CENTRAL BANKS AND THE DOCTRINE OF SOVEREIGN IMMUNITY

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ABSTRACT

Central banks engage in a multiplicity of activities. Their current roles are historically determined, in that each central bank came into being at a certain stage of its country's development and has exercised its functions consistently with its nation's development objectives. Consequently, central bank functions vary in degree and from place to place. However, despite the different conditions under which they operate, most central banks exhibit a tendency to conform to an almost identical pattern, particularly in respect of those practices and principles developed by the Bank of England, which came to be accepted as traditional central bank functions.

This thesis takes up the traditional central bank functions and compares them with the new and expanding roles of central banks in the developing world. The tool for illuminating this review is the important issue of government immunity. As agents of their governments, central banks sometimes breach their contractual obligations and then the issue of immunity comes up. In determining the immunity of foreign states, their agents and instrumentalities, the courts characterize their activities as either private or public acts. This process of characterization has proved difficult in its application to central bank activities. This is because there is no uniform central bank function. Consequently, it is difficult to determine when a central bank is performing a central bank function.

The restrictive immunity approach presupposes that central bank functions could easily be characterized as either commercial or central bank functions. However, a contrary view is presented in this thesis. This thesis takes the position that central bank activities are not uniform and therefore cannot be subject to a general theory of restrictive immunity. A comparative approach is adopted in analysing the different evolutionary patterns of central bank development, the scope of protection that central banks enjoy under the current law in sovereign immunity in the U.S., Canada, the U.K. and other international conventions.

The study ends with an appraisal of the scope of central bank immunity and the problems associated with the characterization process and concludes that in the absence of uniform central bank functions, and an agreement on the proper sphere of governmental activity, the restrictive immunity approach is inadequate for the resolution of central bank immunity issues. Consequently a programme of bilateral treaties is suggested as a better alternative.

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Professor Kwasi Asiedu- Akrofi

and

Mrs. Ellen Asiedu-Akrofi

INTRODUCTION

In 1977, the Central Bank of Nigeria was involved in a myriad of law suits as a result of a breach of its contractual obligations while acting on the instructions of the Federal Government of Nigeria.

In the course of the judgement, the English Court of Appeal denied the central bank immunity on the grounds that, it was not a department of the government of Nigeria. The court construed the bank's distinct legal personality and its function as adviser to the government on fiscal matters as evidence of independence. Consequently, it could not be said to be a department of the government. Even though it was wholly owned by the government which also exercised considerable control over its activities.

This decision is important because it raises several questions among which are the scope of protection that central banks enjoy under the doctrine of sovereign immunity and whether it adequately protects them and those who deal with them. These issues form the basis of the present study. The object of this thesis, therefore, is to assess the impact of the restrictive immunity theory on the activities of central banks and also to address the problems raised by the application of the this theory to central banks.

Chapter one considers the evolution of central banks. It will focus on the factors influencing the functions of central banks, the causes of litigation involving central banks and the problems

associated with classifying their functions in accordance to the restrictive immunity theory. Chapter two will be devoted to an examination of the evolution of the doctrine of restrictive immunity and the conditions under which central banks will be entitled to immunity. This will also involve a consideration of the relevant provisions in the U.S. Foreign Sovereign Immunities Act, the Canada State Immunity Act, the U.K. State Immunity Act, the proposed Draft Articles of the International Law Commission and the Draft Convention of the International Law Association. Chapter three will deal with an analysis of the problem of determining governmental acts. This will involve a consideration of the criteria used in characterizing the activities of states, either as governmental or commercial. It will also consider some of the attempts that have been made to reformulate the doctrine. These attempts it must be noted, are reactions to the effects of the restrictive immunity theory. Chapter four will consider the role of bilateral treaties in economic relations and argue that the present method of regulating the immunity of states leaves much to be desired. Consequently, it discusses the legal framework which is proposed as a substitute for the regulation of central bank immunity issues. Chapter five summarizes the discussion in the earlier chapters and concludes that a programme of bilateral treaties is the most suitable method of regulating economic relations among states with diverse and often conflicting views on economic matters, as it gives them the opportunity to take into account their particular needs when negotiating. Moreover, it provides a much easier, consistent and effective regime of regulation and enforcement of immunity issues involving central banks.

CHAPTER ONE THE RISE OF CENTRAL BANKING

> The whole community derives benefit from the operation of the bank. It facilitates the commerce of the country. It quickens the means of purchasing and paying for country produce and hastens on the exportation of it. The emolument, therefore, being to the community, it is the duty of the government to give protection to the bank.
>
> Thomas Paine

(A) ORIGIN AND DEVELOPMENT OF CENTRAL BANKS

Prior to the beginning of this century there was no clearly defined concept of central banking. Central banking as is known today, is the product of a gradual evolution which took place in many countries over long periods of years. The process was tortuous and marked by the absence of a systematic or consistent technique. Consequently, temperament and discretion of individual management played a vital role in the operation of these banks.[1] During this period, central banking as such was not considered a distinct sphere of the theory and practice of banking and finance.

The worldwide demand for central banking arose largely as a result of fundamental economic and political trends towards nationalism.[2] Although these trends were visible by the first World War, it was the second World War which accelerated them. Thus, while certain large banks like the Bank of England and the Bank of France had assumed

public responsibilities, and the Federal Reserve system had been conceived although not yet born, it was not until the post World War II period that central banking emerged in a recognized and accepted form.[3] In other words, the complex financial problems produced by the wars and the resultant economic crisis catapulted the principles of central banking and the operations of central banks to the centre of the economic stage.[4] Since then, central banks have continued to exert considerable influence on the policy and economic affairs of their governments.

The earlier central banks include those of England, Sweden, The Netherlands, Norway and France. In many of these countries, one bank gradually came to assume the position of a central bank largely as a result of it enjoying the principal right of note issue and acting as government bankers and agents. Thus, they were originally not called central banks. Rather, they were generally called Banks of Issue or National Banks. Although some of them had special relationships with their governments at their inception, their position in other respects was not substantially different from the other existing financial institutions. For example, the Riksbank of Sweden (Sweden's central bank) enjoyed the sole right of note issue for a greater part of its earlier life. But after this right was confirmed by legislation in 1809, the later joint-stock banks which assumed considerable prominence after 1830 also assumed the right to issue their own notes. However, in 1897 the note-issue monopoly of the Riksbank was restored by legislation thereby eliminating the notes of the other banks. The

legislation of 1897 also conferred other functions on the Riksbank and thus gave it a status comparable with that of the central bank of other countries.

The subsequent extension of the powers of the national banks, the regulation of note-issue subject to safeguards imposed by the state and the maintenance of the convertibility of their notes into either gold or silver, mark the emergence of the term central bank with a more or less standardized meaning.[5] Of the existing central banks, the Riksbank of Sweden is the oldest in the sense that it was the first to be established, but the Bank of England was the first bank of issue to assume the role of central bank properly so called and to develop what is today generally recognized as the fundamentals of central banking. Consequently, its history is accepted as illustrating the evolution of central banking principles and techniques.

(i) Bank of England

The Bank of England was established in 1694 as a joint stock company by an act of Parliament; it was granted the right to deal in bills of exchange, to issue its own notes and to make loans. In return for these privileges, it was required to lend to the government £.1,200,000 - an amount equal to its entire original capital. Originally its charter was granted for a period of ten years, however, it was extended from time to time, usually on condition that it reduced interest on outstanding loans or that it granted additional loans to

the government. From its inception, it enjoyed a position of importance as the government's banker; other prerogatives were not conferred on it until some decades after. Until 1826 it enjoyed the status as the only joint stock bank but it faced considerable competition from private banks which were partnerships and proprietorships in the area of commercial activities. It is important to note that the private banks customarily issued their own notes and the grant of the note issue power to the Bank of England did not give it a monopoly in that respect. In 1709, legislation was adopted which forbade partnerships comprising of more than six persons to issue circulating notes in England.

In executing its duties as the government's bankers, the Bank of England developed a great rapport with the private banks it came into contact with, and in due course these banks found it convenient to deposit balances with it. The private banks could obtain extra cash supplies any time they needed such by simply drawing upon their deposit accounts. By the end of the eighteenth century, there had developed a practice whereby the private banks merely kept a sufficient supply of cash for their day-to-day operations while the remainder of their reserves were kept with the Bank of England.

In 1826, there was an increase in the number of joint-stock banks. This undermined the privileged position of the Bank of England in joint-stock banking as well as in note issue. However, in 1833 Parliament adopted legislation that made the notes of the Bank of

England legal tender while denying this privilege to other banks. The Bank Act of 1844 also limited the notes of the other joint-stock banks to fixed amounts and suspended their note-issue authority under certain circumstances. It is worth noting that the new joint-stock banks of which more than one hundred were established in the decade beginning in 1826, followed the private banks in keeping substantial portions of their reserves with the Bank of England. In this way the Bank of England's role as the principal reserve depository was enhanced. In 1854, with the completion of arrangements for the settlement of obligations among the joint-stock banks by means of debits and credits in the deposit amounts, the Bank of England's function as the principal reserve depository became established. With the adoption of the Bank Act of 1844 the Bank of England formally assumed the duty of controlling the volume of money in circulation. From this time onwards, it began to take up leadership roles in times of financial difficulties occasioned by various crises of the latter part of the nineteenth century, as in 1847, 1857, 1866, 1873, and 1890. On most of these occasions, it invoked the "suspension of the Bank Act" which empowered it to make emergency issues of its notes; in this way, its status as the "lender of last resort" came to be accepted.

(ii) Later Developments

In other jurisdictions during the nineteenth century, the state endowed existing banks with the sole right to issue or caused new

banks of issue to be established with special powers and privileges with varying degrees of government control and supervision.[6] This trend was common in Europe and parts of Asia and Africa. By the end of the nineteenth century all the countries in Europe along with Japan and Persia in the East and Egypt and Algeria in Africa[7] had central banks. In all the countries, the central banks acted as both the financial agents and bankers of their governments and assumed other functions developed by the Bank of England, which in due course had become accepted as functions of central banks.

During the early part of the twentieth century, all the countries of the new world and such countries of the old world as India and China had no central banks.[8] However, as from the middle of the century, particularly in the period between the two world wars, central banks developed very rapidly.

As the only major industrial country without a central bank, the United States by the adoption of the Federal Reserve Act of 1913 joined the trend. However, many other countries did not follow suit until after the first World War when international attempts were made to encourage the establishment of more central banks. One of such attempts was the international financial conference held in Brussels in 1920. At this conference a resolution was passed enjoining all countries which had not established central banks to do so quickly. This was because central banks were considered as a means of facilitating the maintenance of stability in the monetary and banking systems as well as world cooperation.[9] The response to the

resolution was marked by varying degrees of promptness by South Africa which established a Reserve bank in 1921, Canada in 1934, followed by Peru, India, China and Poland. The next thirty years witnessed the establishment of several other central banks.

The advent of the decolonization period especially in the late 1950s and 1960s also witnessed a new wave of central bank formation in the newly independent countries of Africa and Southeast Asia. In these places the formation process was in some cases similar to the evolution of the Bank of England. While some countries had existing colonial banks transformed into fully fledged central banks, in others new central banks were established.

(B) Characteristics of Central Banks

As a result of the different processes of evolution, political and economic conditions existing at the time of their establishment, there is no uniform definition of a central bank. While in Canada and the U.K. there are no definitive guidelines for determining central banks besides comparing their structure and functions with that of the Bank of England (upon which the Bank of Canada is modelled), in the U.S. the Federal Reserve Act[10] attempts to provide a definition of a central bank. It provides inter alia,

> "the term 'central bank' includes any foreign bank authorized to perform any one or more functions of a central bank".

The above definition is circular in that it offers no clear guidelines for determining central banks. The definitional problem has also exercised the minds of several economists for some time now. For example, Hawtrey[11] in 'The Art of Central Banking', considers the central bank's function as the lender of last resort, as the most essential characteristic of a central bank and argues that while the right of note issue gives the bank great advantage in carrying out its duty as lender of last resort, it could perform that function without the right to issue. On the other hand, Vera Smith[12] says that

> "The primary definition of central banking is a banking system in which a single bank has either a complete or residuary monopoly in the note issue, and that it was out of monopolies in the note issue that were derived the secondary functions and characteristic of our modern central banks."

Shaw[13] also argues that, in order to have an automatic self regulating currency the state should assume the responsibility of note issue while central banks should only be used for the distribution of the notes if at all. He thinks that

> "the only true, but at the same time all sufficing function of a central bank is control of credit."

Kisch and Elkin[14] argue that

> "the essential function of a central bank is the maintenance of the stability of the monetary standard which involves the control of the monetary circulation"

while Jauncey[15] says that

> "clearing is the the main operation of central banking".

The statute of the Bank for International Settlements also differs in its perception of the essential characteristic of a central bank. It conceives of it as the regulation of currency and credit. This is implicit in its definition of a central bank as

> "the bank in any country to which has been entrusted the duty of regulating the volume of currency and credit in that country."

Moreover, the fact that in several countries central banks are called reserve banks[16] indicates that the maintenance of bank reserves in those countries is the characteristic function of the central bank.

From the foregoing, it is clear that there is little agreement on the essential characteristics of a central bank. This notwithstanding, a clear concept of central bank (recognized as a bank at the apex of the monetary and banking structure of a country) exists.[17]

(i) Functions

The variations in the structure and definition of central banks account for the substantial variations in their constitutional and statutory powers. In the absence of uniform conditions their operations are largely guided by improvisation and prudence. In other words, their functions vary in degree and often in kind as between one central bank and another depending on the particular stage of economic development, the volume and variety of material resources, the nature of its international financial relations (i.e. whether it operates as a creditor or debtor nation) whether it is a highly developed and active market or it is a relatively unorganized and inactive market like those of Argentina and Ghana.[18] Other factors which influence the functions of central banks are the type of political thought that their governments pursue and the need for fundamental changes in the economic conditions of the country.

Despite the varying conditions under which central banks operate, most of them exhibit a tendency to conform to an almost identical pattern in respect of their functions and techniques.[19] These include: (1) the issue of currency and legal tender, (ii) maintenance of the nation's monetary reserves through the holding of foreign exchange, gold, and other foreign securities, (iii) exercise of I.M.F. Special Drawing Rights on behalf of states which are members of the International Monetary Fund, (iv) government's bankers, (v) supervising licensing and inspection of banks as the banker's banker and lender of

last resort, (vi) the management of the public debt. These functions are performed largely as a result of tradition and have therefore become accepted as constituting major functions of central banks. However, some of the relatively young central banks have other functions specifically entrusted to them by statute. Most of these additional functions reflect the need for organized banking assistance to aid national economic development. This trend is symptomatic of some of the central banks established after the second World War. The primary goals of some of these central banks are so widely couched that, arguably they could be said to have been established in furtherance of their governments economic development objectives. For example section 4(c) of the Union Bank of Burma Act (Burma's Central Bank) provides that the primary goal shall be the "development of the productive resources of the country." Similarly, the primary goals of the Central Bank of (Ceylon) Sri Lanka include "the development and promotion of the full development of the productive resources"[20].

(ii) Central Banks and Economic Development

Thus, besides the major role of establishing an institutional and financial framework conducive to economic development, central banks may also play active roles in financing economic development in developing countries, either directly or indirectly.[21]

When we talk of central banks contributing directly in the financing of economic development, we are not suggesting that they dispense loans as commercial banks do. Rather, they assist in the formation of development banks[22] through equity participation either wholly or partly by providing marginal assistance to these institutions while also guaranteeing their obligations in both the domestic and overseas markets.[23]

In the developing economies central banks actively engage in promotional activities aimed at promoting various kinds of financial institutions for facilitating their economic development while their counterparts in the developed economies play more nominal roles in this respect. The structure and extent of central bank involvement in national economic development depends largely on its environment. According to Wilson,[24]

> "It is the influence of the environment, in its broadest sense, which is the basis of the variety of banking organization and technique that is to be found in the world at large"

A fortiori, it is arguable that a central bank need not possess all the 'accepted' attributes of central banking in order to successfully conduct its operations. These attributes or more precisely the canons of central banking are largely a product of history. While some may be valuable others may be regarded as vestigial, redundant at best, and at the worst impediments to normal

healthy performance in their different environments.[25]

In recognition of the potential setbacks from certain operations of central banks, some governments have made pronouncements reflective of the above view. For example, In his 1962 budget speech, the then Nigerian Federal Minister of Finance[26] said of the role of the central bank of Nigeria:

> "One of the major objectives of the banking system, and especially the central bank, will be to facilitate the successful implementation of this plan" (National development plan.)

It is interesting to note that the objectives of the Central Bank of Nigeria (CBN) do not include the promotion of economic development. However, as the CBN Act was framed by an advisor from the Bank of England and modelled on the latter's Act, it is arguable that the aspirations of Nigerians were more accurately reflected by the Federal Minister of Finance[27] when he said

> "the basic objective of monetary ... policies must ... be to facilitate the economic development desired..."

