The Porto Alexandre*.[21] As the instant case fell within even the narrowest requirements for the immunity plea outlined by the House of Lords in *The Cristina*[22] (for lack of a territorial nexus), there was no need, the learned Lords Justices felt, to locate with precision the outer limits of the doctrine.

II

It was this, however, that came before the Judicial Committee of the Privy Council in *The Philippine Admiral*.[23] Though the decision of the Board was delivered some five months after that of the Court of Appeal in *Thai-Europe*, argument had been completed before, and so only the briefest of references is made by Lord Cross of Chelsea (speaking for the Board) to the latter case.[24] The facts here are somewhat complicated, but they must be looked at with some care; the exact nature of the Government's interest in the ship is of paramount importance.

As a result of the 1956 treaty formally ending the state of war between the nations, the Philippines received from Japan $ 550 million in reparations. Almost all of this was in the form of capital goods and services, requested by the former. A 1957 Philippine statute was enacted to govern the payment procedure through the establishment of a Reparations Commission. This act provided that the Government would accept "project studies" from private individuals and firms who could offer to further the aim of assuring "the maximum possible economic benefit for the Filipino people in as equitable and widespread manner as possible."

The Liberation Steamship Company of Manila applied for and was granted by the Commission an ocean-going vessel. Her purchase price was paid by the Commission, which made a contract of "conditional sale" with Liberation. By the terms of this agreement, title and ownership of the Philippine Admiral were to remain with the public body, until full repayment by the company. It was stipulated that in the event of a default in instalments, all moneys already remitted were to be deemed rental charges, and the Commission's right to

20. [1975] 3 All E.R. at 970.
21. Note 6, *supra*.
22. Note 7, *supra*.
23. *Owners of the Ship "Philippine Admiral" v. Wallem Shipping (Hong Kong) Ltd. and others* [1976] 1 All E.R. 71; on appeal from the Hong Kong Court of Appeal, [1974] 2 Lloyd's Rep, 568.
24. [1976] 1 All E.R. at 87.

immediate possession of the ship would revive. The contract was signed in Manila on 16 November 1960, and the Commission was registered as owner of the vessel a month later.

Late in 1972, Liberation, by now seriouly in arrears with payments, chartered her to Telfair Shipping Corporation, the second respondent, for nine to twelve months. The ship was then at Hong Kong, being repaired by the first respondent. A dispute arose with the charterer at once over repair costs, and as a result of this Liberation purported to terminate the charter party. Telfair issued a writ in rem for the breach of contract in June 1973. Wallem, meanwhile, issued two writs in respect of repair supplies and services. The ship was arrested in Hong Kong. Liberation failed to pay the bailiff's maintenance charges, and an order for the sale of the Philippine Admiral was made by the Supreme Court on 8 October 1973.

At that point, the Philippine Reparations Commission became aware of the impending sale, and on 10 October passed a resolution repossessing the vessel. The action that reached the Privy Council was the Republic's attempt to have the Hong Kong writs set aside on the ground that to enforce them would be to subject the property of a foreign sovereign to the judicial process of the Colony.

Having failed before the Full Court of Hong Kong, the Republic founded its appeal on dual grounds. It argued first that its title, coupled with an exercisable right to immediate possession, constituted the Philippine Admiral government property, and then that the commercial usage of the ship was not antithetical to its protection from arrest by the doctrine of sovereign immunity. That the second head of argument was found to be necessary at all illustrated from the outset a change from the halcyon days of absolutism. It would be necessary to assess the latter claim only if *The Porto Alexandre*[25] was not to be followed.

Lord Cross began his judgment with a survey of the early cases on both sides of the Atlantic.[26] The point emerges clearly that until the early part of this century, no one attempted to persuade the courts that a sovereign's right to immunity is in some way compromised by his assuming the character of a trader. That the law so stood was stated in terms by the Court of Appeal in *The Parlement Belge*.[27] It was this case from which *The Porto Alexandre* was said to follow.

The Parlement Belge was a packet used for carrying the mails—surely an act *jure imperii*. The Porto Alexandre was an ordinary freighter. In strict constitutional terms, then, a decision regarding the first could affect the second only by way of *obiter dicta*.

25. Note 6, *supra*.

26. His Lordship relied in particular upon *The Schooner "Exchange"* v. *McFaddon* (1812) 7 Cranch. 116; *The Charkieh* (1873) L.R. 8 Q.B. 197, C.A.; *The Parlement Belge* (1880) 5 P.D. 197, C.A.; *Mighell* v. *Sultan of Johore* [1894] 1 Q.B. 149; *Compania Mercantil Argentina* v. *U.S. Shipping Board* (1924) 93 L.J.K.B. 816, C.A. It is interesting to note in passing that Lord Denning, M.R., cited *The Charkieh* in support of one of his minor exceptions in *Thai-Europe* [1975] 3 All E.R. at 965)—this reasoning was disapproved by the Court of Appeal in *The Parlement Belge*.

