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Whither State Immunity: An Assessment of the Current State of the Law

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I. INTRODUCTION

The purpose of this article is to examine some important developments which, in recent years, have dotted the long and tortuous path of the doctrine of state immunity[1] and have affected it in such a way that their continued influence on the future evolution of the doctrine in international law can hardly be doubted. The developments in question are the European Convention on State Immunity and Additional Protocol of 1972 (Convention),[2] the United States Foreign Sovereign Immunities Act of 1976 (U.S. Act),[3] the British State Immunity Act of 1978 (U.K. Act),[4] and the Singapore State Immunity Act of 1979 (Singapore Act).[5] This article examines the provisions of these instruments to discern patterns and differences among the four, and also to point out the direction that the provisions individually

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1. The doctrine of state immunity holds that a foreign state is exempt from the exclusive and absolute jurisdiction of the forum state by reason of the implied consent of the forum state. The doctrine is said to have arisen from standards of public morality, fair-dealing, reciprocal self-interest, and respect for the power and dignity of the foriegn sovereign, National City Bank v. Republic of China, 348 U.S. 356, 362 (1955), as well as from principles of international comity due from one sovereign to another, The Carlo Poma, 259 F. 369, 370 (2d Cir. 1919), *vacated on other grounds*, 255 U.S. 219 (1921).

2. The European Convention on State Immunity, May 16, 1972, *reprinted in* Explanatory Reports on the European Convention on State Immunity and the Additional Protocol, submitted to the Committee of Ministers of the Council of Europe, 49-72 (Strasbourg 1972) [hereinafter cited as Convention Explanatory Report].

3. 28 U.S.C. §§ 1602-1611 (1976).

4. State Immunity Act, 1978, ch. 33.

5. State Immunity Act, 1979, ch. 19 (Singapore).

and collectively may be said to have imposed on the future development of the doctrine of state immunity.[6]

In any survey of state practice and national legislation regarding state immunity, a mere numerical majority of doctrinal approach would be a misleading indication of the current state of the law. More weight should be given to the practice of states that have a larger volume of external trade and a more extensive involvement in transnational intercourse of all kinds. Those states reach out more often and more intensively into the juridical domains of other states and give rise to more frequent claims by foreigners against them or by their nationals against foreign states. For such states the question of jurisdictional immunity is of more importance and their practice with regard to it is a more significant indicator of the status of international law on the subject. Hence, this article recognizes the particular importance of the Convention elaborated by the twenty-one member states of the Council of Europe and the legislation recently enacted by the United States, the United Kingdom, and Singapore.

II. IMMUNITY FROM SUIT

There is no need to deal descriptively here with the European Convention, the U.S.Act, or the U.K. Act. Such an endeavor has already been undertaken for each of those instruments individually and the results and the explanatory reports of the legislation are readily available.[7] The Singapore Act contains the same provisions as the U.K. Act, after which it was modeled.

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6. Received too late for inclusion in the text, the State Immunity Ordinance, 1981, of Pakistan, Ordinance No. VI of 1981, published in The Gazette of Pakistan, March 11, 1981, is modeled after the U.K. Act from which its main provisions are taken almost verbatim, except that the Pakistani Ordinance does not contain a provision of nonimmunity with regard to the tort liability of foreign states. With this one exception, all the commentary in the text on the U.K. Act applies to the Pakistani Ordinance. It could well be that other countries, unknown to the present writer, are preparing legislation along the same restrictive lines.

In September of 1981 a bill was pending before the Senate of Canada (Bill 5-19) entitled "An Act to provide for State Immunity in Canadian Courts." It was expected to be voted into law. The provisions of the bill are similar to those of the U.S. Act and the U.K. Act.

7. Adede, *The United Kingdom Abandons the Doctrine of Absolute Sovereign Immunity*, 6 BROOKLYN J. INT'L L. 197 (1980); Adede, *The Doctrine of*

The approach of this article will be to review the features common to the four instruments under consideration and the aspects in which the instruments differ, assessing the current state of the law of state immunity, as reflected therein.

The Convention and the three Acts have the following in common with regard to immunity from jurisdiction:

(1) They each adopt the restrictive approach to state immunity and indicate, either by listing or in more general provisions, a vast category of claims with regard to which a foreign state, outside any explicit waiver, is not entitled to immunity.[8]

(2) They each adopt the objective definition of the public acts of a foreign state for which it is generally admitted there is immunity from jurisdiction.[9] Intrinsically private acts no longer enjoy immunity even if they are politically motivated and performed for state reasons. The purchase of the proverbial boots for the army is no longer protected with immunity from jurisdiction.

Sovereign Immunity Under Int'l Commercial Law, 17 INDIAN J. INT'L L. 245 (1977) (deals with the European Convention and the U.S. Act); Bird, *The State Immunity Act of 1978: An English Update*, 13 INT'L LAW 619 (1979); Carl, *Suing Foreign Governments in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 SW. L. J. 1009 (1979); Del Bianco, *Execution and Attachment Under the Foreign Sovereign Immunities Act of 1976*, 5 YALE STUD. WORLD PUB. ORD. 109 (1978-79); Deluame, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT'L L. 185 (1979); Kahale and Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUM. J. TRANSNAT'L L. 211 (1979); Leventhal, *The Bay of Campeche Oil Spill: Obtaining Jurisdiction over Petroleos Mexicanos under the FSIA of 1976*, 9 ECOLOGY L.Q. 341 (1980); Mann, *The State Immunity Act 1978* 50 BRIT. YEAR INT'L L. 43 (1981); Marston, *State Immunity—Recent United Kingdom Developments*, 13 J. WORLD TRADE L. 349 (1979); Sinclair, *The European Convention on State Immunity*, 22 INT'L & COMP. L.Q. 254 (1973); Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33 (1978); Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE STUD. WORLD PUB. ORD. 1 (1976-77).

8. *See* 28 U.S.C. § 1604 (1976); State Immunity Act, 1978, ch. 33, § 1(1); State Immunity Act, 1979, ch. 19, § 3(1) (Singapore); European Convention on State Immunity, art. 15 (1972), *reprinted in* Convention Explanatory Report, *supra* note 2, at 50 [hereinafter cited as Convention]. *See also infra* note 39.