(C) Relationship between Central Banks and their Governments

Traditionally, central banks were expected to engage only in their banking activities and stay clear from government. For this reason, they were organized in a manner which assured them of considerable independence from their parent governments. Being independent, their

responsibility was limited by their various Acts. Their relationship with their governments was more or less one of agent and principal. They were expected to cooperate with the government in carrying out its policy for which the government alone assumed responsibility. In this context, it is apt to quote Montagu Norman's[28] famous dictum (when speaking of the role of the Bank of England in 1926) he said:

> "I think it is of utmost importance that the policy of the Bank and the policy of the government should at all times be in harmony - in as complete harmony as possible. I look upon the bank as having the unique right to offer advise and to press such advice even to the point of 'nagging'; but always of course subject to the supreme authority of the government"

The importance of the above statement lies in the fact that it depicts central banks vis-a-vis their governments as occupying a subjugated position. This view is strengthened by the fact that the autonomy and discretionary power of central banks are sometimes limited by provisions authorizing the government to give directives to the Bank. For example section 4(1) of the Bank of England Act of 1946, and section 14 of the Bank of Canada Act of 1935 provide in certain circumstances for the devolution to the government of functions and powers granted by law to the central bank. There are also procedures which ensure that any disagreement between the central banks and their governments is to be resolved in favour of the governments. The following example is taken from the Bank of Canada Act.

> S.14(1) The Minister and the Governor shall consult regularly on monetary policy and its relation to general economic policy.
>
> (2) If notwithstanding the consultations provided for in subsection (1), there should emerge a difference of opinion between the Minister and the Bank concerning the Monetary policy to be followed, the Minister may, after consultation with the Governor and with the approval of the Governor in Council (i.e. cabinet), give to the Governor a written directive concerning monetary policy, in specific terms and applicable for a specified period, and the Bank shall comply with the directive.
>
> (3) A directive given under this section shall be published forthwith in the Canada Gazette and shall be laid before parliament within fifteen days after the giving thereof, or if the Parliament is not then sitting, on any of the first fifteen days thereafter that Parliament is sitting.

Such directives are seldomly given if at all. But the principle and threat are clearly stated. Typical instances in which such 'a difference of opinion' may arise include where the government is not favourably disposed to measures which the bank, ie. the Bank of Canada, adopts to combat inflation. In some countries, there are no such provisions asserting the government's supremacy and therefore the central banks enjoy more independence. Despite this independence they do not defy their governments' wishes. The Federal Reserve Bank of the U.S. is a good illustration in this regard.

The increased emphasis on development after World War II and the advent of the decolonization period, witnessed increased governmental involvement in economic activities. This marks the beginning of direct central bank involvement in financing government economic development projects. This has led to a blurring of the demarcation between the

functions of principal and of agent, which in recent times has lost much of its cogency. The philosophy and indeed the practice according to Lord Cobbold,[29]

> "has tended to become more uniform in the major centres. The conception, fairly widespread 50 years ago, that the central bank should get on with its own business and not pay too much regard to the politics or Government, has steadily given way to the different conception that, though retaining much of its thinking, the central banks should act in close harmony with the government".

The above statement indicates that there has been a transformation in both the theory and practice of central banking. Like many modern methods of state control, it is in the process of development and extension. Consequently, "what was considered to be good central banking practice some years ago may today be regarded as outmoded and inadequate. Ideas regarding the proper functions of central banks differ not only from time to time, but from place to place and from person to person".[30]

The transformation of the theory and practice of central banking signifies a recognition that

> 'monetary policy and general fiscal and economic policy are part of the <u>same</u> picture in which final responsibility lies with the government. The details of this modern conception differ from country to country, and largely depend on both statute and local practice; the central bank has been described in one country as 'independent within the government' and elsewhere by phrases which reflect the different shades of relationship in different countries.'[31]

This recognition of the modern conception of the relationship between monetary policy and general fiscal economic policy marks a significant development in the theory and practice of central banking.

Firstly, it signifies the demise of the traditional conception of the role of central banks in general fiscal and economic policies. This is explicable in terms of the increased importance attached to trade and related matters. The fact that trade has become an instrument of national policy and the medium through which enhanced economic activity could be obtained, central banks as fiscal agents of their government were called upon to assume the role of financiers. In this capacity they guaranteed the repayment of loans taken out by governments and issued bills of exchange and promissory notes in connection with purchases for government projects. In this way they enhanced their governments' economic activities.

Secondly, it signifies an acceptance of the need to adapt central bank functions to contemporary developments. This is consistent with the admonition of Sayers.[32] He said

> "They have to adapt their ways to the shape of the community's constantly changing financial habits. By a comparative study we may, of course, hope to find some generalizations about the behaviour of central banks, and the experience of some may offer guidance to others, but we are doomed to disappointment if we look for rules applicable to all times and places. We have central banks for the very reason that there are no such rules".

(D) Classification of Central Bank Activities

The role of central banks as financiers makes them comparable to other merchants who trade in the market place. Thus, where they find themselves in breach of their contractual obligations, the courts will have to decide when they are entitled to immunity.[33]

The process of determining the immunity of banks is extensively discussed in the next chapter. However, for now, it will suffice to mention that the doctrine of sovereign immunity classifies the activities of states and their agencies into sovereign or public acts and private acts (i.e. acta jure imperii and acta jure gestionis). While the former entitles the state and its agencies to immunity, the latter does not.

Potential difficulties are likely to arise in the classification of central bank activities given that there is no uniform characteristic functions of central banks as such. This is because

> "Central banking is a subject that does not lend itself to precise definitions and universal rules. Its essence is discretionary control of the banking system, but if we try to elaborate this we shall soon find ourselves at variance."[34]

Furthermore, besides being central banks, some banks are also commercial banks. These banks hold a number of accounts for individuals and for private and public corporations. For example the Bank of France besides being the only central bank of France is also

its major commercial bank. Applying the acta jure imperii/acta jure gestionis distinction to central bank activities, it is submitted that, there will be a tendency to emphasize that a central bank is first a bank. Furthermore banks being financial institutions, prima facie, engage in commercial activities, which may be easily distinguished from the non-commercial activities by considering the nature of the transaction. A similar approach was adopted in Trendtex Trading Corp. v. Central Bank of Nigeria.[35] However, the activities of central banks are not that easily classified as commercial or non commercial. This is because in most cases the two forms of activities are so intertwined that it is difficult to draw any clear distinction between them.

Given the fact that the management of a country's foreign reserves,[36] its public debts and the facilitation of sustained economic growth could have profound effects on its economy and the lives of its citizens at large, such activities could not be simply characterized as commercial. At best these management activities are inherently characteristic of sovereignty.

In view of the above, there are problems with making central banks subject to a general theory based on the distinction between public and private acts of central governments. Such an approacn nas the tendency to oversimplify the activities of central banks, overlook the sensitive position they occupy vis a vis other state organs and the central government and expose their assets to potential attachment and

execution in the event that their activities are classified as commercial.

(E) Causes of Litigation Involving Central Banks

As financiers of government projects, central banks have to deal with private individuals and creditors on behalf of their governments. In the course of their dealings, they attempt to maintain a balance between their roles as banks as well as their government functions. Indeed, the line between the two functions is thin. This sometimes results in a mixup in the capacity in which the banks deal with their creditors.

The mix up often arises when central banks in compliance with government directives are forced to breach their contractual obligations concluded in their capacity as banks. Where this happens without any satisfactory settlement between the banks and their creditors or private contracting parties, a court settlement is sought to enforce the breach.

The directives or circumstances necessitating breaches of their contractual obligations include pressing domestic economic problems, diplomatic rows between parent governments and the governments of the creditors or private individuals. In all these circumstances, the banks seeks to avail themselves of the doctrine of sovereign immunity purpotedly as agents of their parent governments.

(F) Emergent Problems

The classification of central bank functions has presented some difficulty to the courts in recent times. Much as the various Acts may provide useful guidance in the classification of their activities, they are not particularly helpful when their activities are an admixture of both governmental and commercial activities such that it is difficult to determine a legitimate or illegimitate exercise of central bank functions. This problem exists because central bank assets are quite often kept in bulk without earmarked accounts for specific purposes. Consequently, some central bank activities tend to present some difficulties. They include transactions involving letter of credit, transfer of funds through correspondent banks and mixed assets.

(i) Letters of Credit

The case of Werner Lehara International Inc. v. Harris Trust Savings Bank[37] illustrates the potential problems involved in letters of credit transactions. The case involved a request by the plaintiffs for [an order] of injunction against the defendants prohibiting payments under a letter of credit at the request of a foreign central bank (Bank Markazi Iran).

The court rejected the request and without deciding when a foreign central bank's property was subject to attachment, it said:

> 'It is noted the exemption applies to the foreign banks 'own account' which may well not be applicable to Letters of Credit'.[38]

From the tenor of the decision, it seems that once a foreign central bank is engaged in a letter of credit transaction as account party of the beneficiary and the transaction is characterized as commercial, the funds involved will be deemed as funds not held for its own account. However, this should not be the case as the use of letters of credits is one of the established ways by which central banks make foreign payments on behalf of either their governments, private individuals or public corporations.

(ii) Correspondent Banks

The use of foreign correspondent banks by central banks is a very popular means of facilitating payments for overseas purchases. These banks are often used in situations in which other banks have to act on behalf of their customers but due to lack of expertise in the transaction or convenience they have to enlist the services of a bank located in the place of payment. In either case it is probable that the customer's bank may not have any branches in the jurisdiction. In such cases, funds are transferred to the correspondent bank by the central bank. The correspondent bank then credits the account of the respondent bank indicating the name of the person for whose benefit the deposit was made. On receiving such information the respondent bank credits its customer's account on its books with the amount

deposited.

As the transfer of funds from a respondent bank to a correspondent bank gives rise to a series of choses in action[39], there could be some difficulties in determining ownership of the account. It is arguable that since the funds are held for the central bank in the course of its activities, they belong to the bank. This argument is consistent with the decision in Bradford v. Chase National Bank,[40] where the court stated that

> "the best, if not the only, way in which the possession of a chose in action - such as a bank account - can be shown, is by showing in whose name the account stands, for the person in whose name the account stands has absolute control of it and that is all possession of a chose in action can mean."

(iii) Mixed Assets

It is a common practice of central banks to keep their assets in bulk without earmarking specific accounts for particular transactions. However, in some cases accounts are earmarked for specific transactions. Where this is done, it is not difficult for the courts to determine the function of the account. However, where the assets are used for both commercial and central bank activities, it is difficult to classify the use to which they are put. In resolving this difficulty, the courts often consider the nature of the transaction to determine whether or not the assets are (being) used for a commercial

or non commercial purposes. It appears that once there are any trappings of commercial activity the property will be denied immunity from attachment. The case of Birch Shipping Co. v. Embassy of The United Republic of Tanzania[41] illustrates the issue of mixed assets.

The action concerned the issue of a writ of garnishment against the checking account of the Tanzanian Embassy. The court said that the account was not immune from garnishment since it was used for commercial purposes. The commercial purposes referred to the use of the account for the maintenance of the embassy, i.e. the purchase of goods and services incidental to its operation. Additionally the court noted that the immunity granted to central bank property does not extend to property used for mixed purposes, since such an interpretation would enable foreign central banks to switch the use of their property.

CHAPTER 2

SOVEREIGN IMMUNITY AND CENTRAL BANKS

(A) Historical Development

The doctrine of sovereign immunity was recognized by the courts in the nineteenth century, when states generally tended to confine their activities to sovereign acts like legislation and state security and did not actively engage in commercial activities. During this period a state could invoke immunity for any activity it engaged in, on the grounds that it was absolutely immune from the jurisdiction of foreign courts and similarly, its property was immune from attachment and execution. It is this that is referred to as the absolute Immunity theory.

Absolute immunity was based on the view that assumption of jurisdiction by any municipal court over a foreign sovereign would be a violation of the principle of sovereign equality of nations and an erosion of its dignity. Hence the maxim "par in parem non habet jurisdictionem".[42] Since the first World War, there has been a steady decline in the application of this theory. The reasons for this decline include increased state intervention in commercial transactions and the extra territorial effects some of these transactions give rise to.

Today, a large number of states have abandoned the absolute

immunity theory and exhibit a far greater predilection for the theory of restrictive immunity.

The theory of restrictive immunity distinguishes between the public and private acts of states, ie. acta jure imperii and acta jure gestionis. The former posits that a state is immune from the jurisdiction of the courts of a foreign country, while the latter grants immunity from both jurisdiction and execution only for acts done in the exercise of sovereign power. Thus, if a state engages in economic activities it loses its immunity. The rationale for this distinction is that if a state engages in business with private persons or corporations, it would be unfair if it was immune from the jurisdiction of the courts of the state where the transaction was concluded.[43]

Today, state-trading is still considered a crucial part of the ideological struggle between the western capitalist nations and the Eastern bloc countries. Trade has largely become an instrument of national policy in all countries, although the extent to which this means actual interference with the conditions of trade depends on prevailing economic conditions of a country rather than the purity of ideology.[44] According to Friedmann,[45] in the area of international trade in the broad sense,

> "the tacit assumption has been that industry and trade are conducted privately, while governments confine themselves to the traditional functions of "night watchman" states - i.e. defense, foreign affairs, and certain police functions."

It is on this assumption that the present rules on state immunity can be understood.

(B) The Transition to Restrictive Immunity: Anglo-Canadian and U.S. Approaches

The development of Anglo-Canadian and U.S. common law on sovereign immunity followed somewhat similar lines. While some differences exist, they only relate to the time of switching from the absolute immunity theory to the restrictive immunity approach. For this reason, it will suffice to highlight only the significant aspects of the doctrine's development in the various jurisdictions.

(i) U.S. Practice

During the period between 1812 and 1952 the United States adhered to the absolute immunity rule. The decision whether or not to grant immunity was highly politicized. This was because the State Department was the primary arbiter of immunity issues while the courts were largely guided by the policy of the government. Occasionally, the State Department yielded to diplomatic pressures from foreign governments and granted them immunity, otherwise the Courts asserted jurisdiction over the foreign nations.[46]

In assuming jurisdiction, the courts were guided by the policy that they would

> "not deny an immunity which our government has seen fit to allow or ... allow an immunity on new grounds which the government has not seen fit to recognize."[47]

However, where the immunity asserted had been previously recognized by the State Department or other courts, the courts only determined whether the character of the foreign government's activity entitled it to immunity.

The United States' views in respect of the absolute immunity theory was reflected in the U.S. Supreme Court case of The Schooner Exchange v. McFaddon.[48] In this case, the Supreme Court declined jurisdiction on the grounds of international comity. According to Chief Justice Marshall the jurisdiction of a state within its territory is 'necessarily exclusive and absolute'. In his words:

> "This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station though not expressly stipulated are reserved by implication, and will be extended to him."[49]

As from the mid 1940s, there began a gradual decline in the adherence to the absolute immunity theory. This was a result of developments in international trade.[50] The decline of the absolute immunity theory

was characterized by increased reliance on Friendship, Commerce and Navigation treaties as a means of regulating commercial activities among states. The use of this treaty type first began during the nineteenth century and proved to be an effective weapon against the potential abuses and injustice that the absolute immunity approach could give rise to.[51] Despite this development, the theory of absolute immunity lingered on until 1952, when the Tate letter[52] declared the State Department's decision to officially abandon the absolute theory and adopt a restrictive theory of immunity. With this change in official position, states became entitled to immunity only when they engaged in sovereign activities. Additionally, the courts continued to follow the policies of the State Department to a considerable extent. In the absence of any coherent criteria in making determinations in respect of immunity cases, there resulted several conflicting decisions. This was the state of affairs until in 1976 the Foreign Sovereign Immunities Act was passed.[53]

(ii) U.K. Practice

In England, the first authoritative statement of the absolute immunity principle was made in the Court of Appeal decision in The Parlement Belge.[54] In that case, a mail-packet owned by the King of Belgium and manned by officers of the Royal Belgian Navy was granted immunity. The Court of Appeal accepted the argument that the mail packet was used for public purposes. In the words of Brett L.J.,[55]

> "the principle to be deduced from the cases is that as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces a sovereign state to respect the independence and dignity of every other state, each and everyone declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the property of any state which is destined to public use, or over the property of any ambassador though such sovereign, ambassador or property be within its territory and therefore, but for the common agreement, subject to its jurisdiction."

Accordingly, a writ in rem against the ship was set aside.

This principle was followed forty years later by the Court of Appeal in The Porto Alexandre,[56] another admiralty action in rem. The Cristina[57] marked another important step in the development of the law on sovereign immunity. The importance of this case lies in the fact that it may be said to signify the beginning of opposition to the grant of immunity to state owned or controlled vessels engaged in commercial activities. The high water mark of this development was in The Phillipine Admiral.[58] In this case, proceedings for an action in rem were commenced by repairers and charterers against a merchant ship owned by the Reparations Commission, an agent of the Phillipines government. The privy council rejected the Commission's plea of immunity on the ground that it was 'an ordinary trading ship'. This case is important because it signifies an end to the absolute immunity theory in British practice. In reconciling the decision with earlier decisions, the court stated that The Porto Alexandre was decided per incuriam as the Parlement Belge left open the position of vessels

engaged in 'ordinary commerce.' The Cristina was also distinguished on the grounds that the ship in question was clearly intended for public purposes as the requisition order was made to assist in quelling a rebellion and therefore the issue of immunity in an action in rem against a state owned vessel employed for commercial purposes was not in issue. Commenting on the decision in the Phillipine Admiral, Brownlie[59] said:

> "The judicial committee's insistence on a distinction between proceedings in personam and preceedings in rem as a means of canalizing the effects of The Parlement Belge is awkward in some respects. Firstly, it involves a confirmation of the doctrine of immunity in the case of proceedings in personam. Secondly, it is unacceptable that the application of a principle of international law should depend upon concepts peculiar to the system of domestic law. The ship was described by the judicial committee as 'an ordinary trading ship' for the purposes of the doctrine of sovereign immunity, in spite of the fact that her operations were under the terms of a contract with the Reparations Commission and were subject to the provisions of the Reparations Act. In terms of Phillipines law the vessel was operating for public purposes. The difference between this case and the cases of requisitioned ships is fine indeed. The candid view of judicial policy in these matters would be that the English judges are in effect classifying public purposes as seen by other systems: some qualify for immunity, some do not."

