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SOVEREIGN IMMUNITY OF GOVERNMENT-OWNED CORPORATION AND SHIPS

Michael Brandon*

Most articles on this subject start with a reference to the classical decision in *The Schooner Exchange v. M'Faddon*,¹ which resulted in immunity being granted to one of Napoleon's ships of war, and has been the basis of the many American cases involving jurisdictional immunity since that time. In delivering the opinion of the United States Supreme Court, Chief Justice Marshall had occasion to refer to the question of the legal position of a foreign sovereign when acting in a private capacity, in the following language:

. . . there is a manifest distinction between the private property of a person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual. . . .²

This problem of whether a state should accord in all cases jurisdictional immunity to a foreign state, that is, allow the agencies and instrumentalities³ of another state the same immunity which it would allow to the head of that state, has continued to trouble practicing lawyers, academic writers and men of commerce.

Originally, the classical doctrine of absolute immunity reigned supreme and was applied by all states. Gradually, the practice of some states evolved away from this strict attitude which came to be criticized by both bench and bar. It was suggested that the conception of absolute immunity of states with all its implications was being outmoded by the developing activities of the states themselves. For a long time, however, no practical effect was given in the United States to this enlightened criticism.

The old doctrine was upheld by the Supreme Court in all its rigidity in 1926 in the famous case of *Berizzi Bros. Co. v. S. S. Pesaro*.⁴ As of the time of writing⁵ this decision has never been specifically overruled. Nevertheless, the fundamental assumptions on which the judgment is based have become increasingly dubious, and the courts have felt able to maintain the doctrine only subject to a number of technical qualifications.

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* See Contributors' Section, Masthead, p. 482, for biographical data.
1 7 Cranch 116 (U.S. 1812).
2 Id. at 145.
3 These terms have not been used throughout this article as terms of art.
4 271 U.S. 562 (1926).
5 February 1, 1954.
Then, in an announcement which illustrated how closely interwoven are the Executive and Judiciary on this matter, the United States Department of State, four years after it had declared that it was giving serious thought to the question, announced on May 19, 1952, that it had decided to reverse its traditional policy and apply what is known as the restrictive immunity doctrine. This meant that the Executive would only recommend to the Judiciary that it grant full or absolute immunity to a foreign state in cases where the former deemed that purely sovereign functions of the state were involved. Since nearly two years have elapsed from the date of the announcement of this interesting departure from previous practice, it may be appropriate now to examine the whole question afresh.

It is proposed therefore to examine the two main and rival theories, namely, the absolute doctrine and the restrictive doctrine, and to discuss their particular validity in the light of contemporary circumstances. The basic premises, the advantages and disadvantages of both will be discussed, and illustrated by reference to the current practice of states. The various suggestions proposed by legal authorities and critics will also be surveyed, and attention drawn to the various ways by which the problem may be alleviated both on the national and international level. It is not possible within the scope of this article, to enter into a discussion or examination of the jurisprudence of all nations, and reference will be confined mainly to the decisions of American, English and French courts.

**THE DOCTRINE OF ABSOLUTE IMMUNITY**

The doctrine of absolute immunity, in its purest form stems from the maxim *par in parem non habet imperium.* It means simply that no state shall lay claim to exercise any jurisdiction whatsoever over any other state, including all the various persons, bodies, agents, corporations and instrumentalities which may purport to represent it on the international plane. It would be an overstatement, and incorrect in law, to suggest that the doctrine of absolute immunity could claim to form part of customary international law, and thus be an immutable principle which states would be obliged to follow. The very fact that many states have departed from the doctrine indicates an absence of overall consent on the international

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6 N.Y. Times, April 10, 1948, p. 27, col. 3.
7 26 Dep't State Bull. 984 (1952).
level. The doctrine is based upon international comity. Thus, if a state whose representative had been denied the benefit of the immunity in the courts of another state, attempted to bring suit before the International Court of Justice based upon such denial, as a violation of a rule of customary international law, there is no doubt that the claim would be rejected.

In the days when the relations between states were confined to political and diplomatic activities, there was good reason for the wholesale application of the doctrine. But since the time when states acting in the name of agents began to engage in various forms of commercial activity, albeit well concealed beneath the trappings of sovereignty, the basis of the doctrine that nothing must be allowed to be done to impair (or seem to impair) the three virtues of statehood, dignity, equality, and independence, has come to be questioned more closely. As states encroached into the spheres of national life hitherto reserved for the individual, or the individual in association with others, so did the doubts increase as to the practical validity of the doctrine. This century has witnessed the entry of the sovereign state into international trade and commerce in a manner which Chief Justice Marshall would hardly have believed possible. Sometimes this has happened by means of government-owned shipping, sometimes by bulk buying and selling of raw materials and manufactured goods, sometimes by other means. Generally speaking, all governments, to a varying degree, have taken a greater control over the economic life of their respective countries than was scarcely conceived of fifty years ago. The public corporations which have been formed as a result of the nationalization of industries have had effects not only on the domestic life of the states concerned, but also on their international relations. These relations have become increasingly diverse and today extend into every sphere of economic activity carried on over national boundaries. The representation of states abroad, by agencies, corporations and the like, has inevitably raised the question of the legal status of such bodies.

It has been persuasively argued for well over a quarter of a century that no valid reason remains for continuing to grant full jurisdictional immunity to foreign states, when, acting or operating through agencies or instrumentalities created for this purpose, they engage in commercial or so-called non-sovereign activities. This argument has been applied to all branches of state activity which appear to transcend the boundary of

traditionally sovereign functions. With the enormous expansion of governmental activities in almost all states of the world, it is no longer logical, reasonable or justifiable to place the private person or corporation in a position of disadvantage before national courts in suits concerning matters not related to the sovereignty of states. It is entirely inequitable that a citizen aggrieved by a foreign state, by virtue of transactions involving a government-owned corporation or ship, should have no remedy in the courts of his own country if the foreign state concerned decides to plead immunity from jurisdiction.

The citizen faced with a successful plea of immunity is obliged either to have recourse to the remedies which may be available to him in the courts of the foreign state—though these indeed are not necessarily negligible—or rely upon diplomatic intercession on his behalf which may well lead to protracted negotiations. Moreover, it is frequently only the larger and more powerful private claimants which are able to persuade their governments to espouse a claim on the diplomatic level; the little man will often be left even without this form of assistance. Such persons have very little inducement to enter into contractual relations with foreign states or with the agencies thereof. It is not surprising in these circumstances to find that the perpetuation of the absolute immunity doctrine has been called a “threat to free enterprise.”

Where absolute immunity is still granted to foreign states whatever the nature of the transaction or matter involved, it contrasts unfavourably from the standpoint of the private litigant with the relatively narrow immunity which states now claim for themselves in their own courts. In the United States, for example, where the government can only be sued by its consent clearly given by legislative act or otherwise, the trend has been away from the government resting upon its attributes of sovereignty and towards a definite policy of consenting to be sued. This is evidenced by such legislation as the Court of Claims Act, which endowed that court

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13 The term “ship” is used throughout this article to denote merchant vessels, as distinguished from warships.

14 The position has been trenchantly stated by that eminent authority, Judge Learned Hand, in Gould Coupler Co. v. United States Shipping Board Emergency Fleet Corp., 261 Fed. 716 (S.D.N.Y. 1919), as follows:

Moreover, it is in general highly desirable that, in entering upon industrial and commercial ventures, the governmental agencies used should, whenever it can fairly be drawn from the statutes, be subject to the same liabilities and to the same tribunals as other persons or corporations similarly employed. The immunity of the sovereign may well become a serious injustice to the citizen, if it can be claimed in the multitude of cases arising from governmental activities which are increasing so fast.

261 Fed. at 718.


with jurisdiction *inter alia* in claims against the United States whether founded upon the Constitution, any act of Congress, any regulation of any executive department, or any contract express or implied. Other examples of similar legislation are the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act. Equally in the field of government-owned corporations where the Congress has full power to determine whether they shall be subject to suit or judicial process, the clear policy has been, almost without exception, to include the authority "to sue and be sued" in the acts instituting such corporations.

Similarly, the United States has consistently declined to claim immunity for its own ships either in American or foreign courts. Thus the Department of State, on January 11, 1923, issued the following instruction to diplomatic and consular officers:

> The Department does not regard Government owned or operated vessels when engaged in commercial work to be entitled to immunity as public vessels and when the Department has been requested by diplomatic representatives of foreign governments to inform our courts that such vessels were immune, it has declined to comply with the request. It accordingly has also declined to request foreign governments to grant immunity to Shipping Board vessels when arrested in foreign ports on judicial process.

In England the process has been in the same direction, though perhaps somewhat more delayed. Since about the thirteenth century the rule has prevailed that the Crown cannot be sued in its own courts. The hardship of this rule was mitigated by the procedure of petition of right which was established in the sixteenth century, made statutory in 1860, and which enabled a claim to be brought against the Crown once the Attorney General's fiat was forthcoming. However, due to the ancient constitutional maxim that "The King can do no wrong," this remedy was not available for bringing an action founded in tort. Nevertheless by various enactments adopted during the early part of this century, it became possible to bring suit against a Minister of the Crown. Finally, in 1947 after the House of Lords had drawn attention in *Adams v. Naylor* to this unsatisfactory state of affairs the government took action and the Crown Proceedings Act was passed. The object of the statute, in the words of the

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20 For a partial list of such corporations, see Keifer & Keifer v. R.F.C., 306 U.S. 381, 390 n. 3 (1939).
21 2 Hackworth, Digest of International Law 439 (1941). But see also p. 448 infra.
22 E.g., Section 26 of the Ministry of Transport Act, 1919, 9 & 10 Geo. 5, c. 50. The Minister was made responsible for the acts and defaults of his officers, servants, and agents.
24 10 & 11 Geo. 6, c. 44 (1947).
Lord Chancellor who introduced it, is to put "the Crown, so far as may be, in matters of litigation in the same position as the subject, so that a subject who wants to bring an action against the Crown may proceed as though he were proceeding against another subject." 25

In France, where the legal thinking and practices have greatly influenced other continental European countries, the development has been different and yet similar. In the field of contract it has been possible for a long time to bring an action against the government, or the responsible minister, as this was considered as a matter falling within the scope of actes de gestion on the part of the latter. Since the foundation of the Conseil d'Etat in 1804, the area of discretionary governmental actions with which the courts could not interfere has constantly diminished. The spheres of activity of the government have continually increased, and likewise the area of what is known as gestion privée. Today, what is understood in Anglo-Saxon legal parlance, as an action in tort, can be brought against the government either in a civil court or in an administrative court, depending on the nature of the case, which in the event of a dispute as to which court has jurisdiction, is settled by the Tribunal des conflicts.

