THE APPLICATION OF THE DOCTRINE OF FOREIGN SOVEREIGN/STATE IMMUNITY TO PUBLIC CORPORATIONS

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A. INTRODUCTION

In civil actions, a sovereign state is, without its consent, immune from the jurisdiction of the courts and tribunals of another sovereign state. Accordingly a sovereign state cannot, against its will, be impleaded either directly by being served in personam or indirectly by proceeding against its property in the courts of another sovereign state. This is the result of the application of the doctrine of foreign sovereign/state immunity, which is based on international law[1] but which is also engrafted in the domestic laws of many states. The specific application of the doctrine depends on whether the state of the forum adheres to a restrictive or limited theory of immunity or still clings to the absolutist version of immunity.[2]

However, the proliferation of governmental or state activities and operations, a process or phenomenon which began in the last century but has increased greatly in the course of the present one[3] and has blurred the once hallowed distinction between private and public powers[4], has given rise to new forms of public administration and organisation. The public corporation[5] is a prominent example of these new forms. In slightly different construction, Blakeney reports on this development as follows:

> "Governments which only a few decades ago contented themselves with a very narrow field of activity are today branching forth into new and very different avenues of public service. This broadening of the scope of governmental activities has led to the evolution of new types of public administration. One of the new types which has found increasing favour in recent years has been the crown corporation" 6

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Public corporations (or crown corporations as they are referred to in some jurisdictions[7]) are engaged in a plethora of activities, ranging from banking and insurance, oil production, manufacturing, transportation and communications, electric power generation, mining, retail and wholesale trade to research and management, administrative, supervisory and regulatory activities. While the activities and operations of some of the public corporations are confined to national frontiers and do not intrude[8] into the legal domain of other states, there are many whose activities and operations transcend domestic frontiers and spill over into the international arena. Thus Air Canada is authorised "to carry on its business throughout Canada and outside Canada"[9]; the Canadian Broadcasting Commission has power "to make contracts with any person within or outside Canada in connection with the production or presentation of programmes originated or secured by the corporation",[10] and one of the purposes for which the Canadian Overseas Telecommunications Corporation is established is "to establish, maintain and operate in Canada and elsewhere external telecommunication services for the conduct of public communications".[11] These are just Canadian examples. Others may be found respecting public corporations established or set up by other states.

Not unexpectedly, public corporations in their transnational activities, transactions and dealings enter into contracts and other legal relationships, may commit torts and other breaches of the law and generally come into contact with a wide range of persons, natural and juridical. Needless to say disputes and misunderstandings requiring adjudication by courts and tribunals of the forum state are inevitable. A problem then arises as to whether, and to what extent, public corporations, being public institutions, can partake of the protection, privilege or immunity afforded by the doctrine of foreign state immunity.

In this paper I will examine and analyse the judicial response and legislative reaction to the problem just adverted to primarily in the context of common law jurisdictions and also add my own thoughts to the subject. Whereas there is an overwhelming amount of legal literature on the general subject of foreign state immunity, no significant inquiry has, in recent years, been made into the problem identified above. It is hoped that this paper will to some appreciable extent help fill that gap.

B. THE PUBLIC CORPORATION

1. Private and Public Corporations Distinguished

Public corporations, the subject of this paper, must at the outset be distinguished from large, widely-held or super-corporations, operating in the private sector but which are also sometimes referred to as public corporations.[12] It has been claimed that there is little to distinguish between public corporations and the giant private corporations; that both types of corporation perform vital societal functions, make decisions of national importance, and set policy in significant areas of concern, for example, the allocation of resources, the direction and nature of investment; and that in a real sense the giant private corporations are arms of the state.[13]

I do not intend to pronounce on the soundness or otherwise of these propositions or claims. I will only observe that there are sufficient grounds for a separate treatment of the two types of corporation.[14] In any event, on the basis of available legal material, no giant private corporation has attempted to claim the benefit of the doctrine of foreign state immunity. Giant private corporations are therefore outside the province of this paper.

2. Definition of Public Corporation

It has been rightly pointed out[15] that a precise definition of the term 'public corporation' is far from easy and that little attempt has been made to give a general definition. However, that should not deter one from trying to provide a working definition of the term. Indeed a number of authors and writers have endeavoured to define a public corporation. Gower[16] defines a public corporation as "... the type of body set up to operate nationalized industries or for the organization of other public enterprises and services."[17] This definition is of minimal value in those jurisdictions where nationalisation has not been as big or controversial an issue as it has been in Great Britain. Loxley and Saul understand public corporations to be "... those organizations which fall outside the main lines of departmental and ministerial heirarchies and which have in consequence, some measure of quasiautonomy in their day-to-day activities (though of course all are ultimately tied up into the centralised decision making process)."[18] To Turkson public corporations are "... corporate bodies which have been established by parliament under legislation outside the framework of the companies code..."[19] Limitations must be placed on this definition because there is nothing to prevent a government from establi-

shing a public corporation within the framework of a companies or corporations code. In fact in Canada, a number of public corporations[20] have been incorporated under the provisions of the Canada Business Corporations Act or its predecessors.

Friedman[21] outlines, in lieu of a definition, what he calls the universal legal characteristics of the public corporation. Some of these characteristics are as follows:22

(i) The public corporation is normally created by special statute or (exceptionally) by charter. It does not, like a commercial company, come into existence automatically, on fulfilment of certain conditions.23

(ii) The public corporation has no shareholders, either private or public. Its shareholder, in a symbolic sense, is the nation represented through Government and Parliament.

(iii) The responsibility of the public corporation is to the Government, represented by the competent Minister, and through the Minister to Parliament.24

(iv) The administration of the public corporation is entirely in the hands of a Board which is appointed by the competent Minister, sometimes after and mostly without consultation but invariably not on a basis of representation of special interests. Neither the Board nor any employees of the Board are civil servants.

(v) The public corporation has the legal status of a corporate body with independent legal personality.

(vi) All public corporations are supervised by independent accounting and auditing as well as some form of public control. But the type of accounting and public control varies according to the type of public corporation.

(vii) All public corporations have a dual nature; they are instruments of national policy but they are autonomous units, with legal independence and certain aspects of commercial undertakings. The degree of independence varies, the public corporation. 25

A statutory definition of a public corporation is provided in section 61(1) of the Canadian Financial Administration Act[26] as follows:-

> " 'crown corporation' means a corporation that is ultimately accountable, through a Minister, to Parliament for the conduct of its affairs, and includes the corporations named in schedule **B27**, schedule **C28**, and schedule D"29

This definition has been condemned for uncertainty,30 ambiguity and confusion.[31] Ashley and Smails[32] reject this definition because the expression "through a Minister" which appears in the definition leaves one wondering whether the responsible Minister has a responsibility for the conduct of the corporation or whether he acts merely as a messenger or reporting link to Parliament for the public corporation. The true position is that the Financial Administration Act (FAA) and the constituent statutes of the corporations vest considerable powers in the appropriate Minister. These powers imply a greater role and responsibility than simply a reporting link.[33]

Further, the Privy Council office[34] reported some confusion surrounding the term 'crown corporation' owing to the statutory definition quoted above and that this confusion stems from the fact that the statutory definition is not exhaustive, since one must look beyond the FAA to determine what are crown/public corporations. This criticism is generated by the use of the word "includes" in that definition. To remedy the situation and remove the ambiguity, the government proposed that the term 'crown corporation' should be applied only to those corporations listed in the schedules to the FAA[35] and that a corporation could be added to the schedules and thereby become a crown corporation only if it were wholly-owned by the Government of Canada.

The above criticisms of the statutory definition of a public corporation are not without validity but the basic flaw in the statutory definition is that it is silent on two of the fundamental characteristics or attributes of the public corporation. In the first place, a public corporation is an instrument of broad national or public policy. The policy varies from state to state and from corporation to corporation. As instruments of broad national policy, public corporations discharge a multitude of public duties and perform public functions of many kinds. In the second place, a public corporation is wholly-owned by the respective government or governments in the sense that no proprietary or other ownership rights and interests in the corporation are in the hands of private individuals or institutions. Although 'joint ven-

ture' or 'mixed enterprise' corporations[36] are not public corporations in the strict sense, they may, in some jurisdictions and in given circumstances, be regarded as such.

The other fundamental attributes of a public corporation are that it is financed through public sources, is subject to public control and is a body corporate. A public corporation may, therefore be defined as a body corporate which is wholly-owned (or substantially owned) by a government or governments and is an instrument of broad national or public policy. It is basically financed by the parent government or governments and is subject to public control, direction and guidance at two levels - cabinet or Ministerial and Parliamentary.[37]

3. Juridical Forms or Public Corporations

Public corporations take mainly two juridical or legal forms, depending on the mode of their creation.

(a) Statutory Corporations

These public corporations are created by specific Acts of Parliament. The incorporating statutes spell out the objectives, powers and other mundane matters incidental to the operation of the corporations and generally provide for the organisation of the corporations. Statutory corporations pass under various names and titles - Boards, Commissions, Councils and Authorities. They form the bulk of public corporations.

(b) Public Corporations incorporated under a companies or corporations Act or Code

These corporations differ from statutory corporations in that they are not created by specific Acts of Parliament but are incorporated under a companies or corporations Act or Code. A statutory corporation may, by its constituent statute, be authorised to procure the incorporation of a corporation or corporations falling within this category.[38] Nationalised companies also fall under this category.