9. The U.S. Act expressly states that the "character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d) (1976). The Convention, the U.K. Act, and the Singapore Act, although containing no such express statement, are arranged as a series of exceptions to the rule of immunity, the exceptions themselves being directed to the nature of the transaction giving rise to the claim rather than the purpose for the particular state's act. *See infra* note 38 and accompanying text.

On the other hand, the four instruments differ in their treatment of immunity from execution. The Convention's approach is not followed, with minor exceptions, by the U.S. Act or the U.K. Act.

The degree to which the four instruments have followed the restrictive doctrine can best be brought to light by a comparative analysis of their provisions with reference to four sources of rights and obligations that result in claims before the local courts against foreign states. In private law two primary sources of personal rights and obligations are contract and tort. In addition, ownership of immovable property, regardless of the mode of acquisition, entails certain rights and obligations which can give rise to disputes. Finally, the law itself may be a direct source of rights and obligations, such as in matters of taxation and patents. All four sources of rights and obligations are addressed by each of the four instruments under consideration. The extent to which a foreign state is considered immune with respect to contracts concluded by it, torts attributable to it, ownership rights, and rights and obligations deriving directly from the law is a sure indication of the measure of immunity it still enjoys. Conversely, a lack of immunity with regard to the four sources of rights and obligations indicates by its extent how far the four instruments have gone on the way of restricting immunity; substantial lack of immunity in these four areas is indicative of an equally substantial abandonment of the principle of immunity itself.

A. *Contracts*

Contracts, as a generic source of obligations, heads the Convention's catalog of matters with regard to which there is no immunity. Immunity is denied "if the proceedings relate to an obligation of the State, which by virtue of a contract falls to be discharged in the territory of the State of the forum."[10] The Explanatory Report emphasizes that "[i]n principle, immunity should not be granted to a State with respect to any contracts it has concluded."[11]

The U.S. Act does not mention contracts as a source of obliga-

10. Convention, *supra* note 8, art. 4, para. 1.
11. Convention Explanatory Report, *supra* note 2, para. 26, at 14.

tions with regard to which there is no immunity, but the lack of express reference is a matter of drafting technique rather than substance. The regime of the Act centers around the concept of "commercial activity."[12] The foreign state is not immune to suits arising from commercial activity.[13] "Commercial" simply means private or nonpublic. The Act defines "commercial activity" as being "either a regular course of commercial conduct or a particular commercial transaction or act."[14] The report which accompanied the bill submitted to the House of Representatives[15] explains that the term "a particular commercial transaction or act" encompasses "a single contract, if of the same character as a contract which might be made by a private person."[16] Thus, through its particular definition of "commercial activity," the U.S. Act provides no immunity for foreign states with regard to any contractual obligation of private law. There is no difference, in this respect, between the U.S. Act and the European Convention.

The U.K. Act also excludes from immunity contractual obligations of foreign states.[17] It provides that a state is not immune as respects proceedings relating to "an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom."[18] The same type of provision is found in the Singapore Act.[19] Thus, all four instruments deny foreign states immunity with regard to the main source of private law obligations—contract.

While dealing with contract as a generic source of obligations, the four instruments mention, in their texts or in expanatory reports, certain specific contracts or contractual relationships, reiterating with regard to them the nonimmunity rule. The Con-

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12. Lawyers trained in the civil law tradition should be alerted that the word "commercial" here is used in a less technical and much wider sense than the one with which they are familiar in the civil-commercial distinction that determines whether the civil code or the code of commerce will apply, or whether the civil or commercial courts will be competent.

13. 28 U.S.C. § 1605(a)(2) (1976).

14. 28 U.S.C. § 1603(d) (1976).

15. H.R. REP. NO. 1487, 94th Cong., 2d Sess. (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 6604 [hereinafter cited as H.R. REP.].

16. H.R. REP., *supra* note 15, at 16.

17. State Immunity Act, 1978, ch. 33, §§ 3,4.

18. *Id.* § (1)(b).

19. State Immunity Act, 1979, ch. 19, § 5(1) (Singapore).

vention includes specific reference to the contract of employment[20] and to participation in a company, an association, or other entity having its seat, registered office, or principal place of business in the state of the forum.[21] The report accompanying the U.S. Act mentions "a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers, clerical staff or public relations or marketing agents, or its investment in a security of an American corporation" as examples of contracts in respect of which there is no immunity.[22] The U.K. Act and the Singapore Act mention any contract for the supply of goods or services, any loan or other transaction for the provision of finance and any guarantee relating to such a loan or any other financial obligation.[23] Contracts of employment[24] and membership in bodies corporate, unincorporated bodies, or partnerships are also referenced.[25]

With regard to contracts of employment, the Convention, the U.K. Act, and the Singapore Act set forth certain conditions for the denial of immunity. These conditions do not, however, constitute a restriction on the nonimmunity rule; they but rather appear to be intended to ensure sufficient jurisdictional ties between the case and the forum. Thus, the Convention,[26] the U.S. Act,[27] and the Singapore Act[28] require for the denial of immunity that the individual not be a national of the foreign state and that he be either a national or a resident of the state of the forum. In the absence of the connection represented by nationality or residence, the courts of the employing state are considered a more appropriate forum before which to press a claim. It appears, therefore, that the approach is one of requiring the presence of certain relationships and in their absence denying

20. Convention, *supra* note 8, art. 5.
21. *Id.* art. 6.
22. H.R. REP., *supra* note 15, at 16.
23. State Immunity Act, 1978, ch. 33, § 3(3); State Immunity Act, 1979, ch. 19, § 5(3) (Singapore).
24. State Immunity Act, 1978, ch. 33, § 4; State Immunity Act, 1979, ch. 19, § 6 (Singapore).
25. State Immunity Act, 1978, ch. 33, § 3; State Immunity Act, 1979, ch. 19, § 10 (Singapore).
26. Convention, *supra* note 8, art. 5.
27. State Immunity Act, 1978, ch. 33, § 4.
28. State Immunity Act, 1979, ch. 19, § 6 (Singapore).

jurisdiction to the local courts, rather than one of granting immunity to the foreign state.[29] The nonimmunity rule with regard to other contractual obligations of the foreign state appears to be unaffected by the special treatment of employment contracts in the Convention, the U.K. Act, and the Singapore Act.

