STATE IMMUNITY: A VANUATU PERSPECTIVE

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A. ACKNOWLEDGEMENT.

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B. METHODOLOGY

This can be divided into two parts:

i Method of data collection

Library research was the main method of data collection. I gathered most of my primary and secondary material from the USP library. The State Law Office provided some useful information on the latest enacted government legislation and treaties that Vanuatu has ratified. The Internet, Lexis, Wilson's index, Australian case base, library catalogue and microfiche also provided useful materials. However, most of the material collected were either out of date or had nothing to do with Vanuatu. The latest literatures I have managed to get hold of were 1998.

Apart from library research I consulted Mr. Arthur Faerua from the State Law Office and Nesbeth Wilson from the Magistrate's Office to find materials on Vanuatu. Their response was useful. My course supervisor, Prof. Bob Hughes and Ms. Anita Jowitt also supplied some relevant material. A lot of feedback was also gathered from discussions with my fellow colleagues, lecturers, my course supervisor,

Professor Hughes and Mr. Faerua from the State Law Office.

ii Method of analysis

The method I used to present my data was both descriptive and critically analytical. I intended to present my paper by describing the development and common law application of state immunity and then analyze its position in Vanuatu. That is important in order to arrive at a conclusion that reflects a strongly held viewpoint.

C. ABSTRACT

State immunity covers the state, its officers and agencies. Traditionally, a state is immune from all judicial processes of its own courts and the courts of other States. This was the absolute approach. Later on, the courts developed the restrictive approach to distinguish act of governmental nature to that of commercial nature because of the increase in state trading activities. This is the current approach to state immunity. For Vanuatu, its position is unsettled because there is no case law or legislation that specifically addresses the subject matter. Therefore, there is a need for reform on state immunity in Vanuatu.

1.0. INTRODUCTION

State immunity is a principle of international law. The law on state immunity was initially based on the absolute principle and was a well-established rule in international law. However, this rule created complications[i] because it was difficult to distinguish clearly between agents of the state that are not immune and state agencies. In the Trendtex Trading Co v Central Bank of Nigeria[ii], the Court of Appeal developed the restrictive theory. With the increase in state trading activities the restrictive immunity principle became favorable because it helped draw the line in between activities of states that are immune and those that are not. Many countries have adopted the restrictive approach either by way of legislation or case law. The UK is a fine example.

This therefore forms the premise of this paper. That is, to look at state immunity and then analyze what Vanuatu's position would be. The structure of the paper is as follows: Part 1: Introduction, Part 2: Development of the concept of state immunity, Part 3: State immunity under common law, Part 4: Laws governing state immunity in Vanuatu, Part 5: The scope of state immunity, Part 6: Some arguments in support of state immunity, Part 7: Suggested Reform, and Part 8 is the Conclusion.

2.0. DEVELOPMENT OF THE CONCEPT OF STATE IMMUNITY

2.1. Concept of State Immunity

Before going into any substance, it is best to begin with an explanation of 'state immunity'. On a preliminary note, sovereignty is an attribute of the State. Therefore, 'sovereign immunity' means the acts of a Sovereign or a State that are immune. Sovereign or state immunity mean the same thing and are used interchangeably.

State immunity is a concept whereby one State is disallowed to exercise jurisdiction over another State without that State's approval. As Morton puts it "immunity is [the] right to do something that other persons have no right to do."[iii] Under the doctrine of 'par in parem not habet imperium'[iv] all States are equal.

State immunity is a concept that is confined to States alone. It also extends to the sovereign of the State acting in his/her public capacity and any other department of its government.[v] As Lord Atkin observed:[vi]

[T]he courts of a country will not impede a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages.

2.2. Historical Background

The international concept of state immunity initially developed out of the decisions of municipal courts. Doctrinal opinions and international conventions later became instrumental in the process of moulding the rules of 'state immunity'. A municipal case that can be cited as one of the landmark authorities of the concept of state immunity is The Schooner Exchange v M'Fadden and others (US Supreme Court Reports, Vol VII at 287/289). In that case it was said:[vii]

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction and an extent in that power which would impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced to the consent of the nation itself. They can flow from no other source.

The starting point of state immunity is the local State's exclusive territorial jurisdiction. The purpose is to encourage the functioning of the government by protecting the State from the burden of defending litigation abroad. As a result State activities were only limited to the public sphere. Thus, States should not be required to litigate in foreign courts unless there is consent.[viii] It is only from the will of a local State that litigation can be determined."[ix]

A State is protected under the classic absolute theory of immunity.[x] In the words of Lord Cotterham L. C:[xi]

... the acts could not have been done, and were not done, in any private character but ... were done, whether right or wrong, in the character of the sovereign of a foreign state.