C. THE DOCTRINE OF FOREIGN STATE IMMUNITY

1. The Doctrine as an Exception to the Principle of Territorial Sovereignty.

Within that defined portion of the surface of the globe known as state territory, a state has exclusive and unlimited jurisdiction. Whatever person or thing is on, or enters, that territory is in principle subject to the supreme authority of

the state. This is referred to as the principle of territorial sovereignty and was admirably re-stated by Lord McMillan in the English case of Compania Naviera Vascongado v ss Cristina[39] in the following words:

> "It is an essential attribute of the sovereignty of this realm, as of all sovereign independent states, that it should possess jurisdiction over all persons and things within its territorial limits and in all causes civil and criminal arising within these limits".

The doctrine of foreign state immunity stands as one of the reservations or exceptions to the principle of territorial sovereignty. It should also be pointed out that the general rule that a foreign sovereign state is not suable in the domestic courts of other sovereign states is concerned exclusively with a foreign state's personal immunity from the jurisdiction of domestic courts of the forum state; it is not concerned with the substantive law to be applied to foreign states[40] nor is it concerned with the issue of a foreign state's immunity from execution. The distinction between immunity from jurisdiction and immunity from execution has long been recognised.[41]

2. The Justification for Foreign State Immunity

The basis and justification for the doctrine of foreign state immunity are to be gathered from the maxim "Par in parem non Habet imperium" (each state must respect the dignity, equality and independence of another state). According to this maxim the assumption, by the forum state, of jurisdiction over foreign states is contrary to their dignity and as such inconsistent with international courtesy and the amity of international relations. Indignity is inflicted upon a state by making it a defendant in an action; it is beneath the dignity of a foreign sovereign government to submit to the jurisdiction of an alien court and no government should be faced with the alternative of either submitting to such indignity or losing its property in default of appearance.[42] In the American case of French Republic v Board of Supervisors of Jefferson County[43] the Kentucky court of appeals had this to say:-

> "... if one nation enters the territory of another with its consent, for the purposes of mutual intercourse, it does so with the implied understanding that it does not intend to degrade its dignity by placing itself or its sovereign rights within the jurisdiction of the other ..."

It is also said that one of the consequences of independence and equality[44] of states is the duty of municipal courts to abstain from exercising their jurisdiction over foreign states.[45] All states are independent and equally sovereign and therefore no state is amenable to the courts of another.

3. The 'Two Version' of Foreign State Immunity

As was intimated in the introduction to this article, there are two versions or theories of foreign state immunity in vogue, the absolute and restrictive or limited versions. A number of states, notably the socialist block countries,[46] some states of Latin America,[47] Japan and the Philippines[48] still adhere to the doctrine of absolute immunity. Others,[49] constituting the majority, and including the major common law jurisdictions[50] follow the restrictive version of foreign state immunity.

(a) Absolute foreign state immunity

As originally evolved the doctrine of foreign state immunity admitted of only a few exceptions,[51] though the exact scope of the exceptions remained uncertain.[52] Save for the few exceptions, a sovereign state was insulated from the jurisdiction of courts of the forum state in all its acts.[53] In this respect, the doctrine as initially formulated has been referred to as the doctrine of absolute foreign sovereign-/state immunity in contrast to the modern doctrine of restrictive, relative or limited immunity.

The absolute version of state immunity is attributed[54] to the earlier cases of The Schooner Exchange v M'Faddon,[55] The Parlement Belge[56] and The Porto Alexandre.[57] This attribution is startling especially in view of the fact that the doctrine of foreign state immunity is but an exception to the principle of the exclusive and absolute territorial sovereignty of each and every independent state. It has been demonstrated that these cases did not purport to lay down a principle of absolute immunity.[58] In the words of Badr,[59] "the continued citation of those early decisions in support of the absolute theory of state immunity is therefore a curious phenomenon, due perhaps to a hasty perusal of those decisions or to second hand knowledge of them".

(b) Restrictive foreign state immunity

The basic premise of the modern doctrine of restrictive immunity is that commercial activities of a foreign state do not attract immunity.[60] Accordingly immunity is available in respect of so-called sovereign, public or governmental acts of

a foreign state (acts jure imperii), but is not available respecting non-sovereign, commercial or private acts of a foreign state (acts jure gestionis).

The precise origin of this modern doctrine, which has, to a large extent, replaced the absolute doctrine or version of state immunity are not very certain. Professor Lauterpacht[61] suggests that the modern doctrine has its origins in Germany, in the 18th century, in the relations of the numerous German states and principalities. Badr[62] contends that Belgian case law pioneered the restrictive doctrine in the 1840s and Von Mehren[63] merely states that by the end of the 19th century the absolute nature of the doctrine had been eroded. What is clear, however, is that the doctrine or rule of restrictive immunity has found a place in a great number of cases,[64] a Tate Letter,[65] multilateral conventions,[66] Acts of Parliament,[67] works of learned bodies,[68] not to mention writings of reputed academics and jurists.

The rule of restrictive immunity is the result of the encroachment, by states or governments, upon many forms of activity not traditionally within their sphere. The principle of absolute immunity as originally applied by the courts was intended to cover the so-called political activities of the state and has therefore become obsolete and productive of injustice and inconvenience at a time when the operations and activities of the state are increasingly extending into commercial, industrial and similar spheres.[69] The purpose, therefore, of the restrictive doctrine is to try to accommodate the interests of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hindrance of defending the propriety of such acts before foreign courts.[70]

It has been noted that the restrictive theory of state immunity seeks to draw a distinction between acts of a state which are done jure imperii and acts done by it jure gestionis and accords the foreign state no immunity either in actions in personam or in actions in rem in respect of transactions under the second head. When therefore a claim is brought against a state and state immunity is claimed, it becomes necessary to consider what the relevant act is which forms the basis of the claim, with a view to ascertaining whether it is an act jure gestionis or an act jure imperii.[71] But how is one to distinguish governmental, public or sovereign acts from commercial or private acts of a state? Is this not an attempt to apply the outmoded test of 'proper' or 'true' governmental functions? Is the distinction realistic? Does not the expansion of governmental activities imply a corresponding widening

of of the reach of public or governmental purposes? These questions have not escaped the attention of judges[72] and the critical eye of academic writers.[73]

Professor Lauterpacht refers to the distinction between acts jure imperii and acts jure gestionis as "the distinction which experience has proved to be impracticable and productive of uncertainty."[74] The distinction is far from clear or easy to apply, incoherent and unworkable.[75] And Friedman adds:

> "The difficulty is how to find a reasonably precise distinction between acts of the one and the other kind in view of the many diverse ways in which governments may engage in economic and commercial activities. For this reason, neither the functional test (Does the state act in its sovereign capacity?) nor the test of the form of the transaction is satisfactory. Any government activity may fulfil 'sovereign' purposes." (emphasis added).[76]

Various criteria have been offered for distinguishing between sovereign, public or governmental and non-sovereign, private or commercial acts of a state viz; 'nature of the dispute'[77] 'intrinsic nature of the transaction or act'[78]; 'purpose of the act'; 'hard core of an irreducible minimum of government activities';[79] 'strictly political and public acts about which sovereigns have traditionally been sensitive';[80] and 'lack of any extra-territorial effects.'[81] These criteria or tests miss what I perceive as the fundamental problem. The fundamental problem is not inability to define a commercial transaction, act or activity,[82] nor any other type of transaction, but to appreciate the process by which an economic, trading or commercial activity of the state ceases to be a public, governmental or sovereign act of that state, for as the US Supreme Court in Berizzi Brothers v Steamship Pesaro argued:

> "We know of no international usage which regards the maintenance and advancement of economic welfare of the people in time of peace as any less a public purpose than the maintenance and training of a naval force" 83.

In truth, therefore, a sovereign state does not cease to be a sovereign state simply because it performs acts which a private person might perform. "The concept of acts jure gestionis, of commercial, non-sovereign, or less essential activity, requires value judgments which rest on political assumptions as to the proper sphere of state activity and of priorities in state policies.[84] There is no international agreement on the issue of the proper ambit of sovereign autho-

rity".[85] Some economists would consider an extensive public sector as a necessary step forward for developing countries. Thus in a real sense all acts jure gestionis are acts jure imperii and the distinction between the two has no place in logic, politics, law or simply good sense.

If any distinction must be made, it must be between commercial and non-commercial activities of the state. This avoids the infamous and fallacious criterion of sovereignty, but even this distinction would make little sense to a victim of foreign state delinquency.

Evidently, neither absolute nor restrictive immunity commands universal support in the international community,[86] but the emerging trend is a movement away from absolute immunity to restrictive immunity.[87] Most likely the principle of reciprocity[88] will drive those states still adhering to absolute immunity towards a restrictive path.

Despite the criticism levelled against it, the doctrine of restrictive immunity is salutary in the one sense that its opens the door to intending or potential local plaintiffs in respect of the so-called private or commercial activities of the state in general and its agencies in particular. It is in this sense, and this sense only, that one must appreciate the remarks of the court in Trendtex Trading Corporation v Central Bank of Nigeria[89] that the modern principle of restrictive immunity is consonant with justice, comity and good sense.

D. APPLICATION OF THE DOCTRINE OF FOREIGN STATE IMMUNITY TO PUBLIC CORPORATIONS

1. Judicial Response

The origins of the doctrine of foreign state immunity are far from clear,[90] but it may be noted that at the time of its evolution, public corporations had not made their debut and it may be assumed that these corporations were never contemplated as possible objects of the doctrine. Marshall C J in The Schooner Exchange v M'Faddon,[91] a case often cited as the origin or classic formulation of foreign state immunity[92] only mentioned a personal sovereign or head of state and his "sovereign rights" as being immune from the jurisdiction of the courts of the forum state.[93] He did not refer to agencies or instrumentalities of the foreign state. It is therefore interesting to see how the doctrine of foreign state immunity has been applied, by the courts, in common law jurisdictions to public corporations.