B. *Torts*

Tort, the second source of obligations in private law, is treated in Article 11 of the Convention, which denies immunity to the foreign state in respect of "redress for injury to the person or damage to tangible property" provided there is a territorial link between the damaging act and the state of the forum. The wording of this provision indicates that the lack of immunity relates only to claims of compensation for physical injury to person or property and for nonphysical injury accompanying the physical injury.[30] In the absence of physical injury to the person or damage to tangible property, the rule of nonimmunity does not apply.[31]

The U.S. Act has similar provisions.[32] Generally, there is no immunity with regard to proceedings in which money damages are sought for personal injury or death, or damage to or loss of property.[33] The U.S. Act explicitly excludes from the rule of nonimmunity claims based on the exercise by the foreign state of a discretionary function[34] and claims arising out of malicious

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29. *See* Convention, *supra* note 8, art 5, para. 2(c) (limitation of the nonimmunity rule as to employment contracts is a function of the forum state's subject-matter jurisdiction in the case); Convention Explanatory Report, *supra* note 2, para. 30, at 15 (where the nonimmunity rule is inapplicable, "the links between the employee and the employing State (in whose courts the employee may always bring proceedings), are generally closer than those between the employee and the State of the forum").

30. *See* Convention Explanatory Report, *supra* note 2, para. 48, at 20.

31. *Id.*

32. *See* 28 U.S.C. § 1605(a)(5) (1976).

33. *Id.*

34. *Id.* § 1605(a)(5)(B). The House Report, H.R. REP., *supra* note 15, at 21, explains that these exceptions correspond to many of the claims with respect to which the United States Government retains immunity, in national suits, under the Federal Tort Claims Act. *See* 28 U.S.C. §§ 2671-2680 (1966). This is an assimilation of the foreign state's position to that of the domestic state. The U.S. Act also treats the foreign state on a par with the United States Government regarding several procedural matters. *See* Von Mehren, *supra* note 7, at 45-46. It is thus permissible to question the unqualified statement by one of the

prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.[35] The U.K. Act and the Singapore Act also provide that a State is not immune in respect to proceedings relating to death or personal injury or damage or loss of tangible property.[36] Nonphysical injury not connected to a physical injury[37] is not covered by the rule of nonimmunity.

The Convention and the three Acts expressly affirm the principle of state immunity as a basic, all-embracing rule to which the listed cases of nonimmunity are mere exceptions.[38] However, none of the four instruments, their explanatory reports, or their doctrinal commentaries, contain an example of a case where immunity can properly and successfully be invoked. On the contrary, the rather extensive catalogs of matters where the immunity rule does not apply make it difficult to imagine an instance where the local courts have subject-matter jurisdiction but are barred from exercising it by virtue of the defendant foreign state's immunity.[39]

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drafters of the U.S. Act to the effect that the Act "does not base itself on Professor Lauterpacht's assimilative approach." Leigh, 1978 Proceedings of the International Law Association Conference on State Immunity 18.

35. 28 U.S.C. § 1601(a)(5)(B).

36. State Immunity Act, 1978, ch. 33, § 5; State Immunity Act, 1979, ch. 19, § 7 (Singapore).

37. The significance of the exclusion from the rule of nonimmunity of claims based solely on nonphysical injury, an exclusion common to all four instruments, is discussed in the textual paragraphs that follow. *See infra* text accompanying notes 40-64.

38. *See* 28 U.S.C. § 1601 (1976); State Immunity Act, 1978, ch. 33, § 1(1); State Immunity Act, 1979, ch. 19, § 3(1) (Singapore); Convention, *supra* note 8, art. 15. Some writers view as significant the fact that the Convention starts with the enumeration of cases where immunity cannot be claimed and only later affirms the basic rule of immunity, while the U.S. Act and the U.K. Act reverse this order by first affirming state immunity and then listing the exceptional cases of nonimmunity. They therefore describe the principle of immunity in the Convention as purely "residual." *See* Delaume, *supra* note 7, at 186; Sinclair, *supra* note 7, at 267. Immunity is described as "residual" also in the case of U.K. Act. *See* Mann, *supra* note 7, at 62. It does not appear that the formal sequence of basic rule and exceptions is of any substantive importance. All four instruments consider immunity to be the rule outside the specific areas of nonimmunity listed by each of them.

39. In making this observation, one should bear in mind that: (1) Public acts of the foreign state lack jurisdictional contact with the country of the forum and therefore lie squarely beyond the jurisdiction of its courts and raise no proper issue of immunity, *see* Von Mehren, *supra* note 7, at 50-51; and (2) The objective definition of public acts adopted by all four instruments makes it impossible to in-

A question thus arises: In what type of dispute would both jurisdiction for the local court be appropriate and immunity for the foreign state be applicable? Is the area of tort liability for purely nonphysical injury an example of this elusive type of dispute with regard to which the defense of state immunity is still available? Although it appears at first glance that such is the case, a closer examination indicates that under the Convention the scope of immunity is negligible in even this limited area and that with regard to the three Acts the immunity is nonexistent.

Regarding the U.S. Act, the exclusions from the rule of nonimmunity,[40] as the wording of section 1605(a)(5) and the House Report made perfectly clear, apply only to noncommercial torts.[41] The Act uses the term "commercial" to mean private.[42] Hence, noncommercial torts are those torts committed by the state in the discharge of its governmental and administrative functions. The exclusions from the rule of nonimmunity do not, therefore, apply to torts committed by the state in the course of its commercial activity. Commercial torts are included in the generality of the rule of nonimmunity, regardless of whether the injury is physical or purely nonphysical.[43] Thus, for example, unfair competition and defamation, assuming such torts can accompany the trading activities of a foreign state, can be brought before U.S. courts as grounds for liability with no possibility of the defendant foreign state successfully invoking immunity.

