

A REASSESSMENT OF SOVEREIGN IMMUNITY

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I. INTRODUCTION

The doctrine of sovereign immunity appears to have developed from a philosophical trend dominated by the views of Bodin, Austin and Hegel.¹ As early as 1577 Bodin wrote: [I]t is the distinguished mark of the sovereign that he cannot in any way be subject to the commands of another."² Bodin's notion of sovereignty as the absolute and perpetual power within a State,³ coupled with Hobbes'⁴ justification of absolute sovereign power as "an imaginary compact between ruler and ruled,"⁵ seems to have assisted Austin in his definition of law as a command of the sovereign.⁶ The command theory⁷ postulates that the sovereign, subject to no law himself, can command all who find themselves within his "independent political society".⁸ Influenced by these ideas, Hegel, through his theory of dialectics,⁹ reached the conclusion that "a State" is truly the "highest achievement of human endeavour,"¹⁰ only to be found at the zenith of social advancement.

With this philosophical background, the doctrine of sovereign immunity took an absolute form and there developed, particularly during the nineteenth century, a strong animus against impleading a foreign sovereign before a domestic tribunal.¹¹ Colonial expansion required the concept of a sovereign with absolute or near absolute power, a sovereign possessing, to

* Faculty of Law, University of Windsor. The research for this article was conducted under a research fellowship from the Max-Planck Institute for Private International Law in Hamburg, West Germany. I wish to acknowledge with thanks the valuable discussions I had with my colleague, Professor Paul Brenner, during the formative period of this paper.

¹ D. O'CONNELL, II INTERNATIONAL LAW 842 (2d ed. 1970).

² J. BODIN, THE SIX BOOKS OF THE COMMONWEALTH 43 (M. Tooley transl. 1955).

³ *Id.*

⁴ T. HOBBS, LEVIATHAN (1651).

⁵ R. DIAS, JURISPRUDENCE 91 (4th ed. 1976).

⁶ J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 133-34 (I. Berlin, S. Hampshire, R. Wollheim eds. 1954).

⁷ *Id.* at 131-34, 193-95.

⁸ *Id.*

⁹ *Supra* note 5, at 529.

¹⁰ *Id.* at 429.

¹¹ See the authorities cited in O'CONNELL, *supra* note 1, at 844 n. 14. The influence of Austin is clear: see DIAS, *supra* note 5, at 469-80, and D. LLOYD, INTRODUCTION TO JURISPRUDENCE 161-64 (3d ed. 1972).

use Austin's terms, the attributes of indivisibility¹² and illimitability.¹³ Chief Justice Marshall¹⁴ of the United States Supreme Court and Lord Stowell¹⁵ of the Admiralty Court of England accordingly took the view that "sovereigns have made an implied contract to respect each others' independence and dignity".¹⁶ As the Harvard Research Unit¹⁷ reported:

Historically the rule may be traced to a time when most States were ruled by personal sovereigns who, in a very real sense, personified the State—*"L'Etat, c'est moi"*. In such a period, influenced by the survival of the principle of feudalism, the exercise of authority on the part of one sovereign over another inevitably indicated either the superiority of overlordship or the active hostility of an equal. The peaceful intercourse of States could be predicated only on the basis of respect for other sovereigns.¹⁸

In practice, the absolute view of sovereign immunity caused no great problems until the turn of the century. In previous periods sovereigns were mainly engaged in wars and conquests, commercial activity being left to individual merchants of the realm. The sovereign's interest was in taxing their earnings, in return for which he supplied them with the armed protection of his naval power. Colonial expansion was principally a means of extending the sovereign's authority through this indirect exploitation of new overseas dependencies. The Dutch East India Company, the British East India Company and the British South Africa Company were a few of the colonial agencies established by the sovereign for the purpose of exploiting the riches of the New World. The sovereign's role, however, began to change from about the middle of the nineteenth century.¹⁹

The Russian Revolution of 1918 marked the beginning of massive participation by sovereign states in trading activities. The Bolsheviks' nationalization of industry meant that the "means of production" became vested in the state; commercial activities began to be performed by a myriad

¹² AUSTIN, *supra* note 6, Lecture VI. The attribute of "indivisibility" was exploded in: *Powell v. Apollo Candle Co.*, 10 App. Cas. 282, 53 L.T.R. 638 (P.C. 1885); *Re Mwenya*, [1959] 3 All E.R. 525, [1959] 3 W.L.R. 767 (C.A.); *Madzimbamuto v. Lardner-Burke*, [1969] 1 A.C. 645, 3 All E.R. 561 (P.C.); *Harris v. Minister of the Interior*, [1952] 2 S.A.S.R. 428 (C.A.).

¹³ AUSTIN, *supra* note 6, Lecture VI. The attribute of "illimitability" was exploded in: *McCawley v. The King*, [1920] A.C. 691, 36 T.L.R. 387 (P.C.); *Bribery Commissioner v. Ranasinghe*, [1965] A.C. 172, [1964] 2 All E.R. 785 (P.C.); and *Harris v. Minister of the Interior*, *supra* note 12.

¹⁴ *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812).

¹⁵ *The Prins Frederik*, 2 Dods, 451, 165 E.R. 1543 (H.C. of Adm. 1820).

¹⁶ O'CONNELL, *supra* note 1, at 844.

¹⁷ The Draft Convention and Comment on the Competence of Courts in Regard to Foreign States was produced by the Harvard Research Unit, and published in 26 AM. J. INT'L L. (SUPP.) 451 (1932).

¹⁸ *Id.* at 527.

¹⁹ See, e.g., *The Prins Frederik*, *supra* note 15; *The Charkieh*, 8 O.B. 197, L.R. 4 Adm. & Eccl. 59, 28 L.T. 513 (1873); *The Parlement Belge*, 5 P.D. 197, [1874-80] All E.R. Rep. 104 (C.A. 1880); and *The Porto Alexandre*, [1920] P. 30, 122 L.T. 661 (C.A.).

of state agencies.²⁰ The question whether these state agencies could be impleaded in foreign courts began to loom large during the twenties and thirties. During the years succeeding the Bolshevik revolution, the monarchies of the Iberian Peninsula were deposed, and, following the pattern set by the Soviet Union, Spain and Portugal also began trading through state agencies.²¹ Other countries have since followed this trend.²² Naturally enough, the question began to be asked whether the absolute view of sovereign immunity, which had been developed in such different circumstances, was still a reasonable one, particularly in view of the new types of disputes bringing sovereign states before the courts, in which the sovereign appeared directly in the role of commercial trader.²³

Most states reacted by developing a restrictive theory of sovereign immunity, limiting the immunity to the sovereign's *acta jure imperii*, and excluding from it his *acta jure gestionis*, into which category his trading activities, and his trading vessels fell.²⁴

But the common law states were slower to respond.²⁵ Until quite recently, it was clear that in England the absolute theory of sovereign immunity applied to actions *in rem* and *in personam*. Lord Atkin stated in *The Cristina*:

The courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages. [Secondly] they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of the second principle, as to whether it extends to property used only for the commercial purposes of the sovereign or to personal private property. In this country, it is, in my opinion, well settled that it applies to both.²⁶

²⁰ See E. JOHNSON, AN INTRODUCTION TO THE SOVIET LEGAL SYSTEM ch. II (1973). See also *Krajina v. Tass Agency*, [1949] 2 All E.R. 277, [1949] W.N. 309 (C.A.).

²¹ See *Baccus SRL v. Servicio Nacional del Trigo*, [1957] 1 Q.B. 438, [1956] 3 All E.R. 715, [1956] 3 W.L.R. 948 (C.A.).

²² See *Mellenger v. New Brunswick Dev. Corp.*, [1971] 2 All E.R. 593, [1971] 1 W.L.R. 604 (C.A.); *Swiss Israel Trade Bank v. Salta*, [1972] 1 LL.L. Rep. 497 (Q.B.).

²³ See, e.g., Fawcett, *Legal Aspects of State Trading*, 25 BRIT. Y.B. INT. L. 34 (1948); Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT. L. 220 (1951); and the references listed in O'CONNELL, *supra* note 1, at 841 n. 1.

²⁴ See Lee & Vechler, *Sovereign, Diplomatic and Consular Immunities*, in CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION 184-85 (R. Macdonald, G. Marvin, D. Johnston eds. 1974).

²⁵ The United Kingdom signed but has not ratified The International Convention for the Unification of Certain Rules Relating to the Immunity of State-owned Vessels, 1926 (Brussels Convention) and the Convention on State Immunity, 1972 (Basel Convention). The United States was not a party to either Convention.

²⁶ [1938] A.C. 485, at 490, [1938] 1 All E.R. 719, at 721.

With a few qualifications, the position in Canada was the same, notwithstanding trenchant criticism that the doctrine was jurisprudentially unsound and socially anachronistic.²⁷ However, in two recent cases, the Privy Council and the English Court of Appeal have re-examined the doctrine of sovereign immunity and abandoned it in favour of one of restrictive immunity for actions *in rem* and *in personam*.²⁸

This paper will trace the developments leading up to those decisions, concentrating particularly on the question of the immunity of trading vessels of a sovereign state. Unlike diplomatic and consular immunities, including immunities for special state agents and diplomatic property, which are covered by protocols and treaties, the rules regarding the immunity of trading vessels of a sovereign state are largely determined by the common law. They have been the subject of many of the recent important cases in the area, involving claims both *in rem* and *in personam* and the focus of the sharp controversies over the relative merits of the restrictive as opposed to the absolute theory of sovereign immunity.

II. THE RATIONALIA OF SOVEREIGN IMMUNITY

Anglo-American jurisprudence has advanced a number of theories to explain and justify the grant of immunity by domestic courts to foreign sovereigns. Five of these have been identified and labelled by Professor O'Connell:²⁹

(i) *the theory of independence*

It is said that, since states are equal in sovereignty, one state cannot subject itself to the jurisdiction of another "*jurisdiction inhaeret, cohaeret, adhaeret imperio par in parem non habet iudicium*". Among sovereigns there would be not subjection, but an agreement to submit to jurisdiction. Such an agreement would not affect the sovereignty of the submitting state. This theory, which appears to have been distilled from the combined works of Bodin, Austin and Hegel, reflects an absolute view of immunity.

(ii) *the theory of dignity*

According to this theory, the submission of one sovereign to the jurisdiction of another is an affront to the dignity of the submitting sovereign and an embarrassment to the political relations of the state asserting jurisdiction. The theory of dignity stems from the same source as the theory

²⁷ References to the more important articles in point can be found in O'CONNELL, *supra* note 1, at 842 n. 1.