While it would seem that these developments, by which governments have come to allow themselves to be sued to a considerable extent in their own courts, are only carried to their logical conclusion by permitting foreign governments to be sued with respect to their non-sovereign acts, it may be observed that it has been judicially noted that "whether a sovereign government permits itself to be sued in its own courts has no bearing on whether it should be subject to suits in the courts of another jurisdiction." 26

Nevertheless, the developments which have been outlined above serve to emphasize the inconsistency in the position of a private litigant in a country where the absolute immunity rule still prevails with regard to actions brought against foreign states. On the one hand, if he is aggrieved by the government of the country, he can bring suit against that government, but on the other hand, if he is likewise aggrieved by a foreign government, he will have no remedy, and be forced to rely upon the results of diplomatic negotiations if he is fortunate enough in persuading his own government to either assist him or espouse his claim. The inequity resulting from this contrast is evident.

It is submitted that, since in the United States, for example, the established amenability of government-owned corporations to suit has disclosed

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26 Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705, 710 (2d Cir. 1930).
SOVEREIGN IMMUNITY

that the traditional theories relating to sovereign immunity are outmoded, there is no longer any justification for upholding the principle of absolute immunity, at least in so far as the commercial activities of foreign states are concerned. Further, the point may be made that the reason behind the continuation of the policy to grant more extensive immunity to foreign states and their agencies than is granted to domestic government-owned corporations, namely that of international comity, can no longer be justified, not only when the interests of citizens of the United States are sharply prejudiced thereby, but also at a time when the doctrine of absolute immunity has long been discarded and replaced by many other states.

Yet there are two important reasons which support the contention that notwithstanding its effects, the absolute immunity doctrine—in the absence of international agreement on the whole subject—should be applied wherever possible. One is based on the fundamental point that the suability of a foreign state, or an agency thereof, does not extend to matters relating to seizure and execution. This means that although jurisdiction may be exercised in an action in which a foreign state is a party and a judgment given against such state, this judgment can never be enforced or satisfied by judicial process. The practical effect of securing a judgment through legal redress is therefore almost nil. Moreover, the argument that recourse can be had through diplomatic channels is only half an answer. If a foreign government does not feel there is any moral obligation upon it to make an ex gratia payment, then in the absence of political pressure, there is scant likelihood that a citizen can obtain adequate satisfaction of a judgment rendered in his favour. This unenforceability of judgments illustrates the fact that in reality any doctrine which departs from granting absolute immunity and permits the exercise of jurisdiction in given cases, can never be effective unless judgments can be satisfied, in the manner in which they would be in actions involving private persons.

The established practice in England and the United States reaffirms this argument. In these two systems of law it is an admitted principle that even where a foreign government has waived its immunity and had a judgment ordered against it, such waiver does not extend to any measure of execution, whether by seizure, attachment or other means.

The leading American case on the point is *Kunglig Jarnvagsstyrelsen v.*

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Dexter & Carpenter, Inc. In that case the defendant American company, having secured a valid judgment against the plaintiff, the Royal Administration of the Swedish State Railways, obtained a writ of execution under which an order of attachment was levied against property of the Kingdom of Sweden. The latter through its Minister to Washington intervened for the purpose of asserting its sovereign immunity. The District Court for the Southern District of New York vacated the order of attachment and writ of execution. The Circuit Court of Appeals for the Second Circuit upheld the decision.

Originally the courts of all countries maintained this doctrine of declining to order execution against the property of a foreign state. The French courts, where the property of a foreign state has been concerned, have remained true to this principle. Thus in Sociéros c. L'U.R.S.S. the Court of Appeal in Aix in 1938 emphatically held that notwithstanding any question of the limits of jurisdiction, immunity from execution was absolute. This holding was in no way affected by the well known decision in Procureur Général près la Cour de Cassation v. Vestwig et al., in which the French Court of Cassation held that funds held by the Norwegian state, acting as trustee for a Norwegian national, were not immune from garnishee proceedings, since the Norwegian Government in its capacity as trustee was not impleaded and therefore no question of sovereignty was involved. It should be noted, however, that French courts will order execution against the property of foreign government-owned entities which can be distinguished from foreign states as such.

A number of continental European countries in the last two decades have departed from the continued adherence to the traditional practice. Thus a Belgian court, showing itself to be influenced by modern developments by which states have increasingly intervened in purely commercial

30 43 F.2d 705 (2d Cir. 1930).
31 The court said, inter alia:
But consenting to be sued does not give consent to a seizure or attachment of the property of a sovereign government. The clear weight of authority in this country, as well as that of England and Continental Europe, is against all seizures, even though a valid judgment has been entered. To so hold is not depriving our own courts of any attribute of jurisdiction. It is but recognizing the general international understanding, recognized by civilized nations, that a sovereign's person and property ought to be held free from seizure or molestation in all peaceful times and under all circumstances. Nor is this in derogation of the dignity owed to our courts.
43 F.2d 705 at 708.
34 Annual Digest and Reports of Public International Law Cases, Case No. 32 (1946).
35 See p. 451, infra.
SOVEREIGN IMMUNITY

matters, recently sanctioned, in the case of Sacobelge et Etat belge c. Etat hellénique, the attachment of Greek property situated in Belgium, rejecting arguments based upon the equality of states and international courtesy. Certain other states, notably Greece, Italy and Switzerland, permit execution by legislative decree but make it dependent upon the authorization of the Minister of Justice or other important body. Despite these encroachments upon hitherto established practice, it must be recalled that even if execution be permitted under the law of a country in theory, it is not possible against a resisting government in practice.

The second reason why it is said that support should continue to be given to the absolute immunity doctrine is that apparently the only practicable alternative is the restrictive immunity doctrine, which is based upon the alleged distinction between acts jure gestionis, and acts jure imperii. This doctrine, which in a sense is a compromise between granting full immunity to a foreign state and all the agents and instrumentalities thereof, and granting none at all, is attractive at first sight. However, in practice it suffers from a number of serious defects which make it unworkable.

THE DOCTRINE OF RESTRICTIVE IMMUNITY

The fundamental basis of this doctrine, theory, or practice (whichever appellation be preferred), is the assumption that a legally significant distinction can properly be made between the sovereign (jure imperii), and non-sovereign (jure gestionis) activities of a state, or as they are allegedly distinguished in French, between "actes de puissance publique," and "actes de gestion privée." Thus, the workability of the doctrine necessarily depends on the soundness of this assumption, for its essence is contained in the fact that full or absolute immunity should be granted to a state—or to an agency thereof—when what is involved in the case is the exercise of a sovereign function of the state; but that immunity should be denied whenever a non-sovereign function is concerned.

It is generally agreed that another way of expressing this latter form of activity is to use the phrase "commercial activity." In this connexion the case of the Bank of the United States v. Planters Bank, is often cited as an example of the supposed facility with which the sovereign and non-

36 79 Journal du Droit International 244 (1952). The court in this case seems to have been considerably influenced by the views of Professor Niboyet as expressed in his Traité de Droit International Privé Français (1949).
37 Lauterpacht, supra note 8, at 242.
39 9 Wheat. 904 (U.S. 1824).
sovereign (or commercial) activities of a state can be distinguished. In that case Chief Justice Marshall said:

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.40

It must be observed that the Planters Bank case was decided in 1824, at which date, it may be acknowledged, it was not so difficult to make a distinction between the activities or functions which only a government might fulfill, and those which only a private citizen could undertake. As has been indicated above, a steady but relentless change has taken place in the political and economic structure of states. About a hundred years after Chief Justice Marshall uttered the words quoted above, the well known Pesaro case41 was decided by Judge Mack in the District Court for the Southern District of New York. He held that a merchant vessel owned, operated, and possessed by the Italian Government was not immune from arrest in an action brought in rem to recover damages to cargo carried by the ship. He was later overruled by the Supreme Court.42 But what is interesting for the present purposes is that Judge Mack, notwithstanding his ruling, had the following to say with regard to the question of governmental activities:

The question is not merely whether the function in issue is governmental or private; it is doubtful whether any activity of the state may properly be called private. The public service functions of the state today may be as important in their bearing and as public in their character as the more limited functions to which it was the custom of the state to confine itself a century ago.43

Again the illusion which has been created that a line can be drawn between the public and private functions of a state or of the agencies or instrumentalities thereof was neatly dispelled by Mr. Justice Van Devanter in his opinion in Berizzi Bros. Co. v. S. S. Pesaro,44 when it came before the Supreme Court, when, in commenting upon The Schooner Exchange v. M'Faddon,45 he said, inter alia:

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40 Id. at 907. The fact that the statement did not relate to a government in the international law sense would not appear to affect the reasoning behind the dictum.
41 277 Fed. 473 (S.D.N.Y. 1921).
42 271 U.S. 562 (1926).
43 277 Fed. 473, 482 (S.D.N.Y. 1921).
44 271 U.S. 562 (1926).
45 7 Cranch 116 (U.S. 1812).
We think the principles [announced in Schooner Exchange v. M'Fadden] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.46