The principles laid down in the Philippine Admiral were followed in Trendtex Trading Corporation v. Central Bank of Nigeria[60] a year later. This was an opportunity to test the decision in the Phillipine Admiral. This case is particularly important because of the important pronouncements on central banks and the doctine of sovereign immunity.

The foregoing analysis depicts the vicissitudes through which the English law on sovereign immunity underwent before the enactment of the State Immunity Act of 1978.

Canadian Practice

Canadian practice, prior to the 1982 State Immunity Act was not clear. In two decisions,[61] the Supreme Court of Canada granted sovereign immunity in respect of a 'public act' of a foreign state. However, it left open whether immunity would be granted in respect of 'non public' or commercial activities of a foreign sovereign.

In Dessaulles v. Republic of Poland,[62] the plaintiff brought an action against the defendant to recover legal fees but the action was dismissed on grounds of sovereign immunity. Delivering the judgement of the Supreme Court of Canada, Taschereau J. said inter alia,

> "Il ne fait pas de doute qu'un état souverain ne peut pas 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."

This is by far the most authoritative assertion of the absolute immunity doctrine in Canada. Before this decision, other cases had been decided on the basis of absolute immunity.[63] The case of Le Gouvernement de la Republique Democratique du Congo v. Venne[64] marks a significant development in the Canadian practice. Its

significance lies in the attempts by the Courts to apply the restrictive immunity approach in the absence of such an approach in Canadian practice. In that case, an action was brought by a Montreal architect to recover fees incurred in the preparation of plans for a pavillion for the defendants at Expo '67. At the trial court, it was held that the preparation of the plans for the pavillion constituted a commercial activity. Consequently, the defendants were not entitled to immunity. On appeal, the Quebec Court of Appeal[65] endorsed the decision of the trial court stating inter alia

> "It is time our courts repudiated the theory of absolute immunity as outdated and inapplicable to today's conditions."

The Supreme Court reversed the decision of the Court of Appeal on the ground that the hiring of an architect for the construction of a national pavillion was a sovereign act of state. In the course of the judgement, Ritchie, J.[66] said inter alia,

> "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."

From the foregoing, it may be concluded that prior to the 1982 Act, the Canadian courts showed a predilection for the absolute immunity doctrine, with signs of agitation for a shift to the restrictive approach.

At this stage it is important to remark that the development of the restrictive theory in the United States, Canada and U.K. followed a rather tortuous path. The grant or rejection of a plea of immunity depended on whether the activity in question was commercial or sovereign in nature. This means that there was no coherent criteria for the determination of immunity issues. Consequently each case was taken on its own merits.

(C) Statutory Embodiment of the Restrictive Immunity Approach

In order to make the grant of immunity less dependent on political factors and to attempt to standardize the law on sovereign immunity attempts have been made to enact statutes as well as draft treaties for a multilateral convention on the subject. The multilateral conventions on sovereign immunity include the Harvard Law School Draft Convention and the Inter-American Convention. In this section we shall consider the provisions of the U.S. Foreign Sovereign Immunities Act 1976, the Canada State Immunity Act, the U.K. State Immunity Act, the proposed Draft Articles of the Special Rapporteur of the International Law Commission and the Draft Convention of the International Law Association respectively. This is because they have specific provisions relating to the immunity of central banks. These may be viewed as attempts to break away from the uncertainty which in the past has characterized the determination of immunity issues. In this respect they may be described as remedial statutes.

The various Acts clearly state their purpose in different ways but the message is the same; to provide standards for determining immunity issues. For example the Foreign Sovereign Immunities Act's (FSIA) objective is to provide

> "the sole and exclusive standards to be used in resolving questions of sovereign immunity."[67]

In order to ensure consistency in the application of the Act, the FSIA placed the determination of sovereign immunity in the hands of the courts.[68] In addition, it made provision for obtaining in personam jurisdiction as well as restricting the immunity of foreign sovereigns from attachment and execution.[69] Both the Canadian and the U.K. Acts also have similar provisions restricting the immunity of both foreign sovereigns and central banks from attachment and execution of their property. These will be considered later. The U.K. State Immunity Act 1978 which came into force on November 22, 1978 [70] was also meant to settle the uncertainty that had for so long characterized the U.K. law on sovereign immunity. The long title of the Act states its purpose as

> 'to provide for the effect of judgements given against the United Kingdom in the Courts of States parties to the European Convention on State Immunity; to make new provision with respect to the immunities and privileges of Heads of State; and for connected purposes.'

The Canadian Act also states its purpose as

'to provide for state immunity in Canadian courts.'

Considering the various ways in which the purposes of the various statutes have been stated, it is plausible to conclude that they purport to deal comprehensively with both adjudicative jurisdiction (jurisdiction of the courts of the various countries to decide claims against foreign states and their central banks) and enforcement jurisdiction (making pronouncements and orders in accordance with their adjudicatory jurisdiction).

(D) Statutes and Draft Treaty Provisions

A critical feature of the restrictive immunity approach in the various acts of legislation is the distinction drawn between governmental and commercial activities. The statutes do not completely abandon the acta jure imperii/acta jure gestionis distinction. In fact these form the basis for determining when a state is entitled to immunity. However, all the statutes exhibit some refinement in one way or the other. The refinement is reflected in the different formulation of the distinction. Despite the refinements, some of the problems associated with the acta jure imperii/acta jure gestionis distinction exist.

(a) Domestic Statutes

The F.S.I.A. states a general rule of immunity subject to exceptions, including commercial activities. By section 1605 (a)[71]

a foreign state or its agency is not immune in any transaction

> "in which the action is based upon a commercial activity carried on in the United States by the foreign State, or upon an act performed in the United States in connection with a commercial activity of the foreign states elsewhere, or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

Section 1603 (d) defines "commercial activity" as a regular course of commercial conduct or a particular transaction or act. The commercial activity is determined by reference to the nature of the particular transaction, or act rather than by reference to its purpose. The F.S.I.A. does not limit the enjoyment of immunity and privileges to states only. It also extends them to political subdivisions, their governments and agencies, whether or not they are distinct from the government. In this respect it differs from the U.K. Act.

Section 1 of the U.K. Act expresses a general principle of immunity from jurisdiction. However, the general principle is subject to several exceptions laid out in sections 2-17 of the Act.

Many of the exceptions are founded on the existence or non existence of a commercial transaction. Besides the commercial transactions exception, where a state waives its immunity by a prior agreement it is not entitled to immunity. This is not peculiar to the U.K. Act. Similar provisions exist in both the F.S.I.A. and the Canadian Act.[72] This type of waiver is a tacit affirmation of a practice widely encountered in bilateral commercial treaties i.e.

Friendship, Commerce and Navigation treaties (FCN). Below is an example of such a waiver taken from Art. XI of the U.S.-Iran Treaty of Amity.[73] It provides that

> "No enterprise of either [the United States or Iran], including corporations, associations and government agencies and instrumentalities; which is publicly owned or controlled shall if it engages in commercial, industrial, shipping or other business activities within the territories of the other high contracting party, claim or enjoy, either for itself or for its property immunity therein from taxation, suit, execution of judgement or other liability to which privately owned and controlled enterprises are subject therein..."

A fortiori, it is arguable that the FCNs provide the first indication of the breakdown of the absolute immunity theory.

A commercial transaction is defined in section 3(3) of the U.K. Act as

> (a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance, any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

An examination of section 3(3) above reveals that it virtually covers the same scope as the definition of commercial activities in the U.S. - Iran Treaty of Amity.

The Act limits the enjoyment of immunity to states or state agencies which are not distinct from the executive organ of the state or government i.e. a department of the government. This is provided for in section 14(1)(a)-(c) which provides as follows:

> "The immunities and privileges conferred by the part of this Act apply to any foreign or commonwealth state other than the United Kingdom: and references to a state include references to:
>
> (a) the sovereign or other head of that state in his public capacity;
> (b) the government of that state and
> (c) any department of that government but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the state and capable of suing or being sued.

The scope of the definition of state has been justified as follows:[74]

> "The definition is important because many trading industrial or financial activities carried out on behalf of states are done by entities of this kind, so that the wider the definition, the less scope remains for states invoking immunity."

From the above provision, it is arguable that in the U.K. the immunity of state agencies depends on whether or not they are distinct from the executive organ of government.[75] Thus if the bank has no distinct personality, it will be entitled to immunity. However, if section 14(1)(a)-(c) is read in conjunction with s.3(3) a central bank which has no distinct personality will not be entitled to immunity if

it engages in commercial activities. On the other hand, a central bank with distinct personality will only be entitled to immunity where it acts on behalf of government ie. exercise sovereign powers.

The equivalent definitions of a foreign state in both the FSIA and the Canadian Act do not draw any such distinctions. Rather, they define a state to include all agencies or instrumentalities of state without reference to their structure. A fortiori, under both the FSIA and the Canadian Act, the immunity of central banks does not depend so much on their structure as on the type of activity they engage in. Thus, while in the U.K. the structure of the bank and the kind of activity it engages in are important for determining central bank immunity, in both Canada and the U.S. emphasis is on the kind of activity rather than the structure of the bank. S.14(1)(a)-(c) is reminiscent of the decision in the Trendtex case and may well be a codification thereof.

The Canadian Act, like the U.K. Act and the F.S.I.A. also states a general principle of immunity subject to several exceptions which include inter alia commercial activities. The commercial activity exception is provided for in section 5. It states that:

> "A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of a foreign state."

Commercial activity is defined in section 2 as

> "any particular transaction, action or conduct or any regular course of conduct that by reason of its nature is of a commercial character."

This definition parallels the definition in the F.S.I.A. Both the U.S. and Canadian definitions of commercial activity do not provide any guidance for the interpretation of the phrase 'commercial activity' apart from the nature of the transaction. Consequently, the term may be subject to manipulation and different interpretation by the courts. The approach in both countries has been justified in similar terms. The Canadian approach was explained by Jewett[76] as follows:

> '...Focusing on the nature of the activity would make it easier for the courts to adapt this kind of test and bring it within the role which they perform on a day to day basis.'

The Legal Adviser[77] to the U.S. State Department stated the rationale for the U.S. approach as follows:

> We realized that we could probably not draft legislation which would satisfactorily delineate the line of demarcation between commercial and governmental. We therefore thought it was the better part of valour to recognize our inability to do that definitively and leave it to the courts with very modest guidance.

The 'modest guidance' referred to above, requires the courts to determine whether the activity in question is one which private parties ordinarily perform or whether it is particularly within the realm of governments.[78]

(b) Draft Treaty Provisions

Like the various Acts, the proposal draft articles of the ILC and the International Law Association's Draft Convention (ILADC) adopt the restrictive immunity approach. The proposed draft articles state a general principle of immunity subject to several exceptions, including commercial activity.

Article 12(1) of the ILC Draft Articles permits the courts of a state to assume jurisdiction over another state where the latter enters into a commercial contract with a foreign natural or juridical person and by virtue of the applicable rules of private international law differences relating to the commercial contract fall within the jurisdiction of the state. The contracting state is deemed to have consented to the exercise of that jurisdiction in a proceeding arising out of the commercial contract and cannot purport to invoke immunity from jurisdiction in that respect. The provisions of Article 12(1) do not apply to commercial contracts concluded on a government to government basis and in cases where the parties have otherwise expressly agreed.

A commercial contract is defined in article 2(1)(g) as

> (i) any commercial contracting or transaction for the sale or purchase of goods or the supply of services;
>
> (ii) any contract for a loan or other transaction of a financial nature, including any obligation or guarantee in respect of any such loan or of indemnity in respect of any such transaction;

(iii) any other contract or transaction, whether of a commercial, industrial trading or professional nature but not including a contract of employment

The above definition is so widely couched that it seems to cover the activities of central banks. The determination of whether an act is commercial or not is made by reference to the nature of the transaction. However, the purpose of the transaction is also considered if that will be relevant in determining the character of the contract. In these respects, the I.L.C. Draft articles reflects the position adopted by any national legislation on the subject.

The ILADC is in many respects similar to the proposed Draft Articles of the I.L.C. and other national legislation on sovereign immunity. Like the proposed Draft Articles, commercial activities are exception to the rule on immunity. Commercial activity is defined in Article 15 as follows:

> The term "commercial activity" refers either to a regular course of commercial conduct or a particular commercial transaction or act. It shall include any activity or transaction into which a foreign state enters or in which it engages otherwise than in the exercise of sovereign authority and in particular:
>
> 1. Any arrangement for the supply of goods or services;
>
> 2. Any financial transaction involving lending or borrowing or guaranteeing financial obligations.
>
> In applying this definition, the commercial character of a particular act shall be determined by reference to the nature of the act, rather than by reference to its purpose.

Additionally, the scope of the definitions of commercial activity in the proposed draft articles of the ILC and the ILADC are similar to the corresponding definition in the U.K. Act.

(ii) Central Banks as Agents or Organs of Governments

For purposes of determining the immunity of central banks and other state agencies, the courts attempt to classify them either as agents of government who are not immune and/or agencies entitled to immunity.[79] However, immunity of state agencies is not very clear as the principles upon which the courts act are not settled. Sometimes, the courts have relied on the structure of the agency or the nature of the agent's functions, or the relationship between the agency and the government.[80] However, it is doubtful whether the mere fact that an agency is incorporated as a distinct entity per se, is sufficient to preclude it from enjoying immunity.

In Baccus S.R.L. v. Servicio Nacional del Trigo,[81] the action related to a breach of contract for the sale of a quantity of rye by the defendants who were an organization created by the Spanish legislature and regulated by the Minister of Agriculture. The issue in the case (decided in their favour) was whether the defendants were entitled to the immunity of a department of state. The court held that the defendant's functions were those of a department of state because of the necessity of their complying with the ministry's orders and obeying the policy laid down by the government. The structure of the

defendant company as a separate entity was not construed as evidence of independence since it was regulated by the Minister's orders. A similar approach was adopted in Mellenger v. New Brunswick Development Corporation[82] which decided that an action would not lie against the defendants because it was an 'arm or alter ego' of the government of a sovereign state namely the province of New Brunswick.

From the above, it appears that the general test for deciding the immunity of state agencies is effective control. However, in cases concerning central banks, the test has been applied with different results. That is to say, central banks and reserve banks under substantial governmental control and regulation have been held to be neither organs nor agents of their governments. For example, in Swiss Israel Trade Bank v. Government of Salta & Anor,[83] the plaintiffs were holders of some bills of exchange drawn by a Lichtenstein Corporation and accepted by the Ministry of Economy, Finance and Public Works of Salta and the Banco Provincial de Salta payable at a London bank. The bills were not honoured on presentation. The defendants pleaded immunity in an action on the dishonoured bills. The action against the first defendant was dropped because it was part of the central government of Argentina. This is consistent with the decisions in the New Brunswick Development Corporation's case and the Servicio Nacional del Trigo case.

The action against the bank was allowed to proceed because the evidence revealed that it was 'an independent corporation carrying on

the ordinary business of banking.' In this case the court attached importance to the structure of the Bank, and not the fact that it was a provincial bank, i.e. bank of the government of a province of Argentina. Its distinct personality was construed as evidence of the lack of governmental control and political influence. The bank was distinguished from other public corporations on these grounds.

Commenting on the decision, Mann[84] opined that if the banks's case had prevailed, there would have been an undue extension of the sovereign immunity doctrine and every central bank would have been entitled to immunity. In another case,[85] the Bank of Spain was sued in connection with the redemption of certain notes. The action failed because it was held that in matters such as redemption of notes, the bank acted as agents of the government. The court also stated that the outcome of the case would have been different if the bank had transacted business in the normal way viz. as a commercial bank. If that had been the case it would have been liable to proceedings in the same way as a trader. A similar distinction was drawn in Krol v. Bank of Indonesia.[86] In that case the Amsterdam Court of Appeal held that a central bank has dual functions and that so long as its activity did not involve its function as a bank of issue exercising official functions for the government, it was not entitled to immunity.

The distinction between the governmental and commercial activities of central banks was also applied in Battery Steamship Corp. v. Republic of Vietnam.[87] The central bank of Vietnam had issued some

letters of credit in connection with financing by the Agency for International Development and had failed to honour them. In considering the bank's plea for sovereign immunity, the State Department came to the conclusion that the assets of the central bank were used for governmental purposes. It further stated that:

> '[T]he function of the National Bank of Vietnam with respect to this transaction is to authorize the commercial bank in Vietnam to open the pertinent commercial credit with the United States bank and to instruct the United States bank to honour demands for payment by the American supplier. In issuing such instructions, the National Bank of Vietnam is performing a traditional governmental function, i.e. the regulation of the use of foreign exchange. The function involves communication with United States banks because of the A.I.D. policy of keeping the dollars in the U.S, but in no sense does the National Bank of Vietnam act as a commercial bank or otherwise take part in the commercial transaction."[88]

From the above, it is clear that the State Department took a broad view of sovereignty. This may not be unconnected with the fear of possible removal of foreign central bank assets from the United States. It is important to note that, under the Foreign Sovereign Immunities Act the situation is likely to be different as the issue of letters of credit has been considered in some recent cases as a commercial activity.[89] A similar line of reasoning was adopted in the English case of Trendtex Trading Corporation v. Central Bank of Nigeria.[90] In that case the English Court of Appeal was called upon to consider the status of central banks. The plaintiffs sued for payments upon a letter of credit issued by the defendant bank. Upon the instructions of the Federal military government, the defendants suspended their

obligations under the letters of credit. The bank pleaded immunity but its plea was rejected by the Court of Appeal on the ground that the bank was a distinct entity and therefore could not qualify as the alter ego or organ of the government of Nigeria. The court attached great importance to the structure of the bank as a distinct legal entity arguing that it was indicative of its independence from the central government.