²⁸ *Philippine Admiral (Owners) v. Wallem Shipping (Hong Kong Ltd.)*, [1977] A.C. 373, [1976] 1 All E.R. 78, [1976] 2 W.L.R. 214 (P.C.) and *Trendtex Trading Corp. Ltd. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529, [1977] 1 All E.R. 881, [1977] 2 W.L.R. 356 (C.A.) *rev'g* [1976] 3 All E.R. 437. These decisions are discussed *infra*.

²⁹ O'CONNELL, *supra* note 1, at 841-44.

of independence³⁰ and, while it received judicial acceptance by the U.S. Supreme Court in *The Schooner Exchange*,³¹ the criticisms of modern writers on the Austinian concept of sovereignty have reduced the importance of both theories.³²

(iii) *the theory of extraterritoriality*

Tangible property is viewed as remaining under the sovereign's jurisdiction wherever it may be, and thus immune from the processes of a foreign court. The extraterritorial concept is absolutist, but it was to all intents and purposes exploded by Lord Atkin in the Privy Council case of *Chung Chi Cheung v. The King*:

Their Lordships have no hesitation in rejecting the doctrine of extra-territoriality expressed in the words of Mr. Oppenheim, which regards the public ship 'as a floating portion of the flag-state'. However the doctrine of extra-territoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The truth is that the enunciators of the floating island theory have failed to face very obvious possibilities that make the doctrine quite impracticable when tested by the actualities of life on board ship and ashore.³³

Lord Atkin's statement has been affirmed in subsequent English decisions,³⁴ though he himself supported an absolute concept of sovereign immunity on other grounds in *The Cristina*.³⁵

(iv) *the theory of comity*

It is also said that sovereign immunity is not an absolute rule, but is based on traditions of international comity or goodwill among sovereigns. Thus a state which might have jurisdiction will, as a matter of good international relations, waive it. O'Connell, who regards this as the correct approach to the question, states that historically one sovereign granted to his fellow sovereigns the same immunity he himself enjoyed in his own courts, with the expectation of gaining reciprocity. He writes: "Nothing in this theory requires the view that immunity of foreign sovereigns from impleading in the courts is an absolute one".³⁶

³⁰ See AUSTIN, *supra* note 6, at 214: "Now in order that an individual or body may be sovereign in a given society, two essentials must unite. The generality of the given society must render habitual obedience to that certain individual or body: whilst that individual or body must not be habitually obedient to a determinate human superior."

³¹ *Supra* note 14.

³² See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* ch. IV (1961); J. RAZ, *THE CONCEPT OF A LEGAL SYSTEM* chs. 1 & 2 (1970).

³³ *Chung Chi Cheung v. The King*, [1939] A.C. 160, at 174, [1939] 4 All E.R. 786, at 793 (P.C.).

³⁴ See the decision of Cumming-Bruce J. in *Radwan v. Radwan*, [1973] Fam. 24, [1972] 3 All E.R. 967, [1972] 3 W.L.R. 735 (Fam. Div.).

³⁵ *Supra* note 26.

³⁶ O'CONNELL, *supra* note 1, at 843.

The theory of comity can be traced to the judgment of the Privy Council in *Sultan of Johore v. Abubakar Tunku Aris Bendahar*.³⁷ Viscount Simon, after considering several decisions in which the courts had denied immunity to foreign sovereigns, concluded:

Indeed, a great deal of the reasoning of the judgment in *The Parlement Belge* would be inexplicable if there could be applied a universal rule without possible exception to the effect that, once the circumstance of a foreign sovereign being impleaded against his will can be established, a proceeding necessarily becomes defective by virtue of that circumstance alone. To say this is merely to disavow an alleged absolute and universal rule.³⁸

This view was adopted by Lord Denning in the House of Lords case of *Rahimtoola v. Nizam of Hyderabad*.³⁹

(v) *the theory of diplomatic function*

The fifth theory appears to have arisen from a collection of decisions in the English courts beginning in the eighteenth century,⁴⁰ when those courts were engaged in the somewhat delicate task of settling disputes between the princely rulers of India and the East India Company. The problem was compounded by the dual nature of the Company. The decisions characterize sovereign immunity as one aspect of the sovereign activity of a state. A modern restatement of this theory by Lord Denning can be found in the *Rahimtoola* case:

Applying the principle, it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded, directly or indirectly, but rather on the nature of the dispute. . . . Is it properly cognizable by our courts or not? If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the merits of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns, for instance, the commercial transactions of a foreign government (whether carried on by its own departments or agencies or by setting up separate legal entities), and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity.⁴¹

³⁷ [1952] A.C. 318, [1952] 1 All E.R. 1261 (P.C.).

³⁸ *Id.* at 344, [1952] 1 All E.R. at 1269.

³⁹ *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, at 415-21, [1957] 3 All E.R. 441, at 459-63, [1957] 3 W.L.R. 884, at 904-13 (H.L.).

⁴⁰ *Nabob of the Carnatic v. The East India Co.*, 2 Ves. Jun. 56, 30 E.R. 521 (Ch. 1793); *Secretary of State for India v. Sahaba*, 13 Moo. P.C. 22, 15 E.R. 9 (P.C. 1859); *The Ex-Rajah of Coorg v. The East India Co.*, 29 Beav. 300, 54 E.R. 642 (Ch. 1960); *Civilian War Claimants Ass'n Ltd. v. The King*, [1932] A.C. 14, [1931] All E.R. Rep. 432 (H.L.); *Secretary of State for India v. Khan*, [1941] A.C. 356, [1941] 2 All E.R. 606 (P.C.).

⁴¹ *Supra* note 39, at 422, [1957] 3 All E.R. at 463-64, [1957] 3 W.L.R. at 913.

Lord Denning has removed immunity from the judicial plane and relegated it to the world of international diplomacy. Professor O'Connell, commenting on this view, writes: "The true approach to the question of sovereign immunity, then, is not a theoretical one at all but one of expediency tempered by customary law".⁴²

This formulation rejects the absolute theory in favour of a restrictive approach. It emphasizes the nature of the conflict and the type of remedy which is sought. Where the remedy is of such a nature that the municipal courts stand powerless to enforce it, the best course open to the plaintiff is to use diplomatic means rather than the instrumentalities of a domestic tribunal. In such disputes, a court will lack jurisdiction or, to put it differently, a sovereign may claim immunity.

Since the theory of diplomatic function is supported by a strong line of authorities⁴³ stemming from the eighteenth and nineteenth centuries, the question may therefore be asked: How did the absolutists ever gain pre-eminence? The answer to this question calls for an excursion into nineteenth century case law.

III. HISTORY OF THE ABSOLUTE VIEW

The absolute view of sovereign immunity as it existed during the nineteenth and early twentieth centuries⁴⁴ is expressed in two important decisions from the two sides of the Atlantic. These are *The Schooner Exchange v. M'Faddon*,⁴⁵ a decision of the United States Supreme Court in 1812, and *The Prins Frederik*,⁴⁶ a decision of the English Court of Admiralty in 1820. Both decisions omit all reference to judicial precedents,⁴⁷ and both largely rely on the writings of Vattel and Bynkershoek (from the continental school of law) to refute the restrictive and support the absolute approach.⁴⁸ There appears to be no decision prior to *The Exchange* and *The Prins Frederik* putting forward the absolute view. Indeed, the eighteenth century decisions,⁴⁹ as we have seen, support a restrictive view.

The schooner "Exchange", while on a transatlantic voyage to Spain, was captured by unknown persons, who appear to have handed her over

⁴² O'CONNELL, *supra* note 1, at 843.

⁴³ *Supra* note 40.

⁴⁴ Some of the leading cases of this period are: *The Parlement Belge*, *supra* note 19; *The Broadmayne*, [1916] P. 64, 114 L.T. 891 (C.A.); *The Tervacte*, [1922] P. 259, [1922] All E.R. Rep. 387 (C.A.); and *The Cristina*, *supra* note 26 (Lords Atkin and Wright).

⁴⁵ *Supra* note 14.

⁴⁶ *Supra* note 15.

⁴⁷ See the arguments in *The Schooner Exchange*, *supra* note 14, at 143-44, 3 L. Ed. at 296.

⁴⁸ See particularly Marshall C.J.'s judgment in *The Schooner Exchange*, *id.* The writings of Vattel and Bynkershoek were used to show how wrong they were to suggest the adoption of a restrictive doctrine. Impliedly, Marshall C.J. was conceding that the classical view of immunity supported a restrictive view.

⁴⁹ *Supra* note 40.

to Napoleon, the Emperor of France. Fitted as a man-of-war, "The Exchange" entered the port of Philadelphia for repairs. While the vessel lay in port, the respondents, two U.S. citizens who were the previous owners of the vessel, served a writ-in-rem upon a libel on the captain. The defence of sovereign immunity was first raised by the American government before the federal District Court of Philadelphia. That court dismissed the libel, and the respondents—the previous owners of the vessel—successfully appealed to the Circuit Court. The U.S. government then appealed to the Supreme Court, arguing that, because Napoleon was a friendly sovereign and France was at peace with the United States, the Emperor was entitled to claim immunity from process in the U.S. courts. Marshall C.J. allowed the appeal and restored the decision of the District Court of Philadelphia.

It must be emphasized that the Court considered the vessel as a "public armed ship" and made its decision on that basis. As Marshall C.J. said:

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the law of the place, but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.⁵⁰

However, later decisions on both sides of the Atlantic, including *The Prins Frederik*⁵¹ and *The Parlement Belge*⁵² interpreted the rule in *The Schooner Exchange* as applying to trading vessels as well.

Some writers⁵³ have found a direct link between *The Exchange* and *The Prins Frederik*, but upon closer examination of the latter, the connection seems less strong. The "Prins Frederik" was an armed warship belonging to the King of the Netherlands. While conveying a cargo of spices and other valuables from the port of Batavia in the Dutch East Indies to Texel in the Netherlands, it suffered considerable damage off the coast of the Scilly Islands. Salvors had the vessel towed into the port of Penzance for repairs and claimed a right of salvage. Sir William Scott (later Lord Stowell), upon becoming aware of the rights of the King of the Netherlands in the vessel, summoned the Dutch Ambassador to the Court of St. James. He agreed to pay the salvors their due, following which the court awarded a sum of £800. There had thus been a voluntary submission to the jurisdiction. However, in *De Haber v. The Queen of Portugal*,⁵⁴ Lord Campbell interpreted⁵⁵ *The Prins Frederik* as supporting the view that that court had no jurisdiction to implead a foreign sovereign in the absence of his consent. It was this interpretation that Brett L.J. pressed into use in *The Parlement Belge*.⁵⁶ But such an interpretation of *The Prins Frederik* is surely misconceived. It ignores the fact that the "Prins Frederik" was primarily an armed ship

⁵⁰ *Supra* note 14, at 144, 3 L. Ed. at 296.