The scope of nonimmunity under the U.S. Act thus appears to be somewhat broader than the scope of nonimmunity under the Convention or the U.K. Act. This difference arises from the use of the concept of commercial activity as a starting point. The Convention and the U.K. Act mention contracts in general and then list specific contracts or contractual situations among which there is no place for torts. By avoiding any mention of contract and by relating nonimmunity to "a commercial activity" or "an act performed . . . in connection with a commercial activity,"[44]

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voke immunity in a dispute relating to a private act which the foreign state would choose to characterize as public with reference to its purpose, *see supra* note 8.

40. *See supra* text accompanying notes 34 & 35.
41. *See* H.R. REP., *supra* note 15, at 20-21.
42. *See supra* notes 12-16 and accompanying text.
43. 28 U.S.C. § 1605(a)(2) (1976).
44. *Id.*

the U.S. Act makes room for both contract and tort and, moreover, does not require a physical injury subsequent to the commercial tort in order to deny immunity with regard to it.

Returning to noncommercial torts under the U.S. Act, one is reminded that the only governmental functions of foreign states in the territory of the state of the forum are those related to diplomatic representation and consular activities. This is a separate area which has its own rules of immunity[45] and with which this article is not concerned. In fact, it was precisely for the purpose of countering the effects of those immunities with regard to traffic accidents that section 1605(a)(5) of the U.S. Act was first conceived with a view to providing for the victims of those accidents and their heirs some form of redress.[46] Despite primary concern over auto traffic torts, the provision is cast in general terms and applies to all tort actions for money damages, regardless of their cause.

In *De Letelier v. Republic of Chile*,[47] the defendant foreign state, while denying any involvement in the assassination of Orlando Letelier and Ronni Moffit,[48] argued that the nonimmunity provision of section 1605(a)(5) did not apply to political tortious acts of a foreign government because of their public, governmental character. Citing the clear language of the U.S. Act and its legislative history, the federal district court rejected this argument and denied immunity to the defendant.[49] The court further ruled that none of the exceptions to the rule of nonimmunity[50] apply to a foreign state's involvement in a political assassination committed in the United States.[51]

The exceptions to the rule of nonimmunity found in the U.S. Act are derived from the Federal Tort Claims Act.[52] The United States government, engaged in day-to-day functions as depositary of public authority and enforcer of laws and regula-

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45. *See* The Vienna Convention of 1961 on Diplomatic Relations; The Vienna Convention of 1963 on Consular Relations.

46. *See* H.R. REP., *supra* note 15, at 20-21.

47. 488 F. Supp. 665 (D.D.C. 1980).

48. Letelier and Moffit were, respectively, a former Chilean ambassador and an American citizen who happened to be with him. *Id.*

49. *Id.* at 671-72.

50. 28 U.S.C. § 1605(a)(5)(A),(B) (1976).

51. 488 F. Supp. at 672-73.

52. *See* 28 U.S.C. § 2680(a),(h) (1976).

tions, would be exposed to wanton claims for compensation of nonphysical injury allegedly resulting from the discharge of its governmental functions were it not for the protection provided by the Federal Tort Claims Act. No such role devolves to foreign states in the territory of the United States. They have no governmental or administrative functions, outside of the diplomatic and consular domain, the discharge of which might give rise to claims for compensation for nonphysical injury. It is not easy to visualize how a foreign state can exercise or fail to exercise discretionary functions in the territory of the United States and by so doing cause injury to private parties who would then seek redress against the foreign state.[53] It is equally difficult to visualize the foreign state as accountable in the territory of the United States for malicious prosecution or abuse of process.[54] It appears that the exceptions to the rule of nonimmunity in section 1605(a)(5), copied from a national statute without regard for the fundamental difference between the role of the domestic state and that of foreign states in the national territory, are not real exceptions because they cannot in practice apply to a foreign state.

From a different point of view, the exclusions from the rule of nonimmunity in section 1605(a)(5) of the U.S. Act appear unnecessary. According to universally applicable rules of private international law, claims in tort are subject to the law of the place where the injury or the conduct causing the injury occurred.[55] For example, in a suit before a United States court against a foreign state for damages based on any of the actions or omissions mentioned in section 1605(a)(5)(A) and (B) and occurring in the United States, the judge would apply the law of the United States. This law provides that no case against the government can be heard if its object is compensation for nonphysical injury resulting from such actions or omission.[56] Thus, the application of the proper law of the relationship would lead inevitably to the very result sought by precluding nonimmunity in exclusions under section 1605(a)(5). Whenever the normal application of the rules of private international law ensures the end served or

53. *See* 28 U.S.C. § 1605(a)(5)(A) (1976).
54. *See* 28 U.S.C. § 1605(a)(5)(B) (1976).
55. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 146 (1969).
56. *See* 28 U.S.C. § 1605(a)(5)(A),(B) (1976).

thought to be served by state immunity, the latter concept need not be invoked and indeed seems redundant.

At first glance, the European Convention, the U.K. Act, and the Singapore Act do not seem to contain the above distinction between commercial torts, included under the general terms of the nonimmunity provision on commercial activity, and noncommercial torts, to which alone the restrictive provision of section 1605(a)(5) of the U.S. Act applies. In the Convention and the two Acts, torts, with no indication that only noncommercial torts are meant, are dealt with in a single provision.[57] The three instruments preclude immunity only in respect of torts resulting in death or injury to the person and damage or loss of tangible property. Thus, torts resulting only in nonphysical injury are not covered by the nonimmunity rule and a foreign state could presumably claim immunity with regard to suits arising from such torts.

But how real is this apparent area of reserved immunity under the Convention and the U.K. and Singapore Acts? As stated above,[58] torts arising from public acts of the state and resulting in nonphysical injury can occur only in the state's own territory. Claims based on this kind of tort, made against a foreign state before the courts of other states, are brought before the wrong forum. As to torts connected with the foreign state's private activities in the territory of the state of the forum, separate provisions of the Convention and the two Acts ensure their submission to the the jurisdiction of local courts despite their apparent exclusion from the nonimmunity rule.

