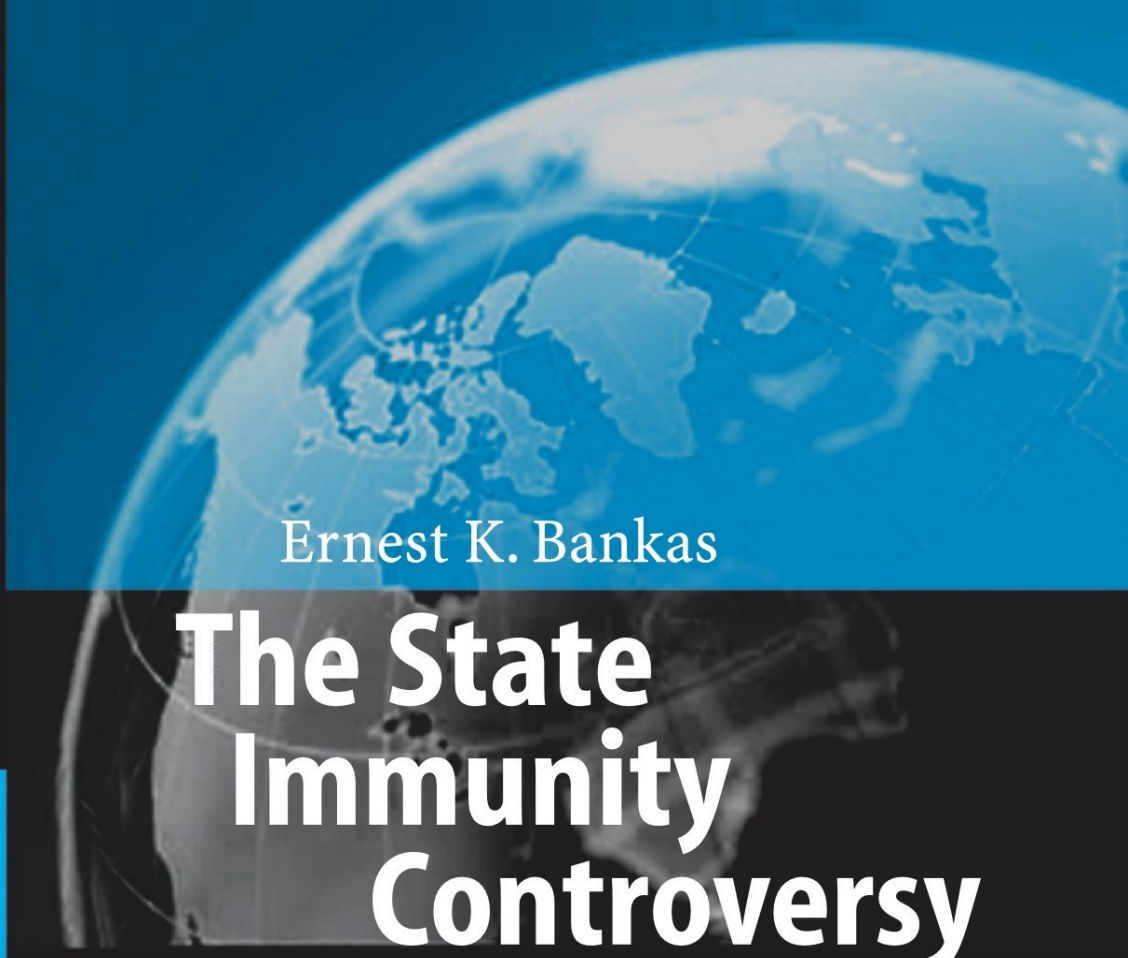

Ernest K. Bankas

The State Immunity Controversy in International Law

Private Suits Against Sovereign States in Domestic Courts

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Dedication

Dedicated to my Parents:

Darling Dzah and Joseph S.K. Bankas – popularly known as "Shall Pass" – for their love, kindness and support

Specially to my lovely wife, Maureen, and children, Krystle Mawuse Abra Bankas, Latasha Nukunya Ama Bankas; the twins, Alison Akofa Yawa and Alethea Akpene Yawa Bankas, and Joshua Kofi Tawiah Bankas – for their love, kindness and encouragement.

I remain indebted to my wife for her encouragement and patience through all these years. Her contribution to the writing of this book is immeasurable, for she always kept the fort whilst I was away studying and conducting research at the University of Durham Faculty of Law, and the World Court (The Hague). A substantial part of the study was done at the University of Durham, UK, Great Britain.

Again, special thanks to my family and I shall forever be grateful. When the cock crows early tomorrow morning, be advised that Ernest Kwasi Bankas is still saying thank you.

February 23, 2005

Preface

Prior to 1900 the immunity of sovereign states from the judicial process and enforcement jurisdiction of municipal courts was absolute and this in the main *ex hypothesi* was derived from two important concepts, namely sovereignty and the equality of states. Sovereignty may be defined as the power to make laws backed by all the coercive forces it cares to employ. This means that a sovereign state has what can be known as *suprema potestas* within its territorial boundaries. Jean Bodin was the first of writers to propose this idea of sovereignty, but in his exposition of this notion, he undoubtedly created a confusion about the *leges imperii* which arguably turned out to be a starting point for the long controversy between what can be denoted as analytic and an historical method in meta–juridical philosophy as regards immunity of states. His influence, however, has remained a lasting imprint on public international, backed by the fact that all states are equal and independent within their spheres of influence (*superanus*), which implicitly has given root to a meta–juridical philosophy that foreign states be accorded immunity in domestic courts. That this meta–juridical philosophy found application in the Schooner Exchange v. McFaddon is clearly exemplified by Chief Justice Marshall's judgment in the following formulated manner.

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an exchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." [See (1812) 7 Cranch 116.]

The decision in the Schooner Exchange over the years in fact became well grounded in the practice of states until quite recently when its currency was thrown into doubt because of the great increase in commercial activities of states.