⁵¹ *Supra* note 15.

⁵² *Supra* note 19.

⁵³ See O'CONNELL, *supra* note 1, at 844.

⁵⁴ 17 Q.B. 171, at 196, 117 E.R. 1246, at 1255 (1851).

⁵⁵ *Id.* at 212-13, 117 E.R. at 1261.

⁵⁶ *Supra* note 19, at 213, [1874-80] All E.R. Rep. at 113-14.

and that it was performing a function for the King of the Netherlands while carrying that cargo. It has long been accepted under international law that an armed ship "constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects".⁵⁷ Armed ships are the sovereign's own ships and are considered in law as being used exclusively for public purposes. These ships must, however, be distinguished from a sovereign's unarmed ships, which may sometimes be used for trading purposes, and at other times for public purposes (for example, as ferries or public transport ships). Unfortunately, the distinction was not consistently maintained in many later cases. Ownership and control of a vessel rather than its nature and particular use were the factors used by many judges to determine whether to apply the doctrine of sovereign immunity.

The starting point of many of the resulting difficulties is *The Parlement Belge*, a case which deserves careful analysis.

IV. THE PARLEMENT BELGE: A RESTATEMENT

"The Parlement Belge" was a cross-channel steamer belonging to the Belgian government. The steamer carried public mail, cargo and passengers, the cargo and passengers being carried for a fee which was credited to the Belgian government. On one of her journeys, "The Parlement Belge" collided with a tugboat, the "Daring", which was lying at anchor in the Dover harbour. An action *in rem* was commenced by the owners of the "Daring" in the Admiralty Division to which the owners of the steamer, the Belgian government, raised the claim of sovereign immunity. Sir Robert Phillimore, at first instance,⁵⁸ denied the claim to immunity:

The Parlement Belge is a packet conveying certain mails and carrying on a considerable commerce, officered, as I have said by Belgian officers and flying the Belgian pennon. Can such a vessel so employed be entitled to the privileges of a public ship of war? . . . [a] distinction might well apply to property like public ships of war held by the sovereign *jure coronae* . . . it would not include a vessel engaged in commerce, whose owner is . . . *strenuè [sic] mercatorem agens*. Upon the whole, I am of opinion that neither upon principle, precedent, nor analogy of general international law, should I be warranted in considering the Parlement Belge as belonging to that category of public vessels which are exempt from process of law and all private claims.⁵⁹

Sir Robert distinguished two types of sovereign activities—the public acts of the sovereign, which undoubtedly fell within the area of sovereign immunity, and trading or commercial activities, which fell outside the area of sovereign immunity. As "The Parlement Belge" was primarily a trading

⁵⁷ See Marshall C.J. in *The Schooner Exchange*, *supra* note 14, at 144, 3 L. Ed. at 296. See also O'CONNELL, *supra* note 1, at 865.

⁵⁸ 4 P.D. 129, 40 L.T. 222 (P.D.A. 1879).

⁵⁹ *Id.* at 147-49, 40 L.T. at 231.

vessel (although it did carry mail between Dover and Ostend), the claim to immunity failed.

The Belgian government appealed that decision to the Court of Appeal.⁶⁰ It must be emphasized that the critical issue, as the Court of Appeal dealt with the case, was not the distinction between a ship used for trading or commercial purposes and a ship used for public purposes and the effect upon the doctrine of sovereign immunity. The appeal proceeded squarely on the premise that "The Parlement Belge" was performing a public and national service for the Belgian sovereign. Brett L.J. who delivered judgment for the court stated the issue as follows:

Has the Admiralty Division jurisdiction in respect of a collision to proceed *in rem* against, and, in case of non-appearance or omission to find bail, to seize and sell, a ship present in this country, which ship is at the time of the proceedings the property of a foreign sovereign, is in his possession, control, and employ as sovereign by means of his commissioned officers, and is a public vessel of his state, in the sense of its being used for purposes treated by such sovereign and his advisers as public national services, it being admitted that such ship, though commissioned, is not an armed ship of war or employed as a part of the military force of his country? ⁶¹

Guided by this formulation, the court proceeded to examine a number of cases⁶² involving the property of a sovereign used primarily for public or national purposes. Relying on these precedents, Brett L.J. correctly concluded:

The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority . . . each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador or any other state, or over the public property of any state which is destined to public use. ⁶³

The question as to whether immunity should lie for a vessel not engaged in a public purpose was never an issue before the courts. Yet, as an after-thought,⁶⁴ Brett L.J. did refer to "the problem of the trading vessel":

But it is said that the immunity is lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship has been so used as to have been employed substantially as a mere trading ship and not substantially for national purposes, or that a use

⁶⁰ *Supra* note 19.

⁶¹ *Id.* at 204, [1874-80] All E.R. Rep. at 108.

⁶² *The Schooner Exchange*, *supra* note 14; *The Duke of Brunswick v. The King of Hanover*, 6 Beav. 1, 49 E.R. 724 (1844), *aff'd* 2 M.L. Cas. 1, 9 E.R. 993 (H.L. 1848); *The Prins Frederik*, *supra* note 15; *De Haber v. The Queen of Portugal*, *supra* note 54; *The Athol*, 1 Wm. Rob. 374 (1842); *Briggs v. The Lightships*, 11 Allen 157 (1865); *The Santissima Trinidad*, 20 U.S. (7 Wheat 283), 5 L. Ed. 454 (1822).

⁶³ *Supra* note 19, at 214-15, [1874-80] All E.R. Rep. at 115.

⁶⁴ Brett L.J.'s consideration of the problem of the trading vessel occupies less than one page of a judgment that spans seventeen pages: *id.* at 219-20, [1874-80] All E.R. Rep. at 117-18.

of her in part for trading purposes takes away the immunity, although she is in possession of the sovereign authority by the hands of commissioned officers, and is substantially in use for national purposes.⁶⁵

Sir Robert Phillimore at first instance and Brett L.J. on appeal were, therefore, generally agreed on the question of sovereign immunity regarding a "trading vessel": they both appear to hold that sovereign immunity would not attach to such a vessel. To Sir Robert Phillimore, "*The Parlement Belge*" was a trading vessel and, therefore, sovereign immunity did not apply to it. Brett L.J., however, assumed⁶⁶ that "*The Parlement Belge*" was *not* a trading vessel but a vessel used for public or national purposes, and he accordingly reached the opposite conclusion. While the fact that "*The Parlement Belge*" was regarded as a trading vessel was central to the decision at first instance, the presumption that it was a vessel used for public purposes was equally central to the decision on appeal. Accordingly, Brett L.J.'s view on the position of a trading vessel was *obiter*.

The Parlement Belge was not, then, authority for a general rule of sovereign immunity.⁶⁷ It does not support the view that a sovereign may claim immunity generally for both his trading activities and his public acts. But, in *The Porto Alexandre*,⁶⁸ the Court of Appeal misunderstood the ratio of *The Parlement Belge*. It felt bound to follow its own previous decision which it misconstrued as laying down a broad order of absolute sovereign immunity for any ship owned or under the control of a foreign sovereign. The "*Porto Alexandre*", a vessel owned by the Portuguese government but used solely for trading purposes, ran aground in British waters. A writ *in rem* was issued by the tug owners to recover payment for salvage services. At least two members of the Court of Appeal upheld the claim of sovereign immunity because they considered that *The Parlement Belge* made no distinction between *acta imperii* and *acta gestionis*.⁶⁹

In 1938, in *The Cristina*, Lord Maugham correctly formulated a ratio decidendi of *The Parlement Belge*:

My Lords, I cannot myself doubt that, if *The Parlement Belge* had been used solely for trading purposes, the decision would have been the other way. Almost every line of the judgment would have been otiose if the view of the court had been that all ships belonging to a foreign government, even if used for commerce, were entitled to immunity For my part, I can see no sufficient reason for not following, in the case

⁶⁵ *Id.*, at 219 [1874-80] All E.R. Rep. at 117.

⁶⁶ *Supra* note 61.

⁶⁷ See Lord Cross in *The Philippine Admiral*, *supra* note 28, at 394, [1976] 1 All E.R. at 88, [1976] 2 W.L.R. at 224.

⁶⁸ *Supra* note 19.

⁶⁹ "It has been held . . . in *The Parlement Belge* that trading on the part of the sovereign does not subject him to any liability to the jurisdiction." Scrutton L.J., *id.* at 37, 122 L.T. at 664. See also Bankes L.J., *id.* at 34 122 L.T. at 663. But Warrington L.J. appears to have based his decision on a finding that the ship was being used for a public purpose: *id.* at 35, 122 L.T. at 663. See the discussion by Huggins J. delivering judgment for the Hong Kong Supreme Court in *The Philippine Admiral*, [1974] 2 LL.L. Rep. 568, at 581.

of a state-owned vessel, being neither a ship of war nor in any true sense a vessel *publicis usibus destinata*, the decision of Sir Robert Phillimore.⁷⁰

He also stated most cogently the arguments against upholding an absolute doctrine of sovereign immunity:

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. There 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 as to 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?

My Lords, I am far from relying merely on my own opinion as to the absurdity of the position which our courts are in if they must continue to disclaim jurisdiction in relation to commercial ships owned by foreign governments. The matter has been considered over and over again of late years by foreign jurists, by English lawyers, and by business men, and with practical unanimity they are of opinion that, if governments or corporations formed by them choose to navigate and trade as ship-owners, they ought to submit to the same legal remedies and actions as any other ship-owner.⁷¹

But, notwithstanding the vigorous support of Lords Macmillan⁷² and Thankerton,⁷³ it was the absolute theory advanced in the judgment of Lord Atkin⁷⁴ (who rested his thesis on *The Parlement Belge*), and supported by Lord Wright, which prevailed⁷⁵ despite considerable judicial⁷⁶ and academic⁷⁷ criticism.

⁷⁰ *The Cristina*, *supra* note 26, at 519-20, [1938] 1 All E.R. at 740. *See also* MacKenna J. in *Swiss Israel Trade Bank v. Salta*, *supra* note 22, at 503: "*The Parlement Belge* left the question of 'mere trading ships' open, the form of the judgment suggesting one answer, and the logic of reasoning another."

⁷¹ *Supra* note 26, at 521-22, [1938] 1 All E.R. at 741-43.

⁷² *Id.* at 497-98, [1938] 1 All E.R. at 725-26.

⁷³ *Id.* at 495-96, [1938] 1 All E.R. at 724.