The Convention submits all the activities of an office, agency, or other establishment of a foreign state in the territory of the state of the forum to the jurisdiction of the courts of the latter.[59] There is no distinction made as to the nature of the activity, contractual or otherwise, or the nature of the injury for which compensation is sought, material or nonmaterial.[60] Thus, a tort committed in connection with the activities of such an office can

57. *See* State Immunity Act, 1978, ch. 33, § 5; State Immunity Act, 1979, ch. 19, § 7 (Singapore); Convention, *supra* note 8, art. 11.

58. *See supra* text accompanying notes 52-54.

59. Convention, *supra* note 8, art. 7.

60. *Id.*

always be invoked in a suit before the local courts regardless of the nonphysical nature of the injury and with no opportunity for the foreign state to plead immunity. Only such torts attributed to foreign states having no office, agency, or other establishment in the state of the forum are subject to immunity under the provisions of the Convention. There is obviously only a slight possibility of such torts being committed by states having only occasional trade activities with the state of the forum. The practical importance of this residual area of immunity in matters of tort appears to be minimal and the chances of its being actually applied remote.

Under the U.K. Act[61] and the Singapore Act,[62] the rule of nonimmunity as to torts connected to the foreign state's private activities extends to torts arising from a "commercial transaction," which is stated to be any "activity (whether of a commercial, industrial, financial, professional or other similar character) . . . in which [the state] engages . . ." This provision is not made conditional on the existence within the forum of an office, agency, or other establishment of the foreign state.[63] Therefore, any private tort attributable to a foreign state and occurring in the territories of the United Kingdom or Singapore can be invoked before British or Singapore courts without a defense of immunity being available to the defendant foreign state. Torts connected with the discharge of the public functions of the state, as explained above, are confined to the state's territory and lie beyond the jurisdiction of the forum.

In summary, only the Convention retains an area of immunity with regard to claims based on tort and that area covers only torts attributable to a foreign state having no office, agency, or other trade establishment in the state of the forum.[64] As already indicated, the practical incidence of claims of this nature against foreign states whose trade volume does not call for the establishment of a local office or agency can be said to be negligible.

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61. State Immunity Act, 1978, ch. 33, § 3(3)(c).

62. State Immunity Act, 1979, ch. 19, § 5(3)(c) (Singapore).

63. State Immunity Act, 1978, ch. 33, § 3(3)(c); State Immunity Act, 1979, ch. 19, § 5(3)(c) (Singapore).

64. The Explanatory Report cites unfair competition and defamation as examples of such torts. Convention Explanatory Report, *supra* note 2, para. 48, at 20.

C. *Ownership and Possession*

All four instruments are in agreement that with regard to rights and obligations resulting from ownership or possession of immovable property situated in the state of the forum, the foreign state can claim no immunity from suit.[65] On excepting diplomatic and consular property from the rule of nonimmunity and maintaining it under its own proper rules, all four instruments are also in agreement.[66] Once a particular piece of property is considered not to be diplomatic or consular, it does not matter whether the property is used for commercial or for public purposes.[67] Denial of immunity is based on the nature of the property; that is, whether or not it is diplomatic or consular, and not on the purposes it serves.

The Explanatory Report of the Convention cites examples of proceedings covered by the nonimmunity rule in respect of ownership or possession of immovable property:

> 1. proceedings against States concerning their rights in immovable property in the State of the forum;
> 2. proceedings relating to mortgages whether the foreign State is mortgagor or mortgagee;
> 3. proceedings relating to nuisance;
> 4. proceedings arising from the unauthorized (permanent or temporary) use of immovable property including actions in trespass, whether an injunction is claimed or damages or both;
> 5. proceedings concerning rights to the use of immovable property in the state of the forum; for example, actions to establish the existence or non-existence of a lease or tenancy agreement, or for possession or eviction;
> 6. proceedings relating to payments due from a State for the use of immovable property, or of a part thereof, in the State of the forum . . .;
> 7. proceedings relating to the liabilities of a State as the owner or occupier of immovable property in the State of the forum (for example, accidents caused by the dilapidated state of the building, *actio de ejectis vel effusis*).[68]

It is clear that every imaginable dispute stemming from a

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65. See 28 U.S.C. § 1605(a)(4) (1976); State Immunity Act, 1978, ch. 33, § 6(1)(a); State Immunity Act, 1979, ch. 19, § 8 (Singapore); Convention, *supra* note 8, art. 9.

66. *See* State Immunity Act, 1978, ch. 33, § 16(a)(b); State Immunity Act, 1979, ch. 19, § 19(1) (Singapore); Convention, *supra* note 8, art. 32.

67. H.R. REP., *supra* note 15, at 20. *See also supra* note 8.

68. Convention Explanatory Report, *supra* note 2, para. 44, at 19.

foreign state's ownership or possession of an immovable property in the state of the forum is covered by the nonimmunity rule.

With regard to diplomatic or consular property, the Report accompanying the U.S. Act makes the following point:

> It is maintainable that the exception . . . with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus the Vienna Convention on Diplomatic Relations concluded in 1961, . . . provides in article 22 that the "premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny to the local state, the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.[69]

It therefore seems certain that nonimmunity from suit extends to diplomatic and consular property with regard to which only immunity from execution and other enforcement measures is available to foreign states.[70]

D. *Obligations Derived Directly from the Law*

The law can be a direct source of certain rights and obligations which are not founded on contract, tort, or the ownership or possession of immovable property. Typical of this type of rights and obligations are those connected with patents and trademarks and those concerning taxation. The Convention includes in its catalog of cases on nonimmunity proceedings those relating to patents, trademarks and the like.[71] The U.K. Act and the Singapore Act extend the rule of nonimmunity to proceedings relating to patents, trademarks and the like[72] and to

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69. H.R. REP., *supra* note 13, at 20.

70. In its judgment of 30 October 1962, Bundesverfassungsgericht 1/60, the Constitutional Court of the Federal Republic of Germany ruled that there is no established rule of international law precluding the local courts from hearing a claim against a foreign state relating to the ownership of the land on which its embassy building stands.

71. *See* Convention, *supra* note 8, art. 8.