27. Note 26, *supra*. This case was followed in *The Scotia* [1903] A.C. 501, P.C., in *The Jassy* [1906] P. 270, and in *The Gagara* [1919] P. 95, C.A.

This line of reasoning seems, with great respect, to assume what it means t prove. The American parallel to *The Porto Alexandre*, *The Pesaro*,[28] shows mos clearly that the *jure imperii/jure gestionis* distinction was not throught relevant t the question of immunity in 1925: "We know of no international usage whic regards the maintenance and advancement of the economic welfare of a peopl in time of peace as any less a public purpose than the maintenance and trainin of a naval force." This sentence, cited by Lord Cross himself,[29] was approve as a correct statement of English law by Lord Wright in *The Cristina*.[30]

It is worth dwelling upon it for a moment, for the change in the courts attitude to this proposition summarises the development of the law. Th doctrine of sovereign immunity is based in the notion of sovereign equality: i is not for the Queen of England to subject the King of the Belgians to th indignity of having to appear as a petitioner at the Bar of her courts. Marshall C.J., in *The Schooner Exchange*[31] spoke of the "perfect equality and absolut independence of sovereigns," with one "being in no respect amenable t another."

Some would no doubt claim that, at least since 1800, few nations wit commercial interests abroad have implemented this particular tenet of Rousseau' "social contract" in their foreign affairs. Be that as it may, the fact remain that immunity from suit stemmed from a sovereign's status *qua* sovereign, an not from the nature of his activities in the public interest (or even in his own[32]) much less from the impracticality of executing any judicial decision that migh go against him.

If this argument is correct, then there is nothing surprising in the universa view that after *The Parlement Belge*, the distinction to which Lord Cross refer was not noticed. Clearly, times had changed when *The Cristina* was decided for although the point did not arise on the facts, two of their Lordships expres sed disapproval of *The Porto Alexandre*, while two supported it.[33] The "absolute theory of sovereign immunity," put into his usual pellucid language by Lord Atkin in *The Cristina*, was none other than the doctrine stated by Marshall, C.J., and Brett, L.J.

Lord Cross traces the historical development of the doctrine primarily by reference to American cases. The two dissents from *The Porto Alexandre* and in *The Cristina* must constitute the first breach. Frankfurter and Black, JJ.,

28. *Berizzi Brothers Co.* v. *S.S. Pesaro*, 271 U.S. 562 (1925); followed in *The Navemar*, 303 U.S. 68 (1938).
29. [1976] 1 All E.R. at 88. The citation is from 271 U.S. (1925) at 574, *per curiam*.
30. Note 7, *supra*., at 732.
31. Note 26, *supra*.
32. In *Mighell* v. *Sultan of Johore*, note 26, *supra*., the defendant successfully pleaded sovereign immunity when sued for breach of promise of marriage! As the Sultan had concealed his identity from the object of his (temporary) affections, the case seems a perfect example of the absolute view of sovereign immunity. It was approved in *Duff Development Co.* v. *Government of Kelantan* [1924] A.C. 797, H.L.
33. See note 7, *supra*.

disapproved *The Pesaro* in the United States Supreme Court in *Republic of Mexico* v. *Hoffman*.[34]

But the leading assault was diplomatic and political, not judicial. It began in earnest just after the War.[35] The series of bilateral treaties involving the United States began, to be followed closely by the alteration in executive policy announced in the "Tate letter." The U.S. State Department gave its official endorsement to the *jure imperii/jure gestionis* distinction. This, finally, gave the courts of one sovereign state the jurisdiction to assess the claims of a foreign ruler that certain property of his is "sufficiently public" in its dedication to be accorded immunity from process. This is softened in practice by American courts' reliance upon executive certificates ... but it can be seen in operation in, for example, the *Victory Transport case*.[36]

The assault on absolutism was not matched in Britain. Lord Cross cites no English case at this key juncture of his judgment. His Lordship does refer to the 1972 Convention of the Council of Europe, but that is, of course, not English law.

The decision to dismiss the Republic's appeal could come about only—and did come about in fact—after the virtual overruling of *The Porto Alexandre*.[37] Lord Cross presents four reasons for refusing to follow that decision:

1. it did not follow from *The Parlement Belge*, as had been thought.
2. it was not affirmed by three members of the House of Lords (*obiter*) in *The Cristina*.
3. it was doubted—or at least held open to question—by the Judicial Committee in 1952.[38]
4. it was wrong in principle.

