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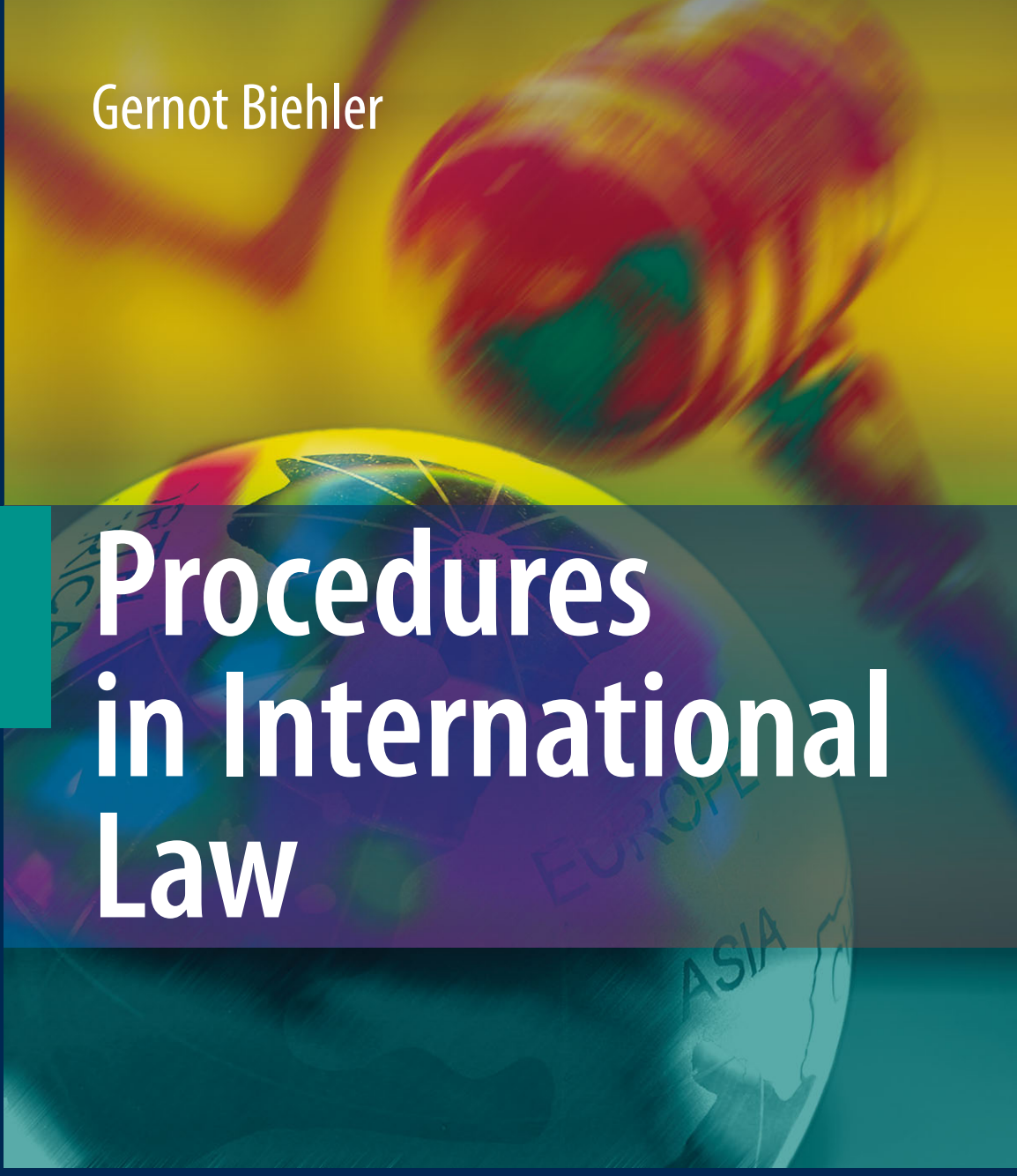

Procedures in International Law

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Chapter 5

Limiting National Jurisdiction by Procedural Means

5.1 Introduction

At a global level there is no general rule which limits courts from assuming jurisdiction even in a way which is considered exorbitant by many. This may lead to a jurisdictional conflict of competing jurisdictions as outlined in the preceding chapter. A jurisdictional conflict shows that there is a need to address the issue of competing jurisdictional claims when there is no special rule, for example, European Regulations and Conventions, to solve the conflict, perhaps with a strict application of the *lis pendens* or *res judicata* doctrines. It has been outlined that national jurisdiction is determined independently by the national *lex fori proceduralis* and since the *Lotus* case[1] no general and substantial limits to national jurisdiction may be found in international law allowing for a variety of agreed limits in Conventions applying to special areas of law.

While a country and its courts may extend jurisdiction into fields claimed by other competing jurisdictions they may choose not to do so. In cases of conflict with competing jurisdictions it may refrain from exercising jurisdiction which is normally assumed. This may be done in the interests of good relations with the other country assuming competing jurisdiction. Comity between courts is a phrase often met in this context. In cases of direct involvement of foreign states and their agents in national litigation immunity is the most common ground on which decisions to refrain from assuming jurisdiction are based. If a public act of a foreign state is an indirect issue in litigation between private parties the act of state doctrine may be employed to the same end. If the focus is on a "better" jurisdiction the classical *forum non conveniens* doctrine renders the same service. Foreign policy prerogatives should be mentioned in this context too. The more general term comprising all these procedures which limit a domestic court's jurisdiction is the notion of judicial (self) restraint relating to some foreign competing interests both jurisdictional and political.

What do they have in common? "Reduced to its simplest, the justification for use of avoidance techniques … is to allocate in the most appropriate manner suit-

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[1] *France v Turkey* [1927] PCIJ Reports, Series A No. 10.

able to all interests and the ends of justice jurisdiction between the forum and the foreign States."[2] This means that it is their common purpose to limit their own national court's competency to adjudicate. This is done by the autonomous means of their own procedural laws which allow foreign claims not to be judged by the forum to the benefit of international relations, the freedom of the executive government to conduct foreign policy or the claim of another forum both international and national. All these procedural means employed to foster international judicial co-operation originate in the national context and are still partly applied outside the realm of foreign relations and international law in national constitutional contexts. A plea of immunity is granted under national law, for example, in most states to the legislature and its members or in the case of France and others to the President of the Republic while in office. The British monarch and most of her international peers would enjoy immunity from adjudication not only in foreign countries but in their own countries too according to their national constitutional provisions. The unhindered function of heads of state or members of parliament is held in most national laws to be preferred to the immediate right of a prosecutor or creditor to seek justice from the bench. In the national context immunity is justified because of the division of powers between the different branches of government, legislative, executive and judicial. Internationally, it is in order to maintain peaceful relations between states and their organs notably courts that immunity is granted. Act of state (or the equivalent *acte de gouvernement* or *justizfreier Hoheitsakt*) is also a national law doctrine invented to exempt some public governmental acts of particular importance from being judicially scrutinised before national courts in the interests of individuals. The reason for this approach is that it is in the remit of the executive power to decide certain things and this is not limited to foreign affairs.[3] The French *acte de gouvernement* would largely have the same field of application as the common law act of state doctrine or the German *justizfreier Regierungsakt.*[4] All these doctrines are defences to substantive law that require the forum court to exercise restraint in the adjudication of disputes relating to legislative or other governmental acts which a state has performed within the limits of its competency as seen by the *lex fori proceduralis*. All these doctrines will be applied on the merits stage except the plea of immunity which will be entertained at the preliminary stage. However, whatever the stage at which these procedural tools become effective, barring jurisdiction or barring the claim to be adjudged on the merits will have ex-

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[2] Hazel Fox "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States" in Malcolm D. Evans (ed.), *International Law* (2nd ed., OUP, 2006) p. 361, 392.