72. State Immunity Act, 1978, ch. 33, § 7; State Immunity Act, 1979, ch. 19, § 9 (Singapore).

certain forms of taxation, such as a value-added tax, customs or excise duties, and rates in respect of premises used for commercial purposes.[73]

The U.S. Act does not explicitly mention proceedings relating to this type of rights and obligations. They are covered, however, by the very broad terms of section 1605(a)(2), which deals with commercial activity. The report containing the section-by-section analysis of the U.S. Act states: "The courts would have a great deal of latitude in determining what is a commercial activity for purposes of this bill. It has seemed unwise to attempt an excessively precise definition of this term, even if that were practicable."[74] In the exercise of this wide latitude the courts will most likely consider any claims in connection with a patent, a trademark, or the like as relating to the foreign state's commercial activity and will consequently deny immunity.

III. IMMUNITY FROM EXECUTION

The almost perfect symmetry observed in the provisions of the Convention and the three Acts with regard to immunity from suit is lacking in their provisions on immunity from execution. Because all four instruments restrict immunity from suit (apparently to an extent greater in fact than what is readily admitted) they were forced to face the question of enforcement of judgments rendered against foreign states. Considerations other than those involved in determining the scope of immunity from suit are taken into account in reaching a decision regarding immunity from execution.[75] Consequently, the four instruments treat the matter differently, the Convention adopting one approach and the three Acts, with slight variations among them, another.

In the course of the elaboration of the European Convention, the Austrian delegation submitted in May 1964 a report which observed with regard to immunity from execution that:

> [t]he question of whether it is possible to proceed to measures of execution against the property of foreign states is controversial.

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73. State Immunity Act, 1978, ch. 33, § 11; State Immunity Act, 1979, ch. 19, § 13 (Singapore).

74. H.R. REP., *supra* note 15, at 16.

75. *See infra* text accompanying note 76.

> In certain states, such execution is prohibited while in others it is permitted, and in yet others it depends on authorization. In the two latter cases, it cannot however take place against the property of a foreign state which is used for public purposes and it is sometimes difficult to distinguish such property from that which is used for private purposes. The report therefore recommended that execution should not be levied against the property of foreign states, but that an attempt should be made to reach an international agreement whereby states would comply voluntarily with judgments given against them.[76]

Precisely such a solution was eventually adopted by the Convention by creating an obligation for each contracting state in favor of other contracting states to "give effect to a judgment given against it" provided the said judgment is definitive and executory.[77]

The Convention thus transfers the obligation to give effect to a judgment from the internal legal order of the state of the forum to the international legal order. An international obligation is created, engaging the responsibility of the judgment debtor state *vis-a-vis* the state of the nationality of the judgment creditor.[78] Failure by the former to perform would make available to the latter state all the sanctions of state responsibility in international law.[79] In the system of the Convention, therefore, a new international obligation is superimposed on the earlier internal obligation, and the sanctions of the former in international law are substituted for the sanctions of the latter in the internal legal order of the state of the forum, or any third state where execution of the judgment would be sought. In opting for this solution, the states members of the Council of Europe gave credence to the expectation that a state would never be in the position of a recalcitrant judgment debtor.[80]

The Convention does not, however, make the private litigant totally dependent on the state of his nationality for obtaining satisfaction of a judgment rendered in his favor. The judgment-creditor is not cast in the role of a helpless spectator of

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76. Convention Explanatory Report, *supra* note 2, para. 5, at 6-7.
77. Convention, *supra* note 8, art. 20, para. 1.
78. *See* Convention, *supra* note 8, art. 20.
79. *See* Convention, *supra* note 8, art. 21, para. 1; Convention Explanatory Report, *supra* note 2, para. 84, at 30-31.
80. *See* Convention Explanatory Report, *supra* note 2, para. 5, at 7.

whatever action may or may not take place at the state-to-state level between his state and the judgment-debtor state. The Convention and the Additional Protocol entitle the judgment creditor to have a judicial determination of the question about whether effect should be given to the judgment or whether there are valid reasons for refusal to do so under one of the exceptions set forth in the Convention.[81] The judgment creditor may bring the matter either before a court of the state against which the judgment has been handed down or before the special European Tribunal established under the Additional Protocol.[82] This Tribunal consists of members of the European Court of Human Rights and is presided over by the President of the court.[83]

Important as these safeguards are, the Convention still perpetuates absolute immunity from execution; under it there can be no forcible execution of a judgment against a foreign state.[84] The practice with regard to execution of some of the states members of the Council of Europe has varied from that described above. Those states who remain noncontracting will most probably continue their current practices. Among those states who are parties to the Convention, however, there is sufficient community of attitudes to give rise to the expectation that the states will voluntarily satisfy judgments.[85]

The U.S. Act, after reaffirming the principle of immunity from execution,[86] lists a number of exceptions where execution can be

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81. *See* Convention, *supra* note 8, art. 21: Additional Protocol to the European Convention on State Immunity, art. 1 (1972), *reprinted in* Convention Explanatory Report, *supra* note 2, at 67-72 [hereinafter cited as Additional Protocol].

82. *See* Additional Protocol, *supra* note 77, arts. 4-8.

83. *Id.* art. 4, para. 2.

84. *See* Convention, *supra* note 7A, art. 23.

85. A system comparable to that of the European Convention is to be found in the Convention on the Settlement of Investment Disputes (1965) of the International Centre for Settlement of Investment Disputes. *See* INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES (1970). Under Article 54, contracting states recognize the awards of the Arbitral Tribunal established by the Convention as binding and undertake to enforce the pecuniary obligations imposed by such awards. Article 55 adds that there is no derogation from the law in force in any contracting state relating to immunity of that state or any foreign state from execution.

86. *See* 28 U.S.C. § 1609 (1976).

levied against the property of a foreign state.[87] Thus, the judgment creditor can obtain forcible execution, apart from the case of waiver, if any of the following conditions is met:

(1) The property of the foreign state is or was used for the commercial activity upon which the claim is based.[88] If the judgment is against an agency or instrumentality of the foreign state and not against the state itself, the scope of the property against which execution can be levied is widened to include any property of the agency or instrumentality "regardless of whether the property is or was used for the activity upon which the claim is based.[89]

(2) The execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for such property.[90]

(3) The execution relates to a judgment establishing rights in immovable property or in property acquired by succession or gift. Diplomatic and consular property is explicitly excluded.[91]

(4) The property consists of what an insurer owes the foreign state or its employee under a policy of automobile or other liability or casualty insurance.[92]

The U.S. Act explicitly rules out the possibility of execution against the property of a foreign central bank or monetary authority "held for its own account."[93] It may on balance be said that under the U.S. Act there is quite a considerable area of possible forcible execution against the property of a foreign state.

