A Comparative Analysis of the British State Immunity Act of 1978

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I. INTRODUCTION

In 1975, Britain was the only major Western state that retained the absolute view of sovereign immunity. This view holds that a foreign state may


3. "Sovereign or State Immunity is a concept of international law which has developed out of the principle par in parem non habet imperium, by virtue of which one State is not subject to the jurisdiction of another State." COUNCIL OF EUROPE, EXPLANATORY REPORTS ON THE EUROPEAN CONVENTION ON STATE IMMUNITY AND THE ADDITIONAL PROTOCOL (1972), [hereinafter cited as EXPLANATORY REPORT].

There is a wealth of material on sovereign immunity. See, e.g., U.S. DEPT. OF STATE, THE INTERNATIONAL LAW OF SOVEREIGN IMMUNITY (1963); Lauterpacht, supra note 1; Sucharitkul, Immunities of Foreign States Before National Authorities, 149 ACADEMIE DE DROIT INTERNATIONAL 86 (1977); 2 D.O'CONNELL, INTERNATIONAL LAW 844 (2d ed. 1970) [hereinafter cited as O'CONNELL]; Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, 26 DEPT. STATE BULL. 984 (1952) [hereinafter cited as Tate Letter]; 2 G. DELAUME, TRANSNATIONAL CONTRACTS §§ 15-16b (1975) [hereinafter cited as DELAUME]; Note, Sovereign Immunity, 13 TEX. INT'L L.J. 131 (1977) [hereinafter cited as Sovereign Immunity].

4. Numerous definitions of the concept 'State' have been advanced. See, e.g., Fitzmaurice, The General Principles of International Law, Considered from the Standpoint of The Rule of Law, 92 HAGUE RECUEIL DES COURS 5 (Vol. II 1957), which states:
not be sued in its own courts against its will. However, beginning in 1976, the underpinnings of the absolute doctrine were eroded as the English Privy Council moved toward the acceptance of the restrictive approach of sovereign immunity. This doctrine provides exceptions to a state's immunity and permits the state to be sued in the courts of a foreign country. In 1977, the Court of Appeals of England abandoned the absolute approach and brought England into conformity with the policy of the western industrialized nations.

A State for international purposes may, however, perhaps be described generally as an entity which possessing certain physical characteristics in the way of territory, a population, and governmental institutions, is self-contained and not a part of a wider political unit; and which also has the capacity to enter into relations on the external plane with other States - either directly (in the case of fully sovereign independent States), or mediatelly, through other States (in the case of protected States.)


5. For its application in Britain, see 18 HALSBURY'S LAW OF ENGLAND 794 (4th ed. 1977).

6. The jurisdiction of the Privy Council arose out of the prerogative right of the Sovereign as the head of all justice to entertain appeals from the courts in her dominion. The Sovereign exercised the jurisdiction through the council, which acted in an advisory capacity. As Parliament developed its power and influence, the High Court of Parliament became the final appellate tribunal for appeals from the United Kingdom, but appeals from the overseas territories and from certain other courts still continued to be heard by the Sovereign in Council. These appeals came to be regulated by the Judicial Committee Act, 1833, S. 3, whereby all appeals were to be heard by a special committee of the Privy Council. The extent of the Judicial Committee's jurisdiction has considerably lessened as a result of the constitutional development of the British Commonwealth.

10 HALSBURY'S LAW OF ENGLAND 767-81 (4th ed. 1977); See generally P. JAMES, INTRODUCTION TO ENGLISH LAW 49-50 (8th ed. 1972) [hereinafter cited as JAMES].


8. Id. at 402.

A decision by the House of Lords or an Act of Parliament was necessary for the adoption of the restrictive immunity approach for all of Great Britain, since the English Court of Appeals has no jurisdiction over the other nations of Great Britain. In 1978, the Parliament passed the State Immunity Act, 1978 (hereinafter State Immunity Act). This represented a comprehensive acceptance of the restrictive approach of sovereign immunity.

This Comment has five major foci. First, it will examine the history of the doctrine of sovereign immunity in England. Such an analysis reveals the difficulty that English courts have had, considering restrictions on state immunity. It reveals the reliance of the English courts upon the trend among Western states in accepting the restrictive theory. Second, the consequences of the English courts' alterations of a state's approach to international law will be set forth. Third, the State Immunity Act is examined from the perspective of whether it constitutes a complete adoption of the restrictive approach of sovereign immunity for Great Britain. It is the author's contention that the Act is a legislative response to the needs of the English courts as well as a state response to the needs of a multinational community. Fourth, it will compare the State Immunity Act with the European Convention on State Immunity (hereinafter European Convention) and the United States Foreign Sovereign Immunities Act (hereinafter FSIA). Finally, the implications of the State Immunity Act will be discussed in view of Western interdependence and solidarity, and its effect on external relationships with both Third World and Communist States.

II. THE HISTORY OF SOVEREIGN IMMUNITY IN ENGLAND: THE TRADITIONAL APPROACH

A. The Absolute School

The doctrine of absolute immunity originated in the international law of the 19th century. In Great Britain the doctrine is stated in The Parlement Belge:

as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every

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sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any State which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction.14

The absolute doctrine was a natural consequence of the respect traditionally granted a sovereign engaged in sovereign acts.15 For instance, international commerce was not viewed as an act stemming from the private ownership of a corporation but rather from the authority of the sovereign. Thus, it was stated that absolute immunity was derived from international law itself. "The exemption of the person of every sovereign from adverse suit is to be a part of the law of nations . . . The universal agreement which has made these propositions part of the law of nations has been an implied agreement."16

In The Parlement Belge, the Courts of Appeals of England considered three questions relating to sovereign immunity. First, the Court considered whether it had in personam jurisdiction. Second, if it lacked in personam jurisdiction over a foreign sovereign, did this grant of immunity extend to suits in rem? Third, should there be a distinction between commercial and non-commercial activities of the sovereign in order to limit its immunity only to the latter? The court found no power over a foreign sovereign in suits in personam. On this point the court referred to The Schooner Exchange v. M'Faddon:17

The world being composed of distinct sovereignties possessing equal rights and equal independence, all sovereigns have consented to a relaxation in practice under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective ter-

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15. Such traditional acts are to "maintain law and order, to conduct foreign affairs and to see to the defense of the country." Trendes, [1977] 1 Q.B. at 555. On this subject, Blackstone wrote:

Our King owes no kind of subjection to any other potentate on earth. Hence it is that no suit or action can be brought against the King even in civil matters, because no court can have jurisdiction over him; for all jurisdiction implies superiority of power. Authority to try would be in vain and idle without an authority to redress and the sentence of a court would be contemptible unless the court had power to command the execution of it . . . . But who shall command the King?


17. Id. at 210, citing Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).
territories which sovereignty confers. This perfect equality and absolute independence of sovereigns has given rise to a class of cases in which every sovereign is understood to waive the exercise of that complete territorial jurisdiction which has been stated to be the attribute of every nation. One of these is the exemption of the person of the sovereign from arrest or detention within a foreign territory. Why has the whole world concurred in this? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation.\(^1\)

The Court stated that a sovereign's real dignity is the essence of his immunity from suit in the courts of a foreign state.\(^1\) Permitting foreign tribunals to obtain jurisdiction over the sovereign could compromise, if not nullify, the independence and equality of the sovereign.

In *The Parlement Beige*, the court felt compelled to consider whether this grant of immunity extended to suits *in rem*.\(^2\) Although an action *in rem* only indirectly imples the owner, it is the owner who suffers the consequences of any adverse decision. Thus, the court argued that in such cases "to impale an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in such a position is a breach of the principle upon which his immunity from jurisdiction rests."\(^3\) The court dismissed any possible statutory construction which sought to limit the scope of immunity only to ships of war. In denying this distinction, the court essentially was following the rationale set forth in *The Prins Frederik*.\(^2\) Such a distinction "puts all the public movable property of a State, which is in its possession for public purposes . . . and exempts it from the jurisdiction of the courts . . . [since it] is inconsistent with the independence of the sovereign authority of the state."\(^3\)

Finally, the court considered whether the ban against limiting immunity to actions *in rem* should be extended to the instant case where the ship was involved in the carriage of goods and persons.\(^4\) The court did not feel that the

\(^{18}\) Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) at 135-36.
\(^{19}\) Id. at 136.
\(^{20}\) The Parlement Beige, \([1880]\) 5 P.D. at 218-19. *In rem* is "[a] technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions which are said to be *in personam*. " BLACK'S LAW DICTIONARY 900 (4th rev. ed. 1968).

The phrases were especially applied to actions, an *actio in personam* being the remedy where a claim against a specific person arose out of an obligation, whether *ex contractu* or *ex maleficio*, while an *actio in rem* was one brought for the assertion of a right of property, easement, status, etc., against one who denied or infringed it.

\(^{21}\) Id. at 219.
\(^{23}\) The Parlement Beige, \([1880]\) 5 P.D. at 213.
\(^{24}\) Id. at 219-20.
distinction between trading and non-trading purposes was warranted. In either case, such action would constitute the enforcement of an action in rem against the foreign state. This would result in the impleading of the sovereign in contravention of one of the most basic principles of international law.25

The issue in *The Parlement Belge* involved in rem jurisdiction. The court's underlying assumption was that it would never consider directly impleading a foreign sovereign in an action in personam.26 The court affirmed the absolute doctrine of sovereign immunity by refusing to admit any exceptions, no matter how peripherally related to the impleading and involvement of a foreign sovereign.

In *Compania Nava Vascongado v. S.S. Cristina*,27 the court affirmed the absolute approach enunciated in *The Parlement Belge* as to both actions in rem and in personam. More recently, in *Thai-Europa Tapioca Service Limited v. Government of Pakistan, Directorate of Agricultural Supplies*,28 the Court of Appeals relied on the long-line of cases following the absolute approach in actions in personam. Here the court refused to find an exception even when the state was involved in international commerce.29

B. Judicial Modification of the Doctrine of Sovereign Immunity30

Although the absolute approach to the doctrine of sovereign immunity was reaffirmed in *Thai-Europa*, some indications of a move away from such a position were evident. Lord Denning acknowledged the existence of four exceptions to the absolute approach.31 These exceptions foreshadowed two potential limitations on the absolute school. First, in rem actions arising in England which involve a foreign sovereign appeared to preclude sovereign immunity.32 Second, the court indicated a refusal to extend immunity when the sovereign is acting in a private, commercial capacity and the dispute arises in England.33

Within a year, both the English Privy Council and Court of Appeals con-

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25. Id. at 220.
26. Id.
27. [1938] A.C. 485, 490. In this case, a commercial exception to the absolute rule was proposed and rejected. Id. at 492-93, 496.
29. Id. at 1492. See Higgins, *supra* note 13, at 424.
32. Id. The first three exceptions appear to preclude immunity in actions in rem arising in England. See note 31 *supra*.
33. The fourth exception at note 31 *supra* appears to deny immunity when the sovereign is acting in a private commercial capacity in England.
sidered and accepted the exceptions set forth in *Thai-Europa.*\(^3^4\) As a result of these decisions, the absolute approach was abandoned *in toto* while the contemporary doctrine of restrictive immunity simultaneously replaced it.\(^3^5\) These courts recognized that the transformation of the relationship of most sovereign states to their leaders, people and sister states is of such a magnitude that the logical underpinnings of the absolute school are no longer relevant.\(^3^6\) The fact that the interdependence of the international system is expanding geometrically has made economic interaction between states a common occurrence and often a matter of private concern. This development has compelled most western states to abandon the antiquated notions of absolute sovereignty.\(^3^7\)

C. Two Schools of Thought

The major explanation for England’s prolonged resistance to the restrictive or modern school of sovereign immunity is a basic philosophical disagreement that has persisted for about a century regarding the role of international law and its relationship to English law.\(^3^8\) One school follows the doctrine of incorporation, which holds that the rules of international law are incorporated into English law automatically and considered to be a part of English law unless they are in conflict with an Act of Parliament.\(^3^9\) The second school follows the doctrine of transformation. This theory holds that international law becomes a part of English law only when it is adopted by judicial decision, Parliamentary Act or established custom.\(^4^0\)

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\(^3^4\) See note 31 supra.

\(^3^5\) See § VI.A infra. The restrictive school of sovereign immunity distinguishes between the public and private acts of the foreign sovereign. The public acts (*jure imperii*) of the sovereign are granted complete immunity, i.e., that which is commonly permitted under the absolute view. However, the private (*jure gestionis*) or commercial acts of the sovereign are not automatically accorded immunity. In these instances, a court examines the acts on their merits. See W. BISHOP, INTERNATIONAL LAW 660-77 (3d ed. 1971). See also O’CONNELL, supra note 3, at 844-46.

\(^3^6\) Trendtex, (1977)1 Q.B. at 555-57.


\(^3^8\) The philosophical disagreement regarding the doctrines of incorporation and transformation has persisted for over a century. See, e.g., Reg v. Keyn, [1876] 2 Ex. D. 63, Trendtes, [1977] 1 Q.B. 529.

\(^3^9\) This concept has been expounded by Lord Mansfield, Sir William Blackstone, and Lord Lyndhurst. G. LEWIS, LEWIS ON FOREIGN JURISDICTION 66-67 (1859). “In 1853, the latter exclaimed in the House of Lords that ‘the law of nations, according to the decision of our greatest judges is part of the law of England’.” Id.