The Current State of the Law of State Immunity

The power of a domestic court or a national authority to determine whether it has jurisdiction over a particular legal controversy is without doubt a question of private international law and this notion is wholly predicated on whether the subject matter at issue is properly associated with a foreign element. The *lex fori* is therefore designated as an important means of defining legal issues and in determining whether to take jurisdiction or not because it is considered as the basic rule in private international law. The problem, however, becomes more difficult if a sover-

eign state is directly or indirectly impleaded before a national authority. In this respect, the court would be faced with the issue of whether a sovereign state can be sued by a private entity in a foreign court.

Until quite recently the notion of absolute sovereign immunity was embraced and accepted without question, but of late, many have started questioning the legitimate basis of the concept of state immunity and have in turn suggested that limitations be placed on state immunity. This in fact has prompted some countries, notably U.S.A., U.K., Canada, Singapore, Australia, Pakistan and South Africa, to resort to legislation as a means of introducing restrictive immunity into their statute books. In spite of the call by some leading countries to abrogate or modulate the concept of absolute immunity in transnational litigation, Russia and the developing nations, however, still cling without any reservations to the notion of absolute immunity.

It is instructive to note that recent writers have suggested and supported the introduction of restrictive immunity but arguably have failed to provide a straightforward and precise prescription to the problem. While it is clear that the jurisdictional immunity accorded to foreign states is most readily recognised for public acts, it is no more recognised in the Western world for acts essentially commercial in nature. There is therefore a strong trend among some countries toward the complete acceptance of commercial restriction on state immunity. Be this as it may, one is still left wondering whether in this complex world without any supranational authority legislation per se is adequate in containing this elusive problem.

The major problem likely to face litigating parties is that restrictive immunity depends wholly on a method by which governmental (public acts) and commercial acts of states are distinguished in order to determine whether to accord immunity or not. So far it has become almost impossible to find a common ground to formulate a criterion that would perhaps be acceptable to all and sundry. Even domestic courts within many sovereign states have differed in their reasoning or quest to formulate a suitable methodology or proper standards to distinguish commercial acts of states from public acts. This in turn has led to persistent divergence in the practice of states as far as restrictive immunity is concerned. It is therefore far from clear as to the current state of the law of state immunity in respect of customary international law or general international law because it would seem restrictive immunity lacks *usus* and the psychological element of *opinio juris sive necessitatis*. These difficulties in a way have created albeit a penumbra of doubt in the application of the doctrine of restrictive immunity.

It is suggested that codification is inherently problematic and not the only means of resolving the controversy. The hub of this thesis is to find an alternative means of dealing with the problem, thus looking at the influence of early writers on the doctrine of sovereign immunity. In this light I would be able to lay bare the problem and then deal with it objectively. Chapter One focuses on the historical origins of the concept of absolute immunity, where an attempt would be made to prove that early European writers did influence Chief Justice Marshall 's judgment in the Schooner Exchange decision. Chapter Two addresses specifically the reasoning behind the Schooner Exchange judgment and how the said judgment found application in other courts around the globe. Chapter Three reexamines some as-

pects of the rational foundation of state immunity and the reasons why some states are finding it difficult to give up the old order, i.e., state immunity.

Chapter Four evaluates the reasons behind the changing views of states on absolute immunity. It also covers observations on current legal position on absolute and restrictive immunity in the USA and UK, respectively. Chapter Five covers in many respects private suits against African states in foreign courts, while Chapter Six examines the practice of African states in respect of state immunity. Chapter Seven is devoted to ILC draft articles on jurisdictional immunities. Chapter Eight covers issues relating to some unresolved problems of state immunity. Chapter Nine covers issues relating to suits against states for the violation of international law and some aspects of *jus cogens* and *obligations erga omnes*. Chapter Ten reviews the recent adoption of the UN Draft Convention on Jurisidictional Immunity of States and their Property. Chapter Eleven covers issues relating to the current state of the law.

Chapter Twelve, the conclusion, is structured as to have regard to the overall position of the thesis: (1) that codification has its own problems; (2) that treaty provisions between states would be helpful and will certainly bring about stability in transnational business transactions; (3) that there should be judicial development of the law of sovereign immunity as exemplified in Lord Denning 's reasoning on state immunity; (4) that domestic courts should follow the principles of justice, equity and good conscience in dealing with sovereign immunity issues, and thus must make it a point to rely on or supplement their forum data with comparative survey of state practice the world over; (5) that national legislation must be discouraged so as to pave way for the modern judge to have a latitude of freedom to explore and solve by reasoning the difficulties usually associated with immunity of states and international commercial transaction (*jus gentium publicum*). For restrictive immunity is an incomplete doctrine which must be relegated to the background and that municipal courts would be better off by balancing the justified expectations of private traders as against the rights of sovereign states.

This is an expanded version of a thesis which was submitted to the University of Durham, for the degree of Doctor of Philosophy in Law.

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Ernest W. K. Bankas
at Durham
February 1998

Contents

1 The Origins of Absolute Immunity of States

The principal purpose for which this study is conducted is to explore the sovereign immunity controversy[1] regarding claims against foreign sovereign states in domestic courts. This then leads us to an important question which runs thus: If a sovereign state has entered into a sale contract for the supply of cement with a foreign corporation and as a result of the violation of the terms of the contract, the state is sued in a foreign court, is it possible that the plea for sovereign immunity can successfully be litigated according to the lex fori? Many believe it is possible.[2] While others have answered in the negative in the light of recent developments in the law.[3]

1.1 Source Analysis

In order to offer an objective assessment of the subject matter at stake, it is apposite that an inquiry be made into the historical sources or foundation of absolute immunity. Judge T. O. Elias, in his exposition on the development of modern international law, had this to say:

"The first and earliest period was characterized by often rudimentary arrangements for regulating the almost ceaseless old–world struggles between empires, kingdoms and city states. The medieval period witnessed the break–up of Western Christendom under the Holy Roman Empire as a result of the Treaty of Westphalia (1648) and the consequent rise

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[1] Sompong Sucharitkul, State immunities and trading activities in international law (1959). Allen, The position of foreign states before national courts (1928–33). Gamel Badr, State immunity, an analytical and prognostic view (1984). Christopher Schreuer, State immunity, some recent developments (1993). Fitzmaurice, State immunity from proceedings in foreign courts (1933) 14 BYIL. 101 Lauterpacht, H., The problem of jurisdictional immunities of foreign states (1951) 28 BYIL. 220.

