

## **TRANSNATIONAL CIVIL LITIGATION FOR COMMONWEALTH GOVERNMENTS**

A Memorandum by the Commonwealth Secretariat

1. The pursuit of civil litigation by Commonwealth Governments in the Courts of other Commonwealth countries has gained prominence recently as a result of some important cases. Law Ministers have already considered the question of the return of cultural property following the Ortiz case brought by the New Zealand Government. More recently the transnational protection of confidential information has been litigated in the "Spycatcher" cases.
2. Because the subject involves some difficult issues of principle and procedure, the Legal Division of the Commonwealth Secretariat asked Dr Campbell McLachlan to prepare a background briefing paper for consideration by Law Ministers.

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COMMONWEALTH GOVERNMENTS  
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I. INTRODUCTION

The resolution of transnational disputes between Governments and private parties is a subject of ever increasing importance, given global interdependence (particularly in the area of trade and investment), and given the prominent role taken by States as trading partners as well as regulators. No doubt arbitration will continue to be the preferred forum for the resolution of many disputes involving States.<sup>1</sup> Whatever its other shortcomings, arbitration can at least provide a neutral forum for balancing the interests of States and private contracting parties. The development of the International Centre for the Settlement of Investment Disputes<sup>2</sup> has led to a degree of specialist expertise in this area.<sup>3</sup>

However, states will continue to be litigants in foreign Courts. Much attention has been devoted to the position of the foreign state as defendant, where refinements in the law of sovereign immunity, both at the domestic and international level,<sup>4</sup> have in general conferred a wider jurisdiction on national Courts over foreign States in the conduct of their commercial affairs. This is a matter which has frequently been discussed at Law Ministers' Meetings.<sup>5</sup>

The reverse situation of the Government as plaintiff in a foreign Court has attracted less discussion, despite the fact that some of the notable additions to the case law on the subject have occurred in intra-Commonwealth cases. In the cultural property field, it was Attorney-General of New Zealand v Ortiz [1984] AC 1, which sparked a major Commonwealth review of co-operation in the area.<sup>6</sup> Even more

recently, the "Spycatcher" decisions have highlighted the competing policies involved in the context of the attempted enforcement of a duty of confidentiality.<sup>7</sup>

It is the purpose of this paper to sketch some of the practice and policy involved in litigating for a Commonwealth state in a foreign Court.

## II. WHO IS THE PROPER PLAINTIFF?

The institution of proceedings involves an initial determination of who in law is the proper plaintiff. Domestic statutes and rules of the Court may well give individual Ministers of the Crown or Government Departments locus standi to sue and be sued.<sup>8</sup> The Queen herself is of course conventionally cited as the prosecution in criminal cases in most Commonwealth countries. Abroad the matter is less certain. The books are full of a pot pourri of different plaintiffs appearing on behalf of a state: for example Solicitor for the Affairs of Her Majesty's Treasury v Bankers Trust 107 NE 2d 448 (1952); Her Majesty the Queen in Right of British Columbia v Gilbertson 597 F 2d 1161 (1979).

One point is clear as a matter of principle. A Government as such is not a legal person and therefore is not capable of suing or being sued. Thus in Sloman v The Governor and Government of New Zealand (1876) 1 CPD 563, it was held that: "There is no such corporation as a governor and government of New Zealand" (566).

In international practice, the State appears by its proper name since the State itself has legal personality in international law. This practice is adopted by Commonwealth countries before the International Court of Justice: Australia v France [1973] ICJ Rep 99, New Zealand v France [1973] ICJ Rep 135 (the nuclear test cases). It appears to be the correct practice when the State appears in foreign Courts as well: see, for example, United States of America v Inkley

[1988] 3 All ER 144; Republic of Italy v Hambros Bank Ltd  
[1950] Ch 314.

However, as between Commonwealth countries, the convention (which is by no means strictly adhered to) is that the state appears through its proper legal officer, the Attorney-General: Attorney-General of New Zealand v Ortiz; Attorney-General for Tuvalu & anor v Philatelic Distribution Corporation Ltd.<sup>9</sup> The practice has no doubt arisen by virtue of the Attorney-General's residual role as a representative of the Crown in legal proceedings.<sup>10</sup> The constitutional features of the office of the Attorney-General make it particularly suited to the presentation of a legal claim on behalf of the State, in addition of course to the practical consideration that the Attorney-General may be the effective officer of State responsible for the conduct of proceedings. Nevertheless even this practice can be problematic, especially in non-unitary states. In the "Spycatcher" proceedings in New Zealand, the Plaintiff has been described as Her Majesty's Attorney-General in and for the United Kingdom. As Cooke P observed<sup>11</sup>:

"In the light of the position of the Lord Advocate for Scotland we are not clear that the Attorney-General is correctly described in the title of these proceedings."

