

State Immunity and Current States' Judicial Practices

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要 旨

主権免除は現代国際法で十分に議論されてきたテーマである。国際法における主権免除概念は、各国の主権免除に関する立法や制限免除主義を適用した国内裁判所の判決によって発展してきた。しかし、現時点でミャンマーには主権免除に関する国内法は制定されていない。本稿ではイギリス、アメリカ、ヨーロッパ諸国、アジア諸国における判例の動向を検討し、さらに主権免除に関する国連条約を分析し、主権免除に関しミャンマーが制定すべき国内法の内容を展望する。

Keywords: International law, suing foreign sovereign states, state's judicial practices

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I. Introduction

State immunity is a topic which being well discussed by states in contemporary international law. The international concept of state immunity had become to develop out of the decisions of municipal courts which applied a restrictive rule of immunity was regarded more and more favorable. Before the international convention and national legislations had been appeared, some decisions of municipal courts can be cited as land mark applications of development of state immunity.¹ Generally, the principle of state immunity had been originally applied by courts was intended to protect the political activities of states as a sovereign entity. However, application of state immunity has created inconveniences and injustices during the time when the state extended its activities into commercial, industrial and similar activities because both states and private individuals become in international trade and commerce. Like private individuals, states also buy and sell goods and manage charter ships or commission work. Consequently, it had an impact on the approach taken by the courts. They had to move away from the absolute to restrictive doctrine of immunity because the growing participation in business matters by the Government. The first step was taken by the courts was in relation to an *action in rem* in the *Phillipine Admiral* case. The next step was taken in the *Treandtex* case and it was obvious that legislation was necessary for purpose of clarifying the issue of state immunity. Those cases showed which approach should be the best for enjoying immunity by states which participated in commercial transactions.

Thus, courts practices on state immunity have increasingly developed on state immunity as long as national legislations and international Conventions have been gradually emerged. There can be seen that the state's court practice is important as interpretations of very complex structure of law of state immunity. This study explores the court's reasoning and its consistency with customary international law. It is, of course, impossible to survey all national courts decisions in details and all that will be attempted is an overview of current some states judicial practices. The United States, the United Kingdom, Australia, Canada, Malaysia, Pakistan, South Africa, and Singapore have all enacted legislation on state immunity adopting a restrictive approach. The position as to countries which have enacted no legislation and have had no or few proceedings before their courts is more difficult to settle their cases.² Accordingly, the U.S. law and U.K. law have been model laws for other countries as their provisions show some extent of comprehensive and well structure since their enactments.

Developed countries such as United States or United Kingdom, have encourage foreign states to participate in sophisticated commercial activities and such commercial activities had taken place in their countries, and foreign states or in a third country. Therefore, a number of employments increased in such developed countries and, also foreign States. Some foreign countries have recruited persons from developed countries as experts, particularly the United States and U.K., to work for foreign governments and their instrumentalities. Moreover, employees from developing countries have worked at the foreign countries, particularly working at the foreign sovereign employment as various kinds of works. Accordingly, technical experts or intellectual persons from developed countries and employees from developing countries become increasingly engaged in international trade and employment, they will increasingly interact with foreign sovereigns and their agencies and instrumentalities. Therefore, a number of lawsuits have been instituted against foreign governments before the national courts of states. Later on, states' courts practices involving foreign sovereign and their instrumentalities gradually continue to growing with the increasingly international trade. The major problem which the courts face in the case is distinction between public acts and private acts in order to determine granting state immunity. This article is mainly discussed with state's courts practices and its unsolved problems on state immunity. The part two of this article examines State immunity and judicial practice of certain states. Part three focus on State immunity and some problems in courts practices. Part four examine UN convention and states' perspective. Part five present desirable experiences form certain states' judicial practices to Myanmar. Finally, the article concludes that states' courts practice regarding with the following research questions;

1. Does the Court correct in applying state immunity under customary international law and in classifying the activity as act *jure imperii* and act *jure gestionis* as forum state?
2. What exactly are the criteria which prevent a municipal court from hearing a case in which an individual plaintiff claims damages from a foreign state?
3. Does the Courts give fair and adequate remedy to the contracting party who grievous and significant injustice from the application of the doctrine of sovereign immunity of state party?
4. What is States' attitude on recent UN Convention?
5. What experiences will be beneficial from states' judicial practices which have already had national legislations to Myanmar which currently lacking domestic statute on state immunity?

II. State immunity and current judicial practice of certain states

Most of the states are now enjoying a larger volume of external trade and a more extensive involvement in transnational intercourse of foreign nationals or foreign states. Thus, most states would be become to appear more often or more intensively into the before the courts of other states. Therefore, the question of state immunity is more importance, and state's courts practice become also significant indicators of the state of international law in this subject. Earlier decisions of national courts appear to have linked state immunity to the international law principles of diplomatic immunities and the immunities of the personal sovereigns.³ At that time, personal immunity of individual sovereign were only recognized by states. U.K. and U.S. practice may also be said to substantiate the view that a diplomatic agent is subject to the local jurisdiction upon the termination of his mission.⁴ The earlier U.S. and U.K. courts decisions usually cited as having establish the absolute immunity. The rule of absolute immunity first appears in *Schooner Exchange v. M'Faddon*⁵ in the United States and seventy years later in *The Parlement Belge*⁶ in England. Both decisions distinguish between a state as it performs governmental functions versus a state participating in international commerce in the same manner as a private trader.⁷ The transition from absolute to restrictive immunity in some major jurisdictions will then be examined in this chapter.