⁷⁴ *Supra* note 26.

⁷⁵ *See, e.g.*, CHESHIRE'S PRIVATE INTERNATIONAL LAW 105 (9th ed. P. North 1974).

⁷⁶ *See, e.g.*, *Rahimtoola v. Nizam of Hyderabad*, *supra* note 39, *Swiss Israel Trade Bank v. Salta*, *supra* note 22.

⁷⁷ *See, e.g.*, Goodhart, Note, 66 L.Q.R. 459 (1950); Lauterpacht, *supra* note 23.

In subsequent decisions, particularly in the Privy Council,⁷⁸ English judges did express grave doubts as to the historical accuracy of the absolute view. They were also concerned about its apparent injustice. However, it was not until Lord Denning's speech in *Rahimtoola v. Nizam of Hyderabad*⁷⁹ that the doctrine of sovereign immunity was correctly traced back to its origins in *Nabob of the Carnatic v. East India Company*.⁸⁰ Sovereign immunity has been associated with acts *jure imperii* simply because sovereign functions of a state are best regulated through diplomacy and not through judicial determinations made by municipal courts. A distinction has naturally been drawn between acts *jure imperii* and acts *jure gestionis*. The distinction could accurately be restated as one between the sovereign and the non-sovereign functions of a state or its agents. Lord Denning drew this distinction at the end of his speech in the *Rahimtoola* case:

[W]hat would be the position if the transaction had taken place, not between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan, but between the Finance Minister of Hyderabad and the Foreign Secretary of Great Britain . . . ? Would an action lie in our courts for the return of the money? Clearly not. The transaction was more in the nature of a treaty than a contract or a trust. Reference would be made to such well-known cases as *Nabob of the Carnatic v. East India Company*⁸¹

The dignity of the sovereign is secured by rendering its sovereign attributes immune; but that dignity is not involved in those commercial transactions of the sovereign which bring it under the municipal law of another state. What is necessary is a determination by the courts as to whether a dispute concerns an attribute of sovereignty, for when that is the case, the dispute must be resolved by diplomacy and not by litigation. The English courts appear to have taken this view⁸² at least as early as the middle of the eighteenth century. Even Lord Atkin, in *The Cristina*, did not assert that a trading activity of a sovereign state was an attribute of its sovereignty—his view was that a defence of sovereign immunity would lie both for trading and non-trading activities of a state. But, returning to Lord Denning's view in the *Rahimtoola* case, it is clear that the courts have always maintained a distinction between acts which are *jure imperii* and acts which are *jure gestionis*, restricting immunity to the former.

Historically then, the absolute view is devoid of authority. The immunity of the sovereign was in fact a limited one. This emerges clearly from the writings of Vattel and Bynkershoek, to which Marshall C.J. made reference in *The Exchange*. The immunity was restricted to the sovereign's public acts and did not extend to acts *jure gestionis*, into which category his trading activities, together with his trading vessels, fell. Such activities

⁷⁸ *Juan Ysmael & Co. v. Indonesia*, [1955] A.C. 72 [1954] 3 All E.R. 236, [1954] 3 W.L.R. 531 (P.C.); *Sultan of Johore v. Abubakar Bendahar*, *supra* note 37.

⁷⁹ *Supra* note 39.

⁸⁰ *Supra* note 40.

⁸¹ *Supra* note 39, at 423, [1957] 3 All E.R. at 464, [1957] 3 W.L.R. at 914.

⁸² *See* note 40, *supra*.

are not within his sovereign attributes—what the Roman jurisprudence properly termed the *imperium*. The *Parlement Belge* clearly supports that restrictive view of sovereign immunity.

V. A NEW TREND IN ENGLISH LAW

Three recent decisions have heralded the advent of a new restrictive theory of sovereign immunity.

The first, the *Thai-Europe*⁸³ case, which was an action *in personam*, marks the end of the traditional absolute doctrine. The owners of a ship which was bombed while in Karachi harbour during the 1971 hostilities sued the consignee corporation to recover demurrage pursuant to the terms of a charter party. Meanwhile, the consignee corporation had been dissolved and absorbed into a department of the Government of Pakistan. The plaintiff obtained leave to join the government Department as defendant and the Department applied to set aside the writ claiming sovereign immunity.

The Court of Appeal on an interlocutory appeal set aside the writ affirming the principle "except by consent the courts . . . will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages".⁸⁴ The facts did not fit any of the established exceptions to that principle, so the claim of sovereignty had to be upheld.

Lord Denning, in a wide ranging judgment, restated and extended in at least one significant respect the list of exceptions.⁸⁵ He also analyzed

⁸³ *Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, [1975] 3 All E.R. 961, [1975] 1 W.L.R. 1485 (C.A.).

⁸⁴ *Id.* at 965, [1975] 1 W.L.R. at 1490 (Lord Denning).

⁸⁵ *Id.* at 965-66, [1975] 1 W.L.R. at 1490:

First, a foreigner has no immunity in respect of land situate in England. If he takes a lease of land and fails to pay the rent, the lessor can institute proceedings for forfeiture. If he borrows money on mortgage of land here and fails to pay the interest, the mortgagee can pursue his usual remedies. . . .

Second, a foreign sovereign has no immunity in respect of trust funds here or money lodged for the payment of creditors. The English beneficiary or creditor can ask the English courts to adjudicate on the claim, even though the foreign government declines to appear. . . .

Third, a foreign sovereign has no immunity in respect of debts incurred here for services rendered to its property here. If it owns a trading vessel which goes aground on our shores, the tugs which pull it off are entitled to be paid, and, if not paid, the vessel can be arrested. *The Porto Alexandre* (which decided otherwise) would be decided differently today, having regard to the Brussels Convention of 1926 and to the criticism to which that case has been subjected in the House of Lords in [*The Cristina*].

Fourth, a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts.

The Master of the Rolls stated that "some [of these exceptions] are already recognized; others are coming to be recognized." (*Id.* at 965, [1975] 1 W.L.R. at 1490). The fourth exception appears to fall into the latter category since it was premature, if farsighted, to assume that a distinction between *acta imperii* and *acta gestionis* was recognized in English law. For an analysis of the case see Markesinis, Comment, 35 CAMB. L.J. 198 (1976).

the claim in terms of the "theory of diplomatic function" which he had expounded in *Rahimtoola*.⁸⁶ None of the transactions had occurred within the territorial jurisdiction of the court: "They were as far off as the moon."⁸⁷ The purchase by a state corporation in Pakistan of fertilizers from a firm in Poland was not properly cognizable in an English court.

Lawton and Scarman, L.JJ. held that the claim was governed by *The Parlement Belge* and *The Porto Alexandre* which were binding on them notwithstanding criticisms of these cases in *The Cristina* and a "developing consensus of juristic and judicial opinion all over the world in favour of . . . the commercial exception to the absolute character of sovereign immunity".⁸⁸

In the second case, *The Philippine Admiral*,⁸⁹ the Privy Council adopted a restrictive doctrine of sovereign immunity for actions *in rem*.

The Philippine Admiral was an appeal from the full bench of the Supreme Court of Hong Kong. Under a 1956 treaty between Japan and the Republic of the Philippines, the Philippine government received a sum of 500 million U.S. dollars by way of war reparations. Using a portion of this money, the Philippine government had the ship "Philippine Admiral" built in Japan. The government, through one of its agencies, delivered the ship upon a conditional sales agreement to the Liberation Company, a private enterprise incorporated in the Philippines. Under the agreement, the Company merely had the possession of the ship; its ownership lay with the "Commission", a government agency created especially to administer the reparation fund, which had the power to repossess the ship immediately upon default. In December 1972, the Company chartered the "Philippine Admiral" for a period of nine to twelve months. During the currency of this charter agreement, the Company fell into arrears in its payments to the Commission. For most of the period of the charter agreement, the "Philippine Admiral" remained in dry dock in Hong Kong, undergoing repairs. In May 1973, the Company, realizing its impecuniosity and the seriousness of the defects in the ship, cancelled the charter agreement. The repairers and the charterers brought separate actions *in rem* for the cost of goods supplied and disbursements made for the ship and for the breach of charter party. The ship was subsequently arrested and, on October 8, 1973, the Supreme Court of Hong Kong ordered it to be appraised and sold. The Republic of the Philippines, as the principal of the Commission, applied for a stay of execution from this order.⁹⁰ The application was based on grounds of sovereign immunity. Briggs C.J. of the Supreme Court of Hong Kong allowed the application:

That the Reparations Commission owns this ship is not really in dispute. The Commission is the registered owners [*sic*] of the ship. It is also not dis-

⁸⁶ *Supra* note 39.

⁸⁷ *Supra* note 83, at 967, [1975] 1 W.L.R. at 1492. The only reason for suing in the English courts was because English law was the proper law of the contract.

⁸⁸ *Id.* at 969, [1975] 1 W.L.R. at 1495 (Scarman L.J.).

⁸⁹ *Supra* note 28.

⁹⁰ [1973] H.K.L.R. 615 (S.C.).

puted that the Reparations Commission is an organ of the government of the Philippines. The ownership of the ship, therefore, lies with the government of the Philippines

[W]e have, therefore, the position that the government of the Philippines is the owner of the vessel and has a right to immediate possession of the vessel. In my view, this is enough to found a claim to immunity successfully.⁹¹

Even assuming the legal validity of the absolute view of sovereign immunity, the learned Chief Justice's dictum is quite untenable. The case law, both in England and in the United States,⁹² reveals that, even on an absolute view, immunity was not granted where the subject matter was not in the control or possession of the sovereign, but was merely owned by him. Upon that ground alone, the application should have been dismissed. The respondents appealed to a full bench of the Supreme Court.⁹³ After a painstaking analysis of the available case law, that court allowed the appeal, and denied the Republic of the Philippines the defence of sovereign immunity. The judgment of Huggins J. showed great learning and skilfully related the defence of sovereign immunity to the sovereign attributes of a state. The failure of the defence rested on his finding that this was not a case involving the sovereign attributes of the Republic of the Philippines:

The true foundation is the consent and usage of independent states, which have universally granted this exception from local jurisdiction in order that the functions of the representative of the sovereign of a foreign state may be discharged with dignity and freedom, unembarrassed by any of the circumstances to which litigation might give rise.⁹⁴

This statement is supported by the case law of nearly two centuries, beginning with *Nabob of the Carnatic v. East India Company*⁹⁵ and extending to *Rahimtoola*.⁹⁶ Huggins J. concluded: "The vessel is a trading vessel and has been used as such for many years. It seems to me that something more was required to justify the claim to immunity than a mere possibility that she might hereafter be used for public purposes."⁹⁷

The Republic of the Philippines appealed to the Privy Council.⁹⁸ Lord Cross, delivering the unanimous opinion of the Board, dismissed the appeal. In doing so, he pointed out that the so-called doctrine of absolute immunity was based upon a misinterpretation of *The Parlement Belge* and, after

⁹¹ *Id.* at 622.