### III. SPECIAL CHARACTERISTICS OF THE COMMONWEALTH ASSOCIATION

Does membership of the Commonwealth entitle a Commonwealth State to any special rights or privileges when it appears as plaintiff in the Courts of another Commonwealth country? In the light of the authorities, a Commonwealth state would seem to be in much the same position as any foreign state in asserting its legal rights. Membership of the Commonwealth should, it is submitted, ensure the recognition of that State within the Commonwealth, but the development of the modern Commonwealth as a free association of independent states has cast out such doctrines as the indivisibility of the Crown and the inter se doctrine under which relations between

Commonwealth members were said to follow different rules to those pertaining to relations between states in the international community generally.<sup>1 2</sup> Although all members of the Commonwealth acknowledge the Queen as Head of the Commonwealth, the Crown, in any event only a convenient constitutional fiction, is divisible, and the consequence in litigation is that a Commonwealth state is, as a matter of strict law, placed in no better position than any other state.

Commonwealth membership may however provide an indication that the State is to be regarded as a friendly one, a fact which may itself be legally significant. Thus in Regazzoni v Sethia [1958] AC 301 the House of Lords held that English law should refuse to enforce a contract, the intent and purpose of which was a conspiracy to subvert the laws of a foreign friendly state, even where that state's law was not the proper law of the contract. In that case, the state was India and the contract concerned the export of jute bags to South Africa in contravention of Indian export control regulations.

Nevertheless, there would not seem to be any room left for arguing that the general rule against the enforcement of foreign public laws (discussed below) has been in any way modified by the courts in relation to intra-Commonwealth claims. When the Indian Government itself sought to prove in an English liquidation in order to recover taxes due to it in Government of India v Taylor [1955] AC 491, the House of Lords held (per Viscount Simonds, 507):

"Finally, it was urged that, whatever might be the position between this country and a foreign country, it was not the same as between different members of the British Commonwealth, including those members which, though within the Commonwealth, do not acknowledge the sovereignty of the Queen. For such a distinction there is no authority and I can see no reason. If such a change is to be made, it is not for the Courts to make it. It will be the task of Governments and Houses of Parliament. I do not think it will be an easy task."

The point was acknowledged both by Lord Denning in Ortiz<sup>13</sup> and by the High Court of Australia in Attorney-General v Heinemann Publishers Australia Pty Ltd & Wright<sup>14</sup>. In both cases the Courts pointed out that they did not mean any disrespect or to belittle the considerable ties between the countries, but simply that this was a necessary recognition of their separate status as sovereign independent States. Interestingly, Cooke P. of the New Zealand Court of Appeal, in determining Attorney-General v New Zealand Newspapers Ltd, though applying this approach, held<sup>15</sup>:

"I would have preferred to determine this part of the case on the ground that Wright owed allegiance to the Crown in right of the United Kingdom, that New Zealand has the same sovereign, and that the Queen's courts will protect her interests wherever they originate."

He held that he was precluded from following this course by Ortiz and Government of India v Taylor.

While Commonwealth States may thus not be afforded any special status as litigants, the extent of Commonwealth legal co-operation presents many advantages to litigants generally.

Enduring similarities between Commonwealth legal systems reduce the many difficulties which otherwise arise in pleading cases in a foreign court. Not only do the basic similarities in substantive law allow a case to be pleaded and argued along lines broadly familiar to the plaintiff from his home jurisdiction, but, perhaps more significantly from a practical point of view, similarities in the practice and procedure, both of the courts and of the profession reduce the perils and the unanticipated procedural requirements which can bedevil foreign proceedings. Thus, to give two basic examples, the service of process is almost universally accepted in Commonwealth countries as a common concept based on personal service effected by the party or its agent. This may be contrasted with the civil law concept of the institution of proceedings as a judicial act, requiring service through official channels.<sup>16</sup> Further, the rules of evidence share a

broad similarity, and in particular the concept of pretrial discovery of documents, which is largely unknown in civil law countries, it is an essential part of the preparation for trial in most Commonwealth countries.<sup>17</sup>

Commonwealth legal co-operation also takes a more tangible form in various shared legislative schemes. Most prominent amongst these are the schemes for the recognition and enforcement of foreign judgments, which provide a system of registration unrivalled internationally in the geographical scope.<sup>18</sup> Similarly proof of foreign law is facilitated by Commonwealth legislation.<sup>19</sup>

#### IV. PROCEDURE

The normal consequence of electing to sue in a foreign court is that both parties must accept the regulation of the dispute according to the local rules.<sup>20</sup> This has a number of consequences for the state as litigant. Firstly, the institution of proceedings by the state is generally sufficient grounds for that state to be regarded as having submitted to the jurisdiction of the local courts, with the consequence that it submits to both interlocutory and final orders of the court (although the law of sovereign immunity may still place restrictions on the property of the state over which enforcement may be sought<sup>21</sup>). Submission by the institution of proceedings also lays the state open to counterclaims, provided they arise out of the same legal relationship or facts as the claim.<sup>22</sup>