(a) State immunity claim in English courts

English courts had been developed application of a doctrine of restrictive immunity as consequence of greater involvement by states in commercial activities. At that time, when public vessels became established in trade, the immunities of public warship in foreign ports and territorial waters had been invoked before the courts. Before nineteenth century, the questions of immunities of state ships had not discussed by English courts. The English courts had established applied restrictive doctrine in the case of *The Phillippine Admiral*⁸ and *Trendtex trading Corporation Ltd v. Central Bank of Nigeria*⁹, just before the 1978 Act was enacted. Later, *I Congreso Del Partido*¹⁰ case was followed and decided on the basis of *The Phillippine Admiral* and *Trendtex trading Corporation Ltd v. Central Bank of Nigeria*.

The United Kingdom ratified the Torture Convention on December 8, 1988 before, on September 29, 1988; section 134 of the Criminal Justice Act came into force. Traditionally, under British common law, heads of state are immune from criminal and civil prosecution by other nations. However, Section 134 provided the

crime of torture that committed anywhere in the world was criminal under U.K. law and triable in the U.K.¹¹ Therefore, the modern trend in the law indicates that a head of state will not enjoy immunity in civil and criminal proceedings with respect to acts that are essentially private in character. In the Pinochet case,¹² the highest court in England took the view that, if a former head of state had carried out acts of torture (as defined in the 1984 UN Torture Convention) he would not be immune from prosecution. But, in the case of civil proceeding against foreign state, *Al Adsani v Government of Kuwait and Others* case,¹³ in which the English court viewed that the State Immunity Act 1978 provides that a state retains immunity unless the injuries were inflicted in that country. The victim had said that psychological injuries he had received under torture had been exacerbated by threats he had received over telephone while in London from the Kuwait ambassador anonymously, but he was unable to prove that threats had been made by the ambassador. The court of appeal therefore held that the state of Kuwait was entitled to immunity and the case could not proceed. The applicant alleged violations by the U.K. of Articles 3 (torture) and 6 (fair trial) of the¹⁴ European Court of Human Rights. The ECHR held that there was no violation of Article 3 because of lack of U.K. involvement in the alleged torture. And then as to Article 6, the right of access to the English courts had not been violated by the upholding the defense of state immunity.¹⁵ The *Al-Adsani* case raised the question of the balance to be struck between the international law of human rights and of state immunity in the context of torture.¹⁶ The Court did not make clear in what circumstances the application of immunity might impose an impermissible restriction on the right of access to a court. At present the law is that the rules on state immunity, if properly applied, are not in conflict with human rights obligations. There is one case in English law which goes some way to developing the law in civil proceedings. In a recent Court of Appeal case relating to alleged torture of British prisoners in Saudi Arabia, the court held that immunity cannot be used to shield state officials from civil claims in respect of systematic torture. In the courts view civil proceedings against a state official, in such circumstances, are not brought against the state and do not, therefore, raise issues of state immunity.¹⁷ It's only a step in the right direction that state official cannot hide behind international law. The law applied to everyone. The court should consider the evidence and all relevant factors at the same time as considering jurisdictional issues. A foreign state cannot have any absolute right to claim immunity in respect of civil claims against its officials for systematic torture, even committed outside the country where the claims was filed. The ruling would mean England would become a forum choice of state for torture claims across the world.¹⁸

(b) State immunity claim in American courts

In the United States (U.S) Supreme Court decided the case of "The schooner Exchange v. M'Faddon"¹⁹ which was the first application of public ships regarding with state immunity. In this case, the Court held that the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. The doctrine of state immunity is justified by the court on the basic of the equality, independence and dignity of states.²⁰ The doctrine of absolute immunity served as controlling principle in the U.S. until 1952. By 1952 several developments had converged to bring about substantive change away from the absolute doctrine.²¹ In the 1960s, the Courts had amended their practices to apply immunity with some limitations. The Foreign Sovereign Immunities Act of 1976 (FSIA)²² was enacted to clarify when a federal court could acquire jurisdiction over a foreign state. Thus, the purpose of the FSIA is to ensure that American citizens doing business with foreign states abroad can, in the event of disputes, sue such states in the United States Federal courts.²³

Since enactment of the FISA, its application by the United States courts has undoubtedly, as intended, reduced the extent to which the executive and policy issues determine the immunity of foreign States before United States courts.²⁴ However, United States courts consistently have refused to extend the scope of the FSIA, and thus, did not find within the FISA the right to sue foreign states, beyond commercial activities, to reach public acts committed by such foreign states outside the United States. As a result, foreign states used FISA as a shield against civil liability for violation of the laws of nation committed against U.S. nationals overseas.²⁵ Under the U.S. legal system, the scope of a foreign state's immunity is determined by judicial, rather than executive, authorities.²⁶ As many aspects of foreign sovereign immunity for the judiciary to determine, opinions of Justice or decisions of courts have influenced on state immunity cases as interpretations of the Act. Thus, the courts practices are very important for interpretations and implementation of FSIA in United States. The FSIA provided the several exceptions to immunity that will allow a court to exercise jurisdiction in an action against foreign states.²⁷ Under this structure, a court must determine whether the foreign state defendant is immune from suit to ascertain whether the court has personal and subject matter jurisdiction. Federal courts have subject matter jurisdiction over claims against foreign nations when the foreign state is not entitled to immunity.²⁸ Thus, when the courts find that the foreign state defendant is entitled immunity, the courts lacks personal and subject matter jurisdiction. Conversely, if the court finds that there is an exception to immunity and that proper service has been made, the court has automatically personal