Clearly, under the absolute rule of state immunity, immunity can apply to any activity that has the character of State involvement.

During the twentieth century when governments became involved in commercial transactions there were complications. As a result, Courts became cautious about the granting of immunity for all activities, whether governmental or commercial[xii] by drawing the distinction between those State activities that are public[xiii] and those that are private.[xiv] They were labeled in Latin as: acta jure imperii and acta jure gestionis.[xv]

English courts began to develop a doctrine of restrictive immunity at common law as a consequence of greater involvement by States in commercial activities. The move to modify the absolute immunity rule was basically to impose a strict application of immunity only to government acts. The rationale behind this was exposed by Lord Mustill in Kuwait Airways Corporation v Iraqi Airways Co[xvi] as:

Where the sovereign chooses to doff his robes and descend into the market place he must take the rough with the smooth, and having condescended to engage in mundane commercial activities he must also condescend to submit himself to an adjudication in a foreign court on whether he has in the course of those activities undertaken obligations which he has failed to fulfil.

3.0. STATE IMMUNITY UNDER COMMON LAW

3.1. Overview

At common law the application of the rule of state immunity is now well defined. Initially, it was the absolute theory, however, through judicial decisions Commonwealth countries have moved on to adopt a modified version of the concept of state immunity known as the restrictive theory.

3.2. Absolute Theory

Absolute state immunity is an established rule of international law. It gives the states and its agencies total immunity on the condition that they did not have a separate personality from their governments.[xvii] The absolute rule was increasingly perceived as anomalous of government participation in business matters and it was difficult for the courts to move away from it because of the binding force of earlier decisions of the House of Lords.

The first move by the courts to expand the absolute rule occurred in relation to actions in rem. This was discussed in the Philippine Admiral case. Later, in Trendtex Trading Co. v Central Bank of Nigeria [xviii] the principle was developed a step further. In that case, Stephenson and Shaw LJJ, were both mindful about the undesirability of extending immunity too far.

Stephenson L.J at 595 expressed his view this way: "English Courts should be extremely careful not to extend sovereign immunity to bodies ... not entitled to it."[xix] On the facts, their Lordships held that the defendant (i.e. the Nigerian Bank) had not established an entitlement to immunity. Lord Denning in delivering his judgement made it clear at 595 that "...there is no immunity in respect of commercial transaction, even for a government department."[xx]

After the Trendtex case many countries realized that legislation was necessary. Thus the law in this area was placed on statutory footing by many countries. UK is a good example. It passed a legislation to significantly reflect the shift from the absolute theory to a restrictive one.[xxi]

3.3. Restrictive Theory

The trend in practice under common law indicates that the courts have moved towards the restrictive doctrine. Before the UK State Immunity Act 1978 came in force the British courts had already taken a change in approach. This was reflected in The Phillippine Admiral [xxii] and Trendtex Trading Corporation Ltd v Central Bank of Nigeria.[xxiii] In the latter case, Lord Denning delivered an important judgement (discussed in 2.2 above). In that case, the Court of Appeal stated "restrictive immunity was now firmly established as a rule of customary international law and it could therefore be incorporated into the common law without need for Act of Parliament."[xxiv]

This proposition was affirmed in I Congreso del Partido.[xxv] In that case, Lord Wiberforce at 1071 cited:

[a]s 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 resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on 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.

From that premise it is apparent that under the restrictive rule states may only enjoy immunity from the jurisdiction of local courts only in regard to certain classes of acts. Thus a distinction needs to be made between acts jure imperii and acts jure gestionis. Acts jure imperii are acts of a sovereign nature and are subjected to immunity. Acts jure gestionis are commercial acts in respect of which the state is not immune but is subject to the jurisdiction of the territorial sovereign. The distinction is significant because it draws

the line to show the situation whereby a state can be treated as a normal litigant and as a sovereign when it exercises power of sovereign.[xxvi] In effect, the restrictive theory provides that a state should have immunity only when it is acting as a state despite being involved in a variety of capacities.

Today, the restrictive theory appears, to be well founded in common law. Many commonwealth countries have adopted it because "[I]n practice it has the advantage of providing a remedy for aggrieved individuals while at the same time encouraging growth of trade and commerce".[xxvii] It is on that basis that it is imperative that a clear distinction must be drawn between acts of sovereign nature (i.e. jure imperii) and acts of a commercial nature (i.e. jure gestionis). Courts do this by considering the purpose of the transaction, its nature and subject matter (see Trendtext case).

