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STATE IMMUNITY IN INTERNATIONAL ECONOMIC RELATIONS

The article is devoted to the question of state immunity in international economic relations. It considers the stages of historical development of the doctrine of state immunity from absolute to restrictive approaches. With the acceptance of the restrictive theory, it becomes crucial to draw a precise demarcation line between immune and non-immune state activity. International practice varies on the question of state immunity, and international law offers no uniform theoretical model. The article substantiates the necessity to reach a broad consensus among states, to discuss and draft an international convention for common understanding and a final solution to the question of state immunity.

The question of the jurisdictional immunity of states and their property is an important and complex issue in international economic law and its practice, touching upon the vital interests of states.

Sovereign immunity until comparatively recently was regarded as appertaining to a particular individual in a state and not as an abstract manifestation of the existence and power of the state [1]. This personalization was gradually replaced by the abstract concept of state sovereignty. The traditional view of immunity was set out by Chief Justice Marshall of the US Supreme Court in *The Schooner Exchange v. McFaddon* (1812). The case concerned a ship, the *Schooner Exchange,* whose ownership was claimed by the French government and by a number of French nationals. The US Attorney General argued that court should refuse jurisdiction on the ground of sovereign immunity. He declared that the jurisdiction of a state within its own territory was exclusive and absolute, but it did not encompass foreign sovereigns [2].

The relatively uncomplicated role of the sovereign and of government in the 18th and 19th centuries logically gave rise to the concept of absolute immunity, whereby the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances. With the rise of industrialization during the 19th century, states became more involved in commercial activities, economic development resulted in a massive growth in the

commercial activity of states [3]. In those times a reaction was created against the concept of absolute immunity, partly because it would enable state enterprises to have an advantage over private companies. Accordingly many states began to adhere to the doctrine of restrictive immunity, under which immunity was available as regards governmental activity, but not where the state was engaging in commercial activity. Governmental acts with regard to which immunity would be granted are termed as *jure imperii,* while those relating to private or trade activity are termed as acts *jure gestionis* [4].

Commonly regarded as the most extreme expression of the absolute immunity doctrine is the case of the *Porlo Alexandre* (1920, UK). It concerned a Portuguese requisitioned vessel against which a writ was issued in an English court for non-payment of dues for services rendered by tugs near Liverpool. The vessel was exclusively engaged in private trading operations, but the Court dismissed the case in view of the Portuguese government interest [5].

State immunity is not unqualifiedly absolute. Once the court is clear that the claim by the sovereign is not merely illusory or founded on a manifestly defective title, it will dismiss the case. This was brought out in *Juan Ysmael* v. *Republic of Indonesia* (1955) in which the asserted interest in a vessel by the Indonesian government was regarded as manifestly defective so that the case was not dismissed on the ground of sovereign immunity [6].

In *Victory Transport Inc. v. Comisaria General de Abasteciemenlos y Transportes* the Court, in the absence of a State Department «suggestion» as to the immunity of the defendants, a branch of the Spanish Ministry of Commerce, affirmed jurisdiction since the chartering of a ship to transport what was not strictly a political or public act [7].

In the 1951 edition of the British Year Book of International Law, Professor Hersch Lauterpacht published an article on state immunity advocated the abolition of the immunity of foreign states before domestic courts except to the extent that the forum state enjoys it [8]. Basically, his strongest argument was that the protection of individual rights and justice require the defeat of immunity. Only certain carefully circumscribed areas of public activities are to remain immune.

Nowadays the general picture has changed quite dramatically. By the 1970s significant number of states had adopted the restrictive approach and, following lengthy discussions, the Council of Europe promulgated the European convention on State Immunity 1972 [9]. Even more important are the various codifications, such as the Foreign Sovereign Immunities Act in the USA, the State Immunity Act in Britain and a number of similar statutes in Canada, South Africa, Pakistan, Singapore and, most recently, Australia.

The State Immunity Act 1978 (UK) provides in section 1 that states are immune from the jurisdiction of the courts of the UK except as provided in the Act. The Act contains 10 provisions which create exceptions to the main rule. Probably the most important three exceptions, provided in section 3, are: a state is not immune as respects proceedings relating to commercial transaction entered into by the state; or an obligation of the state which by virtue of a contract falls to be performed wholly or partly in the United Kingdom [10].

The majority of states now have tended to accept the restrictive immunity doctrine and this has been reflected in domestic legislation.

The Soviet Union and some other countries generally adhere to the absolute immunity theory. The legal doctrine of many socialistic states argued that the state does not refuse from its immunity even while concluding economic treaties [11]. At the present moment the legislation of the former USSR Republics founded on a principle of absolute immunity, puts them in an unequal provision in relation to those states, which legislation is founded on the principle of restricted immunity [12]. Many problems concerning state immunity are to be decided in the Ukrainian legal area.