and subject matter jurisdiction.²⁹

Among the exceptions of FSIA, the most important and widely used exception is the commercial activity exception.³⁰ The courts have decided cases on commercial activity exception to distinguish between sovereign and commercial act with several different views. The Courts have characterized interpretation of this exception and taken action based upon various tests. As it will be discussed in the next chapter about complicated commercial exception context in civil proceeding, the courts' decisions raised several difficulties. Through examination of issues raised by FSIA suits, United States Supreme Court has handed down several important decisions. In *Republic of Argentina v. Weltover*,³¹ the Supreme Court decided that a national of any state could bring a suit against any sovereign in a U.S. court so long as there have some connection between the commercial activity and the United States. Sovereign's acts should be characterized as commercial activity if that particular act is something in which private parties can also engage. This decision showed the acts should be caused direct effect in the United States, and there have sufficient jurisdictional nexus requirement under FISA even if it outside the borders of United States.³² But, in the case of *Saudi Arabia V. Nelson*,³³ the Supreme Court adopted a narrow interpretation of the commercial exception that Nelson's suit was not based upon commercial exception, only based upon allegations of torture which being to be nature of conduct, rather than its purpose, the Court noted that Nelson's employment was held by the Court not to have a sufficient connection to the events which led to his confinement and torture to support jurisdiction under section 1605(a)(2) of the FSIA and thus held Saudi Arabia immune from suit. The court decision in Nelson case has been disappointed by U.S. nationals because it will impair significantly the rights of United States citizens employed by foreign governments abroad.³⁴ Regarding with various characterizations and tests on commercial activity of FSIA, the courts had not been unable to give remedies to the personal injury action of US national against a foreign state under FSIA because of narrow interpretation of the commercial activity exception to foreign sovereign immunity.³⁵ Finally, The FISA had been amended exception of state-owned terrorist case, so as further to limit the foreign state's immunity and increase the occasions on which it may be brought before the United States courts. Its provision relating to immunity from execution had also been amended, in particular to facilitate their nationals who were victims of terrorist activities to recover judgment damages.³⁶ After amendment on FSIA, there were several cases suing in US courts for wrongful death resulting from an act of state-sponsored terrorism by the families of victims of terrorism and the courts gave awards in favor of victim in respect with new amendment on FSIA.³⁷ Accordingly, when FSIA was enacted in United States, it was the new trend of application of FSIA by courts.

(c) State immunity claims in European countries' courts

Before the First World War, German courts seemed to have applied the principle of absolute immunity with little hesitation. At present, the legal system of the Federal Republic of Germany follows general rules of international law under which immunity is constructed as restricted to "*acta jure imperii*".³⁸ Accordingly, a company which has carried out repair work at embassy and the ambassador was permitted to file a suit against the state for a claims resulting from the repairs. In this case, the court had considered only whether it could be said that the relevant contract was concluded for governmental purposes, and whether it was relevant that governmental motives were advanced for breaching the contract.³⁹ The Federal court constitutional ruled that such a repair contract does not fall within the sphere of public authority and is to be regarded as non-public act.⁴⁰ Furthermore, a suit for the correction of the land register was permitted against a foreign state with respect to the site of its mission since the correction of the land register does not impair the diplomatic mission's performance of its tasks.⁴¹ And then, the tourist office of the foreign state which shows publicity films for travel in that State and infringes copyright regulations in respect of the film music does not enjoy immunity since the showing this film, at least indirectly, serves commercial purposes of the state in question.⁴² The above-mentioned court ruling showed that restrictive doctrine is the main trend of judicial practices of German, where courts had distinguished public act and non-public act in accordance with the general rule of customary international law.

The Netherlands has no specific law and regulations on state immunity except the provision of section 13(a) of the Act of 15 May 1829 concerning General Principles of Legislation that "The jurisdiction of the courts and the enforcement of judicial decisions and authentic deeds are subject to restrictions recognized under international law".⁴³ Thus, the doctrine of absolute immunity did not apply in Netherlands judicial practice. The law as it now stands was commented upon a judgment of the Supreme Court of Netherlands of 26 October 1973 in the case of *Societe Europeenne d' Etudes et d' Enterprises en liq v. Socialist Federal Republic of Yugoslavia*,⁴⁴ that " In many countries it is becoming increasingly common for the state to enter into commercial transactions governed by private law, thus entering into judicial relations with private individual on a basic of equality ; in such cases it seems reasonable to extend the same legal protection to the individuals concerned as if they were dealing with a private person; on these grounds it must be assumed that the immunity from jurisdiction which is enjoyed by foreign states under present day international law does not extend to cases in which a state may act as referred to above"⁴⁵

Finland is not a State party to the European Convention on State Immunity nor to any other relevant convention. Finland Supreme Court, however, has decided the case referred to the European Convention as a source when analyzing the rules and principles of customary international law.⁴⁶ The case before the Supreme Court of Finland concerned a labour dispute between the Embassy of Turkey and a locally recruited employee, who had worked as a secretary and translator. The Supreme Court held that the European Convention on State Immunity was a valid source when analyzing the rules and principles of customary international law. The Supreme Court stated that, pursuant to the Convention, a State cannot claim immunity if the proceedings relate to a contract of employment between the State and an individual, where the work has to be performed on the territory of the forum State. However, the Court referred to Article 32 of the Convention, according to which 'nothing in the present Convention shall affect privileges and immunities relating to the exercise of the functions of diplomatic missions and consular posts and of persons connected with them'. On the basis of Article 32 and customary international law, the Court found that a foreign mission as an employer could invoke immunity from jurisdiction before a court of the receiving State when the labour dispute was closely related to the official duties of the mission. The Court held that the duties of the Plaintiff were meant to serve the official duties of a member of the diplomatic staff of Turkey and was thus closely related to the exercise of governmental authority of Turkey. Therefore, Turkey enjoyed jurisdictional immunity in the case and the Finnish courts lacked subject matter jurisdiction.⁴⁷ According to courts practice mentioned above, Finland followed the European Convention on State Immunity in order to determine the issue of immunity.