4.0. LAWS GOVERNING STATE IMMUNITY IN VANUATU

From the previous two chapters the focus was on the development and common law approach to state immunity. This chapter seeks to explore that approach but from a Vanuatu perspective by looking at the laws that may govern state immunity.

4.1. Vanuatu's position on immunity

In Vanuatu there is still no case that requires the courts to adopt a position on the concept of State Immunity. Neither is there any enactment to clearly show Vanuatu's position on the matter. Since there are no specific legislation available to ascertain Vanuatu's position on state immunity the only option is to look at the common law. The Constitution provides for this.[xxviii]

Under common law it appears that after the decisions in the landmark cases such as Phillippine Amiral and Trendtex Trading Cooperation the doctrine of restrictive immunity became well founded and many countries such as Great Britain,[xxix] the USA,[xxx] Canada[xxxi] and Australia[xxxii] seem to adopt this approach. For example, under the Australian Foreign States Immunity Act 1985 it followed the British Model by providing basic immunity and outlining the exceptions.

It appears that Vanuatu's position may be towards the restrictive doctrine as established under common law because of the recognition given to it by the Constitution. However, this is yet to be verified because in any case it is up for the courts to determine this matter because in a practical setting it is never easy to determine what exactly is the position of Vanuatu. Realistically, Governments do not like to be sued, especially in their conduct of foreign or domestic matters.[xxxiii]

Despite no specifically enacted legislation, existing laws of Vanuatu can still be looked at. Certain Acts such as the Official Secrets Act 1980 and the Government Act 1998, the English Common Law, Statutes of General Application and International Law appear to be useful for trying to workout Vanuatu's exact position on state immunity. The identified legislation may also help in defining the extent to which Vanuatu can be immune both domestically and internationally.

4.2. Laws of Vanuatu

4.2.1. Official Secrecy Act 1980[xxxiv]

This Act deals with government officials. It provides for the preservation of the secrets of the Government. By virtue of section 2 of the Act it provides that officers in service of the Government can be prosecuted if they wrongfully communicate classified materials or information. Section 3 (2) further states "it shall be no defence for a person charged with an offence under [the Act] to prove that his section was not complied with." Thus, it appears that the Act provides for instances where officials of the government may be sued but it does not stipulate whether government officials can claim immunity under the Act.

4.2.2. Government Act 1998.

The purpose of this Act is to provide for the role, effective management, and responsibilities of the Executive Government. That means any person acting for the State can be subjected to litigation once there is a breach of the Act. Under section 9 (4) of the Act it is stated that any Minister (including Prime Minister who interferes or attempts to interfere in Public Service employment issues relating to the Teaching Service Commission, Judicial Service Commission and Police Service Commission) can be litigated by the Courts. This indicates that the Act provides for situations whereby government officials may face litigation but it does not mention any thing on state immunity.

4.3. Introduced Laws.

4.3.1. English Common Law.

Common law is also important because it establishes the extent to which a State can be immune from suit. The Constitution by virtue of Article 95 (2) recognizes its application by providing:

Until otherwise provided by Parliament, the British ... laws in force or applied in the New Hebrides immediately before the day of independence shall on and after that day continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and whenever possible taking due account of custom.

4.3.2. Statute of General Application.

British Acts of Parliament that are of 'general application' should be considered also if they are appropriate to the circumstances of Vanuatu. The statute of general application cut off date for Vanuatu is 1st January 1976. Therefore, the Crown Proceedings Act UK, 1947 appears to be applicable. Part I of the Act gives a subject the right to proceed against the Crown.

Section 2 of the Act provides:

[T]he Crown shall be subject to all liabilities in tort to which, if it were a private person full age and capacity, it would be subject: (a) in respect of torts committed by its servants or agents; (2) in respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer; and (c) in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.

Part II of the Act deals with jurisdiction and procedure, Part III of the Act provides for judgements and execution by or against the Crown while Part IV contains a number of miscellaneous provisions. Significantly, it appears sovereign immunity comes into play when the State is sued by a private individual.