Another important procedural consequence of submission is the requirement to give discovery of documents. For the foreign state this may be a sensitive matter since it may require disclosure of otherwise highly confidential state papers, including cabinet minutes and policy documents. Such documents will generally be immune from disclosure in proceedings in the home state on grounds of public interest immunity<sup>23</sup>, but it is doubtful whether it is an available

ground of privilege for a foreign state claimant. The State Immunity Act 1978 (UK) does provide that there should be no penalty by way of committal or fine by reason of a failure by the state to disclose or produce any document or other information for the purpose of proceedings to which it is a party.<sup>24</sup> But it would still be open for the defendant to seek to strike out the claim if adequate discovery were not given.

However, it may be open to the state to seek the exercise of the court's discretion to dispense with discovery of the documents, on the grounds that to give discovery would be injurious to the public interest of the forum state.<sup>25</sup> This argument was successfully applied in Buttes Oil Co v Hammer (No3) [1981] 1 QB 223. There the state documents were in the hands of a third party who himself sought to claim the state's privilege from discovery. The application succeeded before the English Court of Appeal. Brightman LJ held (265):

"It is in the public interest of the United Kingdom that the contents of confidential documents addressed to, or emanating from sovereign states, or concerning the interests of sovereign states, arising in connection with an international territorial dispute between sovereign states, shall not be ordered by the courts of this country to be disclosed by a private litigant without the consent of the sovereign state concerned."

It is still unclear the extent to which the state itself as a litigant could invoke the court's discretion on such grounds.<sup>26</sup>

#### V. WHAT RIGHTS MAY BE ENFORCED?

The most troublesome question confronting the courts where the plaintiff is a foreign state is that of what rights may be enforced. This poses but little problem in the case of the private litigant, who must found his claim on some cause of action in the private law of the forum state. Where the foreign state is in effect acting as a private person in bringing a claim jure gestionis it would be wrong to place any additional fetter on its right to enforce such a claim in a

foreign court. If states are to be exposed to such claims under a restrictive doctrine of sovereign immunity, they ought to enjoy the benefit of being able to bring them as well. Thus states have successfully sued for the recovery of goods due under a contract, for a contractual debt, and for damages for negligent damage to its property.<sup>27</sup>

Difficulties however arise where the state seeks to enforce what is in substance a public right jure imperii. In that case, the state is attempting to call in aid a foreign court to carry out its own public policies. The rule has been explained on the basis of sovereignty:<sup>28</sup>

".... an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties."

Dicey & Morris put the rule as follows<sup>29</sup>:

"English courts have no jurisdiction to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state."

This exclusionary rule applies even where the proceedings are "in the shape of a civil suit"<sup>30</sup>. The issue which has vexed Commonwealth courts in particular in recent years has been drawing the line between private and public laws, particularly in areas where there is no well settled authority.

The attempt to enforce directly penalties imposed under foreign law presents little difficulty as coming within the category of law unenforceable by foreign courts. A recent attempt to achieve indirect enforcement of a penal claim was rejected by the English Court of Appeal in United States of America v Inkley [1988] 3 All ER 144 where the United States had sought to enforce a civil judgment obtained for the amount of an appearance bond given by the Defendant, who had failed to return to the United States under the terms on which he was

given bail. The Court held that "the fact that in the foreign jurisdiction recourse may be had in a civil forum to enforce the right will not necessarily affect the true nature of the right being enforced"<sup>31</sup>. The United States judgment was accordingly unenforceable in England.

The unenforceability of revenue claims is equally well established. Thus, in Government of India v Taylor the House of Lords held that the Government of India was not entitled to prove in the liquidation of an English company for the recovery of Indian income tax. The House approved Peter Buchanan Ltd v McVey [1955] AC 516 in which the Irish High Court had declined to allow an action by a liquidator of a Scottish company to recover debts due to the company on the grounds that the sole debtor was the Scottish revenue, the liquidator being merely the nominee of the revenue and the claim being thus in substance one for the enforcement of a foreign revenue law.

That case has, however, been distinguished by the Australian Federal Court of Appeal in Ayres v Evans [1980-4] LRC (Comm) 809. In that case, the New Zealand official assignee in bankruptcy sought to recover some of the bankrupt's property in Australia. The Australian court held that he was entitled to do so. Though the decision turned partly on the effect of Australian bankruptcy provisions, which the Court considered overrode the common law rule in cases to which they applied, the court was also influenced by the fact that the New Zealand revenue was only one of many creditors to the bankrupt's estate. Fox J was concerned at the implications of any other result (812-3):

"In most cases of a deceased's estate there would be some amount owing to revenue authorities, and to prevent participation by beneficiaries raises public policy considerations quite different from that which treats revenue enforcement as confined to the place of enactment. .... doubtless, if it were a bankruptcy administration here, the Official Receiver or trustee would quite properly refuse to pay a claim by the New Zealand revenue authority, but I do not see how the local executor can refuse to transfer the appellant's interest

to the official assignee overseas, once he is shown to be the person having title to it. It is to be remembered, too, as a general consideration, that Australian individuals and companies may be creditors or beneficiaries in an overseas estate. If the rule were as contended for by the appellant, public policy would rebound."