From the foregoing, it would appear that in determining the immunity of state agencies, the courts consider the relationship between the agency and the government, the agency's structure and the nature of its functions. In respect of central banks, it seems that the courts tend to consider them as agents or organs of their governments when they perform their traditional functions i.e. as the government's bankers, issue and regulation of currency etc. In those circumstances, they are entitled to immunity. However, where they perform other banking functions involving documentary credits and bill of exchange, they are denied the status of agents or organs of their governments and their activities are characterized as commercial.

The rationale for this may undoubtedly be connected with the notion that governmental activities do not include commercial activities which are supposed to be the domain of the citizenry.[91] Consequently, the bank cannot purport to carry out commercial activities under the guise of a governmental act without being subject

to the rules of the commercial world. This appears to be consistent with the view that central bank activities developed from early banking practices which were basically commercial. Consequently, they should be liable for their activities involving ordinary banking practices, even if those have been exclusively ascribed to them for purposes of enhancing their regulatory and supervisory functions and not be allowed to take advantage of their privileged relationship with their governments as their bankers and agents in carrying out central bank activities.

(iii) Central Banks and Commercial Activities

Apart from the central bank functions earlier discussed, central banks functions also engage in some of the commercial bank functions. These include the issuing of letters of credit, discounting bill of exchange and promissory notes and the issue of loans to designated persons or corporations and accepting deposits for banking institutions, eg. Bank of Ghana accepts deposits of foreign exchange on behalf of individuals. Although such activities may not necessarily involve active credit operations, they may, however, furnish the basis for overdraft arrangements which are are active credit operations in nature. As a result of the fusion of traditional central bank functions and some commercial bank activities, coupled with the increased governmental involvement in economic activities, it sometimes becomes difficult to determine when a bank is performing a purely central bank function and when it is involved in a commercial activity.

The decisions in the Trendtex case and the Swiss Israel Bank case illustrate this difficulty.

The frequency with which this problem has arisen in recent times may account for the broad definitions of commercial activities in the various Acts. S.1603 of the FSIA defines a commercial activity as

> "either a regular course of commercial conduct or a particular transaction or act."

while S.2 of the Canadian Act defines commercial activity as

> "any particular transaction, act or conduct of any regular course of conduct that by reason of its nature is of a commercial character"

Apart from the nature of the act or conduct, the above definitions do not afford any clearer guidance in the characterization of central bank activities as commercial or governmental.[92] The formulations appear to have been made on the assumption that a commercial act is easily identified by reference to the nature of the act. However, this criterion cannot be easily applied to central bank activities. The criterion overlooks the fact that there are no uniform central bank functions as such, and that central bank activities are more or less a reflection of their communities' financial habits and the prevailing environment in which they operate. Thus, while some central banks particularly in the developing world, are more active in financing

their government's economic development projects, fostering monetary credit and exchange control conditions conducive to balanced and sustained economic growth of their states, their counterparts in the developed countries play a more nominal role in such matters. They rather emphasize control of monetary circulation and the monetary standard, thereby facilitating exchange control conditions. This activity of the latter group of central banks, is largely the result of the absence of severe foreign exchange and balance of payment problems and their ability to develop an effective network of commercial banks and other specialized agencies to handle trade and investment related transactions. In this way, they refrain from exercising their commercial bank activities and concentrate on their regulatory and more traditional functions. In contrast to the U.S. and Canadian definition of commercial activity, the U.K. Act attempts to define commercial transaction by example. Section 3(3) of the Act defines it as

> (a) any contract for the supply of goods or services:
>
> (b) any loan or other transaction for the provision of finance and any guarantee or idemnity in respect of any such transaction or of any other financial obligations; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority.

The above definition appears to cover some banking practices which both central banks and commercial banks engage in. These include transactions for the provision of finance, i.e. documentary credits and

loans and guaranteeing financial obligations. The scope of subsection (c) above, is wide enough to cover the government projects which central banks in the developing world usually finance. From the tenor of the provision, it appears that any transaction of a commercial and financial or industrial nature and contracts for services are not governmental activities entitling a state to immunity. Consequently, as the activities of central banks include both monetary and non commercial activities, and the phrase 'any transaction or activity of a financial character' covers both but does not distinguish between the monetary activities of the bank that are entitled to immunity and those not entitled to immunity, there is the tendency to conceive of all central bank functions as commercial. Following a similar line of reasoning Shaw L.J.[93] in the Trendtex case, said that

'the whole name central bank has a commercial ring'

The above analysis also holds true for the definitions of the commercial activities in the proposed Draft Articles of ILC and the ILADC. The definitions in both articles 2(1)(g) of the proposed Draft Articles of the ILC and article 15 of the ILADC are very similar. However, there is a slight difference. While both adopt the U.K. approach, describing commercial activities by example, the ILADC's definition attempts to combine the U.S. approach with the U.K. approach.

The absence of any clear and coherent criteria for characterising

central bank activities as commercial is bound to present some difficulties in establishing the immunity mixed assets. This is because central banks usually keep their assets in bulk without earmarking specific accounts for particular transactions. In resolving this problem, the courts have usually considered the nature of the transaction in which the assets were used. Apart from the ILADC none of the other Acts provides express provision for the resolution of the problem. The provision governing mixed assets is Article VIII B. It provides that:

> In the case of mixed financial accounts that proportion duly identified of the account used for non-commercial activity shall be entitled to immunity.

It is important to note that the definitions of commercial activities and the distinction between central bank activities and commercial activities reflect western conceptions of free enterprise, which break down in mixed economies or economies with large government sectors. This could possibly result in the activities of central banks operating in countries with large public sectors and those actively engaged in financing economic development being more readily characterized as commercial while those that concentrate mainly on the regulatory and more traditional functions being characterized as governmental activities.

(E) Conditions for Central Bank Immunity

Given the fact that the commercial activities of central banks are diverse and encompass both commercial and non commercial activities, there is bound to be great difficulty in applying the restrictive immunity theory to them. Before the enactment of the various acts, central banks were treated like all other state agencies, but under the various Acts there are specific provisions which attempt to circumscribe the scope of central bank immunity.

(i) General Considerations

Section 1611 of the FSIA states the conditions under which central bank property will be entitled to immunity. It provides firstly, that a foreign central bank's property will be entitled to immunity if it owns the property, secondly that the property is held for its own account and that it has not waived its immunity.[94] The first requirement has been critized as vague and problematic.[95] It is worth noting that the exact meaning and scope of the second requirement is not clear.

The legislative history of the FSIA [96] interprets the phrase 'Property held for is own account' to mean

> "funds used or held in connection with central banking activities as distinguished from funds solely used to finance the commercial transactions of other entities or foreign states."

The above explanation adopts the purpose test in defining central banking activities. In addition, it presupposes the existence of a uniform monetary system worldwide. However, there is no such thing. According to Patrikis[97]

> "Central monetary systems vary widely from country to country. Consequently, no simple definition adequately describes the characteristics of all central banks ... As money and financial mechanisms, legal systems and government structures differ widely from country to country, so too do central monetary institutions. In some countries the central monetary authority may share central banking functions with other institutions, or in other cases a specific central banking function may not be carried on at all."

Section 11(4) of the Canadian Act governs the immunity of central bank property. It provides that the property of a foreign central bank shall be immune from attachment and execution if it owns the property, if it is held for its own account and it has not waived its immunity. The Canadian Act defines the phrase 'held for its own account' as money held by a foreign central bank and not used or intended for commercial activities.[98]

Both s.11(4) and its interpretation appear to have been modelled on the American Act. The phrase "held for its own account' is likely to present some difficulties in terms of determining the ownership of the funds. The interpretation of the phrase does not help to resolve this problem of ownership associated with banking. It is a trite principle of banking law that the relationship between a bank and its customers or depositors is that of a creditor and debtor. It is only when a demand for payment is made that the bank pays the debt. It is

therefore arguable that moneys such as deposits held by the bank may be deemed to be its property. Similarly, Patrikis[99] has argued that, funds transferred to the account of a foreign state ought to be considered as the property of the central bank. Considering the resemblance that s.11(4) and its interpreation bear to the F.S.I.A. equivalence it is arguable that the drafters of the Act in borrowing ideas from the FSIA did so with all its infelicities. For example the Canadian Act like the FSIA does not define 'central bank' or 'monetary authority.' This could give rise to problems. Central banks having to appear before U.S. and Canadian court would have to establish their status as central banks. This problem came up in the U.S. case of New England Merchant National Bank v. Iran Power Generation and Transmission Co. et al.[100] In this case the Bank Markazi Iran, a party to the suit was required to prove its status as a central bank by affidavits and other means. The bank sought to prove its status as a central bank by presenting affidavits sworn to by senior bank officials. A similar approach was adopted by the central bank of Nigeria in its attempt at establishing its status as a department of the government in the Trendtex case. The bank supported its case by furnishing the court with affidavits from both the Nigerian High Commissioner or to London and its Directors. The court relying on the bank's structure held that even though the bank was substantially under government control, its status as a distinct entity did not make it a department of the government. Consequently, it was not entitled to immunity. The U.K. Act has no elaborate provisions comparable to sections 1611 of the FSIA and 11(4) of the Canadian Act respectively.

In the absence of such provisions emphasis is placed on the organizational structure of the bank and the nature of the transaction. In order to determine whether or not a foreign central bank property is entitled to immunity, the U.K. courts are likely to consider whether the transaction is stricto sensu a central bank function by comparing the said function with the Bank of England's. If it does not fall within the traditional functions of the Bank of England, it is likely to be characterized as a commercial activity. A similar approach was adopted in the Trendtex case. This approach seeks to compare every central bank with the Bank of England. It is pertinent to reiterate that central banking is a subject which does not lend itself to precise definitions and universal rules. Consequently their functions and activities are bound to differ from place to place.

By article 24(1)(c) and (d) of the proposed ILC Draft Articles, the property of a foreign central bank or state monetary authority is entitled to immunity if it is for Central banking purpose(s) and not allocated to any specific payments; or if the property is held for monetary and non-commercial purposes and not specifically earmarked for payments of judgement or any debt. The distinction drawn between property held by central banks for central banking purposes and not allocated to specific payments, presupposes that central banking purposes exclude the use of property allocated for any specific payments. It is important to note that central banking purposes include the use of central bank property allocated for specific

payments. For example the issue of letters of credit by a central bank for the financing of government project is no less a central banking function than the regulation of currency flow, given that one of the primary functions of central banks is the regulation of the use of foreign exchange. Additionally, the distinction drawn in Art. 24(d) between property held by a central bank for 'monetary and non-commercial purposes and not specifically earmarked for ... any debt' appears to be based on the assumption that central bank functions are monetary but non commercial. However this is not entirely the case. As we saw in Chapter One, Central bank functions are diverse and incapable of being subject to universal rules or definitions. Consequently, the above distinctions may at best be considered artificial.

Article 8(c) of the ILADC provides in part that a foreign central property will be entitled to immunity it if holds such property for central banking purposes or where the property is held by a state monetary authority it is used for monetary purposes. The provisions reflects a similar formulation in the FSIA. Like the proposed ILC Draft Articles, it does not provide any indication as to what is meant by property used for 'central banking purpose' or 'monetary purpose.' Consequently, the interpretation of the phrases could be subject to manipulation. In addition, if the provision is read together with article 1(c) which defines commercial activity, it is probable that the property used for commercial transactions could well qualify as property used for monetary purposes and may be denied immunity.

However, as some of the financial activities of central banks, namely lending to the government, or guaranteeing financial obligations are central banking or monetary purposes, it is arguable that they should be entitled to immunity.

(ii) Waiver

A study of the various statutes reveals one common method of facilitating the attachment and execution of foreign central bank property - waiver of the bank's immunity.

By section 1116(b)(1) of the FSIA, the property of a foreign central bank may be subject to the jurisdiction of U.S. Courts if either the bank or its parent foreign government has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank or the government may purport to make in accordance with the terms of the waiver. Section 1603 defines a foreign state to include an agency or instrumentality of a foreign state or any entity which is a separate legal person or otherwise is an organ of a foreign state or political subdivision and is substantially controlled by the foreign state. The scope of the definition is wide enough to include central banks. By S. 1610, the immunity of state agencies or instrumentalities may either be waived explicitly or implicitly.

As central banks could be described as agencies or instrumentalities of a state, the provisions of section 1610 arguably

apply to them. However, as S. 1611 (b)(1) requires an explicit waiver of central bank immunity it is arguable that S. 1610 does not apply to them. This has been said to be indicative of Congress' intention not to subject foreign central bank property to the liberal construction contemplated by section 1610.[101]

Section 13(3) of the U.K. Act provides that a state may waive its immunity by written consent or in a prior agreement to facilitate the procurement of relief for an injured party. The waiver may be general or limited in extent. It is important to note that property for the time being in use or intended for use for commercial purposes are not entitled to immunity.

The Canadian position is governed by section 11(5) of the Canadian Act. It provides that a foreign central bank or monetary authority will lose its immunity where the bank or its parent government has expressly waived the bank's immunity. Section 11(1)(a) draws a distinction between the immunity of central banks and other state entities. While the immunity of central banks must be expressly waived, that of other state entities, may either be waived expressly or by implication. In this respect, the Canadian Act follows the American Act. Similarly the analysis of its waiver provisions also holds true for Canadian practice.

Both the ILC Draft Articles and ILADC have waiver provisions modelled on the American Approach. S. 24(c) and (d) of the proposed

ILC Draft Articles requires that a state must expressly and specifically agree to any judicial measure of constraint sought to be applied to the property of a foreign central bank or monetary authority. The corresponding provision in the ILADC is Article VIII A.

(iii) Attachment and Execution

Prior to the FSIA, the traditional position in relation to attachment and execution was that a foreign state enjoyed immunity from both. The current U.S. practice is governed by S. 1609 of the FSIA. It states a general rule of immunity subject to exceptions in sections 1610 and 1611.

S. 1610(d) provides that a foreign state's property will not be immune from attachment and execution if the state has explicitly waived immunity prior to the judgement. The purpose of the attachment should be to secure satisfaction against the foreign state and not to enable the courts to assert jurisdiction over the state. In other words, attachment for jurisdictional purposes has been abolished by the FSIA. It has been replaced by a long arm statute which requires a transaction to be substantially connected with the United States. The effect of this has been said to be the lowering of the barrier of immunity from execution in conformity with the general tenor of jurisdictional immunity in the Act.[102] The abolition of attachment for jurisdictional purposes is indicative of recognition of the possible

foreign relations problems prejudgement attachment could give rise to.[103]

The phrase 'attachment in aid of execution' as used in s. 1610(d) has been interpreted to include attachment, garnishment and supplementary proceedings available under applicable federal or state law to obtain satisfaction for judgement.[104]

As the FSIA has no enforcement procedures, provision is made in that respect for supplementary proceedings under applicable federal or state law. The controlling provision in that respect is Rule 69 of the Civil Procedure Rules. It provides in part that:

> "Process to enforce a judgement for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of judgement, and in proceedings and in aid of execution shall be in accordance with the practise and procedure of the state in which the district court is held existing at the time. The remedy is sought except that any statute of the United States governs to that extent is applicable".

A fortiori, the procedures for judgement execution under the FSIA are those of the state in which proceedings are initiated. The effect of this, is that foreign governments, their agents and instrumentalities will be subject to different enforcement measures depending on the subject matter of the execution.

Given the broad immunities to foreign central bank property in s.1611 (b)(1) U.S. plaintiffs may attempt to circumvent its effect by obtaining a temporary restraining order directed at anyone holding foreign central bank property. Such a relief is available under Federal Rule of Civil Procedure 65. The rule states that:

> 'A temporary restraining order may be granted ... only if (1) it clearly appears from specific facts shown by affidavit ... that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or attorney can be heard in opposition.'

Thus, a court may find that the proposed action comes within the terms 'attachment arrest and execution' for purposes of s.1609, which makes foreign property immune from the above forms of relief unless there is a waiver. Despite this, the courts have prohibited Iran, its agencies and instrumentalities from transferring or removing their assets. In Electronic Data Systems Corp. Iran v. Social Security Organization of the Government of Iran[105] the District Court issued a preliminary injunction against Iran, its agencies and the Bank Markazi prohibiting them from transferring any property in which they had an interest. However the order stopped short of attaching the foreign currency reserves of the Bank Markazi at the Federal Reserve Bank in New York. On the distinction between an attachment and injunction the court said

> 'I conclude that the usual distinction between an attachment and injunction applies with special force in this case. The equitable considerations present here favour

> issuance of an injunction against the Government of Iran's movement of property. The injunction sought is a limited one, extending to precisely identified property. An injunction in favour of [the plaintiff] does not purport to bestow property rights; rather, its purpose is solely to prevent a meaningless judgement by enjoining dispersal of these assets from this country.[106]

So far, the clearest opinion on this issue was stated in Pfizer v. Islamic Republic of Iran.[107] In that case the defendants's argument that the practical effect of an injunction was similar to a prejudement attachment under Rule 64 was rejected. In rejecting the argument the court stated inter alia,

> "Although a prejudgement attachment and preliminary objection such as the one sought here may share the purpose of preventing a meaningless judgement, they are separate legal remedies. Unlike a prejudgement attachment, a preliminary injunction runs against individuals and is not limited to place. The preliminary injunction in this case reaches property that may be dealt with in any final injunction that may be entered, and it is appropriate - see 325 U.S. at 220."[108]

From the above discussion, it is evident that if a court holds that section 1609 does not prevent it from issuing an injunction, it may do so. Precedent has been set in respect of Bank Markazi Iran's property. Even though in this case foreign currency reserves were not attached, it may not be long before the courts attempt to do so. If the courts adopt such a broad interpretation it might cause a great capital flight from the U.S. since many foreign central banks keep their foreign currency reserves in the United States.