Generally, the Official Secrets Act and the Government Act deal with situations where government officers can be prosecuted while the English common law addresses activities of the State. However, neither of the laws provided what Vanuatu's position is on state immunity. Even the common law can be problematic because not all common law principles are applicable unless they are consistent with the local circumstances. With the UK Crown Proceedings Act it deals with activities of the Crown. While this may be useful for determining the extent of proceeding claims against the State it should be noted that Vanuatu is not a Crown therefore, it can be argued that the Act is not meant for Vanuatu. Notably, while the existing laws do appear to determine the extent to which Vanuatu, its government officers and agencies can claim immunity there is no clear distinction to show the exact position of Vanuatu on state immunity.

4.4. International Law.

In International law, the premise upon which state immunity is based on is "a nation cannot be sued without its consent." [xxxv] This seems to be the practice in the era where state immunity had not limitations. A case authority that is useful for understanding this concept of unlimited state immunity is Schooner Exchange v M'Faddon.[xxxvi] Nowadays, the application of state immunity has become restricted.[xxxvii] International law no longer recognizes that States are immune from all suits. Significantly, this demonstrates the extent to which immunity from suit can be allowed in International law.

It is therefore necessary that a distinction regarding when the rules of International law can come into play as compared to the domestic laws must be determined.[xxxviii] One way of doing this is by considering international treaties. Generally, when a state ratifies a treaty it attains an international responsibility. This indicates the circumstances where legal responsibilities can be established once a state violates its international obligation. [xxxix]

Article 1 (Part 1) of the International Law Commission Draft Articles describes this as "[e]very internationally wrongful act of a State entails the international responsibility of that State and this applies to all States..."[xl] Likewise, responsibility occurs when the state ill treats the nationals of another state or violates legally binding decision of a competent international organization such as the Security Council.[xli] State responsibility comprises of; (1) an unlawful act and (2) an unlawful act attributable to the state.

Vanuatu has ratified a considerable number of multilateral or bilateral Treaties or Conventions. The following are some of the examples;

i) Multilateral treaties.

a) Convention for the unification of certain rules relating to international carriage by air. Warsaw, October 12, 1992 (ratified by the Civil Aviation Conventions) Act, Cap. 137.

b) International Convention for the prevention of pollution of the sea by oil, 1954 (ratified by the Maritime (Conventions) Act, Cap 155).

c) Convention on the International Regulations for preventing collisions at sea, 1972; as amended (ratified by the Maritime (Conventions) (Amendment) Act No. 17 of 1988).

d) Vienna Convention on Diplomatic Relations, Vienna, 1961 (Ratified by the Diplomatic Privileges and Immunities Act, Cap 143).

e) Convention on the Rights of the Child, New York, 1990 (ratified by the Convention on the Rights of the Child (Ratification) Act No. 26 of 1992).

ii) Bilateral Treaties.

f) Agreement on Economic and Technical Co-operation between the government of the Republic of Vanuatu and the government of the People's Republic of China (Ratification) Act No.1 of 1995.

g) Loan Agreement (Comprehensive Reform Program) between the Republic of Vanuatu and the Asian Development Bank Approval Act No. 17 of 1998.

Both the multilateral and bilateral treaties are significant because they establish the mutual rights and obligations of Vanuatu internationally. The multilateral treaties are the international agreements between other States and Vanuatu. The bilateral treaties are agreements that Vanuatu has ratified in order to be

bound by when contracting with another State or entity.

The ratifying of the treaties by Vanuatu shows its intention to create new rules so that it comply with when dealing with other States or entities. The ratified treaties that form the premise for its rights and duties on the international place thereby determining the extent where it can be protected from suit/litigation.

However, there is no fine line that shows Vanuatu's position on immunity. While there is indication that the above identified treaties have been adopted and accepted by the domestic laws of Vanuatu there is uncertainty whether international law in its fullest extent

is approved as part of the laws of Vanuatu. As it appears, the international law treaties help determine the rights and responsibilities of Vanuatu but the issue on state immunity is not satisfactorily established. Vanuatu's position on the immunity principle remains an issue for debate because there is no specific enacted legislation or case law to show what should be the approach for Vanuatu.

5.0. THE SCOPE OF STATE IMMUNITY

5.1. Responsibilities and liabilities

Initially, State responsibilities and liabilities can be used interchangeably when determining the extent to which immunity can be applied. However, according to the International Law Commission the two terms are distinct; a) responsibility refers to cases involving a breach of obligation and b) liability refers to activities that are otherwise lawful or involve no wrongful acts.[xlii]

The two terms are multifaceted in their meaning in treaties and judicial practice. However, the most common use of 'responsibility' concerns the obligation of States, and 'liability' refers to breach of those obligations and the consequences that may arise from that breach. This interpretation is derived from the Law of the Sea Convention 1982.