(a) Immunity granted

The doctrine of foreign state immunity has been applied, by the courts, to public corporations, by a clumsy process of identifying the corporations seeking immunity from suit with the the parent states or governments. In this regard a public corporation has been variously described as an 'emanation', 'arm', 'alter ego', 'organ' or a 'department', 'mere instrument', or 'part and parcel' of the respective government or state.[94] Some cases will serve to illustrate this development.

In the English case of Baccus S R L v Servicio Nacional del Trigo,[95] the defendant was a public corporation set up by the Spanish government and engaged in the regulation of production and distribution of wheat and similar products. It was under the supervision and control of the Spanish Ministry of Agriculture. The plaintiff was a limited company formed under the laws of Italy and carrying on business there. The plaintiff and defendant entered into two cif contracts, with a clause for arbitration in London, for the sale by the defendant to the plaintiff of a specified quantity of rye. When disputes subsequently arose, the plaintiff issued a writ claiming damages for breach of contract.

Subsequently a summons was issued on behalf of the defendant praying that all further proceedings in the action be stayed and that the writ and statement of claim be set aside on the grounds that the defendant was a department of the state of Spain and entitled to sovereign immunity. It was specifically argued on behalf of the defendant that a legal entity is not necessarily separate from the state and that there can be a department of state which is incorporated; that it does not thereby cease to be a department of state and that if it is a department of state which is incorporated, there must be a right to claim sovereign immunity if it is impleaded.[96]

The court of appeal upheld the defendant's arguments and held that the defendant was a department of the state of Spain notwithstanding that it was a corporate body and a separate entity (public corporation) and was, therefore, entitled to claim immunity in English courts. In the words of Parker L J, "there is no ground in English law for thinking that the mere constitution of a body as a legal personality with rights to make contracts and sue and be sued is wholly inconsistent with its being a department of state".[97]

Mellenger v New Brunswick Development Corporation[98] involved a claim of immunity by a Canadian public corporation, the New Brunswick Development Corporation, in English courts. In that case, two industrial consultants, the intended plain-

tiffs in an action against the corporation, applied for leave to issue the writ and serve notice of it on the corporation outside jurisdiction. The writ claimed a substantial amount of money as commission alleged to have been payable to the consultants for effecting a business transaction leading to the establishment of a chipboard plant in New Brunswick. A conditional appearance was entered on behalf of the corporation, which opposed the application alleging, inter alia, that the corporation was an 'arm' of the government of New Brunswick, one of the Canadian provinces, and as such entitled to immunity from suit in a foreign country.

The court of appeal sustained the contention, holding that the corporation was an 'arm', 'alter ego' or 'part and parcel' of the sovereign state and therefore entitled to immunity from suit in English courts.

The American case of re Investigation of World Petroleum Arrangements[99] involved a semi-public, joint venture or mixed enterprise corporation, the Anglo-Iranian Oil Co., Ltd. In that case a special grand jury had been convened in the District of Columbia to investigate possible violations of U S Federal anti-trust laws. Subpoenas duces tecum were served on various oil companies including Anglo-Iranian Oil Co. Ltd., (now BP). The British government had a capital investment of approximately 35% of the total capital in the company and dominated the ownership of the 'ordinary shares' which carried with them the greater proportion of voting rights and thus controlled the company. The company filed a motion to quash the subpoena served on it on the ground, inter alia, that as an instrument of the British government, it was immune from the jurisdiction of US courts.

The court was of the view that the company was indistinguishable from the British government and held that the immunity of the British government extended to the company. The court based its decision on the fact that the company was controlled by the British government and that it performed a fundamental government function, namely, ensuring a proper supply of petroleum, crude oil and other products for the British Navy. According the subpoena was quashed.

The court also made the strange remark that in determining whether or not a given corporation is an instrument of its government and therefore entitled to shelter under the protective umbrella of immunity, it is not material whether the government owns all the stock, none of the stock (emphasis added) or only part of the stock. What is determinant is the nature of the functions performed by the corporation. But in reality mixed-enterprise corporations reflect such diversities in the extent of governmental ownership and control, the nature of functions they perform and the nature of the part-

nerships consumated that it might be appropriate to treat them separately from public corporations properly socalled. And a corporation in which the respective government owns no stock or other ownership interest is not, in terms of this article, a public corporation.

A pertinent question that must immediately be addressed is: How is one to determine whether a given public corporation is an 'arm' or 'alter ego', to take but two of the expressions, of the respective government or state? It is clear that no simple, precise, or satisfactory test is readily available or has emerged.[100]

One way of dealing with the question is to consider whether there is any clear indication in the constituent Act of the corporation as to its statutes vis-a-vis the respective government or state. In Mellenger v New Brunswick Development Corporation[101] the court treated the fact that the corporation was constituted "... on behalf of Her Majesty ..." as one of the grounds for holding that it was an arm or alter ego of the government. And in the Trendtex case the court noted that there was no clear expression of intent that the Central Bank of Nigeria, a public corporation, which claimed immunity in an action based on a Commercial Letter of Credit, should have governmental status. The problem with this approach is that express and unambiguous statutory provisions on this matter are rare.

Further guidance may be sought in the views of the government of which the corporation claims to be part and parcel. It has been held that a certificate of the ambassador or other appropriate representative of a state saying whether or not a body is a department, arm or alter ego of the state is of much weight.[102] It is weighty because the ambassador or other appropriate representative speaks, so it is assumed, with knowledge of his country and its laws, but inconclusive in the sense that he may apply tests which the courts of the forum state would not consider decisive. After all different countries have different ways of arranging their internal affairs and as Lord Denning pointed out the question under discussion does not depend on the foreign law alone.[103]

Other tests have been used,[104] but the test that has been most consistently applied by the court in determining whether or not a public corporation is an organ, arm, alter ego or department of the state is the "governmental function" test (does the corporation exercise governmental functions?).[105] In the Baccus SRL case[106], Jenkins LJ paid particular attention to the functions of the defendant corporation, namely the importation and exportation of grain for the Spanish Government in accordance with the directions of

the Spanish Ministry of Agriculture, and the policy from time to time laid down by the Spanish Government. He went on to say:-

> "Thus it seems to me that although their status was a corporate status, their functions were wholly those of a department of state .... In these days the Government of a sovereign state is not as a rule reposed in one personal sovereign: it is necessarily carried out through a complicated organization which ordinarily consists of different ministries and departments. Whether a particular ministry or department or instrument, call it what you will, is to be a corporate body or an unincorporated body seems to me purely a matter of governmental machinery. If it seemed good to a foreign state - let us say Ruritania possessed of a navy to put the affairs of the navy in the hands of a navy board let us say, the Ruritanian Navy Board - and to enact that the members for the time being of this board should constitute a juridical person or corporation for the purpose of doing all things necessary for the maintenance and efficiency of the Ruritanian Navy, it seems to me impossible to suppose that an action brought against the Ruritanian Navy Board could be held not to infringe the sovereign immunity of Ruritania because, simply as a matter of convenience and administrative machinery, the duties appertaining to the affairs of the Ruritanian Navy had been put in the hands of an incorporated body". **107**

Denning L J in the Mellenger case said of the New Brunswick Development Corporation "... It has never pursued any ordinary trade or commerce. All that it has done is to promote the industrial development of the province in a way a government department does ... In the circumstances it seems to me that the corporation is really part and parcel of the Government ..."[108]

From the foregoing discussion, incorporation is immaterial, and as long as the corporation carries on so-called governmental functions, it is an arm, organ, alter ego, part and parcel or whatever else it might be called, of the government. But it has already been pointed out that public corporations are public or governmental institutions and all their functions, economic, commercial or otherwise, as long as they are within their corporate powers, are public or governmental functions.

It is noteworthy that no clear legal principle emerges from the cases referred to above requiring or justifying the application of the doctrine of state immunity to public corporations. The expressions 'arm', 'alter ego', 'organ' and 'part and parcel' are not legal expressions or terms and do not convey the notion of a legal relationship. The only relationships of any legal consequence that could provide an avenue for applying state immunity to public corporations are those, not unfamiliar to the general law, of master-servant and principal-agent, but the facts seldom give support to the existence of such relationships between public corporations and the states or governments with which they purport to have the special relationship necessary to attract sovereign or state immunity.[109]

(b) Immunity denied

A different line of cases[110] has attempted to detach public corporations from the governments concerned and to deny immunity in the process. It is interesting to note that almost the same arguments and criteria as have been used to identify the corporations with the relevant governments, have also been utilised in seeking to detach the corporations from governments or states - clear indication in the statute, the degree of independence enjoyed by the body, nature of functions, control and incorporation. One is tempted to say, as was said of equity in the olden days, that the status of public corporations in this respect, varies with the size of the Chief Justice's foot.

In the Trendtex case, the Central Bank of Nigeria (the Bank) issued a Letter of Credit drawn on Midland Bank in London in favour of the plaintiff, a Swiss company, to pay for cement sold by the plaintiff to an English company. The bank assured the plaintiff that the Letter of Credit was reliable. The plaintiff purchased the cement, sold it to the English company and shipped it to Nigeria. The bank then refused to pay and the plaintiff brought an action on the Letter of Credit. The bank's defence was that, as an arm or department of the government of Nigeria, it was entitled to immunity. The court, rejecting the argument, held that the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, alter ego or department of the State of Nigeria and was therefore not entitled to immunity from suit. The court went on to say, that even if the bank were part of the Government of Nigeria, since international law now recognised no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature it was not immune from suit on the plaintiff's claim in respect of the Letter of Credit.