These citations illustrate the enormous difficulty with which courts are faced when attempting to draw a valid legal distinction between acts jure imperii and acts jure gestionis. Examples may be taken from a number of decisions of American and Continental European courts which show that different courts will vary as to whether they consider the same activity to fall upon one side of the line or the other. Thus, on the one hand an Italian court has disallowed a claim of immunity in a case concerning the purchase by Romania of munitions and supplies for military use on the ground of it being a non-sovereign function,47 while on the other, a United States federal court has treated the activity of Romania in buying shoes for the army as the "highest sovereign function of protecting itself against its enemies"48 and therefore one to which immunity attached. Such divergencies occur also between decisions of courts of the same country: the purchase of goods by Romania (it is of no importance that Romania comes into both these examples), for resale to Romanians was held by one French court to be an act jure gestionis,49 and by another to be an act jure imperii.50 Numerous other examples could be given where courts have reached opposite conclusions with regard to the nature of similar governmental activities and transactions.51

It follows that what is essentially lacking is a dependable criterion upon which to draw satisfactory and pragmatic distinctions. It has become impossible to define, with any precision which would be useful, what is the "proper" scope of government activity. Nor is the nature of the transaction in question necessarily definitive.52 Equally, to make decisions solely upon the basis of the "public purpose" of the transaction involved, is unworkable. Not only do the standards upon which the alleged distinctions

46 271 U.S. 562, 574 (1926).
47 Stato di Romani c. Trutta, Monitore dei Tribunali 1,228 (1926).
50 Lakhovsky c. Gouvernement fédéral Suisse, 1 Gazette du Palais 382 (1920).
52 Cf. Weiss, "Compétence ou incompétence des Tribunaux à l'égard des États étrangers," Hague Academy of International Law, Recueil des Cours 525 (1923).
are made vary, but the fact that a large number of terms have been imported into this field to denote acts *jure imperii* and acts *jure gestionis*, respectively, is illustrative of a somewhat chaotic situation likely inevitably to lead to uncertain law. The absolute immunity doctrine, for all its disadvantages and injustices to the private litigant, produces at least certain law. The same cannot be said for the restrictive immunity doctrine.

Then again, upon what legal basis should the distinction be made? Does the court turn to the notions of the forum, is it guided by the law of the foreign state concerned, or is recourse made to some international standard? The answer will usually be that in the absence of the latter, reference will be made to the rules of the forum. However, the rule that the law of the state claiming immunity is the source to which the court of the forum must look for guidance—which itself is based upon the principle that only the foreign state can know its own law—is also applied. Indeed, although the argument can be well made that, if this rule be applied, the distinction between acts *jure imperii* and acts *jure gestionis* can have no meaning, and that there can be no restriction of immunity in cases where it is intended to restrict it, the Court of Appeal in England in determining the legal status of the Tass News Agency in *Krafina v. Tass Agency* in 1949, held that recourse had to be made to Soviet law. However, this does not mean that the status of a foreign agency under its own law is necessarily conclusive of its entitlement to immunity under the law of the forum. Moreover, it must not be forgotten that in the final analysis, whichever rule is preferred, such preference will only have been arrived at by reason of an application of a rule of the forum, and that the very fact of the inquiry being made at all is evidence of the negation of the principle *par in parem non habet imperium*.

Two other arguments may be levied against the restrictive immunity doctrine. The alleged distinction between acts *jure imperii* and acts *jure gestionis* can have no application to a state where it is not possible to say that there are some foreign commercial activities which only the government can perform, and some which only a private citizen can perform. In such states where according to law all foreign intercourse is carried out

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56 [1949] 2 All E.R. 274.
58 Fitzmaurice, supra note 38, at 123.
by virtue of the state's *imperium*, the doctrine becomes inapplicable. Moreover, in the words of a learned authority:

It is no longer generally accepted that the economic activities of the state—such as state management of industry, state buying, and state selling—are necessarily of a purely "private-law nature"; that they are "*jure gestionis*"; and that in engaging in them a state acts like a private person. In these and similar cases ostensibly removed from the normal field of its political and administrative activities, the state nevertheless acts as a public person for the general purposes of the community as a whole. This applies not only to states with a socialist economy where trading or management of industry have become a public function of the state. For the state always acts as a public person. It cannot act otherwise. In a real sense all acts *jure gestionis* are acts *jure imperii*.

Finally, the argument which is raised in favour of the absolute immunity doctrine, namely, the non-enforceability of judgments given against states, may also be levied in reverse against the doctrine of restrictive immunity. Clearly if that doctrine is to have any value, a judgment which is rendered with regard to an act *jure gestionis* must be capable of being enforced, otherwise the practical effect of securing such a judgment will in the vast majority of cases be nil. Thus, a sovereign state does not cease to be a sovereign state merely because it performs acts which a private citizen might also perform.

Having now discussed the two major doctrines, it may be instructive to review the evidence of the current practice of states. For these purposes it is proposed to start with the so-called Anglo-American school, commencing with the United States. It will then be appropriate to compare briefly the practice of this "school" with the continental European "school" as principally represented by France. This division has been made primarily for reasons of convenience and not because it necessarily represents a clear-cut pattern or trend.

**The Practice of States**

**The United States**

In the United States, a review of the decisions leading up to the State Department's policy change in 1952 may be conveniently divided into those which concern foreign government-owned ships and those which

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60 Lauterpacht, supra note 8, at 224.
61 Lauterpacht, supra note 8, at 249.
concern foreign government-owned corporations. With regard to the former, the Supreme Court has not yet specifically overruled its decision of 1926 in *Berizzi Bros. Co. v. S. S. Pesaro.* In that case, a merchant vessel which was owned, operated and in the possession of the Italian Government, and engaged in commercial trade, was held to be immune from suit. This decision might clearly be cited as an example of the application of the absolute immunity doctrine, on the ground that had the court attempted to apply the restrictive rule, it would presumably have held that since the vessel was engaged in trade, and since this was a non-sovereign function, no immunity should be granted. Such an analysis, however, would constitute a superficial view of the case, for the court held in fact that the use of a ship for trading and commercial purposes was a "public use" sufficient to entitle the ship to the same full immunity as a warship. The court therefore in a sense indulged in the reasoning involved in the restrictive doctrine, and found that the commercial activities of the ship were a public purpose such as to give the activities a "sovereign" classification for the purposes of entitlement to immunity.

The Supreme Court's ruling in this case represents the high water mark with respect to the immunity of foreign government-owned ships. The courts themselves have made no attempt to draw distinctions between the public or private, governmental or proprietary functions being exercised by the ships in question. Since 1926, the trend of decisions has been towards restricting, albeit by artificial distinctions, the wide immunity granted in the *Berizzi* case.

Thus, in *The Navemar,* immunity was denied to a Spanish merchant ship, the ownership of which the Spanish Government claimed by virtue of a decree of expropriation, and which was engaged in the carriage of merchandise for hire, on the ground that the ship was not shown to be in the actual physical possession and public service of the Government. The requirement of possession was stated to be "actual possession by some act of physical dominion . . . or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of the Government." (The question of ownership was immaterial to the extent that the court treated the ship on the basis that the legal title thereto properly reposed in the Government.)

Similarly, in *Republic of Mexico v. Hoffman,* the Supreme Court, following the *Navemar* decision, held that a Mexican vessel owned by

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64 Id. at 75-76.
65 324 U.S. 30 (1945).
66 See note 63 supra.
the Mexican Government, but operated, controlled and in the possession of a private Mexican corporation, was not entitled to immunity from a suit in rem in admiralty. The court held that ownership of the vessel was not sufficient, nor was constructive possession. Mr. Justice Frankfurter in a concurring opinion said, however:

... that "possession" is too tenuous a distinction on the basis of which to differentiate between foreign government-owned vessels engaged merely in trade that are immune from suit and those that are not. Possession, actual or constructive, is a legal concept full of pitfalls. ... Ascertainment of what constitutes possession or where it is, is too subtle and precarious a task for transfer to a field in which international interests and susceptibilities are involved.

It is submitted with respect, that this statement illustrates very adequately the artificiality of the immunity of a foreign government-owned ship depending upon actual possession and service. Lower courts have continued, however, to follow the decision in the Hoffman case.

With regard to decisions concerning foreign government-owned corporations, the courts have sought to make legal distinctions based upon the legal status of the corporation. In general, where the courts have found the corporation in question to be indistinguishable in law from the government itself, or have found themselves concerned with a body which is an integral part of the government, rather than a separate corporate being, then immunity has been granted. Thus, in Oliver American Trading Co. v. Government of the United States of Mexico et al., a suit brought against the Mexican Government and the National Railways of Mexico was dismissed by the United States Circuit Court of Appeals for the Second Circuit on the ground that it was in reality directed against the government alone, since the railways were owned and operated by it for national purposes. In this connexion, it is noteworthy that the court took judicial notice of the fact that in the leading countries of Europe and in Canada it is the practice of governments to own and operate railways.

On the other hand, where it has been shown that the corporation is a separate legal entity from the foreign government, although the government may have a controlling interest or indeed own all the stock, then immunity has been denied by the federal courts, since the government

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67 Chief Justice Stone, who delivered the opinion of the court, noted:

Whether this distinction between possession and title may be thought to depend upon the aggravation of the indignity where the interference with the vessel ousts the possession of a foreign state, ... it is plain that the distinction is supported by the overwhelming weight of authority.