The U.K. practice in respect of attachment and execution of central bank property is governed by sections 13 and 14(4) of the U.K. Act respectively.

Section 13(2)(b) provides that the property of a state shall not be subject to any process for the enforcement of a judgement or arbitration award or in an action in rem, for its arrest, detention and sale. In subsection (2)(b) provision is made to prevent the issue of reliefs such as injunctions or specific performance for the recovery of any property. However, these provisions do not prevent the issue of any process in respect of property if the property is for the time being in use or intended for use for commercial purposes (section 13(4)). The rule of non-immunity stated in s. 13(4) above, is subject to a qualification by section 14(4). It provides that:

> "Property of a state's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity subsections (1) to (3) of that subsection shall apply to it as if reference to a state were references to the bank or authority."

The above provision classifies central banks into two categories depending on their structure and relationship with the executive organ of the state. The rationale for this classification is difficult to perceive given that, in either category of central banks, for purposes of execution, their property are not to be considered as 'in use or intended for use for commercial purposes.' A fortiori, it is arguable

that regardless of the organizational structure or status of a foreign central bank, its property is in all cases protected from execution. On the other hand, as the provisions of section 14(3) and (4) (relating specifically to the immunity of central bank property from execution) have no equivalent in respect of immunity from suit, 'it would thus appear that foreign central bank is to be treated for jurisdictional purposes as any other separate entity'[109] The absence of provisions excluding central banks from the jurisdiction of local courts coupled with the fact that they are only immune in non commercial activities, makes their treatment resemble that of any other separate entity. This interpretation is consistent with the approach of the Court of Appeal in Trendtex Trading Corp. v. Central Bank of Nigeria.[110]

The scope of execution permitted under the U.K. Act differs significantly from the FSIA. Section 13(4) of the former places no limitation on the property of a foreign state, where it is used for commercial purposes. This is because all property that is used or intended for use for commercial purposes is subject to execution. The FSIA permits the execution of property of a foreign state property used for commercial activities, if the property 'was used for the commercial activity upon which the claim is based.'[111]

Thus, while under the FSIA there must be a nexus between the property sought to be attached and the commercial activity from which the claim arose, the contrary is the case in the U.K. and Canadian

Acts. The Canadian Act has a provision modelled on the U.K. approach. The traditional Canadian practice in respect of attachment and execution of foreign government property was described in City and County of St. John et al. v. Fraser Brace Overseas Corp. et al.[112] by Rand, J. as follows:

> 'Freedom from coercion of the public law is co-extensive with the requirements of the purpose for which the entry [of a visiting sovereign is made]. In general, the immunity of a sovereign, his ambassadors, ministers and their staffs together with his and their property, extends to all process of courts, all invasions of or interferences with their persons or property, and all applications of coercive public law brought to bear affirmatively including taxation."

This was adopted in Corriveau v. Republic of Cuba[113] where a writ of fieri facias was issued against the bank account of the embassy. On the question, whether execution could lie against the funds, the Supreme Court of Canada[114] said that the Diplomatic and Consular Privileges and Immunities Act[115] clearly drew a distinction between immunity from jurisdiction and execution as two different things. Accordingly, the decision turned on the Diplomatic and Consular Privileges and Immunity Act. The tenor of the judgement indicates that the learned judge was considerably influenced by the restrictive immunity approach. This is evident from the fact that he drew a distinction between property used for governmental purposes and commercial purposes and concluded that

> 'The only record before me shows that the leased premises were for governmental use ... For these reasons I must hold that Cuba is entitled to a claim of immunity'.[116]

Section 11 of the 1982 Act governs attachment and execution of foreign state property. By section 11(4), the property of a foreign central bank or monetary authority that is held for its own account and is not intended for a commercial activity is immune from attachment and execution.

As section 11(2) provides that an agency of a foreign state is not immune from arrest, attachment and execution for the purpose of satisfying a court judgement in respect of any proceeding of which the agency is not entitled to immunity. Implicit in section 11(2) and (4) is the principle that where there is no immunity from suit, there is no immunity from execution.[117] In this respect Molot and Jewett[118] have said:

> "The principle earlier stated, that where there is no immunity from suit, there should be no immunity from execution "has been given its most unqualified translation in subsection 11(2) of the Canadian legislation, which makes property accorded to state agencies reflect the premise that, being "separate from the foreign state", they should not be treated as if they were the state itself. This appears to be consistent with the position of Canadian corporate crown agents that, in incurring "personal liability in the same manner as a natural person" are not to be assimilated to the Crown or the state for all purposes. Moreover, because a state agency is included in the definition of foreign state, it is subject to the waiver of immunity provisions of paragraph 11(1)(a) of the Act."

This principle is also recognized in both the U.S.A and U.K. Acts. As the definition of 'agency of a foreign state' in section 2 is wide enough to include central banks, it is arguable that for purposes of attachment and execution central banks are treated like other state agencies. Consequently, their property could be subject to attachment and execution once it is established that the property was used for commercial purposes.

In respect of enforcement procedures for judgements rendered, it is apposite to consider section 10(1) of the Act. It provides inter alia,

> 'no relief by way of specific performance or the recovery of land or other property may be granted against a foreign state unless the foreign state consents in writing to such relief and where the state consents the relief granted shall not be greater than that consented to by the state."

If section 11 is read together with section 10, it would seem that a plaintiff can obtain judgement but cannot execute it. Similarly, there appears to be difficulty in enforcing judgements rendered under sections 5 and 6. Section 5 provides that

> 'A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.'

On the other hand, section 6 provides that

> 'A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to'
>
> (a) any death or personal injury, or
>
> (b) any damage to or loss of property that occurs in Canada.

Commenting on the potential difficulty of enforcement under the above provisions, Castel[119] has said that:

> How does one execute a judgement rendered under clause 6 in light of clauses 10 and 11, because clauses 10 and 11 of the bill do not parallel clauses 5 and 6. So one could obtain a judgement under clause 6 but one could not execute it. I wonder what good the judgement would be in that case."

In respect of the problem, Molot[120] and Jewett have observed that

> "Jurisdictional immunity is not matched by enforcement mechanisms in the area of special coercive remedies. Except for state agencies and for consent by a foreign state, subsection 10(1) denies a litigant "relief" by way of an injunction, specific performance or the recovery of land or other property" against a foreign state. The reasons for this lies in principles of international law expressed above by Rand J. The British Act contains a similar provision. Moreover, both make clear stipulations that submission to jurisdiction does not constitute consent to any of these forms of relief."

The general rule in respect of enforcement measures in the proposed Draft Articles of the ILC is stated in article 22. It provides that

> A state is immune without its consent in respect of its property or property in its possession or control, or in which it has an interest, from judicial measures of constraint upon the use of property, including attachment, arrest and execution, in connection with a proceeding before a court of another State, unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of

judgement or any other debts.

The above provisions echoes the principle that where there is no immunity from jurisdiction there is no immunity from execution. This is reinforced by Article 24(1) which makes the property of foreign central banks and state monetary authorities immune from any judicial measure of constraint if they are used for central banking purposes and non commercial purposes respectively. Section 24(1) provides as follows.

> 1. "unless otherwise expressly and specifically agreed by the state concerned, no judicial measure of constraint by a court of another state shall be permitted on the use of the following property ...
>
> (c) property of a central bank held by it for central banking purpose, and not allocated to any specific payments; or
>
> (d) property of state monetary authority held by it for monetary and non-commercial purposes and not specifically earmarked for payments of judgement or any debt; or ..."

From the above, it seems that the property of foreign central banks or state monetary authorities could be subject to attachment and execution in the absence of proof that the property is used for central banking or monetary and non-commercial purposes. The ILADC also has similar provisions. Article VII of the ILADC states a general rule from attachment, arrest and execution. However, Article VIII sets out a list of exceptions to this general rule. They include property used for commercial activities. By Article VIII c. 3-4 the property of

foreign central banks or monetary authorities enjoy immunity from attachment and execution if they are used for central banking and monetary purposes respectively.

CHAPTER THREE The Problem of Determining Governmental Acts

(A) Criteria for Determining Governmental Acts

The preceding analysis indicates that the restrictive immunity approach enjoys considerable support. This is evident from contemporary state and judicial practices of many countries, which reflect increased adherence to it. Despite this trend, some countries still adhere to the absolute immunity approach. Among this group of countries are the People's Republic of China, the Soviet Union, many Eastern European countries and some developing countries.[121]

The major trading countries of the world, namely the United States, Britain, Canada, France and Germany adhere to the restrictive immunity approach. As there is presently no uniform practice, it is difficult to say whether the restrictive theory is an accepted principle of international law, even though it enjoys fairly wide acceptance and is also consistent with treaty practice.[122]

The adoption of the restrictive approach was aimed at making states responsible for their actions when dealing with private individuals of other countries. This was because states which acted in breach of their contractual obligations often left the private contracting party (usually an individual of another state) without a remedy - due to the operative effect of the doctrine of sovereign immunity. Despite its lofty objectives, the restrictive immunity

approach has failed to attain universal adoption. The doctrine's inability to attain universal adoption may be ascribed to the fact that the acta jure imperii/acta jure gestionis distinction was perceived differently by the major legal systems of the world.

The distinction between the private and public acts of states grew largely from European practice. In the continental legal systems, economic activities were considered to be the domain of the citizenry, while the state concerned itself with matters like state security, legislation and foreign affairs. As a result of this practice, there emerged two distinct sets of laws, private law and public law.

Private law governed private relationships, including transactions involving individuals, while public law governed relationships with the state. Where the state engaged in any commercial activities, it lost its immunity from suit while it enjoyed immunity when it engaged in public activities.

The realm of private activities was dominated by merchants and anything that smacked of the activities of merchants was considered a private or commercial act. The concept of commercial act had a very technical meaning. Its essence was to help determine who was or acted like a merchant. With the influence of Europe in the development of international law, this distinction came to be accepted by many countries which did not even have any concepts like private and public law ie. the common law jurisdictions.

In these jurisdictions, the state controlled and regulated all the commercial activities. It gave out charters to merchants and guilds which conducted commercial transactions on its behalf. Additionally, the state owned the courts and therefore could not be sued in its court without its consent. Contrasting the continental legal systems approach to trading with that of the common law jurisdictions, it is clear that while the European states did not engage in private law activities except in furtherance of a public act, the common law countries actively engaged in private law activities. As the states of continental legal systems did not engage in private law activities as such, they had rules for distinguishing the public and private acts of states. However, the common law jurisdictions did not have any such rules. Consequently the absence of any rules for distinguishing the public and private acts of a state in common law jurisdictions is bound to present some difficulties in any attempt at applying such a distinction. This is further compounded by the fact that in contemporary times states have become active participants in economic activities, culminating in a blurring of the distinction between the public and private acts of states even in the continental legal systems.

The distinction is based on the assumption that the traditional functions of the state are primarily sovereign, while the newly assumed economic functions, having been taken from the private sector, may because of their nature, be properly assigned a different and inferior status.[123] According to Setser,[124] the distinction between the public and private acts of states

> "neglects to recall that State monopoly of the essentially sovereign functions has not at all times and in all places been complete, and that state activities in military affairs, justice, and even public finance, for example sometimes came to be acts of a public authority in a manner not wholly lacking in similarity to that in which the state has become involved in state trading and other economic activities."

From the above quotation, it is clear that the so-called public acts of states have not at all times and in all places been completely public. Consequently, any attempt at distinguishing between the public and private acts of a state in contemporary times may at best be described as artificial. The persistence of this distinction is the result of international law's resistance towards recognizing that:

> "the line of demarcation between the political and economic activities of the state have become blurred and it is in this border land that state trading flourishes.'[120]

In contemporary times, the acta jure imperii/acta jure gestionis distinction has been formulated in several ways. These include inter alia, a distinction between commercial and governmental transactions, governmental and non governmental acts and sovereign and non sovereign acts. In respect of central banks the distinction has been formulated to include inter alia, central bank purposes, non-central bank purposes and monetary and non-commercial purposes.

Despite these formulations there are no objective criteria for distinguishing governmental and commercial (and central bank purposes/commercial activities). This leads one to ask, what is in the

acts of governments, that render them governmental on one hand and commercial on the other? The way in which the distinctions have been formulated presupposes the existence of a general theory of government. However, this is not the case, as there is little agreement on the proper sphere of governmental activity in the international community. A similar argument has been advanced by Crawford.[126] According to him,

> "only some general theory of government, that is, of the functions peculiar to or distinctive of government or alternatively, only some conventional test of what is to count as governmental could provide an answer. Yet it is trite to say that, internationally, there is no agreement between different ideologies on this question. Indeed, there is little agreement on it even within many Western countries."

The result has been several conflicting decisions. The conflicting decisions may also be ascribed to the fact that the characterization of government activities as governmental or commercial has been made by reference to municipal law and not international law.[127] This view was reiterated by the Federal Constitutional Court in the Phillipines Embassy Case.[128] In that case the court stated that

> "The classification of a state's function (according to the legal nature of the act) as non governmental must be determined according to current domestic law as international law does not as a rule, include criteria of such a delineation."

Similarly, Article 3 of the resolution of the Institut du Droit

International in 1954 also reiterates this principle. It provides that

> "La question de savoir si un acte n'est pas de puissance publique releve de la lex fori".

A fortiori, the different conceptions of the proper sphere of governmental activity in international law is largely a reflection of different municipal laws. Arguably, this could be said to be evidence of a general principle of law.

The following cases illustrate some of the difficulties associated with the characterization process. In Yessenin-Volpin v. Novosti Press Agency[129] the action concerned a libel suit brought against the defendants in respect of publications in the Soviet Union allegedly defaming the plaintiff. The court held that the act of publishing was not commercial, as the alleged libel appeared in the official journals and represented "an official commentary of the soviet government". It further said that

> "By collaborating in the publication... Novosti ... was engaged not in 'commercial activity' but in acts of intra-governmental cooperation of a type which apparently constitutes much of Novosti's ... activity. Such action was not in connection with a contract or other arrangement with a non-governmental or foreign party, which activity would be found commercial under most circumstances".[130]

In order to avoid some of the difficulties encountered in the characterization process, some judges have adopted the practice of

defining the commercial transaction as narrowly as possible. This approach was canvassed in the judgement of Hank D.J., in International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries (OPEC)[131] This was an antitrust action against (OPEC) and its thirteen members in which it was held that the production and sale of OPEC member country natural resources namely crude oil, was a sovereign and not a commercial activity. In respect of the criteria for the governmental/commercial activities distinction, the learned judge said:

> "These standards are somewhat nebulous, however, in the context of a particular factual situation...[T]he determining factor is how the Court defines the act or activity. An act or activity can be defined broadly, such as hiring of employees, an activity carried on by private parties, and thus, 'commercial', or it can be defined narrowly, such as 'employment of diplomatic ... personnel', a governmental activity. It was suggested that in determining whether to define a particular act narrowly or broadly, the Court should be guided by the legislative intent of the FSIA, to keep our courts away from those areas that touch very closely upon the sensitive nerves of foreign countries. This Court agrees that this 'commercial acitivity' should be defined narrowly. The determination, while based partially on the factor mentioned above, is premised primarily on the recognition that the court must base its ruling on specific facts. By basing a rule on a generalized view of the evidence, a Court may be basing its ruling on half truths. This court is required to make its ruling upon the specific evidence presented ... From the evidence ... it is clear that the nature of the activity engaged in by each of these O.P.E.C. member countries is the establishment by a sovereign state of the terms and conditions for the removal of a prime natural resource from its territory."[132]

The approach of taking each case on its own merits does not make claims to solving all the problems related to the characterization process. At best, it could avoid confusion and perhaps lead to clearer

analysis of the facts in issue. This ad hoc method of resolving issues of sovereign immunity reflects the potential difficulty in attempting to apply a general theory of immunity.

Some commentators have argued that under the restrictive immunity approach, the courts in the common law jurisdictions will not have any greater difficulty in formulating acceptable criteria in immunity cases than for example, in determining the conduct of the reasonable man as is often the case in the common law countries.[133] In response to this, it is important to note that while there is no agreement on the proper sphere of governmental activity, this is not the case for the 'reasonable man's test', which is based on acceptable social behavior upon which there is general agreement.

Also commenting on the distinction, Brownlie[134] has said that:

> There is a logical contradiction in seeking to distinguish the 'sovereign' and 'non-sovereign' acts of a state. The concept of acts iure gestionis, of commercial, non sovereign, or less essential activity, requires value judgements which rest on political assumptions as to the proper sphere of state activity and of priorities in state policies.

The difficulty with the distinction was also reiterated in Berizzi Bros. Co. v. S.S. Pesaro[135] by Justice Van Devanter. In his words:

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

In the light of the foregoing, it is clear that the acta jure imperii/acta jure gestionis distinction has great limitations. Moreover, the lack of a consensus on the proper sphere of governmental activity, and the absence of any objective criteria renders the distinction radically defective.

(B) Attempts at Reformulation

The recognition that the doctrine of sovereign immunity, in the absence of any coherent criteria for determining immunity issues, could be susceptible to abuse, and thereby cause hardship for individuals and corporations that deal with states, has led to several attempts reformulating the doctrine.