It is obvious from the Trendtex case that the court was applying the restrictive doctrine of state immunity, but it is also significant to note the criteria for the decision namely, "separate legal entity", "no clear expression of intent that the bank should have governmental status" and "ordinary commercial transaction". But the case could also have been decided in favour of the bank using the "nature of functions" and "control" tests since the bank had governmental functions in that it issued legal tender, safeguarded the international value of the Nigerian currency and acted as banker and financial adviser to the Nigerian government. Its affairs were under a great deal of government control and the government had power to overrule the bank's board of directors on monetary and banking policy and on internal administrative policy. In this connection the court made a subtle distinction between a body which is a government department in the guise of a bank and a body which is in truth a bank and to which execution of specific aspects of government control of finance has been directed and went on to decide that the bank belonged to the latter category.

United States v Deutsches Kalisyndikat Gesellschaft[111] involved a corporation formed and controlled by the French government for the purpose of exploiting potash mines in Alsace. It was held that a suit against the corporation was not a suit against the government merely because it had been incorporated by direction of the government and used as a governmental agent and its stock was owned solely by the government.[112] The ground for the decision, denying immunity, was that the corporation was a commercial concern. In Ulen & Co v Polish National Economic Bank,[113] a bank created by the Republic of Poland as a state institution, but as a separate legal person, whose stock was owned by the state, municipalities and state and municipal enterprises was held not immune from suit on interest coupons attached to the bonds issued by it and guarantted by the Polish government because it had commercial objectives and "since it is a person quite different from the Polish government." And Singleton L J in a dissenting judgment in the Baccus SRL case lamented:

> "I cannot find that it has been almost universally recognised that if a government sets up a legal entity, something which may contract on its own behalf as a limited company does in this country, it can succeed in a claim for sovereign immunity in respect of the activities of that company or entity."[114]

(c) Restatement of doctrine

Having considered instances where jurisdictional immunity has been accorded to public corporations and cases where the same has been denied it is now possible to restate the doctrine as follows:

> "The doctrine of foreign state immunity accords to a foreign state or government, its departments or other political subdivisions and to any corporation or other legal entity set up established, or acquired by that state or government which can be regarded as an emanation, arm, alter ego, organ, instrumentality or part and parcel of that state or government immunity from suit in the courts or tribunals of the state of the forum in respect of sovereign, public or governmental acts. No immunity is granted in respect of non-sovereign, private, or commercial acts of the state or government or bodies claiming thereunder."[115]

The legislative reaction to the problem of foreign state immunity and its application to public corporations will now be considered.

2. The Legislative Reaction

The legislative reaction to the problem under consideration is embodied, for example, in the European Convention On State Immunity, 1972 (ECOSI),[116] the United States Foreign Sovereign Immunities Act of 1976 (USFSIA), the United Kingdom State Immunity Act, 1978 (UKSIA), the Singapore State Immunity Act, 1979 (SSIA), the Pakistan State Immunity Ordinance, 1981 (PSIO), the South African Foreign States Immunities Act, 1981 (SAFSIA) and the Canadian State Immunity Act, 1982 (CSIA), hereinafter collectively referred to as the "seven instruments".

(a) The general approach of the seven instruments

All the seven instruments codify or adopt the restrictive theory of jurisdictional immunity in so far as that theory is premised on the dichotomy between acts jure imperii and acts jure gestionis.[117] The USFSIA simply defines a commercial activity or act (act jure gestionis) as "a regular course of commercial conduct or a particular commercial transaction or act".[118] This is augmented by the further provision that the commercial character of an activity shall be determined by reference to "the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose".[119] This definition is both flexible and expan-

sive[120] and applies the "nature of the act" test in determining whether an activity or act is commercial or otherwise. This test analyses a transaction in terms of its juridical nature[121] and affords immunity to a sovereign state or bodies claiming thereunder only when the juridical nature of the act is such that only a state can perform such an act. Commercial acts performable by private businessmen or institutions will be treated as commercial when performed by a foreign state (or a foreign public corporation). However, legislative, regulatory or other political acts of a foreign state will not be considered as commercial acts, even if such acts may have been motivated by economic or commercial considerations. "Only a government can legislate or regulate with the force of law and only a government can institute national policies and speak for the nation on an international level".[122] The CSIA defines a commercial activity or act in similar terms.[123]

The UKSIA, which was in 1979 claimed to be the most advanced codification of the law relating to foreign state immunity in existence,[124] is more specific in its definition of a commercial transaction, act or activity. It defines a commercial transaction as meaning:

> (a) any contract for the supply of goods and services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or 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. **125**

This definition "solves the issue of characterization in respect of two of the most frequent transnational activities of foreign states, namely, those arising out of contracts for the supply of goods and services and those relating to loans or similar financial transactions concluded by foreign states".[126] The SSIA, PSIA and SAFSIA which, with little modification, adopted the UKSIA,[127] define a commercial transaction in terms similar to those of the UKSIA.

The legal implication of the adoption of a restrictive approach to jurisdictional immunity is that commercial transactions, activities or acts, however defined, of a foreign state and more importantly of a foreign public corporation,

are carved out of the area of immune transactions, activities or acts. Consequently some of the cases decided prior to the passing of the relevant instruments, granting immunity to public corporations, have been deprived of legal authority and are no longer binding precedents in those jurisdictions in which they were decided. Baccus S R L v Servicio Nacional del Trigo[128] and Mellenger v New Brunswick Development Corporation[129] are examples of cases overriden by the statutory adoption of the restrictive theory of jurisdictional immunity. The former case involved a contract of sale of goods, an undeniably commercial transaction, while in the latter case the plantiffs' writ claimed a substantial sum of money as commission alleged to have been payable to them for effecting a business transaction leading to the establishment of a chipboard plant in New Brunswick.

Further, the seven instruments, provide, apart from the 'commercial activity' exception to jurisdictional immunity, a whole catalogue of proceedings in respect of which a state and bodies or entities claiming thereunder, outside any waiver explicit or implicit, are not entitled to immunity. Taking the UKSIA as an example, a foreign state is not immune as respects proceedings relating to:

(i) an obligation which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom,

(ii) a contract of employment between the foreign state and an individual made in the United Kingdom or where the work is to be wholly or partly performed in the United Kingdom,

(iii) death or personal injury or damage to or loss of tangible property caused by an act or omission in the United Kingdom,

(iv) any interest in or possession or use of immovable property situate in the United Kingdom or any obligation arising out the foreign state's interest in, or its possession or use of such property,

(v) any interest in movable or immovable property, being an interest arising by way of succession, gift or bona vacantia,

(vi) an alleged infringement in the United Kingdom of any patent, trademark, design or copyright registered or protected in the United Kingdom,

(vii) arbitration, where the foreign state has agreed in writing to submit a dispute to arbitration,

(viii) a foreign state's liability for value added tax , any customs or excise duty or rates in respect of premises used for commercial purposes, etc.

Plainly, the area of non-immune activities or proceedings has been significantly widened. A foreign state or more pertinently, a foreign public corporation can hardly claim jurisdictional immunity and this development is indicative of a substantial abandonment of the principle of immunity itself.[131]

(b) The seven instruments as they specifically apply to public corporations

(i) **The USFSIA and CSIA**

The provisions of the USFSIA and the CSIA, in this respect, are substantially in pari materia and to avoid a repetitive analysis, only the USFSIA will be considered.

The USFSIA applies to suits or proceedings against all entities defined as "foreign states". It defines a foreign state in section 1603, as including an "agency" or "instrumentality" of a foreign state. An agency or instrumentality is further defined, inter alia, as an entity "which is a separate legal person, corporate or otherwise, and which is an organ of a foreign state or subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof".[132] A public corporation, as defined in this article, falls squarely within this definition of an agency or instrumentality of a foreign state. It is an agency or instrumentality of the foreign state in that it is set up, established or acquired, and controlled by the respective state as part of its broad national or public policy and is charged with the discharge and performance of public or governmental duties and functions. It is a separate legal person in the sense that it is clothed with corporate personality. In fact in Carey v National Oil Corporation,[133] a case decided after the USFSIA had come into force, the court held that the Libyan National Oil Corporation, a corporation wholly owned by the Libyan government was indisputably a foreign state for jurisdictional purposes within the meaning of the USFSIA.[134]

Once it has been established that an action has been instituted against a public corporation answering the description of a 'foreign state', the remaining provisions of the USFSIA come into play for purposes of determining or ascertaining whether the action may properly be brought before the US courts. If the action is grounded upon a commercial transaction or falls within the exceptions enumerated in s1605, jurisdictional immunity is unavailable. If, in the most unlikely event, the action is based upon so-called acts jure imperii and is not otherwise covered by s1605, immunity is available to a public corporation. Thus in a sense, the USFSIA focuses the jurisdictional inquiry principally on the nature of the act, activity or transaction in respect of which proceedings are instituted, rather than the entity sued.[135]

(ii) The ECOSI, UKSIA, SSIA, PSIO and SAFSIA

One of the reasons why the UKSIA was enacted was to enable the United Kingdom to ratify the ECOSI[136] and the UKSIA in turn served as a model for the SSIA, PSIO and SAFSIA.[137] It is, therefore, not surprising that the provisions of the five instruments are substantially similar in their application to public corporations. Only the UKSIA will be analysed as the comments, arguments and contentions made in respect thereof are equally applicable to the other four instruments.