Outside the comparatively well settled categories of penal and revenue laws, there remains the much debated residual category of "public laws". The significance of this additional category was explored and approved by Lord Denning MR in Attorney-General of New Zealand v Ortiz, a case on protection of cultural property legislation, a context which highlights the dilemma of the foreign court.

(a) Cultural Property

Most states seek to protect their cultural heritage by controlling the export of cultural property. However this objective is frustrated if items, once illegally exported, can be freely sold elsewhere. In 1918, the Italian Government had sought to obtain an injunction in England to prevent Christie's from selling the Medici papers.<sup>32</sup> Half of these papers were the property of the Italian Government, and the other half were private property but prohibited from export. An interlocutory injunction was granted relating to the state papers, but declined in relation to the other papers, since the Italian Government had no proprietary claim in relation to them.

The failure to establish a proprietary claim was ultimately fatal to the New Zealand Government's attempt to recover a valuable Maori carving which had been illegally exported from New Zealand in the Ortiz case. The contrasting approaches taken by the Court of Appeal and the House of Lords in that case suggest that, while a foreign state may be precluded from enforcing its export control law as such, it may be possible for a state to recover an item, to which it had obtained title while it was within its own jurisdiction. Seen in this light,

it is submitted that Lord Denning's judgment, which is based on the general proposition that the Court will not enforce a foreign public law, is unhelpful. The House of Lords forebore from expressing any opinion on the "public law" point, preferring to decide the case solely on the question of whether the relevant New Zealand legislation was effective to vest title in the goods in the Crown automatically upon illegal export. Having found the legislation did not have that effect, it was unnecessary to go on to decide the further question of whether enforcement was in any event precluded on public law grounds.

Many states now have legislation which does purport to vest title in the Crown automatically on illegal export<sup>33</sup>. This may be effective to give the foreign state an enforceable claim, despite the public law rule, unless it is further required that the Crown's ownership be reduced to possession, which a mere vesting by operation of statute does not achieve.<sup>34</sup>

The Ortiz case was the catalyst for a proposed Commonwealth scheme, under which Commonwealth states inter se would have undertaken to return cultural objects illegally exported from other Commonwealth countries. The scheme encountered significant policy as well as technical difficulties, and has not so far been adopted by Law Ministers.

Two more recent cases have, however, shown that Ortiz may not present an intractable impasse. In Kingdom of Spain v Christie Manson & Woods Ltd [1986] 1 WLR 1120, the Kingdom of Spain brought proceedings for declarations that a Goya painting had been illegally exported from Spain and that the export documents were forgeries. An application by the Defendants to strike out failed, even though it was clear that the Kingdom of Spain did not have title to the painting. The Vice-Chancellor found that the plaintiff had an arguable case that there was an equitable right to restrain the doing of deliberate acts in England which would cause damage to the

property of the Kingdom of Spain, by debasing the credibility of genuine export documents issued by the Government. (Applying Emperor of Austria v Day (1861) 3 de GF&J 217, discussed below).

A more remarkable case is Union of India et al v Bumper Development Corporation Ltd (Unrep, 17 February 1988, English High Court, Kennedy J). A 12th Century bronze statue of the Hindu god Siva, known as 'Nataraja', had come to light in London when the Bumper Development Corporation (a Canadian company which had a large collection of antiquities) delivered it to the British Museum for valuation. The statue had been seized by the Metropolitan Police and the Union of India then intervened claiming a superior title. The matter came on for trial as a special issue before Kennedy J. There were five plaintiffs in the issue: the Union of India itself, the State of Tamil Nadu, the custodian of the temple in which it was alleged the statue had originally resided, the temple itself and the idol said to be incarnate in the statue.

There were two main issues in the case. Firstly the Court had to determine whether the statue, the subject of the litigation, was in fact the same statue alleged to have been removed from the temple in Tamil Nadu. Once that factual link had been established, it was then necessary to establish which of the plaintiffs (if any) had a superior title to that obtained on purchase by Bumper. It appears to have been accepted that the statue had been originally removed illegally from the temple.