One of the early attempts at reformulation was the Harvard Law School Research on the Competence of Courts in regard to Foreign States.[136] It made the grant or denial of immunity dependent on whether a private person could perform the act in question. Art. 11 of the Harvard Convention provides that

> "A state may be a respondent in a proceeding in a court of another state when, in the territory of such other state, it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage or does not act there in connection with such enterprise wherever conducted and the proceeding is based upon the

> conduct of such act. The foregoing provision shall not be construed to allow a state to be made a respondent in a proceeding relating to its public debt."

The above provision echoes the view that industrial and commercial activities are the exclusive preserve of the individual, and that where a state engages in any of those activities, it should be subject to the rules of the trade and not be allowed to plead its sovereign status as a defence for breaches of the contractual obligations. The rationale for this may not be unconnected with the need to protect the interests of private individuals dealing with states. Despite this, the formulation has been the subject of severe criticism. For example, Friedmann[137] has argued that the application of the formulation may present problems in respect of government projects held in partnership with private individuals or in cases where the state is only a nominal partner and does not maintain the service as a state monopoly. In his words:

> 'such a differentiation is not likely to lead to the adoption of a generally applicable international standard. Moreover, it is difficult to apply to the not infrequent situations where a government operates a public service, with participation of private interests, or without any intention to maintain the service as a permanent state monopoly.'

A fortiori, it is arguable that joint-venture projects between states and individual entrepreneurs may not be entitled to immunity.

Lalive[138] has also critized the approach of the Harvard Draft Convention on grounds of difficulties in determining when a particular

act can be said to be only capable of being performed by an individual. He is of the view that, there is no international law for according immunity to foreign states. However, he makes exceptions for internal and administrative acts, and diplomatic privileges and immunities. He does not consider these exceptions as exhaustive but only a guide for the courts which could add or subtract from it as and when necessary. In cases not covered by the exceptions, he thinks that the courts should assume jurisdiction as they would do in the case of private persons. Lalive exhibits a preference for the characterization of state activities into governmental or commercial. He argues that the progress made by the use of this approach should be further developed without any revolutionary changes. On the method of effecting the reformulation, he considered a system of bilateral treaties coupled with the establishment of a system of courts with jurisdiction over cases involving the liability of foreign states as the most efficacious solution. His preference for a bilateral treaty approach is based on his fear that a multilateral approach could at best only achieve 'only a least common denominator level'.[139]

Another attempt at reformulating the doctrine was made by Lauterpacht,[140] who advocated the abolition of the jurisdictional immunity of states. His proposal was influenced by the successful challenges of state activities by individuals before the courts through actions in tort and contract.

In the light of the increasing recognition of individual rights against the state, Lauterpacht embarked on a re-examination of the

jurisdictional immunities of foreign states. His approach sought to assimilate foreign states as completely as possible to the position of the territorial sovereign. In other words, the foreign state would enjoy the same procedural privileges and exceptions that the law provided for the territorial sovereign. However, he made exceptions of legislative, administrative and executive acts of foreign states performed in their territories. In his view, a solution of this nature, will obviate the necessity of considering the subtleties of the relationship between a state and its departments, the limits of waiver and the importance attached to declarations by states as to their ownership or possession of the subject matter of the action.

On the method of effecting his proposal, Lauterpacht suggested that the abolition of jurisdictional immunities should initially take place on a unilateral basis. He believed that such an approach would provide the initial impetus for freeing international law of 'the shackles of an archaic and cumbersome doctrine of controversial validity.'[141] However, he recognized that it cannot in the long run provide a final solution as the doctrine has been generally considered judicially and otherwise as part of international law. Consequently, he suggested the adoption of an international agreement for the regulation of jurisdictional immunities of foreign states. He cited the codification efforts of the ILC as capable of providing the much needed clarification.

The International Law Commission[142] has also lent support to attempts at reformulating the jurisdictional immunities of states as

part of its efforts in the codification programme. It has undertaken an extensive study and discussion of the subject having recourse to the practice of states and judicial pronouncements on the topic, with a view to formulating a draft multilateral convention. The findings of the ILC are contained in eight reports prepared by Sompong Sucharitkul.

The ILC reports basically reflect a codification of the restrictive immunity approach. This makes the award or rejection of a plea of immunity dependent on the characterization of the act in question, as either commercial or governmental.

The characterization of an act as commercial or governmental is primarily done by reference to the nature of the transaction. If, according to this test the act is characterized as non-commercial, then the transaction is decidedly non-commercial. However, if the contract appears to be commercial in nature but non-commercial in purpose, the purpose could be taken into consideration if in the practice of the state party to the contract, purpose is relevant to determining the non-commercial character of the transaction. It is important to note that relevance as used here does not imply decisiveness. Consequently it is not necessarily determinative of the non commercial character of the transaction.

The reports attempt to define commercial transactions in very broad terms. It includes any commercial contract or transaction for the sale of goods or the supply of services, any contract for a loan

or other transaction of financial, industrial, trading or of a professional nature excluding employment of persons.

The approach presupposes the existence of a general theory of government and an agreement on the proper sphere of governmental activity. The absence of any such agreement, coupled with the different political, ideological and economic considerations underlying the involvement of states in economic activities, makes it unlikely that a multilateral convention as envisaged by the ILC will be signed in the near future.

Given the circumstances, the approach that readily suggests itself is a system of bilateral treaties within a multilateral framework. This will provide the medium for various states to organize their economic relations without fear of jeopardizing their interests. The different bilateral trading arrangements in the GATT attest to the effectiveness of this method.

Chapter 4 Bilateral Treaties: An Answer to the Central Bank Immunity Question?

(A) Protecting the Interests of Central Banks and their Contracting Parties

So far the discussion reveals that the absence of uniform central bank functions, and objective criteria for characterizing governmental activities presents some difficulties, where central bank activities are sought to be classified. These difficulties indicate that the acta jure imperii/acta jure gestionis distinction has great limitations and cannot easily be applied in a world in which states actively engage in economic activities.

The increased involvement of states in economic activities is evident from the increased governmental support in private sector activities. In the words of Kamenka and Tay,[143]

> ... the major sphere of social life passes from the private to the public, not merely in the sense that more and more activity is state activity, but in the sense that more and more "private activity becomes public in its scale and its effect, in the sense that the [central bank] is felt to be as "public" as the state electric utility, the private hospital and the private school with their growing need for massive state subsidies, as public as the ... state school."

This implies that, in contemporary times, the doctrinal basis of the acta jure imperii/acta jure gestionis distinction in its pristine form has lost much of its cogency, as a result of the blurred demarcation

between governmental and commercial activities.

As a result of these developments, wide spread recognition of the changing social functions of governments, has been slow in gaining acceptance. This has sometimes led to the application of principles and doctrines which do not aptly reflect contemporary developments. In this way, the principles and doctrines become systematized. According to Pound[144]

> 'Legal science is not exempt from this tendency. Legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence. In a period of growth through juristic speculation and judicial decision, there is little danger of this. But whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, jurisprudence tends to decay. Conceptions are fixed. The premises are no longer examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules ..."

This is what the acta jure imperii/acta jure gestionis distinction has become - a system of mechanical jurisprudence whose theories have come to maturity and decayed into a theory with fixed conceptions. In this state," the way of social progress is barred by a barricade of dead precedents.[145]

The tendency of the law not to reflect contemporary developments was recognized some fifty years ago when Sir Hersch Lauterparcht[146] wrote that:

> "The problem of adjusting the functions of the law to the perpetual antimony of change and stability and justice and

> security, is not one peculiar to international law. It is a general legal phenomenon, common to every political society. It is one of the central problems of legal philosophy."

The adaptation of international law to reflect contemporary developments, will greatly contribute towards establishing clear and coherent principles, thereby avoiding the noticeable confusion and the vacillation of thinking in respect of government trading entities.

The present state of the law does not adequately protect central banks and their their creditors or individuals and corporations who transact business with them. This is evident from the absence of a uniform definition of central bank functions, and an objective criteria for characterizing their activities. This has resulted in uncertainty about the scope of central bank immunity which sometimes leads to costly litigation, attachment and execution of foreign central bank property. These incidents bode no good for both the parent state of the central bank and private entrepreneurs. It is therefore necessary to develop a legal framework which would ensure that central banks do not take undue advantage of their relationship with their governments to the detriment of private entrepreneurs, who play an important role in economic development.

The legal framework should be in the form of a bilateral treaty programme. It should seek to establish the desired certainty in the law and equilibrium between the pressing and diverse interests of states and the protection of the interests of private entrepreneurs from any whimsical behaviour of foreign states or of their central

banks. Its objectives should also include the creation of a regime of sovereign immunity quite distinct from the customary law over which much doubt has been created. This approach will ensure the creation of a

> general equilibrium of rights and responsibilities among states that differ widely in their political and economic philosophies or organizations.[147]

(B) Bilateral Treaties in the Regulation of Economic Relations

Bilateral treaties have featured prominently for several centuries in the conduct of foreign economic relations among different states. The earliest types of such treaties are the bilateral treaties of Friendship, Commerce and Navigation (FCN). They are the oldest instruments known to the diplomatic tradition.

(i) FCNs

The FCNs are accords spelling out basic rules governing the daily intercourse of states. According to Walker[148]

> 'they designate the medium par excellence through which nations have sought in general settlement to secure reciprocal respect for their national interests abroad according to agreed rules of law."

The treatment of the contents of these instruments as treaty types vary from time to time depending on the needs of the time, the usages of the

countries involved and their foreign policy objectives.[149]

FCNs are known to have a broad framework. This makes it possible for them to be used to accomodate and regulate a wide variety of interests which may be either political, economic or ideological.[150]

Much as 'Friendship' enjoyed prominence in the title of these treaties, they were by no means political in nature. In the broad sense of the word they were commercial in nature. They usually contained most favourable nation (MFN) and national treatment standards.

The MFN standard guarantees non discriminatory treatment as between foreign investors, while the national treatment standard ensures that no foreign investor is accorded treatment any less favourable than that accorded to host country's nationals. The MFN and national treatment standards were concerned with the protection of both natural and juridical persons, their property and interests. Thus, it was customary to find provisions addressing

> "the right of citizens of each country to establish and carry on business activities within the other and to receive due protection of their persons and property."[151]

In this way, foreign investors were protected and encouraged to carry on business in other countries. Apart from the protection FCNs afforded foreign investors, they also dealt with trading and

navigation.

A look at the provisions of an FCN treaty would reveal that it also provides for entry, movement and residence of individuals; protection from molestation, standing in court, right to establish and operate business, tax treatment, rules governing the state in business, reservations, transit of goods and persons, acquisition of tenure of property, dispute settlement, procedural clauses, administration of exchange control, rules on international trade, customs and excise administration and a protocol containing materials clarifying the treaty texts, accommodation for unforeseen circumstances, special cases and an appendix.

The above attest to the broad and general framework of FCNs. The flexibility that these treaties exhibit accounts for the numerous FCNs that were signed among several states. For example the United States has well over one hundred FCNs, the first of which was signed with France and came into force in 1778.[152] Similarly, both Canada and the U.K. have several such treaties.

The increased expansion in world trade and investment after the second World War, marked the decline of FCNs as an investment device.[153] This was largely because of their scope. In terms of coverage, they had two major setbacks. Firstly, their provisions were vague. This made reliance on them by both investors and non investors alike difficult in event of disputes with host governments. Secondly, because of the wide spectrum of subjects they covered, many non-

aligned states were cautious about entering into relationships based on FCNs for fear that their actions would be interpreted as political alignment with the countries with which they had such treaty relationships.

Perhaps the greatest drawback of the FCNs was the fact that they did not address the problem of 'creeping expropriation".[154] Additionally, FCNs had very poor arbitration clauses. This may not be unconnected with the fact that at the time most of these treaties were negotiated, arbitration as a method of dispute settlement was not popular.[155] This is evident from the fact that it took several countries a long time to accede to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). For example, even though the United States drafted its last FCN in 1968, it was not until 1970 that it acceded to the New York Convention.[156]

(ii) Bilateral Investments Treaties (BITS)

The drawbacks associated with the FCNs often resulted in friction, disputes and the inadequate protection for foreign investors. These consequently led to the evolution of a new regime of bilateral treaties aimed at addressing problems in specific types of economic activities. These treaty types date back to the period after the Second World War. They evolved largely from European practice and by the early 1970s had been adopted by many countries. These treaty types are the bilateral investment treaties (BITs). They focused mainly on investments by

nationals and companies of other countries in particular states.

The shift from FCNs, which in time 'evolved into a comprehensive charter of relations in the domain of private affairs,[157] reflects changes that have occured in commercial interests of states and the political and legal environment.[158]

In contrast with the FCNs these agreements are short i.e. they have very few provisions and well defined scope in terms of subject matter. For example, while the United Kingdom - Singapore BIT[159] contains 14 provisions the France-Singapore BIT[160] has 12 substantive provisions.

The essence of these treaties is the promotion and protection of investments, the reduction of risks in event of expropriation and the submission of investment disputes to arbitration.[161] Like the FCNs, the BITs are also concerned with investment related issues such as treatment standards, expropriation, financial transfers, protection of the rights and property of both natural and juridical persons. Additionally, the BITs also mirror the FCNs in conferring on private parties rights which are directly enforceable in courts.

Notwithstanding the foregoing, the BITs attempt to expand upon the FCN features that they retain. This is evident from the concepts of establishment and terminology in areas of entry, and general treatment

standards. The BITs also have an added innovation, which is the resolution of investment disputes through binding arbitration.

Despite these differences, the general application and interpretation of BITs yield similar results as the FCNs in common areas of coverage.[162]

Since the 1970s BITs have increasingly gained popularity. They also reflect the admonition of the Council of the International Chamber of Commerce to countries to develop a suitable atmosphere within which international investments could flourish.[163] To date, BITs are increasingly seen as 'the best means for obtaining reciprocal obligations of matching guarantees'.[164] The underlying principle of reciprocity makes it possible for BITs to provide the much needed security for investments. The emergence of BITs per se has not resolved the differences over issues such as compensation and the applicable law. However, they have provided a medium through which both developing and developed countries can accomodate their more immediate economic interests. It could therefore be said that, BITs have become a medium par excellence through which investors have secured a fair degree of certainty in their dealings with host governments in developing countries. The certainty, coupled with the provision for compulsory arbitration has earned the BITs great respect. According to the International Chamber of Commerce[165] (ICC),

> 'That these treaties are respected seems to be evident from a large-scale measure of expropriation from which foreign enterprises protected by relevant treaties appear to

> have been deliberately excluded. Moreover, in two of these known cases which might have involved breaches of relevant protective treaties, remedial steps were instantly taken by the developing country involved.'

As BITs have turned out to be an effective medium effective medium for accommodating the competing interests of states, and thereby meeting their immediate economic interests, they have become very popular. Their popularity is demonstrated by the fact that between 1979-1980, twenty four BITs were negotiated between the European states and developing countries (LDCs). For example, the Federal Republic of Germany by mid-1985 had 55 BITs.[166] While by 1980 the U.K. had 19 BITs. Similarly, the U.S., France and Japan have also resorted to BITs as a means of protecting and promoting foreign investments in other countries.

At present, Canada has no BIT programme in force. However, it has a series of bilateral investment insurance agreements with many countries. These ensure the recognition of Canada's rights as subrogee under insurance policies upon which claims have been met.[167] In due course, Canada may have to abandon this scheme as its effectiveness in dealing with the numerous investment issues that arise between states is limited. This is implicit in the following observation of Paterson.[168] According to him,

> 'Bilateral investment insurance agreements of the kind entered into by Canada are now widely seen as inadequate vehicles with which to deal with the numerous investment issues that arise between any two states.'

Several reasons account for the success of BITs, the most significant factor being the failure of earlier attempts of multilateral investment protection. Other factors include the bilateral nature of the treaty, and its flexibility. The bilateral nature of the treaty, makes it easy to obtain reciprocal obligations of matching guarantees. The underlying principle of reciprocity makes it possible for states to propose the terms upon which they are prepared to accept investments, as well as adapt the treaties to suit their economic needs and rates of development. These, coupled with the acceptance and widespread use of BITs by the major trading countries of the world typify BITS as a practical solution to foreign investment protection. Bergman 164 states that:

> 'As a practical matter, the negotiation of a bilateral treaty permits a state to communicate the terms on which it is willing to accept foreign investment in the context of its own economic needs and rate of development. It is far simpler to adjust an investment framework that is being negotiated bilaterally than it is to exercise a right of reservation to a complex international treaty which has been crafted to represent competing state interests. Moreover bilateral arrangements tend to be of a short duration and can be terminated or renegotiated with greater ease than multilateral agreements.'

The above discussion illustrates the flexibility and versatility of bilateral treaties in the regulation of economic activities between states. A fortiori, it is clear that the use of bilateral treaties in the regulation of economic activities, enjoys considerable support and also possesses many advantages. Therefore, its adoption in the regulation of direct central bank involvement in economic activities and immunity related issues, is likely to yield fruitful results and

lead to clearer understanding of the scope of central bank immunity. This proposal is based on the fact that the direct involvement of central banks in economic activities is an aspect of economic relations and/or investments which have for several years been successfully regulated by bilateral treaties.