⁹² *The Parlement Belge*, *supra* note 19; *The Scotia*, [1903] A.C. 501; *The Jassey*, [1906] P. 270; *The Broadmayne*, *supra* note 44; *The Crimdon*, [1918] 35 T.L.R. 81; *The Gogara*, [1919] P. 65; *The Porto Alexandre*, *supra* note 19; *The Tervaele*, *supra* note 44; *The Cristina*, *supra* note 26; *The Schooner Exchange*, *supra* note 14; *Briggs v. Lightships*, *supra* note 62; *The Pampa*, [1917] 254 F. 137. *See also*, O'CONNELL, *supra* note 1, at 848-59.

⁹³ [1974] 2 Lloyd's Rep. 568.

⁹⁴ *Id.* at 579.

⁹⁵ *Supra* note 40.

⁹⁶ *Supra* note 39.

⁹⁷ *Supra* note 93, at 584.

⁹⁸ *Supra* note 28.

examining post-war developments elsewhere, held that it should have no place in English jurisprudence:

In *The Parlement Belge* the Court of Appeal said that the court could not exercise jurisprudence over "the public property of any state which is destined for its public use"; but it did not say that a state-owned vessel engaged wholly or substantially in ordinary commerce must be regarded as property "destined to its public use". It was careful to leave that point open.⁹⁹

After reviewing the authorities, Lord Cross stated:

Their Lordships turn now to consider what answer they should give to the main question raised by this appeal—whether or not they should follow the decision of the Court of Appeal in *The Porto Alexandre*. There are clearly weighty reasons for not following it. In the first place, the court decided that case as it did because its members thought that they were bound to decide by *The Parlement Belge* whereas—as their Lordships think—the decision in *The Parlement Belge* did not cover the case at all. Secondly, although Lord Atkin and Lord Wright approved the decision in *The Porto Alexandre* the other three Law Lords who took part in *The Cristina* thought that it was at least doubtful whether sovereign immunity should extend to state-owned vessels engaged in ordinary commerce. Moreover this Board in the *Sultan of Johore* case made it clear that it considered that the question was an open one. Thirdly, the trend of opinion in the world outside the Commonwealth since the last war has been increasingly against the application of the doctrine of sovereign immunity to ordinary trading transactions. Lastly, their Lordships themselves think that it is wrong that it should be so applied. In this country—and no doubt in most countries in the western world—the state can be sued in its own courts on commercial contracts into which it has entered and there is no apparent reason why foreign states should not be equally liable to be sued there in respect of such transactions.¹⁰⁰

Lord Cross was careful to confine the new restrictive doctrine of sovereign immunity to actions *in rem*. Actions *in personam* were still to be subject to the absolute doctrine of sovereign immunity.¹⁰¹

However, in the next recent decision, *Trendtex Trading Corp. v. Bank of Nigeria*,¹⁰² the majority of the Court of Appeal extended the restrictive doctrine to actions *in personam*. The case concerned a claim on a letter of credit issued by the Bank of Nigeria through its London agent in favour of the plaintiffs to pay amounts due on contracts with the Nigerian Ministry

⁹⁹ *Id.* at 394, [1976] 1 All E.R. at 88, [1976] 2 W.L.R. at 224-25.

¹⁰⁰ *Id.* at 402, [1976] 1 All E.R. at 95, [1976] 2 W.L.R. at 232-33.

¹⁰¹ *Id.*:

The rule that no action in personam can be brought against a foreign sovereign state on a commercial contract has been regularly accepted by the Court of Appeal in England and was assumed to be the law even by Lord Maugham in *The Cristina*. It is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so, and counsel for the respondents did not suggest that the Board should cast any doubt on the rule.

¹⁰² *Supra* note 28.

of Defence for the supply of cement. Following the imposition of import controls, the Bank instructed its agent not to honour the letter of credit. When sued, it claimed sovereign immunity as a department of the State of Nigeria.

At first instance,¹⁰³ Donaldson J. referred to *The Philippine Admiral* and disposed very briefly of the question of law relating to the scope of the doctrine of sovereign immunity. The claim before him was an action *in personam* to which the absolute doctrine of sovereign immunity applied.¹⁰⁴ He also held on the evidence that the Bank of Nigeria, although incorporated as a legal entity, was in fact the *alter ego* of the Nigerian government.¹⁰⁵

The Court of Appeal disagreed on both points. The Court was unanimous on the latter point, holding that the evidence had not established that the Bank was a government department.¹⁰⁶ But on the other issue (which was perhaps *obiter*) they were divided. The source of disagreement was not whether sovereign immunity ought to be governed by the restrictive theory for actions *in personam* and *in rem* alike, but whether the Court of Appeal could itself adopt such a doctrine in the light of *The Parlement Belge*, *The Porto Alexandre* and *The Cristina*.

According to Lord Denning and Shaw L.J., English courts must at any given time discover what is the prevailing international law and apply that rule.¹⁰⁷ If international law had shifted from the absolute to a restrictive doctrine of sovereign immunity—which was clear from examining the Treaty of Rome, the law of other countries and the writings of leading scholars—such developments were automatically incorporated into English law. Shaw L.J. stated:

What is immutable is the principle of English Law that the law of nations (not what was the law of nations) must be applied in the courts of England. The rule of *stare decisis* operates to preclude a court from overruling a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier decision was made if the new rule has had the effect in international law of extinguishing the old rule.¹⁰⁸

Thus, for the majority of the court, *The Parlement Belge* and *The Porto Alexandre* were no longer applicable having been superseded by a new rule of international law incorporated into English law. But for Stephenson L.J. who dissented, they were binding decisions under the rule of *stare decisis*. He reminded the court of its earlier decision in *Thai-Europe Tapioca Service*

¹⁰³ [1976] 3 All E.R. 437, [1976] 1 W.L.R. 868.

¹⁰⁴ *Id.* at 441, [1976] 1 W.L.R. at 872-73 (citing the passage quoted *supra* note 101).

¹⁰⁵ *Id.* at 441-44, [1976] 1 W.L.R. at 873-77.

¹⁰⁶ See particularly the judgment of Shaw L.J., *supra* note 28, at 575, [1977] 1 All E.R. at 907, [1977] 2 W.L.R. at 385.

¹⁰⁷ *Id.* at 576-77, [1977] 1 All E.R. at 909-10, [1977] 2 W.L.R. at 386-87 (Shaw L.J.), and at 556-57, [1977] 1 All E.R. at 889-90, [1977] 2 W.L.R. at 365-66 (Denning M.R.).

¹⁰⁸ *Id.* at 579, [1977] 1 All E.R. at 910, [1977] 2 W.L.R. at 388.

*Ltd. v. Government of Pakistan*¹⁰⁹ where the very same argument had been rejected:

Even if their reasoning or conclusion were wrong—and they seem to follow the opinions of all three members of this court in *Thakrah v. Secretary of State for Home Department*—they clearly decided, by no means per incuriam, that it was not open to them to accept the rule of restrictive immunity, and the ratio of that decision of theirs was that this court is bound, by previous decisions as to what international law is, to hold that it is the same until altered by the House of Lords or the legislature; and that this court is bound by previous decisions to hold that absolute sovereign immunity is a rule of international law until the House of Lords or the legislature declares that it is so no longer.¹¹⁰

VI. THE MODERN LAW OF SOVEREIGN IMMUNITY IN THE UNITED STATES

The starting point of the law of sovereign immunity in the United States is Marshall C.J.'s judgment in *The Schooner Exchange*.¹¹¹ A careful reading of his judgment indicates that the doctrine was considered applicable only in four situations: (1) men-of-war;¹¹² (2) the arrest or detention of the sovereign while he is upon a foreign territory;¹¹³ (3) the immunity of foreign ministers of the sovereign (including presumably, ambassadors, plenipotentiaries and other special agents);¹¹⁴ (4) troops of a sovereign that may pass through friendly foreign territory.¹¹⁵ In each case, Marshall C.J. thought that all civilized nations would grant immunity to the sovereign, since not to do so would derogate from his dignity.¹¹⁶

Subsequent decisions, however, have extracted an absolute view from the ratio of *The Exchange*, extending the sovereign's immunity to include even his trading vessels. In *The Pesaro*,¹¹⁷ for example, the United States Supreme Court, after quoting extensively from *The Exchange*, commented:

It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omission is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners, and there was little thought of governments engaging in such operations. That came much later.

The decision in *The Exchequer v. M'Faddon* therefore cannot be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as war ships, in the

¹⁰⁹ *Supra* note 83.

¹¹⁰ *Supra* note 28, at 571, [1977] 1 All E.R. at 904, [1977] 2 W.L.R. at 381.

¹¹¹ *Supra* note 14.

¹¹² *Id.* at 145-46, 3 L. Ed. at 296-97.

¹¹³ *Id.* at 137, 3 L. Ed. at 294.

¹¹⁴ *Id.* at 138, 3 L. Ed. at 294.

¹¹⁵ *Id.* at 139, 3 L. Ed. at 294.

¹¹⁶ *Id.* at 137, 3 L. Ed. at 294.

¹¹⁷ *Berizzi Bros. v. The Pesaro*, 271 U.S. 562, 40 S.Ct. 611 (1926).

absence of a treaty or statute of the United States evincing a different purpose.¹¹⁸

In subsequent decisions¹¹⁹ the Supreme Court applied a rule of absolute immunity, drawn from *The Exchange* and *The Parlement Belge*. Van Devanter J. had in *The Pesaro*¹²⁰ given reasons for expanding the ratio in *The Exchange*; but even before that, the Court, relying largely on *The Parlement Belge*, had extended Marshall C.J.'s formulation to include trading vessels.¹²¹

This line of cases was fortunately interrupted in 1944 by Frankfurter J. in *The Baja California*¹²² case, which marked the beginning of the modern law of sovereign immunity in the United States.¹²³ The ship "Baja California" was owned by the Mexican government, but operated under contract by a private company incorporated in Mexico. The contract provided that the Mexican government would receive fifty per cent of the net profits, but the losses were to be wholly borne by the private corporation. On one of its voyages, the ship collided with the "Lottie Carson", which was owned by a citizen of the United States. Under a libel *in rem*, the "Baja California" was arrested for the damage it had done to the "Lottie Carson". The Mexican government applied to have the writ set aside, claiming sovereign immunity. The State Department made no representation in court as to the question of immunity,¹²⁴ leaving the way open for a judicial determination of the question. Having failed in its application at every lower level, the Republic of Mexico appealed finally to the U.S. Supreme Court. That Court dismissed the appeal on the general grounds that the "Baja California" was not within the control or possession of the Mexican Republic. Frankfurter J. sketched the development of commerce among sovereign states which had necessitated a change in the attitude of courts towards sovereign immunity.¹²⁵ Quoting Lord Maugham's judgment in *The Cristina*¹²⁶ in support of the need for a change in the classical doctrine of immunity, Frankfurter J. stated:

The Department of State, in acting upon views such as those expressed by Lord Maugham, should no longer be embarrassed by having the decision

¹¹⁸ *Id.* at 573-74, 40 S.Ct. at 612 (Van Devanter J.).