Unlike the USFSIA, the UKSIA embodies a presumption against jurisdictional immunity in case of public corporations, for a reference to a state does not include a reference to "any entity (referred to as a 'separate entity') which is distinct from the executive organs of the state and capable of suing and being sued".[138] A public corporation in the context of this paper, being a corporate personality is a separate entity and has by its definition capacity to sue and is liable to be sued in its corporate name.

However, a public corporation or 'separate entity' to use the language of the Act, is immune if "the proceedings relate to anything done by it in the exercise of sovereign authority, and the circumstances are such that a state would have been so immune."[139] It is not clear what is meant by the expression "in the exercise of sovereign authority" and as has been argued in this article, the characterisation or compartmentalisation of state activities based on the notorious criterion of sovereignty is illogical and must be emphatically rejected. As the Australian Law Reform Commission has observed, the expression just alluded to "has no precise meaning and may indeed be impossible to define."[140] What the expression could probably mean is that a public corporation may

plead immunity only to the extent that it acted on behalf of the state itself in cases in which the state could claim immunity.[141]

(c) The practical application of the doctrine of foreign state immunity to public corporations

In view of the extensive catalogues of proceedings in respect of which there is no immunity, it becomes necessary to ascertain whether, in practice, there is still room for the application of the doctrine of foreign state immunity to public corporations. This can best be done by examining the provisions of the seven instruments as they relate to the principal sources of rights and obligations which can result in claims before local courts against foreign public corporations. The principal sources are, contract, tort, ownership or possession of immovable property regardless of the mode of acquisition and statute law.[142]

It is notable that the seven instruments deny jurisdictional immunity to public corporations in relation to the principal sources of obligations or disputes.[143] In relation to obligations or disputes arising out of contract, however, the USFSIA and the CSIA do not specifically mention contracts as a source of obligations with regard to which there is no immunity but as has been pointed out,[144] this is only a matter of drafting technique, not of substance. The USFSIA defines a "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."[145] This definition covers a contractual obligation[146] especially in view of the additional provision that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose".[147] The Canadian definition is substantially similar and the same inference is to be drawn.[148]

With respect to obligations arising out of tort, lack of immunity relates only to claims of compensation for material or physical injury; non-material injury not connected to a material injury is not covered by the rule of no-immunity.[149] Examples of non-immune proceedings in respect of ownership or possession or use of immovable property include the following:

(i) proceedings against a public corporation concerning its rights in inmovable property in the forum state,

(ii) proceedings relating to mortgages whether the public corporation is mortgagor or mortgagee,

(iii) proceedings relating to nuisance,

(iv) proceedings arising from the unauthorised use of immovable properly including actions in trespass,

(v) proceedings concerning rights to the use of immovable property in the forum state, for example, actions to establish the existence or non-existence of a lease or tenancy agreement,

(vi) proceedings relating to payments due from the public corporation for the use of immovable property in the forum state, and

(vii) proceedings relating to liabilities of the public corporation as owner or occupier of immovable property situate in the forum state. **150**

Typical examples of obligations imposed by statute law which may give rise to proceedings against public corporations in respects of which public corporations may not claim jurisdictional immunity, are those related to patents and trademarks and those concerning taxation.[151]

Additionally, as has been pointed out, the UKSIA, the SSIA, the PSIO and the SAFSIA render the doctrine of foreign state immunity virtually inapplicable to a public corporation by the exclusion of such a corporation from the definition of foreign state.

Badr, in analysing the seven instruments, as they apply to foreign states observes that:

> "In view of the rather extensive catalogue of matters where the immunity rule does not apply, one is hard put to come up with instances where the local courts would have jurisdiction but would be barred from exercising it by virtue of the defendant foreign state's immunity."**152**

This observation is made in relation to a foreign state but is equally applicable to a public corporation since in claiming jurisdictional immunity a public corporation must assert a status analogous to that of the state itself or must establish a special relationship between itself and the parent state.

In practice, therefore, it is highly unlikely that claims to jurisdictional immunity by public corporations will succeed since most, if not all, of their extra-territorial activities fall within the non-immune area delineated by the seven instruments and further expounded in this article. In theory, however, a successful claim to jurisdictional immunity by a public corporation is not totally inconceivable. This calls for an analysis of the reasons, if any, for the continued application of the doctrine of foreign state immunity to these corporations.

E. REASONS FOR THE CONTINUED APPLICATION OF STATE IMMUNITY

It is now appropriate to determine whether there are any compelling reasons or legal principles requiring the application of the doctrine of foreign state immunity to public corporations, notwithstanding its theoretical application, in varying degrees, to such corporations, by the seven instruments. At first sight one might be tempted to suggest that the doctrine of jurisdictional immunity should not, in any form, be applied to public corporations and there are seemingly convincing reasons and arguments for such a suggestion.

1. Erosion of the Theoretical Underpinnings of the Doctrine Itself

It was intimated earlier in this article that the theoretical underpinnings of the doctrine of jurisdictional immunity are to be found in the dignity, equality and independence of sovereign states. However, time and events have eroded and falsified these very foundations of the doctrine. It is no longer necessary or desirable that state activity in all its forms be hedged about with special exonerations and be fenced off from the process of law by the attribution of perverse and inappropriate notions of sovereign dignity, equality and independence.[153] "Courts exist to apply the law to disputes before them in accordance with prevailing ideas of due process and fairness".[154]

The rule of immunity was evolved in the days when no action lay against the sovereign in any circumstances. It was thought to offend the dignity of a sovereign and to impinge on his independence if subjects were allowed to sue him in his own courts. Hence, the maxim, "the King can do no wrong". Likewise, he would be offended if he were sued in the courts of another country. Subsequently the personal immunities of the individual sovereign were extended to the sovereign state. But states have long vacated that position,[155] and therefore, the attempt to transpose into the international legal

domain, the traditional claim of a sovereign or a sovereign state to be above the law, appears very inappropriate and groundless. The dignity of foreign states is no more impaired by their subjection to the law of a foreign state than it is by their submission to their own law and courts. A state does not derogate from the dignity of another by subjecting it to the normal operations of the law on a footing of equality with the state within which it concludes a contract or commits a tort or legal wrong. It is in fact more in keeping with the dignity of a sovereign state to submit itself to the rule of law than to claim to be above it.[156]

The equality of states is not impaired if all states are suable in foreign courts. The factors which vitiate such equality - disparities in wealth, miltary prowess, levels of education, scientific and technological attainment, etc. - have nothing to do with the issue of states being liable to suit in alien courts. Independence of a state, in the sense of the right to exercise within its territory, and to the exclusion of any other state, the functions of a state,[157] is not negated by subjecting it to suit in a foreign court. Therefore, neither dignity, equality, independence of states nor international comity require vindication through a doctrine of immunity.

If jurisdictional immunity as a concept appears inappropriate in its application to states proper, its application to public corporations would logically be inappropriate.

2. The rule of Law and Considerations of Fairness

Another reason for not applying the doctrine of immunity to public corporations is that a claim to immunity is inconsistent with the concept of the rule of law, national and international, and is productive of unwarranted injustice. It has been pointed out that "... the object of international law ... is not to work injustice, nor to prevent the enforcement of a just demand...",[158] but a rule of immunity may appear to do just that. A consequence of the doctrine of immunity is that in protecting sovereign bodies from alleged indignities and disadvantages of adverse judical process, it operates to deprive the other persons of the benefits and advantages of that process in relation to rights which they possess and which would otherwise be susceptible of enforcement.[159] Take the Baccus case for example. The defendant public corporation agreed to sell a specific quantity of rye to the plaintiff. The contract contained a clause for arbitration in London. When disputes arose and the plaintiff issued a writ claiming damages for breach of contract, the defendant responded by hiding under the protective umbrella of immunity, with the court's blessing. How, then can we have a meaningful law of

contract when one party can abandon his obligations with impunity? Happily, the seven instruments have provided an answer to this particular question, but doubts still remain in other jurisdictions. Professor Lauterpacht highlighted the present concern in the following words:

> "At a period in which in enlightened communities the securing of the rights of the individual in all their respects, against the state has become a matter of special and significant effort, there is no longer a disposition to tolerate the injustice which may arise when the state - our own or a foreign state - screens itself behind the shield of immunity in order to defeat a legitimate claim ... a claim to immunity consists in an unwarranted - and often petty - refusal to satisfy what would otherwise be a good claim. It amounts, in fact, to a denial of justice ... It is this essential incompatibility of the doctrine of jurisdictional immunity with the principle of the subjection of the sovereign state to the rule of law, which explains the strength - we might say the vehemence - of the opposition to the maintenance of the doctrine." 160

Thus the doctrine of immunity as it applies to the state in general and to public corporations in particular would appear unjust and in conflict with the rule of law.

3. The Notion of Waiver

When a state sets up a public corporation with capacity to acquire, own and dispose of property, to contract, to sue and liability to be sued, not in the name of the state, but in its corporate name, that may in appropriate cases be taken as an indication that the state has waived immunity as far as the activities and operations of that corporation are concerned.[161] Any other inference, depending on the circumstances of the case, may lead to strange results. It would for example mean that employees in foreign offices of public corporations would not be able enforce claims for wages or salaries, that parties contracting with the public corporations outside their national jurisdictions would not be in a position to enforce such contracts and that victims of public corporation delinquency in foreign states would go without a remedy. The state would be taking away with one hand what it gave with the other.