With the acceptance of the restrictive theory, it becomes crucial to analyze the distinction between those acts that will benefit from immunity and those that will not. In the *Victory Transport* case (1964), the Court declared that it would refuse to grant immunity, unless the activity in question fell within one of the categories of strictly political or public acts [13]. In determining the characterization of an activity as either sovereign (jure imperii) or non-sovereign (jure gestionis), the test is basically that of the nature of the transaction rather than its purpose [14]. It should be noted that article 3(2) of the International Law Commission Draft on Jurisdictional Immunities of States and their Property (1986) provides that: «in determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract)) [15]. The reason for the modified «nature» test was in order to provide an adequate safeguard and protection for developing countries, particularly as they attempt to promote national economic development.

Of all state activities for which immunity is no longer to be obtained, that of commercial transactions is the primary example and the definition of such activity is crucial.

Section 3(3) of the State Immunity Act 1978 defines the term commercial transaction)) to mean: any contract for the supply of goods or services; any

loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; or any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority [16].

The recent Australian Act defines a commercial transaction as «a commercial, trading, business, professional or industrial or like transaction: including contracts for the supply of goods or services, loans and other financial agreements and financial guarantees)) [17].

It is possible, of course, for a state to waive expressly or impliedly its immunity from the jurisdiction of the court. Express waiver of immunity from jurisdiction, however, does not of itself mean waiver of immunity from execution. In the case of implied waiver, some care is required. Section 2 of the State immunity Act provides for loss of immunity upon submission to the jurisdiction, either by a prior written agreement or after the particular dispute has arisen. A state is deemed to have submitted to the jurisdiction where the state has instituted proceedings or has intervened or taken any step in the proceedings. If a state submits to proceedings, it is deemed to have submitted to any counterclaim arising of the same legal relationship or facts as the claim. By section 9, a state which has agreed in writing to submit a dispute arbitration is not immune from proceedings in the courts which relate to the arbitration [18].

It is important to note that just as a foreign state can waive its immunity, a forum state need not exercise jurisdiction even where it is permissible to do so under international law. National legislation or court practice might accord a wider immunity to foreign states than that required by international law for political or economic considerations or simply in the hope of reciprocal treatment [19].

Immunity from execution is to be distinguished from immunity from jurisdiction, particularly since it involves the question of the actual seizure of assets appertaining to a foreign state. Such immunity may be waived by written consent but not by merely submitting to the jurisdiction of the courts (Article 23 of the Federal Agreement Law on Production Division) [20].

In 1977, the West German Federal constitutional Court in the *Philippine Embassy* case declared that: «Forced execution of judgment by the state of the forum under a writ of execution against a foreign state which has been issued in respect of non-sovereign acts of that state, or property of that state which is present or situated in the territory of the state of the forum is inadmissible without the consent of the foreign state if such property serves sovereign purposes of the foreign state. The onus of proof lies upon the applicant)) [21].

It is difficult to state the current position with regard to state immunity with any clear certainty. Most writers stress the trend towards the restrictive approach in the practice of states. There still remains the problem of clearly distinguishing between acts *jure imperii* and acts *jure gestionis* [22].

There are official and unofficial attempts at global codification such as the Draft Articles on Jurisdictional Immunities of States and their Property almost completed at the time of writing by the International Law Commission. In addition there remains the case law of national courts, which continues to be the most important source in many countries.

The prevailing theory of absolute immunity, according to which actions against foreign states were in general inadmissible without their consent, was replaced by the doctrine of restrictive immunity. Under this theory immunity is to be granted only in the case of particular types of property, notably those of a sovereign nature *(acta jure imperii).* Today the absolute theory is represented only by the People's Republic of China and a few other third world countries [23].

The controversy surrounding absolute immunity versus restrictive immunity has been a perennial topic in international legal circles. There have been consultations on this question for many years without reaching a consensus.

There are still many issues to be solved, for instance, the definition of states and their property, the criteria by which a transaction is judged to be commercial, whether giving up immunity from procedural jurisdiction means giving up immunity from enforcement measures, under what circumstances may enforcement measures be taken against state property, and the categories and the scope of state property against which such measures may be taken. All these are important issues of principle concerning the states and their properly.

The solution of this problem depends on the further development of international practice and the corresponding development of theory as well as on the basic compromise or agreement to be reached by states after full consultations on this question.

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ДЕРЖАВНИЙ ІМУНІТЕТ У МІЖНАРОДНИХ ЕКОНОМІЧНИХ ВІДНОСИНАХ

Стаття присвячена питанню державного імунітету в міжнародних економічних відносинах. У ній розглянуто стадії історичного розвитку доктрини державного імунітету від абсолютного до обмеженого (функціонального). З прийняттям теорії функціонального імунітету надзвичайно важливим стало питання проведення чіткого розмежування між суверенною та приватноправовою діяльністю держави. В міжнародній практиці не існує єдиного підходу до розуміння цього питання, і в доктрині міжнародного права теж не вироблено універсальної теоретичної моделі. У статті обгрунтовано потребу досягнення консенсусу між державами, а також обговорення та створення проекту міжнародної конвенції для спільного розуміння й остаточного вирішення проблеми державного імунітету.