[2] The Schooner Exchange v. McFaddon (1812) 7 Cranch 116; The Prins Frederik (1820) 2 Dods 451. The Parlement Belge (1880) 5 PD 197; The Cristina (1938) AC 485; Fitzmaurice, State immunity from Proceedings in Foreign Courts (1933) 14 BYIL. 101 Hyde, International Law (1947), "In his view a state always acts as a public person."

[3] See Lauterpacht, H., The problem of jurisdictional immunities of foreign states (1951) 28 BYIL; 220 Pasicrisie (1857) II 348 Foro Italiano 1887, 1474. See generally Briton, Suits against foreign states (1931) 25 AJIL 16. For recent rule: See Trendtex Trading Corp v. Central Bank of Nigeria (1977) I All ER 881.

of nation–states based upon the Cult of Political Sovereignty adumbrated by Jean Bodin and others."[4]

In fact, historical records[5] show that Jean Bodin (1530–1596), a French political scientist and jurist, was the first of writers to develop the concept of sovereignty in the sixteenth century.[6] And it is believed Bodin took up the challenge because of the ceaseless sixteenth century struggles between empires and nation–states, and more particularly because of the problems of political instability facing France.[7] In an attempt to find solutions to these problems, Bodin undoubtedly created a confusion about the leges imperii[8] which arguably turned out to be a starting point for the long controversy between what can be denoted as analytic and an historical method in meta juridical philosophy as regards immunity of states.

1.2 Jean Bodin's Philosophy on Sovereignty

The term superanus means sovereignty which in simple terms denotes supreme power. Sovereignty is therefore an essential characteristic of the state and it continues to be part of the state so long as the state subsists'[9] In other words, sovereignty in reality is inseparable from the state.

The modern theory of sovereignty came into being in France[10] because of its internal political contradictions. Bodin lived in France at that historical epoch. And during that era, France was divided as to whether to obey the Monarch or the Pope as he was believed to be the head of Christendom.[11] The controversy regarding the location of the sovereign power was to a large extent due to the fact that, at that historical epoch, the French war of religion was at its zenith.[12] These problems with respect to the location of the sovereign power thus prompted Bodin to express his thoughts on the concept of sovereignty in the following formulated manner. Defining the state:

"as an aggregation of families and their common possessions ruled by a sovereign and by reason, he said that in every independent community governed by law there must be some authority whether residing in one person or several, where the laws themselves are established and from which they proceed. And this power being the source of law must be above the law though not above duty and moral responsibility."[13]

For Bodin, in practical terms any legitimate power being the source of state law must be above the law though somewhat limited by the demands of duty and

[4] T. O. Elias, Africa and the development of International Law (1990) p. 63.

[5] George Sabine and Thomas Thorson, A history of political theory (1973) pp. 348–385; A. Appadorae: The substance of politics (1968) p. 48.

[6] Appadorea, op. cit., supra note 5.

[7] George Sabine and Thomas Thorson, op. cit., 5.

[8] Ibid.

[9] Bhattacharyya, First course of political science with constitutions of Indian Republic and Pakistan (1949) pp. 89–103.

[10] Ibid.

[11] Ibid. at pp. 348–385.

[12] Appadorae, op. cit., note 5.

[13] Ibid. at p. 48.

moral responsibility. Sovereignty, he maintained, is a supreme power over citizens or the ruled and this supreme power being the source of law is not bound by any laws of the realm'[14]

Bodin's theory, however, fell short of the mark when he postulated and admitted that the sovereign could not abrogate certain important entrenched laws dear to the hearts of the ruled, e.g., the Salic Law of France,[15] and that international law was outside the domain of the power of the Sovereign.[16] He further explained that the laws of God and nature are to be duly respected by the Sovereign and the citizenry, i.e., the subjects. However, he was careful in stating that the law of nations (international law) cannot influence or bind a sovereign any more than domestic laws legitimately enacted by the Sovereign, except the laws of God and nature.[17] Bodin's system as can be gathered implicitly favours or shifts somewhat towards the maxim: *Par in parem non habet imperium*, and this in the main can logically be supported insofar as sovereignty according to his system means a supreme power, wholly unlimited in its sphere of influence and thus will not bow or succumb to any other power, be it on the international plane or in its local spheres of operation.[18] This bent of thinking contributes greatly to the postulation that if a country or a sovereign state has its source of power controlled by another country, it cannot in the real sense of the meaning of sovereignty be designated as a state, because it lacks sovereign power or supreme power which as a matter of principle is a distinctive characteristic or mark of a state'[19] In this respect, Bodin laid the groundwork for others to develop the subject to such reasonable heights as to be received into international law'[20]

Many scholars from the period of Renaissance to Hume,[21] such as Thomas Hobbes (1508–1679), John Locke (1632–1704), Rousseau (1712–1778), Jeremy Bentham (1748–1832) and John Austin (1790–1859) contributed greatly to the development of the theory of sovereignty.[22] Grotius whom many regard as the father of international law, also made his mark as an exponent of political sovereignty. Grotius, as may be recalled, however, was the first to concentrate on explaining the importance of external sovereignty[23] and its implications with regard to state equality, which has much to do with the independence of states with respect to all other states in the international system.[24] But he was certainly not the original proponent of the concept of natural equality of states.

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[14] Ibid.
[15] Ibid.
[16] Edwin Dickinson, The equality of states in international law (1920) at pp. 56–57.
[17] Ibid.
[18] Ibid.
[19] Bhattacharyya, op. cit., note 9, at p. 80, pp. 90–92.
[20] Dickinson, op. cit., note 16 at pp. 55–99.
[21] Bertrand Russell, A history of Western Philosophy (1964), p. 491.
[22] Ibid.
[23] Appadorae, op. cit., note 5; Dickenson, op. cit., note 16 at pp. 56–60.
[24] Dickinson, op. cit., note 16 at pp. 60–98.