The U.K. Act and the Singapore Act affirm the principle of the foreign state's immunity from execution.[94] Both Acts, however, provide that execution is possible in respect of property which is for the time being in use or intended for use for commercial purposes.[95] There is no distinction made here be-

87. *See* 28 U.S.C. § 1610 (1976). For a detailed study of the provisions of the U.S. Act on immunity from execution, *see* Del Bianco, *supra* note 7.

88. 28 U.S.C. § 1610(a)(2) (1976).

89. 28 U.S.C. § 1610(b)(2) (1976).

90. 28 U.S.C. § 1610(a)(3) (1976). This obviously assumes the presence of the property in the United States.

91. 28 U.S.C. § 1610(a)(4)(B) (1976).

92. 28 U.S.C. § 1610(a)(5) (1976).

93. 28 U.S.C. § 1611 (1976).

94. *See* State Immunity Act, 1978, ch. 33, § 13(2)(b); State Immunity Act, 1979, ch. 19, § 15(2)(b) (Singapore).

95. *See* State Immunity Act, 1978, ch. 33, § 13(4); State Immunity Act, 1979, ch. 19, § 15(4) (Singapore).

tween property used for the commercial activity upon which the claim is based and any other commercial property of the foreign state.[96] There is also no difference between the foreign state as such and its agencies or instrumentalities.[97] In this regard, the provisions of the U.K. Act and the Singapore Act appear broader than the corresponding provisions of the U.S. Act.

Both Acts also protect the property of a foreign state's central bank or other monetary authority from execution by providing that it shall not be regarded as in use or intended for use for commercial purposes.[98] The foreign state is provided with at least preliminary control over the characterization of any particular property as commercial or noncommercial.[99] The Acts provide that the head of the diplomatic mission's certificate "to the effect that any property is not in use or intended for use . . . for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved."[100] The burden of proof is therefore on the judgment creditor seeking execution.

This brief review of the provisions of the U.K. Act and the Singapore Act demonstrates that there is, more so than under the U.S. Act, a considerable area of nonimmunity from execution, although this area is less extensive than the area of nonimmunity from suit.

IV. EFFECTS OF RECIPROCAL TREATMENT

Reciprocity is an integral part of the mechanism by which rules of international law are created. In a world order still lacking a central lawmaking authority, states are both the makers and the subjects of international law. In a sense, reciprocal treatment is one facet of the basic principle of the equality of states. Every state wants to be treated no worse than it treats others and can expect no better treatment than what it affords them.

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96. *See* State Immunity Act, 1978, ch. 33, § 13(4); State Immunity Act, 1979, ch. 19, § 15(4) (Singapore).

97. *See* State Immunity Act, 1978, ch. 33, § 13(4); State Immunity Act, 1979, ch. 19, § 15(4) (Singapore).

98. *See* State Immunity Act, 1978, ch. 33, § 14(4); State Immunity Act, 1979, ch. 19, § 16(4) (Singapore).

99. *See* State Immunity Act, 1978, ch. 33, § 13(5); State Immunity Act, 1979, ch. 19, § 15(5) (Singapore).

100. *See* State Immunity Act, 1978, ch. 33, § 13(5); State Immunity Act, 1979, ch. 19, § 15(5) (Singapore).

In the creation of rules of international law by treaty, reciprocity is often explicitly invoked or is evident in the balance of rights and obligations assumed by the parties. Reciprocity also plays a major role in the creation of customary rules, as evidenced in particular by the historical development of diplomatic law before the Vienna Convention of 1961,[101] which itself makes considerable use of the concept of reciprocity.[102] The role of reciprocity in the creation of customary rules can be explained by the fact that such rules are not handed down by a higher authority but are born out of the conduct of states which are jealous of their equality before international law and are unlikely to grant what they do not receive. Because the subjects of customary rules are also their creators, reciprocity is necessarily an important component of the mechanism by which those rules are created. It has been rightly observed that "given the present structure of the international community, reciprocity is at the origin of all international law."[103]

The rules regarding state immunity have developed principally from the judicial practice of states, each acting within its own jurisdiction. Municipal courts have been primarily responsible for the growth and progressive development of a body of customary rules governing the relations of nations in this particular connection.[104] In this context, the operation of the principle of reciprocity makes it inevitable that the restrictive approch to state immunity will gain ground as it has and that the least admitting of immunity among the rules applied by municipal courts will in time acquire universality through the ripple effect of reciprocal treatment. It is practically certain that states which are denied immunity in foreign courts will in turn deny it to foreign states in their own courts in similar cases.

It has been observed, for example, that the United Kingdom was precipitated into promulgating the State Immunity Act of 1978 by the realization that "the more restrictive immunity accorded in most other states resulted in the embarrassing position

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101. The Vienna Convention of 1961 of Diplomatic Relations. *See generally* Cahier, *Vienna Convention on Diplomatic Relations*, 57 INT'L CONCILIATION 5 (1969).

102. *See* Cahier, *supra* note 101, at 9 & 36.

103. Virally, 122 *Recueil des cours de l'Academie de droit int'l* 51 (1967).

104. Report of the International Law Commission to the General Assembly 35 U.N. GAOR Supp. (No. 10) at 321 para. 115, 330 para. 7, U.N. Doc. A/35/10.

that the United Kingdom was unable to assert immunity when sued in foreign courts whereas other states sued in United Kingdom courts could assert immunity on similar facts."[105]

Certain national statutes have explicitly incorporated the principle of reciprocity in their regulation of state immunity.[106] There can therefore be no possible disagreement with the statement that reciprocity "has to be recognized as a legal principle applicable to the doctrine of sovereign immunity."[107]

Because reciprocity is such a determining factor, the prevalence of a severely restricted and practically inexistent immunity from suit in the four instruments under consideration insures that this position will in time become universally accepted and applied through the mere operation of the principle of reciprocity. The major inroads which these instruments have made into immunity from execution are also bound to become universal. In fact, many countries had already been restricting immunity from execution long before the instruments under consideration caught up with that practice. This process is now bound to snowball, feeding on itself through the action of reciprocal treatment.