The Union of India had no claim to title, despite being the effective litigant in the proceedings. The State of Tamil Nadu likewise had no claim based on cultural property legislation or otherwise. The local statute recognised the locus standi of the trustee of the temple to assert claims on the temple's behalf. Thus it was that, in applying Indian law, Kennedy J came to recognise a valid claim by the trustee of the temple. Had he been wrong in this, Kennedy J

would have been prepared to find that the idol itself was a juristic entity capable of recognition in English law, which could claim title. Thus the Plaintiffs succeeded in reclaiming an important item of cultural property and establishing an important precedent in the overall objective of the Government of India which, as the Judge observed "wants to stop, and if possible, reverse the outward flow of a precious part of the nation's cultural heritage."

(b) A Patrimonial Claim?

Does a state have a right to protect a wider class of property than a private litigant? In Government of India v Taylor, Lord Keith distinguished between assertions of sovereign authority, which were unenforceable, and a "patrimonial" claim which was enforceable. Doubtless this expression includes claims for title to goods, but Emperor of Austria v Day raises the prospect of further types of patrimonial claim. In that case, a Hungarian refugee had printed in London a quantity of bonds, purporting to be official bills of Kingdom of Hungary. The Emperor of Austria successfully obtained an order for delivery up of the bills and an injunction against further production on the ground that it would have been an invasion of the property rights of the Emperor of Austria in his representative capacity to allow the creation of spurious circulation of these false notes.

The Emperor of Austria was, as has been seen, relied upon as creating an arguable case in relation to forged export licenses in the Kingdom of Spain v Christie. More recently, in Attorney-General of Tuvalu & anor v Philatelic Distribution Corporation Ltd et al, the Government of Tuvalu sought to obtain delivery up of stamps bearing the name of Tuvalu and purporting to be genuine Tuvalu stamps, which had been produced without the Government's authority and which in some cases bore deliberate flaws, which were marketed to the public as if they were accidental flaws at inflated prices. The action was based principally on the rights vouchsafed to

the Government by their contract with the First Defendant, but in addition the Plaintiffs sought to allege the infringement of their property rights by the creation of the spurious circulation in Tuvalu stamps. In the event, the Defendants consented to summary judgment for delivery up and a perpetual injunction against further production. A finding of contempt against the Managing Director of PDC for breach by the company of its undertaking by producing further stamps was upheld by the Court of Appeal.<sup>35</sup>

(c) Confidential Information

The third and most celebrated recent rehearsal of the public law exclusionary rule has been in the British Government's attempts to enforce a duty of confidence.

The facts of "Spycatcher" are now notorious but a short summary is merited here. Peter Wright had been a member of the British security service from 1955 until 1976. From 1964 he had been with the counter-espionage branch. On commencing his employment with the service, and on his retirement he had signed declarations under the Official Secrets Act 1911, in which he acknowledged a duty of confidentiality with respect to information obtained by him while he was with the service. On his retirement, Mr Wright went to Australia, became an Australian citizen, and settled in Tasmania. Whilst there, he wrote "Spycatcher", which was accepted for publication by Heinemann Publishers (Australia) Pty Ltd. The book recorded details of the operation of the service as observed by Mr Wright during his employment, and also made a number of allegations about the services intervention in political affairs in the United Kingdom and on the degree of infiltration by Soviet spies.

The British Government thereupon began a series of proceedings in Australia, England, Hong Kong and New Zealand in an attempt to stop the publication of the book and of extracts from it. The proceedings went to the House of Lords twice, to the High

Court of Australia and to the New Zealand and Hong Kong Courts of Appeal. In substance, however, the British Government failed to enforce the duty of confidentiality, because the Australian High Court held that it had no jurisdiction to entertain the British Government's action, and widespread publication of the book in Australia and the United States of America ultimately rendered injunctions against newspapers in Britain futile.

At the heart of the case was the question of whether the British Government was seeking to enforce a public or a private right. Mr Wright and Heinemann Publishers were both Australian nationals, and the writing of the book and its publication were both to take place outside England. The criminal law was thus of little avail to the British Government, which sought instead, both in England and elsewhere to establish a duty of confidence in the civil law, and to enforce that with private law remedies. It was thus argued that Mr Wright owed a duty of confidence, either flowing from his contract of employment or in equity. While establishment of the contractual duty stood little chance of success, given the peculiar status of the Crown's servants,<sup>36</sup> it was accepted in all jurisdictions that there was a duty of confidence in equity, and that such a duty could be enforced by the Crown to prevent disclosure of documents injurious to the public interest: Attorney-General v Jonathon Cape Ltd [1976] QB 752; Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39. However, the proceedings partook of strong public law character. Wright's duty of confidentiality flowed from the two declarations he had made pursuant to the Official Secrets Act 1911. The confidential information related to state secrets as to the operation of the security service. The case thus raised squarely the issue of whether the Courts would refuse to enforce a claim on the ground of the public law exclusion in circumstances where, were the Plaintiff not a state, there would exist a clear right of action in private law.