324 U.S. at 38.

68 Id. at 39-40.


70 5 F.2d 659 (2d Cir. 1924) discussed in Note, 10 Cornell L.Q. 390 at 395 (1925).
becomes merely a stockholder in the corporation, and acts as such, and
does not exercise its sovereignty in so doing. Moreover, the juristic per-
sonality of the corporation is distinguished from that of the owner of the
shares. Thus, in 1927, the United States brought a suit against the
Deutches Kalisyndicat Gesellschaft to enjoin alleged violations of the
anti-trust laws. The French Ambassador intervened by a motion to set
aside the service of process on the corporation on the ground of sovereign
immunity, alleging that the suit was in fact directed against the French
state, since the corporation was controlled thereby and was an instrument-
tality thereof. The court denied the motion, saying:

A suit against a corporation is not a suit against a government merely be-
cause it has been incorporated by direction of the government, and is used
as a governmental agent, and its stock is owned solely by the government . . .
The only difference between the defendants and other foreign corporations
and their officers and agents doing business in the United States is that the
French Republic owns a part of the stock of the defendant corporation, and
that the defendant company and its agents are selling potash for the French
government as well as for others . . .
The defendant company being an entity distinct from its stockholders, im-
munity cannot be claimed by it or on its behalf on the ground that it and
the government of France are identical in any respect. Private corporations
in which a government has an interest, and instrumentalities in which there
are private interests, are not departments of government.\textsuperscript{71}

A more recent case which went the other way was \textit{Re Investigation of
world arrangements with relation to the production, transportation, refining and distribution of petroleum.}\textsuperscript{72} This case arose out of an investiga-
tion commenced by the United States Government through the Depart-
ment of Justice, in 1952, of an alleged world-wide arrangement by
twenty-one oil companies, including the Anglo-Iranian Oil Company, to
determine if there had been a possible violation of the Sherman Anti-
Trust Act, and other federal anti-trust laws. Voluminous \textit{subpoenas duces
tecum} were served on the companies involving millions of documents
located in the United States and abroad. The AIOC pleaded sovereign
immunity, and counsel read in open court a letter from Mr. Geoffrey
Lloyd, British Minister of Fuel and Power ordering the officers of the
company "not to produce any documents which were not in the United
States of America and which do not relate to business in the United States,
without in either case, the authority of Her Majesty's Government." This
letter being challenged, the State Department then delivered to the court

\textsuperscript{71} United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 202 (S.D.N.Y. 1929). The court relied inter alia on the fact that the French law under which the corporation was incorporated as well as its certificate of incorporation provided that it might be sued.

\textsuperscript{72} 13 F.R.D. 280 (D.D.C., 1952).
a note signed by Mr. Anthony Eden, British Foreign Secretary, to the
effect that the letter from Mr. Lloyd "was issued with the official approval
and under the full authority of Her Majesty's Government in the United
Kingdom." This note further stated that the letter from Mr. Lloyd "em-
braced a claim of sovereignty in that it was addressed to British subjects
and organisations by Her Majesty's Government in the exercise of their
governmental authority and in the British public interest, including the
economic, strategic and political interests of Her Majesty's Government."
The court inquiring into whether the corporate entity involved in the
AIOC was of such a character as to be recognized as a unit of the British
Government, said that the main factor in determining whether a given
corporation was a governmental instrumentality was not whether the gov-
ernment had a controlling interest in the stock, but rather the object and
purpose of the corporation. The court reviewed the history of the AIOC
and recalled that it came into being as the result of an agreement between
Anglo-Persian Oil Company, Ltd. and the British Government in the year
1914, and that the latter acquired its interest in the company to insure
a proper supply of petroleum, crude oil and other products for the British
Fleet. The court then stated that the supplying of oil to insure the main-
tenance and operation of a naval force—and at the present time, an air
force—was certainly a fundamental governmental function serving a pub-
lic purpose within the meaning of the rule in the Berizzi case.
The court concluded accordingly that the operation of the AIOC was
a sovereign activity of the British Government, and that for the purposes
of immunity was "indistinguishable" from that government. It followed
that in the view of the court "a successful prosecution of Anglo-Iranian
here would in reality be to charge and find the British Government guilty
of violating a law of the United States, which imposes criminal penalties,"
and that the statements from Mr. Lloyd and Mr. Eden made it clear that
Great Britain was embracing a claim of sovereignty and asserting her
privilege of immunity. The subpoena served upon the AIOC was there-
for quashed.
State courts have also set up these distinctions in deciding upon asser-
tions of immunity put forward by foreign government-owned corpora-
tions.\textsuperscript{73} In \textit{Ulen \& Co. v. Bank Gospodarstwa Krajowego},\textsuperscript{74} a case
brought against a Polish bank to recover interest on bonds issued by it,
a New York court held that notwithstanding the fact that 60 per cent. of
the shares in the bank were held by the Polish Government, the bank was

\textsuperscript{73} United States of Mexico v. Schmuck, 293 N.Y. 264, 56 N.E.2d 577 (1944).
\textsuperscript{74} 261 App. Div. 1, 24 N.Y.S.2d 201 (2d Dep't 1940). See also Plesch et al. v. Banque
nevertheless a separate legal entity from the Polish state and therefore not entitled to immunity.

This brief review which has shown the different treatment accorded to foreign government-owned ships and corporations by American courts, may be appropriately concluded by a reference to the fact that this difference was due in great part to the policies of the State Department. With regard to the foreign government-owned corporations, the Department had occasion to make in connexion with the *Deutches Kalisyndicat* case the following statement:

... it has long been the view of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, and individuals doing business here, and should conform to the laws of this country governing such transactions.\(^\text{75}\) This position, of course, contrasts with the policy pursued with respect to foreign government-owned ships in respect to which the absolute immunity doctrine was followed.\(^\text{76}\)

Mention may now be made of the case which led the State Department to announce on April 9, 1948 that it was reconsidering its policy of requesting immunity for foreign government-owned and operated merchant vessels in the light of the increasing tendency of such vessels to engage in commercial operations.\(^\text{77}\) This case involved the libel of the Russian ship *Rossia* by an injured passenger. When the suit was instituted, the Soviet Ambassador officially presented a claim of immunity to the State Department, asserting that the ship was owned by the Ministry of Marine Fleet of the Union of Soviet Socialist Republics. The Department "recognized and allowed the claim," whereupon the District Court of the Southern District of New York dismissed the case without making any further inquiry into the facts.\(^\text{78}\) It was in response to questions concerning the recognition and allowance of immunity to this Soviet ship that the State Department made the above announcement relating to the reconsideration of its policy.

Subsequently, after four years of due consideration, the State Department by a letter dated May 19, 1952 from its Acting Legal Adviser, Mr. Tate, addressed to the United States Attorney-General, announced that thereafter it would be "the Department's policy to follow the restrictive

\(^{75}\) Hackworth, op. cit. supra note 21, at 481.

\(^{76}\) It may be recalled that in the Berizzi case the State Department disallowed the Italian Government's immunity claim; this is the only occasion upon which the Department's negative determination has been flatly ignored by the Judiciary.

\(^{77}\) See p. 443 supra.

theory of sovereign immunity in the consideration of requests of foreign
governments for a grant of sovereign immunity." Mr. Tate in his letter
reviewed the so-called rival theories of immunity and referred briefly to
the judicial practice of various countries. He then continued:

The reasons which obviously motivate state trading countries in adhering to
the [restrictive] theory with perhaps increasing rigidity are most persuasive
that the United States should change its policy. Furthermore, the granting
of sovereign immunity to foreign governments in the courts of the United
States is most inconsistent with the action of the Government of the United
States in subjecting itself to suit in these same courts in both contract and
tort and with its long established policy of not claiming immunity in foreign
jurisdictions for its merchant vessels. Finally, the Department feels that the
widespread and increasing practice on the part of governments of engaging
in commercial activities makes necessary a practice which will enable per-
sons doing business with them to have their rights determined in the
courts.

This announcement is of the greatest practical importance. Only in the
last thirty-five years has the position of the State Department in immunity
cases become clarified. Thus, prior to the decision of the Supreme Court
in Ex parte Muir, there were at least six methods used for asserting a
claim of immunity before the courts. In that case, the Supreme Court
indicated that only two methods were henceforth to be acceptable, namely,
the special appearance of the foreign sovereign through its "accredited
and recognized representative" in the actual suit, or the assertion of the
claim through the State Department which would then submit to the court
its Suggestion of immunity through the Attorney-General or other author-
ized Justice Department official. Since that time, foreign governments
have almost invariably made their claims through diplomatic representa-
tives to the Department. The latter's "recognition and allowance" is con-
clusive upon the court. Nevertheless if the court finds the language of

79 26 Dep't State Bull. 984, 985 (1952).
80 Ibid.
81 See generally, Lyons, "The Conclusiveness of the 'Suggestion' and Certificate of the
82 254 U.S. 522 (1921).
83 Riesenfeld, supra note 60, at 46 n. 174.
84 See Ex parte Republic of Peru, 318 U.S. 578 (1943) in which Chief Justice Stone said:
Upon recognition and allowance of the claim by the State Department and Certification
of its action presented to the court by the Attorney General, it is the court's duty to
surrender the vessel and remit the libelant to the relief obtainable through diplomatic
negotiations. . . .
The certification and the request that the vessel be declared immune must be accepted by
the courts as a conclusive determination by the political arm of the Government that the
continued retention of the vessel interferes with the proper conduct of our foreign
relations.
318 U.S. at 588-589. It is conclusive not only upon federal courts but also probably upon
state courts under the principle in U.S. v. Pink, 315 U.S. 203 (1942), that in the sphere of
international relations the question is one for national rather than for state rules.
the Suggestion filed by the Department to be equivocal, it will be free to examine the merits of the immunity claim itself.\footnote{Lamont v. Travelers Ins. Co., 281 N.Y. 362, 24 N.E.2d 81 (1939).}

There are dicta from the Supreme Court to the effect that the conclusiveness of the Suggestion extends to other legal questions involved in the case such as ownership and possession.\footnote{Ex Parte Republic of Peru, 318 U.S. 578, 588-589 (1943).} However, as a learned author has written "all that can safely be said is that the courts have considered themselves bound by, and will accord great respect to, a Suggestion of the Executive recognizing and allowing a claim of immunity, so long as it is not concerned too obviously with questions of pure law." \footnote{Lyons, supra note 81, at 146. But see Judge Walter's remarks in Frazier v. Hanover Bank, 119 N.Y.S.2d 319 at 321 (Sup. Ct. N.Y. County), aff'd, 281 App. Div. 861, 119 N.Y.S.2d 918 (1st Dep't 1953), and Comment thereon by Cardozo, "Sovereign Immunity: The Plaintiff Deserves a Day in Court," 67 Harv. L. Rev. 608 (1954).} Nevertheless, it is clear that the function of the State Department in these matters of immunity has become in effect a quasi-judicial one.

