PARTICIPATION OF THE STATE IN INTERNATIONAL COMMERCIAL TRANSACTIONS (INTERNATIONAL COMMERCIAL ACTIVITY): IMMUNITY ISSUES

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Abstract: The article examines current trends in the development of state immunity in international commercial relations. The author characterizes and defines the concept of a commercial transaction while identifying the peculiarities of the state's participation in these relations as a subject of private international law. International legal instruments and national legislation in this area are analyzed. The author substantiates the necessity of applying limited immunity in international private law relations and places special emphasis on court practices.

Keywords: international private law relations, limited immunity, commercial activity, commercial transaction.

1 Introduction

The increasing level of economic integration among various states is a long-standing trend that significantly impacts the development of international and domestic state law. It is evident that states are among the most powerful, influential, and active participants in private international law. There are an increasing number of forms of state participation in global economic activity. States may be represented by various entities, including government bodies, sovereign wealth funds, state-owned enterprises, and state-controlled joint-stock companies, each of which has distinct legal regulatory peculiarities.

The modern global economy is characterized by a well-developed sphere of international trade, labor migration, capital movement, and technology transfer, as well as an independent international financial sector. Historically, international trade has been the first and most significant form of economic relations between countries and peoples, reflecting the interactions between commodity producers of different nations and expressing their mutual economic dependence. Since the mid-twentieth century, there has been a substantial increase in state participation in international civil legal relations, including dealings with counterparties that are subjects of private law in other states. At the same time, states are increasingly interested in transactions with such entities, which typically agree to engage in these transactions only if there is assurance of the states' property liability in the event of non-fulfillment or improper fulfillment of their obligations under the agreements. This necessitates thorough legal regulation of these relations, which is currently inadequate. Notably, the UN Convention on Jurisdictional Immunities of States and Their Property, adopted in 2004, has yet to be ratified due to the unfulfilled conditions of Article 30 [24] of this Convention, and the law in Ukraine concerning jurisdictional immunities of states remains only a draft [7].

2 Materials and Methods

The methodological foundation of the study consists of general scientific methods, including the dialectical and system-structural approaches, as well as methods of induction and deduction. In addition, special methods are employed, primarily formal-legal, comparative-legal, and historical-legal methods. The primary research methods are formal-legal and historical-legal analyses, which are utilized to investigate current trends in the development of state immunity in private international law, conceptual approaches to the fundamental principles guiding the evolution of this institution, and their reflection in legal norms.

3 Results and Discussion

Your text is well-written, but there are a few areas where the vocabulary, grammar, and style could be improved for clarity and flow. Here’s a revised version:

International economics can be understood in both broad and narrow senses. "In the broad sense, international economics is a theory used to study the economy of the modern interdependent world. In a narrower sense, international economics is a branch of market economy theory that examines the patterns of interaction between economic entities of different nationalities in the areas of international trade in goods and services, the movement of production factors and financing, and the formation of international economic policy" [3]. In the international economy, there are two main categories of activities: a) commercial (entrepreneurial) activities, and b) non-commercial activities. The basis for this classification is the primary objective of the activities of international economic actors. Commercial activity is oriented toward profit-making. Non-commercial activities, on the other hand, serve different purposes, such as the advancement of science, education, culture, charity (e.g., the activities of the Soros Foundation), and so on. In domestic civil law, the criterion of profit is fundamental to distinguishing between commercial and non-commercial economic activities, which necessitates consideration of the specific legal regime governing these types of activity. The state engages in economic activity, particularly in civil transactions, not as a private entity but as a sovereign state, which is the bearer of public authority.