(iii) Bilateralism v. Multilateralism

The choice of a bilateral treaty approach over a multilateral convention does not imply that efforts for multilateral investments through international organization should ipso facto be abandoned. The choice of a bilateral treaty approach only

> 'suggests the continuing utility of the familiar long term, ... means which is a bilateral commercial treaty directed to solving practical problems in day to day relations of individuals and companies with foreign governments.'170

Multilateral approaches towards the solution of economic problems came into existence during the period after the second World War. This was in response to the non-cooperation of the Thirties and the hostilities of the early Forties. During this period a wide range of international institutions directed at solving the social and economic problems of the international community emerged. Among these are organizations like the International Monetary Fund and the General Agreement on Trade and Tariffs (GATT) which are products of discussions aimed at evolving a sound international economic and financial order.

At the time the idea for international organizations was proposed, a multilateral approach to the solution of world problems was considered an effective way of accomodating differences among states. The earliest attempts at accommodating the conflicting interests of states in economic matters led to the formation of the GATT. It sought to lay down binding rules for a large number of states, with a view to ensuring fair play and non discrimination in international trade.

The principal policy of GATT in relation to trade is summarized in two principles, namely non discrimination and reciprocity. The principles require that no country would treat another country any less favourably than others.

One assumption which underlies these principles is that the negotiations will be conducted among parties of equal bargaining powers. In this regard, one commentator has observed that

> 'They in fact accord the major bargaining strength to those countries which have most to offer and gain in negotiations, namely the industrialized countries with large markets and highly developed agricultural ... industries. The superior bargaining strength of the developed world has meant that negotiations have been restricted mostly to manufactured products of interest to them, thus discriminating indirectly against third parties, largely the emerging nations.'171

The above quotation depicts that a multilateral approach to the regulation of economic matters, is based on the assumption that the parties are of equal bargaining strength. The falsity of this assumption is depicted by the attitude of the LDCs in multilateral

trade negotiations under the aegis of GATT. By a multilateral approach, the stronger parties are able to dominate the negotiations and thereby extract onerous concessions from the weaker parties. Where they are unable to offer sufficient concessions, they do not obtain good bargains. In this way, the bargaining process is lop-sided and at best appears to be on a basis of non reciprocity.

This weakness, inherent in the multilateral treaty approach, has often resulted in bilateral trade agreements within a multilateral framework to ensure the success of the multilateral treaty approach. A typical example is the emergence of several bilateral trade arrangements which emerged from the Tokyo Round of Multilateral Trade Negotiations. This has led the Honorable Donald S. MacDonald172 to describe the GATT as:

> 'a multilateral trade agreement modelled on the bilateral trade agreements with most-favoured-nation clauses which had become the basis of commercial policy in the late nineteenth and twentieth centuries.'

The emergence of the bilateral trade agreements is significant, in that it attests to the difficulty of crafting together the competing interests of various states (inspired by different considerations) under a general scheme. This was recognized by Professor Friedmann173 some twenty eight years ago when he said that:

> 'It is unlikely that a general and multipurpose agreement, such as GATT, can provide more than a theoretical bridge between the diverging principles and policies that govern planned economies, on the one hand, and the more or less private economies, on the other. When state trading enterprises form part of a mixed economy, as they do in a majority of western countries, it is impossible to fit them into a general scheme of non discriminatory trading ...'

From Friedmann's observation it is clear that state trading is motivated by different and often opposing considerations which theoretically, can be regulated by a general scheme. Furthermore, the above observation typifies multilateral negotiations as a complex and intensely creative process which has several important components upon which its success as a suitable form of economic regulation depends. These components include inter alia, political and ideological considerations which are closely interrelated. The political and ideological factors come into play when states differ in their perception of issues at stake. This could result in the adoption of extreme positions and the tendency to be insensitive to problems of other parties, thereby impeding the success of potentially promising deliberations.

Additionally, the ideological and nationalistic ferment that often characterizes multilateral treaty negotiations is much less evident in bilateral treaties. This may not be unconnected with the fact that bilateral treaties enjoy less publicity. Furthermore, they emphasize respect for the legitimate interests of the states that enter into such treaty relations by emphasizing principles rather than ephemeral arrangements.

A fortiori, it is clear that a programme of bilateral treaties possesses great advantages and is best suited to the resolution of problems involving divergent and often opposing interests. The efficacy of such an approach is borne out by the numerous bilateral trading arrangements that emerged out of GATT multilateral trade negotiations and the successful negotiation of several BITs in recent times.

Another important development which attests to the effectiveness of bilateral treaties is the fact that, the staunchest opponents to BITs and investment guaranty arrangements - the Latin American countries (that subscribe to the Calvo Doctrine) have recently shown a readiness to sign BITs. For example in 1983 Panama signed a BIT with the U.S. According to Albrecht Stockmayer,174 the fact that Chile, Uruguay and Ecuador have all signed the convention for the establishment of the World Bank's Multilateral Investment Guaranty Agency, is a good indication of their willingness to accept deals offered by BITs.

(C) Legal Framework for Bilateral Treaty Programme

From the discussion so far, it is clear that bilateral treaties have by far been the most effective and oldest means of regulating economic relations among states. This method has the advantage of being able to accomodate competing interests of states, which the restrictive immunity approach does not. In order to effectively regulate the activities of central banks and their creditors there has

to be a more determined modification of the traditional principles of central bank immunities and a more enlightened interpretation of their status. This will go a long way towards eliminating the present inconsistencies and injustices.[175] Additionally by bilateral treaties, states will be able to agree on the scope of immunity that central banks will enjoy and provide better security for their nationals when they deal with central banks.

To this end, the definition section of the treaty should be comprehensive and non exclusive. The provisions should contain a comprehensive coverage of activities that the state parties accept as falling within the ambit of immune transactions.

(i) Status Provisions

Another important feature of the treaty will be the presence of a substantive provision recognizing the juridical status of central banks. This will obviate the necessity of central banks having to establish their status before foreign courts. For example in New England Merchants National Bank v. Iran Power Generation and Transmission Co. et al.[176] the central bank of Iran, the Bank Markazi Iran, was required to prove its status as the central bank of Iran. Similarly, in the Trendtex Case, the central bank of Nigeria was required to prove its status as a department of the government even though it was wholly state owned and substantially under the control of the government. Such treatment of sensitive organs of sovereign states could only contribute to create tension and sometimes give rise to

conflicts. But with the prior recognition of the status of central banks, potential conflicts could be avoided.

Additionally, the provisions will take into account the different structures of central banks or central monetary authorities by not making their enjoyment of immunity dependent on factors like incorporation and distinctiveness from government. In the past, these factors have been the basis upon which central banks have been denied immunity. That approach tends to discriminate against central banks which are distinct from the executive arm of government. By emphasizing incorporation and distinctness from government, central banks organized as departments of the government could take advantage of their organizational structure and seek to plead immunity on the grounds that they are agents or departments of government. To avoid this, it is suggested that the status of a bank as an agent or department of state should depend on the centre of control. Thus if it is established that the government substantially controls it, that should suffice to make it an agent of a state. This will make it easier to establish the relationship between the banks and their respective governments. In respect of establishing the immunity of central banks, emphasis will be placed on the nature of the transaction engaged in. The purpose of the transaction will be considered only if it will be useful in establishing special reasons which warrant the the grant of immunity. It is important to state that the consideration of the purpose of the transaction is not decisive of the grant of immunity.

To this end, the definition section of the treaty should be comprehensive and wide in scope. The provisions should contain a comprehensive coverage of activities that the state parties accept as falling within the ambit of immune transactions. The immune transactions will include inter alia, transactions involving the issue of legal tender and the regulation of currency and credit while the non-immune transactions will include loan guarantee agreements or any agreement for the use of documentary credits i.e. letters of credit, bills of exchange and negotiable instruments in the purchase of goods and services and the capricious use of selective credit regulation. The latter involves the restriction of payment and remittance of funds abroad. Much as this may be justified in times of severe foreign exchange problems, it should not be undertaken in total disregard for the banks outstanding contractual obligations. Its use should be justified only if it is in the national interest to do so. However, it is also suggested that where this measure is sought to be undertaken, the central banks and their parent governments should negotiate the possible postponement of the performance of their contractual obligations with their contracting parties. The scope of this exclusion is justified on the grounds that breaches of contractual obligations involving these transactions have been the cause of many a litigation involving central banks.

(ii) Waiver

In all the non-immune transactions between central banks and private individuals and corporations of foreign countries, it is

suggested that there should be an express waiver of immunity from both suit and execution. The waivers should include immunity from both pre-enforcement and post judgement measures.

This type of waiver may be found in transnational loan agreements and some economic development agreements providing for ICSID arbitration.[177] However, it is in transnational loan agreements that this type of waiver is very popular. Such a waiver provision will ensure that private individuals and corporations are not unnecessarily confronted with the act of state doctrine as a justification for breaches of contractual obligations and thereby jeopardize their interest. In this connection, it is necessary that the waiver provision be drafted in as clear and precise language as possible.

(iii) Dispute Settlement

In the event of a dispute between a national of a state party and the central bank of the other state, the state parties should initially attempt to resolve the dispute amicably. This resolution my be through negotiation, or consultation. As part of this approach, they may also have recourse to third party settlement, e.g. good offices of another friendly state and only resort to binding arbitration where they fail to reach a satisfactory agreement.

In respect of procedure the parties will be free to choose any arbitral procedures as well as to submit to the jurisdiction of any arbitral bodies of their choice. In the absence of any specific

arbitral procedures, the UNCITREAL model rules may be a suitable option.

With respect to disputes relating to the interpretation of the treaty, attempts may first be made to resolve such by consultation between the state parties. Where this fails, the states are encouraged to submit to a binding arbitration in accordance to the terms of the treaty. This sets the stage for the development of a coherent jurisprudence on the subject.

As bilateral treaties require mutual forebearance and a certain community of ideals to effectively implement their objectives, it is unlikely that state parties will allow the much needed cooperation to be ruptured by frivolous disputes. Moreover, history suggests that states are not likely to litigate in matters in which they have a common interest but rather find ways to resolve their differences amicably.

The proposed treaty programme will also make provision for biennial consultation between the parties. This will provide an opportunity to assess the effectiveness of the treaty's operation with a view to making amendments. A similar provision can be found in the U.S.-Egypt BIT.[178] It is also important that in central bank transactions with individuals in corporations, they adopt the practice of earmarking specific accounts for the transaction, so as to avoid the problem of determining the portion of their assets used in the transaction. This will considerably alleviate the problems associated

with handling the mixed assets of the banks. Furthermore, to ensure the safety of foreign investment and the continuous flow of foreign capital, it is suggested that parent governments of central banks should endeavour to negotiate with their contracting parties on possible adjustment in the performance of their contracts rather than adopt unilateral repudiation. Unilateral repudiation not only threatens the interests of their contracting parties, but also in the long run it affects the prospects of attracting foreign entrepreneurs.

Chapter 5 Conclusions

The doctrine of sovereign immunity has been the subject of many judicial pronouncements and commentary engendered by the distinction drawn between the private and public acts of states, i.e. commercial and governmental acts. This distinction presupposes the existence of a general theory of government, which limits the activities of states to internal and administrative acts, legislation and state security while trading is limited to the individual. As the study shows, there is no such agreement on the proper sphere of governmental activity. The absence of any such agreement, has posed some problems for the courts in respect of the immunity of state agencies and instrumentalities with the increased involvement of states in economic activities. These difficulties have led to several attempts at reformulating the doctrine. These attempts at reformulation have been manifested in draft multilateral conventions and several national statutes on the subject.

The increased involvement of states in economic activities signifies a shift from the view that the state has no business with trading. It also refects the desire of states to use trade as an important instrument for reaching a take off stage in economic development. In pursuit of this objective, central banks and other financial institutions in some countries have been given the responsibility of financing the governments purchases. The functions of the central banks largely depended on several factors, among which

are the stage of the country's economic development, the volume and variety of resources, whether they operated in debtor or creditor countries and whether they had active financial markets. These factors cause substantial differences in their constitutional and statutory powers. Consequently, their functions differ from place to place. However, in practice they exhibit a tendency to conform to an almost identical pattern in respect of their functions and methods. The uniformity is usually reflected in the banking practices developed and handed down by the Bank of England and have come to be known as the cannons of central banking. These include the custody and management of the nation's reserves, issue of currency, custody of commercial bank reserves and reserves of international currency, acting as the government's bankers and management of public debt. In addition to these, some central banks undertake the financing of their government's projects. This often raises problems as to whether their activities as financiers constitute central bank functions, when they breach their contractual obligations with individuals or corporations with whom they transact business and plead immunity. The breaches usually occur in compliance with government directives. In recognition of this problem, some of the statutes and draft conventions on sovereign immunity have sought to provide specific provisions to govern the immunity of central banks, thereby safeguarding the interests of parties that deal with them. However, the provisions on central bank immunity are too general and vague. Moreover, they do not provide adequate guidelines for the definition of central bank, and the determination of activities which may be legitimately characterized as central bank functions. For example, the requirement that the immunity of central bank property

depends on their being held for their own account and used for central bank or monetary purposes in the absence of uniform central bank functions makes them of little help. As we saw in the discussion, the interpretation given to the above requirements, presupposes that central bank functions are only commercial in nature.[179] Consequently, this could lead to potential increases in judgements against banks engaged in economic activities.

The presence of such vague provisions coupled with the absence of an agreement on the proper sphere of governmental activities, seems to suggest that the distinction between the public and private acts of states has lost much of its cogency. In the light of the foregoing the author has argued that central banks ought not to be subject to a general theory of restrictive immunity, because central banking as a subject does not lend itself to universal rules and definitions. Furthermore, it was argued that the distinction overlooks the fact that states have abandoned their 'night watchman status', in response to contemporary developments in international relations and have become actively involved in economic activities.

In view of its shortcomings, the restrictive immunity approach is inadequate for the regulation of central bank immunity issues. In the absence of a better solution, a system of bilateral treaties was proposed for the regulation of central bank immunity issues. This is because they exhibit far more flexibility in meeting the different needs of states with divergent interests. The success of bilateral investment

treaties and FCN treaties in the regulation of economic relations attest to their effectiveness as a medium for harmonizing the interest of countries with often opposing interests. As central bank involvement in economic activities is an aspect of economic relations, which has been successfully regulated by bilateral treaties, it has been argued that a cue be taken from the numerous advantages it possesses. Being based on mutuality, bilateral treaties will afford better protection to the assets of central banks and individuals and corporations who happen to deal with them because it will give various states the opportunity to determine the scope of central bank immunity as well as the terms on which to regulate central bank involvement in economic activities. The restrictive immunity approach appears highly favourable to individuals and corporations that contract with central banks. This is evident from the 'current mercenary attitude towards central banks.'[180]

A fortiori, it is necessary to take a cue from the unilateral extension of coastal jurisdiction by littoral states in the law of the sea and the conceptual problems associated with the distinction in administrative law between 'administrative' and 'judicial' functions[181] and abandon the restrictive immunity theory. In this connection it is important to remind ourselves that

> We have constructed such conceptual traps before and causistry has to be employed to remove them. 'Administrative' and 'judicial' functions were once sharply distinguished ... These conceptual barriers have gradually been dismantled. In the same way a "private/public" classification would prove too rigid and the fashionable continental terminology, functional in its home would prove disfunctional when introduced (in other places than its home)."[182]

Moreover, as the product of a society of states that has had a long history of relations and also attained a certain level of development, it can no longer be trusted therefore to accommodate the needs of the developing world.[183]

FOOTNOTES

1. De Kock, M.H., Central Banking, 11., (3rd edn London, 1961).

2. Plumtree, A.M., Central Banking in the Dominions, 159 (London, 1940).

3. Ibid.

4. Kent, R.P., Money and Banking, 391-2. 5th edn (New York, 1966).

5. Op. cit., note 1 at 11.

6. Op. cit., note 1 at 13.

7. Op. cit., note 1 at 16-17.

8. Op. cit., note 1 at 18.

9. Ibid.

10. 12 U.S.C. ch. 623 (1976).

11. Hawtrey, R.G., The Art of Central Banking, 131 (London, 1962).

12. Smith, Vera, Rationale of Central Banking, 148 cited in note 1 at 23.

13. Shaw, W.A., Theory and Principles of Central Banking, and 77-80. (London, 1930).

14. Kisch, C.H. and Elkin, W.A., Central Banks, 74 (4th edn) (London, 1930).

15. Jauncey, L.C., Australia's Government Bank, 166 (London, 1933).

16. The Federal Reserve Bank of the U.S., the Central Reserve Bank of Peru, and the Reserve Bank of India are examples.

17. Op. cit., note 1 at 22.

18. Ibid.

19. Op. cit., note 1 at 21.

20. See Section 5(d) of the Central Bank of Ceylon Act 1950.

21. Basu, C.B., Central Banking in a Planned Economy, 202 (New Delhi, 1977).

22. The Agricultural and Industrial Development Banks in most developing countries are examples of these development banks.

23. Op. cit., note 21 at 203. It was in fulfilment of such objectives that the Central Bank of Nigeria got involved in a myriad of Law suits. See e.g. Trendex Trading Corportation v. Central Bank of Nigeria, [1977] 1 ALL.E.R. 881 infra.

24. Wilson, J.S.G., Banking Policy and Structure - A Comparative Analysis, 3. (New York, 1986).

25. Op. cit., note 2 at 15.

26. Per Chief Festus Okotie-Eboh, quoted in Brown, C.V., The Nigerian Banking System, 10 (London, 1966).

27. Ibid.

28. Op. cit., note 24 at 2.

29. Some Thoughts on Central Banking, 6 (London, 1962).

30. Op. cit., note 2 at 14.

31. Op. cit., note 29 at 3. Emphasis supplied.

32. Sayers, R.S., Central Banking After Bagehot, 7 (London, 1956).

33. See generally p. 36-37.

34. Op. cit. note 32 at 35.

35. [1977] 1 All.E.R. 906.