[3] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398 *per* Lord Fraser and at 407 *per* Lord Scarman and at 411 *per* Lord Diplock, all considering that the subject matter of executive power and not its source determines justiciability.

[4] Husen, Paul van, "Gibt es in der Verwaltungsgerichtsbarkeit justizfreie Regierungsakte?" Deutsches Verwaltungsblatt 1953, pp. 70 -73; Biehler, *Auswärtige Gewalt* (Mohr & Siebeck, 2005) p. 95 *et seq*.

actly the same effect. When applied they all have the effect that no decision on the merits will be handed down by any court. Therefore, it is submitted that it is not necessary to dwell on the subtle procedural distinctions between those avoidance techniques.[5] Their common effect and purpose as well as the different approaches taken by national courts in characterising issues as preliminary or substantive indicates that all procedural avoidance techniques can be seen to be substantially similar. This certainly would apply from an international law perspective where the effect of not assuming jurisdiction rather than the subtle reasoning of the different courts would count as state practice in establishing international customary law within the meaning of Article 38.1.b of the ICJ Statute.

All these doctrines originating in a national law context are now well established in serving international co-operation based on the idea of legal equality of states under international law as expressed in Article 2.1 of the United Nations Charter. From it follows the rule of non interference (Article 2.7) in the domestic affairs of another state and the prohibition of the use of military force to effect this (Article 2.4). These doctrines are from this perspective emanations of international law condensed into means of national procedural law. The classic statement of the act of state doctrine which appears to have taken root in England as early as 1674[6] may be understood as giving a valid ground for all those doctrines mentioned. As Chief Justice Fuller outlined in the US Supreme Court:[7]

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgement on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

This does not rule out the making of distinctions deriving from the differing origins of the doctrines. As Lord Millett states in relation to the act of state doctrine and immunity:

> "As I understand the difference between them, state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of sovereign acts of a foreign state."[8]

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[5] Hazel Fox "International Law and the Restraints on the Exercise of Jurisdiction by National Courts of States" in Malcolm D. Evans (ed.), *International Law* (2nd ed., OUP, 2006) p. 361 introduces this term for the different doctrines in this context, which seems very useful.

[6] *Blad v Bamfield* (1674) 3 Swans 604; 36 ER 992.

[7] *Underhill v Hernandez* 168 US 250, 252 (1897).

[8] *R v Bow Street Magistrate, ex p. Pinochet Ugarte* (No 3) [2000] 1 AC 147, 269 (HL).

Any of these contentions of Lord Millett are open to debate, as immunity may be applied by a court in relation to a state defendant which does not appear before it and consequently does not plead immunity meaning that immunity is not only a plea but must be considered *ex officio* by the courts under certain circumstances. Immunity is certainly part of domestic law not only in the form of statutes regulating and incorporating immunity nationally, such as the US Foreign Sovereign Immunities Act or the UK State Immunities Act, but as outlined immunity is accorded constitutionally to members of parliament, government and sometimes heads of state and it is submitted that the doctrine of foreign state immunity is derived from the national doctrines. However, these distinctions do not have any practical significance for the outcome and effect of the doctrines mentioned and may, therefore, be put to rest.

Before turning to the details of the single avoidance techniques of national procedural laws serving international relations and law, it is submitted that they are more closely linked than usually admitted. Certainly, immunity is a defence at the preliminary stage for a foreign state or its agents against the jurisdiction of the forum while act of state and judicial restraint or non justiciability are usually considered at the merits stage in proceedings between private parties where the legality or validity of a foreign official act must be implicitly addressed by the court in order to decide the case. It is not only that there will be a common effect in that there will be no decision on the merits if one of these doctrines is applied but the regard which the court has to the non-justiciability of foreign state acts which deserve immunity in the interest of international law which brings them together. This has been recently shown in *Ansol Ltd v Tajik Aluminium Plant*,[9] where act of state, non-justiciability, judicial restraint and immunity were pleaded together.[10] The same can be observed in *Wood Industries Ltd v United Nations and Kosovo*[11] even including the *forum non conveniens* plea. All possible distinguishing marks between them, for example, whether the act of state doctrine or judicial restraint can be waived by the party benefiting, are contentious and no clear distinction can be asserted except that immunity is usually pleaded by a state party at an earlier procedural stage than the other avoidance techniques. The joint plea of all of these techniques in *Ansol v Tajik* shows their close procedural and substantive relationship which will usually indicate that they should be considered together.

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[9] [2006] EWHC 2374 (Comm).

[10] See para. 148 *et seq*. of the judgment of Cresswell J.

[11] US District Court for the Southern District of New York Case No. 03-CV-7935 (MBM), see *amicus curiae* brief on behalf of Kosovo.

5.2 Act of State

As with all procedural avoidance techniques serving foreign policy and international law objectives the act of state doctrine has its origin in a national doctrine rendering certain public acts of the government non-justiciable, sometimes based on the idea of the division of powers between the courts and the executive and parliament and developed from there to cover foreign acts of state. Therefore, the act of state doctrine gives effect to a policy of judicial restraint and non-justiciability.[12] It provides that the court of the forum should not adjudicate upon or call into question legislative or other government acts of a foreign state within the limits of its own territory or competency. This precludes the court from inquiring into the motives of the foreign state in carrying out an act of state.[13] The doctrine applies usually when the relevant foreign state is not a party to the proceedings as it would then usually plead immunity in relation to its state acts. However, there is nothing to bar its application in cases in which a state is a party and has for whatever reason not pleaded immunity in relation to its relevant state acts. Act of state can be applied even when not pleaded and it has this in common with judicial restraint or immunity in cases where the state party does not appear and the court decides that it can enjoy immunity *ex officio*. As Ackner LJ outlined in *The Playa Larga*:[14]

> "Sovereign immunity is derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases. However, the same basic principle applies to an Act of State, which is also an exercise of sovereign power. An Act of State is something not cognisable by the court: if a claim is made in respect of it, the court will have to ascertain the facts, but if it then appears that the act complained of was an Act of State the court must refuse to adjudicate upon the claim. In such a case the court does not come to any decision as to the legality or illegality, or the rightness or wrongness of the act complained of: the decision is that because it was an act of State the court has no jurisdiction to enter a claim in respect of it."

The court will consider the act in question to see whether it is in truth a sovereign act or an act of a private or commercial character.

In *A Bank v B Bank*[15] Morritt LJ referred to the fact that counsel for the intervener had relied on comity as descriptive of a principle requiring the courts in England to decline to grant relief which would constitute interference in the inter-

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[12] *Kuwait Airways v Iraqi Airways* (*Nos. 4 and 5*) [2002] 2 AC 883, 927 *per* Lord Hope.

[13] *William & Humbert v W & H Trade Marks (Jersey) Ltd* [1982] AC 368, 431 *per* Lord Templeman.

[14] [1983] 2 Lloyd's Rep 171, 193.

[15] [1997] FSR 165.

nal affairs of a foreign sovereign state. This principle was relied on to support the general proposition that the action was non-justiciable and the narrower point that the claim for delivery up or destruction upon oath of all infringing articles within the United Kingdom and in the possession, power or control of the defendant would be destructive of confidence in the currency in question and an unwarranted intrusion into the internal affairs of the state by which it was issued. However, Morritt LJ rejected these submissions in the following terms:

> "The word 'comity' is no doubt a convenient word by which to refer collectively to the principles of law and diplomatic behaviour which regulate the relations between friendly sovereign states. But if it is itself a principle wider than that established or recognised by *Buttes Gas and Oil Co. v Hammer*[16] then the careful limitation of that principle in the manner to which I have referred earlier would have been unnecessary."[17]

Morritt LJ also referred to the judgment of Justice Scalia in the concluding passage of the opinion of the US Supreme Court in *W.S. Kirkpatrick & Co Inc v Environmental Tectonics Int.*[18] where he had observed: "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The Act of State doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." Morritt LJ expressed the view that this statement was particularly apposite to the case before him. He stated that he could understand that the trial of the action might be embarrassing to the state whose currency was involved but the issues to be resolved did not include the validity of any sovereign act of that state. He concluded that in his view it was the duty of the court in England to determine the dispute as to whether the patent granted to A Ltd was infringed by B Bank and that he would allow the appeal against the decision of the trial judge.