1.3 Thomas Hobbes

Thomas Hobbes made sovereignty absolute and aptly located it without any hesitation in the ruler, thus deriving his theory from the force and thrust of the social contact.[25] Professor Russell in his studies stated that:

"Hobbes holds that all men are naturally equal. In a state of nature, before there is any government, every man desires to preserve his own liberty but to acquire dominion over others; both these desires are dictated by the impulse to self–preservation. From their conflict arises a war of all against all, which makes life 'nasty, brutish and short.' In a state of nature, there is no property, no justice or injustice; there is only war and 'force and fraud are in war, the two cardinal virtues.'"[26]

For Hobbes, in order for men to escape from these evils, they must endeavour to form communities ready to delegate absolute power into the hands of a central authority[27] and this, according to him, must be based on the concept of the social contract.[28] This central authority, according to Hobbes, represents a source of power known as *superanus* which by all means shall put an end to the "universal war."[29]

Again Professor Russell explains that:

"Hobbes prefers monarchy, but all his abstract arguments are equally applicable to all forms of government in which there is one supreme authority not limited by legal rights of other bodies. He could tolerate Parliament alone but not a system in which governmental power is shared between King and Parliament. This is the exact antithesis to the views of Locke and Montesquieu. The English civil war occurred, says Hobbes, because power was divided between King, Lords and Commons."[30]

It is instructive to note that Hobbes prefers dictatorship to checks and balances and the purported golden notion of liberty. The powers of the sovereign in his view must be made unlimited.[31] Thus the ruled must surrender power to the Sovereign in order to have peace and tranquillity which shows clearly that the kernel of his thesis was predicated on achieving internal peace[32] Hobbes was also of the opinion that the worse despotism be preferred to anarchy since absolute power will create perpetual peace.[33]

The concept of absolute sovereignty also found favour with Rousseau but he was a bit careful to conclude that it belonged to the people rather than the ruler.[34]

The most authoritative restatement of the modern concept of sovereignty may be credited to John Austin (1790–1859).[35] In his words,

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[25] Russell, op. cit., note 21 at pp. 494–659.
[26] Ibid. at p. 550.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid. at p. 551.
[31] Ibid.
[32] Ibid.
[33] Ibid.
[34] Appadorae, op. cit., n. 5 at p. 451.
[35] Ibid.

"If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society (including the superior) is a society political and independent. . . . Furthermore every positive law or every law simply and strictly so called is set directly or circuitously, by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme."[36]

Austin also follows the notion that the sovereign's power is unlimited.[37] His system therefore accepts the precept that sovereign power is inalienable and that the sovereign has the authority to exact obedience from the ruled but his status is such that his authority cannot be affected by anybody in the world.[38] The truth of the matter is that Austin believes that law is the command of the sovereign and therefore according to his bent of reasoning, knows no internal or external superior.[39]

Austin's views at best were legalistic and therefore may require proper qualification with respect to the democratic doctrine of sovereignty, in order to contain criticism of his views being unrealistic.[40] These difficulties regarding the concept of sovereignty and its many other confused underlying principles prompted Professor Laski to argue that the whole notion of sovereignty be surrendered for the sake of political science.[41] It must be noted in passing, however, that Austin's views were vehemently opposed.[42]

It should, however, be noted that all these theories can be attacked from a standpoint of equitable maxims specifically associated with the writings of Locke[43] and Montesquieu,[44] but these equitable maxims can only be applied to put pressure to bear on the sovereign if the sovereign is willing to succumb to world public opinion. International law in its intrinsic nature, as derived from the practice of states, can be a source of limitation upon the absolute power of the state, but in reality there is no supranational power to enforce these laws.[45] International law, therefore, is obeyed by states out of courtesy and the need to promote the concept of comity with the hope of avoiding disrepute.

1.4 The Influence of the Philosophy of Thomas Hobbes

International law was not invented by magical powers. Its growth followed a route of gradual process singularly influenced by philosophical writings specifically de-

[36] Ibid., at p. 49.
[37] Bhattacharyya, op. cit., n. 9 at pp. 94–95.
[38] Ibid. at p. 95.
[39] Appadorae, op. cit. n. 5 at pp. 49–50.
[40] Ibid.
[41] Ibid., p. 50.
[42] See Laski, A grammar of politics (1967), pp. 44–45.
[43] Russell, op. cit., n. 21.
[44] Montesquieu, The Spirit of Law (1748).
[45] Sornarayah, Problems in applying the restrictive theory of sovereign immunity (1982) 31 ICLQ 664.

rived from natural law as correctly stated by some prominent writers[46] on international law; one such writer was Professor Schwarzenberger who observed that:

"Although several systems of international law in various stages of arrested development existed in antiquity and simultaneously or subsequently, in other parts of the world, present–day international law has its roots in medieval Europe. It might be thought that the hierarchical order of the Middle Ages was incompatible with the existence of international law, which requires the coexistence of equal and independent communities. Actually, the pyramidal structure of feudalism, culminating in Pope and Emperor as spiritual and temporal heads of Western Christendom was hardly ever fully realized. It left ample scope for relations on a footing of equality between what were often in fact independent states."[47]

Professor Schwarzenberger seemed to indicate that the trend of inequality that existed in medieval period was not that markedly pronounced as to eclipse the development of international law which by its very nature supports the equality of states, as a special ingredient necessary for the harmonious existence of states. Secondly, the materialism of Hobbes, a naturalist disquisition, encouraged the essential nature of natural law, the quest for universal order and the equality of states.[48]