In international economic activity, the state functions as an active, independent participant alongside individuals and legal entities. In commercial activities, the state often acts not as a sovereign power, but as a "trader" or "merchant" in relation to foreign merchants and corporations. Meanwhile, commercial relations between states (for example, the sale and purchase of goods) are governed exclusively by public international law. In several countries, commercial activities are regulated by commercial codes (Austria, Argentina, Bulgaria, Brazil, Estonia, Poland, Romania, the United States, France, Japan, etc.). As Professor O. Merezhko notes, "according to the theory of international law, an agreement between a state and a foreign individual or legal entity is not an international treaty governed by the rules of international treaty law, but a commercial contract governed by the rules of the national law of the state" [16]. This conclusion was similarly reached by the International Court of Justice, for example, in the case of the Anglo-Iranian Oil Company in 1952 [1].
The state's participation in international economic relations of a private nature introduces a peculiarity, namely the issue of jurisdictional immunity concerning the state. The general principle of state immunity is well-known: *par in parem non habet imperium* (an equal has no power over an equal), but the application and interpretation of this principle in practice often present significant challenges.

The doctrine of international law recognizes two primary concepts regarding the legal immunity of states: the concept of absolute state immunity and the concept of functional (or limited) state immunity, both of which are currently acknowledged in national legislation and judicial practice [13]. Absolute immunity grants a state the right to exercise its sovereignty fully, without being subject to the laws and jurisdiction of another state; this is particularly effective in the public law sphere of state activity. According to the theory of absolute sovereignty, a state cannot be sued in the courts of another state without its explicit consent, even in cases of breach of a commercial contract by the state. Functional (limited) sovereignty, on the other hand, applies to a state acting as a participant in international private legal relations, especially in the realm of foreign economic law, when it engages in commercial activities. The concept of limited sovereignty is now widely recognized in the theory and practice of many states. Its core principle is that a state’s immunity extends to actions performed as acts of sovereign power (*de jure imperii*) but does not apply to actions undertaken by the state in a private capacity (*de jure gestionis*).

The well-known English judge, Lord A.T. Denning, explains the shift away from the theory of absolute sovereignty in interstate practice as follows: "The last 50 years have seen a complete transformation of the functions of the sovereign state. Almost every country is now engaged in commercial activities. Countries have governmental agencies or establish their own legal entities that participate in global markets. They charter ships, they purchase goods, they issue letters of credit. This transformation has altered the rules of international law regarding sovereign immunity. Many states have now abandoned the rule of absolute sovereignty. So many states have abandoned it that it can no longer be considered a rule of international law. The theory of absolute sovereignty has been replaced by the doctrine of limited sovereignty. This doctrine grants immunity to governmental actions, described in Latin as *jure imperii*, but does not grant immunity to commercial actions, *jure gestionis*" [17].

The spread of the concept of limited immunity worldwide is driven by the development of economic relations between countries and the increasing involvement of states in these activities. States enter into various foreign trade agreements on their own behalf, engage in investment activities, obtain loans from foreign banks, and use maritime transport for trade purposes. Through these actions, they effectively position themselves as merchants, traders, or as private individuals and legal entities, which allows courts to treat them as ordinary participants in the commercial process. According to the Law of Ukraine "On International Commercial Arbitration" of 1994 [22], commercial activities can occur across various sectors of economic life, not limited solely to traditional commercial relations. These activities may include agreements for the supply or exchange of goods and services, distribution agreements, trade representation, factoring transactions, leasing, engineering, construction of industrial facilities, investment, financing, provision of advisory services, purchase and sale of licenses, banking services, insurance, operating or concession agreements, joint ventures, and other forms of industrial or business cooperation, as well as the transportation of goods and passengers by air, sea, rail, or road. Today, states cannot avoid engaging in commercial activities; moreover, they actively seek to participate in them. Therefore, states that aim to expand their involvement in international private law relations must be prepared to limit their immunity. The global community is developing various mechanisms to define the boundaries and scope of state immunity, among which the conclusion of relevant international treaties is particularly effective.

The European Convention on State Immunity of May 16, 1972 [9] is of particular significance for the development of the doctrine of state immunity, as it is based on the concept of limited immunity and delineates exceptions to state immunity, with commercial activities being especially prominent. The European Convention of 1972, along with other international documents, draft international instruments, and national laws, adopts the approach of listing specific types of actions that are commercial in nature, for which a foreign state cannot claim immunity. This approach, as described by L. Boucher, is known as a "*negative list*" [4].