¹¹⁹ *Campania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 58 S.Ct. 432 (1938), and the cases cited to the court in *Republic of Mexico v. Hoffman* (*The Baja California*), 324 U.S. 30, 65 S.Ct. 530 (1945), as well as *Ex parte Republic of Peru* (*The Ucayali*), 318 U.S. 578, 63 S.Ct. 793 (1943).

¹²⁰ *Supra* note 117.

¹²¹ See *In re Muir* (*The Gleneden*), 254 U.S. 522, 41 S.Ct. 185 (1921), also a decision of Van Devanter J.

¹²² *Supra* note 119.

¹²³ See *The Jurisdictional Immunity of Foreign Sovereigns*, 63 YALE L.J. 1148, at 1156-59 (1954).

¹²⁴ Under the U.S. law, the State Department may issue a type of directive conceding sovereign immunity, which the courts are bound to follow. There is no similar procedure in Canada or in the other Commonwealth countries.

¹²⁵ *Supra* note 119, at 39-42, 65 S.Ct. at 534-36.

¹²⁶ *Supra* note 26.

in The Pesaro remain unquestioned, and the lower courts should be relieved from the duty of drawing distinctions that are too nice to draw. It is my view, in short, that courts should not disclaim jurisdiction which otherwise belongs to them in relation to vessels owned by foreign governments however operated except when "the department of the government charged with the conduct of our foreign relations", or of course congress, explicitly assents that the proper conduct of these relations calls for judicial abstention. Thereby responsibility for the conduct of our foreign relations will be placed where power lies. And unless constrained by the established policy of our State Department, courts will best discharge their responsibility by enforcement of the regular judicial process.¹²⁷

Aided by the Tate Letter¹²⁸ of May 1952, the U.S. Courts began to adopt a "legalistic"¹²⁹ as opposed to a "dogmatic" attitude towards sovereign immunity, in effect a restrictive view. In *Victory Transport v. Comisaria General*,¹³⁰ the U.S. Court of Appeals (Second Circuit) explained that "[t]he purpose of the restrictive theory of sovereign immunity is to try to accommodate the interest of individuals doing business with foreign governments in having their legal rights determined by the courts, with the interest of foreign governments in being free to perform certain political acts without undergoing the embarrassment or hinderance of defending the propriety of such acts before foreign courts".¹³¹ This careful compromise has worked well in the U.S. and has inspired writers elsewhere to advocate a similar change in English private international law.¹³²

If any doubts remained about the status of the restrictive doctrine in the United States, these have been removed by the recent decision of the Supreme Court in *Alfred Dunhill of London v. Republic of Cuba*¹³³ and

¹²⁷ *Supra* note 119, at 41-42, 65 S.Ct. at 535-36.

¹²⁸ The letter, dated May 19, 1952, was sent from J. B. Tate, acting legal adviser to the State Department, to the acting Attorney General. It sets out the policy of the State Department regarding sovereign immunity. Adopting the restrictive approach, the Tate Letter states that in the future the Department would only grant immunity in respect of acts *jure imperii* and not acts *jure gestionis*. The Tate Letter is reproduced in *Alfred Dunhill of London v. Republic of Cuba*, 96 S.Ct. 1854, at 1869, Appendix 2 (1976).

¹²⁹ Until *The Baja California*, the U.S. courts, unwilling to consider the question of sovereign immunity upon any established rules of law, dogmatically allowed the defence in all cases in which a foreign sovereign was impleaded. Following the Tate Letter, the courts, in the absence of an executive directive, considered the application for foreign immunity as a mixed question of fact and law: it was a question of fact whether the sovereign was engaged in a trading venture; it was then a question of law whether he was entitled to immunity. There were some critics of the way in which the Tate Letter directives eventually developed: See *The Jurisdictional Immunity of Foreign Sovereigns*, *supra* note 123, at 1160-63, and the judgment of Smith J. in the *Victory Transport* case, *infra* note 130.

¹³⁰ *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes (The Hudson)*, 336 F.2d 354 (2nd Cir. 1964).

¹³¹ *Id.* at 360.

¹³² See Lauterpacht, *supra* note 23, and Friedmann, *The Growth of State Control over the Individual, and its Effect Upon the Rules of International State Responsibility*, 19 BRIT. Y.B. INT. L. 118 (1938).

¹³³ *Supra* note 128.

the Foreign Sovereign Immunities Act, 1976.¹³⁴

In the *Dunhill* case, the Supreme Court discussed the various theories of sovereign immunity and concluded:

Although it had other views in years gone by, in 1958, as evidenced by [the Tate letter] the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our Government since that time, as the attached letter of November 25, 1975, confirms: "... such adjudications are consistent with international law on sovereign immunity."¹³⁵

The Foreign Sovereign Immunities Act, 1976,¹³⁶ which came into force in January 1977, carries the restrictive doctrine one stage further by defining commercial or proprietary activities which will disentitle a sovereign to immunity in the U.S. federal courts. As one commentator has noted, "The intent and purpose of the statute clearly is to force foreign sovereigns engaged in commercial activities 'having substantial contact with United States' into the U.S. Courts."¹³⁷

VII. THE CANADIAN POSITION

It has been shown that significant strides have been made in England and the United States towards tempering or eliminating the absolute doctrine of sovereign immunity. There remains the question: What is the current position in Canada?

Various aspects of the doctrine were in issue in three cases before the Supreme Court of Canada in the 1940's. The question whether diplomatic premises could be taxed was referred to the Supreme Court in 1943.¹³⁸ The Court, relying largely on Lord Campbell's judgment in *Magdalena Steam Navigation Co. v. Martin*,¹³⁹ answered in the negative. The case is important for its refusal to regard foreign policy arrangements

¹³⁴ 28 U.S.C.A. ss. 1330, 1332, 1391, 1441, 1602, 1602 notes, 1603-1611, Pub L. No. 94-583, 90 Stat. 2891.

¹³⁵ *Supra* note 128, at 1863.

¹³⁶ *Supra* note 134.

¹³⁷ See, *Recent Developments in the Law of Sovereign Immunity*, 1 B.C.S. L. REP. 209, at 212 (1977).

¹³⁸ Reference Re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] S.C.R. 208, [1943] 2 D.L.R. 481. See also *Saint John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263, 13 D.L.R. (2d) 177.

¹³⁹ 2 El. & El. 94, 121 E.R. 26 (K.B. 1859), where Lord Campbell held that an accredited envoy to the Court of St. James could not be sued in a civil action, unless he had private property of his own against which execution could be levied. The importance of having the envoy's private property (as distinct from his accrediting sovereign's property) within the jurisdiction before a suit could be brought was emphasized throughout his judgment.

made by the Dominion of Canada as a matter properly falling under municipal legislation. Such an exclusion, the Court emphasized, was no diminution of the sovereignty of either the provincial or dominion legislatures, but merely a recognition that arrangements pertaining to the foreign relations of the Government of Canada are not properly dealt with in municipal courts.¹⁴⁰

A second Reference¹⁴¹ dealt with the question whether the members of the United States Army and Navy who visit Canada with the consent of the Canadian government are exempt from prosecution in Canadian courts. The Court, by a majority, answered that such persons were immune from prosecution in so far as their offences were committed among themselves; in so far as Canadian subjects or Canadian property were affected, Canadian courts would have jurisdiction. A criminal act committed against the subjects of the host country in no way represents an act in the service of the foreign sovereign, especially when the act was committed by agents of the foreign sovereign present in the host country on the invitation of its sovereign.

These two decisions are in line with *Nabob of the Carnatic v. East India Company* and *Rahimtoola*. Yet in *Dessaulles v. Republic of Poland*,¹⁴² the Supreme Court held unanimously that:

Il ne fait pas de doute qu'un état souverain ne peut être poursuivi devant les tribunaux étrangers. Ce principe est fondé sur l'indépendance et la dignité des états, et la courtoisie internationale l'a toujours respecté. La jurisprudence l'a aussi adopté comme étant la loi domestique de tous les pays civilisés.¹⁴³

The Exchequer Court of Canada, which was the court of admiralty jurisdiction until 1970,¹⁴⁴ also appears to have felt itself bound by the absolute view as expressed in *The Parlement Belge* and *The Cristina* in a series of cases dealing with the trading ships of a foreign sovereign.

In *The Indochine*,¹⁴⁵ a 1922 case, the Exchequer Court held that immunity applied to all government-owned or government-requisitioned

¹⁴⁰ See Editorial Note, [1943] 2 D.L.R. at 482, and the decision, *supra* note 138, at 216-31, [1943] 2 D.L.R. at 486-502.

¹⁴¹ Reference Re Exemption of U.S. Forces from Canadian Criminal Proceedings, [1943] S.C.R. 483, [1943] 4 D.L.R. 11.

¹⁴² [1944] S.C.R. 275, [1944] 4 D.L.R. 1.

¹⁴³ *Id.* at 277, [1944] 4 D.L.R. at 7.

¹⁴⁴ The name of the Court was changed to the Federal Court of Canada by The Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.). Section 43(7)(c) of the Federal Court Act deals with ships owned by foreign sovereigns, and reads:

(7) No action *in rem* may be commenced in Canada against . . .

(c) any ship owned or operated by a sovereign power other than Canada, or any cargo laden thereon, with respect to any claim where, at the time the claim arose or the action is commenced, such ship was being used exclusively for non-commercial governmental purposes.

Lee and Vechsler, *supra* note 24, at 186, state that this section, "[b]y specifically excluding ships owned or operated by foreign states and 'used exclusively for non-commercial governmental purposes' . . . may be interpreted as implicitly granting jurisdiction to the court over ships owned and operated by foreign states and used for commercial non-governmental purposes".