That Convention by virtue of Article 139 (1) & (2) expressed:

"State Parties shall have the responsibility to ensure that activities ... shall be carried out in conformity with this Part. [D]amage caused by the failure of a State Party ... to carry out its obligation under this Part shall entail liability."

The International Law Commission is of the view that in order to establish international liability, the primary and secondary obligations of a State must be determined. However, according to legal commentators such as Browlie, the view taken by the International Law Commission regarding State responsibility and liability is towards an objective or risk responsibility approach. That is, if acts complained of are attributed to the State then it is subjected to liability if there is a breach.[xliii] The most used judicial precedent that applies this objective test is Caire Claim.[xliv]

In that case, Caire a French national was asked to obtain a large sum of money by a major in the Mexican army. He failed to do so thus he was arrested, tortured and killed by the major and a some soldiers. France pursued a claim against the Mexican government and was successful. In the judgement of Verzijl, he supported the objective responsibility of the state by holding that a state is responsible for the acts of its officials and organs.[xlv]

Verzijl held a state to be responsible by expressing:

... for all the acts committed by its officials or organs which constitute offences from the point of view of the law of nations, whether the official or organ in question has acted within or exceeded the limits of his

competence ... [provided that] they must have acted at least to all appearances as competent officials or organs, or they must have used powers of methods appropriate to their official capacity.[xlvi]

On the other hand, a number of writers, especially Hersch Lauterpacht, argue that State responsibility relies on some element of fault. "Such fault is often expressed in terms of intention to harm (dolus) or negligence (culpa). [xlvii]A number of cases do support this subjective view.

A fine example is the Home Missionary Claim.[xlviii] That case concerns a rebellion in the British protectorate of Sierra Leone. At the time of the rebellion the property of the Home Missionary Society was destroyed and damaged. The US brought a claim on behalf of the aggrieved party. The claim was dismissed by the tribunal and held:

It is well established principle of international law that no government can be held responsible for the act of rebellious bodies of men committed in violation of its authority, where it is itself guilty of no breach of good faith, or of no negligence in suppressing insurrecting.[xlix]

Corfu Channel (Merits)[l] is another case in support of subjective responsibility. The case involved the sinking of a British warship in Albanian territorial waters by a mine. Firstly, UK brought proceedings by claiming that Albania planted the mine although there was little evidence on this point. Hence, it relied on the argument that mine could not have been laid without the knowledge of the Albanian authorities.

"The International Court of Justice found that the laying of the mines could not have been achieved without the knowledge of the Albanian government. [Thus], Albanian's failure to warn British naval vessels of the risk of mines gave rise to international responsibility."[li] When delivering the judgement the Court held:

It cannot be concluded from mere fact of the control exercised by a state over its territory and waters that that state knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.[lii]

Accordingly, it appears that the debate regarding the nature of state responsibility arises because of the attempt to equate objective responsibility with the municipal doctrine of strict liability. Therefore, discussion of state responsibility in isolation would be problematic as highlighted by Philip Allot:[liii]

It the terms of legal analysis, wrongdoing gives rise to a liability in the offender owed to others who have rights which may be enforced by legal processes. Liability is not a consequence of some intervening concept of responsibility. It is a direct consequence flowing from the nature of the wrong ... and the nature of actual wrongful act in the given case.

In situations that involve individual cases liability is established once there has been breach of the obligation. Browlie explained this as:[liv]

It must always be borne in mind that the rules relating to state responsibility are to be applied in conjunction with other, more particular rules of international law, which prescribe duties in various precise forms. Indeed, the basic concept of particular legal duties ... The relevance of fault, the relative 'strictness' of the obligation, will be determined by the content of each rule ... it would be pointless to embark on an examination of a question, framed in global terms, whether state responsibility is founded upon fault (i.e. culpa or dolus) or strict liability: the question is unreal.

The discussion here concerns how a State can be held responsible or liable on the international plane if it

breaches its duty or it involves in an unlawful act. This seems to be the law but its application to Vanuatu can only be determined by the international law treaties that Vanuatu has adopted. As it appears, the treaties that Vanuatu has ratified may assist to determine the extent to which it can be held responsible or liable but they do not indicate whether Vanuatu can claim immunity or what approach it should take.