The European Convention on State Immunity of 1972 does not provide a definition of commercial activity or commercial transaction. The document merely states that "a State may not invoke immunity in a court of another State if it has in the territory where the proceedings are taking place a bureau, agency or other establishment through which it carries on industrial, commercial or financial activities in the same manner as a private person, and if the proceedings relate to those activities of the bureau, agency or establishment" (Article 7, paragraph 1) [9].

National laws on state immunity in countries such as the United Kingdom, the United States, Canada, Australia, Singapore, and South Africa were adopted in the 1970s, based on the provisions of the European Convention on State Immunity of 1972. These laws also reflect the principle of limited state immunity and provide for exceptions to this principle. The structure of these national laws closely mirrors that of the Convention, often replicating its categories of norms in terms of content and the subject matter of legal regulation. In countries that have not adopted specific laws on state immunity, the issue of granting immunity to a foreign state falls within the jurisdiction of the courts. Most European countries, including Austria, Belgium, Denmark, Finland, Greece, Italy, the Netherlands, Germany, Norway, Switzerland, and the United Kingdom, are among those that do not have special legislation governing the immunity of foreign states.

The UN Convention on Jurisdictional Immunities of States and Their Property, dated December 2, 2004 [24], holds significant importance due to its potential universality, although it has not yet entered into force because the required ratification conditions have not been met (Article 30). Like the European Convention of 1972, the UN Convention of 2004 establishes exceptions to the general rule of state immunity in the context of their commercial activities (Article 10 "Commercial Transactions"). According to this article: "1. If a State enters into a commercial transaction with a foreign natural or legal person and, by virtue of applicable rules of private international law, a dispute concerning that commercial transaction is subject to the jurisdiction of a court of another State, that State may not invoke immunity from jurisdiction in the consideration of a case arising out of that commercial transaction. 2. Paragraph 1 shall not apply: (a) in the case of a commercial transaction between States; or (b) if the parties to the commercial transaction expressly agree otherwise."

The primary exception to the principle of state immunity is outlined in Article 10 of the UN Convention, which states that "if a State enters into a commercial transaction with a foreign natural or legal person and, by virtue of applicable rules of private international law, a dispute concerning that commercial transaction is subject to the jurisdiction of a court of another State, the State may not invoke immunity from jurisdiction in the consideration of a case arising out of that commercial transaction" (Article 10(1)) [24]. It should be noted that the application of this Article 10 of the 2004 UN Convention depends on the classification of the dispute as involving a "commercial" or "non-commercial" transaction, as defined in subparagraph "c" of paragraph 1 of Article 2 of the Convention.

General exceptions to state immunity, as established by international legal instruments, include commercial transactions, employment contracts, personal injury or damage to property, intellectual property, and industrial property, among others. The most significant exception is a state's commercial activities. The definitions of "*commercial activity*" and "*commercial transaction*" of a foreign state, as provided in international agreements and modern codifications, are crucial for determining the application of functional (limited) state immunity in private international law. Even if a court recognizes a party to a dispute as a "foreign state," it will deny immunity if the foreign state is engaged in commercial activities as a subject of private international law.

According to the Legal Encyclopedia, the term "*commercial activity*" derives from the Latin *commercium*, meaning trade. In a broad sense, it refers to activities in the field of trade and commerce, which, with the development of economic relations, have increasingly encompassed a wider range of parties and types of economic activity [15]. In modern foreign legislation, the concept of commercial activity is employed in both a narrow (trade) and broad sense. This approach is reflected in the practice of most countries, where the broadest interpretation of commercial (trading) activity is commonly used. This concept includes any activity of an economic nature, such as agreements arising from the production activities of industrial, agricultural, construction, publishing, entertainment, and other enterprises; agreements of commercial, banking, and other enterprises related to the circulation of goods and money; agreements of transport, insurance, and forwarding enterprises involving transportation, storage, insurance, and other operations related

to the circulation of goods; and agreements related to ancillary industrial and commercial activities, such as leasing for a trading enterprise, advertising of goods, and similar activities.

According to the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law (Unidroit), the concept of international *commercial contracts* extends not only to contracts related to the exchange of goods, but also to service contracts, as well as investment, concession agreements, and more. The only exceptions are consumer agreements [25].