The introduction of the theory of natural equality into the law of nations was first developed by the naturalists who gathered inspiration from the singularly pragmatist views of Thomas Hobbes (an Oxford trained philosopher).[49] The works of Hobbes covered legal and political theory and this can be found particularly in his Elementa Philosophica de Cive and the Leviathan.[50] As a result of his influential work, he was able to revive the importance of juridical philosophy which covered a critical aspect of medieval theory of natural law, the state of nature, and natural equality.[51] Through his sagacious writings and influence these theories were not by any means relegated to the background but were rather explored in a new fashion as a way of encouraging philosophers and jurists of the 17th, 18th and 19th centuries. It is important to note, however, that the system of Hobbes was somewhat in antithesis to that of Grotius' teachings[52] and this ex–hypothesi cannot

[46] Nussbaum, A concise history of the law of nations (1962) pp. 35–44, 61–114; Appadorae op. cit., n. 6, pp. 35–99; Sanders, International jurisprudence in African context (1979) pp. 3–38. Brownlie principles of public international law (1992). Brierly, The law of nations, an introduction to international law and peace (6th ed. 1963); Kelsen, Principles of international law (2nd 1966); Lauterpacht, International law (general works) (1970) 4 volumes; O'Connell, International law (2nd ed. 1970) 2 vols.; Verzijl, International law in historical perspective (1968–1976) vols i–viii; Schwerzenberger, International law (vol. 1 3rd ed. 1957; vol. 2, 1962); Oppenheim and Lauterpacht, A treatise (1952) 2 vols; Hyde, International law chiefly as interpreted and applied by the United States (1947) 3 vols.

[47] Schwarzenberger, Manual of international law (4th ed. 1960).

[48] Dickinson, op. cit., n. 16 at pp. 69–75.

[49] Russell, op. cit., n. 21.

[50] Dickinson, op. cit., n. 16.

[51] Ibid. at p. 74.

[52] Ibid. at p. 70.

be disputed in view of the authoritative analysis of the works of Grotius and Hobbes by Dr. Edwin Dickinson.[53]

The teachings of Hobbes albeit did influence Pufendorf and the naturalists, and such prominent writers as Barbeyrac, Rutherforth, Burlamaqui and Vattel,[54] but it would appear that these successors were by no means all agreed as to the basic general applications of the naturalist theories advanced by Thomas Hobbes.[55] In sum "anthropomorphism" played a central role in the philosophical teachings of Hobbes which also leads to the conclusion that the law of nature and the law of nations in his system can appropriately be taken in philosophical terms to mean the same thing.[56] Hobbes, therefore, can be credited for the introduction of the notion of natural equality of states into juridical philosophy. And its after–effect on Vattel, by every estimation cannot be ignored in the light of his writings and the fact that the combined force of all these theories implicitly or explicitly have had effect on the development of the law of nations.[57]

One major influence of Hobbes as can be gathered from the writings of Vattel runs thus:

> "Since men are by nature equal and their individual rights and obligations the same, as coming equally from nature, nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights, strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small republic is no less a sovereign state than the most powerful kingdom.
>
> A nation is therefore free to act as it pleases, so far as its acts do not affect the perfect rights of another nation, and so far as the nation is under merely obligations without any perfect external obligation. If it abused its liberty it acts wrongfully; but other nations cannot complain since they have no right to dictate to it.
>
> Since nations are free, independent, and equal, and since each has the right to decide in its conscience what it must do to fulfil its duties, the effect of this is to produce, before the world at least, a perfect equality of rights among nations in the conduct of their affairs and in the pursuit of their policies. The intrinsic justice of their conduct is another matter which is not for others to pass upon finally; so that what one may do another may do, and they must be regarded in the society of mankind as having equal rights."[58]

The thrust and total effect of the above statement by Vattel in its philosophical and practical terms without doubt supports the maxim: *par in parem non habet imperium* which is derived basically from the principle of independence, equality and the dignity of states.[59] Although the classical writers of international law did not explicitly deal at length with the notion of immunity of foreign states from the jurisdiction of domestic courts,[60] at least in the main, their writings in one way or the other gave support to the idea of absolute sovereignty which in turn logically

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[53] Ibid. at pp. 35–100.
[54] Ibid. at pp. 68–100.
[55] Ibid. at pp. 76–89.
[56] Ibid. at p. 75.
[57] Ibid.
[58] Ibid. at p. 98.
[59] Badr, op. cit., n. 1, pp. 34–40; Lauterpacht, op. cit., n. 1.
[60] Badr op. cit., n. 1, p. 9.

gave foundation to the concept of state immunity in international law.[61] The weight of these historical records shows clearly that early philosophical writings on the concept of absolute sovereignty did influence individual states and their municipal courts to take the lead in opening the way for the development of the rules of state immunity.[62]

Further evidence of the influence of classical international law writers such as Grotius, Pufendorf, Bynkershoek and Vattel, who were all to some extent influenced by the writings of Hobbes on natural law, the state of nature and natural equality, found application in the decisions of municipal courts of the United States between 1789 to 1820.[63] And this is clearly supported by the statistical data below.

Table 1. Influence of Classical International Law Writers

Writers	Citations of Pleadings	Court Citations	Court Quotation
Grotius	16	11	2
Pufendorf	9	4	8
Bynkershoek	25	16	7
Vattel	92	38	22

Source: See G. Schwarzenberger, Manual of International Law (1960). This information was borrowed from Dr. Dickinson's work.

The above statistical data was prepared by Professor Edwin D. Dickinson, and it reflects citations and quotations from early writers to support international law cases which were decided by American courts from 1789 to 1820.[64] One therefore cannot underestimate the influence of early philosophical writers of Europe in view of the authority of the above statistics.[65] It is important also to take note of the fact that Bynkershoek and Vattel were specifically cited in Schooner Exchange v. McFaddon,[66] by Chief Justice Marshall and therefore lends support to the thesis that early philosophers and classical international law writers did affect the jurisprudence of municipal courts in developing the rule of sovereign immunity.[67] This

[61] Ibid., p. 12.