(d) State immunity claims in Asian courts

Asian courts had decided some notable state immunity case since the beginning of the Second World War. At that time, most of the Asian courts followed the absolute doctrine of state immunity which a foreign state is accorded immunity from the jurisdiction of local or municipal courts irrespective of the nature of the transaction.⁴⁸ In such time, some Asian Courts such as Malay states (Malaysia-Singapore) and Hong Kong appeared to have followed English Courts precedents.⁴⁹ In Japan, the Great Court of Judicature of Japan decided the case of *Matsuyama & Sano v. The Republic of China*⁵⁰ which is the proceeding against China for the payment of the notes with interest and applied that foreign state was immune from the jurisdiction of the courts of Japan under international law.⁵¹ Japan courts have generally followed the *Matsuyama* case despite apparent changes in the rules of customary international law. Some recent cases, however, have pointed out a

slight change in this practice and there have some understanding of a trend toward the restrictive approach.⁵² In *Yamaguchi v. United States* (Yokota Base case) was decided in 2002 by the Supreme Court of Japan, became again on the question of state immunity. The Court held that although absolute immunity theory was a traditional rule of customary international law, the view has gained ground, with the expansion of the scope of state activities and so on, that it is not appropriate to grant immunity from civil suit for acts *jure gestionis*, and the practice of foreign states to restrict the scope of immunity has accumulated. However, even under such circumstances of today, it should be stated that as far as acts *jure imperii* of foreign states are concerned, we can still affirm the existence of a rule of customary international law to the effect that immunity from civil suit is granted.⁵³ The court granted United States immunity on the reason of U.S act concerned with acts *jure imperii*. However, Japan Supreme Court, recently, decided a case that foreign government should no longer be immune to lawsuit filed in Japan, effectively ending a 78 years restriction on Japan's jurisdiction.⁵⁴

The case brought before the Supreme Court, involved a trading company in Tokyo that filed a civil lawsuit against the Pakistani government, demanding payment of about 1.2 billion yen for computer bought in 1986. The Tokyo High Court in 2003 dismissed the suit under the excuse of state immunity and followed the Matsuyama decision but the Supreme Court viewed that there is no longer an international custom of exempting foreign states from civil action concerning commercial transactions, employment contracts and in other cases. Thus, the Court nullified the high court ruling and sent back for re-examination.⁵⁵ Since then, Japan courts practice can be observed on the question of state immunity is exactly moving toward the restrictive theory concerning with commercial transactions.

(e) State immunity claims in South African courts

The South African common law, which combined with Roman-dutch and English common law adopts the doctrine approach to customary international law. Customary international law is part of South African law and courts are required to ascertain and administer rules of customary international law without the need for proof of law-as occurs in the case of foreign law.⁵⁶ Before enactment of South Africa Foreign Sovereign Immunities Act on 20 November 1981, South Africa followed the traditional doctrine of absolute immunity.⁵⁷ Although *Trendtex trading Corporation Ltd v. Central Bank of Nigeria* pointed out for new rules of customary international law which is restrictive doctrine of sovereign immunity instead of the absolute doctrine, South African courts had not fully accepted it. The South African courts generally followed English

courts decisions upholding the absolute immunity approach. However, in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular De Mocambique*⁵⁸, the restrictive approach was approved. The presiding judge, Margo J, said that it must be accepted such rule of international law on sovereign immunity which prevails today is reflected in the restrictive doctrine; international law forms part of our law; and there is no statute or principle of South African law in conflict with the doctrine. The court held that the Government of Mozambique was not entitled to immune in respect of trading activities and ordered an attachment to satisfy the judgment.⁵⁹ Furthermore, the South African legislature approved the restrictive approach by providing the Foreign States Immunities Act of 1981 (“Act 1981”), which is followed U.K State Immunity Act 1978.

The following conclusion has been drawn from the above survey of state practice. That survey serves to demonstrate that there are some judicial decisions are divergent, and that the problems raised by private party had not been satisfactorily solved. Nevertheless, most of the countries have principally focused state immunity cases with restrictive approach. The state which has not domestic legislation on state immunity also followed the modern trend of doctrine that can not be invoked immunity by states, with referred to principle of customary international law. Even the courts viewed with restrictive approach, legislations seemed much confusion which made various interpretations of prescribed laws and gave diversity decisions. Thus, when states engage in many commercial activities which can end in disputes in other countries, not only judges but also businessmen and legal practitioners should be more widely known and discussed state immunity concern the protection which a state and such entities is given from being sued in the courts of another states and domestic court itself and substantial exceptions by statutes, in which state can be sued when the dispute arises from a commercial transaction entered into by state or its agencies. And then, the courts should have examined not only making a distinction between public acts and private acts but also considering about variety of questions related with cases.

III. Some problems of state immunity in courts practices

Since the application of a restrictive doctrine in state immunity had been developed, states practices have become cautious to distinguish between private acts and government acts in commercial activities. The courts focused on cases to determine the acts based upon respective legislations in which provide certain exceptions which not to be invoked immunity on state’s participation in commercial transactions. However, the courts

practices are still unsettled and there are uncertain problems as states legislations have complexity exceptions in this sphere.