The US Foreign Sovereign Immunities Act of 1976 also outlines circumstances under which a foreign state engaged in commercial activities and establishing a jurisdictional connection with the United States will not be entitled to immunity. The Act states that "foreign sovereigns are immune from the jurisdiction of the courts of the United States except in limited specified circumstances" (§ 1604). To bring a lawsuit against a foreign sovereign, the case must fall under one of the exceptions listed in the Act (§ 1605-1607). Similar provisions are found in the laws of the United Kingdom, Canada, Australia, and other countries. Like the US law, these laws specify that a foreign state is not granted immunity from enforcement actions concerning property used for commercial (trade) purposes.

The 1976 US law identifies several scenarios in which a foreign state engaged in commercial activities and establishing a jurisdictional connection with the United States will not be entitled to immunity. First, there is the waiver of immunity by a foreign state, either explicitly or implicitly. In other words, a foreign state does not enjoy immunity from the jurisdiction of US federal and state courts if it has waived its immunity or has taken actions indicating this, such as participating in a lawsuit or filing a counterclaim. Secondly, immunity is not granted when a foreign state conducts commercial activities within the United States or engages in activities outside the United States that have a direct impact within the country. Thirdly, the Act applies when a foreign state performs "an act outside the territory of the United States in connection with commercial activity and that act has a direct effect in the United States." Thus, when a foreign state engages in commercial activity anywhere, and that activity has a "direct effect" in the United States, the foreign state may be held liable under the Act. For example, a foreign state's commercial activities abroad, such as price fixing, that result in price effects within the United States, may lead to the foreign state being held liable under the Act.

The 2004 UN Convention offers a generalized definition of a commercial transaction: "A commercial transaction means: (a) any commercial contract or agreement for the sale of goods or the provision of services; (b) any loan or other financial transaction, including any obligation to guarantee or indemnify such a loan or transaction; (c) any other contract or agreement of a commercial, industrial, trade, or professional nature, except for employment contracts" (Article 2, paragraph 1, subparagraph (c)).

The subsequent part of this article specifies the criteria for classifying commercial agreements: "In determining whether a contract or agreement qualifies as a 'commercial transaction' under Article 2(1)(c), the nature of the contract or agreement shall be the primary consideration. However, the purpose of the contract or agreement should also be considered if the parties have so agreed or if, according to court practice, that purpose is relevant to determining the non-commercial nature of the contract or agreement" (Article 1(2)).

The debate over the criteria for classifying commercial agreements—whether to consider only the nature of the contract or also its purpose—was contentious within the International Law Commission during the Convention's drafting. As Yevgenii Korniichuk notes, "The inclusion of the purpose clause was strongly supported by developing countries but opposed by Western countries[12]. The main argument against considering the purpose is that government actions ultimately serve sovereign purposes, which could lead to a return to absolute immunity, especially concerning politically sensitive issues like investment disputes." [14]

Determining the commercial nature of an agreement or contract involving a state as a party can be challenging. The traditional approach to distinguishing between *jure imperii* (sovereign acts) and *jure gestionis* (commercial acts) involves assessing the nature of the state's activities or actions and, in some cases, the purpose of the transaction. Modern codifications emphasize the principle of the transaction's nature. The European Convention on State Immunity of 1972 adheres to the doctrine of functional immunity but does not provide criteria for differentiating between *jure imperii* and *jure gestionis* activities, only listing instances where the state does not enjoy immunity.

National laws enacted after the 1972 Convention generally reflect similar principles. The 2004 UN Convention on Jurisdictional Immunities of States and Their Property also specifies in Article 2(2) that determining whether a contract is commercial should primarily consider its nature. However, the purpose of the contract should also be considered if the parties have agreed to it or if applicable law regards the purpose as relevant to determining the contract's commercial character. Most national courts prefer to focus on the nature of state agreements rather than their purpose. Foreign scholars argue that a clear distinction between *jure imperii* and *jure gestionis* actions, as well as the criteria for defining commercial versus non-commercial state activities, requires further justification. [11]