[62] The Schooner Exchange v. McFaddon (1812) 7 Cranch 116; The Prins Frederik (1820) 2 Dods 451; The Parlement Belge (1880) 5 PD 197; The Cristina (1938) AC 485; The Annette: The Dora (1919) p. 105 at p. 111. Mighell v. Sultan of Johore (1894) 1QB 149.

[63] Schwarzenberger, op. cit., n. 46.

[64] Ibid.

[65] Ibid.

[66] (1812) 7 Cranch 116.

[67] Badr, op. cit., n. 1 at p. 9.

is further supported by the fact that Justice Marshall relied on a combination of factors ranging from history, philosophy, and the U. S. Constitution, i.e., the Eleventh Amendment in his quest to find solutions to the issues regarding state immunity in the Schooner Exchange case.[68]

1.5 Claims and Counter Claims

The writings of Bodin, Hobbes, Hagel and Vattel set the pace for the understanding that immunity of states must be seen in a metaphysical sense as a theoretical derivation from local supreme power (*superanus*).[69] This doctrine gave foundation to the accepted notion that the state has a positive link with sovereign power. Thus without a state there will be no sovereign power.[70] Which means that in the absence of sovereign power and the power to enact or make laws backed by all the coercive forces it cares to employ, a state cannot be recognised in international law.[71] In logical terms, therefore, the former cannot exist without the latter. An intriguing result can hereby be discernible from the above proposition, and that is before a territory is recognised as a state, equal in status to other states, it must have a permanent population, a defined territory, and a determinable attribute of an autonomous juridical community ruled by a sovereign power.[72] If these factors are present within a community, statehood is achieved equal to all other states in international law.[73] Statehood in turn gives birth to international personality and thus breeds consensus among equals on the international plane rather than subjection.[74] Such is the essence of the concept of independence, equality and dignity among sovereign states, shaped by Pufendorf's doctrine of *quae invicem in statu naturali vivunt*,[75] coupled with perhaps Zouche's idea of *pax civilis*, i.e., "between equals as states"[76] and finally by Vattel's positive notion of state equality.[77]

The commitment of most states to the notion of immunity of states stems from the writings of modern scholars who followed Bodin and Hobbes, and their influence had laid the foundation for the determination of state equality based on the following factors in international law: (1) The independence of states; (2) The

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[68] Ibid.
[69] Dickinson, op. cit., n. 16 at p.
[70] Bhattacharyya, op. cit., n. 9.
[71] O'Connell, International law for students (1971) pp. 49–63. See also Chen, The international law of recognition (1951). Compare the views of the above writers with Lord McNair's "The Stimson Doctrine of Non–Recognition" (1933) 14 BYIL. Lauterpacht, Recognition in international law (1947).
[72] I. Brownlie, op. cit., n. 46 at pp. 87–105.
[73] Ibid., at pp. 88–91.
[74] O'Connell, op. cit., n. 46, p. 842.
[75] Dickinson, op. cit., n. 16.
[76] Ibid.
[77] Ibid.

dignity of states; (3) The need for comity; (4) The legal nature of sovereign property; and (5) Diplomatic function qua international personality.

The literature on jurisprudence shows clearly as has already been stated elsewhere, that Hobbes's bent of reasoning was in antithesis to both Grotius and Montesquieu. Hobbes' notion of absolute sovereignty also runs counter to Locke's theory of legal and political sovereignty. In reality, therefore, the notion of absolute sovereignty has fallen out of favour with modern publicists.[78]

In fact, it is highly doubtful as to whether the views expressed by exponents of absolute sovereignty today would be allowed without criticism. The theory that sovereignty is unlimited, indivisible, inalienable, imprescriptible, ultra comprehensive and exclusive is open to question and therefore must be relegated to the background. Perhaps it was so before the 20th century,[79] when the sovereign had control over the police and army and was also at the same time the lawmaker, a judge and the executor.[80] Modern states will not accept the theory as it stands in view of Montesquieu's theory of separation of powers.[81] This is perhaps correct insofar as the sovereign has to conform to certain principles well entrenched and respected in modern democratic countries.[82] It may be contended, therefore, that in these modern times the argument in support of absolute sovereignty is *non sequitur* and perhaps anachronistic, given the changes that have taken place both in municipal law and international law.[83]

The sentiments expressed by modern writers against the absolute nature of sovereign power have been canvassed of late before domestic courts.[84] This tendency finds expression in both common law[85] and civil law countries[86] except in former Soviet Union. In Great Britain, for example, the Crown Proceedings Act, 1947, prepared the way for suits to be filed against the government.[87] Actions in contract in the United States against the state are possible as a result of the enactment of the Court Claims Act 1855.[88] And quite recently, legal proceedings with respect to the jurisdiction of U.S. courts have been flexibly extended and this culminated in the enactment of the Torts Claims Act of 1946.[89] It is possible therefore in these

[78] Laski, op. cit., n. 42.

[79] Ibid.

[80] George Sabine, and Thomas Thorson, op. cit., Laski. Op. cit.

[81] Montesquieu, op. cit., The Federalist Papers (American classics about government) (1981).

[82] A.D. Linsay, The Essentials of Democracy, Oxford (1935).

[83] The European Convention on State Immunity and Additional Protocol (1972); The U.S. Sovereign Immunity Act (1976); U. K. Sovereign Immunity Act (1978).

[84] Claims before U.S. courts and U.K. courts are on the rise and this I believe might have been influenced by modern writers on state immunity. But there is an absence of precise prescriptions as to the problem.

[85] Clive M. Schmitthoff, The claim of sovereign immunity in the law of international trade (1958) 7 ICLQ 456–457.

[86] Ibid. at p. 457.

[87] (1957) 3WLR 884, 910.

[88] Schmitthoff, at p. 457.

[89] Ibid.

modern times for a sovereign to submit to its own courts.[90] These trends of events and the call for limited immunity are gaining ground and have in fact, *sit venia verbo*, unhappily I may say, created a Pandora's box of difficulties and uncertainties in transnational business transactions.[91] It is submitted, however, that the above argument is eclipsed by the very fact that forum law is vertical and thus the creature of the sovereign and therefore cannot be applied to sovereign states in view of the popular concept of natural equality of states.