¹⁴⁵ *Brown v. S.S. Indochine*, 21 Ex. C.R. 406 (1922).

ships, whether used for public or commercial purposes, in times of peace and war. In *White v. The Frank Dale*,¹⁴⁶ the court upheld a defence of sovereign immunity in relation to a public ship engaged in commerce. Sir Joseph Chisholm relied directly on *The Cristina*:

In the Cristina Case the courts held that the immunity claimed extended and applied to ships engaged in trade and belonging to a foreign sovereign state. The desirability of modifying the accepted rule so far as it concerned trading ships was pointed out by some of their Lordships and particularly by Lord Maugham, but the House was of the opinion that in the case the immunity was properly claimed. That seems to be the principle applied in the United States . . . and until changed must be accepted by our Court.¹⁴⁷

Sir Joseph failed to recognize both the change in U.S. law brought about by Frankfurter J. in *The Baja California*¹⁴⁸ and the fact that three of the law lords in *The Cristina* were unwilling to endorse the width of Lord Atkin's general rule.¹⁴⁹ As has been seen, *The Parlement Belge*, correctly understood, is authority for no other proposition than that a vessel used for public purposes and owned by the sovereign will be protected by sovereign immunity.

In *The Canadian Conqueror*,¹⁵⁰ the Exchequer Court again followed the rule laid down by Lord Atkin, and held that immunity applied to ships owned by and in the possession of the Cuban government, which at the time of their arrest were in the port of Halifax being outfitted as trading or passenger ships.

When *The Canadian Conqueror* came before the Supreme Court of Canada on appeal,¹⁵¹ that Court expressly left the door open as regards the question of the application of immunity to vessels used for purely commercial purposes. Ritchie J., delivering the majority judgment, rested his decision on the grounds that the ships in question were "public ships"

¹⁴⁶ [1946] Ex. C.R. 555.

¹⁴⁷ *Id.* at 556-57. Three years earlier, Sir Lyman Duff C.J.C. had expressed doubt about the ratio of *The Cristina*:

Parallel with this rule touching the immunity of legations, there runs the principle of the immunity of the property of a foreign state devoted to public use in the traditional sense. In *The "Parlement Belge"* it was held that this immunity applies to a ship used by a foreign government in carrying mail. The Supreme Court of the United States has held that it is enjoyed by a ship, the property of a foreign sovereignty and employed by the foreign government for trading purposes. . . . It most certainly cannot be said that this is a settled doctrine, in view of the opinions expressed in *The Cristina*, although Lord Atkin, who delivered the judgment of the Judicial Committee in *Chung Chi Cheung v. The King* . . . uses a general phrase: 'The sovereign himself, his envoy, and his property, including his public armed ships, are not to be subjected to legal process'.

The Foreign Legations Reference, *supra* note 138, at 221, [1943] 2 D.L.R. at 490-91.

¹⁴⁸ *Supra* note 119.

¹⁴⁹ *Supra* note 26 (Lords Maugham, Macmillan and Thankerton).

¹⁵⁰ *Flota Maritima Browning de Cuba S.A. v. The Canadian Conqueror*, [1962] Ex. C.R. 1.

¹⁵¹ [1962] S.C.R. 598, 34 D.L.R. (2d) 628.

owned and in the possession of a foreign state”¹⁵² and entitled to immunity on the principle derived from *The Parlement Belge*:

Although the ships might ultimately be used by Cuba as trading or passenger ships, there is no evidence before us as to the use for which they were destined, and, with the greatest respect for the contrary view adopted by Mr. Justice Pottier who had the benefit of viewing the ships, I nevertheless do not feel that we are in a position to say that these ships are going to be used for ordinary trading purposes. All that can be said is that they are available to be used by the Republic of Cuba for any purpose which its Government may select, and it seems to me that ships which are at the disposal of a foreign state and are being supervised for the account of a department of government of that state are to be regarded as “public ships of a sovereign state” at least until such time as some decision is made by the sovereign state in question as to the use to which they are to be put.¹⁵³

The Court did not find it necessary to express an opinion as to whether sovereign immunity would apply to property of a foreign sovereign state only used for commercial purposes.¹⁵⁴

In the sixties, Quebec courts, noting the silence of the Supreme Court, attempted to restrictively restate the doctrine of sovereign immunity. Two cases arose out of international participation in Expo 67. In *Allan Construction Ltd. v. Venezuela*,¹⁵⁵ the plaintiff company had contracted to construct a pavilion for the defendant government for the International Exhibition. The plaintiff, having completed construction, sued for payment, against which claim the government raised the defence of sovereign immunity. The Quebec Supreme Court denied the defence on the grounds that the transaction fell under the broad heading of *jure gestionis*, because evidence showed the pavilion was to be used primarily for commercial purposes.

The issues were similar in *Venne v. Republic of the Congo*.¹⁵⁶ The defendant Republic had commissioned the services of the plaintiff architect to plan the construction of the Congolese pavilion for Expo 67. Soon after the plans were drawn, the Congolese government decided to abandon construction and terminated the services of the plaintiff. The plaintiff thereupon claimed recompense for the plans he had drawn, and the Congolese government raised the defence of sovereign immunity and challenged the jurisdiction of the court. The Quebec Court of Appeal was of the opinion that the contract was a private commercial transaction and not a public act of the Republic. Disallowing the defence of sovereign immunity, Owen J. stated:

In my opinion it is time our courts repudiated the theory of absolute sovereign immunity as outdated and inapplicable to today's conditions. This theory may have been workable in the past when government acts

¹⁵² *Id.* at 603, 34 D.L.R. (2d) at 632.

¹⁵³ *Id.* at 604, 34 D.L.R. (2d) at 634.

¹⁵⁴ *Id.* at 608, 34 D.L.R. (2d) at 638.

¹⁵⁵ [1968] Que. C.S. 523, [1968] Que. R.P. 145 (1967).

¹⁵⁶ [1969] Que. B.R. 818, 5 D.L.R. (3d) 128 (1968).

were more limited in scope. It may have been an apt theory when foreign sovereigns were in many cases personal despots. However, today, instead of starting from the principle that every sovereign state enjoys jurisdictional immunity unless the other party can demonstrate some established exception to this rule, I believe we should reverse the process.¹⁵⁷

The Republic of the Congo appealed to the Supreme Court of Canada.¹⁵⁸ That Court allowed the appeal by a majority of seven to two, on the ground that the transaction in question was in the nature of a public act of state and, therefore, was properly accorded sovereign immunity. Ritchie J., who delivered the majority judgment, once again, as he had in *The Canadian Conqueror*, declined to express a final opinion as to whether the doctrine would apply to commercial activities:

I think that it is of particular significance that the request for the respondent's services was made not only by the duly accredited diplomatic representatives of the Congo who were Commissioners General of the Exhibition, but also by the representative of the Department of Foreign Affairs of that country. . . . This makes it plain to me that in preparing for the construction of its national pavilion, a Department of the Government of a foreign State, together with its duly accredited diplomatic representatives, were engaged in the performance of a public sovereign act of State on behalf of their country and that the employment of the respondent was a step taken in the performance of that sovereign act. It therefore follows in my view that the appellant could not be impleaded in the Courts of this country even if the so-called doctrine of restrictive sovereign immunity had been adopted in our Courts, and it is therefore unnecessary for the determination of this appeal to answer the question posed by Mr. Justice Owen and so fully considered by the Court of Appeal. In an area of the law which has been so widely canvassed by legal commentators and which has been the subject of varying judicial opinion in different countries, I think it would be undesirable to add further *obiter dicta* to those which have already been pronounced and I am accordingly content to rest my opinion on the ground that the appellant's employment of the respondent was in the performance of a sovereign act of State.¹⁵⁹

This passage reflects the theory of diplomatic function expounded by Lord Denning in the *Rahimtoola* case. Whether the transaction was actually a "public sovereign act of State" is not relevant. What is important is that the Supreme Court reached a conclusion contrary to that of the Quebec Court of Appeal simply on a question of fact. This is emphasized by the Court's relegation of Owen J.'s dictum to the realm of *obiter* and its assertion that the matter is still open for future adjudication.

In a strong dissenting judgment, Laskin J. (as he then was), stated that he regarded the doctrine of absolute immunity as "spent".¹⁶⁰ The considerations which had led the Supreme Court to state the absolute view in

¹⁵⁷ *Id.* at 827, 5 D.L.R. (3d) at 138.

¹⁵⁸ *Republic of the Congo v. Venne*, [1971] S.C.R. 997, 22 D.L.R. (3d) 669.

¹⁵⁹ *Id.* at 1002-1003, 22 D.L.R. (3d) at 673.

¹⁶⁰ *Id.* at 1025, 22 D.L.R. (3d) at 691 (Hall J. concurring).

Dessaulles v. Republic of Poland,¹⁶¹ were no longer valid, having been overtaken by "time and events":

First, it is clear that the absolute doctrine is not today part of the domestic law "de tous les pays civilisés". Second, neither the independence nor the dignity of States, nor international comity require vindication through a doctrine of absolute immunity. Independence as a support for absolute immunity is inconsistent with the absolute territorial jurisdiction of the host State; and dignity, which is a projection of independence or sovereignty, does not impress when regard is had to the submission of States to suit in their own courts.¹⁶²

Laskin J. went on to cite with approval Lord Denning's judgment in *Rahimtoola*,¹⁶³ and to propose the substitution of function for status in considerations regarding immunity:

The considerations which, in my view, make it preferable to consider immunity from the standpoint of function rather than status do not rest simply on a rejection of the factors which had formerly been said to underlie it. Affirmatively, there is the simple matter of justice to a plaintiff; there is the reasonableness of recognizing equal accessibility to domestic Courts by those engaged in transnational activities, although one of the parties to a transaction may be a foreign State or an agency thereof; there is the promotion of international legal order by making certain disputes which involve a foreign State amenable to judicial processes, even though they be domestic; and, of course, the expansion of the range of activities and services in which the various States today are engaged has blurred the distinction between governmental and non-governmental functions or acts (or between so-called public and private domains of activity), so as to make it unjust to rely on status alone to determine immunity from the consequences of State action.¹⁶⁴

Both *The Canadian Conqueror* and *Venne* were considered by the Privy Council in *The Philippine Admiral*.¹⁶⁵ The Board pointed out that *Venne* left open the question of immunity for commercial vessels and had no difficulty distinguishing *The Canadian Conqueror* on the facts:

The vessels in question in that case had not been put to any use by the Cuban government since it had acquired them; they were available for use by that government in any way it chose; and having regard to the political conditions obtaining in Cuba at that time it was by no means improbable that they would be used for other than purely commercial purposes. Here on the other hand one has use for commercial purposes for many years while the government was the owner and no reason whatever to suppose that such user is going to change after the government has retaken possession from Liberation.¹⁶⁶

¹⁶¹ *Supra* note 142.