Discussions during the work of the UN International Law Commission and subsequent negotiations on the 2004 draft Convention highlight varying approaches to defining this concept across different legal systems [21]. For example, the US Foreign Sovereign Immunities Act of 1976 [26] stipulates that immunity will not be granted "when the cause of action arises out of commercial activities conducted by a foreign state within the United States or from an act performed outside the United States in connection with the commercial activities of a foreign state outside the United States, provided the act has direct consequences for the United States" (§ 1605(a)(2)). Furthermore, property of a foreign state located in the United States and used for commercial activities there is not immune from measures to secure claims or foreclosure based on a court decision. The Act defines commercial activity to include either ongoing activities or specific transactions or actions. Here, the key criterion for determining the nature of a foreign state's action is its nature rather than its purpose [10]. In the case of the Federal Bank of Nigeria, the US Court of Appeals ruled: "If the activity is one that a private person could engage in, it does not give rise to immunity" [5]. Thus, when assessing the commercial nature of an act by a foreign state, US courts determine whether it could be conducted by a private person [8]. This stance is evident in the US Supreme Court's decision in *Republic of Argentina v. Weltover*, where it concluded that the purpose behind a foreign state's activities is irrelevant for determining their commercial nature. Instead, the decisive factor is whether a private person could undertake similar activities [19].

To determine the nature and content of a transaction involving the state, it is important to assess whether the transaction could be conducted by a private individual or if it necessitates the exercise of the state's sovereign power. As Professor O. Merezhko notes, "Contracts for the international sale of goods involving a state as one of the parties should be classified as acta jure gestionis, meaning they are of a commercial nature. Similarly, transportation transactions where the state is a contracting party should be regarded as purely commercial and may be governed by international trade law. This is because transportation agreements involving state entities such as postal or railway organizations are commercial in nature and do not require the state to act in its sovereign capacity" [16].

Despite the existence of the 1978 *Act on State Immunity* [23],

UK law lacks a general concept for categorizing which foreign state actions are commercial. The law follows the structure of the European Convention on State Immunity and enumerates acts to which state immunity does not apply [10]. It defines a commercial action by describing its nature and listing relevant types of contracts. The Act states: "The State does not enjoy immunity in legal proceedings relating to (a) a commercial transaction entered into by the State, or (b) a duty of the State which, by virtue of a contract (commercial or non-commercial), is to be performed wholly or partly in the territory of the United Kingdom" (Part I, Section 3, clause 1). The term "commercial transaction" is defined as follows: (a) any contract for the supply of goods or services; (b) any loan or other transaction involving financing, or any guarantee or indemnity related to such a transaction or other financial obligation; (c) any other transaction or activity (commercial, industrial, financial, professional, or similar) that a State enters into or engages in outside its sovereign authority (Part I, Section 3, clause 3) [23]. Thus, determining the commercial nature of state contracts requires considering their nature, and in some cases, their purpose.

Australian law defines a commercial transaction as "a commercial, trade, business, professional, industrial, or similar transaction, including contracts for the supply of goods or services, loans, other financial arrangements, and financial guarantees" [20].

The criterion of the "nature of the acts" is also reflected in the European Convention on State Immunity (1972), although some of its provisions (Articles 1-3, 12) approach the concept of limited immunity. They establish conditions and forms for waiving immunity by the state. A similar "mixed" approach is found in the Draft Articles on Jurisdictional Immunities of States and Their Property, developed by the UN International Law Commission (UN International Law Commission Draft Articles on State Immunity [27]). While the predominant influence of the "nature of actions" criterion is evident, the purpose of the state's commercial contract may also be considered in certain cases. For instance, Article 2(2) of the Draft Articles refers to the practice of the state party to the contract, indicating that such purpose may suggest the non-commercial nature of the contract or transaction.

Therefore, to distinguish between commercial and non-commercial actions of the state, international regulations, national legislation, and judicial practice apply two main criteria: *the nature and character of the specific action, and the purpose of the action*. To determine the commercial nature of the state's actions, both court practice and international law doctrine consider whether such activities could be performed by a private person.