(a) Identification of nature of acts and purpose of acts

Regarding with ground of distinction between private acts and public acts, there are two categories: purpose act and nature act. Generally, the cases which concern the purchase, contract of leasing property would be simple commercial transactions to be distinguished between private act and public act. But, the official nature of the intended use is doubtful to determine stripping immunity. When the cases appeared before the courts, judges firstly examined the criteria of immunity to determine whether the foreign state's act which gave rise to the dispute is public or private. Thus, the courts have done it according to concepts and criteria of national laws and respected foreign laws, and those of above considerations are naturally apt to encourage the use of tests and standard of the law of forum. However, when the scope of public law in the two internal legal orders concerned is not the same, the courts faced difficulties raised by the method of describing the act of the foreign state as public or private.⁶⁰In dealing with describing the act of the foreign state as private or public, the case has been examined firstly the identification of the relevant aspect of the case-nature test and purpose test and then the act has been classified as commercial or non-commercial.

The more difficult cases usually involve complicated patterns of facts or sequences of acts and generally the questions arise whether we just find that it is nature of transaction or purpose acts. The nature test purports to be an objective inquiry into whether the act could be performed by a private or ordinary person. For example, if such a person could perform the act such as making contract, managing property, this act is private a state performing such an act is liable just like private individuals. But, if the act is one that only a public authority could perform such as legislating, adjudicating, providing national defense, this act is public and the state is immune. Under the purpose test, an act is private or public, according to whether it serves a private or public purpose.⁶¹The court practice in *Empire of Iran* case viewed that "As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the state transaction or the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity. It thus depends upon whether the foreign state has acted in exercise of its sovereign authority that is in public law, or like a private person, that is in private law."⁶²And then, *Trendtex trading* case had also applied similar ground of nature act, but in *I Congreso Del Partido* case, in a contractual context, the court

had looked not only the nature of the contract but also nature of the breach and had examined the nature of all acts.⁶³The rule as developed by the courts to look only at the nature of government's activity and not at its purpose has turned out in most cases.⁶⁴State's legislations provide commercial activity to be determined by reference to nature of conduct or its purpose. The recent UN Convention provides for the purpose test that "reference should be primarily made to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction".⁶⁵ This provision was intended to provide an adequate protection for developing countries promoting national economic development⁶⁶ and it shows that focusing only a single nature test is not adequate, both tests should be considered when the nature of the transaction appears to be commercial is the burden of proving that its purpose pursued by the defendant state is also to be taken into account if this is of significance under domestic law. However, the western states do not agree to take purpose into account in cases that government action always serves sovereign purposes, thus, particularly problematic actions like investment disputes, will be entitled immunity. Some courts have applied the purpose test as the application of the purpose test is clear and it would be the best way of promoting justice.⁶⁷ However, when courts attempt to distinguish commercial activity from government activity in characterizing the activity's nature, complications have been arisen in courts. It is often difficult to distinguish acts that are connected with trade, traffic and business from acts that further some governmental interest. In practice, the courts would need to reach a decision based on all the grounds of facts. The courts would prefer the nature test to the nature and purpose test for determining the commercial character of a transaction to be disentitled to state immunity. Generally, a practical solution has to consider the differing views maintained in different legal system. Hopefully, the U.N Convention would make uniformity of practice to the differing approaches reflected in various domestic legal systems.

(b) Commercial activities and Jurisdictional nexus

When a suit appears before the court, the first step in evaluating a suit that the claims being based upon a commercial act of a foreign states or agency or state's instrumentality is to identify the relevant act of the defendant upon which the suit is based. In such case, the question raised on whether the claim must be based upon a commercial act or not and the courts in several decisions, held that there must be a nexus between the commercial activity and the alleged wrong on which the complaint is based.⁶⁸ Jurisdictional nexus is the one

of the requirements to determine for granting immunity on states. When the case firstly has been characterized as commercial activity, the second requirement which is known as action "based on" the particular commercial activity focus on the commercial activity and its relationship to the cause of action. The courts decided several cases by applying various tests regarding with "base on" the particular commercial activity. Among these tests, jurisdictional nexus test is the most widely used test.⁶⁹ Thus, jurisdictional nexus requirement has been expressed a nexus between plaintiff's claim and sovereign's commercial activity. In United States, FSIA Section 1605(a) (2) mentions that commercial exception of the plaintiff must show a territorial connection between claim and the United States forum in which he wants to sue. The claims must be based upon (1) a commercial activity carried in the United States, (2) an act performed in the United States in connection with a commercial activity elsewhere, or (3) an act outside the United States having a direct effect on the United States.⁷⁰ Finally, the courts must consider a nexus between those commercial activities and the United States. But, the UK act did not talk of a specific requirement respecting territorial connection and Section 3(1) merely prescribes that "an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the U.K". Thus, U.K courts have decided cases without taking commercial activity and jurisdictional nexus into account in the contractual cases.