¹⁶² *Supra* note 158, at 1019-20, 22 D.L.R. (3d) at 687.

¹⁶³ *Supra* note 39.

¹⁶⁴ *Supra* note 158, at 1020, 22 D.L.R. (3d) at 687.

¹⁶⁵ *Supra* note 28.

¹⁶⁶ *Id.* at 403-404, [1976] 1 All E.R. at 96, [1976] 2 W.L.R. at 233-34.

In *Penthouse Studios Inc. v. Venezuela*,¹⁶⁷ the Venezuela government refused to pay for the filming equipment and materials supplied to it by the plaintiff corporation. The defence of sovereign immunity failed both at first instance and in the Quebec Court of Appeal. Particular emphasis was placed by the Court of Appeal on one clause in the contract: "Title to, property in and ownership of the equipment, materials and film sold herein shall remain in Penthouse at the risk of Venezuela until all amounts due hereunder are paid in cash."¹⁶⁸

More recently, the Ontario High Court in *Smith v. Canadian Javelin Ltd.*¹⁶⁹ has quoted with approval a passage from the Quebec Court of Appeal's judgment in *Venne v. Republic of the Congo*.¹⁷⁰ The broad question was whether the Securities and Exchange Commission of the United States was entitled to claim sovereign immunity. Relying on both *Venne* and *Rahimtoola*, Cory J. answered in the affirmative, holding that "[t]he act of SEC complained of in this action is scarcely a private or commercial act but is, in reality, a reflection of the legislation and legislative policy of the United States of America."¹⁷¹

The Supreme Court decisions in *Venne* and *The Canadian Conqueror* leave the Canadian position open. In *The Canadian Conqueror*, the vessels in question were treated as property destined for public purposes and owned by the Republic of Cuba, and yet the general rule enunciated by Lord Atkin in *The Cristina* was left out of the judgment. The deliberate refusal of the Supreme Court to undertake a clarification of the doctrine in the last mentioned case is regrettable.¹⁷² The Canadian law of sovereign immunity awaits a fundamental restatement.

VIII. A PLEA FOR A RESTRICTIVE VIEW

In England and the United States, the restrictive view of sovereign immunity has replaced the absolute theory. It is true that in England the authority behind the development remains rather shaky: the decision of the Privy Council in *The Philippine Admiral*¹⁷³ applying the restrictive theory to actions *in rem* and a somewhat unorthodox decision in the *Trendtex* case¹⁷⁴ by a divided Court of Appeal incorporating the general restrictive theory of prevailing international law in preference to its own earlier binding decisions. An authoritative pronouncement by the House of Lords is needed

¹⁶⁷ 8 D.L.R. (3d) 686 (Que. C.A. 1969).

¹⁶⁸ *Id.* at 687.

¹⁶⁹ 12 O.R. (2d) 244, 68 D.L.R. (3d) 428 (H.C. 1976).

¹⁷⁰ *Supra* note 156. The passage is quoted in *Smith v. Can. Javelin Ltd.*, *supra* note 169, at 246, 68 D.L.R. (3d) at 430.

¹⁷¹ *Supra* note 169, at 248, 68 D.L.R. (3d) at 432.

¹⁷² See Comment, 14 MCGILL L.J. 334 (1968) and Comment, 15 MCGILL L.J. 493 (1969).

¹⁷³ *Supra* note 28.

¹⁷⁴ *Supra* note 28.

to dispose of *The Porto Alexandre*¹⁷⁵ once and for all and to establish the restrictive theory. This opportunity may soon come, since leave to appeal was granted in the *Trendtex* case.

In the United States, the restrictive theory is now entrenched in legislation as well as through recent Supreme Court decisions.¹⁷⁶

Evidence abounds that Canadian courts are ready to follow their counterparts in England and the United States. The Quebec courts appear to be in the forefront of the movement,¹⁷⁷ but even in the Supreme Court the express reservation of opinion regarding the application of immunity to the commercial activities of a foreign sovereign has left the strong impression that the Court would depart from the absolute doctrine of sovereign immunity in an appropriate case.¹⁷⁸ But before that route is taken by the Supreme Court, one basic problem remains to be solved.

The restrictive view of immunity requires the courts to enquire into the nature and purpose of the activity in question in order to distinguish acts *jure gestionis* and *jure imperii*. Lauterpacht, a keen opponent of the absolute view, did not view this as a major difficulty: "It may be contended that the difficulty of drawing the line is not confined or peculiar to the distinction between acts *jure gestionis* and acts *jure imperii* and that it is proper and feasible that, given the broad meaning of the distinction, the line should be determined in doubtful cases by the courts."¹⁷⁹

How will the courts determine whether a given transaction is for public purposes or for private ones? Will the sovereign be summoned to court for the limited purpose of determining the issue, or should the determination be made solely from the records? It may be necessary for the foreign sovereign to explain the nature of his activities; that is, he may have to participate in the ensuing legal battle, at least up to a point.

Several tests have been used or proposed to distinguish between acts *jure imperii* and acts *jure gestionis*. In *Rahimtoola*,¹⁸⁰ Lord Denning laid down the test of the "nature of the dispute".¹⁸¹ Castel identifies a second test relating to the "purpose" or object of the act, and himself suggests that "a good test might be the nature of the transaction".¹⁸²

The only treatment of these points by a Canadian court is found in the dissenting judgment of Laskin J. in the *Venne* case.¹⁸³ In supporting the restrictive view, Laskin J. acknowledged that "a shift from status to

¹⁷⁵ *Supra* note 19.

¹⁷⁶ See text *supra* at notes 136, 137.

¹⁷⁷ See the decisions in *Allan Constr.*, *supra* note 155, and *Venne v. Republic of the Congo*, *supra* note 156.

¹⁷⁸ And, of course, there is the strong dissent of Laskin J. in *Venne*, *supra* notes 160-163.

¹⁷⁹ Lauterpacht, *supra* note 23, at 225.

¹⁸⁰ *Supra* note 39.

¹⁸¹ *Id.* at 422, [1957] 3 All E.R. at 463, [1957] 3 W.L.R. at 913.

¹⁸² J. CASTEL, *INTERNATIONAL LAW* 650 (3d ed. 1976).

¹⁸³ *Supra* note 158.

function means . . . the substitution of a loose formula for a precise one".¹⁸⁴ He termed "useful aids" both the illustrations used by Lord Denning in *Rahimtoola* in support of his "nature of the dispute" test and the classification of activities in respect to which immunity should continue to attach laid down by the U.S. Court of Appeals (Second Circuit) in the *Victory Transport* case.¹⁸⁵ And he admitted that he had resisted the temptation to add a third classification of his own.¹⁸⁶

The court's ability to enquire into the surrounding circumstances of a transaction whenever the facts are unclear from the record has been consistently recognized in both English common law and private international law. This right has been held by the House of Lords to be exercisable against the British sovereign in *Conway v. Rimmer*,¹⁸⁷ and, in *Juan Ysmael & Co. v. Indonesia*,¹⁸⁸ it was applied by the Privy Council to a foreign government. In that case Earl Jowitt stated that:

In their Lordships' opinion the view of Scrutton L.J. that a mere assertion as a claim by a foreign government to property the subject of an action compels the court to stay the action and decline jurisdiction is against the weight of authority, and cannot be supported in principle. In their Lordships' opinion a foreign government claiming that its interest in property will be affected . . . is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. The court must be satisfied that conflicting rights have to be decided in relating to the foreign government's claim. When the court reaches that point it must decline to decide the rights and must stay the action, but it ought not to stay the action before that point is reached.¹⁸⁹

Most recently, the Court of Appeal in the *Trendtex* case,¹⁹⁰ faced with the question of whether the Bank of Nigeria was in fact "the sort of body which the law . . . recognizes as entitled to the immunity which it accords to a sovereign state",¹⁹¹ was willing to go behind the affidavits submitted by the High Commissioner and other Nigerian officials to examine the constitution of the Bank, which made it an independent institution, and subsequent amending decrees which substantially eroded this independence. In the words of Shaw L.J.:

A consequence of the doctrine of immunity is that in protecting sovereign bodies from the indignities and disadvantages of adverse judicial process, it operates to deprive other persons of the benefits and advantages of that process in relation to rights which they possess and which would otherwise

¹⁸⁴ *Id.* at 1020, 22 D.L.R. (3d) at 687.

¹⁸⁵ *Supra* note 130, at 360.

¹⁸⁶ *Supra* note 158, at 1022, 22 D.L.R. (3d) at 688.

¹⁸⁷ [1968] A.C. 910, [1968] 1 All E.R. 874 (H.L. 1967).

¹⁸⁸ [1955] A.C. 72, [1954] 3 All E.R. 236 (P.C.).

¹⁸⁹ *Id.* at 89-90, [1954] 3 All E.R. at 240.

¹⁹⁰ *Supra* note 28.

¹⁹¹ *Id.* at 564, [1977] 1 All E.R. at 897-98, [1977] 2 W.L.R. at 374 (Stephen-son L.J.).

be susceptible of enforcement. Those who contemplate entering into transactions with bodies which may be in a position to claim sovereign immunity are entitled at least to the opportunity of assessing any special risk which may arise. How can they know that such a risk lurks in dealing with a body which assumes a guise and bears a title appropriate to a commercial or financial institution? Readily recognisable individual sovereigns are now rare. Departments of state are impersonal and faceless. Institutions which share in the government of a state carry no visible hallmark of sovereign status. The least that the interests of justice require is that the intention to invest an institution which is not manifestly part of government with the status of government should be declared and overt. There is no rule of law which demands this; but where the issue of status trembles on a fine edge, the absence of any positive indication that the body in question was intended to possess sovereign status and its attendant privileges must perforce militate against the view that it enjoys that status or is entitled to those privileges. This is especially the case where the opportunity to define the status of the institution concerned in clear and express terms has existed from the very inception, or indeed conception, of that institution—as in this case.¹⁹²

The conditions are now ripe for Canadian jurisprudence to adopt a restrictive view of sovereign immunity. The spadework has been done by other courts. When it next comes to consider the issue, the Supreme Court of Canada will find awaiting it a sizeable accumulation of authorities urging it to recognize that in appropriate cases, “[i]t is more in keeping with the dignity of a sovereign to submit himself to the rule of law than to claim to be above it”.¹⁹³

¹⁹² *Id.* at 574, [1977] 1 All E.R. at 907, [1977] 2 W.L.R. at 384.

¹⁹³ *Rahimtoola v. Nizam of Hyderabad*, *supra* note 39, at 418, [1957] 3 All E.R. at 461, [1957] 3 W.L.R. at 910 (Denning M.R.).