Whether the act of state doctrine or judicial restraint can be waived by the party benefiting has not yet been decided. On the one hand, this was suggested *obiter* by Ackner LJ in *La Playa Larga*, however, he stated in the case that an act of state plea would fail on the merits anyway which makes his former point not only *obiter* but weak. The discretion of the party benefiting to rely on the doctrine or not has never been upheld anywhere and is contradicted by *dictum* in the same case. Ackner LJ held that the court "must refuse to adjudicate", which indicates that it is not within the discretion of the parties to decide whether the doctrine will be applied once the relevant facts have been established.

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[16] [1982] AC 888.

[17] [1997] FSR 165, 176.

[18] 493 US 400 (1990).

In the United States the act of state doctrine has been defined in the following terms in the US Supreme Court by Justice Scalia:[19]

> "This Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years. We once viewed the doctrine as an expression of international law, resting upon 'the highest considerations of international comity and expediency'.[20] We have more recently described it, however, as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs.[21] Some Justices have suggested possible exceptions to application of the doctrine, where one or both of the foregoing policies would seemingly not be served: an exception, for example, for acts of state that consist of commercial transactions, since neither modern international comity nor the current position of our executive branch accorded sovereign immunity to such acts[22]; or an exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act, since then the courts would be impeding no foreign policy goals …[23]
>
> In every case in which we have held the act of state doctrine applicable, the relief sought or the defence interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory. In Underhill v Hernandez,[24] holding the defendant's detention of the plaintiff to be tortious would have required denying legal effect to "acts of a military commander representing the authority of the revolutionary party as government, which afterwards succeeded and was recognized by the United States." … In Sabbatino,[25] upholding the defendant's claim to the funds would have required a holding that Cuba's expropriation of goods located in Havana was null and void.

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19 *WS Kirkpatrick & Co v Envtl Tectonics Corp, Int'l* 493 US 400 (1990).

20 *Oetjen v Central Leather Co.* 246 US 297, 303 –304 (1918).

21 *Banco Nacional de Cuba v Sabbatino* 376 US 398, 423 (1964).

22 *Alfred Dunhill of London, Inc v Republic of Cuba* 425 US 682, 695-706 (1976) (opinion of White J).

23 See *First National City Bank v Banco Nacional de Cuba* 406 US 759, 768 -770 (1972) (opinion of Chief Justice Rehnquist).

24 168 US 250, 254 (1897).

25 *Banco Nacional de Cuba v Sabbatino* 376 US 398, 423 (1964).

French law uses the term of "*actes de gouvernement*" to come to a result comparable with the act of state doctrine in English speaking jurisprudence.[26] However, the distinction between act of state and immunity or judicial restraint is not used. It is said that the application of an *acte de gouvernement* leads to immunity and judicial restraint. The great charm and advantage of the French doctrine is that it comprises both national and international issues such as the division of powers between parliament and the executive government[27] as well as international relations.[28] The latter is the most important field of application of the French doctrine. This has been determined in the French Greenpeace[29] case.

It is submitted that the German courts would come to a comparable result, although the terminology that they use is less straightforward. Historically, the act of state doctrine as *justizfreier Hoheitsakt* or *Regierungsakt* was well established in German law.[30] It was seen as opposed to the administrative act *Verwaltungsak*t of the state authorities which was fully subject to judicial review while the *Regierungsakt* was not.[31] This would apply particularly to so-labelled diplomatic acts in the realm of foreign affairs.[32] This was summarised by the *Oberverwaltungsgericht* Münster (Court of Administrative Appeals) as follows:

> "Anträge, mit denen Maßnahmen … begehrt werden, die in den Bereich der Außenpolitik fallen, sind im verwaltungsgerichtlichen Verfahren unzulässig"[33]
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> "Applications which fall into the realm of foreign policy are inadmissible in administrative judicial review procedures before this court."

The background to this case was that the British army, then still an occupying army in Germany, was causing a nuisance to German residents who sued before

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[26] See Rougevin-Baville, Irresponsabilité des Puissamces Publiques, in F. Gazier and F. Drago (eds.), *Dalloz, Encyclopedie de Droit Publique, repertoire de la Responsabilité de la Puissance Publique* (Paris 1988); Virally "L'introuvable acte de gouvernement" RDP 1952, 317; R. Chapus "L'Acte de gouvernement, Victime ou Monstre?" D. Chronique, p. 5.

[27] CE 20 February 1989, Allain [1989] Rec 60.

[28] CE 29 October 1954, Taurin [1954] Rec 566.

[29] CE 1995 Association Greenpeace France. Solution validée par la CEDH. Lodemann, Catharina, *Die Geschichte des französischen acte de gouvernement* (2005, Verlag Peter Lang Frankfurt), provides a good summary and treatment of the case law.

[30] Biehler, *Auswärtige Gewalt* (Mohr & Siebeck, Tübingen, 2005) p. 88 *et seq*.

[31] Eyermann and Fröhler, *Kommentar zur Verwaltungsgerichtsordnung* (9th ed., 1988) zu § 42 VwGO, Rz. 70 et seq.: Stelkens in Stelkens/Bonk/Leonhardt *Kommentar zum Verwaltungsverfahrensgesetz* (5th ed., 1998) zu § 42 VwVfG, Rz. 97.

[32] Schneider, Hans, "Gerichtsfreie Hoheitsakte" in Recht und Staat 1951, p. 42 *et seq*., Helmut Rumpf, *Regierungsakte im Rechtsstaat* (1955) p. 21 *et seq*.

[33] *Anon v Germany ex parte British Military Government in Germany, Oberverwaltungsgericht* Münster, Beschluss vom 23.9.1958 in DVBl. 1959, 294.

the German courts putting forward some environmental concerns against the use of the land by the British. The application was not granted against the German executive government which had allocated the private lands of the applicants to the British military for use free of charge under the international law of belligerent occupation. The court found that jurisdiction and *locus standi* must be denied as the case concerned the review of *justizfreier Hoheitsakt*, on this there is unanimity in the jurisprudence of courts and scholarly works.[34] In an answer of the *Auswärtiges Amt* (Foreign Ministry) to the Bundestag, the German government made reference to this decision of the Münster *Oberverwaltunggericht* and elaborated:

> "Der erkennende Senat habe in seinem Beschluss ausgeführt, dass die geforderten Maßnahmen in den Bereich der Beziehungen zu ausländischen Staaten fallen und damit zu den justizfreien Hoheitsakten gehörten. Das Gericht habe sich mit dieser Entscheidung der von der Bundesregierung vertretenen Rechtsauffassung angeschlossen."[35]
>
> "The Senate/bench (of the court) elaborated in its decision that the requested measures are part of the relations between foreign states and, therefore, must be considered to be part of state acts not subject to judicial review. The Court followed with this decision the legal opinion held by the Federal Government."

The *Bundesverwaltungsgericht* (Federal Administrative Court of Final Appeals) has also applied the *justizfreier Hoheitsakt*,[36] as has the *Bundesgerichtshof* (Supreme Court).[37] However, the *Bundesverfassungsgericht* (Federal Constitutional Court) *obiter* felt uneasy about reducing access to the court[38] with the *justizfreier Hoheitsakt* doctrine in the light of the constitutional guarantee to judicial review.[39] This apodictic approach of the latter court albeit *obiter* has led to the demise of the development of the doctrine in German law and a practice on the part of the courts of reformulating the incompatible principles of full judicial review on the one hand and necessary discretion in foreign affairs including respect for foreign state acts on the other hand only in terms of judicial self restraint or prerogatives, *außenpolitische Einschätzungsprärogative der Regierung*. However, they will reach the

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[34] "darüber besteht in der Rechtsprechung und im Schrifttum Einigkeit" loc. cit.