As has been seen, only the fourth reason is a very convincing one. Lord Cross cites leading textbooks in international law in support of the contention that "there is no apparent reason"[39] for the exemption from suit of one party to a commercial transaction. The appeal of this argument is to the same notion of fairness upon which Lord Denning, M.R., relied in *Thai-Europe*, and the argument is open to the same objections.

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34. 324 U.S. 30 (1945).
35. The 1926 Treaty is, of course, no more a derogation from the absolute theory than is a sovereign's voluntary acceptance of commercial arbitration in the City of London.
36. Note 11, *supra*. Atkeson *et. al.* (note 16, *supra.*) evidently do not see this decision as a "confirmation" of the "restrictive theory" of immunity advocated in the "Tate letter." It is hard to see why not. The point they miss is that only a "restrictivist" adjudicates the claim of immunity on the basis of the kind of *activity* in question.
37. "Virtual" because the Privy Council is not a "higher court" than the Court of Appeal (they apply to different jurisdictions), although four of the five judges who heard this case were Lords of Appeal in Ordinary.
38. *Sultan of Johore* v. *Abubakar Tunku Aris Bendahar* [1952] A.C. 318, P.C. The relevant part of this decision was, again, *obiter*, as the appellant was held to have waived immunity. Besides, the case related to real property, to which different rules may apply: see Brownlie, *Principles of Public International Law*, 2nd ed., 1973, pp 328-9.
39. [1976] 1 All E.R. at 95.

The Board did not go so far in *The Philippine Admiral* as to threaten to implead a foreign sovereign in a *personal* action. This action was *in rem*, and although the vessel herself was no longer in Hong Kong, bail moneys paid by the Republic for her release were in the hands of the bailiff. There is, then, one law for actions *in rem* and quite the opposite rule for suits *in personam*. Lord Cross was not put off by the anomaly, and it seems a matter of time only before English courts even in personal actions (which include all arising from sales of goods and many from contracts for the carriage of goods by sea) will evaluate the nature of the foreign sovereign's activity. Indeed, their Lordships believe and have held that "the restrictive theory is more consonant with justice."[40]

Given, then, that *The Porto Alexandre* was not to be followed, there was no difficulty in finding that the Philippine Admiral herself was being operated as a commercial venture, and not as a public enterprise. The argument that she was not, during her commercial career, within the *possession* of the Commission was at this point unnecessary. The Commission repossessed her with the express intent of leasing or selling her on similar terms to those offered to Liberation. Lord Cross does not speculate on the vexed question of assessing a hypothetical sovereign's declaration that the ship is to be withdrawn from service. So the refusal to follow *The Porto Alexandre* was decisive—and integral to that refusal is the argument from what has here been called the "principle of fairness."

III

Taken together, *Thai-Europe* and *The Philippine Admiral* indicate that, in England at least, the absolute theory of sovereign immunity is no longer to be considered sacrosanct. What remains of it in the United States will soon be interred, with the passage of a bill currently before Congress.[41] Yet the political importance of the entire question of immunity is growing unchecked.

The volume of business transacted in the City of London, much of it involving agents or organs of foreign governments (and be it shipping, banking, insurance, or sales) is itself an overwhelming argument for clarification, if necessary by statute, of the law in England. But at the same time, the "principle of fairness" must be seen by judges and politicians alike as quite far from axiomatic. The principle requires what Professor Brownlie calls "value judgments which rest on political assumptions as to the proper sphere of state activity and of priorities in state policies."[42] It requires the taking of a political stance with respect to developing nations, and an ethical one with respect to the nature of a promise.

Ideally, a defined attitude towards the "principle of fairness" would be an integral part of a state's foreign policy. Regardless of what one thinks of the decisions in *Thai-Europe* and *The Philippine Admiral* on their facts, one must be

40. [1976] 1 All E.R. at 96.
41. H.R. 11315: State-Justice Bill on Sovereign Immunity, introduced 19 December 1975. For the text, see (1976) A.J.I.L. 313.
42. *Op. cit.* (note 38, *supra*) at pp. 323-4.

struck by the changing image of the foreign sovereign as a trading partner, in the eyes of British courts. There are strong arguments to be raised on either side of the question whether it is or is not "fair" for the sovereign of a foreign state—even when he is wearing the cloak of a merchant—to be granted special privileges to which H.M. the Queen does not herself pretend. But what is important above all is to see that it is a question.