In Practice, Some cases had not been reached to satisfy by the plaintiffs when United States courts have practiced complexity test of commercial activity and jurisdictional nexus test.⁷¹ The language of section 1605(a) (5) stipulates that the damage must occur in the United States and be caused by the foreign states, thus, when the plaintiffs institute the suits of claim for torture conduct which occurred by foreign states in outside of United States, the court have investigated the claims based upon commercial transaction with jurisdictional nexus. In those cases, the plaintiffs have not been achieved their claims because of narrow definition of commercial activity in this context and a strict nexus between the claims and such activity. The case of *Nelson v. Saudi Arabia*⁷² is a good example of this situation. In that case, a United States national had been recruited in the United States to work at a State-owned hospital in Saudi Arabia as a monitoring systems engineer. Saudi police later took him to jail and physically abused him after Saudis discovered that he had submitted a fraudulent university diploma while he complained of safety defects at the hospital. He sued the foreign State for personal injury, arguing that his action was based upon his initial recruitment in the United States. The Supreme Court took a view⁷³ on this case that there must be more than a mere connection between the commercial activity and the injury: the activity must, in effect, be the cause of the plaintiff's injury. The

basis of the claim brought by the Nelsons was not breach of the employment contract but merely the torture conduct, the claim was not based upon commercial activity. Accordingly, the Supreme Court decision in Nelson has been condemned by United States commentators on the basic that it will impair significantly the rights of United States nationals employed by foreign government abroad.⁷⁴ However, looking at the view point of international, the Supreme Court reached this result by interpreting the jurisdictional forum contact requirements of the FSIA which primarily reflects on the status of domestic law and not on international immunity law.⁷⁵

Nowadays, Problems of State immunity are still vague to distinguish between act of governmental nature and act of commercial nature. There are no common court practices for proposed criteria for the distinction between public acts and private acts. Therefore, the denial of such distinction by court practice differs from country to country or from legal system to legal system. And then narrowing interpretations of domestic law and jurisdictional nexus test has also been occurred problem to redress a grievance by foreign states because of lack of practical possibilities. When state practice is unsettled, there are some problems of court practice which associate with this subject. Such problems must be thoroughly explored and diligently analyzed by every state on this subject by reference the recent U.N Convention.

IV. UN convention and states' perspective

The UN Convention was adopted during the 65th plenary meeting of the General Assembly by resolution A/59/38 of 2 December 2004. In accordance with its articles 28 and 33, the Convention shall be opened for signature by all States from 17 January 2005 until 17 January 2007, at United Nations Headquarters in New York.⁷⁶ Among the countries, Austria which was among the first to sign the Convention, Belgium, China, Estonia, Finland, Iceland, Lebanon, Madagascar, Morocco, Norway, Paraguay, Portugal, Romania, Senegal, Slovakia, Sweden, Timor-Leste, United Kingdom have already signed recent UN Convention and Norway only have ratified it.⁷⁷

The states in which already have national laws on state immunity such as United Kingdom, United States, Australia, Canada, Malaysia, Pakistan, South Africa, and Singapore are now in the process of carrying out a detailed comparison of the provisions of the UN Convention with their national laws, and the European Convention on State Immunity 1972 in which some states are members. In those cases, while the precise

language of the UN Convention may differ in some respects from that application in current states' legislations. The States need to consider whether a compatible interpretation of their national laws by respective courts can be realistically expected. This process will assist a decision to be made as regards whether the states should sign and ratify the UN Convention, and do so without primary legislation.⁷⁸ The states which have not still enacted national laws of state immunity are now going to discuss whether the U.N Convention should be signed and ratified to use its rules as a model for their new legislation. In doing this process, the states would more understand interpretation of the U.N Convention and they would consider whether the U.N Convention may produce an applicable legal regime within respective states' certain circumstance as their national legislations as it would be widely copied among states because it may be able to come up with acceptable solutions in the disputed area of customary international law. There have a tendency of states' perspective during the process of carrying out to discuss about U.N Convention by every state that whatever view may be taken by states which have national law e.g. U.K or U.S or Canada but there may be many U.N member states that will adopt the Convention and apply it. The Convention was a potential international standard which would be adopted and implemented by many states whether or not it conformed to current states' legislations or suited future circumstances.⁷⁹

As an emergence of UN Convention on Jurisdictional Immunity and State and their Properties, there have several advantages and disadvantages in this concerned. Looking into firstly as merit of the U.N Convention, the most significant advantage is that the U.N Convention would contribute to the codification and development of international law and the harmonization of practice on state immunity topic. And then, it became to appear in right time when international trade has been increased by great participation of states and its entities that need to restrict state immunity. Furthermore, it incorporates the generally accepted rule of modern practice that whoever suffers death or personal injury, or loss of tangible property, resulting from a foreign state's tortuous act or omission within the forum state may sue the foreign state for monetary compensation.⁸⁰ The Convention is compatible with current developments in the law concerning with torture and other human rights abuses. Thus, head of state has not been entitled immunity as they had carried out acts of torture. Finally, it stands a much better chance of being acceptable to more comprehensive range of states. States which do not have national legislation on this subject and which rely on the jurisprudence of their courts will have good reasons to ratify.⁸¹ Unfortunately, as a disadvantage, the Convention might affect on state practices that bringing the Convention into force might freeze the law and stop the development of state practice outside the Convention.⁸² Actually, state practice will continue constructively to develop the law by

reflecting the share interests of states in this increasingly important area of law. By reference of the Convention, State practice would have been constrained and they will make few mistakes against language of the Convention than they would otherwise.