5.2. Areas subject to immunity

The rules of immunity protect a State from direct proceedings that are brought against it. This extends to cover proceedings against its property as well. Also in situations where the State is not named as a party, but which an action in rem is brought against a ship or action against the State's bailee or its agent the rules of immunity may apply. Apart from the application of immunity to State owned property, the rule also applies to cases where the State has a lesser interest, such as possession, or merely under requisition and those in control of the property who hold it for the State.[lv]

In cases where the State is entitled to immediate possession of a chattel in the hands of its bailee then that indicates sufficient control. This also applies to choses in action, and where the agent of the State is the legal owner the court is barred from inquiring into the beneficial title against the wishes of the State even though the State may or may not claim a beneficial interest. However, if the State claims interest in the property in an action against the property it must produce evidence (1) that its claim to an interest is not illusionary or manifestly defective; and (2) to establish an arguable issue. Only then that the State can be in a position to claim immunity in respect of that property.[lvi]

State trading activities are also subject to immunity. Traditionally, a court had no jurisdiction over the activities carried out by another State because it enjoys immunity from jurisdiction.[lvii] However, now a days where States and private individuals alike both take part in international trade, that is both can buy and sell, manage or charter ships and commission works[lviii] this immunity from jurisdiction has restricted. Therefore, in trade States can only be immune from jurisdiction in circumstance where the activities are governmental in nature (acta imperii). If the activities are commercial activities (acta gestionis)[lix] then state immunity is restricted and the State is subject to litigation.

This appears to be the current pattern that courts are following in determining the areas that the State can be immune from jurisdiction. For Vanuatu, the existing laws that have been identified and international law can assist in determining the areas where the State can either be sued or not. However, the Acts did not specify whether the areas they have identified as subject to prosecution or not also extends to cover areas that the State can be immune from jurisdiction. There is no clear indication on this issue for Vanuatu, therefore even though the area subject to immunity can be identified this is not conclusive for Vanuatu because its position on state immunity remains uncertain.

5.3. Situations that are not subject to immunity

It has been said that "[t]here is no absolute rule that a foreign sovereign/state cannot be impleaded in the English courts in any circumstances."[lx] This is because it is not entirely clear in what situation the plea of immunity is not available. In some cases, where a State is involved in administering a trust fund, the Court of Chancery shall make a State a formal party to proceeding. This is to give an opportunity to the State to defend itself. Also, in circumstances where a company is winding up the court may make an order despite a State having an interest in the surplus assets. It is possible that a court may entertain an action against a foreign sovereign or State in respect of private property owned by it in England in its private capacity.

In cases where there is waiver of immunity a State must submit itself to the jurisdiction of the court. "This may be done ... in situations where a State enters an unconditional appearance to the action begun against it, full knowledge of its right to immunity and with proper authority from the competent organs of the

State."[lxi] The waiver comes into effect at the time when the court is asked to exercise its jurisdiction, or from an agreement to submit to arbitration, or from an application to set aside an arbitration award. Thus:

"Costs awarded cannot be recovered by execution, and even if the State has submitted to the jurisdiction it does not thereby waive the right to remove its property from the jurisdiction. Submission to the jurisdiction for the purpose of determining liability does not constitute submission for the purpose of execution. By suing, a foreign State submits to the jurisdiction for the purpose of an appeal against decision in its favor."[lxii]

As provided in the Crown Proceedings Act UK, 1947 the State can be sued in a tort therefore implying that immunity can not be relied on. This appears to be the traditional practice that the courts have followed. A good municipal case authority in support is Qualao v The Government of the Republic of Vanuatu. The defendant in that case was the State/Government of Vanuatu. This was because one of its employees, a medical doctor was alleged to be negligent when treating the plaintiff. Thus, an action was brought against the defendant.

The court held that the defendant as the controlling authority of the Vila Central Authority and employer of the medical doctor owes the hospital patients a duty of care. The issue before the court was whether the State as the defendant breached that duty through the actions/omissions of its servants, agents or other people engaged by it. In the ruling, the defendant was held liable for the death of the plaintiff and had to pay for damages. This case illustrates an area whereby the State can be held responsible for the acts of its agents/servant or employer once there is a breach of the duty of care. This case is a good precedent for determining circumstances whereby the State of Vanuatu can be held liable for the acts of its officers or agencies through the judicial process of its own courts. However, this does not indicate Vanuatu's position on immunity but rather signifies an exception to the immunity rule. That is, States could not be immune in a tort action .

6.0. S0ME ARGUMENTS IN SUPPORT OF STATE IMMUNITY

There are three main arguments that are relied on to support the contention on why state immunity should be retained by States.