In Australia, the action came for trial before Powell J in the High Court of New South Wales. Powell J included in his judgment a very full discussion of the nature of Mr Wright's disclosures against the background of existing published material about the MI5 during the same period. He found that Wright was under a duty of confidentiality to the Government. However, detriment was an essential ingredient in the cause of action, and the Attorney-General failed because much of the information in "Spycatcher" was readily available already, or else factually stale, and therefore there was no prejudice to the national security of the United Kingdom. He found however that the Court's jurisdiction was not excluded by the public or penal law defence, since the obligation of confidentiality was one which was open to everyone in the United Kingdom to seek to enforce for his own benefit.

When the case went on appeal to the New South Wales Court of Appeal, the majority (Kirby P and McHugh JA) dismissed the appeal, but a different approach to the fundamental issues was taken in each of the judgments. Kirby P held that in substance the claim was based upon an alleged breach of duty of secrecy in the Official Secrets Act 1911 (UK), which Act was a public penal statute of a foreign state unenforceable in Australia. The Australian Courts thus had no jurisdiction to entertain the claim. McHugh JA found that the duty of confidence was independent of the Official Secrets Act and therefore that its enforcement was not precluded by the public law rule, but that, as a matter of public policy, the Australian Courts should refuse to entertain any action brought by a foreign Government to restrain the publication of confidential Government information. In a careful dissenting judgment, Street CJ found that the claim would have been unenforceable as a foreign penal law but for the evidence in support of the British Government's application given on affidavit by an authorised representative of the Australian Government. Street CJ considered that it lay in the hands of the local sovereign to qualify the basic rule, and that this had been effectively achieved in the present case.

The High Court of Australia found unanimously that the Attorney-General's claim failed. As Mason CJ put it, delivering the judgment of the majority:<sup>37</sup>

"Thus, to concentrate on the private law character of the causes of action or grounds of relief pleaded by the appellant is to overlook the appellant's central interest in bringing the action. That interest is to ensure the continued secrecy of the operations of the British security service by enjoining disclosure of information relating to those operations and by discouraging revelations by others.

....

Viewed in this light, the action is neither fully nor accurately described as an action to enforce private rights or private interests of a foreign state. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its security service as 'part of the defence forces of the country'. The claim for relief made by the appellant in the present proceedings arises out of, and is secured by, an exercise of a prerogative of the Crown, that exercise being the maintenance of the national security. Therefore the right or interest asserted in the proceedings is to be classified as a governmental interest. As such, the action falls within the rule of international law which renders the claim unenforceable."

The High Court's decision thus marks a clear finding in favour of the existence of a broad exclusionary rule against the enforcement of foreign public or prerogative rights (despite some additional unnecessary and inappropriate references to the Act of State doctrine and public policy<sup>38</sup>). As Lord Griffiths observed in the House of Lords in Attorney-General v Guardian Newspapers Ltd:<sup>39</sup>

"The High Court of Australia have by their judgment in this litigation made it plain that we cannot look to the law in Australia for any assistance when a member of the security services wishes to betray the secrets of his service."

Between the judgments of the New South Wales Court of Appeal and that of the Australian High Court, the "Dominion" newspaper in New Zealand began serialisation of articles published by the English "Sunday Times" relating to

"Spycatcher". An interim injunction against further publication was obtained in the New Zealand High Court but subsequently set aside by Davison CJ, whose decision was upheld by the New Zealand Court of Appeal. The judgment of Cooke P in the Court of Appeal is however instructive in that it takes a different approach to the public law question. The Court held that it was not a case where an injunction should be granted in New Zealand in relation to the "Spycatcher" material since the book and its contents had already been so widely disseminated that "to try to stop further dissemination in New Zealand would be incongruous and not far short of absurd".<sup>40</sup> In the Court's reserved judgment, Cooke P held that the claim failed because two relevant defences had been made out. Firstly, the Defendants had established evidence of such widespread prior publication as to destroy the confidential character of the material. Secondly, New Zealand's public interest justified publication since, on the agreed facts before the Court, the book included material about the penetration of and wrong doing by the security service, which it was in the public interest to be disclosed.

However, Cooke P held that the action was not barred by the rule that the local Court will not enforce a foreign penal or other public law. He held that the duty of confidentiality subsisted apart from the Official Secrets Act, and the action was not therefore merely an attempt to enforce a penal statute. Whether the Court was barred by some wider exclusion of public laws was found by him to be an open question. He preferred an approach which allowed a foreign friendly state to assert a private law duty of confidentiality. The task of determining which actions should be so entertained could be dealt with by executive certificate.

The "Spycatcher" judgments reflect differing approaches to the balance to be struck between freedom of the press on the one hand, and the importance of the duty of confidence on the other. This is a matter on which very different approaches have been taken in Commonwealth countries. For example, the

Official Secrets Act model has been comprehensively reformed in New Zealand by the Official Information Act 1982, which replaces the presumption of secrecy of official information with a presumption of openness. However, few would dissent from the proposition that certain Governmental information may be legitimately restricted, and that defence and security interests are an important relevant class of information entitled to protection. Whether the material contained in Mr Wright's book was such as to justify lifelong secrecy or whether the public interest required disclosure is a matter on which opinions may differ. However an equally significant feature of the "Spycatcher" litigation was the powerlessness of the Courts to prevent disclosure given the ease with which Mr Wright and his publishers could resort to a multiplicity of jurisdictions for publication.