There are some points on states' perspective and the U.N Convention that states which have national legislations such as U.K., U.S etc. would require new legislation when they ratify U.N Convention. As a result, there is no claim of any serious defects in the current legislation which would be remedied by new legislation adopted in order to implement the new convention. As far as foreign courts are concerned, in the courts of forum state, there may be good arguments in favor of such courts applying the convention. These arguments of both states will be seemed as illustrative example. Furthermore, the effect of this new convention will depend on how is it implemented in domestic law and applied in specific situations. In the short run, one can anticipate rapid adoption by a considerable number of states currently lacking domestic statutes on sovereign immunity. For the relatively few states that already have such statutes, and particularly where domestic law has been extensively developed through judicial decision, ratification may prove a more difficult process requiring on careful consideration of existing law.⁸³ Accordingly, there has been seemed possibility of states' perspective on U.N Convention that there are various options open to the government in relation to the Convention, including ratification with reservations, or not ratifying the Convention at all. Careful consideration should be given to both of these trends. It should be recalled that some states needed an international agreement before they could introduce new domestic legislation.⁸⁴

In view of the merits and demerits of emergence of U.N Convention that mentioned above, there may be some affects in both states, forum state itself and foreign state as well. Nevertheless, states which have national legislation have been extensively developed by judicial practice not to be bound by the precise wording of the Convention on every point. However, while every states greatly welcome the appearance of U.N Convention that may seem reflection of the general development of international law, many States are currently conducting wide ranging consultation exercises on the Convention and are contemplating legislation. It is strongly recommended that States should ratify the recent U.N Convention with reservations, or non-ratification, to secure such a position. By signing and ratified of the U.N Convention, the result would be greater harmonization and compatibility within the states' judicial practices on state immunity law.

V. Desirable experiences for Myanmar from certain states' judicial practices

In Myanmar, there have no national legislation of state immunity till now. As a member of United Nations, Myanmar do need to sign and ratify the U.N Convention in some day. However, it should be considered to take a reasonable time to do signing on the U.N Convention by having adequate amount of knowledge on this subject. Therefore, Myanmar had better to look not only the precise language of the Convention but also other state practices which will be clear indications to Myanmar concerning the state immunity laws. Among the national legislations of state immunity, the provisions of the Singapore Act, the Pakistani Ordinance and the South African Act, Malaysian Act, Australian Act are close enough to the U.K State Immunity Act, which obviously served as a model law. The U.N Convention had adapted extensively some provisions from U.K and U.S law.⁸⁵ Judicial decisions in the United States and in United Kingdom have made a substantial contribution to the development and formulation of the doctrine of foreign sovereign immunity. Therefore, I have surveyed on the above mentioned national legislations and their practices especially U.K. and U.S for getting good experiences to Myanmar.

In cases where the Myanmar is involved in a transaction with a foreign State or individual, the rule of immunity would have been well established if Myanmar has her domestic law. Otherwise, the application of immunity and the exceptions to it would have been well defined, if domestic law has been enacted in Myanmar. This is important because as a least-developed country,⁸⁶ Myanmar do need to promote its foreign direct investment and Myanmar citizens investment as well for her economic development. The national interest in promoting international trade justifies the disruptions in foreign policy caused by the relatively lack of needed law in respect of investment. Also, a clear distinction can be made between government departments and officials who can claim immunity in the same way, as the state and state owned or state-managed enterprise that may be treated as private corporations. These distinctions can be clearly made when Myanmar has an Act of its own. Therefore, it is exactly said that Myanmar do need to enact its own national legislation on state immunity.

Generally, all of states adopted restrictive approach and indicated that foreign state is not entitled immunity when it involved commercial transaction. As I have mentioned above in Chapter Two- State judicial practice, their practices and considerations are quite different on immunity of suit and execution. Prominent judicial decisions of states provide workable methodology that should allow for consistency and predictability in

future applications of the Myanmar State Immunity law. By analyzing state practice, the most important to examine is distinction between act of public and private on commercial activities. As for the important criteria of commercial transactions-nature or purpose, most of states apply nature test more than purpose test, but some states use the latter one that mentioned above Chapter 3. But, the Convention' solution is to consider nature test as primary as reference of commercial or non-commercial character and purpose test should also be taken into account for immunity. Even its meaning is not very clear, and it could encourage differences in approach from one country to another⁸⁷ The Convention test is a compromise between states so that it will be a clear indication for applying in Myanmar.

Regarding with jurisdictional link with forum state, as previous discussion, U.S law nexus approach is a problematic practice in the courts e.g. Nelson case, and its employment context is questionable one. Unlike U.S law, the U.K law does not impose additional jurisdictional link; it stipulates such a requirement for some exceptions but most importantly omits it with regard to the general exception for commercial transactions.⁸⁸ But, a more stringent nature of jurisdictional requirement to be found in the employment contract exception in the U.K. law, Section 4 provides that a foreign state will not be immune where an entity of that state is a party to an employment contract made or to be performed, in the United Kingdom.⁸⁹ And then, the exercise of extraterritorial jurisdiction is applied in all proceedings falling within all the statutory exceptions. Thus, the best solution is made by U.K courts in employment context including commercial activity should be also considered to future employment agreements between Myanmar citizens and foreign governments in the commercial transactions context being taking into account along with respected national laws.

In Myanmar, some of Myanmar nationals left the country for working of a number of different types of employment in abroad including working at foreign sovereign employment. It may be expected that a number of disputes between foreign governments and their employees will be increased in future. Most Myanmar national employees instinctively may consider that their prospects of obtaining redress in the courts of Myanmar would be greater than in a tribunal of the foreign state employer. It will be pointed out that Myanmar should be improved the rights of redress for their nationals who are working for foreign sovereign employment under national laws. Therefore, it should be considered that the torture conduct exception will need to be interpreted and applied in light of established state practice, consistent with the distinction between acts *jure imperii* and acts *jure gestionis*, in order to apply to torture acts or omissions of a private nature that are attributable to the state, while preserving immunity for acts of a strictly sovereign or governmental nature.