\(^4^0\) In Reg v. Keyn, [1876] 2 Ex. D. 63, the court first set forth the rationale of the transformation school:

*For writers of international law, however valuable their labours may be in elucidating and ascertaining the principle and rules of law, cannot make the law. To be binding, the law must have received the assent of nations who are bound by it . . . . Nor, in my*
The English courts rejected the approach of the transformation school in favor of the approach of the incorporation school in two recent decisions. The rationale for adhering strictly to the absolute approach was initially weakened in *The Philippine Admiral* and finally discarded in *Trendtex Trading Corporation v. Central Bank of Nigeria*. In *The Philippine Admiral* the Privy Council upheld the theory of absolute immunity in an action *in personam* where the sovereign state was involved in a commercial enterprise. However, the Council rejected the absolute approach to actions *in rem* holding that in such situations the courts should apply the restrictive approach. The Council considered two questions that directly affected the precedents supporting the absolute approach for actions *in rem*.

First, the Council determined whether it was bound by the decision in *The Porto Alexandre* which affirmed a lower court ruling dismissing a writ *in rem* against The Portuguese Import and Export Co., Inc. The company used The Porto Alexandre in ordinary commerce although the vessel was the property of the Portuguese government. *The Philippine Admiral* court rejected the applicability of *The Porto Alexandre* for various reasons. Initially, the Council cited numerous English and foreign cases repudiating the logic supporting the implementation of the absolute theory in actions *in rem*. Lord Cross further

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opinion, would the clearest proof of unanimous assent of the past of other nations be sufficient to authorize tribunals of this country to apply without an act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the providence of the legislature.


42. [1977] 1 Q.B. 529.

43. In 1956 Japan made a reparation treaty with the government of the Philippines over the damage to the latter's property caused by Japan during the second world war. To effectuate this treaty, the government of the Philippines passed a reparations law which authorized a reparations commission to supervise the allocation of funds and administer the goods and services obtained from the treaty. Liberation, a steamship company, applied to the commission for an ocean-going vessel. In 1960, an agreement was consummated between these parties for a vessel finally named *The Philippine Admiral*. The agreement stated that the commission retained title to and ownership of the vessel until it was fully paid for. In 1973, several writs *in rem* were issued against Liberation by several parties who asserted that there was a breach of contract. On October 8, 1973, Pickering, J., ordered that the ship be appraised and sold and the proceeds paid into court. In response, the Reparations Commission ordered the return of the vessel since it was not entirely paid for. Moreover, solicitors in behalf of the government sought to have the writs and order of October 8th set aside. On December 14, 1973, Briggs C.J., did set aside the writs in the four actions. However, before the full court of the Supreme Court of Hong Kong, the appeal was unanimously reversed and the applications for dismissal of the writs were set aside. The appeal to the Privy Council ensued. *The Philippine Admiral*, [1977] A.C. at 386-90.

44. *Id.* at 402-03.


maintained that although *The Porto Alexandre* court felt bound to decide the case by the rule elaborated in *The Parlement Belge*, the two cases could be distinguished. The distinction rested on the fact that in *The Porto Alexandre* the vessel was involved exclusively in a commercial enterprise, while in *The Parlement Belge* the vessel was only partially engaged in commerce. Thus, the court in *The Porto Alexandre* would have been justified in establishing a commercial exception to the absolute doctrine. The Privy Council also noted that the three members of the court deciding *The Porto Alexandre* had serious doubts whether the rule of absolute immunity should extend to actions *in rem* when state-owned vessels are engaged in ordinary commerce. *Mighell v. Sultan of Jahore* emphasized that this very point remained unsettled. However, the Privy Council relied upon the post World War Two trend in international law towards rejection of sovereign immunity for states in private commercial contracts. The Council noted the situation that arises when most countries (including England) may be sued in their own courts after entering into a commercial transaction while foreign states entering into identical contracts are held to be immune from the court's jurisdiction. In rejecting the rationale of *The Porto Alexandre*, the Council recognized that there would be one rule for actions *in rem* and another for actions *in personam*. This distinction was accepted because of the strength of the precedents, i.e., no case had allowed any exception for actions *in personam*. Thus, with respect to actions *in personam*, the holding of *The Parlement Belge* remained good law.

Second, the Privy Council briefly considered that, traditionally, a ship

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47. [1880] 5 P.D. 197. The Parlement Belge court held that where a vessel is used for a government purpose (i.e., to carry the mail) and only peripherally for a commercial purpose, the vessel may not be proceeded against *in rem*. Thus, the court viewed an *in rem* proceeding as an indirect means of exercising control over the owner, the sovereign. The court found this an unacceptable infringement with the independence and equality of the sovereign. *Id.* at 220. See notes 16-28 *supra* and accompanying text.


49. *Id.*

50. The three members of the court were Lord Justices Bankers, Washington and Scrutton.

*Id.*

51. *Id.*

52. [1894] 1 Q.B. 149.


55. *Id.*

56. *Id.*

57. Because the Privy Council limited the absolute approach to actions *in rem*, but not to actions *in personam*, that part of *The Parlement Belge*, [1880] 5 P.D. 187 (C.A.), which relates to actions *in personam* remained good law. *Id.*
owned or used by a government was granted immunity. However, the issue before the Council in this instance was whether the ship was a vessel engaged in ordinary commerce.\textsuperscript{58} The Council determined that although the ship potentially could be used by the Philippine government, it need not entertain such a possibility since the entire history of the vessel had been as a commercial trading ship and not as a vessel of the state.\textsuperscript{59} The Council implied a broader exception, \textit{i.e.}, whether a ship is owned or used by the government is secondary to how the ship is used. If the vessel is being used for a government purpose, then the traditional concept of sovereignty applies; if the vessel is being used in international commerce, indistinguishable from the practice of private ownership, the concept of sovereignty will not be applicable.\textsuperscript{60}

In adopting a restrictive view of sovereign immunity for the first time, at least relative to actions \textit{in rem}, the Privy Council combined aspects of both the incorporation and the transformation schools of thought. The court was hesitant to further erode the absolute theory by extending its holding to include actions \textit{in personam}, and stated that it was the responsibility of the House of Lords to adopt the restrictive approach.\textsuperscript{61} In the alternative, it was up to the government to ratify the European Conventions of 1926 and 1972 on State Immunity\textsuperscript{62} in order to affect a substantial alteration of the English application of the law of sovereign immunity. However, the court did manifest some flexibility. In the absence of an Act of Parliament to the contrary, the more flexible restrictive approach adopted by the Council in actions \textit{in rem} found its support in legislation adopted by the European Community and the United States.\textsuperscript{63}

\section*{III. The Restrictive Approach: Trendtex Trading Corporation v. Central Bank of Nigeria}

The landmark case on the issue of sovereign immunity in \textit{Trendtex Trading Corporation v. Central Bank of Nigeria (Trendtex)}.\textsuperscript{64} In its consideration of whether courts should continue to be bound by the absolute approach, the Court of Appeals of England rejected the absolute approach in favor of the restrictive

\textsuperscript{58} Id. at 403.

\textsuperscript{59} Id. Because the determination of sovereignty is achieved by considering the government's purpose for using the vessel, this analysis is an example of the procedure formerly followed by courts in sovereign immunity cases. Today, courts look to the nature of the activity undertaken by the state. It is far more difficult to discern the motivation of a state than to determine whether the actual operation of the activity is an act \textit{jure gestionis} or act \textit{jure imperii}. See \textsuperscript{6} VI.A infra.

\textsuperscript{60} The Philippine Admiral, [1977] A.C. at 403-04.

\textsuperscript{61} Id.


\textsuperscript{63} \textit{See} European Convention, \textit{supra} note 1; FSIA, 28 U.S.C. \textsection 1602 (1976).

\textsuperscript{64} [1977] 1 Q.B. 329.
approach. In November, 1975 Trendtex sought a writ against the Central Bank of Nigeria claiming demurrage on all vessels, damages for non-acceptance of the balance of the cement outstanding and damages based on obligations to their suppliers. The Central Bank of Nigeria sought to have the writ set aside on the ground that the bank was a department of the Federal Republic of Nigeria and therefore immune from suit. The lower court set aside the writ and Trendtex appealed.

Speaking for the court, Lord Denning first discussed the doctrines of transformation and incorporation. Lord Denning determined that the court should adopt the approach of the incorporation school because it is the responsibility of the courts to effectuate changes when Parliament has not acted.

Seeing that the rules of international law have changed — and do change — and that the courts have given effect to the changes without an act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form a part of our English law. It follows too, that a decision of this court as to what was the ruling of international law 50-60 years ago — is not binding in this court today. International law knows no rule of stare decisis. If this court is today satisfied that the rule of international law on a subject has changed from what it was 50-60 years ago, it can give effect to that change — and can apply the change in our English law — without waiting for the House of Lords to do it.

After reviewing international precedent and the decision of the Privy Council, the court decided that the Central Bank was not immune from suit.

65. Id. at 549. The facts of Trendtex are as follows: the Central Bank of Nigeria, which was incorporated in 1958, was modeled on the Bank of England. It issued legal tender and acted as banker and financial advisor to the Government of Nigeria. It was also involved in other matters involving significant government oversight.

In July, 1975, the Central Bank issued an irrevocable letter of credit in favor of Trendtex for over $14,000,000 to pay for over 240,000 tons of cement which plaintiff had sold to an English company. The cement was to be shipped to Nigeria but there was congestion in the port of discharge. Thus, the Central Bank declined to make payments claimed to be due for the price and for demurrage. The plaintiff claimed against the bank for payments due in respect of the bank's breaches and repudiation of the letter of credit. Id.

66. Id. at 551. "Demurrage is a maritime law term which is defined as follows: the sum agreed to be paid to the ship for delay caused without her fault, and which ordinarily does not begin to run until the lay days have been used up." Earn Line S.S. Co. v. Manati Sugar Co., 269 F.2d 774, 776 (2d Cir. 1920). See BLACK'S LAW DICTIONARY 519 (4th rev. ed. 1968).

68. Id. at 532.
69. See notes 38-40 supra and accompanying text; see also Trendtex, [1977] 1 Q.B. at 554.
71. Id.
Council in *The Philippine Admiral*, Lord Denning accepted the Privy Council’s limitation of the absolute doctrine to actions *in rem* while rejecting the Council’s refusal to extend the limitations to actions *in personam*, thus eliminating the use of the absolute approach entirely. In *The Philippine Admiral*, the Privy Council expressed its concern that overruling the traditional practice of the absolute school was an action to be taken only by Parliament because it was unlikely that the House of Lords would uphold any substantial judicial modification of sovereign immunity law. However, Lord Denning disagreed, asserting that “this is a dismal forecast. It is out of line with the good sense in the rest of the judgment of the Privy Council.” He emphasized that the same reasoning used by the Privy Council in support of the creation of an exception to absolute immunity for actions *in rem* was applicable to a complete rejection of the absolute doctrine:

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 transaction . . . . Their Lordships themselves think that it is wrong that it should be so applied . . . . Thinking as they do that the restrictive theory is more consonant with justice, they do not think that they should be deterred from applying it.

Lord Denning made an important distinction between the authority of the House of Lords as the final arbiter of English domestic law as contrasted with its authority over matters of international law:

I see no reason why we should wait for the House of Lords to make the change. After all, we are not considering here the rules of English law on which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong.

This Comment may be viewed merely as stating an obvious systemic truism:

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74. *Id.* at 402.

If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.

*Id.* at 422.
the Court of Appeals can decide a case with ultimate review in the House of Lords. However, the statement may also be viewed as putting forth the proposition that it is the affirmative duty of the courts, and specifically the Court of Appeals, to determine the relevant international law and properly apply it whether or not there is an explicit precedent of the House of Lords to the contrary.

Lord Denning next dealt with the separate question of whether the Central Bank of Nigeria is "an alter ego of the government." This determination would allow the court to decide the case on narrow grounds without reaching the issue of sovereign immunity. If the court refused to adopt the restrictive approach, the court could still deny immunity under the absolute approach if the bank was not a government agency. If the bank is not an alter ego of the government, it could not be accorded sovereign immunity. After reviewing several cases as to what constitutes an "alter ego" and deciding that the rule is not clear in England or abroad, Lord Denning stated his own test: "looking to the functions and control of the organization... I would look to all the evidence to see whether the organization was under government control and exercised government functions."

78. As James notes, the Appellate Jurisdiction Act of 1876, 39 & 40 Vict., c. 59 (1876), gave the House of Lords the power to be "the ultimate court of appeal... it is the ultimate appellate tribunal for England and Wales, both in civil and criminal cases... as well as for] the courts of Scotland and Northern Ireland..."

79. The Court of Appeals has power to hear any appeals from decisions of the High Court in civil matters. The court also hears appeals from the County courts. The method of appeal is by rehearing. There is further right of appeal to the House of Lords. Id. at 48.

80. Lord Justice Shaw went further, stating:

81. Id. at 559. In his opinion, Lord Denning did not give any weight to the Nigerian Ambassador's statement that the Central Bank was, in fact, a department of the state. Relying on Krajina v. Tass Agency, [1949] 2 All E.R. 274 (C.A.), he asserted that there were no standards by which the court could satisfactorily determine whether or not the bank is an alter ego of the government. Trendex, [1977] 1 Q.B. at 559. This has been interpreted to mean that Krajina may no longer be good law. In Krajina, the court held that Tass had sovereign immunity in an action for damages where the evidence supporting immunity was a certificate from the Soviet ambassador of the Tass' enabling statute. [1949] 2 All E.R. at 279-81. See generally Sovereign Immunity, supra note 3, at 135.


84. Id. at 560. Lord Denning's test was not accepted by the entire court. Lord Justice Stephenson rested his decision on immunity on the 'status' of the agency. He determined that if the bank was actually a governmental organization, the enabling statute establishing the bank must be read as creating a sovereign status. Failing to find such evidence in the statute, Lord Justice Stephenson refused to grant the bank immunity. Id. at 575. See Higgins, supra, note 13, at 428. In
tion, the court was unable to determine whether the Central Bank of Nigeria was a government agency. Therefore, the case was not decided on this issue: "... I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department."

The other two judges concurring in *Trendtex* dealt with both of these issues, *i.e.*, first, the status of the bank and second, the restrictive principle of immunity.

Second, Stephenson, L. J., rejected the Central Bank’s claim of immunity since he did not view the bank as an organ of the government. However, he did believe it was proper for the Court of Appeals to abolish the absolute doctrine without executive or legislative action or a decision by the House of Lords. Shaw, L.J., agreed with Lord Stephenson that the Central Bank was not an agency of the Nigeria government and that the proper rule of law was the doctrine of restrictive immunity.

The rule emerging from *Trendtex* was twofold: first, immunity depends upon the relationship of the organization to the government. If the organization is considered an arm of the government, immunity will follow. Second, the doctrine of absolute immunity was abolished in favor of the restrictive approach.

The *Philippine Admiral* and *Trendtex* have been recently followed in several cases. The most important was *I Congreso del Partido* which dealt with the failure of a Cuban state corporation to complete an installment contract involving the delivery of sugar to a Chilean company even though the latter had paid for the commodity. The underlying reason for the breach of contract by the Cuban company was the 1973 overthrow of the Allende regime. The Cuban government found the newly instituted leadership politically unacceptable and severed diplomatic relations. Consequently, all commercial activities

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an earlier case, Mellenger v. New Brunswick Corporation, [1971] 1 W.L.R. 604, Lord Denning stated, "If the corporation is part and parcel of the government of New Brunswick - so much so as to be identified with it like a government department - it can clearly claim immunity." *Id.* at 608-09. He later maintained that the corporation was carrying out its governmental functions. *Id.* at 609. See Higgins, *supra* note 13, at 429.

86. *Id.* at 561, 572 (Stephenson, Shaw, L.JJ., concurring).
87. *Id.* at 570.
88. *Id.* at 576.
90. *I Congreso del Partido*, [1978] 1 Q.B. at 506-13. Even though the parties in *I Congreso del Partido* had no substantial connection with the territorial jurisdiction of the English courts, jurisdiction was asserted by the courts of England because of the arrest of the ship. The court stated:

Jurisdiction asserted by means of an arrest is not an exorbitant jurisdiction. By allowing the ships to trade, a foreign sovereign must be taken to have exposed his ships to the possibility of arrest, a procedure which is widely accepted among maritime nations and which is regulated to some extent by international convention . . .

*Id.* at 534.
91. *Id.* at 506-13.
between the two states were cancelled. Mambisa, the Cuban corporation controlling this commercial transaction, obtained the ship the Congreso del Partido. At that time, the Chilean owners of the cargo instituted a damage action for non-delivery and conversion by seeking writs *in rem* against the Congreso del Partido.

The court addressed several points previously discussed by the appellate court: the status of sovereign immunity as viewed by the English courts; the extent to which a court will investigate the nature of the sovereign's claim of immunity under the restrictive view; and the issue of whether the act of the Cuban corporation under the direction of the Cuban government is an act *jure imperii*. The opinion of the Admiralty Court on these points was premised upon the holdings in *The Philippine Admiral* and *Trendtex*.

"*[The Philippine Admiral]* provides me with the clearest guidance that, in an action *in rem* against an ordinary trading ship, the rules of international law require me to give effect to the restrictive doctrine of sovereign immunity . . . ." The Court discussed the relationship of the government of the Republic of Cuba with the corporation involved in the interstate transaction. The court ruled that the I Congreso del Partido was, in fact, owned by the government. Moreover, following *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia*, the court held that a "foreign sovereign invoking sovereign immunity on the ground that its interest in property would be affected by the judgment need not prove its title to the property, but need only produce evidence to satisfy the court that its claim was not merely illusory."

Finally, the court accepted the arguments of the Cuban government concerning a matter of first impression in the Court, *i.e.*, whether the act of the Cuban corporation in breaching its commercial obligations can still be considered an act *jure imperii*. The court answered this question in the affirmative. It reasoned that since the Cuban government had demonstrated ownership of the vessel and the cause of action arose out of a governmental response to the overthrow of the Allende regime in Chile, "both claims therefore arise from an *actus jure imperii* of the Republic of Cuba: accordingly . . . the Republic is entitled to invoke the principle of sovereign immunity . . . ."
Although the opinion may appear to limit the Court of Appeal’s far-reaching decision in Trendtex, the Admiralty Court refused to deny immunity only where the sovereign is involved in commercial transactions with a private trading vessel for a governmental purpose. In most respects, I Congreso del Partido supports the conclusions of its predecessors. It accepted the reasoning of the appellate courts, notwithstanding the fact that the Admiralty Court is bound by their decisions. In accepting the restrictive approach to sovereign immunity, it was careful not to deny immunity where the facts indicate an act *jure imperii*. From the outset, the Republic of Cuba was enraged at the consequences of the coup d’état in Chile in 1973. The new Chilean military dictatorship was vehemently opposed to the Castro regime and diplomatic relations were severed. By balancing the nature of the commercial transaction against the negative impact on the Cuban government if immunity were denied, the court determined that the act of the Cuban government was a foreign policy directive and must be respected. This reasoning is consistent with Trendtex. In Trendtex, the court never developed standards for discerning an act *jure imperii* from an act *jure gestionis*. As in I Congreso del Partido, these standards were left to be determined on a case-by-case basis.

100. *Id.* at 523-33. The court rejected the plaintiff’s contention that the court should follow the United States’ case of Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682 (1976). I Congreso del Partido, [1978] 1 Q.B. at 530-31. In Alfred Dunhill, the U.S. Supreme Court stated that when a sovereign is involved, or becomes involved, in a commercial enterprise which is considered a commercial act or an act *jure gestionis*, a breach of that transaction by the sovereign will not allow an invocation of the doctrine of sovereign immunity. 425 U.S. at 705-06. See § VI.A infra.


103. *See* notes 64-88 *supra* and accompanying text.

104. *Id.*

105. I Congreso del Partido, [1978] 1 Q.B. at 529-30. The Court remarked: There appears to be no consensus as to where the dividing line should be drawn between the two categories of *actus jure imperii* and *actus jure gestionis*. Differences of opinion were revealed in relation to contracts for public purposes. In a case of that kind, courts generally look to the nature of the contract rather than to its purpose in deciding whether or not the contract is to be characterized as *jure gestionis* or *jure imperii*. But, in my judgment, the cases only demonstrate that in the case of a contractual claim the nature of the contract will be relevant, not that it will necessarily be *decisive* of the question whether or not the case is concerned with an *actus jure imperii*. If the nature of the contract is such that it is itself an *actus jure imperii*, then any claim under it may be the *actus jure gestionis*, then an ordinary breach of the contract cannot be the subject of a claim to immunity but the character of the contract cannot necessarily preclude a breach from being held to result from an *actus jure imperii* in which event sovereign immunity may be claimed in respect of such breach. *Id.*
D. Analysis

After I Congreso del Partido, the common law of sovereign immunity in England was compatible with the statutory law of sovereign immunity on the European continent106 and in the United States.107 Because of institutional limitations on rule-making in any particular judicial decision, the process of developing a concept of sovereign immunity similar to the European Convention on State Immunity or the Foreign Sovereign Immunities Act still required a Parliamentary Act or further elaboration by the Court of Appeals. The importance of these decisions by the Privy Council and the Court of Appeals must not be underestimated. Realizing the antiquated notions underlying the absolute approach, these courts refused to follow the more facile process of judicial deference in an area of potential sensitivity in foreign relations. They appeared to encourage Parliament to ratify the European Convention on State Immunity or establish a comparable statute of its own: the State Immunity Act was enacted in July 1978.108

The decisions discussed have another potentially far-reaching result.109 It has been argued that domestic courts have a role beyond the traditional concept of determining the proper outcome for litigants involving reference to domestic law and domestic parties only:

Domestic courts have extensive experience with problems of balancing the claims of the forum against the claims of foreign states that have an interest in the outcome of a legal dispute. The judicial arena is an appropriate place for the articulation of a general view of international relations in which doctrines of reciprocal deference govern areas of significant diversity and to which common efforts at enforcement govern areas of significant consensus.110

Through the settlement of controversies involving international law the courts would then become "agents of world order . . ." rather than solely "servants of national policy."111 In this way, courts would have an independent but significant role in balancing the need for a stable international legal order against the need for a comprehensive and viable foreign policy. The realm of sovereign immunity is especially appropriate for judicial determination. Most questions that arise are of a private nature involving private litigants. The courts are well suited for determining such questions because

106. See, e.g., European Convention, supra note 1.
109. See R. FALK, THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER (1964) [hereinafter cited as FALK].
110. Id. at 173-74.
111. Id.
the essence of their function is to resolve disputes between adverse parties. When the dispute involves a sovereign act or act *jure imperii* as in *I Congreso del Partido*, the courts can defer to the political branches.

112. See notes 89-107 supra and accompanying text.

113. Even with the passage of the State Immunity Act, the political branches continue to have some input into sovereign immunity decisions. State Immunity Act, 1978, c.33, § 15, *reprinted in 17 INT'L LEGAL MAT'LS at 1127.*

However, it can be argued that in the United States the courts are taking an increasingly active role in foreign policy decisions while showing less deference to the political branches.

Traditionally, in matters of foreign policy the judiciary has been viewed as subservient and deferential to the authority of the President. Moreover, it has been ruled that the chief executive has plenary power in international affairs. United States v. Curtis-Wright Export Co., 299 U.S. 304 (1936). The basis for judicial deference in U.S. foreign policy was stated in *C. & S. Air Lines v. Waterman*, 333 U.S. 103 (1948):

> The very nature of executive decisions as to foreign policy is political not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Id.* at 111.

However, it appears that the judiciary is slowly asserting its role in the area of foreign affairs. See *Baker v. Carr*, 369 U.S. 186 (1962), where the Court carefully examined the political-question doctrine. This doctrine limits the judiciary from becoming embroiled in political controversies. Although the *Baker* Court recognized that the area of foreign affairs is generally considered to be a political question, "[i]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Id.* at 211. The Court further stated that if no conclusive action has been taken as to the meaning of the terms of a treaty, the courts are free to construe that treaty. *Id.* at 212. Although the courts have no power to recognize a foreign country, once recognized, "the courts may decide independently whether a statute applies to that area." *Id.* at 212. In lieu of a definitive executive declaration abroad, the courts may make a judgment as to America's status in that conflict. *Id.* at 212-13.

In numerous areas affecting foreign policy, there has been a growing involvement of the judiciary. During the Vietnam War, several justices were willing to consider the constitutionality of the war on the merits. Holtzman v. Schlesinger, 361 F.Supp. 553, 566 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 414 U.S. 1316 (1974).

See generally R. LONGAKER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 148-50 (1976), which concludes that the scope of presidential power is increasingly coming under judicial scrutiny. He dates the origin of this process to *Youngstown Steel and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Within the past few years, the courts have found themselves more directly involved in foreign policy. The landmark case establishing a positive judicial role in foreign affairs was *Banco Nacional del Cuba v. Sabbatino*, 376 U.S. 398 (1964). In *Sabbatino*, the Supreme Court upheld the Act of State doctrine by asserting that courts are not to sit in judgment of acts of foreign states occurring within their territory. *Id.* at 428. The Court "found implied in the Constitution an independent power for the federal courts to make law on their own authority. It was the federal judiciary that decided that the foreign relations of the United States required the Act of State." L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 218-19 (1972) (footnote omitted).

In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), the Supreme Court carved out an exception to the Act of State doctrine involving acts "committed by sovereigns in the course of their purely commercial operations." *Id.* at 706. See *Weber, The
IV. UNITED KINGDOM LAW ON SOVEREIGN IMMUNITY: 
THE STATE IMMUNITY ACT, 1978

The English decisions that rejected the absolute approach in favor of the restrictive approach to sovereign immunity received legislative support in the State Immunity Act. In this act, Parliament incorporated most of the major aspects of The Philippine Admiral, Trendtex and I Congreso del Partido into the most comprehensive body of law on the subject of sovereign immunity in the United Kingdom.

Initially, it is important to recognize that the State Immunity Act goes further than all of the English decisions discussed supra because those decisions were only rulings of the Court of Appeals of England. As a result, they were binding only in England proper and did not extend to the other nations of Great Britain. However, the legislative enactment is law not only in England proper, but also in Scotland, Wales, Northern Ireland and any dependent territory to which Her Majesty by Order of Council wishes to extend its provisions.

The State Immunity Act embraces the restrictive approach and implicitly accepts the traditional distinction between acts jure imperii and acts jure gestionis. The State Immunity Act defines these concepts by delineating those activities for which a state is immune from judicial process. Part I of the


For an analysis of congressional action which has contributed to the more expansive judicial role in foreign affairs, see, e.g., Rodino, Congressional Review of Executive Action, 5 Seton Hall L. Rev. 524 (1974).


117. Id. § 23(7), reprinted in 17 Int'l Legal Mat'ls at 1129.

118. Id. Although no explicit reference to the restrictive approach is made, the fact that there are listed numerous exceptions to the absolute immunity traditionally granted foreign states is enough to support this proposition. The statute is silent as to the terms jure imperii and jure gestionis. However, the list of exceptions includes only activities that do not constitute "public acts" such as commercial transactions. See, e.g., id. § 3, reprinted in 17 Int'l Legal Mat'ls at 1124.

119. Actus jure imperii has been defined as acts or activities of the state which are characterized as public, political, governmental or sovereign for purposes of immunizing the state from the jurisdiction of foreign courts. Actus jure gestionis are acts or activities of the state which may be characterized as private, commercial, or non-sovereign, thereby permitting foreign courts to exercise jurisdiction over the state by denying immunity to that state. See VI. infra.
State Immunity Act enumerates twelve major exceptions to a state’s traditional claim of immunity. The most important exceptions include commercial transactions of states, proceedings relating to property and personal injury, as well as actions in rem involving a commercial purpose.

The State Immunity Act attempts to limit judicial discretion by setting specific standards for protected and unprotected activity. For instance, the act defines the term ‘commercial transactions’ which, read by itself, appears to leave significant discretion to judicial interpretation. However, when read in the context of the entire statute, the definition substantially limits judicial interpretation.

A. In Rem Actions: A Ratification of The Philippine Admiral

The holding of The Philippine Admiral has been ratified by the State Immunity Act. The legislation specifically denies state immunity in admiralty proceedings in actions in rem when the vessel belongs to the foreign state and is being used for commercial purposes. The State Immunity Act sets limitations on state immunity for actions in rem to a greater extent than did the Privy Council in the Philippine Admiral. For instance, except for those states who are signatories of the Brussels Convention of 1926, a state loses its immunity when an action in rem is taken against a ship’s cargo belonging to the state if

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121. Id. § 3(1), reprinted in 17 INT'L LEGAL MAT'LS at 1124.
122. Id. § 6, reprinted in 17 INT'L LEGAL MAT'LS at 1125.
123. Id. § 10, reprinted in 17 INT'L LEGAL MAT'LS at 1125.
125. State Immunity Act, 1978, c.33, § 3(3), reprinted in 17 INT'L LEGAL MAT'LS at 1124. ‘Commercial transaction’ is defined here as:
(a) any contract for the supply of goods or services;
(b) any loan or other transaction for the provision of finance and any guarantee of 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. . . .

Id.
127. Id. §§ 4, 6, 7, 8, 10, 11, reprinted in 17 INT'L LEGAL MAT'LS at 1124-25.
128. See notes 43-63 supra and accompanying text.
129. 1978, c.33, reprinted in 17 INT'L LEGAL MAT'LS at 1123.
130. Id. § 10(2), reprinted in 17 INT'L LEGAL MAT'LS at 1125.
131. See note 62 supra.
the activity is commercial. The statute also goes further than the Council did in *The Philippine Admiral* by restricting the immunity of foreign ships in actions *in personam* to situations where the claim is in connection with a ship involved in a commercial enterprise.


The State Immunity Act affirms *Trendtex* in most respects. The legislation accepts the court's decision to follow the restrictive school of sovereign immunity. The State Immunity Act is also an affirmation of Lord Denning's reasoning that his decision rests squarely "on the ground that there is no immunity in respect of commercial transactions . . ." The effect of the exceptions enumerated in Part I of the Act is to limit immunity in every case before a tribunal of the United Kingdom when the foreign state is engaging in a commercial activity. One major focus of the *Trendtex* decision, at least for Lord Justices Stephenson and Shaw, was the question of whether the Central Bank of Nigeria was a department of the Federation of Nigeria or a separate entity. Both Justices concurred in finding that it was independent from the control of the Nigerian government. The State Immunity Act attempts to formulate standards for determining when an entity is and is not an alter ego of its government.

The State Immunity Act sets forth three general categories which are protected by sovereign immunity. These include the "sovereign or head of State in his public capacity, the government of the State and any department of the State." The statute then proceeds to define in very general terms "a separate entity." An entity is deemed separate when its activities have nothing to do with sovereign authority or where a state in similar circumstances is not immune. The effect of these definitions is to grant immunity whenever any activity concerns the power and authority of the state.

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133. Id. § 10(2)(b), reprinted in 17 INT'L LEGAL MAT'LS at 1125.
134. 1978, c.33, reprinted in 17 INT'L LEGAL MAT'LS at 1123.
136. Id. at 560.
137. See note 126 supra, where the definition of commercial transaction is explicit in stating that any contract, loan or other activity is not immune.
140. Id. § 14(1)(a), reprinted in 17 INT'L LEGAL MAT'LS at 1127.
141. Id. § 14(1)(b), reprinted in 17 INT'L LEGAL MAT'LS at 1127.
142. Id. § 14(1)(c), reprinted in 17 INT'L LEGAL MAT'LS at 1127.
143. Id. § 14(2), reprinted in 17 INT'L LEGAL MAT'LS at 1127.
144. Id.
The presumption is in favor of an expansive view of sovereign immunity. However, the statute limits the application of sovereign immunity to a sovereign's acts in a public capacity.

Two sections of the act appear susceptible to contrary interpretations on the question of whether central banks of a foreign state are to be viewed as alter egos of the government, or as separate entities, respectively.

1. Central Bank as Alter Ego

The first interpretation upholds the rationale of Lord Denning on this point while simultaneously overruling a portion of the *Trendtex* opinion. On the issue of whether the Central Bank of Nigeria is an alter ego of the government, Lord Denning stated: "[I]n these circumstances I have found it difficult to decide whether or not the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal entity. But on the whole, I do not think it should be." Lord Denning's hesitancy on this question may be the reason why the statute permits on interpretation granting central banks or other monetary authorities the privileges and immunities of a foreign state. If this interpretation is accepted, the State Immunity Act overrules the portion of the *Trendtex* opinion concurred in by both Lord Justices Stephenson and Shaw holding the Central Bank of Nigeria to be a separate entity.

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145. This may be going too far. Section 14(1) of the State Immunity Act, *id.* § 14(1), reprinted in 17 INT'L LEGAL MAT'LS at 1127, may be simply interpreted as the minimum requirement of sovereign immunity under the restrictive approach. Without the protection afforded in this section, sovereign immunity could be completely diluted.

146. *Id.* § 20(5), reprinted in 17 INT'L LEGAL MAT'LS at 1129.


148. State Immunity Act, 1978, c.33, §§ 14(3) & (4), reprinted in 17 INT'L LEGAL MAT'LS at 1127. Section 14(3) provides:

If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to State were references to that entity.

Section 14(4) provides:

Property of 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; and where any such bank or authority is a separate entity subsections (1) to (3) of that section shall apply to it as if references to State were references to that bank or authority.

These sections can be read as permitting a bank to be considered automatically a department of the state. Even though sections 14(3) and 14(4) appear to limit this reading to procedural privileges in sections 13(1), (2), (3) & (4), there is nothing to suggest that it does not extend beyond this section. However, one may also argue that since Parliament was explicit in reference to section 13, it could just as easily have stated that a central bank must be treated as a department of the state. *See Trendtex*, [1977] 1 Q.B. at 572, 575.

The significance of characterizing a central bank as a governmental department rather than a separate entity will be in the test applied by the court. When a defendant central bank is sued in a British court and claims immunity on the basis of state status, a two-fold test will be applied. First, the court ascertains whether the defendant is actually a department of the state. If it is not, then no immunity is granted. However, if it is, the court must next consider if the defendant, as a state entity, comes within any of the exceptions in Part I of the State Immunity Act. In most situations, this analysis will end the inquiry. In certain circumstances, the court will be compelled to make further inquiry. If Her Majesty determines that the privileges and immunities accorded the foreign state are greater or lesser than those accorded Great Britain by that state, Her Majesty may restrict or extend those privileges as appears appropriate. Thus, Section 15 may serve two purposes. First, it allows for equivalence of rights between Britain and individual foreign states. This may be appropriate when Great Britain does not provide immunity in certain situations and the foreign state does. The foreign envoy may expect to be protected in a particular activity only to find that British law does not accord him immunity. This section may also be implemented when a foreign state has failed to provide adequate immunity for one of Britain's envoys. Thus, restricting the immunity generally granted to foreign states raises British disagreement with the sovereign immunity policy of that foreign state. It may also serve retaliatory political purposes. Second, it allows the political branches to determine highly sensitive questions of sovereign immunity superseding the authority of the courts. Thus, in the situations where the

150. This seems to be implicit in the meaning of section 14 of the State Immunity Act, 1978, c.33, § 14, reprinted in 17 INT'L LEGAL MAT'LS at 1127.
151. Id. §§ 3-11, reprinted in 17 INT'L LEGAL MAT'LS at 1124-26.
152. 'Her Majesty' literally means the Queen. Historically, the King or Queen was the Sovereign. Today, the Queen wields minimal power and is actually only a figurehead. Thus, 'Her Majesty' is a term connoting respect for a tradition where the Monarch did in fact have ultimate power. Today, the power rests within the elected body of Parliament. JAMES, supra note 6, at 115-19.
154. This may be viewed as a form of due process in order to protect the foreign envoy from a law of which he has no fair warning. However, it may be argued that it is the responsibility of the state's foreign office to adequately investigate the laws of another state with which it has intercourse and to notify its agents concerning the nature of these laws. See 18 HALSBURY'S LAWS OF ENGLAND at 722-23, paras. 1409-11 (4th ed. 1977).
155. If another country has mistreated a British envoy or is seeking to make a political gesture by taking action against an envoy, section 15, State Immunity Act, 1978, c.33, § 15, reprinted in 17 INT'L LEGAL MAT'LS at 1127, allows the government to take effective counteraction.
156. Id. This section does seem to leave discretion on extremely sensitive issues of sovereign immunity to the political branches. Some may argue that this is for the better: courts are by nature unable and ill-equipped to handle sensitive matters affecting foreign affairs. See C & S Air Lines v. Waterman, 333 U.S. 103 (1948). But see FALK, supra note 109, at 173-74.

In contrast, it appears that the U.S. Congress has decided that either no issue arising under a
government decides to intervene, the court is compelled to defer to the decisions of Parliament. 157

2. Separate Entity

The second interpretation of the State Immunity Act's provisions relating to a central bank's status upholds the ruling in Trendtex that central banks can be defined as separate entities. A strict construction of the appropriate sections suggests such an interpretation. 158 These sections define the central banks as states only for limited purposes. 159 The intention in defining central banks as states is to bring central banks under the protection of the State Immunity Act. 160 This section provides certain procedural privileges to states. One clause, in which the banks are accorded state status, serves as a bar to any penalty or fine being levied where the state fails to provide information or tangible evidence in a judicial proceeding. 161 Another clause prevents an injunction from issuing or an action in rem for the recovery of land or the enforcement of a judgment. 162 Finally, the statute specifically states that the central bank may be characterized as a separate entity. 163

This interpretation seems more consistent with international banking practices. Many state banks are involved in investments and other activities which are not related to state activity. Those state banks that are inextricably tied to the government are accorded state status. 164 When a bank that is not an alter ego is involved in governmental activity it will also be accorded state status. This interpretation refuses to grant blanket protection to all central banks and follows from the entire reasoning of the restrictive approach, i.e., states will be granted immunity only in their official capacity as serving a governmental function. Otherwise, they will be treated as private individuals being sued in a private cause of action.

sovereign immunity claim before the courts will have major ramifications for foreign policy or that the courts are able and equipped to deal with such sensitive issues. See FSIA, 28 U.S.C. § 1602 (1976). "The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. . . ." Id. See generally note 113 supra.

158. Id. § 14(4), reprinted in 17 INT'L LEGAL MAT'LS at 1127.
159. Id. § 14(4), reprinted in 17 INT'L LEGAL MAT'LS at 1127, which states "and where any such bank or authority is a separate entity subsections (1) to (3) of that section (13) shall apply to it as if reference to a State were references to the Bank or authority." Id. Thus, equating a Bank with the State may be limited simply to the purposes of section 13 and not to a comprehensive immunity for banks generally.
160. Id. § 13, reprinted in 17 INT'L LEGAL MAT'LS at 1126.
161. Id. § 13(1), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
162. Id. § 13(2), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
163. Id. § 14(4), reprinted in 17 INT'L LEGAL MAT'LS at 1127.
164. Id.
V. A COMPARATIVE ANALYSIS OF THE STATE IMMUNITY ACT, 1978

A discussion of the State Immunity Act in light of the European Convention and the FSIA is instructive because it elucidates the tremendous import of the two latter Acts on the former. The drafters of the State Immunity Act had the advantage of reviewing the specific terms of both the European Convention and the FSIA. It is obvious that both acts were utilized as models for the text of the State Immunity Act. This section will compare the State Immunity Act with the European Convention and the State Immunity Act with the FSIA.

A. A COMPARISON OF THE STATE IMMUNITY ACT, 1978 WITH THE EUROPEAN CONVENTION ON STATE IMMUNITY

One fundamental difference between the State Immunity Act and the European Convention is the scope of the respective legislation. The latter is applicable only to those members of the Council of Europe that ratify the convention. The State Immunity Act is not so limited. Although certain sections of the State Immunity Act do speak directly to British associations solely with parties to the European Convention, The Act has a universal impact upon any state having commercial, contractual or other arrangements in the United Kingdom.

Although the European Convention on State Immunity was recommended in Resolution 72-2 of January 7, 1972 by the Council of Ministers of the Council of Europe, it did not enter into force for over four years. At the time of enactment of the State Immunity Act, Britain had signed but not yet ratified the European Convention. Although the United Kingdom has not ratified the European Convention yet, in most respects the State Immunity Act closely resembles the European Convention. In fact, "it was the original and main purpose of the Act to enable the United Kingdom to ratify the European Convention." Thus, it may be assumed that English ratification according to the procedures of the European Convention is merely pro forma.


167. 11 INT'L LEGAL MAT'LS 470 (1972).

168. 16 INT'L LEGAL MAT'LS 766 (1977). See EXPLANATORY REPORT, supra note 3, at 5-7 for a brief historical survey of the European efforts concerning state immunity.


170. Delaume, supra note 165, at 185 n.4. Because of the numerous references to the European Convention within the State Immunity Act, there is little doubt that the framers of the act intended subsequent ratification of the Convention. Id.

171. European Convention, supra note 1, arts. 36-41, reprinted in 11 INT'L LEGAL MAT'LS at 482-83.
1. Format

The structure of both Acts is similar. The State Immunity Act's initial section explicitly asserts the underlying implicit assumption of the European Convention: "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 the Act." Both documents subsequently set forth numerous exceptions to this rule, thus adopting the restrictive view of sovereign immunity. The next major provision of each statute governs the procedural problems involving service of process and the consequences arising from a judgment against one state by the courts of a state party to the European Convention. The final clauses of both Acts deal with miscellaneous matters. Thus, the format reveals that the State Immunity Act was patterned after the European Convention.

2. Adoption of The Restrictive Approach of Sovereign Immunity

The State Immunity Act and the European Convention both implicitly reject the absolute theory of sovereign immunity in favor of the restrictive approach. The Convention is explicit in its affirmation of the restrictive approach. The Preamble states:

Taking into account the fact that there is in international law a tendency to restrict the cases in which a State may claim immunity before foreign courts; . . . [d]esiring to establish in their mutual relations common rules relating to the scope of immunity of one State from the jurisdiction of the courts of another State . . . .

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172. State Immunity Act, 1978, c.33, § 1(1), reprinted in 17 INT'L LEGAL MAT'LS at 1124; European Convention, supra note 1, art. 15, reprinted in 11 INT'L LEGAL MAT'LS at 474. This latter section states: "A contracting State shall be entitled to immunity from the jurisdiction of the courts of another contracting State if the proceedings do not fall within Articles 1 to 14; the court shall decline to entertain such proceedings even if the State does not appear." Id.

Delaune states that this constitutes a residual concept rather than a principle since it does not come at the outset of the Convention as in the State Immunity Act or the FSIA. Delaune, supra note 165, at 186. This analysis appears to attribute undue significance to the mere placement of the clause. Whether the general statement of immunity is positioned before or after the exceptions to immunity, it remains the general rule.


174. The State Immunity Act implicitly accepts the restrictive approach. See note 118 supra. The European Convention, supra note 1, reprinted in 11 INT'L LEGAL MAT'LS at 470, explicitly does so.


178. European Convention, supra note 1, reprinted in 11 INT'L LEGAL MAT'LS at 470.

179. Id.
The European Convention explicitly adopts the distinction between acts *jure imperii* and acts *jure gestionis* while the State Immunity Act implicitly accepts these characterizations.\(^{180}\) The presence or absence of the terms ‘restrictive,’ *jure imperii* or *jure gestionis* have no effect beyond formality in the implementation of the machinery in the State Immunity Act.

There is one traditional area under the heading of acts *jure gestionis* in which the State Immunity Act goes further than the European Convention: in *rem* and in *personam* actions in admiralty proceedings.\(^{181}\) The European Convention does not apply to such proceedings.\(^{182}\) One possible explanation for this difference is the precedent of *The Philippine Admiral.*\(^{183}\) This case held that the restrictive theory applies in actions in *rem* where a state owned or controlled ship is used as an ordinary trading vessel.\(^{184}\) The fact that the European Convention does not extend its provisions to apply to these actions appears inconsistent with the logic that characterizes the rest of the Convention. Denying immunity where a state is involved in a commercial activity, whether or not it was commercially motivated, is the very reason for the initial adoption of the restrictive approach.\(^{185}\) Thus, the presence of this exception in the State Immunity Act is consistent with the purposes of the restrictive theory even though it is not present in the European Convention.

3. Immunity From Jurisdiction

One area of comparison involves the definition of state in both the European Convention and The State Immunity Act. The test established in the European Convention is twofold: A contracting state does not include any legal entity which has (1) a distinct, separate existence from the executive organs of the state and (2) the capacity to sue or be sued.\(^{186}\) The Convention further states that once an entity is deemed not to be a state, proceedings may be instituted as if that entity were a private person. However, the Convention has limited the extent of this statement to acts *jure gestionis.*\(^{187}\)

The State Immunity Act’s definition of state is quite similar. Under this statute, the term state includes references to the sovereign or other head of state in his public capacity, the government of the state and any department of

\(^{180}\) See note 118 supra. See European Convention, supra note 1, arts. 24(1), 27(2), reprinted in 11 INT'L LEGAL MAT'LS at 474, 480.


\(^{182}\) European Convention, supra note 1, art. 30, reprinted in 11 INT'L LEGAL MAT'LS at 481.


\(^{184}\) Id.

\(^{185}\) See Tate Letter, supra note 3.

\(^{186}\) European Convention, supra note 1, art. 27(1), reprinted in 11 INT'L LEGAL MAT'LS at 480.

\(^{187}\) Id. art. 27(2), reprinted in 11 INT'L LEGAL MAT'LS at 480.
government. 188 This definition does not include separate entities except in their exercise of the sovereign's authority. 189

These definitions are similar in that they place strict limits on grants of immunity. Immunity will only be available when the person or entity can prove that there is a clear nexus between the activity and sovereign authority and, that in such a capacity a suit against it interferes with that authority. English case law is consistent on this point. 190 In Krajina v. Tass Agency (Krajina), Tucker, L.J., wrote:

It may be that under some foreign systems of law such a separate existence might be considered inconsistent [with immunity], but it is clear from our Acts of Parliament that we do not consider the fact that a government department may have a separate legal juristic existence as necessarily incompatible with it being a department of a State for which immunity can be claimed. 191

This case may be interpreted as stating that when a department of the British government is sued and its activity is not related to sovereign authority, there is no grant of immunity. Krajina stands for the proposition that any entity is capable of being sued except when it is engaged in acts jure imperii.

The European Convention adds an exception to a state's assertion of immunity that is not present in the State Immunity Act. Article I of the European Convention states that when a contracting state intervenes or institutes proceedings before a court of another contracting state, it assents to the jurisdiction of that court for the purposes of those proceedings. 192 However, notwithstanding this latter provision, Article 13 allows a state to intervene in a proceeding in which it is not a party and claim immunity, on behalf of third parties where it has a right or interest in property which is the subject matter of the proceedings. 193 Thus, the state is allowed to safeguard any property interests where a suit brought by or against a Third Party affects its interests. 194 Only where the circumstances are such that the state would have been entitled to immunity had proceedings been brought directly against it, will immunity be granted and jurisdiction denied. 195

4. Exceptions From Immunity

Both the State Immunity Act and the European Convention provide an expansive list of activities in which sovereign immunity is not available.

188. State Immunity Act, 1978, c.33, §§ 14(a), (b) & (c), reprinted in 17 INT'L LEGAL MAT'LS at 1127.
189. Id. § 14(2), reprinted in 17 INT'L LEGAL MAT'LS at 1127.
191. Id. at 283.
192. European Convention, supra note 1, art. 1, reprinted in 11 INT'L LEGAL MAT'LS at 470.
193. Id. art. 13, reprinted in 11 INT'L LEGAL MAT'LS at 474.
194. EXPLANATORY REPORT, supra note 3, at 21-22.
195. European Convention, supra note 1, art. 13, reprinted in 11 INT'L LEGAL MAT'LS at 474.
Although the wording is somewhat different in the two statutes, the substance of the provisions is similar.

Both Acts state that when a state submits to the jurisdiction of the courts of a foreign state, it is no longer immune from suit. This may occur when the state initiates a suit, intervenes in ongoing proceedings or files a counterclaim. Under the European Convention, a contracting state which counterclaims cannot claim immunity when: (1) the counterclaim arises out of the same legal relationship or facts on which the principle claim is based; and (2) no immunity would lie if the claim was brought separately. The State Immunity Act requires only that the counterclaim arise out of the same legal relationship or the same facts as the principle claim. Thus, situations could arise where a state would be immune from suit because the activity was jure imperii if brought as the principle claim. However, because the state counterclaims it forfeits its immunity.

As a result of the unqualified language of the State Immunity Act, once a state or its subdivision has waived immunity by submitting to the court's jurisdiction, there is no procedure available to revoke the waiver. The absence of a procedure for revocation of waiver promotes fairness for both parties and requires the state to consider seriously the implications of its waiver before initiation of proceedings. Finally, the State Immunity Act requires that a state's submission to proceedings extends to any subsequent appeals.

The State Immunity Act is flexible with regard to the capacity of individuals to submit to a court’s jurisdiction on behalf of a state. The head of a state’s diplomatic mission has authority to submit “in respect of any proceedings.” Moreover, “the person entering into a contract on behalf of the State” has authority to submit to jurisdiction in “proceedings arising out of the contract.” This may cause problems for the contracting party of the

197. European Convention, supra note 1, art. 1(1), reprinted in 11 INT'L LEGAL MAT'LS at 470.
199. European Convention, supra note 1, art. 2, reprinted in 11 INT'L LEGAL MAT'LS at 470.
200. Id. §§ 2(1), (2), (3), (6), reprinted in 17 INT'L LEGAL MAT'LS at 1124. Obviously, if a proper waiver has not been made then a revocation is unnecessary. According to section 2(4), a State has not submitted if the only reason it has sought to intervene is for the purpose of 2(4)(a): “claiming immunity”; or according to section 2(4)(b): “asserting an interest in property in circumstances such that the State would have been entitled to immunity if the proceedings had been brought against it.” Moreover, under Section 2(5), intervention is not submission if “any step taken by the State in ignorance of facts entitling it to immunity if those facts could not reasonably have been ascertained and immunity is claimed as soon as reasonably practicable.” Id. §§ 2(4)(a) & (b), 2(5).
201. Id. § 2(6), reprinted in 17 INT'L LEGAL MAT'LS at 1124.
202. Id. § 2(7), reprinted in 17 INT'L LEGAL MAT'LS at 1124.
203. Id.
state when the head of that state's diplomatic mission submits to the court's jurisdiction and the state believes that the individual is immune from proceedings. However, the absolute power given the head of the diplomatic mission, and the fact that no revocation of waiver procedures exist, precludes any subsequent rescission of that waiver by the contracting party.\footnote{204}

The State Immunity Act and the European Convention specifically delineate those instances in which a state is not immune from proceedings.\footnote{205} Similarly, the two acts deny immunity in the following situations: (1) commercial transactions and contractual arrangements in the territory of the state or the forum;\footnote{206} (2) contracts of employment in the state of the forum;\footnote{207} (3) personal injuries and damage to property;\footnote{208} (4) suits involving patent, trademark or other rights;\footnote{209} (5) ownership, possession and use of property;\footnote{210} (6) membership in a corporation;\footnote{211} (7) and where a state has submitted to arbitration.\footnote{212}

In certain respects, the State Immunity Act is more comprehensive than the European Convention. The most important distinction involves the presence of a definition of commercial transaction.\footnote{213} This definition is a cautious effort to minimize judicial discretion and to provide an explicit list of circumstances that will result in a denial of immunity.

The numerous exceptions to the grant of state immunity demonstrate the enormous transformation in the British approach to sovereign immunity. There are few if any instances of commercial or contractual activity that are omitted. The State Immunity Act also allows for enlargement of these exceptions to state immunity when:

\begin{quote}
  it appears to Her Majesty that the immunities and privileges . . . are less than those required by any treaty, convention or other international agreement to which that State and the United Kingdom are par-
\end{quote}

\footnotesize{\begin{tabular}{ll}
204. & See Delaume, supra note 165, at 192. \\
205. & See State Immunity Act, 1978, c.33, §§ 3-11, reprinted in 17 INT'L LEGAL MAT'LS at 1124-26. European Convention, supra note 1, arts. 4-14, reprinted in 11 INT'L LEGAL MAT'LS at 471-74. \\
206. & State Immunity Act, 1978, c.33, § 3(1), reprinted in 17 INT'L LEGAL MAT'LS at 1124. European Convention, supra note 1, art. 7, reprinted in 11 INT'L LEGAL MAT'LS at 472. \\
207. & State Immunity Act, 1978, c.33, § 4(1), reprinted in 17 INT'L LEGAL MAT'LS at 1124. European Convention, supra note 1, art. 5, reprinted in 11 INT'L LEGAL MAT'LS at 471. \\
208. & State Immunity Act, 1978, c.33, § 5, reprinted in 17 INT'L LEGAL MAT'LS at 1125. European Convention, supra note 1, art. 11, reprinted in 11 INT'L LEGAL MAT'LS at 1125. \\
209. & State Immunity Act, 1978, c.33, § 7, reprinted in 17 INT'L LEGAL MAT'LS at 1125. \\
210. & Id. § 6, reprinted in 17 INT'L LEGAL MAT'LS at 1125. European Convention, supra note 1, arts. 9 & 10, reprinted in 11 INT'L LEGAL MAT'LS at 473. \\
211. & State Immunity Act, 1978, c.33, § 8, reprinted in 17 INT'L LEGAL MAT'LS at 1125. European Convention, supra note 1, art. 6, reprinted in 11 INT'L LEGAL MAT'LS at 472. \\
212. & State Immunity Act, 1978, c.33, § 9, reprinted in 17 INT'L LEGAL MAT'LS at 1125. European Convention, supra note 1, art. 12, reprinted in 11 INT'L LEGAL MAT'LS at 473. \\
213. & See note 126 supra.
\end{tabular}}
ties. Her Majesty may . . . extend those immunities and privileges as appears to Her Majesty to be appropriate.\footnote{14}

The State Immunity Act establishes other exceptions not included in the European Convention. The denial of immunity in admiralty proceedings, whether \textit{in rem} or \textit{in personam}, has been discussed \textit{supra}.\footnote{15} The State Immunity Act does not grant immunity where the proceeding relates to a state's liability for value added, customs or excise taxes,\footnote{16} agricultural levies\footnote{17} and "rates in respect of premises occupied by it for commercial purposes."\footnote{18}

5. Procedures

The European Convention and the State Immunity Act generally are in accord with respect to the procedural rules applied in sovereign immunity proceedings. For example, both Acts require service of process to become effective upon receipt by the state's Ministry of Foreign Affairs;\footnote{19} an appearance must be entered within two months after the initial complaint is instituted;\footnote{20} and neither Act requires a state\footnote{21} to pay a fine or penalty because of failure to disclose documents or other evidence.\footnote{22} However, the European Convention allows the court to draw any conclusions concerning the refusal or failure of a state to supply the requested evidence.\footnote{23} The State Immunity Act is silent on this point.\footnote{24}

\footnote{15. \textit{See} notes 128-33 \textit{supra}.}
\footnote{16. State Immunity Act, 1978, c.33, § 11(a), \textit{reprinted in 17 INT'L LEGAL MAT'LS} at 1126.}
\footnote{17. \textit{Id.}}
\footnote{18. \textit{Id.} § 11(b), \textit{reprinted in 17 INT'L LEGAL MAT'LS} at 1126.}
\footnote{19. \textit{Id.} § 12(1), \textit{reprinted in 17 INT'L LEGAL MAT'LS} at 1126. European Convention, \textit{supra} note 1, art. 16(4), \textit{reprinted in 11 INT'L LEGAL MAT'LS} at 474.}
\footnote{20. State Immunity Act, 1978, c.33, § 12(2), \textit{reprinted in 17 INT'L LEGAL MAT'LS} at 1126. European Convention, \textit{supra} note 1, art. 16(4), \textit{reprinted in 11 INT'L LEGAL MAT'LS} at 475.}
\footnote{21. State Immunity Act, 1978, c.33, § 14(1), \textit{reprinted in 17 INT'L LEGAL MAT'LS} at 1127.}
\footnote{22. \textit{Id.} art. 24, \textit{reprinted in 11 INT'L LEGAL MAT'LS} at 478.}
\footnote{23. \textit{European Convention, \textit{supra} note 1, art. 27(1), \textit{reprinted in 11 INT'L LEGAL MAT'LS} at 480. Reference to 'State' in the European Convention are to those states party to this Convention, unless otherwise specified. \textit{Id.} art. 24, \textit{reprinted in 11 INT'L LEGAL MAT'LS} at 478.}
\footnote{24. \textit{In} the State Immunity Act, the absence of any directions to the court as to how the refusal or failure to supply the requested evidence leads to three possible conclusions. First, it is obvious that the court can interpret this as it chooses. Second, because of its presence in the European Convention, it would be redundant to restate it within the Act. Finally, \textit{its absence} means that the court can make no use of this evidence. \textit{See generally} Delaume, \textit{supra} note 165, at 194-97. Because of the framers' knowledge of this clause within the Convention, one may assume that they were concerned that the unrestricted use of this evidence might grant too much discretion to the courts. \textit{Id.} This latter interpretation is far more protective of the foreign sovereign's presumed immunity than the other interpretations found in the European Convention.}
The European Convention specifically exempts a state from placing a security deposit or bond to guarantee court expenses. The State Immunity Act does not address this point, it is more thorough in setting out the procedural privileges accorded states. The Act does not allow the issuance of injunctions against a state for the recovery of land or other property and property is not subject to actions in rem, sale, arrest, etc. unless there is written consent by the state or unless the property is used or intended to be used for commercial purposes. The State Immunity Act extends these privileges to states which are parties to the European Convention only if they have complied with the appropriate provisions of the Convention.

The European Convention allows a court to stay proceedings in certain situations. One example occurs when a party to the suit makes a motion that it will decline to proceed with the case either because similar proceedings have been initiated in that state or any tribunal of other states which are parties to the Convention. The State Immunity Act has no similar provision which pertains to states not parties to the Convention. Thus, if proceedings simultaneously are brought in a foreign court, British courts are not compelled to dismiss the suit due to legislative comity and deference for the other state’s proceeding at the present time. However, it is permissible for the British courts to defer voluntarily as a result of the respect and comity between courts. When the United Kingdom ratifies the European Convention, British courts will be compelled to stay proceedings when they simultaneously occur in the courts of a party to the Convention.

225. European Convention, supra note 1, art. 1, reprinted in 11 INT'L LEGAL MAT'LS at 475.
226. One reason the European Convention, supra note 1, reprinted in 11 INT'L LEGAL MAT'LS at 470, need not be more specific is because of the insertion of an optional provisions section. The provision permits a state to make a declaration that in cases not falling within the enumerated exceptions the courts are entitled to entertain proceedings against another contracting state to the extent that its courts are entitled to entertain proceedings against states not party to the European Convention. Id. art. 24(1), reprinted in 11 INT'L LEGAL MAT'LS at 478. See Sinclair, supra note 72.

This optional regime was included because certain States already applying that rule of relative immunity were afraid that acts jure gestionis might fall outside the catalogue of cases of non-immunity, thereby restricting the jurisdiction of their courts. It was also argued that the connecting factors incorporated in Articles 1-13 did not correspond exactly with the rules of jurisdictional competence in these states.

228. Id. § 13(2)(b), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
229. Id. § 13(3), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
230. Id. § 13(4), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
231. Id. § 13(4)(a), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
232. European Convention, supra note 1, art. 19, reprinted in 11 INT'L LEGAL MAT'LS at 475.
233. State Immunity Act, 1978, c.33, § 19(3), reprinted in 17 INT'L LEGAL MAT'LS at 1128, is similar to the European Convention but only as it relates to the members of that Convention.
234. This conclusion is drawn directly from article 19 of the European Convention, supra note 1, art. 19, reprinted in 11 INT'L LEGAL MAT'LS at 175-76.
Another procedural difference between the acts is that the State Immunity Act creates a rebuttable presumption in favor of a foreign state's claim that its property is not being used or is not intended for use for commercial purposes by the state. There is no equivalent provision in the European Convention. This is further evidence that, although the drafters of the State Immunity Act supported the restrictive theory, sovereign immunity would be carefully protected before it was discarded.

6. Enforcement of Judgments

A third basis for comparison concerns the enforcement of judgments.

That there is a distinction between immunity from jurisdiction and immunity from execution has long been recognized. This distinction is recognized in the jurisprudence of the English courts which apply the principle that, even where a foreign state has waived its immunity in the proceedings, execution cannot be levied against its property.

The common law appears to be overruled by the State Immunity Act. According to section 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 special performance or for the recovery of land or 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.

Because this section is subject to earlier sections specifically denying immunity in proceedings relating to commercial transactions and proceedings involving contracts of employment between the state and the individual where the contract was made in the United Kingdom or work to be performed there, the initial denial of immunity is sufficient to preclude immunity from execution. Thus, section 13(2) is applicable only in cases where an exception from immunity does not exist initially and there has been no waiver of immunity. Moreover, process against property used or intended for commercial purposes

235. State Immunity Act, 1978, c.33, § 13(5), reprinted in 17 INT'L LEGAL MAT'LS at 1126. Delaume notes that there are two problems which confronted the framers of the Act. First, it was difficult for the private claimant attempting to show that property is not being used for a sovereign purpose. Second, there is the real need of protecting against harassment and frivolous claims. Delaume, supra note 165, at 196.

236. Sinclair, supra note 72, at 276.


238. Id. § 3, reprinted in 17 INT'L LEGAL MAT'LS at 1124.

239. Id. § 4, reprinted in 17 INT'L LEGAL MAT'LS at 1124.

240. See Delaume, supra note 165, at 195.
is permitted subject to two conditions:\textsuperscript{241} First, if the property is owned by a state party to the European Convention, and the proceeding does not involve admiralty litigation,\textsuperscript{242} but is a final judgment,\textsuperscript{243} and the state has made a proper declaration under Article 24 of the European Convention, issue of process may be taken against the property.\textsuperscript{244} This is also true for the enforcement of arbitration awards.\textsuperscript{245} Second, as stated supra,\textsuperscript{246} there is a rebuttable presumption in favor of the state's assertion that its property is not being used or intended for commercial use.\textsuperscript{247} Thus, the party seeking to enforce a claim against a foreign state has the difficult burden of proving that the property which is in fact being used is intended to serve a commercial purpose.\textsuperscript{248}

One part of the State Immunity Act carefully elucidates the relationship between the State Immunity Act and the European Convention.\textsuperscript{249} The drafters of the Act were aware that no provision was made in the European Convention for the enforcement of judgments against the property of a state party to the Convention.\textsuperscript{250} Thus, they permitted these states to obtain relief against the property of the United Kingdom if the state seeking relief had previously complied with Article 24 of the European Convention.\textsuperscript{251} Moreover, if the declaration is by a state under Article 24, it would allow the United Kingdom or its citizens to seek similar relief against that state in their own courts or British courts. This interpretation flows from the simple words of the State Immunity Act. It is a reasonable assumption that the drafters of the State Immunity Act felt certain that the British government would ratify the European Convention soon after the act became law.

Although the European Convention does not provide procedures for the en-
forcing of judgments, it goes into great detail on the issue of giving effect to judgments.\textsuperscript{252} Giving effect may have several connotations:

The expression 'give effect' does not necessarily imply the making of a payment or, indeed, any transfer of property. It may signify an obligation to accept a state or affairs determined by a declaratory judgment. The State must submit to the judgment in good faith; this may even involve acquiescence in the dismissal of an action instituted in a foreign country and consequently, based on the same facts before one of its own courts or before a court of a third state.\textsuperscript{253}

Unlike the State Immunity Act\textsuperscript{254} or the FSIA\textsuperscript{255}, no machinery exists for enforcing judgments in the European Convention. Thus, compliance rests mainly on the good faith obligation of the state to give effect to the judgment.\textsuperscript{256} One article seeks to resolve the problem arising from a state's broad construction on the grounds justifying refusal to abide by a judgment against itself.\textsuperscript{257} In this situation, the party seeking to uphold the judgment against a state party to the Convention can bring an action in the appropriate court of the state disputing the judgment.\textsuperscript{258} This would be determined by the law of that state. "It is left to the law of the State concerned to determine whether the State may also institute proceedings before its own courts to obtain a declaration that it is not bound to give effect to a judgment pronounced against it by a foreign court."\textsuperscript{259}

Additional procedures have been established to protect a private litigant against a state that fails to abide by a judgment of a court which is party to the Convention. In Part I of the Additional Protocol\textsuperscript{260} the litigant may seek redress before the European Tribunal established to hear these disputes.\textsuperscript{261}

\textsuperscript{252} European Convention, supra note 1, arts. 20-23, reprinted in 11 INT'L LEGAL MAT'LS at 476-78.
\textsuperscript{253} EXPLANATORY REPORT, supra note 3, at 27.
\textsuperscript{254} State Immunity Act, 1978, c.33, §§ 13, 18, 19, reprinted in 17 INT'L LEGAL MAT'LS at 1126, 1128.
\textsuperscript{256} The methods found in the European Convention, supra note 1, arts. 20-23, reprinted in 11 INT'L LEGAL MAT'LS at 476-78, contrast with the procedure to enforce judgments abroad in the FSIA. See notes 313-36 infra and accompanying text.
\textsuperscript{257} European Convention, supra note 1, art. 21, reprinted in 11 INT'L LEGAL MAT'LS at 477.
\textsuperscript{258} Id.
\textsuperscript{259} Sinclair, supra note 72, at 276.
\textsuperscript{260} Additional Protocol To The European Convention on State Immunity, 74 EURP. T.S., reprinted in 11 INT'L LEGAL MAT'LS at 485 (1972) [hereinafter cited as Additional Protocol].
\textsuperscript{261} Id. arts. 1(1)(b), 4(2), reprinted in 11 INT'L LEGAL MAT'LS at 486-87. The European Tribunal is a court organized for the purpose of hearing cases concerned with the various issues related to sovereign immunity occurring between member states party to the Convention. Id. art. 4(1), reprinted in 11 INT'L LEGAL MAT'LS at 487. The European Tribunal consists of members of the European Court of Human Rights. Id. art. 4(2), reprinted in 11 INT'L LEGAL MAT'LS at 487. For the non-member states acceding to the Protocol, a person possessing the qualifications re-
Both the State Immunity Act and the European Convention are concerned with the problems arising from judgments in one member state against another member state and the requirement of recognition of this judgment in the latter.262

Both statutes recognize certain exceptions in which the state is not required to give effect to the judgment. These include decisions which are contrary to public policy263 where the state has not entered an appearance because the proper procedural rules have not been observed;264 when the judgment cannot be deemed final due to simultaneous proceedings on the same facts having been instituted previously in another court;265 where there are inconsistent judgments in proceedings between the same parties;266 or when a court applies jurisdiction rules or other laws not in accord with the laws of the state against which the judgment was decided and the judgment would be different if the proper rules were applied.267

7. Summary

This analysis shows that the State Immunity Act closely resembles the European Convention in purpose as well as design. The drafters of the State Immunity Act expanded the list of exceptions present in the European Convention to state immunities or acts jure gestionis. The State Immunity Act is broader than the Convention in the enforcement of judgments by a court of the forum against a foreign state because the latter lacks any mechanism to allow the direct seizure or control of property other than redress in a European Tribunal. However, when certain conditions are met, effective enforcement of judgments can be compelled by seizure, arrest or sale of the foreign state's property in Britain.


263. European Convention, supra note 1, arts. 20-23, reprinted in 11 INT'L LEGAL MAT'LS at 476-78.


265. European Convention, supra note 1, art. 20(2)(a), reprinted in 11 INT'L LEGAL MAT'LS at 476.


267. European Convention, supra note 1, arts. 20(2)(b)(i) & (ii), reprinted in 11 INT'L LEGAL MAT'LS at 476.

The FSIA\textsuperscript{268} had four goals: first, to give the exclusive jurisdiction over determinations of whether immunity should be granted in any specific case to the judiciary; second, to adopt the restrictive theory of sovereign immunity as enunciated in the Tate Letter;\textsuperscript{269} third, to provide “the means whereby process may be served on foreign states would be specified,” and, fourth, to deny absolute immunity to foreign states concerning execution of judgments against them.\textsuperscript{270} Although the second and fourth goals were related to the motivation for the passage of the State Immunity Act, the importance of the first and third goals is less obvious. This comparative analysis will examine the goals of the two Acts and the methods implemented to achieve them.

1. Courts Have Exclusive Jurisdiction over Determination of Sovereign Immunity Grants to Foreign States

The opening section of the FSIA\textsuperscript{271} states the importance of delegating jurisdiction on foreign immunity questions to federal courts:\textsuperscript{272}

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.\textsuperscript{273} This was an important priority of the legislation due to the uncertainty as to whether the legislative or judicial branch of the U.S. government had authority in this area. Prior to the enactment of the FSIA, foreign states seeking immunity from the jurisdiction of U.S. courts sought redress in the State Department.\textsuperscript{274} The decision of the State Department was usually final.\textsuperscript{275} The courts

\textsuperscript{269} See note 3 supra.
\textsuperscript{270} Id. The bill in its original form as S.566, 93rd Cong., 1st Sess., 119 CONG. REC. 2215-16 (1973), was introduced in the Senate on behalf of the Departments of State and Justice and is appended to a letter from Attorney General Kleindienst and Secretary of State William P. Rogers to the President of the Senate, (Jan. 22, 1973) 199 CONG. REC. 1299 (1973), reprinted in 12 INT'L LEGAL MAT'LS 118 (1973) [hereinafter cited as Letter of Jan. 22, 1973]. See Department Testifies on Foreign Sovereign Immunities Bill, 74 DEPT OF STATE BULL. 826 (1976), where Monroe Leigh, Legal Advisor to the State Department, stated similar goals of the FSIA before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary. Id.
\textsuperscript{272} The FSIA permits state as well as federal courts to exercise jurisdiction. 28 U.S.C. §§ 1604, 1610 (1976).
\textsuperscript{274} Even before the Tate Letter, supra note 3, the U.S. courts had followed executive suggestions. Ex Parte Peru, 318 U.S. 578 (1943), held that the State Department’s expression was a “conclusive determination.” Id. at 589. See Rich v. Naviera Vacuba S.A., 197 F.Supp. 710 (E.D. Va.), aff’d, 295 F.2d 24 (4th Cir. 1961); Spacil v. Crowe, 489 F.2d 614 (2d Cir. 1974). See Sovereign Immunity, supra note 1, at 226 n.11.
usually deferred to the State Department based on the assumption that questions of sovereign immunity were integrally related to the executive’s extensive powers in the area of foreign affairs.276

In contrast, there is little evidence in either English case law or the language of the State Immunity Act to indicate an intent to grant the British judiciary unqualified authority in this area. It seems implicit in the State Immunity Act that the courts are suited to resolve issues of sovereign immunity because courts are most capable of resolving questions of law and fact arising between adverse litigants. This conclusion flows from the specificity of the entire act. The comprehensive enumeration of the various categories of exemptions from immunity expresses the legislative determination that these areas should not be given protection.277 However, it remains for the court to find in any specific case whether the parties were, in fact, engaged in one of the enumerated unprotected activities.

It does not appear that the British courts are as removed as the American courts are from direct outside influence on their decision-making. One section in particular may be interpreted as providing large discretion in Parliament to oversee the area of sovereign immunity.278

Section 15(1) — If it appears to Her Majesty that the immunities and privileges conferred by this Part of this Act in relation to any State —

(a) exceed those accorded by the law of that state in relation to the United Kingdom; or

(b) are less than those required by any treaty, convention or other international agreement to which that State and the United Kingdom are parties,

Her Majesty may by Order in Council provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to Her Majesty to be appropriate.

15(2) — Any statutory instrument containing an Order under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.279

This section is limited to those immunities and privileges conferred by “this part of this Act.”280 This refers to Part I of the State Immunity Act which sets forth the various exceptions to immunity,281 defines terms such as ‘State’ and ‘separate entity’282 and details those matters excluded from the Act.283

276. Id.
277. State Immunity Act, 1978, c.33, §§ 3-11, reprinted in 17 INT'L LEGAL MAT'LS at 1124-26
278. Id. § 15, reprinted in 17 INT'L LEGAL MAT'LS at 1127.
279. Id.
280. Id.
281. Id. §§ 1-17, reprinted in 17 INT'L LEGAL MAT'LS at 1124-28.
282. Id. § 14, reprinted in 17 INT'L LEGAL MAT'LS at 1127.
283. Id. § 16, reprinted in 17 INT'L LEGAL MAT'LS at 1127.
possible views arise from this provision. The first one is that Parliament can only take such action to make the British statute equivalent with the foreign statute by the restriction and extension of privileges and immunity in the State Immunity Act. The second view, presuming that Parliament can overcome any objections or the Order in Council occurs before the proceedings are initiated, is that Parliament appears to have the discretion to intercede whenever it desires to affect the outcome of a particular case. The third view is that Parliamentary involvement is sanctioned only when there is a need for restricting or extending the immunities and privileges of the Act even though it may affect the outcome of a particular case.

If one accepts the first view, then Parliament has no role whatsoever in affecting results in individual cases. If one accepts either the second or third view, there is at least some possibility that this discretion can be used to alter or reverse the result that would probably have resulted if the case had proceeded through the courts. This may occur in situations where the Foreign Office is seeking to improve political relations with a foreign country and a suit permissible under British law could conceivably harm the progress of this process.

Under the FSIA there is little possibility that the State Department’s view would be automatically binding on the court.284 The State Department can submit a brief amicus curiae but its views are not conclusive as they were in the past.285

In the author’s view, the American approach of excluding any executive influence from the decision-making process of sovereign immunity cases is superior. In addition to the fact that courts are institutionally more capable of properly dealing with such issues, allowing others to influence the ultimate outcome is unfair to the parties seeking redress before the court. Prior to the passages of the FSIA, political influence with the State Department rather than the merits of the case was often determinative.286 Thus, if Parliament continues to have the capability to influence determinations of sovereign immunity, the situation existing prior to the FSIA in the U.S. may characterize British efforts in this area.287 Another view is that the British approach is much more realistic since the executive continues to play an important role. This view finds support in the difficulty courts have had distinguishing acts jure imperii from jure gestionis.288

285. Id.
288. See § VI.A infra.
2. The Restrictive Approach is Particularized in Statutory Form

Both the State Immunity Act and the FSIA, as the European Convention had done before them,289 adopted the restrictive theory of sovereign immunity. The major difference between the two statutes is the greater discretion that is delegated to the courts in the FSIA than in the State Immunity Act. Both Acts initially state the general rule of immunity of foreign states from judicial jurisdiction followed by numerous exceptions.290 The State Immunity Act enumerates and comprehensively defines a greater number of exceptions. The following exceptions are enumerated by the State Immunity Act and are not present in the FSIA:

1) contracts of employment between the state and an individual where the contract was made or performed in the United Kingdom;291
2) proceedings related to patents, trade-marks, etc.;292
3) where a state is a member in a body corporate, etc.;293
4) where a state has agreed to submit a dispute to arbitration;294 and
5) proceedings related to taxation, duties, etc.295

One may argue that the FSIA implicitly extends exemptions to immunity in these few instances because these are believed to be the least harmful to foreign policy interests of the United States. The heading of section 1605 of the FSIA, which states, "General Exceptions to the jurisdictional immunity of Foreign States," appears to support this argument.296 In contrast, the State Immunity Act uses the phrase "Exceptions from Immunity"297 as its section heading. Because the FSIA only lists 'general' exceptions, it omits a vast area of possible disputes. Since the actual purpose of the statute was to give the courts exclusive jurisdiction, it does not seem consistent for Congress to have created an exclusive and unalterable list of exceptions. Thus, implicit in the term 'general' is the delegation to the federal courts of power to develop common law in the area to supplement the broad outlines set forth in the FSIA.298

In comparison, the State Immunity Act appears to leave little discretion to

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289. European Convention, supra note 1, reprinted in 11 INT'L LEGAL MAT'LS at 470.
292. Id. § 7, reprinted in 17 INT'L LEGAL MAT'LS at 1125.
293. Id. § 8, reprinted in 17 INT'L LEGAL MAT'LS at 1125.
294. Id. § 9, reprinted in 17 INT'L LEGAL MAT'LS at 1125.
295. Id. § 11, reprinted in 17 INT'L LEGAL MAT'LS at 1126.
the courts to establish new exceptions on their own. This conclusion seems warranted because of the specificity of exceptions. In addition, one section delegates the authority to expand or restrict the privileges and immunities accorded foreign states to Parliament.299

3. Service of Process

There are fundamental differences between the means implemented by the State Immunity Act and the FSIA for the service of process on foreign states. One major difference between these statutes is that the FSIA is more specific. It sets out four ways to serve process by delivery of a summons and a complaint:300 first, by special arrangement between the parties;301 second, through compliance with the applicable international convention;302 third, if either of these cannot be satisfied, by sending the summons, complaint and notice of suit with proper translation by any form of mail requiring signed receipt, to be signed by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned;303 fourth, if the latter cannot be achieved within 30 days, two copies of the summons and complaint with proper translation and a signed receipt, are sent by the clerk of the court to the U.S. Secretary of State and the Director of Consular Services. The Secretary will send one copy through diplomatic channels to the foreign state and one copy to the clerk of the court.304

In the State Immunity Act, service of process must go through diplomatic channels: a writ or other document is served by transmission through the Foreign and Commonwealth Office to the foreign State’s Ministry of Foreign Affairs.305

The procedures in the FSIA for service of process are comparable to a federal long-arm statute.306

The underlying jurisdictional theory of section 1608 is consonant with the developments in U.S. law in the area of personal jurisdic-

302. Id. § 1608(2). The only international convention on service of judicial documents to which the U.S. is presently a party is the Hague Convention on Service Abroad of Judicial Documents, 20 U.S.T. 361, T.I.A.S. No. 6638 (1969). In order for an international convention to be applicable “both the U.S. and the foreign state must be a party to the convention.” H.R. REP. No. 1487, 94th Cong., 2d Sess. 24 (1976). If neither a special arrangement nor an international convention exists between the U.S. and the foreign state, section 1608(3) of the FSIA provides for service of process by mail. FSIA, 28 U.S.C. § 1608(3) (1976). This is based on F.R.C.P. 4(i)(1)(D).
304. Id. § 1608(4).
tion. . . . [T]he instant provision established a method of service of process of foreign sovereigns determined to have "substantial contacts" in the U.S. so as to make that sovereign amenable to suit in the Federal District Court. 307

The State Immunity Act does not go as far. Section 12(7) specifically states that section 12(1) "shall not be construed as affecting any rules of court whereby leave is required for the service of process outside the jurisdiction." 308 This section can be interpreted to mean that the Act in no way extends the ability of a court to serve process beyond its jurisdiction. 309 Thus, British courts have no jurisdiction over foreign states until there has been diplomatic service.