V. CONCLUSIONS

This survey of the provisions of the Convention and the three Acts focused on the various possible sources of private rights and obligations for a foreign state. The results show that in all categories the areas reserved for immunity are either nonexistent or, with regard to one source of obligations under the Convention only, very restrictively defined. Under all four instruments there is no immunity for the foreign state with regard to its contractual obligations, by far the most important and the most frequent source of claims leading to transnational disputes. With regard to torts attributable to a foreign state which can properly be brought before the local courts, there is also no immunity under the three Acts. There is a very limited immunity under the Convention, available only to a foreign state having no

105. Marston, *supra* note 7, at 349.

106. *See e.g.*, [1977] C. Anales, art. 24 (Argentina); Chilean Decree-Law No. 2349 of October 13, 1978, art. 9; Hungarian Decree-Law No. 13 of 1979 on Private International Law, § 17, para. 2; Fundamentals of Civil Procedure in the Soviet Union and the Union Republics, art. 61, para. 3.

107. 27 Zao RV at 692 (1967) (statement of Suy).

office, agency, or other establishment in the state of the forum, with regard only to torts resulting in purely nonmaterial injury. The practical incidence of this immunity is likely to be minimal

Significantly, the U.K. Act, intended to implement the Convention of which the United Kingdom is a signatory, did not follow the Convention on this point. It submits to the jurisdiction of British courts all torts attributed to foreign states where there is a nexus between the act or omission and the United Kingdom. It will be interesting to see what other implementing national statutes will do in this regard. If they follow the example of the United Kingdom, and because of reciprocity they are likely to do so, it can be unqualifiedly asserted that there are no longer any concrete instances of immunity from tort liability in the current regulation of the matter as reflected in the four most recent instruments, including the European Convention as put into effect by implementing national legislation.

In respect of its obligations arising from ownership or possession of immovable property and its obligation derived directly from the law, the foreign state has no immunity from suit under all four instruments, outside the area of diplomatic immunities with which this analysis is not concerned.

The inevitable conclusion is that, for all practical purposes, assimilation of the position of the state before foreign courts to its position before its own courts is now a fact of law, despite continued affirmation by all four instruments of the principle of immunity. States of all ideological persuasions have linked immunity to sovereignty for so long that the issue has become for them one charged with emotion. They cannot easily bring themselves to face the withering away of state immunity. It appears that the very process of negating immunity is helped by continuing to pay lip service to the principle of immunity, as the four most recent instruments on the subject expressly affirm the doctrine in the face of compelling evidence to the contrary. A qualitative mutation is represented as a mere quantitative change. The negation of the principle of state immunity is disguised as a mere statement of exceptions to an ostensibly reaffirmed general rule of immunity. The above assessment is supported by two further considerations: First, public arts of a foreign state, the effects of which are necessarily limited to its own territory, lie *ab initio* beyond the jurisdiction of the local courts and do not, therefore,

raise a proper issue of immunity; and, second, private acts of foreign states are to be defined objectively, with reference to the nature of the act, and not subjectively, with reference to the purpose of the act, rendering impossible a claim to immunity in proceedings relating to a private act of the foreign state.[108]

Between the first area of nonjurisdiction for the local courts and the second vastly expanded area of no immunity for the foreign state, there is not much room left for claiming or for granting immunity from suit. A state does not fare better before a foreign court that it does before its own courts. The virtual abolition of the immunity from suit of foreign states appears to have become a fact, awaiting only to be proclaimed.

In view of the existence of a more basic rule of international jurisdiction precluding local courts from even considering the public acts of a foreign state, continued reliance on state immunity from suit is nothing but a legal fiction deserving of Bentham's admonition: "What you have been doing by the fiction—could you or could you not, have done it without the fiction? If not, your fiction is a wicked lie; if yes, a foolish one. Such is the dilemma. Lawyer! escape from it if you can."[109]

In any transnational dispute, whether involving a foreign state or not, the local court's first concern *in limine litis* is to justify its assumption of jurisdiction based on a close connection between the forum and the facts of the case. Such a connection is lacking when it comes to the public acts of foreign states done *per definitionem* within their own territories in the exercise of their governmental functions. Thus, the courts are simply pre-

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108. *See supra* note 39. To the provisions of the four instruments which may be cited in support of this point, the following quotation from the section-by-section analysis accompanying the U.S. Act may be added:

> As the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.

H.R. REP., *supra* note 15, at 16.

109. C.K. OGDEN, BENTHAM'S THEORY OF FICTIONS at 141 (1932).

cluded from taking cognizanace of any challenge to public acts of foreign states and there is no need to invoke state immunity. The defense of state immunity appears as a meta-juridical argument not pertaining to the self-contained and self-sufficient mechanism of positive law. Where the mechanism is capable of producing the desired result, that is, protecting the public acts of the state from foreign judicial interference, there is no reason why its workings should be obscured behind the smokescreen of immunity from suit.

As to transnational relationships into which states might enter with private parties, they are of the same nature as similar relationships involving only private parties. At the national level, the state is subject to the jurisdiction of its own courts in respect of such relationships. There is no reason why the state should not be subject to the jurisdiction of a foreign court when that foreign court is empowered to take cognizance of a transnational dispute under the rules of international jurisdiction. This is not merely a logical inference from the analysis presented herein. It is the reflection of the current state of the law as manifested in the recent developments surveyed above, which, as explained, are destined to gain universality in the not-too-distant future. Immunity from execution shows more durability because of the somewhat different factors involved in execution against a foreign state and, ultimately, because of the expectation that a state will not in bad faith fail to satisfy a final and executory judgment rendered in a matter in which it can claim no immunity from suit. The relative durability of immunity from execution, as compared to the erosion of immunity from suit, is reflected in the unequal treatment of the matter by the four recent instruments, which contrasts with their common negative approach to immunity from suit.