[35] *Bundestagsdrucksache* 3/756 zu 5. (of 11 December 1958). Translation by the author.

[36] BVerwG in DVBl 1963, 728.

[37] BGH MDR 1971, 200.

[38] Under Article 19.4 of the *Grundgesetz* (Constitution) which is comparable to Article 6 of the ECHR. See BVerfG E 4, 157, 169.

[39] See Article 19.4 of the German Constitution, Grundgesetz. Biehler, *Auswärtige Gewalt* (Mohr & Siebeck, Tübingen, 2005) p. 98 *et seq*. with commentary on the doctrine in German law.

same result as they would have if they had applied the act of state/*justizfreier Hoheitsakt* doctrine directly.[40]

It may be said that despite the subtle distinctions in arguing the procedural exception in relation to foreign relations and international law there is a common approach taken by most courts of most countries in this field which justifies reciprocally taking note of the jurisprudence of various countries.

5.3 Comity

The same considerations put forward in the context of the act of state doctrine, foreign policy prerogative or foreign sovereign immunity leading to judicial restraint or abstention are sometimes described as comity of courts or nations. It is submitted that there is no substantial difference between them in relation to their aim or effect. However, as immunity, judicial restraint and act of state each cover a certain angle of the same subject matter and have their distinct applications and historically developed doctrines so does comity. It is suggested that comity is probably the widest notion with the less clearly defined field of application. The normal understanding of "comity" indicates even a non legal content. Comity is exercised between people and is usually understood as politeness or appropriate behaviour. Between states it describes good practice in the diplomatic area and the mutual regard observed towards other states' concerns. Most of what evolved as international law could be described in those terms. It would be going too far to assume that there is a doctrine of "comity" with a defined content. However, the use of the term by courts is regularly concerned with accepting other countries' claims to jurisdiction in a contentious matter and limiting a state's own jurisdiction accordingly. This relates to everything described in the context of limiting rather than extending its jurisdiction in the international realm. Thus, comity comprises all notions discussed here and it may be said that the act of state doctrine, immunities and prerogatives are rooted in the comity between courts and nations when directed to serve international relations. As Diplock LJ outlined in *Buck v Attorney General*:[41]

> "As a member of the family of nations, the Government of the United Kingdom (of which this court forms part of the judicial branch) observes the rules of comity, *videlicet*, the accepted rules of mutual conduct as between state and state which each state adopts in relation to other states and expects other states to adopt in relation to itself. One of those rules is that it does not purport to exercise jurisdiction over the internal affairs of any other independent state, or to

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[40] Petersmann, Ullrich, "Act of State, Political Question Doctrine und gerichtliche Kontrolle der auswärtigen Gewalt" in Jahrbuch des Öffentlichen Rechts Neue Fassung 25 (1976) p. 587 *et seq*.

[41] [1965] Ch 745, 770 (CA).

> apply measures of coercion to it or to its property, except in accordance with the rules of public international law. One of the commonest applications of this rule by the judicial branch of the United Kingdom Government is the well-known doctrine of sovereign immunity. A foreign state cannot be impleaded in the English courts without its consent."

What was outlined as the doctrine of comity, of which immunity is one of the commonest applications, could also be said in relation to other applications of the rules of comity by courts in the field of international law and relations:

> "The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law containing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction, as, for instance, the validity of a foreign law might come in question incidentally in an action upon a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is about nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction."[42]

The US Supreme Court in *F.Hoffman-La Roche Ltd v Empargran SA*[43] recently applied comity in relation to the jurisdiction of other countries in the sensitive area of the extraterritorial effects of US competition legislation. The US Foreign Trade Antitrust Improvements Act 1982 (FTIA) amending the "Sherman Act" was applied to some price fixing conduct of international pharmaceutical companies in relation to vitamins. After referring to other cases,[44] it was outlined that there is a rule of "prescriptive comity" which

> "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world."[45]

The concerns of comity were relevant in the case of the extra-territorial application of US Antitrust laws as other nations had not adopted competition laws similar to the United States' laws and disagreed about the ways to proceed in cases of infringement like price fixing. By applying prescriptive comity as the US Supreme

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[42] *Ibid.*

[43] 542 US 155 (2004).

[44] *Hartford Fire Insurance Co. v California* 509 US 764, 817 (1993); *Murray v Schooner Charming Betsy* 2 Cranch 64, 118 (1804).

[45] 542 US 155, 163 *per* Justice Breyer for the court.

Court phrased it regard was had to the diverging stances of other jurisdictions as represented in the case for Germany, Japan and Canada. This was done by limiting the scope of the international application of its own antitrust statutes.

Very recently in *Walsh v National Irish Bank*[46] the Irish High Court decided not to authorise the Irish Revenue Commissioners to obtain information from a bank in Ireland in relation to Irish residents' accounts according to Irish statutory provisions because it respected the concept of the comity of courts towards the Isle of Man jurisdiction. It applied Manx law to the requested customers' account information. Considering the strong tendency of courts normally to apply their own law to a bank's headquarters in their own territory, sometimes even in relation to their operations abroad,[47] this self restraint on the part of the Irish court is quite remarkable. It may be seen as the opposite of the ultimate judicial conflict displayed *supra* in the preceding chapter. It was an unambiguous case as all relevant material was situated in the territory of Ireland and there was no longer a branch or subsidiary of the bank in the Isle of Man which could have asserted any rights against an Irish court order based on Manx law.[48] Nor was there any incentive for the Irish court to let the Irish Revenue Commissioners down for the benefit of Irish residents who may have evaded Irish taxes. The context of this decision shows what forceful considerations must be associated with the comity of courts in order to justify a decision which would be totally untenable without the idea of comity. This decision displays a very far reaching acceptance of foreign law as limiting a domestic jurisdiction's reach. A more abstract delineation of the competing Irish and Manx jurisdictions became instrumental and as one of the most far reaching decisions of a court it may be either hailed as a model for judicial restraint under the flag of comity of nations and their courts or blamed for neglecting the forum state's vital interests for the benefit of remote and rather abstract foreign interests. Therefore, it may be justifiable to consider the reasoning of the court in some detail.

The applicant, Mr Walsh,[49] asked the National Irish Bank in Dublin to disclose the account information of Irish residents in relation to accounts held in the Isle of Man before 2002 when the National Irish Bank offered deposit facilities in Douglas. Specifically the applicant sought an order

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[46] [2008] 2 ILRM 58.

[47] *X AG v A Bank* [1983] 2 All ER 465; *SEC v Minas de Artemisa* 150 F 2d 215 (9th Cir 1945).

[48] See the rights asserted by the Fruehauf France branch of Fruehauf US as confirmed by the French Cour d'Appel in Paris, [1968] DS Jur 147, [1965] JCP II 14,274 bis. An English language summary of the case is available in 5 ILM 476 (1966). See William Laurence Craig, "Application of the Trading with the Enemy Act to Foreign Corporations owned by Americans: Reflections on Fruehauf v Massardy (1969-1970) 83 Harv L Rev 579.

[49] Mr Paul Walsh, the applicant in the case was a Principal Officer with the Revenue Commissioners and was attached to the Offshore Assets Group responsible for dealing with Irish residents, who might have sought to evade their tax liability by the use of offshore accounts.