36. By the end of 1981 foreign official institutions had about 169.6 trillion in U.S. bank liabilities, U.S. government stock obligations and U.S. Corporate stocks and bonds. See. 69 Fed. Reserve Bull. A58 (1982). Similarly, at about the same time $112.4 billion or 11% of the gross public debt of the U.S. Treasury was held by foreign institutions. See 68 Fed. Reserve Bull. A32 and A58 (1982). The above statistics underscore the importance of foreign government overseas investments in foreign securities which keep the global economy bouyant. It is worth reiterating that these are investments by central banks of other countries.

37. 484 F. Supp. 65 (W.D. Mich. 1980).

38. Id. at 75.

39. Delbruek v. Manufacturers Hanover Trust Co. 464 F. Suppl. 989 (S.D.N.Y. 1979) aff'd 609 F. 2d 1047 (2d Cir. 1939).

40. 24 F. Supp. 28 (S.D.N.Y. 1938).

41. 507 F. Supp. 311 (D.D.C. 1980). Contrast with Alcom v. Republic of Columbia, [1983] 3 W.L.R. 906.

42. Lauterpacht, H., "The Problem of Jurisdictional Immunities of Foreign States," (1951) 28 B.Y.I.L. 221.

43. Harvard Draft Convention on the Competence of Court with regard to Foreign States, Harward Law School Research in International Law reproduction in (1932) 26 Am. J. Int'l. L. 598.

44. Friedmann, W., "Changing Social Arrangements In State Trading States And Their Effects On International Law" (1959) 24 Law and Contemporary Problems, 350.

45. Op. cit. supra note 44 at 351.

46. See Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F. 2d. 354 (2d. cir. 1964).

47. Republic of Mexico et al. v. Hoffman, 324 U.S. 30.

48. II U.S. 7 Cranch 116 (1812).

49. Hilton v. Guyot, 159 U.S. 113, 164 (1894).

50. Simmons, K.P., "The Foreign Sovereign Immunities Act of 1976: Giving The Plaintiff His Day in Court." (1977) 46 Fordham L. Rev. 543 at 545-546.

51. In 1948 the U.S. and Italy signed a Treaty of Friendship which eliminated the application of Sovereignty Immunity in Trade between the two countries. See Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy 63 st. 2255 T.I.A.S. No. 1965.

52. For the State Deparment's reasons for the adoption of the restrictive immunity approach see the letter from Jack B. Tate, Acting Legal Advisor of the Department of State, to Phillip. B. Pearlman, Acting Attorney General dated May 19, 1952, 26 Dept. St. Bull. 984-85 (1952)

53. Although this has not resolved all the problems of conflicting decisions, it has attempted to reduce them by setting out a criteria for the determination of immunity issues.

54. (1880) 5 P.D. 177.

55. Id. at 214-215.

56. [1920] P.30.

57. [1938] A.C. 485.

58. [1976] 1 All. E. R. 78, 15 I.L.M. 133 (1976). see also Playa Larga (owners of Cargo lately laden on Board) v. I Congresso Del Partido (owners) [1981] 3 W.L.R. 328

59. Principles of Public International Law, 338 3rd. edn. (1979) p. 338.

60. [1977] 1 All. E.R. 881.

61. Flota Maritima Browning de Cuba S.A. v. Steamship "Canadian Conqueror" et al. and Republic of Cuba [1962] S.C.R. 997 (infra).

62. [1974] S.C.R. 275.

63. White v. The Ship 'Frank Dale' [1946] Ex. C.R. 555.

64. (1968) R.P. 6.

65. [1968] 5 D.L.R. 3d. 128.

66. (1971) S.C.R. 1003. In a dissenting judgement, Laskin, J., (as he then was) showed preference for the restrictive immunity approach, basing his argument on the function of governments and the need to protect litigants in claims against foreign sovereigns.

67. H.R. Rep. No. 1487 94th Congress 2nd. Sess., Reprinted in U.S. Code Cong. and A.D. News 6604, 6810.

68. Id. at 6606.

69. See Von Mehren, R.B., "The Foreign Sovereign Immunities Act of 1976", (1978) 17 Col. J. Transnat'l. L. 33 at 65.

70. S.I. 1978, No. 1572. By S.I. 1979, No. 458, operative since May 2, 1979 the Act was extended to other U.K. overseas territories including Hong Kong.

71. Some difficulties have arisen in respect of the jurisdictional nexus requirement in s. 1605 F.S.I.A. For a discussion of section 1605 (a), see Cosby, M.G., "Commercial Activity in the Foreign Sovereign Immunities Act of 1976: Towards A More Practical Definition," (1982) 34 Baylor L. Rev. 295-308 and Schloss, D., "Commercial Activity Under the Foreign Sovereign Immunities Act of 1976" (1979) 14 J. Int'l L. & Econ. 1163-79.

72. See s. 11 (1)(a) of the Canada State Immunity Act and S. 1605 F.S.I.A.

73. Treaty of Amity, August 15, 1955. U.S.-Iran. Art. XI 914, 8 U.S.T. 901, 909 T.I.A.S. No. 3883.

74. The Lord Chancellor made this comment during the House of Lords debate on the draft bill of the U.K. Sovereign Immunity Act, 1978. See. (1977-78) 385 (5 ser.) Parliamentary Debates of the House of Lords, 1530.

75. For a full discussion of central banks as organs or agents of governments see p. 45-50 infra.

76. Proceedings of Senate Committee on Legal and Constitutional Affairs, 12:9, 9-4-81.

77. Hearing on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary 94th Cong. 2d. session 1978, p. 5.

78. Ibid.

79. O'Connell, D.P., International Law. Vol. 2 872-7 (2nd edn. 1971).

80. Supra at p.40.

81. [1957] 1.Q.B. 438.

82. [1971] 1 W.L.R. 603.

83. (1972) 1 Lloyds Law Rep. p. 497.

84. "New Developments in the Law of Sovereign Immunity" (1973) 36 Mod. Law Rev. 18 at 20.

85. Decision of Nov. 3, (1952), see also Clunet (1953) 654.

86. Decision of June 25, 1958, 25 Int. L. Rep. 180.

87. Battery Steamship Corp. v. Rep. of Vietnam No. 72-1440 (N.D.Cal. 1972) cited in note 95 at 269.

88. Id. at 230.

89. See Texas Trading v. Federal Republic of Nigeria 647 F. 2d 300 (1981)

90. Supra, [1977] I. All. E.R. 881 at 895. The decision turned on the banks having a distinct entity. While Lord Denning agreed with this, he chose to base his decision on the ground that there is no immunity in respect of commercial transactions even for a government department.

91. Infra, see p. 73-87 for a detailed discussion on the criteria for determining governmental acts.

92. Supra, see p. 41.

93. Id. at 906.

94. See Section 1611 (b)(1) FSIA and Section 11(4) of the Canada State Immunity Act. The U.K. Act does not spell out any criteria. This may not be unconnected with the fairly wide definition of

commercial activity in the U.K. Act.

95. Patrikis, Ernest T., "Foreign Central Bank Property: Immunity From Attachment in the United States" (1982) 1 Univ. ILL. L. Rev. 273-274.

96. See Section by Section Analysis of H.R. 11315 94th Cong. 2d. Sess. 1975 reproduced in 15 I.L.M. p.116 (1976).

97. See footnote 95.

98. Mr. B.L. Strayer offered the same interpretation before the Canadian Senate Committee on Legal and Constitutional Affairs. See Proceedings of Senate Committee on Legal and Constitutional Affairs (1981) 12:5 32nd Parliament 1st. Sess.

99. Supra note 95 at 275.

100. 502 F. Supp. (SDNY 1980) 120.

101. Note 95 at 282.

102. (1976) 15 ILM. p. 113.

103. Ibid.

104. The Federal law specifically mentioned is Rule 69 of the Federal

Rules of Civil Procedure. Contrast with s. 10(1) Canada State Immunity Act (1982). Attachment in aid of execution is only permissible in the circumstances in s. 1610 (a)(1)-(5) of the F.S.I.A.

105. 610 F. 2d 94 (1979).

106. Ibid.

107. No. 80-2791 (D.D.C. Nov. 26, 1980) cited in note 95 at 285.

108. Ibid.

109. Delaume, G., "The State Immunity Act of the U.K." (1979) 73 Am. J. Int'l. L. 185 at 186.

110. Supra, note 90.

111. s. 1610 (a)(2).

112. [1958] S.C.R. 263 at 268; 13 D.L.R. 2d. 177 at 182.

113. 103 D.L.R. 3d (1980) p. 520.

114. Re Royal Bank and Corriveau (1981) 117 D.L.R. 3d. 199.

115. S.C. 1976-77, C 31.

116. Per Cromarty J. at 205.

117. Supra, see note 109.

118. "The State Immunity Act of Canada" (1982), 20 Can. Y. B.I.L. 79 at 177

119. Testimony before the Senate Committee on Legal and Constitutional Affairs (1981) 11:10 26-3-81.

120. Op. cit., note 118 at 117.

121. Until the decision in the Trendtex case, Nigeria adhered to the doctrine of absolute immunity. As the decisions of English courts are of persuasive authority in Nigerian Courts, the Nigerian courts may adopt the restrictive immunity approach. However, to the best knowledge of the writer, there has not been any official change in position by way of a policy statement or the enactment of a new statute to that effect.

122. Bogulavski, M.M., "Foreign State Immunity: Soviet Doctrine and Practice (1979) 10 Neth. Y. Int'l. L. 166-77, Crawford, J., "Execution of Judgements and Foreign Sovereign Immunity" (1981) 75 Am. J. Int'l. L. 820 at 827-9. See generally Eight Report on Jurisdictional Immunities of States and Their Property A./Cn.4/396.

123. Setser, V.G., The Immunities of the State and Government Economic Activities, (1959) 24 Law and Contemporary Problems 309. See also p. 48 - footnote 91.

124. Ibid.

125. Fawcett, J.E.S., "Legal Aspects of State Trading", (1948) 24 B.Y.I.L. p. 35)

126. Crawford, J., "International Law and Foreign Sovereigns: Distinguishing Immune Transactions." (1983) 54 B.Y.I.L. p. 54.

127. Claim Against The Empire of Iran Case, (1963) 45 I.L.R. 57 at 80.

128. Decision of 13th December 1977, 38 Zeitschrift Fur Auslandisches Offentliches Recht and Volkerrecht, 242 at 278 (1979). See also 46 Annuaire de l'institut de Droit International 301-302 (1954).

129. 443 F. Suppl. 849 (S.D.N.Y. 1978).

130. Id. at p. 858.

131. 477 F. Suppl. 533 (1979). The Court had recourse to United Nations Declaration on Permanent Sovereignty over Natural Resources, 1962, U.N.G.A. 1803 (XVII) and U.N. Resolution 3171 (XXVIII) 1973 as evidence that the acts of the OPEC countries were sovereign and not commercial. It did not simply restrict itself

to the view that OPEC had a monopoly over the production and pricing of oil for export on the international market and therefore was engaged in a commercial act. Rather, it took a broad view of sovereignty.

132. Id. at p. 567.

133. Friedmann, W., "Some Impacts of Social Organization on International Law", (1956) 50 Am. J. Int'l. L. 457 at 481.

134. Principles of Public International Law, 330 (3rd edn. London 1979). See also Fitzmaurice, G.C., "State Immunity Proceedings in Foreign Courts", (1933) 14 Brit. J. Int'l. L. 121, and op. cit. note 42 at 224-6.

135. 271 U.S. 562 (1926). For a detailed discussion of the criteria for determining governmental arts, see the judgement of Lord Wilberforce in Playa Larga (owners of cargo lately laden on Board) v. I Congresso Del partido (owners) [1981] 3 W.L.R. 328 at 338-345.

136. (1932) 26 Am. J. Int'l. L. 597 et Seq.

137. Friedmann, W., op. cit. note 133 at 481.

138. "Immunite de Jurisdiction des Etats et des Organizations Internationales" (1953) 3 Hague Academy of International Law, Recueil des Cours 259-60. O'Connell has also critized the

Formulation as 'facile and unhelpful'. See O"Connell, D.P., International Law, Vol. 2, 846 (2d edn. 1970).

139. Ibid.

140. Op. cit., note 42 at 224.

141. Op. cit., note 42 at 247.

142. See generally, Eight Report on Jurisdictional Immunities of States and Their Property, A/CN.4/396.

143. "Beyond Bourgeois Individualism: The Contemporary Crisis in Law and Legal Ideology", in Feudalism, Capitalism and Beyond, 127 (1975).

144. "Liberty of Contract", 18 Yale L.J. 454 at 462 (1908-1909).

145. Ibid.

146. The Function of Law in the International Community, 248 (1933).

147. Friedmann, W., op. cit., note 44 at 359.

148. Walker, Jr. H. , "Modern Treaties of Friendship, Commerce and Navigation", (1958) 42 Minn. L. Rev. 805.

149. Ibid. For a discussion of the historical development of FCN Treaties, see Culberston, Commercial Treaties, 2 Encyclopedia of Soc. Sci. 24-31 (1930).

150. Op. cit., note 148 at 808.

151. Walker Jr. H. , "Treaties for the Enforcement and Protection of Foreign Investment: Present United States Practice." (1956) 5 Am. J. Comp. L. 229 at 232 (1956).

152. See 8 Stat. 32 T.S. No. 249, Treaty with Sweden, 1783 8 Stat. 50 T.S. NO. 346 and with Prussia 1785, 8 Stat. 84 T.S. No. 292. For a compilation of Treaty text prepared under the auspices of Senate, see International Acts, Protocol and Agreements Between the U.S.A. And Other Powers. (1776-1909) 2 Vol. Malloy ed.

153. Aksen, G., Landwehr, M.L., (ed) "The Case for Bilateral Investment Treaties," in Private Investors Abroad, Problems and Solutions in International Business (New York, 1981) South Western Foundation.

154. Rubin, Seymour J., Private Foreign Investment: Legal and Economic Realities 88 (1956), see also Treaty of Friendship, Commerce and Navigation, April 2, 1953, United States and Japan, Art. VI 4 S.T. 2063, 2068 T.I.A.S. No. 2863.

155. Op. cit., note 153 at 377.

156. Ibid, see also Convention on the recognition and Enforcement of Foreign Arbitral Awards, Sept. 30, 1970, U.S.T. 2517, T.I.A.S. No. 6697.

157. Op. cit., note 148 at 805.

158. Gudgeon, K.S., "United States Bilateral Investment Treaties: Comments on their Origin Purposes and General Treatment Standards" 4 Int'l Tax and Bus. Lawyer, 108 (1986).

159. Agreement for the Promotion and Protection of Investments, July 22, 1975. Great Britain - Northern Ireland - Singapore 1975 Gt. Britain T.S. No. 151 (Cmnd. 6300).

160. Agreement Concerning the Protection and Promotion of Investments, Sept. 8, 1975, France-Singapore Official Gazette 7150.

161. Op. cit., note 153 at 379.

162. Op. cit., note 158 at 109.

163. See generally, International Chamber of Commerce, Guidelines for International Investment (1972).

164. Paterson, R.K., Canadian Regulation of International Trade and Investment 346. (1986).

165. Note 163 at 10-11.

166. Stockmayer, A., "Bilateral Investment Promotion Protection and Treaties: A Model for Community Promotion of Mining Investment?" (1986) 4 Jo. of Energy and Nat. Resources Law. 249.

167. Op. cit., note 164 at 346.

168. Ibid.

169. Bergman, M.S., "Bilateral Investment Protection Treaties: An Examination of the Evolution of the U.S. Prototype Treaty," (1985) 16 N.Y.U.J. Int'l. L. & Pol. 34. Emphasis supplied.

170. Wilson, R.R., U.S. Commercial Treaties and International Law, p. 239. (1960).

171. Wall, D., The Third World Challenge, p. 216 (1967).

172. The Multilateral Trade Negotiations - A Lawyers Perspective, (1980) 4 Can. Bus. L. J. 139 at 142.

173. Op. cit., note 147 at 363.

174. Op. cit., note 166 at 249.

175. Supra, see note 173.

176. Supra, note 100.

177. See eg. The exploration Agreement of April 14, 1983 between Liberia and Amoco Liberia Exploration Co., Petroleum Legislation. South and Central Africa, Supp. No. 76 Art. XXI (h):

> 'The Republic of Liberia hereby irrevocably waives any claim to immunity in regard to any proceedings to enforce any arbitral award rendered by a tribunal constituted pursuant to this contract, including, without limitation, immunity from service of process, immunity from jurisdiction of any court, and immunity of such of its property as is of a commercial nature from execution.'

178. U.S.-Egypt BIT Article VI, paragraph 2.

179. For eg. in Trendtex Trading Corp. v. Central Bank of Nigeria [1977] I All. E.R. 906 Shaw L.J., after considering the statute of the Central Bank of Nigeria said inter alia,

> "Nowhere is that legislation called anything but a bank and not a 'federal' or 'national' or 'state' bank but a "central" bank ... The very name has a commercial ring."

180. Mann, F.A., The State Immunity Act 1978, (1979) Brit. Y. Int'l. L. 62.

181. For a detailed analysis of the conceptual problems associated with the distinction in administrative law between "administrative" and "judicial" functions, see generally De Smith, S.A., Judicial Review of Administrative Action, 70-80 (London,

182. Harlow, C., "Public' and 'Private' Law: Definition without a Distinction," (1980) 43 Mod. L. Rev. 241 at 258.

183. Flory, M., "Adapting International Law to the Development of the Third World," (1982) 26 J. of African Law. 13.

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