Sovereign Shield: Revisiting State Immunity in *Argentum Exploration v. South Africa*

I. OVERVIEW

In *Argentum Exploration Ltd. v. Republic of South Africa*, the Supreme Court of the United Kingdom addressed the application of sovereign immunity in the context of state-to-state transactions during wartime.[1] The noted case originated from a dispute over ownership of silver recovered from the *S.S. Tilawa*, a ship sunk in 1942 by a Japanese submarine.[2] The silver was part of a wartime transaction between South Africa and the United Kingdom, primarily intended for the minting of coinage.[3] In 2017, Argentum Exploration Ltd. successfully recovered the silver and sought ownership under a salvage claim upon its return to the United Kingdom.[4] South Africa, however, invoked its sovereign immunity, asserting its property rights over the cargo by claiming that the silver had been transferred for sovereign purpose and use.[5] