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Sucharitkul: State Immunities and Trading Activities

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BOOK REVIEW

State Immunities and Trading Activities. By Sompong Sucharitkul. New York: Frederick A. Praeger, Inc., 1960, pp. xliv, 390. $10.

One of the subjects which is demanding a great deal of attention from lawyers today, in the ever expanding field of commercial activity, is the legal protection of private commercial interests against foreign States in international trade. Recent international incidents like the nationalization of Dutch interests by the Republic of Indonesia and the expropriation of American property by the Cuban Government, together with the needs of underdeveloped countries for foreign capital, have prompted special consideration of the problem of procuring adequate protection for private investment in foreign nations. Here the difficulty originates from the sovereignty of the State over persons and property within its own territory in conjunction with the State's immunity from the jurisdiction of international tribunals without its express consent.

Our era of Communist and socialist States has also given rise to another problem of great importance, namely, the security of private business interests against foreign States in commercial transactions within their own home States. Commercial activity between foreign States and private traders has become very common. Here the difficulty arises from the immunity granted under classical international law to one sovereign State from the municipal jurisdiction of another. This immunity caused no great hardship in an age when State transactions abroad were generally confined to the activities of diplomats, consuls, armies and warships; it presents an entirely different picture when claimed by many modern States with respect to their commercial transactions. It is this second problem of the trading State's immunity from the jurisdiction of foreign municipal courts to which Dr. Sucharitkul has addressed himself in this book.

State trading, Dr. Sucharitkul points out, is now a commonplace in world commerce. Although States are engaging in trade in the same manner and to the same extent as private persons and corporations, State traders have nevertheless claimed and have been accorded certain privileges not available to the latter. Among these privileges is the formidable doctrine of State immunity, in virtue of which States may exempt themselves from the jurisdiction of foreign courts which are otherwise competent under the ordinary rules of private international law. The application of this doctrine to commercial activity carried on by organs of government has given the State trader an unfair competitive advantage vis-à-vis private merchants and trading corporations. The sovereign immunity principle also precludes effective recourse against foreign State traders in domestic courts for breach of contract.

In view of these inequities it is clear, Dr. Sucharitkul argues, that in connection with commercial activities the doctrine of State immunity needs a re-examination, especially in the light of the current judicial and govern-

mental practice of States. This revaluation is particularly necessary for persons and corporations dealing directly with foreign States to enable them to predict, with some measure of certainty, the prospect of justiciability and the extent of enforcement of actions against State traders in the event of a breach of a contractual obligation or tortious liability.

The principles of international law regarding jurisdictional immunities of States have derived mainly from the judicial practice of individual nations. American courts were the first, in point of time, to formulate the doctrine of State immunity. Chief Justice Marshall clearly enunciated the principle in *The Schooner Exchange v. McFaddon.*[1] Thereafter the recognition of State immunity became firmly established in the general practice of the majority of modern European States as well as in the United States. But, as Dr. Sucharitkul points out, the nineteenth-century doctrine of sovereign immunity was applied to cases where the foreign State was acting in its sovereign capacity and not as a trader.

After World War I, however, the courts began to apply the principle of State immunity to the commercial activities of foreign States. Dr. Sucharitkul, employing the techniques of comparative law in a study of the judicial and governmental practice of the leading trading nations, reveals how the immunity rule was thus broadened during this period. The immunities of public vessels, which were originally granted to ships of war, were extended to all kinds of public ships, including State-owned and/or State-operated vessels employed in commercial activities. This wider ambit of the sovereign immunity doctrine was accepted in the United Kingdom, the United States, Germany and the Netherlands, among others. In these nations foreign State-owned merchant vessels were generally granted absolute immunity from the jurisdiction of domestic courts.

The obvious advantage thus accorded foreign State-controlled merchant ships has led to a gradual abandonment of the absolute immunity principle. In the United States, for example, the distinction between *acta imperii* and *acta gestionis* of foreign governments has been adopted and refuses immunity in respect of *acta gestionis*, that is, acts of an essentially non-governmental nature, including the use of public vessels for commerce. That foreign State-controlled merchant ships are now amenable to the jurisdiction of American courts is clear from the decision of the United States Supreme Court in *Republic of Mexico v. Hoffman*[2] and from a recent statement of the State Department.[3]

The theory of restrictive immunity with respect to foreign public merchant vessels has also been incorporated into various international conventions. The Brussels Convention of April 10, 1926,[4] and two Conventions adopted on April 27, 1958, at the Geneva Conference on the Law of the

[1] 11 U.S. (7 Cranch) 116 (1812).

[2] 324 U.S. 30 (1945).

[3] In 1952, the State Department announced that it was the Department's policy to follow the restrictive theory of sovereign immunity. 26 Dep't State Bull. 984 (1952).

[4] 176 L.N.T.S. 199.

Sea[5] have affirmed that the position of government vessels operated for commercial purposes is to be assimilated, as far as possible, to that of private merchant vessels.

The restrictive theory of sovereign immunity has also been adopted by the rest of the nations of the world, with the notable exception of the United Kingdom. Dr. Sucharitkul concludes, therefore, that the restrictive theory is now declaratory of the general practice of States.

Dr. Sucharitkul devotes a chapter to the problem of the immunity of foreign State agencies engaged in commercial activity. This is also a matter of growing importance since many nations engage in foreign trade through State-controlled corporations and trade delegations in foreign countries. Here, too, current State practice is to refuse immunity to foreign government agencies engaging in trade, on the ground that these activities are *acta gestionis*.[6]

The author also considers, briefly, some other problems which are related to the current tendency to assimilate the position of trading States to that of ordinary private traders. These include the seizure and attachment of the property of foreign States within the jurisdiction, the service of process, the incidence of costs and counterclaims against foreign governments. Many nations are still reluctant to subject the foreign State trader to these legal procedures. For example, in the United States, as in most other countries, the courts have consistently refused to allow the attachment of foreign State property to satisfy a judgment.[7] This situation should be corrected, the author argues, in order to guarantee an effective remedy from the point of view of the individual plaintiff.

Dr. Sucharitkul's final conclusion, with which this reviewer heartily agrees, is that the only hopeful approach to the problem of jurisdictional immunities of States in regard to trading activities is to look upon foreign State traders as ordinary private merchants. This means, in effect, the denial of immunity in all cases of State trading. The author sees codification by the United Nations International Law Commission as the best way to secure this objective. Pending codification, he urges national courts to continue to take the initiative to limit immunity in cases of State commercial activity.

One might object to the arrangement of some of the materials in this book on the score that it leads to some overlapping in treating various aspects of the question, but this study makes a valuable contribution towards the solution of a very difficult problem in the field of commercial activity. The author has achieved his objective—the clarification of existing legal

[5] Doc. No. A/CONF.13/L.52; Doc. No. A/CONF.13/L.53 and Corr. 1.

[6] United States practice, subjecting foreign State trade agencies to local jurisdiction, is reflected in court decisions. Hannes v. Kingdom of Roumania Monopolies Institute, 260 App. Div. 189, 20 N.Y.S.2d 825 (1940). The current treaty practice of the United States also provides for submission to the jurisdiction of domestic courts. Treaty of Friendship, Commerce and Navigation with Israel, Aug. 23, 1951, art. 18(3), T.I.A.S. No. 2948.

[7] Dexter and Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930).

principles with respect to State immunity and trading activities. Persons and corporations, in the United States and elsewhere, can now transact business with foreign State traders with certain knowledge of their legal rights and remedies. To this extent the rule of law has made a significant advance in an area of world trade which had been long beset by confusion and irresponsible action.

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