Persons dealing or contracting with public corporations on the international plane legitimately expect that resultant disputes and controversies will be settled or resolved in the courts of the state of the forum without recourse, by public

corporations, to the obstructive principle of jurisdictional immunity. Other victims of public corporation delinquency have similar expectations. Singleton, LJ might have had this notion of waiver in mind when in a dissenting judgment in the Baccus case he lamented:

> "I cannot find that it has been almost universally recognised that if a government sets up a legal entity, something which may contract on its own behalf as a limited company does in this country, it can succeed in a claim for sovereign immunity in respect of the activities of that company or entity". 162

The foregoing discussion supports only a prima facie case for the non-application of the doctrine of jurisdictional immunity to public corporations. However, a closer analysis and examination would support the continued application of some form of restrictive immunity to states and consequently to bodies or entities, including public corporations, claiming under the respective states.

In the first place there appears to be universal agreement that a state is entitled to immunity with respect to some transactions,[163] though there is no corresponding agreement as to which transactions are immune and which are not. If a state is entitled to immunity in relation to a given transaction, then the legal form it adopts for the purpose of effecting that transaction is irrelevant. Thus one may not be justified in treating the decision of the government of a state, for its own reasons whatever these may be, to make one of its activities the province of a public corporation, as a waiver of immunity in the courts of other states.[164]

The aforesaid universal agreement is evidenced by the fact that no state has attempted to abolish the doctrine of jurisdictional immunity altogether.[165] This, coupled with the fact that some states, albeit the minority, still adhere to absolute immunity, militates against the assertion, for public corporations, a rule of no immunity as a rule of international law.

Secondly, Professor Crawford[166] has identified three established international law rules which can be regarded as underlying or justifying the continued application of some form of restrictive immunity. These are the international dispute settlement rule, which implies that certain disputes involving foreign states are to be resolved on the international plane, and not by subjecting the defendant state to the compulsory jurisdiction of some municipal court; the principle of domestic jurisdiction which places the determination of

some matters exclusively or primarily within the competence of a particular state; and the rule of exhaustion of local remedies.

Further, immunity may be accorded as a matter of deference or strategy or out of considerations of comity and reciprocity.[167]

F. WHAT NEXT?

The member states of the Council of Europe signatory to the ECOSI, the United States of America, the United Kingdom, Singapore, Pakistan, the Republic of South Africa and Canada have taken bold steps in attempting to codify the law of foreign state immunity as it applies to public corporations in particular, and as it applies to states in general. It has been demonstrated that, in practice, there is very limited scope for applying the doctrine of immunity to public corporations. However, no drastic developments are expected in the immediate future in view of the continuing reasons, outlined above, for some foreign state immunity rule.

In the majority of common law jurisdictions, especially the developing countries, the problem of the application of the doctrine of foreign state immunity to public corporation has not, as yet, been addressed either by the judiciaries or the legislatures. In Australia the federal Law Reform Commission (ALRC) has considered the broad issue of jurisdictional immunity[168] and its particular application to public corporations.[169] Having noted that a great deal of difficulty would be avoided if there was no immunity granted to public corporations or 'separate entities',[170] the ALRC goes on to extend jurisdictional immunity to public corporations. Thus according to the ALRC, a foreign public corporation would be immune from the jurisdiction of Australian courts in the same circumstances as a foreign state itself would be immune.[171] But as the ALRC itself has correctly observed, in practice, "it is unlikely that claims by separate entities will succeed as most entities do not perform in Australia the sort of activities that entitle foreign states to immunity".[172] The International Law Commission (ILC) is currently considering the general problem of foreign state immunity.[173]

Australia and the majority of states in which the problem of jurisdictional immunity has not, as yet, been addressed are bound to draw from the experiences of the US and the UK and the other jurisdictions in which issues of jurisdictional immunity have been addressed. Additionally, the possibility of a new multilateral treaty emerging in the next few years cannot be ruled out.

G. CONCLUSION

That the doctrine of foreign state immunity predates public corporations, as we know them today, is beyond dispute. When public corporations made their debut and subsequently claimed to be entitled to the protection and advantages afforded by the doctrine, the courts, evidently trying to fit new situations into old categories, responded to the challenge by fastening upon the now familar phrases or slogans 'emanation', 'arm', alter ego', 'instrumentality', 'part and parcel' etc of the state. Immunity was granted or denied depending on whether or not the particular corporation answered the description of an emanation, arm, alter ego etc of the respective state.

The USFSIA and the CSIA have somewhat improved on the situation by providing that a public corporation is not jurisdictionally immune if the proceedings relate to a commercial activity or transaction or fall within the exceptions enumerated in sl605 and ss6-8 respectively.

The most significant contribution to this area of law has been made by the ECOSI, the UKSIA, the SSIA, the PSIO and SAFSIA which proceed on the premise that jurisdictional immunity is not available to public corporations. However, a public corporation may claim immunity if "the proceedings relate to anything done by it in the exercise of sovereign authority".[174] The five instruments do not, however, give any indication as to what is meant by the expression "in the exercise of sovereign authority".

In current practice, the doctrine of jurisdictional immunity applies to public corporations in very limited circumstances since most of the extra-territorial activities of these corporations are covered by the exceptions to immunity.

The very foundations of the doctrine of immunity itself - dignity, equality and independence of states - have been eroded. However, there are principles or reasons justifying the very confined extent of immunity of public corporations.

ENDNOTES

1. Per Denning, LJ, in Trendtex Trading Corporation Ltd v Central Bank of Nigeria (1977) 2 WLR 356 at p363.

2. The restrictive theory of immunity is based on the nature of the act giving rise to proceedings in respect of which immunity is claimed. Thus a state is jurisdictionally immune if proceeding relate to sovereign, public or governmental acts (acts jure imperii) but is not entitled to immunity in respect of non-sovereign, private or commercial acts (acts jure gestionis). The absolute theory of immunity does not distinguish between acts jure imperii and acts jure gestionis. The foreign state is jurisdictionally immune irrespective of the nature of the act giving rise to proceedings. However, the restrictive doctrine of sovereign immunity which has been adopted by many states and embodied in several legislative enactments, is now regarded as the accepted rule of international law. See for example Crawford, J, "International Law and Foreign Sovereigns: Distinguishing Immune Transactions" (1985) BYBIL 75; Singer, M, "Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe" (1985) 26 Harv. Int'l LJ 1.

3. Friedman, W, "Government (Public) Enterprise" v13, International Encyclopedia of Comparative Law (New York 1972) p86; Brownlie, I, Principles of Public International Law (Oxford 1966) p277; Royal Commission on Government Organization Report (Ottawa 1963) v5, 54; Scott, FR, "Administrative Law 1923-1947" (1948) 26 Canadian Bar Review 268 at p270; Tupper, A, "The State in Business" (1979) v22 no1 Canadian Public Administration 124; Scott, LJ in Royster v Cavey (1947) 1 KB 204 at p210.

4. Treves, G, "Public and Private Enterprise in Italy" in Public and Private Enterprise in Mixed Economies, Friedman, G, ed (New York 1974) p43; Price, T, "The Public Corporation in South Africa" in Friedmann, W, ed The Public Corporation - A Comparative Symposium Friedmann (Toronto 1954) 302 at p303; Tupper, A, "The State in Business" op cit p131; Scott, F, "Administrative Law 1923-47" op cit pp283-85.

5. Public Corporations are variously referred to as crown corporations, government corporations, state corporations etc.

6. Blakeney, A, "Saskatchewan crown corporations" in Hodgetts, J, & Corbett, D, eds, Canadian Public Corporations (Toronto 1960) 212; Friedmann, W, ed The Public Corporation - A Comparative Symposium op cit p93.

7. Eg Canada and the United Kingdom.

8. Eg Public corporations engaged in

   (a) air transport business (British Airways), Air France, Air India International, Kenya Airways, Uganda Airlines, Air Canada),

   (b) banking business (Central Bank of Nigeria, Papua New Guinea Banking Corporation, Bank of Uganda),

   (c) post and telecommunications operations (Canadian Overseas Telecommunications Corporations, Papua New Guinea Post and Telecommunication Corporation),

   (d) broadcasting (Canadian Broadcasting Corporation, BBC, National Broadcasting Commission (PNG)),

   (e) etc.

9. S13(1)(d) Air Canada Act, RSC 1970 c A-11.

10. S39(1)(d) Broadcasting Act, RSC 1970 c B-11.

11. S7(a) Canadian Overseas Telecommunications Corporation, RSC 1970 c C-11.

12. Gower, LCB, The Principles of Modern Company Law 3rd ed (London 1973) p13.

13. Miller, A & Ferrara, R, "Public and Private Enterprise in US: Co-existence in an Unsteady Equilibrium" in Friedmann, W, ed, Public and Private Enterprise in Mixed Economies op cit 291 at p296; See also Friedman, M, "The corporate clout" Newsweek, May 5, 1980 p82; Scott, E, "Administrative Law, 1923 1947" op cit pp284-85.

14. Public corporations are instruments of government policy charged with the performance of public functions, they are predominantly financed by the governments concerned and are subject to ministerial and parliamentary control. On the other hand, giant private corporations are incorporated by private indivi-

duals and/or institutions, the shares or other ownership interests in these corporations are in private hands, they usually look to the private capital markets for funding and are generally not subject to ministerial and parliamentary control and guidance. Ultimate control of these corporations lies in the hands of shareholders in general meetings.

15. Friedmann, W, "The Public Corporation in Great Britain" in Friedman, W, ed, The Public Corporation - A Comparative Symposium op cit p163.

16. Gower, L, The Principles of Modern Company Law op cit p224.

17. Eg the USA and Canada.

18. Loxley, J & Saul, J, "The Political Economy of the Parastatals" 5 EALR 9.

19. Turkson, R, "The Applicability of the Companies Code, 1963 (Act 179) to Public Corporations" (1973) 10 University of Ghana Law Journal 65.