There has been considerable criticism concerning this alleged interference by the State Department acting for the Executive branch of the Government in the normal functions of courts. It has moreover been alleged that the system of the Suggestion involves an unwelcome and unwelcome abdication by the Judiciary of its proper sphere of activities.\footnote{Deak, "The Plea of Sovereign Immunity and the New York Court of Appeals," 40 Col. L. Rev. 453, 461 (1940); Jessup, "Has the Supreme Court Abdicated One of its Functions?," 40 Am. J. Int'l L. 168 (1946). Cf. Dickinson and Andrews, "A Decade of Admiralty in the Supreme Court of the United States," 36 Calif. Law Rev. 169, 215 (1948).} It may be more persuasively argued that whilst the courts should not permit the Executive to dictate to them—which indeed it has deliberately and carefully refrained from doing—they should pay great attention to the latter's views in the realm of international affairs, and try to avoid causing any embarrassment. Mr. Tate in his above-mentioned letter put the position of the State Department when he wrote:

> It is realized that a shift in policy by the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.\footnote{26 Dept't State Bull. 984, 985 (1952).}

The "indications" of the Supreme Court may be illustrated by the following extract from the Opinion of the court in the\footnote{324 U.S. 30 (1945).} Hoffman case, delivered by Chief Justice Stone:

> It is therefore not for the courts to deny an immunity which our government
SOVEREIGN IMMUNITY

has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. The judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept and follow the executive determination that the vessel shall be treated as immune. *Ex parte Peru* . . . But recognition by the courts of an immunity upon principles which the political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations.91

The effect of the State Department's new policy in practice is, therefore, that where it recognizes and allows a claim of immunity, the courts will be very unlikely to deny it,92 and when the Suggestion of immunity is conveyed to the court only for such action as it may consider just and proper in all the circumstances, the latter will generally not allow the claim.93 In the first event the implication is that the Department will have decided that on the facts a question of *jure imperii* is involved, and in the second, that it is merely a matter of *jure gestionis*. Where the Department arrives at the second conclusion, although it is tantamount to a negative suggestion which the court will be disinclined to disregard, nevertheless it would appear that at least in theory the court will be required to decide the case upon the precedents, depending upon whether a government-owned ship or corporation is concerned.

**England**

In England, the Foreign Office Certificate is as conclusive upon the courts as the State Department Suggestion is upon the American courts. However, there is a notable difference in the conclusiveness in that the Foreign Office Certificate relates solely to questions of fact or status and not to law. With regard to immunity cases, any Certificate which is delivered to the court will relate solely to whether the foreign state, or entity is recognized by H.M. Government as being entitled to diplomatic status in England. The Certificate will leave to the court the legal conclusions to be drawn from the statement thus submitted. It follows, that no questions have arisen in England as to the propriety of the Executive exercising quasi-judicial functions in these matters, for unlike the position in the United States, the Executive confines itself to pure statements of fact.

With regard to the practice of English courts in immunity cases, it may be convenient to divide this discussion into two parts, as was done for the American cases, taking first those concerned with foreign government-

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91 Id. at 35. See also Mr. Justice Frankfurter's concurring opinion at 41-42.
This is a different case from the one of the same name cited in the previous note.
owned ships, and then those with corporations. With respect to the former, the absolute immunity doctrine has not yet been discarded. On the contrary, the decision of the Court of Appeal in *The Porto Alexandre* in 1920 in which a ship owned and operated by the Portuguese Government solely for purposes of ordinary commerce was held immune from arrest, is still good law and has not been overruled.

The Court in this case followed the leading authority of *The Parlement Belge* in which it was held that a vessel owned by the Belgian State and employed primarily in carrying mails, but also in other commerce, was exempt from proceedings *in rem* since these indirectly impleaded the owner of the vessel, a foreign state.

*The Porto Alexandre* decision was seriously questioned by a majority of the House of Lords in *Compania Naviera Vascongado v. Cristina S.S.*, which was the first occasion on which an immunity case involving a foreign vessel had come before the highest judicial body in England. The holding in this case which concerned a public ship not engaged in state trading, was that the English courts will not permit the arrest of a ship which is in the possession of, and which has been requisitioned for public purposes by a foreign sovereign.

However, three Law lords during the course of their judgments made some interesting and pertinent *obiter dicta* concerning *The Porto Alexandre* case, and the absolute immunity doctrine in general. Lords MacMillan and Thankerton both reserved their position as to the continued applicability of that decision, the former saying:

*I confess that I should hesitate to lay down that it is part of the law of*
England that an ordinary trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign state. 98

Lord Maugham went even further and attacked outright the philosophy of the absolute immunity doctrine. In a much quoted judgment, 99 he said:

Half a century ago foreign Governments very seldom embarked in trade with ordinary ships, though they not infrequently owned vessels destined for public uses, and in particular hospital vessels, supply ships and surveying or exploring vessels. These were doubtless very strong reasons for extending the privilege long possessed by ships of war to public ships of the nature mentioned; but there has been a very large development of State-owned commercial ships since the Great War, and the question whether the immunity should continue to be given to ordinary trading ships has become acute. Is it consistent with sovereign dignity to acquire a tramp steamer and to compete with ordinary shippers and ship-owners in the markets of the world? Doing so, is it consistent to set up the immunity of a sovereign if, owing to the want of skill of captain and crew, serious damage is caused to the ship of another country? Is it also consistent to refuse to permit proceedings to enforce a right of salvage in respect of services rendered, perhaps at great risk, by the vessel of another country? Is there justice or equity, or, for that matter, is international comity being followed, in permitting a foreign government, while insisting on its own right of indemnity, to bring actions in rem or in personam against our own nationals? 100

These reservations were referred to in the Opinion of the Judicial Committee of the Privy Council in 1952 in Sultan of Johore v. Abubakar, 101 a case concerned with the waiver of immunity in personam. The Board took the opportunity to observe that there has not been finally established "any absolute rule that a foreign independent sovereign cannot be impleaded in our [the English] courts in any circumstances." 102 The Board then added that it seemed "desirable to say this much, having regard to inferences that might be drawn from some parts of the Court of Appeal's judgment in The Parlement Belge and from the speech of Lord Atkin in The Cristina." 103 The position with regard to foreign government-owned ships is therefore that in the absence of distinguishing facts, the absolute immunity doctrine still applies as far as the Court of Appeal but that the House of Lords has not yet pronounced on the matter.

There are few English decisions concerning government-owned corporations. The two worthy of mention for the present purposes both concern state agencies. In 1924 a suit in personam was brought against the United

98 [1938] 1 All E.R. 719, 725.
99 E.g., by Mr. Justice Frankfurter in Republic of Mexico v. Hoffman, 324 U.S. 30, 41 (1945).
100 [1938] 1 All E.R. 719, 741 (H.L.)
101 [1952] 1 All E.R. 1261 (P.C.)
102 Id. at 1268.
103 Ibid. See note 97 supra.
States Shipping Board for the recovery of an alleged overpayment of freight.\textsuperscript{104} The State Department informed the American Ambassador that its circular instruction of March 5, 1923\textsuperscript{105} referred only to waiver of immunity from arrest of vessels owned by the United States, and was in no sense to be construed as a waiver of the immunity of the U.S. Shipping Board from \textit{in personam} actions. The Ambassador was accordingly instructed to certify to the court that the Shipping Board was an agency of the U.S. Government, and therefore not subject to suit.\textsuperscript{106} The Court of Appeal setting aside the proceedings said that the certificate established that the Board was "a body representing a Sovereign State," and concluded that:

\textbf{[T]here is no authority anywhere to be found that the mere fact that a Sovereign is engaging in some private trading business subjects him to the processes in the Courts of a foreign country.}\textsuperscript{107}

A similar decision was reached by the Court of Appeal in 1949 in \textit{Krajina v. Tass Agency}.\textsuperscript{108} In this case the court set aside a writ of libel against the agency on the ground that from the evidence of the certificate provided by the Soviet Ambassador in London, it was a department of the Soviet State. The plaintiff failed to satisfy the onus upon him to prove that the agency was a legal entity separate from the Soviet State. He further pleaded that even if the agency were not a separate legal entity, the nature of its activities were such as to deprive it of its immunity. At least a majority of the Court were of the opinion that this argument also failed. Thus Cohen L.J. said that even if the Court had decided that the evidence established that Tass was given the status of a separate juridical entity, "it does not seem to me necessary to follow that it would thereby have been deprived of its immunity."\textsuperscript{109} Tucker, L.J. added, "It may be that under some foreign systems of law such a separate existence might be considered inconsistent [with immunity], but it is clear from our Acts of Parliament that we do not consider the fact that a government department may have a separate legal juristic existence as neces-

\textsuperscript{104} Compania Mercantil Argentina v. United States Shipping Board, 93 L.J.K.B. 816 (1924).

\textsuperscript{105} This circular instruction was substantially similar to the one dated January 11, 1923, which is set out on p. 429 supra.

\textsuperscript{106} Hackworth, op. cit. supra note 21, at 477.

\textsuperscript{107} Ibid. It may be noted that the German Reichsgericht in 1921 in Gustav Selling v. United States Shipping Board (The Ice King), Annual Digest and Reports of Public International Law Cases, Case No. 102 (1919-1922), a case arising out of a collision in which a Shipping Board vessel was involved, also declared itself incompetent to entertain the action on the ground that the United States was the real defendant.

\textsuperscript{108} [1949] 2 All E.R. 274.