1.6 Final Remarks

At the onset of this study, a question was posited as to whether a sovereign state can possibly litigate a sovereign immunity claim successfully before a foreign court. To answer the question a journey was taken through the uncharted seas of the history of philosophy and law to find an answer to the question. The answer seems to be predicated on the principle that every sovereign state has the obligation to give due respect to each others' independence, equality and dignity,[92] a concept clearly borrowed by Chief Justice Marshall from the philosophical writings of the past to support his Schooner Exchange decision on state immunity regarding public ships. *Prima facie*, Justice Marshall's decision today, however, seemed to run counter to Lord Denning's observations in Rachimtoola v. Nizam of Hyderabad,[93] thus:

"It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decision of a court of acknowledged impartiality than by arbitrarily rejecting their jurisdiction."[94]

Be this as it may, some leading countries are now modulating their positions on the question of state immunity,[95] and therefore, while successful litigation of immunity claim was fairly easy in the past, at least in recent years the trend has changed because the modalities of restrictive immunity are gaining currency.[96]

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[90] Ibid.

[91] Trendtex Trading Corp v. Central Bank of Nigeria (1977) QB 529 Court of Appeal I Congreso Del Partido (1988) AC 244 House of Lords. Alcom Ltd. v. Republic of Colombia (1984) 2 All ER6.

[92] O'Connell, op. cit., note 46 at pp. 842–845.

[93] (1958) AC 379.

[94] In Rachimtoola v. Nizam of Hyderabad (1957) 3 WLR 884, 910.

[95] This is very common in the Western Hemisphere, especially in countries such as the U.S., U.K., Canada, Australia, to mention the main ones.

[96] Report of the International Law Commission (1986) Yrbk ILC; see also Fitzmaurice (1957, 11) 92 Hague Recueil; Emanuelli (1984) 2 Canadian Yrbk; Foreign Sovereign Immunity Act, FSIA (1976). The State Immunity Act, SIA (1978) reproduced in (1983) ILR 64 p. 718; Canadian Sovereign Immunity Act (1982; South African Foreign Sovereign Immunity Act (1981); Pakistani Foreign Sovereign Immunity Act (1981); Foreign Sovereign Immunity Act of Singapore (1981); Australian Sovereign Immunity Act (1979).

In sum the sources of modern law of immunity of states can be traced back to the days of Bodin, Hobbes, Austin, Grotius and Vattel, to mention a few. And the desire of these great thinkers to ameliorate perhaps the problems of their days gave strength to the thought that because of the notion of equality of states, sovereign states be accorded absolute immunity in their dealings with other states, both public and private. For it will certainly be difficult to lord it over an "equal," i.e., another state, two or three hundred years ago in view of the ceaseless struggles between nation–states, hence the notion *par in parem non habet imperium* or *par in non habet jurisdictionem.*

2 The Development of Sovereign Immunity

2.1 France before American Courts and its Aftereffects

The doctrine of state immunity was not simply conceived overnight or *eo instanti*, but was rather gradually developed over a long period of time by municipal courts. In other words, the concept became law specifically through juridical evolution totally influenced by juridical philosophy.[1]

It all started when philosophical writings of the past found expression in an American municipal court decision of 1812.[2] This decision in due course became a *cause célèbre* and therefore turned out to be a source of strong influence on other municipal courts of the world.[3] Arguably, the proposition that the doctrine of state immunity is a product of municipal courts cannot ex–hypothesi be disputed in view of the fact that there is a considerable amount of municipal case law on this subject.[4]

In fact, American courts were the first to express their thoughts and perhaps to give true meaning to the doctrine of sovereign immunity. It is indeed worth noting that Chief Justice Marshall's ruling focused on the *leges imperii* and borrowed heavily from Vattel's juridical philosophy.[5] In order to understand the reasoning behind Justice Marshall's decision, it is expedient that a thorough study of the case be done so as to lay bare the force and thrust of its authority and effects thereto, for one would not like to be accused of looking at flowers from a horseback.[6] Let us now consider *seriatim* the Schooner Exchange v. McFaddon, its effects and subsequent cases that followed its authority.

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[1] Fitzmaurice (1933) 14 BYIL; Sucharitkul, State immunities and trading activities (1959); Sinclair, (1980 II) 167 Hague Recueil 113; Badr, State immunity: An analytical and Prognostic view (1984).

[2] The Schooner Exchange v. McFaddon 11 US 7 Cranch, 116, 3 ed 287 (1812); Chief Justice Marshall as can be gathered from his reasoning per the issue of immunity, relied on the writings of the revolutionary era, particularly that of Vattel.

[3] See Sinclair, op. cit., n. 1, pp. 121–134; O'Connell, International Law (2nd ed 1990) vol pp. 844–845.

[4] See Sucharitkul, op. cit., n. 1, pp. 51–162; Sinclair, op. cit., n. 1, pp. 121–134.

[5] A careful reading of Chief Justice Marshall's thesis in the Schooner Exchange shows clearly in part that he relied on Vattel's thoughts or philosophy regarding the subject matter of sovereign immunity. See Badr, op. cit., p. 12.

[6] This is a Chinese saying regarding 'piecemeal attempts' or less thorough work.