U.K law and U.S law provide certain rather extensive exceptions to the immunity from attachment and execution of property of a foreign state. It might be emphasis once again in here that although U.S law gives many aspects of foreign sovereign immunity for the judiciary to determine, there are sometime tremendous difficulties being settled by courts. In U.S, the application of state immunity is not only on law but also court practice. Leading judicial decisions in the United States had made reasonable solutions to the development of the doctrine of foreign sovereign immunity. Nevertheless, its practice would not been consistent to seek the problems occurred in developing country due to different situations by states. It may be considered that its practice too far to be followed for applying in Myanmar as a leased- developed country. Myanmar needs to be taken certain amount of duration to do some what of a modification on legal regime regarding with foreign sovereign immunity. Basically, Myanmar legal regime had been influenced by the legal system of English as being a colonial country by British and the Courts in Myanmar follow the British practice with regarding to international law. Moreover, U.K law adopt broaden and more transparency exception for all commercial transactions than U.S law. In U.K court practice, well known leading cases had been encouraged to apply restrictive rule of state immunity by statutory enactment. However, there does not mean that U.K act and court practice are very comprehensive and conclusive at all. As a much broad sphere of foreign sovereign immunity, there may also have other unsolved problems before the court. Nevertheless, U.K law has guided as a perfect model, subject to some modifications, for subsequent legislation in commonwealth countries.⁹⁰ Otherwise, the U.N Convention has followed some extents from U.K law which even provisions are not the same at all. It may be considered that Myanmar should have some experiences of U.K courts practice, and consequently to become no difficulty in implementing such legislation by observing the way of acknowledged exceptions to be applied in court with the general norms of State immunities. Therefore, Myanmar should follow independently or otherwise following some extents of the U.K practice and recent U.N Convention' articles as model, by constrictive way to adopt foreign sovereign immunity legislation with consideration of present Myanmar situation.

Conclusion

This article has been analyzed on the current states judicial practices which will be future indications to apply in Myanmar. As the need of foreign sovereign immunity law in Myanmar, it should be observed established other state practices and legislations and scrutinized the most functional experiences among them as an accessible application for Myanmar's situations. It has been concluded the state' court practice by observing

with the following research questions;

1. Does the Court correct in applying state immunity under customary international law and in classifying the activity as act *jure imperii* and act *jure gestionis* as forum state?

Foreign sovereigns have been increasingly denied immunity since 1970s, and some exceptions, notably for commercial activities, are now firmly in practice. It is an established rule of customary international law that one state can not be sued in the courts of another for acts performed *jure imperii*. The existence of doctrine is confirmed by the relevant provisions of state which are generally regarded as reflecting customary international law. Moreover, the courts have recognized denial of immunity with consideration of criteria on distinction of act of commercial when the foreign sovereign entity takes part in commercial activities. Thus, most of states correct in applying state immunity under customary international law and in classifying the activity as act *jure imperii* and act *jure gestionis* as forum state based up on connection of act of foreign sovereign nature and territorial jurisdiction.

2. What exactly are the criteria which prevent a municipal court from hearing a case in which an individual plaintiff claims damages from a foreign state?

There are several criteria which prevent a municipal court to hear a case in which an individual plaintiff claims damages from a foreign state. First of all, nature test and purpose test are examined to determine whether the foreign state's act whether dispute is public act or private act and then the act has been classified as commercial or non-commercial. After that there has been scrutinized on jurisdictional nexus with commercial transaction in the case. But, some broad exceptions to immunity have become generally well-established, the courts views are complicated consideration of the criteria to characterize foreign sovereign act as public may be seen by another state as private. Nevertheless, the nature test and purpose test are the exact criteria to examine the act of foreign state.

3. Does the Courts give fair and adequate remedy to the contracting party who grievous and significant injustice from the application of the doctrine of sovereign immunity of state party?

Generally, the Courts give fair and adequate remedy to the contracting party who grievous and significant injustice from the application of the doctrine of sovereign immunity of state party. Nevertheless, the court sometime have not reached satisfied conclusion to the contracting party because of vague worded legislations that may make difficult questions for solution in the courts. The court become difficulty to determine whether

foreign sovereign immunity should be stripped or not based upon very broad and complicated exceptions to immunity.

4. What is states' attitude on recent UN Convention?

The rules on state immunity are complicated and very technical. They can affect business and individual, and should be well versed and discussed when governments are going to take the decision whether to sign and ratify the recent UN Convention or not. However, there may be occurred rapid adoption by a considerable number of states currently lacking domestic legislations on sovereign immunity. For the relatively few states that already have such legislations, and particularly where domestic law has been extensively developed through judicial decisions ratification may prove a more difficult process requiring careful consideration of existing law. However, States should ratify the recent U.N Convention with reservations, or non-ratification, to secure such a position. The result would be greater harmonization and compatibility within the states' judicial practices of state immunity law.

5. What experience will be beneficial from states' judicial practices which have already had national legislations to Myanmar which currently lacking domestic statute on state immunity?

As discussed on Chapter 5, several experiences will be beneficial from states' judicial practices to Myanmar which currently lacking domestic statute on state immunity. Among the state practices, English courts practice and U.K. law will be more appropriate for application of state immunity in Myanmar. Finally, this article concludes by proving that emergence of foreign sovereign immunity legislation in Myanmar would be justifiable not only in the context of national laws, but also as a matter of international law.

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