As noted above, state immunity does not cover commercial actions, making it crucial to identify what constitutes commercial actions of a state and how they differ from sovereign actions. In private international law, a state's commercial activity involves its economic engagements as a participant in international economic relations to achieve market goals, ensure profitability, and interact with other market participants through commercial contracts. Such activity is characterized by private law principles and aims to generate profit through property use, sale of goods, provision of services, or performance of work for foreign individuals or entities.

To mitigate or prevent potential property losses, the state, like other commercial entities, takes necessary measures, including commercial risk insurance. International commercial activity involves organizing and executing the exchange of goods, services, and creative outputs between two or more parties to a commercial contract. This activity transcends national borders and includes the movement of property, goods, services, capital, or personnel, contributing to the formation of a global market.

The parties to a commercial transaction engage in various contractual relations, such as trade, property, investment, and concessions, as defined by international legal instruments and national legislation. The predominant criterion for determining the commercial nature of transactions involving the state is the nature (character) of the actions. However, the purpose of the commercial contract should also be considered in certain cases.

International law, founded on the principle of equality of parties and the principle of *pacta sunt servanda*, mandates that all parties (both individuals and legal entities, including the state) fulfill their contractual obligations in good faith and enjoy equal rights. The principle of *pacta sunt servanda*, as a fundamental legal principle, applies uniformly across all legal systems and to all legal phenomena, binding both individuals and states.

However, a key issue arises when a state is a party to a commercial contract: as a sovereign entity, the state enjoys certain privileges that serve as exceptions to the principle of pacta sunt servanda, which do not apply to individuals and legal entities. These exceptions are closely tied to the concept of state sovereignty and aim to protect the public interests of the state. For instance, the state may have the right to nationalize foreign property on its territory in certain situations for the public good. Nevertheless, as arbitration practice demonstrates, "the state cannot unilaterally release itself from fulfilling its contractual obligations by invoking its sovereign power" [2]. When the state voluntarily undertakes obligations under a commercial contract, this commitment does not undermine its sovereignty or affect the application of pacta sunt servanda.

One way to ensure equality between parties and uphold the principle of pacta sunt servanda in commercial contracts involving a foreign state is through the use of a stabilization clause. It is important to note that a state, by virtue of its sovereignty, has the authority to change its laws at any time, which can alter the legal relations between the parties. According to G.R. Delom, "to prevent such scenarios, parties often include a stabilization clause (also known as a 'grandfather clause') in the contract. This clause stipulates that the contract will be governed by the law in effect at the time of its conclusion, and any subsequent changes in legislation will not affect the contract" [6]. An example of a stabilization clause is as follows: "This agreement cannot be canceled by the government, and the terms contained in the agreement cannot be altered in the future by any legislative act, administrative measure, or other actions of the executive branch" [17].

Regarding the legal effectiveness of the stabilization clause, it is important to note that not all legal systems may recognize it. From the perspective of constitutional law, a state cannot limit its legislative or executive powers by entering into a private contract [18]. Therefore, a court in the contracting state that reviews the validity of the stabilization clause may not use it to restrict the sovereign power of the state. Similarly, a foreign court might refuse to enforce a stabilization clause that conflicts with the sovereign power of another state, due to the doctrine of "act of state" [28].

4 Conclusion

In the second half of the twentieth century, the participation of states in international private legal relations with counterparties representing private law subjects of other states increased significantly. States are increasingly involved in such activities and are unique participants in these relations due to their immunity. These state participations in international private relations are governed by international legal instruments, with the European Convention on State Immunity of 1972 being particularly significant. The UN Convention on Jurisdictional Immunities of States and Their Property of 2004 also plays a role in this regulation, but it has not yet been ratified as required by Article 30.

Both conventions underscore state immunity but establish certain exceptions, with commercial activity being a principal exception. A state cannot claim immunity from jurisdiction in a foreign court if it is involved in a commercial transaction with a foreign individual or entity. Similar provisions are

found in the special national laws of various states and are commonly reflected in court practice. When engaging in commercial activities, the state operates on an equal footing with other entities.

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28. According to this doctrine, the US courts are prohibited from reviewing the validity of acts of foreign state authorities if the scope of these acts is limited to the regulation of legal relations in the territory of the state that adopted the act to be applied.

Primary Paper Section: A

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