2.2 Justice Marshall and His Groundbreaking Rule

The Schooner Exchange, by every estimation can be described as the *fons et origo* of the modern law of state immunity. That such an attribute is proper and must not be doubted had been well documented in the writings of modern international lawyers.[7] The case alluded to above can be related thus: Two American citizens named McFaddon and Greetham, the true owners of the Schooner Exchange, filed a libel suit in the United States District Court of Pennsylvania claiming that, based on equitable principles, they were entitled to the possession of the Schooner Exchange and that they had title to it when it left the port of Baltimore for Spain on October 27, 1809; they stated further that on December 30, 1810, the ship was seized on the orders of Napoleon, then the Emperor of France, in violation of international law, without due process or proper French prize court adjudication. In addition to all these, the two partners also intimated that the vessel was now docked in Philadelphia in possession of one Dennis Begon. It must be pointed out, however, that at this juncture a decree of condemnation had not been formally issued against the said vessel by any local court. They therefore prayed in their pleadings that they be allowed by the Court to take possession of the vessel for restoration since the vessel was damaged severely on the high seas. A process was issued, but Mr. Dallas, a U.S. attorney at that time for the District of Pennsylvania, appeared and filed a brief of suggestion stating inter alia that since peace existed between France and the United States, a public vessel of the Emperor which had been driven into the port of Philadelphia in distress cannot be attached. The District Court without any hesitation dismissed the libel. The decision, however, was thereafter reversed by the Circuit Court, and then appealed to the Supreme Court; the issues that fell before the Supreme Court for consideration were as follows:

Whether France being a sovereign country can be impleaded or sued in her own name in a foreign court, i.e., U.S. courts.

Whether based on absolute or classical doctrine of sovereignty immunity France could arrest suit or possibly resist if the need be an execution against her property.

Whether Napoleon having acquired title by force could be impleaded.

Marshall, Ch.J. Delivered the opinion of the Court as follows:

"A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

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[7] See Sucharitkul, op. cit. n. 1; Sinclair, op. cit.; O'Connell, op. cit.; J. Sweeney The International Law of Sovereign Immunity (1963); Brownlie, Principles of Public International Law, 4th ed. (1990) pp. 323–326; Hall, International law (8th ed. 1924). See also generally Lauterpacht, The problem of jurisdictional immunities of foreign states (1951) 28 BYIL; 220 Harvey, Immunity of sovereign states when engaged in commercial enterprise: A proposed solution, (1929) 27 Mich L Rev; Brandon, (1954) 39 Cornell Law Quarterly.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra–territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him."

He concluded his judgment in the following words:

"If the preceding reasoning be correct, the Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country."

2.3 Analysis of Chief Justice Marshall's Thesis

There was no *lex scripta*, i.e., written law, on the question of state immunity to guide Chief Justice Marshall when the Schooner Exchange case was brought before him.[8] And in order to keep himself within the confines of reasonableness, he threw his efforts behind the authority of the writings of the past[9] but specifically on the philosophical writings of Vattel,[10] coupled with the inherited precepts of the social contract, cleverly adumbrated by Hobbes[11] and Rousseau.[12] Perhaps it would have been easier on him if there was in existence *cum sensu*, i.e., shared feeling, among judges at that time slanted towards a classical doctrine, according to which a sovereign is accorded absolute immunity irrespective of the subject matter at issue. Nevertheless, Justice Marshall was able to gather courage from the

[8] In fact, Schooner Exchange v. McFaddon can rightly be termed the locus classicus or the first of its kind to delve into the jurisprudence of sovereign immunity. And before this case was decided there was no literature on the subject, i.e., there was no *lex non scripta* on the subject. Marshall therefore relied on philosophical writings of the past: see Schwarzenberger, Manual of International Law 4th ed. (1960). but it appears clearly that Schwarzenberger got his information from the works of Professor Edwin D. Dickinson, a leading American legal historian. See supra chapter one for an insight into the statistical formulation prepared by Dr. Dickinson.

[9] Emmerich de Vattel, Le droit des gens, OU, Principes de la loi naturelle, applique a la conduite & aux affairs des nationes & des souverains (1758), translated by C.G. Fenwick, Classics of International Law (1916) 3 vols.; Bynkershoek, De foro legatorum appeared in 1721; and Quaestionum juris publici (1737).

[10] Vattel, op. cit., n. 9, and perhaps earlier writers.

[11] B. Russell, A History of Western Philosophy (10 ed. 1964) pp. 546–556.

[12] Ibid. at pp. 685–701.

political culture of his time[13] to set the pace for the evolution of the doctrine of absolute sovereign immunity.

For Marshall, a potentate's freedom from domestic judicial control or subjugation cannot be predicated upon the will or power of a local court. Thus in considering the immunity of a foreign state much depends upon the will of the local sovereign, in other words, the ability and freedom of a sovereign to arrest suit or resist jurisdiction must be derived from the express consent of the local sovereign and nothing else.[14] This immunity as can be gathered from his reasoning emanates from the notion of sovereignty arguably predicated on innate superiority. In a sense Justice Marshall was trying his best to postulate that sovereignty entails equality, independence and dignity which in turn gives meaning to common sense that equality breeds consensus and courtesy rather than subjection.[15] The reason offered by Justice Marshall in support of the sovereign's willingness or consent to the exclusion of sovereign states from the general jurisdiction of domestic courts can be stated as follows:

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of these good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may in some instances be tested by common usage, and by common opinion, growing out of that usage."[16]

Chief Justice Marshall's bent of thinking in this respect takes us unto a higher level of reasoning, where he argues that the world which involves the interchange between ambassadors of different states detests an action not in consonant with accepted usage. Thus if a state goes to the extent of exercising its territorial powers in a manner that generates acrimony and disrepute, without any regard to the dignity of states, then such a state blatantly violates the terms of an implied agreement or faith not specifically stipulated.[17] His thesis also tells us that the power of one sovereign is not amenable to another sovereign[18] which in logical terms adds precision to the idea that sovereign states have the highest obligation to guard against being subjected to the jurisdiction of other states.[19] One important ingredient of Marshall's reasoning can be likened unto the proposition that states must endeavour always to protect their dignity from being damaged. There is therefore the presumption that the law of immunities of states in his days, although

[13] U.S. Constitution in whole or in part did influence Chief Justice Marshall's thesis in the Schooner Exchange. See also Lauterpacht with respect to his comments on this issue: op. cit., n. 7 at p. 230. The dignity of states concept seemed to have come from the Virginia Convention of 1788.

[14] Schooner Exchange v. McFaddon, 11 US 7 Cranch 116 3 Ed 287 (1812).

[15] Ibid.

[16] Ibid. at p. 136.

[17] Ibid.

[18] Ibid.

[19] Ibid.