Firstly, immunity is genuine because it signifies the principles of independence, equality and dignity of States[lxiii] that have been embedded in international law. It is from these principles that the maxim "par in parem non habet imperium" is derived.[lxiv] That is, "all sovereigns [are] considered equal and independent."[lxv] Therefore, in order to safeguard the independence, equality, and dignity of States it is important that immunity should be upheld in order to clearly outline what are the responsibilities and obligations of States internationally.

Secondly, the rule of sovereign immunity is a principle of international law.[lxvi] It is well established as part of a customary rule of international law. Thus, making it valid and binding.[lxvii] The validity of immunity as part of customary international law is derived from two elements; a) material element and b) psychological element. The material element refers acts and practices of States and the psychological element refers to the subjective conviction held by States that the behavior in question is compulsory and not discretionary.[lxviii] Therefore, since immunity is a well-founded principle under international law this gives it the force to be valid and binding upon States.[lxix] Thus, a clear distinction can be made regarding when a State can be held responsible or liable.

Finally, with the increase of State activities in the economic circles it has influenced the rule of immunity to be well established unlike in the past where there were difficulties because of the application of immunity without restriction. It may not be wholly justified if the state enjoyed immunities in all

circumstances because that would be unfair to its trading partners. However, given the current trend where countries have restricted the possibility of immunity for a foreign State in their jurisdiction either by way of legislation or court decisions, there is justification that it has now become well founded. This gives an added impetus for clearly determining State responsibility and international liability because the principle of state immunity has become well defined because of the restrictive approach.

7.0. POSSIBLE SUGGESTED REFORM

Historically the principle of State immunity as originally applied by courts was intended to protect the political activities of States as a sovereign entity. However, that has created inconveniences and injustices during the time when the State extended its activities into commercial, industrial and similar spheres because both States and private individuals become involved in international trade. Like private individuals, States also buy and sell good and manage or charter ships or commission works.[lxx]

Consequently, this had an impact on the approach taken by the courts. They had to move away from the absolute to the restrictive doctrine of immunity because of the growing participation in business matters by the Government. The first step taken by the courts was in relation to an action in rem in the Phillipine Admiral case. The next step was taken in the Trendtex case and it was obvious that legislation was necessary for purposes of clarifying the issue of State immunity. Thus, the UK passed the State Immunity Act 1978 to clearly show its position in relation to State Immunity followed by Australia and other Commonwealth countries.

However, in Vanuatu it is apparent that there is no specific locally enacted legislation or case law on state immunity to clearly show its position. While the existing laws of Vanuatu may assist in determining the extent to which the State, its officials or agencies can be sued or be held liable, non-of them addresses the doctrine of state immunity. For example, the Crown Proceeding Act 1947 UK covers areas where proceedings by and against the Crown can be made but it provides no help for determining what is Vanuatu's position on state immunity. This is because the Act is outdated since it does not reflect the current common law position on state immunity. Even with the common law what it does is provide the law on state immunity but it does not determine the kind of immunity approach that Vanuatu should take.

Therefore, as a means to get around this problem it is suggested that Vanuatu should have its own enacted legislation that deals with state Immunity. With that, the law regarding immunity in Vanuatu can be clearly established in order to determine the situations where the independent State of Vanuatu can either be immune or not. Otherwise a similar problem faced by Papua regarding the Sandline issue where it had to pay millions of dollars because its position on state immunity was not defined properly might be repeated.

In cases where the State of Vanuatu is involved in a transaction with a foreign State or individual the rule of immunity can be well established once Vanuatu has an Act of its own. This is important because as a small island country, Vanuatu needs to maintain its independence, equality, and dignity both domestically and internationally. By having an Act, the presumption of immunity and the exceptions to it can be well defined. Also, a clear distinction can be made between government departments and official 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 clearly be made once Vanuatu has an Act of its own because it would make it easier to determine the responsibilities and obligations of Vanuatu domestically and internationally.

8.0. CONCLUSION

State immunity is a concept that concerns a State, its governmental officers and agencies. The basic issue that this concept addresses is whether a state is immune from judicial processes of its own courts and courts of other nations.[lxxi] Traditionally, courts had no power to rule on any matter that a State is a party

to because of the absolute rule of state immunity. This approach was later restricted when the issue of state immunity arose in the Trendtex. Afterwards, the restrictive approach became well-founded in common law. Thus, today only acts of sovereign nature (i.e. jury impair) are subject to immunity while acts of commercial nature (i.e. jure gestionis) are not.