> "… that … in relation to persons holding deposits with the Isle of Man branch of National Irish Bank, the respondent do make available for inspection by the applicant, from books, records or documents maintained by the respondent or from books, records or documents to which the respondent has access, the following information:–
>
> (C) A schedule, whether in electronic or paper form, of all deposit holders with an address in the State having accounts with the Isle of Man branch of National Irish Bank where the balance on the account exceeded £5,000 or €6,350 at any time setting out:
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> (1) The name and address of the account holder,
>
> (2) The date the account was opened and the amount of the opening balance,
>
> (3) The maximum balance on the account over the life of the account, and
>
> (4) If applicable the date of closure of the account." [50]

A time schedule for the supply of this information was then set forth.

As an authorised officer of the Irish Revenue Commissioners, the applicant based his claim on the statutory provision of section 908 of the Irish Taxes Consolidation Act 1997, the relevant parts of which read as follows:

> "(2) An authorised officer may, … make an application to a judge for an order requiring a financial institution, to do either or both of the following, namely –
>
> (a) to make available for inspection by the authorised officer, such books, records or other documents as are in the financial institution's power, possession or procurement as contain, or may (in the authorised officer's opinion formed on reasonable ground) contain information relevant to a liability in relation to a taxpayer, …"

No explicit exception is contained in the Act which may exempt the bank from complying with an order the purpose of which is to enable the Irish Revenue Commissioners to obtain information regarding potential tax evaders, when otherwise, for example by reason of the common law duty of confidentiality, such information may not be available. It could, therefore, be argued that the Act has extra-territorial application. However, it was not necessary to decide on the question of the Act's extra-territorial reach as the facts of this case related only to the Irish jurisdiction and territory as the respondent bank was incorporated in Ireland with its headquarters in Dublin and could supply the information, and produce the

[50] *Ibid.* at 60.

documents, within the Irish jurisdiction without any contact with or effect in the territory of the Isle of Man. From the perspective of the Irish authorities bringing the action the true and real connecting jurisdiction was Ireland and not that of the Isle of Man. The respondent bank, whose head office was in Ireland, was a legal entity under Irish law, the taxpayers whose account details were sought were Irish citizens and residents, and it was most likely that any movement on such accounts would have had an instruction input from Ireland. Furthermore, if the suspicions of the Revenue Commissioners were correct, the account holders might have evaded and/or might continue to evade their Irish taxation responsibilities. These circumstances make this case exceptional and its considerations of comity as remote as they can possibly be. In the words of McKechnie J: "The question then arises as to what difference the Isle of Man location makes to this application? Are the facts that the respondent bank is subject to Irish law, that it has its principal place of business in this jurisdiction and that the information and records requested are most probably reachable from its Dublin office, sufficient to justify this court in granting the order sought? Or do other considerations prevent such an outcome?"[51]

The bank in opposing the order suggested such "other considerations" should be decisive, claiming essentially that the Irish court had no jurisdiction to make the order as sought because the target of the order was a branch of the respondent bank which was then located in the Isle of Man and not to a branch which was located in the Irish jurisdiction. It is noteworthy that the NIB branch in the Isle of Man was dissolved in 2002 and all relevant information transferred to Ireland to the bank headquarters in Dublin thereafter.

McKechnie J followed this line of argument with reference to comity:

> "The reference to "a principle of comity" includes the mutuality of respect which each judicial system affords to another. Therefore if the particular circumstances of any given case should require it, the court of the country whose jurisdiction is being invoked, should exercise self restraint so as to avoid the possibility of a conflict between that jurisdiction and its foreign neighbours."[52]

It is suggested that this formula excellently describes what the principle of comity is meant to achieve and what it also has in common with all other avoidance techniques.

The decision relies on some scholarly work on statutory interpretation.[53] In coming to his conclusion McKechnie J follows the author of that work and outlines that one reason for restricting the literal meaning of a statutory Act is "a principle of

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[51] *Ibid.* at 76.

[52] *Ibid.*

[53] Francis Alan Roscoe Bennion, *Statutory Interpretation* (4th ed., Butterworths, 2002) p. 306.

comity which confines its operation within the territorial jurisdiction of the enacting state".[54] Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. This, it is submitted, is one of many instances where the express words of any statutory provision are taken to be subject to implications altering their literal meaning. The rules of comity and international law indicate that it is for each territorial government to regulate the inhabitants and affairs of its own territory.

McKechnie J could further rely on some Irish precedents[55] and a similar case in Wales in which Lord Denning held for the English Court of Appeal:[56]

> "I was impressed at first by [this] argument (that the sought court order was purely personal '*in personam*' and therefore did not interfere with the Isle of Man jurisdiction)… But on reflection I think that the branch of Barclays Bank in Douglas, Isle of Man, should be considered in the same way as a branch of the Bank of Ireland or an American bank, or any other bank in the Isle of Man which is not subject to our jurisdiction. The branch of Barclays Bank in Douglas, Isle of Man, should be considered as a different entity separate from the head office in London. It is subject to the laws and regulations of the Isle of Man. It is licensed by the Isle of Man government. It has its customers there who are subject to one Manx Law. It seems to me that the court here ought not in its discretion to make an order against the head office here in respect of the books of the branch in the Isle of Man in regard to the customers of that branch. It would not be right to compel the branch … or its customers … to open their books or to reveal their confidences in support of legal proceedings in Wales."

Based on this understanding of comity of courts and nations McKechnie J comes to a conclusion which would have been very different without regard to comity.

> "Even therefore if the Revenue Commissioners are correct in submitting that s. 908 [of the Irish Taxes Consolidation Act 1997] applies to National Irish Bank, with its registered office in Dublin, I

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[54] Bennion *ibid*. p. 306.

[55] *Chemical Bank v McCormick* [1983] ILRM 350 *per* Carroll J at 354: " … I do not propose to make such an order in case there would be a conflict of jurisdiction, which should be avoided in the interest of the comity of courts", and the English cases *Mackinnon v Donaldson* [1986] 1 All ER 653,658 and *Re Grossman* (1981) Cr App R 302 *per* Lord Denning.

[56] *Re Grossman* (1981) Cr App R 302, 307-308.

> would not deliberately offend the integrity of the Isle of Man or its judicial system by granting an order which I knew they would strongly object to. To do so would be downright disrespectful to a sovereign jurisdiction and would be the antithesis of showing due respect for the comity of courts. I would therefore decline to grant the order sought."[57]

The larger part of the judgment is not concerned with international law and comity of courts but with determining the proper law applicable to the banking contracts between National Irish Bank and its Irish customers in relation to the former accounts in its Isle of Man branch. Only on the basis that Manx law applied to those accounts according to the Irish law of conflicts or international private law McKechnie J was prepared to limit his own court's jurisdiction to the benefit of the principle of comity. This interplay between the determination of the proper and applicable law as a precondition to considering the reach of the domestic court's jurisdiction is remarkable. It is reflected in the arguments of the defendants in *X AG v A Bank*, [58] where they claimed that New York law, New York being the seat of the headquarters of the bank, should apply to the banking contract relating to the Swiss applicant's accounts with an American bank's branch in London. The applicable law determined according to the national rules of international private law was held to be relevant by Leggatt J for the delineation of the English and American jurisdictions. The defendant bank's argument was that the confidentiality of the account information should not be enforced if performance of the contract required the doing of an act which violated the law of the place of performance. The background to this case was that the New York court lifted the duty of confidentiality and the English court wanted to decide whether this would affect the confidentiality of information located in the London branch of the American bank. After finding English law to be the proper law regarding the London branch, the court delineated the English and American jurisdictions accordingly in favour of the English in what it is submitted was probably the fiercest clash of jurisdictions in the field.

The same recourse to international private law was had by McKechnie J in *Walsh v National Irish Bank*, quoting *X AG v A Bank*,[59] refuting the applicant's contention that the proper law of the banking relationship between Irish citizens and residents and National Irish Bank in relation to banking information available in its Irish headquarters must be Irish. He made a number of interesting observations in relation to Manx law as the applicable law considering *deprecage* between Irish and Manx law and the Rome Convention of 1980 and indicating that the question of which place had the closest connection to the relationship between the bank and the customers must be decisive. He concluded as follows:

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[57] [2008] 2 ILRM 56, 80.