In this respect, "Spycatcher" is simply symptomatic of a much wider problem of the limited efficacy of domestic laws in dealing with transnational situations. As Cooke P put it<sup>41</sup>:

"For the world is shrinking, with nuclear hazards, terrorism, ideologies and the power of the media transcending national boundaries and at times making them almost irrelevant. .... The rule expounded by Lord Watson and Lord Denning was not designed to meet this sort of problem."

These considerations also troubled Street CJ<sup>42</sup>:

"As the world community becomes increasingly inter-dependant, there comes also an increasing need for flexibility which will enable nations to mould their relations in ways suited to promote their common interests without finding themselves fettered by unduly inward looking notions of sovereignty."

Having found that the origin of the rule against the enforcement of foreign public laws related to the infringement of local sovereignty, Street CJ held that the local sovereign might, provided it operated within the constraints of local law, open the doors of the Court to a foreign sovereign. This might be validly done by executive certificate. This approach

was endorsed by Cooke P in the New Zealand Court of Appeal. However it cannot be regarded as being the law in Australia, since the High Court expressly rejected it in the following terms<sup>43</sup>:

"First, the notion that effective access to the courts should depend on a decision of the executive is as unacceptable as the related notion that the enforceability of the claim should depend on an executive decision that the claim should be able to succeed. Secondly, the possibility of detriment to Australia's national security interests cannot transmogrify the character of the claims. So far as friendly states are concerned, the remedy, if one is thought to be desirable, is to be found in the introduction of legislation."

The exclusionary rule does of course avoid the necessity for adjudication upon claims of a "political" character, but it is doubted whether the Australian High Courts objections are compelling. A foreign state still needs to be able to establish a cause of action genuinely founded upon a private law right. The Courts are well accustomed to accepting official certificates in matters of foreign relations.<sup>44</sup> If the approach proposed by Street CJ and Cooke P were followed, the certificate would have to invoke the national interest of the forum state as justifying an exception to the normal exclusionary rule. Finally, it would still be for the local Court to evaluate, based on local law, whether the case was made out. In the case of a duty of confidence, this would include consideration of the defence of public interest.

## VI. CONCLUSION

The "Spycatcher" cases were on any view extraordinary litigation. No doubt there will continue to be many cases in which the state appears as plaintiff in a purely private and commercial capacity. In such cases, the state will be treated in almost an identical fashion to any private litigant. However, in the conduct of litigation as in other respects, a state is performing public duties, a fact which

gives such litigation an added dimension in practice. It may also affect the nature of the rights asserted.

Recent cases on the rule excluding the enforcement of foreign public law have shown that the rule does have a broad basis in the exclusion of claims which are in substance jure imperii, or an exercise of the sovereign power of a foreign state. In the application of this rule, Commonwealth states inter se are in no different position to states generally. The incidents of sovereignty are the same.

However, Street CJ's reflections on the increasing interdependence of the world and the need to avoid "unduly inward looking notions of sovereignty" do give cause for thought. As the revenue and cultural property cases reviewed above show, it may be possible in some individual cases to adopt a flexible approach within existing private law categories. The certification procedure may also offer the prospect of enlarged co-operation on an ad hoc basis. However, perhaps the greatest chance of effective solutions lies in international agreement in particular subject areas. These are not matters which, with respect to the High Court of Australia, can be dealt with by domestic legislation alone. The remarkable achievement of the Commonwealth in the Scheme for Mutual Assistance in Criminal Matters shows how the effectiveness of the local judicial process in dealing with transnational problems may be substantially improved by international co-operation. As the proposed scheme for the protection of the cultural heritage in the Commonwealth illustrates, such co-operation offers the prospect of remedies to global problems, for which Commonwealth Governments must presently seek redress in the civil courts.