\textsuperscript{109} Id. at 280.
sarily incompatible with it being a department of State for which immunity can be claimed." 110 The third Lord Justice who heard the case, Singleton, L.J., was more inclined to view the absolute immunity doctrine with some suspicion for he said, "So far as I can see, there is no precedent for extending immunity to a corporate body carrying on business in this country, and I should wish for further argument before deciding that it could be so extended." 111

These judicial expressions of opinion afford a possible indication as to how the Court of Appeal, at least, would approach an immunity case, where there was involved on the evidence a government-owned corporation, which was not a department of a foreign state. As Lord Justice Singleton might have added there is also no precedent for not extending immunity in such circumstances; the difference between the Tass Agency case and the Shipping Board case being that in the latter there was no evidence on which an argument could be based that the Board was a separate legal entity in any sense of that term.

With regard to the question of what law governed the status of the Tass Agency for the purpose of the immunity determination, the Court of Appeal found that this had to be decided by Soviet law, in the same manner as it had held that recourse had to be made to United States law in the Shipping Board case. However, in such matters, under English law, the certificate of an Ambassador is not binding upon an English court in the same way and to the same degree as the Certificate emanating from the Secretary of State for Foreign Affairs.

The importance of the Tass Agency case went beyond its actual decision, as it led to letters of protest to The Times, and to questions in Parliament. The Government then appointed an Interdepartmental Committee on State Immunities to enquire into the situation. This Committee was required to consider whether the law or practice of the United Kingdom afforded to Governments, and other state organs of foreign states a wider immunity than was desirable or was strictly required by the principles of public international law in regard to property (including ships), transactions, or any other act capable of creating legal liabilities. An interim report, which was not published in view of its nature, was submitted at the beginning of 1952. Subsequently it was announced in the House of Commons on February 13, 1953 by the Parliamentary Under-Secretary for Foreign Affairs that the Committee had found such great divergencies in state practice as to make it difficult to establish the exact position under international law. In view of the differing opinions among members of the

110 Id. at 284.
111 Id. at 285.
Committee as to what principles it would be best to follow, the Committee
was unable to reach any final conclusions or make any final recommenda-
tions.112

France

With regard to French decisions, it does not seem useful to differentiate
between those involving government-owned ships, and those involving
government-owned corporations. The absolute immunity doctrine was
laid down in the frequently cited judgment of the Court of Cassation of
January 22, 1849, in Gouvernement espagnol c. Casaux.113 It has been
followed and reaffirmed on many occasions since that time, and as re-
cently as 1933 the Court of Cassation had occasion once again in Hanu-
kiew c. Ministre de l'Afghanistan, to state that:

... du principe de l'indépendance de l'État, il résulte qu'un gouvernement
ne peut être soumis, pour les engagements qu'il a contractés, à la juridiction
d'un État étranger.114

The evidence of practice indicates that French courts are unwilling to
depart from the classical doctrine when the case concerns a foreign state
as such.115 However, where “un acte de commerce” has been in question,
and where the activity forming the subject of the suit is not that of the
foreign state's, but that of an entirely separate entity, then the courts have
been prepared to take jurisdiction. Thus, in l'U.R.S.S. c. Association
France-Export,116 the Court of Cassation allowed the issuance of a
saisie-arrêt against the assets of the Soviet Trade Delegation. The court
carefully distinguished the Soviet state as such, from the entity involved
in the case which it described as “la représentation commerciale en France
de l'U.R.S.S.” and to which it declined to extend jurisdictional immunity.
Unlike the English Court of Appeal in the Tass Agency case, the Court of
Cassation declined to attach weight to the fact that according to Soviet
law the Trade Delegation was a part of the Russian state.117 French
courts in other cases in which this Delegation was concerned, have main-
tained the same disregard of its domestic constitutional position and have
held, in fact repeatedly, that the Delegation was not entitled to state
immunity.118

113 Hamson, supra note 32, at 301.
114 Sirey, I, 249 (1933).
116 Sirey, I, 49 (1930).
117 Hamson suggests in his study that the French courts will not enquire too closely into
the foreign state's legislation, but that although not bound by the foreign state's constitu-
tional or internal law, they will in general pay some regard to it. Hamson, supra note 32,
at 331.
The theory of the “acte de commerce” has enabled French courts, whilst upholding the absolute immunity doctrine whenever foreign states as such have been concerned, to take jurisdiction in all cases where it has appeared that an entity distinct from the foreign state has been involved. On the other hand, whenever the foreign agency has been recognized to be indisputably a state agency, immunity has been granted. The practice evolved, thus corresponds to the treatment by American courts of foreign government-owned corporations.

Conclusions as to Practice of States

It may be appropriate at this juncture to summarize the foregoing and present various conclusions with regard to the practice of the various states which has been discussed. On the one hand, the English courts are still bound by precedents up to the Court of Appeal to follow the absolute immunity doctrine in cases concerning foreign government-owned ships. There are, however, indications that the House of Lords if and when presented with a case will at least scrutinize the legal basis of these precedents very carefully. It would not be surprising to find them overruled in the light of modern developments, and of the persuasive force of American decisions adopting a more restrictive approach. Thus with respect to the practice in the United States, it is clear that no longer will the Executive provide the courts with the opportunity of following the absolute immunity theory. This too is in line with the French practice of maintaining the absolute immunity doctrine subject to the application of the theory of “acte de commerce.” The assumption by the French courts of jurisdiction in this latter sphere may have been partly due to the influence of the Belgian and Italian courts which were the first to restrict the immunities of foreign states to causes of actions arising from their sovereign activities. This distinction between acts *jure imperii* and acts *jure gestionis* is also made by the courts of a number of other continental European countries including Austria, Greece, and Switzerland. Moreover, on the basis of only a few decisions it would appear that the courts in some Latin American countries, as well as those in the Netherlands and in the Scandinavian countries do likewise. Only England, some Commonwealth countries, probably the Soviet Union, and possibly one or two other states still continue to grant full acceptance to the absolute immunity doctrine.

As has been indicated earlier in this article, neither of these two doc-

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119 E.g., the United States Shipping Board cases, Hamson, supra note 32, at 324.
120 Cf. Article 333 of the Bustamente Code adopted at the Sixth International Conference of American States at Havana in 1928, 4 Hudson, International Legislation 2328 (1928-9), which 15 states had ratified (some with reservations) as of August 1, 1953.
121 See Mr. Tate’s letter in 26 Dep’t State Bull. 984, 985 (1952).
trines is truly satisfactory, both suffering from grievous practical defects. It is now proposed, therefore, to review various suggestions which have been put forward—including some to which effect has been given—for the purpose of arriving at a generally acceptable and workable solution for immunity problems. These suggestions may be divided into three types: those which involve national action only, those which are upon a bi-national basis, and those which are upon a multi-national level. Finally it is intended to discuss briefly from the viewpoint of the progressive development of this part of international law the past experience and the future prospects of its codification.

SUGGESTED SOLUTIONS FOR IMMUNITY CASES

Solutions Involving National Action only

The decision of the U.S. Supreme Court in Berizzi Bros. Co. v. S. S. Pesaro led to frequent attacks by American writers on the ground that the implication of the holding was that foreign government-owned ships before United States Courts were being granted greater immunities than the foreign governments themselves enjoyed before their own courts or granted to United States government-owned ships. One of the earliest proposals made to remedy this situation was that a law should be enacted by Congress declaring that henceforth all foreign government-owned ships should be conclusively presumed to have consented to be subject to the same laws and obligations as private vessels. Another suggestion was that the United States should resume territorial jurisdiction through an express legislative announcement in all cases where a foreign state engaged in commercial undertakings within American territory.

A further partial solution, which attempts to avoid the difficulties encountered on the international plane of deciding what is a governmental function for the purposes of the restrictive immunity doctrine is embodied in Article 11 of the Harvard Draft Convention on the Competence of Courts in Regard to Foreign States. Article 11 reads as follows:

A State may be made a respondent in a proceeding in a court of another State when, in the territory of such other State, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act.

122 271 U.S. 562 (1926).
123 Sanborn, "The Immunity of Merchant Vessels when owned by Foreign Governments," 1 St. John's L. Rev. 5, 28 (1926).
The foregoing provision shall not be construed to allow a State to be made a respondent in a proceeding relating to its public debt.

In the words of the Comment to this Article, it "endeavors to supply a practical criterion for the solution of problems of exceptional difficulty. From a practical point of view, the basic consideration is the fact that when a State engages in business in competition with private persons or corporations, this competition is unfair if the State is not answerable in the courts of the State where the business is transacted. The text proceeds on this theory, making the State subject to court process wherever it engages in an enterprise in competition with private endeavor." 126 No proposal of this kind, however, can completely escape the interpretation difficulties and clarification problems, necessarily inherent in the restrictive immunity doctrine.

The same disadvantage is encountered with the proposal concerning changes in substantive law contained in the resolution on "state immunity" adopted by the International Law Association, at its 45th Conference at Lucerne in 1952, upon the recommendation of its Committee on State Immunity. The discussion by the Committee members revealed that the consensus of opinion was in favour of moving away from the absolute immunity doctrine. Nevertheless, there was at the same time a very real appreciation of the problem of how to arrive at a distinction, likely to be generally valid, between acts jure imperii and acts jure gestionis. 127 Moreover, it is probable that many of the members were not entirely satisfied with this part of the final text of the resolution, which reads as follows:

\textit{Whereas} the 45th Conference of the I.L.A. has taken into consideration the present position of foreign states before national courts; \textit{Whereas} the multiplication and extension of the activities of the State has resulted in an attempt by the Courts of many States to restrict the operation of the rule of Immunity of Foreign States by distinguishing between "the public law acts" and the "private law acts" of the States.

\textit{Whereas} the principle of the immunity from suit of foreign States is becoming obsolete in cases where States enter into commercial enterprises or other acts of the nature of private law (droit privé).

\textit{And Whereas} the aforesaid distinction should be defined with precision in order to be of greater practical value.

\textit{With the object of establishing} security in the relationship between States and individuals.