20. Eg Atomic Energy of Canada Ltd, Canadian Arsenals Ltd, Canadian Patents and Development Ltd, Defence Construction (1951) Ltd, Uranium Canada Ltd, Eldorado Aviation Ltd and Eldorado Nuclear Ltd, and Polysar Ltd.

21. Friedmann, W, "The Public Corporation in Great Britain" op cit p162.

22. Id 164-65.

23. As has been already pointed out, public corporations may be incorporated under a companies or corporations Act or Code.

24. See for example, s66(1) Financial Administration Act (Canada) RSC 1970 c F-10.

25. See also, Robson, W, in Problems of Nationalised Industries (London 1952) pp27-35.

26. RSC 1970 c F-10.

27. A schedule B or departmental corporation is defined as "... any crown corporation that is a servant or agent of Her Majesty in right of Canada and is responsible for administrative, supervisory or regulatory services of a governmental nature." (See s66(3)(a) Financial Administration Act (FAA)).

28. A schedule C or agency corporation is "... any crown corporation that is an agent of Her Majesty in right of Canada and is responsible for the management of trading or service operations on a quasi-commercial basis, or for the management of procurement, construction or disposal activities on behalf of Her Majesty in right of Canada" (See s66(3)(b) FAA).

29. A schedule D or proprietary corporation "... is responsible for the management of lending or financial operations, or for the management of commercial and industrial operations involving the production of or dealing in goods and the supplying of services to the public, and is ordinarily required to conduct its operations without appropriations." (See s66(3)(c)(i) & (ii) FAA).

30. Ashley, C, & Smails, R, Canadian Crown Corporations, some Aspects of Their Administration and Control (Toronto 1965) p3.

31. Privy council office (Canada), Crown Corporations, Direction, Control, Accountability. Government of Canada Proposals (the Government Blue Paper) (Ottawa 1977) pp17 & 37.

32. Ashley, C, & Smails, R, Canadian Public Corporations op cit p3

33. For example, under the FAA the appropriate Minister, with the President of the Treasury Board, approves the annual operating budgets of crown corporations (s70(1) and with the Minister of Finance and the President of the Treasury Board, recommends the approval of annual capital budgets to the Governor in Council (s70(2)). Further the appropriate Minister has, in certain cases, power to direct the corporation respecting the exercise and performance of corporate powers and functions.

34. The Government Blue Paper op cit p37.

35. S2(1) of Draft Legislative Proposals defines a crown corporation as follows:

> " 'Crown corporation' means a corporation named in schedule B, Schedule C or Schedule D to the FAA."

36. These are corporations the capital of which has been subscribed in part by private interests and in part by government and in which the government has a measure of

control by its possession of a right to nominate a specific number of directors. But these corporations reflect diversities both in the extent of governmental ownership and the nature of the partnership consumated. In some cases, the state participates only with private corporations or firms while in others ownership is shared between the government and the general public. The United States Foreign Sovereign Immunities Act, 1976 in s1603 treats some of these corporations as public corporations for purposes of granting jurisdictional immunity. However, these joint venture corporations should be distinguished from joint ventures par excellence ie corporations established by two or more independent governments eg British West Indies Arlines Corporation. These are no doubt public corporations in the strict sense.

37. Price, T, "The Public Corporation in South Africa op cit p303, comes close to this definition when he writes "... [they are] 'public' because they are subject to a certain limited degree of political or governmental finance and control and 'corporations' because they are otherwise autonomous bodies ..."

38. Eg s27(1) of the St. Lawrence Seaway Authority Act (RSC 1970 c S-1) provides that the St. Lawrence Seaway Authority, a statutory corporation, may, with the approval of the Governor in council, procure the incorporation of any one or more corporations for the purpose of undertaking or carrying out any acts or things that the authority is authorised to undertake or carry out.

39. (1938) AC 496, at p496-7. See also The Schooner Exchange v M'Faddon (1812) 7 Cranch 116.

40. Australian Law Reform Commission (ALRC) Report no24 Foreign State Immunity (Canberra 1984) para2.

41. Badr, G, State Immunity: An Analytical and Prognostic View (The Hague 1984) p107. Contrary to what one might expect, lack of immunity from suit does not necessarily mean lack of immunity from execution. Generally, the property of a foreign state is not liable to forcible execution. This is partly because of the expectation that the foreign state will voluntarily satisfy judgments passed against it and partly because of the desire to avoid diplomatic complications. However, a trend is observable in the practice of some states (eg Italy, Greece, Switzerland, Belgium, the Netherlands, the USA, the UK, Singapore, Pakistan, South Africa and Canada) towards restricting immunity. Property of a foreign

state used for public purposes is immune from execution while that used for so-called private or commercial purposes is not. See Badr pp109-112 & 129-132.

42. Juan Ysmael & Co Inc v Government of the Republic of Indonesia (1954) 3 All ER 236; I Congreso del Partido (1981) 2 All ER 1064 at p1070.

43. (1923) 20 Ky 18, See also The Parlement Belge (1880) 5 PD 197 at p207.

44. All states are deemed equal irrespective of their sizes, power or wealth.

45. See Brett LJ in The Parlement Belge op cit at p214; Lord McMillan in The Cristina op cit at p498; ALRC report op cit at pp23-24.

46. Eg USSR, China and most Eastern Europe countries. These countries consider the distinction between acts jure imperium and acts jure gestionis meaningless since the major means of production and exchange are invariably in the hands of the socialist state.

47. Eg Chile, Brazil.

48. Badr, G, op cit at p99.

49. Eg Argentina, Austria, Belgium, Egypt, Federal Republic of Germany, Italy, the Netherlands, Pakistan, the UK, the US, South Africa.

50. The UK, and the US, Canada and Australia.

51. Eg

(i) cases in which the foreign state waived immunity;

(ii) cases in which rights in property in the host state acquired by succession were in issue;

(iii) cases involving the determination of title to immovable property situate in the forum state - see The Charkieh (1873) LR 4A & E 59; ALRC report op cit para10. However, with the passage of time and change in circumstances other exceptions to the doctrine have emerged. See Castel, J, "Exemptions from Jurisdiction in Canadian Courts" (1979) 9 Canadian Yearbook of International Law 159 at pp161-62, US Foreign Sovereign Immunities

Act, 1976 s1605, UK State Immunity Act, 1978 ss 3-11, Thai - Europe Tapioca Ltd v Government of Pakistan (1975) 1 WLR 1485 at pp1490 1491, The Philippine Admiral (1976) 1 All ER 78.

52. ALRC report op cit para10.

53. See for example Campania Mercantil Argentina v US Shipping Board (1924) 13 LT 338 where the Court of Appeal held that a sovereign state does not by entering into a trading contract with a foreigner lose its immunity from process in British courts as regards matters arising out of that contract.

54. See for example Mann, F, "The State Immunity Act 1978" (1979) BYBIL 43, Von Mehren, R, "The Foreign Sovereign Immunities Act of 1976" (1978) 17 Colum J Transnat'l L 33 at p36.

55. (1812) 7 Cranch 116.

56. (1880) 5 PD 197.

57. (1920) p30.

58. Badr, G, op cit at pp19-19, Molot, H & Jewett, M, "The State Immunity Act of Canada" (1982) 22 CYBIL 79 at pp84-85, Siewert, C, "Reciprocal Influence of British and United States Law: Foreign Sovereign Immunity Law from the Schooner Exchange to the State Immunity Act of 1978" (1980) Vanderbilt Journal of Transnational Law 761 at p772, Sultan of Jahore v Abubaker (1952) AC 318.

59. Badr, G, op cit p19.

60. Von Mehren, R, op cit at p33.

61. "The Problem of Jurisdictional Immunities of Foreign States" 28 BYBIL 220.

62. Badr, G, op cit p24.

63. Von Mehren, R, op cit p36.

64. See for example The Schooner Exchange op cit, The Charkieh op cit, The Parlement Belge op cit, Penthouse Studios Inc v Venezuela (1970) 8 DLR 865, Rahimtoola v Nizam of Hyderbad (1958) AC 379, Thai - Europe Case op cit, The Philippine Admiral op cit, Alfred Dunhill of London Inc v Republic of Cuba (1976) ILM 765, Trendtex case op cit, I congreso del Partido op cit.

65. (1952) 26 US Department of State Bulletin 984.

66. European Convention on State Immunity, 1972, Brussels Convention of 1926, 176 LNTS 199.

67. US Foreign Sovereign Immunities Act, 1976, UK State Immunity Act, 1978, Singapore State Immunity Act, 1979, Pakistan State Immunity Ordinance 1981, South African Foreign States Immunities Act, 1981, Canadian State Immunity Act, 1982.

68. Eg International Law Association, Internationl Law Commission, ALRC.

69. Castel J, op cit p170.

70. Victory Transport Inc v Comisaria General de Abastecimientosy Transportes (1964) 336 F 2d 354 at p360.

71. I Congreso del Partido op cit p1070.

72. See for example Laskin J in Government of the Democratic Republic of the Congo v Venne (1972) 22 DLR 2d 669 at p687, Stephenson, L, in the Trendtex case op cit p376.

73. See for example Castel, J, op cit p166, Wedderburn, K, "Sovereign Immunity of Foreign Public Corporations" (1957) 6 Int'l & comparative Law Quartely 290, Lauterpacht, H, op cit p240.