[58] [1983] 2 All ER 464, 475.

[59] [2008] 2 ILRM 56, 69.

> "… the respondent when offering its services in the Isle of Man and the account holders who availed of such services, both did so on the presumed understanding that the applicable law would be Isle of Man law and not the law of this jurisdiction. Otherwise it makes absolutely no sense for a person with an Irish address to open an account in the Isle of Man rather than in Ireland. As it is not suggested that these accounts were opened to facilitate the carrying on of a business, trade or profession, I can see no good reason to have an account, which is subject to Irish law, in an Isle of Man branch of an Irish bank."[60]

McKechnie J certainly did not feel that his primary task was to come down on potential tax evasion. He made this remarkably clear:

> "Finally there was a suggestion running through a number of submissions made by the Revenue Commissioners that if this court should grant the order as sought, the respondent bank would be most reluctant to frustrate its effects by seeking an injunction in the Isle of Man. I am not sure precisely what the applicant means in this regard. However could I categorically say that this Court is not in the business of making orders which rely for their compliance, in part upon public opinion, in part upon the fear of public reaction or in part upon moral obligations. In the absence of a justifiable legal basis no such order should issue."[61]

This judicial stance should be borne in mind if the reported[62] offer of the German government to sell stolen banking secrets concerning Irish residents' confidential accounts in the Principality of Liechtenstein to the Irish government gives rise to effects which may be scrutinised by the Irish courts.[63]

Turning back to the discussion of the proper law in *Walsh*, both at common law and under Article 4.2 of the Rome Convention of 1980, the relationship between the NIB and its former account holders in the Isle of Man was held to be more connected with the Isle of Man than it was with the Irish jurisdiction. The branch in question could never have existed unless authorised by Manx law; it could op-

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[60] *Ibid.* at 74.

[61] *Ibid*. at 80.

[62] *Irish Times*, 28 April 2008, p. 13. "The Pursuit of Tax Evaders" (editorial of the chief editor Geraldine Kennedy) "And the German tax authorities have offered to share information, secured from a whistleblower, about any Irish residents with offshore investments in Liechtenstein, a tax haven." The whistleblower was actually offering the stolen information to the German secret service (*Bundesnachrichtendienst*) for several million euro which he reportedly received.

[63] See the assessment of comparable international collaboration of security services in *R v Horseferry Road Magistrates Court, ex p. Bennet* [1994] 1 AC 42.

erate only in accordance with that law which meant that the creation, maintenance and retention of records, accounts and information, of any and every account holder, was, *inter alia,* subject to such law. Access to and the operation of such accounts was likewise governed by that law. Of course of crucial significance was the fact that the accounts were opened, operated and kept in the Isle of Man. In addition, repayment is the essence of any banking contract and this obligation could only be legally enforced by an account holder in the Isle of Man.

This two step approach of determining the appropriate or proper law of the issue (*lex causae*) in order to indicate the realm of the jurisdiction and with it the reach of the court's orders (*lex fori proceduralis*) informed by international law considerations of comity of courts cannot but be highly commended. It indicates the reach of international law both private and public in providing a pattern to address these most intrinsic legal challenges which global exposure has given rise to. Anything less would be bound to be one-sided, limited or ignorant. To set other interests above the full scale of the formidable legal reasoning employed by McKechnie J in *Walsh* would scarcely suffice.

5.4 Executive Certificates

To establish underlying facts in the realm of foreign relations and international law it is advisable for national courts to involve the executive branch of government to ensure that all organs of the state both judicial and executive speak with one voice. Although normally courts guard their independence against the executive branch of government's influence in relation to international relations it must be the reverse in this context as differing views of the executive and judicial branch of government in matters relevant to international law cannot be entertained. This materialises in communications of the executive branch to the courts either at the request of the courts or just on its own initiative when it thinks it to be appropriate to let the court know its views on an issue. It is the Foreign Ministry which usually issues such a communication which can take the form of a letter and may be referred to as an executive certificate, a letter of interest or *amicus curiae* brief when the court has chosen to invite the views of the government in this specific form. Information of this kind is almost entirely confined in practice to the underlying facts justifying or questioning the application of avoidance techniques by courts as discussed here. They often concern the status of a foreign government or its agents or the existence of a state, for example, the disintegrating former Soviet Union or Yugoslavia or unifying Germany (*e.g.,* when considering ownership of embassy property before the courts in foreign countries). Such certificates are usually seen as conclusive by courts and where this is not the case by virtue of the doctrine of the independence of courts it is unheard of for such a certificate of a government not to be followed by its own courts. Sometimes, there are statutory provisions providing for such certificates. An example is section 47 of the Irish Diplomatic Relations and Immunities Act 1967 which provides:

> "In proceedings in any court a certificate purporting to be under the seal of the Minister and stating any fact relevant to determine whether a judicial or semi-judicial body, an arbitration or conciliation board, an organisation, community, body, diplomatic mission, consular post or person is entitled to inviolability or to an exemption, facility, immunity, privilege or right under a provision of this Act or of an order made under this Act shall be *prima facie* evidence of the fact."

However, it is clear that certificates of governments are not limited to those cases where they are provided for by statute. This was made clear by the Irish High Court which considering certificates of governments beyond the remit of this statutory provision.[64] That a certificate "shall be *prima facie* evidence of the fact" means that it is conclusive and there is no suggestion that a court will not follow its government's certificates. Lord Esher MR confirms that conclusive evidence is given by those means which must be followed by courts:[65]

> "In the first place it is clear that the proper mode of obtaining information with respect to the status of the defendant was adopted by Wright, J., who communicated with and obtained a letter from the Colonial Office. We are told by that letter that the Sultan, 'generally speaking, exercises without question the usual attributes of a sovereign ruler.' … The first point taken was that it was not sufficiently shown that the defendant was an independent sovereign power. There was a letter written on behalf of the Secretary of State for the Colonies, on paper bearing the stamp of the Colonial Office, and which clearly came from the Secretary of State for the Colonies in his official character. He is in colonial matters the adviser of the Queen, and I think the letter has the same effect for the present purpose as a communication from the Queen. It was argued that the judge ought not to have been satisfied with that letter, but to have informed himself from historical and other sources as to the status of the Sultan of Johore. It was said that Sir Robert Phillimore did so in the case of *The Charkieh*.[66] I know he did; but I am of opinion that he ought not to have done so; that, when once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the Courts of this country is decisive. Therefore this letter is conclusive that the defendant is an independent sovereign."

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[64] *Zarine v Owners of the SS Ramava* [1942] IR 148.

[65] *Mighell v Sultan of Johore* [1894] 1 QB 149, 158 (CA).

[66] 4 A & E 59.

The "one voice" argument to be guaranteed by executive certificates was prominently put forward by Lord Wilberforce in *Rio Tinto Zinc Corp v Westinhouse Electric Corp*:[67]

> "The intervention of Her Majesty's Attorney General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of the United States investigatory jurisdiction extra-territorially against the United Kingdom companies. The courts should in such matters speak with the same voice as the executive … they have, as I have stated, no difficulty in doing so."

In *Attorney General for Fiji v Robt Jones House*[68] the New Zealand High Court had to decide whether the acts concerning the lease of property in Wellington by the Fiji government which came to power by violent and illegal means should be recognised while there was no official recognition by this government of the executive government of New Zealand which was the forum state. Quilliam J requested a certificate from the New Zealand Minister of Foreign Affairs to advise the court:

1. Whether the New Zealand Government recognises the Government in Fiji …
2. If so is that recognition de facto. i.e. does it recognise that such a Government has effective control over most of the territory of Fiji and that this control seems likely to continue or is that recognition de jure, i.e. does it recognise that such a Government not only has effective control over most of Fiji's territory but that it is firmly established, or is that recognition upon some other basis and if so upon what basis.