The 45th Conference of the I.L.A. resolves:—

\footnote{126 Id. at 598.} \footnote{127 Report of the Forty-Fifth Conference of the International Law Association 210-232 (1952).}
As to substantive law: That foreign States should not be immune from suit in relation to their acts when engaged in private enterprise.\(^{128}\)

The weak point of the proposal would appear to centre around the term "private enterprise." It is no reflection at all upon the distinguished members of the Committee to suggest that although this term may be an improvement upon many other suggested criteria of this nature, it is conceivable that a varying interpretation would be given to it by the courts of different countries. Moreover, it is true also, as a member of the Committee noted,\(^{129}\) that the term "private enterprise" is less comprehensive than the term used in the preamble to the resolution, namely, "public law acts."

The most logical and practicable suggestion so far put forward involves the assimilation of the jurisdictional immunities of foreign states in the courts of other states, to those enjoyed by such states before their own courts.\(^{130}\) The foreign state would then be in the same position as the domestic state before the latter's courts. The assimilation would not be complete, as certain exceptions and safeguards are suggested. Thus, immunity would continue to extend to legislative acts and all measures taken pursuant thereto, and to executive and administrative acts performed within the territory of the foreign state. Moreover, the rules of public international law relating to diplomatic immunities would not be affected. Furthermore, the foreign state would in no event be made amenable to the domestic jurisdiction, in cases where under the rules of private international law the courts would have no jurisdiction over private litigants. With regard to execution, it is suggested that this should be allowed as a general rule, but without extending it to warships, diplomatic premises, and to cases where friendly relations with foreign states might be seriously endangered.

There is authority for the view that this proposal would not disregard any "clear or binding principle of international law."\(^{131}\) Despite the obvious attractions of the suggestion it remains at its best an idea to which effect can only be given on the national level. It is bound to suffer from the defect common to all remedies which are solely unilateral in character, namely, that any action which is taken is likely to be uncoordinated. Thus, even if this proposal were adopted by a large number of states—which indeed would be an improvement upon the present somewhat unclear situation—domestic enabling legislation in the matter would inevitably vary leaving states in different position vis-a-vis each other's courts.

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\(^{128}\) Id. at vii-viii.

\(^{129}\) Id. at 225.

\(^{130}\) Lauterpacht, supra note 8, at 237.

\(^{131}\) Id. at 239.
Sovereign Immunity

Solutions Involving Bi-national Action

The only type of solution under this heading is government sponsored by reason of its nature, and comprises provisions in bilateral agreements under which each state agrees to waive its immunity before the courts of the other. Such provisions were not common prior to the second world war, though there are a number of examples to be found in the agreements concluded in the nineteen-twenties and thirties by the Soviet Union on account of its state monopoly of trade. Thus, in the Temporary Commercial Agreement between England and the Soviet Union of February 16, 1934, which was principally concerned with the establishment in London of a Soviet Trade Delegation, the following clauses are to be found: 132

Article 5

(6) Any question which may arise in respect of any transaction entered into in the United Kingdom by the Trade Delegation, the Trade Representative or either of his two deputies, acting for and on behalf of the Union of Soviet Socialist Republics, and duly signed in accordance with the provisions of Paragraph (4) of the present Article, shall be determined by the Courts of the United Kingdom in accordance with the laws thereof, and, for the purposes of any proceedings which may be instituted in respect of any such transaction, service of the Writ of Summons or other process shall be deemed to be good service if such Writ or process is left at the office in London of the Trade Delegation.

(7) The Union of Soviet Socialist Republics will accept the jurisdiction of the Courts of the United Kingdom in respect of any question referred to in paragraph (6) of the present Article and will not claim any privilege or immunity in connection with any proceedings which may be instituted in pursuance of the said paragraph. Where any Writ of Summons or other process is served upon them in accordance with the said paragraph (6), the Union of Soviet Socialist Republics will cause the Trade Representative or other person acting on their behalf to take the necessary steps to enable the questions involved in the proceedings to be determined by the Courts of the United Kingdom and to ensure that an appearance to those proceedings is entered on their behalf. Equally, the Trade Delegation, the Trade Representative and his two deputies will accept the jurisdiction of the Courts of the United Kingdom in respect of any question referred to in paragraph (6) of the present Article and will not claim any privilege or immunity, whether under paragraph (2) of the present Article or otherwise, in connection with any proceedings which may be instituted in pursuance of the said paragraph (6).

A substantially similar clause was contained in at least eight other such treaties entered into by the U.S.S.R. during this period. 133

Since 1945, a clause which assures on a reciprocal basis that state-

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133 See Harvard Draft Convention, 26 Am. J. Int'l L. 561-562 (Supp. 1932) for list of such treaties.
owned commercial enterprises of one country engaging in business in another country will not be immune from taxation, suit, execution of judgment, or other normal liabilities, has been inserted in the majority of treaties of friendship, commerce and navigation entered into by the United States. The first such provision is contained in the Treaty with Italy, signed on February 2, 1948, and reads as follows:

No enterprise of either High Contracting Party which is publicly owned or controlled shall, if it engages in commercial, manufacturing, processing, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, from suit, from execution of judgment, or from any other liability to which a privately owned and controlled enterprise is subject therein.

Virtually identical provisions are to be found in treaties concluded with Colombia, Denmark, Greece, Ireland, and Uruguay. In a treaty with Israel, signed on August 23, 1951, there is a corresponding clause, but with the addition after the words "no enterprise of either . . . Party," of the phrase, "including corporations, associations and government agencies and instrumentalities," which clearly makes the waiver of immunity all-embracing.

The object of the United States in seeking the insertion of these mutual waiver clauses is in line with its policy of not claiming immunity for its vessels in foreign courts, and with the new adherence to the restrictive immunity doctrine with respect to foreign states and their instrumentalities before American courts. Moreover, the effect of the mutual waiver clauses upon the legal position of government-owned corporations of state A before the courts of state B would appear to correspond roughly to that which would be produced if reciprocal action were taken—albeit on a unilateral basis—to assimilate the immunities of such corporations to those enjoyed by those of state B before its own courts, assuming of course that in both states the government-owned corporations were entitled to no immunity.

There is no doubt that this form of bi-national action achieves at least

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134 Statement of May 9, 1952, by Mr. H. F. Linder, Assistant Secretary for Economic Affairs, Department of State, on Treaties of Friendship, Commerce, and Navigation to a subcommittee of the Senate Foreign Relations Committee, 26 Dep't State Bull. 881 (1952).
136 Colombia, 29 Collections des Traités No. 64, art. XVIII(2) (1951).
137 Senate Executive I, 82d Cong., 2d Sess., art. XVIII(3) (1952).
139 1 U.S. Treaties and other Int'l Agreements 797, art. XV(3).
140 23 Dep't State Bull. 507, art. XVIII(5) (1950).
141 Israeli Treaty Series No. 34, art. XVIII(3) (1951).
in a limited field a satisfactory solution to the immunity question. Having regard to the fact that it is often much easier to achieve agreement on such matters on a bilateral basis, rather than a multilateral one, it may be hoped that similar provisions will be adopted in other such treaties entered into between different countries. Moreover, it is likely that the conclusion of an increasing number of bilateral agreements will have a stimulating and encouraging effect upon the prospects for a multilateral convention in so far as they will create a wider basis of possible accord. It may be emphasized in this connexion that the International Law Association in its above-mentioned resolution adopted at the Lucerne Conference, also suggested that as a method "of improving the present operation of the rule of immunity . . . that States should by Treaty, either bilateral or multilateral, regulate more precisely and limit the immunities which each may claim in the courts of the other." 142 (Italics added.)

Solutions Involving Multinational Action

There has been but one real example of multinational action by governments jointly concerned with the restriction of the immunity rules.143 This is the Brussels Convention for the Unification of Certain Rules Concerning the Immunities of State-owned Ships, which was signed on April 10, 1926. The convention was adopted at a conference144 initiated mainly through the work of the International Maritime Committee, and was attended by the representatives of twenty-one states. Of the principal maritime powers, only the Soviet Union and the United States were absent. Subsequently there was also signed at Brussels on May 24, 1934 an interpretative protocol which was deemed to form an integral part of the Convention. The latter then entered into force on January 8, 1937. In March 1945,145 the following states had become parties: Belgium, Brazil, Chile, Egypt, Estonia, Germany, Hungary, Italy, Mexico, Netherlands, Norway, Poland, Portugal, Rumania, and Sweden.146 The pertinent articles of the Convention are as follows:

143 Article 281 of the Treaty of Versailles, June 28, 1919, 13 Am. J. Int'l L. 151, 291 (Spec. Supp. 1919), is not a real precedent, but is nevertheless interesting and pertinent for the present purposes. This Article reads as follows:

If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty.

144 The subject of the jurisdictional immunities of government-owned ships was also considered at the Conference of London 1922, the Conference of Gothenburg 1923, and the Conference of Genoa 1925.

145 It has not proved possible to ascertain the exact number of parties at the time of writing. The Belgian Government is the depositary of the convention and is the only available authority with accurate and up-to-date knowledge.

Article 1.

Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on Government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.

Article 2.

For the enforcement of such liabilities and obligations there shall be the same rules concerning the jurisdiction of tribunals, the same legal actions, and the same procedure as in the case of privately owned merchant vessels and cargoes and of their owners.

Article 3.

1. The provisions of the two preceding Articles shall not be applicable to ships of war, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by a State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service, and such vessels shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings in rem.

Nevertheless, claimants shall have the right of taking proceedings in the competent tribunals of the State owning or operating the vessel, without that State being permitted to avail itself of its immunity:

(1) In case of actions in respect of collision or other accidents of navigation;

(2) In case of actions in respect of assistance, salvage and general average;

(3) In case of actions in respect of repairs, supplies, or other contracts relating to the vessel.