## FOOTNOTES

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1. See: Redfern & Hunter Law and Practice of International Commercial Arbitration (1986); Hague Academy of International Law: Centre for Studies & Research in International Law and International Relations Transnational Arbitration and State Contracts (1988).
  2. Established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States (1985) 575 UNTS 159.
  3. See the recent decision of the New Zealand High Court in: Government of New Zealand v Mobil Oil New Zealand Ltd et al (1988) 13 Yearbook Commercial Arbitration 638, where the Court referred to the reasons in principle for referring an international investment dispute to ICSID arbitration, and upheld a contractual clause to that effect.
  4. Recent Commonwealth legislation includes:  
State Immunity Act 1978 (United Kingdom)  
Foreign State Immunities Act 1985 (Australia)  
State Immunity Act 1982 (Canada)  
State Immunity Act 1979 (Singapore)  
State Immunity Act 1982 (Pakistan)
  5. Meeting of Commonwealth Law Ministers and Senior Officials (1986) Memoranda, pp 443-488.
  6. McLay 'Protection of Cultural Property' Meeting of Commonwealth Law Ministers 1983; O'Keefe & Prott 'Protection of the Cultural Heritage within the Commonwealth Consultative Document' (1985); Meeting of Commonwealth Law Ministers and Senior Offices (1986) Minutes pp 68-75.
  7. The Spycatcher litigation in England, Australia, Hong Kong and New Zealand has been reported in a single volume of the Fleet Street Reports, [1989] 2 RSR, to which reference will be made here.
  8. Crown Proceedings Act 1947  
Hogg Liability of the Crown in Australia, New Zealand and the United Kingdom (1971).
  9. Court of Appeal (England) (Woolf & Bingham LJJ and Sir Roualeyn Cumming-Bruce), 20 October 1989, 1989-T-No 568, The Times 24 October 1989.
  10. See: Edwards The Law Officers of the Crown (1964), Edwards The Attorney-General: Politics and the Public Interest (1984).

11. [1989] 2 FSR 726.
12. Fawcett The British Commonwealth in International Law (1963) Chapter 4.
13. [1984] AC 1, 20.
14. [1989] 2 FSR 631, 645 per Brennan J.
15. [1989] 2 FSR 732, 740.
16. See the discussions in the context of the Hague Convention of the Service of Process Abroad in the Hague Conference Practical Handbook (1983).
17. See the discussions in the context of the Hague Convention on the Taking of Evidence Abroad in the Hague Conference Practical Handbook (1984) and in McClean & McLachlan Explanatory Documentation (Commonwealth Secretariat, 1985).
18. The system of parallel legislation is fully dealt with in Patchett Recognition of Commercial Judgments and Awards in the Commonwealth (1984).
19. See the Evidence (Colonial Statutes) Act 1907 (UK) and the British Law Ascertainment Act 1859 (UK).
20. South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provinciën" NV [1986] 1 QB 348, 358 (CA).
21. See e.g. State Immunity Act 1978 (UK) s.13. The question of enforcement against the property of a State is discussed in Crawford "Execution of Judgments and Foreign Sovereign Immunity" (1981) 75 AJIL 820.
22. See e.g. State Immunity Act 1987 (UK) s.2(6).
23. Crown Proceedings Act 1947 s.28; Conway v Rimmer [1968] AC 910; see: Style & Hollander Documentary Evidence 2 ed (1987) 132-143.
24. Section 13(1).
25. Style & Hollander supra n.23, 140.
26. See Mann Foreign Affairs in English Courts (1986) 160-2, which suggests that Buttes may have unexpected and unacceptable results where the State is itself a litigant.
27. Attorney-General for Tuvalu & anor v Philatelic Distribution Corporation Ltd et al supra n.9 (recovery of Tuvalu postage stamps); Haile Selassie v Cable and Wireless [1938] Ch 545, 839 (recovery of a debt); The Ardennes [1950] 2 All ER 517 (damages for damage caused to a State's ship in a collision).

28. Government of India v Taylor [1955] AC 491, 511 per Lord Keith of Avonholm.
29. Dicey & Morris on the Conflict of Laws (11 ed, 1987) Rule 3(1), p 100. The basis of the rule is discussed in Mann 'Prerogative Rights of Foreign States and the Conflict of Laws' in Studies in International Law (1973) 492 and Mann 'The International Enforcement of Public Rights' (1987) 19 NYUJILP 603.
30. Huntingdon v Attrill [1893] AC 150, 156 per Lord Watson.
31. [1988] 3 All ER 144, 150.
32. King of Italy v Marquis Cosimo de Medici Tornaquinci (1918) 34 TLR 623.
33. See e.g. Protection of Movable Cultural Heritage Act 1986 (Australia) s.9(1).
34. Dicey & Morris supra n.29 suggest, at page 109, that the foreign state must reduce the property into its possession while it is within its jurisdiction to have a valid and enforceable title in a foreign Court.
35. See reference supra n.27.
36. Discussed fully by Powell J in the New South Wales High Court [1989] 2 FSR 349, 478-487.
37. [1989] 2 FSR 631, 643.
38. [1989] 2 FSR 631, 638-9; criticised by Mann (1988) 104 LQR 497.
39. [1989] 2 FSR 304, 328.
40. [1989] 2 FSR 726, 730 (interim judgment of the Court of Appeal).
41. [1989] 2 FSR 732, 739.
42. [1989] 2 FSR 511, 542.
43. [1989] 2 FSR 631, 644.
44. Mann Foreign Affairs in English Courts (1986) Chapter 3 'The Effect of Certification'.