The answer of the Foreign Ministry was as follows:

> "1. The New Zealand position has been for many years that formal acts of recognition in respect of new Governments in other countries are unnecessary as a matter of international law and except in most unusual cases, undesirable.
>
> 2. New Zealand's general practice, therefore, has been to leave any questions of recognition in respect of new Governments to be inferred from the nature and level of its dealings with such Governments. …"

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[67] [1978] AC 547, 617.

[68] [1989] 2 NZLR 69.

The Minister then proceeded to offer the High Court some factual information about the state of relations between New Zealand and Fiji in order to enable the Court to make its own assessment. It reads in part:

> "The New Zealand Government has made clear its very strong and continuing disapproval of the two coups in Fiji. But since the installation of the present interim Government in Fiji there has been some improvement in the level of relations. Contacts on Ministerial level have been undertaken and the development assistance programme to Fiji has been resumed. However, relations have not by any means returned to what they were before the coup in Fiji. Development of relations with the new government beyond their present level will now depend on future developments in Fiji."[69]

This answer casts light on the subtle relationship between the Foreign Ministry and the court which must express itself on a question relevant to international relations and law. This is not specific to the New Zealand situation but will be found everywhere. The court is meant to decide clearly the question before it (in this case whether the lease of the house in Wellington between Fiji and the claimant could be affected by the acts of the non-recognised government) which results in an answer of yes or no. The Foreign Ministry usually conducts foreign relations with a different perspective; it is not one single question which must be ultimately decided but a variety of factors which must be weighed against one another which usually leads to a slightly ambiguous position leaving room for future developments. The Foreign Ministry does not like to bind itself by taking a legal position which may be held against it. Therefore, it will try to avoid a clear cut answer in favour of a multifaceted statement which may give the court a hint as to how it may proceed (which is the very task such a letter is meant to fulfil) but will try to avoid any clear legal commitment whenever possible to leave room for discretion in relation to the foreign country in question. This diplomatic reaction is a necessary result of the different tasks fulfilled by those maintaining international relations with a long term perspective as diplomats and those who are asked to decide an issue brought before them as judges.

The government statement in *Fiji v Robt Jones House* is an excellent example of this difference of perspectives. Obviously, some phrases in the certificate are directed more to the international community and Fiji than the court, for example, when the government says that it "has made clear its very strong and continuing disapproval of the coups in Fiji." This is, however, not meant to lead to any conclusions by the court relevant to the case before it. This is different from the statement that: "Contacts at Ministerial level have been undertaken" which is a clear hint that the government of Fiji is taken by the New Zealand government as the effective government in power and should also be accepted as such by the

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[69] Quoted in "Recognition of Foreign Governments in New Zealand" (1991) 40 ICLQ 162, 164.

court. To ensure that the government of Fiji does not understand this as an implied recognition or a political licence by the New Zealand government to feel free to do what it wants, the letter to the court continues "Development of relations with the new government beyond the present level will now depend on future developments in Fiji." At this juncture political and diplomatic language and necessities meet judicial needs and executive certificates reflect this in a special way.[70]

This became particularly clear when the Chief Justice of Hong Kong, then still a British colony, asked the London Foreign Office whether Formosa was part of China or whether it was a foreign territory *vis à vis* China. The Foreign Office certified that the British government had ceased to recognise the Nationalist Government of China but that Formosa was still *de jure* part of Japan, but that the Nationalist Government has "superior authority" to administer the island as a belligerent occupant.[71] A comment on this executive certificate sums it up: [72]

> "The truth, of course, is that the United Kingdom is compelled by political exigencies to be vague. In some situations a government cannot be committed to a specific political manoeuvre merely at the instance of a private litigant or of a private member in the House.[73] It is notable that Foreign Office certificates, which are binding on English courts, have since the days of the Spanish Civil War been couched in such cautious and frequently evasive language that in fact the whole question has been passed back to the courts for factual finding."

The basic problems in relation to the division of executive and judicative powers in the constitutional structure of a state that arise when issuing executive certificates have been addressed in *Duff Development Corp v Government of Kelentan*.[74] Viscount Cave stated that:

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[70] See the various conclusive executive certificates issued in exceptional circumstances in *R (Alamieyeseigha) v The Crown Prosecution Service* [2005] EWHC 2704 (Admin); *Trawnik v Lennox* [1984] 2 All ER 791; [1985] 2 All ER 368 (CA); *R. v Secretary of State for Foreign Affairs, ex p. Trawnik,* The (London) Times; 18 April 1985; *Carl Zeiss Stiftung v Rayner and Keeler (No. 2)* [1967] 1 AC 853 (Comment by F. A. Mann "The Present Legal Status of Germany Revisited" (1967) 16 ICLQ 760, 788); *Bank of Ethopia v National Bank of Egypt and Ligouri* [1937] Ch 513; *Banco de Bilbao v Sancha* [1938] 2 KB 176; *Luther v Sagor* [1921] 3 KB 532; *Zarine v Owners of the SS Ramava* [1942] IR 148.

[71] *Civil Air Transport Inc. v Chennault* (1950), Hong Kong Action No. 5, see Editorial note in (1956) 50 AJIL 415, 416.

[72] Editorial note in (1956) 50 AJIL 415, 416.

[73] This reference to the "House" may be meant to refers to the House of Commons, where opposition parliamentarians may put questions to the government which trigger answers comparable to those given in executive certificates to courts.

[74] [1924] AC 797.

> "It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the Court does not permit it to be questioned by the parties."[75]

When there is no conclusive answer a Canadian Court[76] concludes:

> "The Department of Foreign Affairs has the power to issue an executive certificate when it wishes and, when it does so, the court is bound by its contents. When it does not, the court, in light of all the evidence put before it, must determine for itself the status of a foreign country. In leaving the power to the court to make this determination, the State Immunity Act[77] keeps law and diplomacy separate. Thus the Act achieves its purpose of integrating into Canadian law the principle of state immunity under customary international law with due regard for its underlying concern for the sovereignty, independence, dignity and equality of states."

Sometimes executive certificates of foreign governments or foreign ministries may be requested under the applicable rules by courts and will then come under scrutiny. When Germany sought extradition of one of its (former) citizens from South Africa, it provided a certificate to the South African authorities which came to be assessed by the courts. The facts were as follows.[78] Herr Geuking, a former German citizen, was convicted in December 1990 on several counts of fraud and arson in Germany and was sentenced to imprisonment. When his appeal to have the conviction and sentence set aside failed, he fled to South Africa and obtained South African citizenship through naturalisation in 1995. In November 1996,

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[75] *Ibid.* at 805-806.

[76] *François Parent et Specnor Technic Corporation et Corporation Specnor Technic International c. Singapore Airlines Ltd. c. Civil Aeronautics Adminstration*, 2003 IIJCan 7285 (QC CS), ILDC 181 at para. 53 of the judgment: "Lorsque le politique et le diplomatique peuvent ou veulent admettre officiellement la situation, ou lorsqu'ils souhaitent la contrôler, le ministère a le pouvoir d'émettre un certificat aux termes de l'article 14 de la Loi. Cette preuve déposée au dossier étant concluante, le tribunal est alors lié par le contenu sous réserve toutefois de l'interpréter" and in para. 54: "Par contre, quand le politique et le diplomatique ne peuvent officiellement reconnaître la situation ou que le ministère s'abstient d'émettre un certificat, la tâche d'évaluer les faits, et d'en tirer les conclusions de droit qui s'imposent, revient alors au tribunal saisi de la demande."