2. The same rules shall apply to State-owned cargoes carried on board the vessels hereinafore mentioned.

3. State-owned cargoes on board merchant vessels for Governmental and non-commercial purposes shall not be subject to seizure, attachment, or detention, by any legal process, nor to judicial proceedings in rem.

Nevertheless, actions in respect of collision and accidents of navigation, assistance and salvage, and general average, and actions on a contract relating to such cargo may be brought before the tribunal having jurisdiction under Article 2.

Article 4.

States may plead all measures of defence, prescription, and limitation of liability, which are available to private vessels and their owners.

If it becomes necessary to adopt or modify the provisions relative to such means of defence, prescription, and limitation so as to make them applicable to ships of war, or Government vessels coming within the terms of Article 3, a special convention shall be concluded to that effect. In the meantime, any necessary measures may be effected by national legislation in conformity with the spirit and principles of this Convention.

Article 5.

If in the case of Article 3 there is in the opinion of the Tribunal a doubt as to the Governmental and non-commercial character of the vessel or cargo, a
certificate signed by the diplomatic representative of the contracting State to which the vessel or cargo belongs, produced through the intercession of the State before whose courts and tribunals the case is pending, shall serve as evidence that the vessel or cargo comes within the terms of Article 3, but only for the purpose of securing a release from seizure, attachment, or detention, that may have been ordered by legal process.

Without entering into a detailed examination of these provisions, the following comments may be pertinent. The Convention represents an attempt to reconcile the various conflicting national viewpoints on the legal issues involved in the light of modern developments. As such in a sense it is a compromise solution. The general rule appears to be that state-owned ships and their cargoes are to be liable to the same liability as any other ships before the courts of the state owning the ships, or before the courts of any other state party to the Convention. There is an important exception to this rule provided in Article 3 for certain kinds of state-owned vessels, and other state-owned vessels, when they are being used in "government and non-commercial" service. Only specified forms of actions will be maintainable against such vessels and state-owned cargoes on board, and these will have to be brought in "the competent tribunals of the State owning or operating the vessel." However, similar actions in respect of state-owned cargoes on board merchant vessels may be brought in any court. Whenever a court is not certain of the governmental status of a vessel or cargo, a certificate from the diplomatic representative of the state owning the ship or cargo will be conclusive upon it (Article 5).\textsuperscript{147}

The Convention has therefore certain drawbacks associated with its partial adherence to the restrictive immunity doctrine. It is still in force, but the fact that it has received only a relatively small number of ratifications, not including some of the major maritime powers, has a serious limiting effect. However, the importance of the Convention may be considered from the standpoint of future multilateral treaties. Any such treaties drawn up for the purpose of limiting the immunity granted by national courts to foreign states, their agents and instrumentalities, would need to go beyond the limits of the Brussels Convention. In particular if such a convention set forth that the immunities granted to foreign states and their agencies and wholly-owned corporations and ships should be assimilated before the courts of other states to those enjoyed by the latter and their instrumentalities in their own courts, then this would be an advance in the right direction, provided, of course, that all contracting parties were required to have divested themselves of their immunities be-

\textsuperscript{147} The English text says "evidence" merely, but the French uses the word "preuve." Neither text is stated to be authentic, but the French seems the more probable meaning.
fore their own courts to an equal extent.\textsuperscript{148} This assimilation would need to be subject to the same exceptions and reasonable safeguards as set forth above in the section dealing with national action.\textsuperscript{149}

The Institute of International Law has recently been interested in the subject of jurisdictional immunities.\textsuperscript{150} Thus at the Siena Session in 1952 a Report was presented to the First Committee by its rapporteur, M. Lémonon, together with a set of draft resolutions and a draft convention. In general, it may be said that M. Lémonon favours the adoption of the restrictive immunity rule. Thus, Article 3 of his draft convention reads as follows:

\begin{quote}
Même lorsqu’il n’y aura pas consenti, un État peut être assigné devant un tribunal étranger toutes les fois où l’acte qui motive le litige est un acte de gestion patrimoniale, analogue à celui d’un simple particulier, qu’il s’agisse d’une action personnelle mobilière ou réelle mobilière, ou immobilière. Une action successorale ne peut justifier une demande d’immunité.\textsuperscript{151}
\end{quote}

With regard to this provision, M. Niboyet, the great partisan of the restrictive immunity rule, approves of it, but regards the term “gestion patrimoniale” as too vague, and prefers either “acte de commerce,” “activité commerciale,” or “activité non gouvernementale.”\textsuperscript{152} It is submitted with respect that the very fact that so many synonyms are readily available to describe non-sovereign activities underscores the futility of attempting by means of a substitution of terms to avoid the basic difficulties associated with the alleged distinction between acts \textit{jure gestionis} and acts \textit{jure imperii}.\textsuperscript{153} Unfortunately the same point militates against M. Lémonon’s suggestion concerning the restriction of the immunity from seizure and execution to state property “affectés à l’exercice de leur puissance publique” (Article 14).

However, it is easy to agree with his proposal, contained in Article 17 of the draft convention, that more multilateral conventions should be con-

\textsuperscript{148} See the recommendation by the World Economic Conference of 1927 to the effect:
That, when a Government carries on or controls any commercial, industrial, banking, maritime transport or other enterprise, it shall not, in its character as such and insofar as it participates in enterprises of this kind, be treated as entitled to any sovereign rights, privileges, or immunities from taxation or from other liabilities to which similar privately owned undertakings are subject, it being clearly understood that this recommendation only applies to ordinary commercial enterprises in time of peace.

\textsuperscript{149} The problem of classifying the various commercial transactions which are carried on internationally by states or state-owned corporations has not been touched upon in this article. But see, Fawcett, “Legal Aspects of State Trading,” 25 Brit. Y.B. Int’l L. 34 (1948).

\textsuperscript{150} The Institute also produced a “projet de règlement” on the question in 1891-2. See

\textsuperscript{26} Am. J. Int’l L. 738 (Supp. 1932).

\textsuperscript{151} Id. at 121.
SOVEREIGN IMMUNITY

cluded, designed to enlarge the scope of exceptions to the absolute immunity rule. In this connexion it may be recalled that the International Law Association at its 1952 Lucerne Conference also recommended the regulation and limitation of immunities by multilateral treaties. These suggestions from learned societies of international lawyers, are encouraging auguries.

The International Law Association also formulated another proposal in the same resolution which would require the machinery of a multilateral treaty. This was the recommendation:

(a) That States should agree to create special international tribunals for the settlement of disputes arising out of activities of a "private law" (droit privé) nature between themselves and foreign individuals, it being understood that direct access to those tribunals would be allowed to private parties without their claim being first espoused by their respective Governments.\textsuperscript{154}

Certain doubts were expressed by members of the Committee on State Immunity concerning the efficacy of such arbitration tribunals having regard to the tendency of some governments to decline to submit to international arbitration notwithstanding the presence of an arbitration clause in a contract to which they are parties.\textsuperscript{155}

The subject of jurisdictional immunities was also considered by the League of Nations Committee of Experts for the Progressive Codification of International Law appointed by the Council in 1924. The Committee had the following terms of reference:

(1) To prepare a provisional list of the subjects on international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment;
(2) After communication of the list by the Secretariat to the Governments of States, whether Members of the League or not, for their opinion, to examine the replies received; and
(3) To report to the Council on the questions which are sufficiently ripe and on the procedure which might be followed with a view to preparing eventually for conferences for their solution.\textsuperscript{156}

The Committee decided to include in its list the question of the "Competence of the Courts in regard to Foreign States," being of the opinion that:

even though the conclusion of a uniform agreement between the Powers might meet with serious difficulties, these difficulties were not the same for all parts of the subject, and it felt that it was desirable to ascertain, exception always being made of the case of acts of State:

"Whether and in what cases, particularly in regard to action taken by a State in the exercise of a commercial or industrial activity, a State can be liable to be sued in the courts of another State."\textsuperscript{157}

\textsuperscript{155} Id. at 227.
\textsuperscript{156} 22 Am. J. Int'l L. 117 (Spec. Supp. 1928).
\textsuperscript{157} Ibid.
The Committee thereupon requested the views of governments (both Members and non-members of the League) as to whether the codification of the topic was “desirable and realisable.” Twenty-one governments, including England, France and the United States replied in the affirmative although France, together with a number of other governments expressed certain hesitations and reservations. Only three of the governments asked returned negative answers. Nearly all the states questioned referred to the difficulties likely to be encountered in drawing up an international agreement on the subject. It was, therefore, in some respects surprising that the Committee should, after an examination of the replies, have reported to the League Council that in its view the question of the “Competence of the Courts with regard to Foreign States” was “ripe” for codification. As the Committee had already recommended three topics for the agenda of the first world conference on codification (the Hague Conference of 1930), the present subject was merely left in abeyance for a future conference. This has not yet taken place.

There is no compelling reason why, with sufficient preparation in the light of all recent developments, that such a conference should not take place under the auspices of the United Nations. Since the topic of the “Jurisdictional immunities of States and their property” has already been provisionally selected by the International Law Commission of the United Nations, it would be appropriate for the preparatory work to be undertaken by the Commission. As a distinguished and learned member of the Commission has written, “A detailed study and discussion by that body may provide a much-needed clarification of the subject by reference to the practice of governments and courts.” Such a study might well indicate that continued progress toward reducing the size of the problem could be achieved through binational and multinational action, since the two approaches need not be considered as necessarily mutually exclusive. The Commission might wish to encourage the conclusion of bilateral agreements containing mutual waiver clauses or similar measures designed to diminish the sphere of governmental immunity. At the same time it might recommend the negotiation of a multilateral treaty. Whether it would suggest that such a treaty should be confined to limiting further the immunity granted to foreign government-owned ships (e.g., an improved Brussels Convention), or should attempt to encompass the whole problem in all its aspects, is a matter upon which the present writer prefers not to speculate. So much might depend upon the boldness of the minds of the Commission’s members at that time.

159 Lauterpacht, supra note 8, at 248.