In Vanuatu, there are no available case law or enacted legislation to show its position of on state immunity. Although there are existing legislation in Vanuatu that determine areas where the State, its officials or agencies can be sued, none of them draw the line between the common law approach and Vanuatu's position on state immunity. Frankly, it is necessary for Vanuatu to have a State Immunity Act in order to reflect its legal position on state immunity both domestically and internationally. Until there is a reform the contention that this paper holds is 'there is a state immunity vacuum in Vanuatu and its position remain unsettled'.

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ENDNOTES:

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[i] V.H. Houtte , 'The Law of International Trade', (1998) 33.

[ii] [1977] 2 WLR 356.

[iii] F Przertacznik, Protection of Officials of Sovereign States according to International Law (1983) 10.

[iv] What the doctrine basically means is that one can not exercise authority over an equal.

[v] Dicey & Morris, The conflicts of Law (1993) v1, 243.

[vi] The Cristina [1938] AC 485 at 490.

[vii] G.M. Badr, State Immunity: An analytic and prognostic view (1984) 11.

[viii] J Hill, 'The Law Relating to International Commercial Disputes' (1998) 26/7.

[ix] Ibid.

[x] Encyclopaedia Dictionary of International Law (1986) 369.

[xi] Above, n7, p15.

[xii] Above, n5, p241.

[xiii] Public activities are those activities that the State may reasonably expect to be immune from legal proceedings in a foreign court.

[xiv] Private activities are activities that are commercial in nature and the State cannot reasonably expect to

be immune from litigation.

[xv] 'Acta jure imperii' means 'acts of government'. On the other hand, 'acta jure gestionis' means 'acts of commercial nature'.

[xvi] [1995]1 WLR 1147, 1171.

[xvii] I Shearer, 'Jurisdiction', Blay S et al (ed), Public International Law: An Australian Perspective (1997) 185.

[xviii] [1977] 2 WLR 356.

[xix] [1977] Llyoyd's Rep 581.

[xx] Ibid.

[xxi] Above, n8, p27.

[xxii] [1977] AC 373.

[xxiii] [1977] 2 WLR 356.

[xxiv] T Hillier, 'Source book on Public International Law' (1998) 290.

[xxv] [1981] 2 ALL ER 1064.

[xxvi] M Dixon, 'International Law', 3rd edn (1996) 160.

[xxvii] Ibid, p161.

[xxviii] See Article 95 (2) Constitution of Vanuatu.

[xxix] See UK's State Immunity Act, 1978.

[xxx] See USA's Foreign Sovereign Immunities Act 1976.

[xxxi] See Canada's State Immunity Act 1982.

[xxxii] See Australia's Foreign State Immunity Act 1985.

[xxxiii] Jr Fox, 'International Commercial Agreements' (1998) 244.

[xxxiv] Cap 111.

[xxxv] R.W Slomanson (1990) 55.

[xxxvi] (1882) 11 US (7 Cranch) 116.

[xxxvii] Above, n1, p33.

[xxxviii] Above, n24, p33.

[xxxix] Above, n26, p218.

[xl] Ibid.

[xli] Ibid, p220.

[xlii] A. E. Boyle, 'State Responsibility and International Liability for injurious consequences of Acts not prohibited by International Law: A necessary distinction' (1990) 8/9.

[xliii] Above, n24, p338.

[xliv] (1929) RIAA 575.

[xlv] Above, n43.

[xlvi] Ibid.

[xlvii] Ibid.

[xlviii] (1920) RISS42.

[xlix] Ibid.

[l] [1949] ICJ Rep at p4.

[li] Above, n26, p339.

[lii] Ibid.

[liii] Ibid, p340.

[liv] Browlie, "The System of the Law of Nations: State Responsibility (1983) 40.

[lv] Halbury Laws of England (1977) para 1550 at 796.

[lvi] Ibid, para 1551/2 at 796.

[lvii] Above, n1.

[lviii] Ibid.

[lix] Above, n55, para 1553 at 797.

[lx] Ibid, para 1554 at 798.

[lxi] Ibid, para 1555 at 798.

[lxii] Ibid.

[lxiii] H Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States' (1951) 221.

[lxiv] Above, n17, p184.

[lxv] Above, n24, p288.

[lxvi] M Pryles et al, 'International Trade Law' (1996) 1091.

[lxvii] Above, n63.

[lxviii] Above, n24, p66.

[lxix] Above, n63.

[lxx] Above, n1, p32/3.

[lxxi] Above, n35, p55.