[77] Canadian State Immunity Act incorporates the international law of immunity into Canadian Law and is comparable to the British SIA or the US FSIA. In its Article 14 it expressly provides for executive certificates on the issue of immunity.

[78] *Geuking v President of the Republic of South Africa* 2004 (9) BCLR 895 (CC), ILDC 283.

Germany requested Geuking's extradition so that his German sentence could be enforced and so that he could answer to a further fifteen counts of fraud. Since no extradition agreement existed between South Africa and Germany at the time, the extradition proceedings were to commence on the basis of section 3(2) of the South African Extradition Act No. 67 of 1962, which empowers the President to authorise the extradition of a person by written consent in the absence of an extradition agreement with the requesting State. Such consent was given on 30 May 1997. In April 1998, a warrant for Geuking's arrest was issued and extradition proceedings commenced in a magistrate's court pursuant to section 10(2) of the Extradition Act on the strength of a certificate submitted by Germany indicating sufficient evidence to warrant the prosecution of the applicant. The appellant claimed that the conclusive nature of the section 10(2) certificate constituted an invasion of the independence of the judiciary and was thus inconsistent with the provisions of section 165 of the Constitution which reads:

> "(1) The judicial authority of the Republic is vested in the courts.
>
> (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
>
> (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

The submission was that a foreign prosecutor should not be allowed to dictate the manner in which the South African magistrate must make this decision. This was refuted by Goldstone J in the following terms:

> "[T]he [German foreign] certificate is conclusive solely with regard to a question of foreign law. The inquiry by the magistrate does not constitute a trial in which guilt or innocence has to be determined. … the provisions of section 10(2) do not interfere in any way with the independence of the judiciary by rendering conclusive the opinion on foreign law by an appropriate foreign official from the country seeking the extradition. In my opinion, the provisions of section 10(2) in no way interfere with or detract from the independence of the judiciary or violate the separation of powers."

With this the system of foreign governmental executive certificates was upheld by the South African court.

5.5 Amicus Curiae Briefs

Although substantially the same as executive certificates, *amicus curiae* briefs have developed a slightly different profile. While executive certificates are usually formulated at the request of the court, the *amicus curiae* (friend of the court) often represents its own interests and applies on its own initiative to be heard by the court to make its views known. However, participation as an *amicus curiae* must be distinguished from a third party intervening. An intervening party will be subject to the court's jurisdiction and be bound by the court's decision as a party to the proceedings. An *amicus curiae* stays outside the binding proceedings and has leave only to make its views known which is meant to assist the court rather than to pursue its own interests before the court as an intervening party. Where executive certificates (or letters of interest as they are called in the US) would be used in the UK, often the US courts and government[79] choose the *amicus curiae* procedure. Probably, at least in the US governmental interventions (foreign and national) in contentious legal procedures are mainly effected through the *amicus curiae* procedure and only occasionally by letters of interest from the Legal Adviser to the Secretary of State to the court.

In *Belize Telecom v Government of Belize*[80] a court order stipulating monetary sanctions against the defendant, an African state, was at issue. The US government intervened with an *amicus curiae* brief which outlined:

> "In this case, despite the lack of any explicit authorization or enforcement mechanism in the FSIA,[81] the district court has imposed monetary contempt sanctions upon a foreign state. The United States has a substantial interest in the proper interpretation and application of the FSIA because of the foreign policy implications of U.S. litigation involving a foreign state. Those foreign policy interests are particularly significant where, as here, a U.S. court's orders are likely to be viewed as an affront to the dignity and sovereignty of the foreign state. The United States also has a significant interest in the treatment of foreign states in U.S. courts by virtue of the reciprocal treatment of the United States Government by the courts of other Nations. Accordingly, the United States has participated in this litigation to express its position that a U.S. court should not impose monetary contempt sanctions upon a foreign state.

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[79] The Website of the US Department of State Legal Adviser contains documents on the annual practice of the US in international relations with some *amicus curiae* briefs in current litigation.

[80] *Belize Telecom v Government of Belize* US Court of Appeal 11th Circuit. Case No. 06-12158.

[81] The US Foreign Sovereign Immunities Act 1976 incorporating international law on immunity into US law.

> … The imposition of such sanctions also contravenes international practice, and could adversely affect our nation's relations with foreign states and open the door to reciprocal sanctions against our Government abroad."

Although it is mostly the US government which acts as *amicus curiae* before its own courts it may be also a foreign government or a group thereof, for example, organised in the European Union ("EU"). Many foreign governments[82] together with the EU presented an *amicus curiae* brief in *Donald Roper v Christopher Simmons* before the US Supreme Court.[83] It reads:[84]

> "The European Union ("EU") considers the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, to be of vital importance both nationally and in the international community. … The EU and its Member States, as members of the international community, have a strong interest in providing information to this Court on international human rights norms in a case in which those norms may be relevant. The EU and its Member States share the widespread opinion of the international community of States that the execution of persons below 18 years of age at the time of their offences violates widely accepted human rights norms and the minimum standards of human rights set forth by the United Nations**.** Furthermore, the EU and its Member States are opposed to the death penalty in all cases and accordingly aim at its universal abolition. … The EU provides a special and unique perspective to this Court that is not available through the views of the parties or other *amici*."

In *Hoffmann La Roche Ltd v Empagran S.A.*[85] the decision of the US Supreme Court takes note of the *amicus curiae* briefs as stated in the following terms by Justice Breyer speaking for the court:

> "Brief for Federal Republic of Germany et al. as Amici Curiae 2 (setting forth German interest "in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs—whose injuries were sustained in transactions entirely outside United States commerce—seeking treble

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[82] Canada, Iceland, Norway, Liechtenstein, New Zealand, Mexico and Switzerland with the Member States of the EU and the Council of Europe, see p. 21 of the *amicus curiae* brief.

[83] 543 US 551 (2005).

[84] http://www.internationaljusticeproject.org/juvSimmonsEUamicus.pdf (visited 15 May 2008) p. 21.

[85] 542 US 155 (2004).

> damages in private lawsuits against German companies"); Brief for Government of Canada as Amicus Curiae 14 ("treble damages remedy would supersede" Canada's "national policy decision"); Brief for Government of Japan as Amicus Curiae 10 (finding "particularly troublesome" the potential "inter-fere[nce] with Japanese governmental regulation of the Japanese market").

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty."[86]

An *amicus curiae* brief was also prepared on behalf of Kosovo in *Wood Industries Ltd v United Nations and Kosovo* [87] which reads in part:

> "This court should embrace one or more of several doctrinal bases to decline deciding this case on the merits. Several interrelated doctrines of sovereign immunity, the doctrine of *forum non conveniens* and the Act of State Doctrine require this court to avoid reaching the merits of this lawsuit. It should dismiss the lawsuit, allowing it to be heard, if the plaintiff so desires, in the Special Chamber of the Kosovo Supreme Court."

This synopsis of the related doctrines or avoidance techniques is informative. As Hazel Fox comments:[88] "Reduced to its simplest, the justification for use of avoidance techniques, particularly of the plea of immunity, is to allocate in the most appropriate manner suitable to all interests and the ends of justice jurisdiction between the forum and the foreign States."

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[86] *Amicus curiae* brief for Federal Republic of Germany *et al*. at 28–30; Brief for Government of Canada as *Amicus Curiae* 11–14. See also Brief for United States as *Amicus Curiae* 19–21 (arguing the same in respect to American antitrust enforcement).

[87] US District Court for the Southern District of New York Case No. 03-CV-7935 (MBM), see *amicus curiae* brief on behalf of Kosovo at http://operationkosovo.kentlaw.edu/amicus/Amicus%20Brief-posted-web.htm#_Toc59606115 (last visited 15 May 2008).

[88] "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States" in Malcolm D. Evans (ed.) *International Law* (2nd ed., OUP, 2006) p. 361 at 392.