One final point deserves mention. There is a significant difference between the method imposed by a British as contrasted with an American court in levying a judgment of default against a foreign state. 310 In the FSIA, a default judgment will not be entered against a foreign state "unless the claimant established his claim or right to relief by evidence satisfactory to the court." 311 The State Immunity Act does not require a decision on the merits for a default judgment. Rather, when the court is satisfied that there has been proper service and the time for appearance by the foreign state has expired, the British claimant will prevail. 312

4. Execution of Judgments

The FSIA section concerning immunity from execution is analogous to the earlier section regarding immunity from jurisdiction. 313 The general rule supporting immunity is immediately followed by several exceptions to that rule. 314 The State Immunity Act also includes the general rule prohibiting execution of judgment against foreign states. It mentions one broad exception: "[the rule] 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

307. Sovereign Immunity, supra note 1, at 247.
308. State Immunity Act, 1978, c.33, § 12(1), reprinted in 17 INT'L LEGAL MAT'LS at 1126. Section 12(1) reads as follows:
Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the State and service shall be deemed to have been effected when the writ or document is received by the Ministry.

Id.
309. See Delaume, supra note 165, at 195.
314. Id. § 1605.
purposes. 315 However, this one clause sets the two acts apart. The State Immunity Act allows for execution according to section 13(4) in any suit against a foreign state where any property is being used for commercial purposes. 316 This conclusion seems implicit in the fact that a limiting construction was placed on the similar clause in the FSIA. There, an execution of judgment may be obtained where "the property is or was used for commercial activity upon which the claim was based." 317 Thus, whenever a foreign state has property which is determined to be utilized commercially, execution against that property is available even if the specific property had no relation to the specific suit in question.

Both acts provide a mechanism for enforcing judgments abroad. 318 In the FSIA three sections specifically deal with this issue 319 as contrasted with only several subsections in the State Immunity Act. 320

The FSIA goes furthest in elaborating the means by which a judgment will be enforced. The foreign state can expect a judgment to be executed by attachment when: 1) the property is used for a commercial activity and the foreign state has waived immunity from the execution of a judgment; 321 2) the property is being used for the commercial activity upon which the claim is based; 322 3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or exchange for property taken in violation of international law; 323 4) the execution relates to a judgment establishing rights in property acquired by succession or gift; 324 5) the property is immovable and situated in the United States; 325 or 6) the property consists of a contractual obligation, etc. 326

In contrast, the State Immunity Act only briefly sets out procedures for enforcing judgments. 327 Attachment of property is permissible where the property is being used, or intended for use, for commercial purposes with several limitations. 328 The enforcement of judgments against a state party to the European Convention may occur only when the suit does not involve an admiralty

316. Id.
318. Id. §§ 1609-11.
319. Id.
320. 1978, c.33, §§ 13(2) & (4), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
322. Id. § 1610(a)(2).
323. Id. § 1610(a)(3).
324. Id. § 1610(a)(4)(A).
325. Id. § 1610(a)(4)(B).
326. Id. § 1610(a)(5).
328. Id. § 13(4), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
proceeding, the judgment is final and the state has made a declaration under Article 24 of the European Convention. The latter declaration must include an agreement between Britain and the foreign state that it will permit enforcement of judgments.

There is a more complicated procedure for enforcing judgments through the mechanisms set forth in the State Immunity Act against parties to the European Convention than against non-parties. In states not party to the European Convention, no written agreement is required for the British courts to execute judgments against these governments, as long as the property involved is being used or intended for use for commercial purposes. It would appear that since Britain has close relationships with these states, they would permit enforcement of judgments more readily than other states. One possible explanation for the difference is that the British knew that they would inevitably be a party to the European Convention. Since the Convention has no enforcement procedures of its own, it might pose problems if there were inconsistent provisions within the State Immunity Act.

Thus, the FSIA and the State Immunity Act are similar in that they both provide extensive judgment enforcement procedures. The problem with these approaches is that they place foreign states in a precarious position. Foreign sovereigns are compelled to acquiesce to decisions by United States or British courts which not only rule on the merits, but can also order execution of those judgments against that foreign state. It was for this reason that the Committee of Experts that drafted the European Convention refrained from including such an elaborate mechanism for enforcing judgments against foreign states:

The Convention deliberately abstains from providing any machinery of recognition or enforcement since the primary obligation of the State is to give effect to the judgment. Moreover, enforcement against the property of a foreign State is considered by some States to be contrary to international law, while in others it is governed by special rules of a restrictive nature.

329. Id.
330. Id. § 13(4)(a), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
331. Id. The enforcement of judgments can also occur where the process is for enforcing an arbitral award. Id. § 13(4)(b), reprinted in 17 INT'L LEGAL MAT'LS at 1126.
332. European Convention, supra note 1, art. 24, reprinted in 11 INT'L LEGAL MAT'LS at 478.
335. EXPLANATORY REPORT, supra note 3, at 2. The European Convention, supra note 1, reprinted in 11 INT'L LEGAL MAT'LS at 470, was drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Legal Cooperation.
336. EXPLANATORY REPORT, supra note 3, at 1.
5. Summary

The comparison between the FSIA and the State Immunity Act is strained by the inconsistency between the degree to which each supports the restrictive approach. For instance, because the American service of process mechanism has such a far reaching impact, it might follow that the mode of execution on assets would be equally expansive. However, the state Immunity Act, which has a far more traditional approach to service of process, codifies an extremely liberal method of attaching a foreign state’s property.

Any statutory comparison will elucidate numerous variations in the approaches. However, the FSIA and the State Immunity Act are the most recent efforts to incorporate the restrictive approach in detailed form by statute.

VI. CONSEQUENCES OF A UNIFIED WESTERN APPROACH ON ISSUES RELATING TO SOVEREIGN IMMUNITY

It is clear that the three statutes representing the Western approach to sovereign immunity have adopted the restrictive theory of sovereign immunity. The implications of this unified approach for the continued international development of the law of sovereign immunity may be significant.

A. Standards for Determining Distinctions Between Acts Jure Imperii and Acts Jure Gestionis

The restrictive approach to sovereign immunity distinguishes certain acts for the purposes of permitting courts to entertain suits against foreign states or sovereigns. Traditionally, these distinctions were based on the difference between acts jure imperii and acts jure gestionis. Acts jure imperii have been identified by such generalized terms as public, political, governmental or sovereign. Acts jure gestionis have been defined as private, commercial or non-sovereign. The problem with these characterizations is that they do little to specify those situations in which the courts can entertain suits against foreign states. The European Convention was the first act to state specific


338. See note 337 supra.

339. Numerous authorities find great difficulty in distinguishing by means of these generalized distinctions of acts jure imperii and acts jure gestionis.

It should at least be clear that there is no universal agreement on the “proper” sovereign functions of a government, nor upon how widely or for how long a time governments must have engaged in a particular activity before it comes within the category of “sovereign function” as viewed by any international standard.
standards for the general category of acts *jure gestionis*. The FSIA supplemented this list. Most recently, while closely following the enumeration of acts in the European Convention, the State Immunity Act was even more comprehensive and specific in its listing of such activities.

Those activities which permit a denial of immunity do not preclude judicial interpretation. There will be some close questions concerning the commercial or sovereign character of an act even with the definition of ‘commercial transaction.’ One method that has been devised to differentiate between acts *jure imperii* and acts *jure gestionis* is to examine the nature of the activity.

As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should refer to the nature of the State transaction and not to the motive of purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of sovereign authority, that is, in public law or like a private person, that is, in private law.

This approach would return the distinctions between certain acts to the discretion of the courts. However, such an analysis would occur only in the interstices of legislative standards.

For the first time, courts have adequate specific elements to determine acts *jure gestionis*. The European Convention and the State Immunity Act have created a rebuttable presumption that immunity will not be granted unless there is an adequate demonstration of the sovereign nature of the state’s activity. The exceptions to the practice of granting immunity are so broad that immunity will be granted only upon a strong evidentiary showing by the state of its sovereign involvement. Thus, if an act of the foreign state is governmental or public, immunity will not be automatically granted. Rather, the court will conduct a further investigation into the nature of that transaction in conformity with the new legislative standards.

The implications of a specific explication of the distinction between acts *jure imperii* and *jure gestionis* are twofold. First, it provides manageable standards for

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340. See European Convention, *supra* note 1, arts. 4-14, reprinted in 11 INT’L LEGAL MAT’LS at 471-74.

341. Sinclair, *supra* note 72, at 266-73.

342. See notes 213-67 *supra* and accompanying text.


345. The Italian courts have gone the furthest in restricting immunity of foreign states. See Lauterpacht, *supra* note 1, at 251-53. See also Sinclair, *supra* note 72, at 265. For a comprehensive comparative study of international sovereign immunity law, see S. SUCHARTHIKUL, STATE IMMUNITY AND TRADING ACTIVITIES IN INTERNATIONAL LAW (1959).
the respective state judiciaries to fairly determine whether a grant of sovereign immunity is proper in a specific case. Second, it provides a state contemplating certain activities within a foreign state fair notice of those situations in which that state's courts will not accept the affirmative defense of sovereign immunity. In addition, it provides notice to those in the forum state who are involved in some activity with a foreign state as to the latter's liability should a default, breach, or other problem arise. Finally, the various legislative enactments as supplemented by judicial interpretations have propelled the law of sovereign immunity further into the restrictive approach.346

B. The Implications of The Unified Western Approach

There are four major consequences of the unified Western approach to sovereign immunity.347 First, a unified approach among West European States is continued evidence of a determination to work together in international commerce. Second, the willingness to forfeit some sovereignty in the area of foreign judicial enforcement of claims against the state according to the procedures set forth in the European Convention is evidence of the trust and confidence that the submission to a supra-national authority has attained. Third, with the codification of the FSIA and the passage of the State Immunity Act, the Western powers now have a unified approach on the issue of sovereign immunity.348 Finally, it encourages the nations of the Third World that continue to observe the absolute school349 to reconsider their policy for retaining this approach. This is important because of the increasing trend of Western multi-national organizations towards the establishment of commercial arrangements in Third World countries. If these states are unwilling to accept liability for breaches of commercial transactions, Western companies may invoke sanctions against these states by refusing to invest or withdrawing current investments. This uniformity can promote the attainment of interna-

346. However, there is evidence to show that the State Immunity Act remains somewhat protective of sovereign immunity. See note 235 supra.
347. See Sovereign Immunity, supra note 3, at 132, 140.
348. Id.
349. Id. Whether it is actually to the benefit of the less developed countries to adopt the restrictive view of sovereign immunity remains a serious question. The recent official statements of the developing nations seems to reject the restrictive approach. In the United Nations Resolution on Permanent Sovereignty over Natural Resources, G.A. Res. 3171, 28 U.N. GAOR, Supp. (No. 30) 52, U.N. Doc. A/9030 (1973), and The New International Economic Order, G.A. Res. 3202, 6 U.N. GAOR, Special Supp. (No. 1) U.N. Doc. A/9559 (1974), the developing nations strongly affirmed their support for strengthening sovereignty which is quite similar to the pronouncements made by the western powers in the 19th century. Because these states feel that they have permanent sovereignty over their natural resources, limiting their sovereign control over these resources to the developing nations is an unacceptable concession. Thus, the FSIA, State Immunity Act and the European Convention can be interpreted by the Third World Countries as having potentially irreparable harm to their sovereign authority. See Sovereign Immunity, supra note 1, at 231-32.
tional agreement on a sovereign immunity treaty which would abolish the absolute approach in favor of the restrictive approach for all nations.

VII. CONCLUSION

This Comment has examined four major issues affecting the international approach to sovereign immunity. The discussion has focused on the recent trend of the English courts away from the absolute approach of sovereign immunity toward adoption of the restrictive approach of sovereign immunity. These decisions\textsuperscript{350} manifest willingness to assert judicial independence in the arena of international legal disputes. This judicial attitude appears to have been a major impetus in the recent passage of the State Immunity Act.\textsuperscript{351}

With its passage, the British Parliament became the last Western power to accept the restrictive theory of sovereign immunity. The British now have a comprehensive statute which addresses every major aspect of the sovereign immunity issue. Although the British have not formally ratified the European Convention on State Immunity, there has been a \textit{de facto} ratification in the form of the State Immunity Act. The parties to this Convention have another member which has accepted the logic of lowering the shield of sovereignty in order to enable private litigants and other states to obtain judicial resolution of acts \textit{jure gestionis}. The British are in accord with the Western states on the subject of sovereign immunity. Although several possible ramifications of a unified Western approach have already been suggested, it is clear that the law of sovereign immunity remains a dynamic issue among legal academicians as well as among the states that comprise the international system.

\textit{Robert K. Reed}

\textsuperscript{350} Previous to the action of the Privy Council in The Philippine Admiral, [1977] A.C. 373, the absolute approach of sovereign immunity was firmly entrenched as British law. It was not until after \textit{Trendtex}, [1977] 1 Q.B. 529, that Parliament passed the State Immunity Act. Although it is impossible to prove the actual effect these decisions had in the decision to adopt the restrictive approach, it is a reasonable assumption that they did have some impact.