74. Lauterpacht, H, op cit p240.

75. ALRC report para40.

76. Friedmann, W, "Government (Public) Enterprises" op cit p79.

77. See Lord Denning in the Rahimtoola case op cit p422.

78. See Shaw, L, in the Trendtex case op cit p389, s1603(d) US Foreign Sovereign Immunities Act, 1976, I Congreso del Partido op cit, Badr, G, op cit p57, Von Mehren, R, op cit p49, Kahale III & Vega, M, "Immunity and Jurisdiction: Towards a Uniform Body of Law in Actions Against Foreign States" (1979) 18 Colum J Transnat'l L 211 at pp212-213.

79. Friedmann, W, op cit p80.

80. Victory Transport case op cit. Such acts are limited to the following categories:

(a) internal administrative acts, such as expulsion of an alien,

(b) legislative acts, such as nationalisation,

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(c) acts concerning the armed forces,

(d) acts concerning diplomatic activity, and

(e) public loans.

81. Badr, G, op cit pp65-70, 80.

82. For a statutory definition of a commercial activity or transaction see for example s1603(d) US Foreign Sovereign Immunities Act, 1976, s3(3) UK State Immunity Act, 1978.

83. (1926) 271 US 562.

84. Brownlie, I, Principles of Public International Law, 3rd edn (Oxford 1979), pp330-331.

85. ALRC report op cit para71.

86. Id para13.

87. The UK, US, Singapore, Pakistan, South African and Canadian Acts adopt a restrictive view of immunity and so do the European convention on State Immunity, 1972 and the Brussels Convention of 1926. See also Harris, D, Cases and Materials on International Law 3rd edn (London 1983) p421, Badr, G, op cit, the Trendtex case op cit, The Philippine Admiral op cit, the Tate Letter op cit.

88. "Every state wants to be treated no worse than it treats the others and can expect no better treatment than what it affords other states" Badr, G, op cit p101.

89. (1977) 2 WLR 356 at pp367, 380, 385 & 386. See also Laskin, J, in the Venne case op cit p687, I Congreso del Partido op cit p1070.

90. Lanterpacht, H, op cit p228, ALRC report para8.

91. (1812) 7 Cranch 116.

92. Badr, G, op cit pp 9-10, ALRC report op cit para8.

93. See also Badr, G, op cit p17.

94. See for example Mellenger v New Brunswick Development Corporation (1971) 1 WLR 604, Baccus SRL v Servicio Nacional Del Trigo (1957) 1 QB 438, Krajina v The Tass Agency (1949) 2 All ER 247.

95. Supra n94.

96. Id 450.

97. Id 472, see also Cohen, L, in Krajina v The Tass Agency supra n94 at p284.

98. Supra n94.

99. (1952) 13 FRD 280 reproduced in (1783 - 1968) 6 AILC 29.

100. ALRC reporL op cit para20, the Trendtex case op cit.

101. Supra n94 p604.

102. Krajina v Tass Agency op cit p247.

103. The Trendtex case op cit.

104. See for example, financial dependence and appointment of members of the the board of the corporation by the government, powers and duties conferred and imposed on the corporation, control etc.

105. Wedderburn, K, op cit, Denning, L, in the Trendtex case op cit.

106. Op cit p466.

107. Id p466-467.

108. Op cit p609, see also re Investigation of World Petroleum Arran,ements op cit Dunlap v Banco central del Ecuador (1943) 41 NYS 2d 650.

109. The definitions of departmental and agency corporations in the FAA (Canada) would seem to provide exceptions and most Canadian public corporations are constituted as 'agents of Her Majesty', but in Alberta Government Telephones v Selk (1974) 4 WWL 205 the court held that a provision constituting the Alberta Government Telephone Commission, a provincial public corporation, as an 'agent of Her Majesty' did not confer any crown immunities or privileges on the corporation.

110. Ulen & Co v Polish National Economic Bank 24 NY 2d 201, Coale v Societe Co-op Suisse Des Charbons Basle DC (1921) 21 Fed 2d 180, US v Deutches Kalisyndikat Geselschaft (1929) 31 Fed 2d 199, Hannes v Kingdom of Roumania Monopolies Institute (1940) 260 AD 189, the Trendtex case op cit.

111. Supra n110.

112. Id 202.

113. Supra n110.

114. Op cit p461.

115. This re-statement of the doctrine is an improvement on Lord Denning's words in the Trendtex case op cit p370.

116. ETS no74; (1972) 11 ILM 470.

117. Art 7 ECOSI, ss1602, 1604(a)(2) USFSIA, s3 UKSIA, s5 SSIA, s5 PSIO, s4 SAFSIA, s5 CSIA.

118. S1603(d) USFSIA.

119. Ibid.

120 Kahale III & Vega, M, op cit p243.

121. Von Mehren, R, op cit p49.

122. Kahale & Vega, M, op cit p243.

123. See s2.

124. Siewert, C, op cit p79, Delaume, G, "The State Immunity Act of the United Kingdom" (1979) 73 AJIL 185 at p199.

125. S3.

126. Delaume, G, op cit 191.

127. Badr, G, op cit 115.

128. Op cit.

129. Op cit.

130. Ss3-11, See also s1605 USFSIA, Arts 1-2 ECOSI, ss4-13 SSIA, ss4-12 PSIO, ss4-12 SAFSIA, ss6-8 CSIA

131. Badr, G, op cit p116.

132. S1603(b). Note that the CSIA is s2 does not include in its definition of a foreign state an entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof".

133. (1978) 453 F supp 1097.

134. See also Herzberger v Campania de Arcero del Pacificio SA (CAP) (1978) 78 Civ 2451 where the court held that the defendant corporation (CAP), a Chilean corporation founded and 91.15% owned by the Corporacio de Formento de la Produccion, an entity in turn wholly owned by the Republic of Chile "falls squarely with the s1603 definition of 'agency or instrumentality of a foreign state' since it is a separate corporate person and the majority of its shares is owned by a 'foreign state or political subdivison thereof'".

135. Kahale & Vega, M, op cit p228.

136. Other state parties to the ECOSI are Austria, Belgium, Federal Republic of Germany, Luxembourg, Netherlands and Switzerland.

137. Badr, G, op cit p115.

138. S14 UKSIA, See also Art 27(1) ECOSIA, s16 SSIA, s15 PSIO, s2 SAFSIA.

139. S14(2) UKSIA. See also Art 27(2) ECOSI, s16 SSIA, s15(2), PSIO, s15(1) SAFSIA.

140. ALRC report para92.

141. Delaume, G, op cit p188.

142. Badr, G, op cit pp116-127. The CSIA in s8 provides a narrower rule of non-immunity with regard to the obligations of a foreign public corporation arising out of ownership of property. It is only with regard to property acquired by way of succession, gift or bona vacantia that a foreign public corporation is not immune from the jurisdiction of Canadian courts.

143. Arts 4, 5, 9, 10, 11 ECOSI; ss1603(d), 1605 USFSIA; ss3(1)(b), 4, 5, 6, & 11 UKSIA, ss5(1)(b), 6, 7, 12 PSIO; ss4(1)(b),5, 6, 7, 12 SAFSIA. The PSIO is however silent with regard to claims arising out of personal injury or death or damage to tangible property.

144. Badr, G, op cit p117.

145. S1603(d).

146. Badr, G, op cit p117 notes that the report which accompanied the Bill when submitted to the House of Representatives explains that the term "a particular commercial transaction or act" covers a "single contract, if the same is of the same character as a contract which might be made by a private person".

147. S1603(d).

148. S2 CSIA.

149. Art 11 ECOSI, s1605(a)(b) USFSIA, s5 UKSIA; s7 SSIA; s6 SAFSIA; s6 CSIA. See also Badr, G, op cit p119-124.

150. Badr, G, op cit p125.

151. Art 8 ECOSI; ss7, 11 UKSIA; ss13, 19 SSIA, ss8, 12 PSIO; ss8, 12 SAFSIA. Proceedings relating to patents and trademarks and liability tax are also covered by the "commercial activity" exception in the US and Canadian Contexts - See Badr, G, op cit pp126-127.

152. Badr, G, op cit p120.

153. See Shaw, L, in the Trendtex case op cit pp385-386.

154. ALRC report para43.

155. See for example, Crown Proceedings Act, 1947 (UK), Crown Liability Act (Canada) RSC, 1970 c C-38, Petition of Right Act RSC, 1970 c P-12.

156. Denning, L, in the Rahimtoola case op cit.

157. The Island of Palmas case (1928) RIAA ii 829.

158. Phillimore, Sir R, in The Charkieh op cit p97.

159. Shaw, L, in the Trendtex case op cit p384.

160. Launterpacht, H, op cit pp235-236.

161. Osakwe, C, "A Soviet Perspective on Foreign Sovereign Immunity: Law and Practice" (1983) 23 VaJ Int'l L 13 at p20.

162. Op cit p461.

163. Crawford, J, "International Law and Foreign Sovereign: Distinguishing Immune Transactions" (1985) BYBIL 75, at p78.

164. See for example Jenkins, L, in the Baccus Case op cit 466-467.

165. Crawford, J, op cit 114.

166. Id, pp87-88, 114-115.

167. Id, p78.

168. See generally ALRC report op cit.

169. Id paras 71-73, ss3 & 22 of the Draft Bill (Appendix A) and explanatory notes especially at p136.

170. Id para71.

171. Id see explanatory note to s22 of Draft Bill.

172. Ibid.

173. Crawford, J, "A Foreign State Immunities Act for Australia? (1983) 8 Australian YBIL 71 at pp75-80, McCaffrey, SC, "Current Developments: The 35th Session of the International Law Commission" (1984) AJIL v78 no2 457.

174. See for example s14(2) UKSIA.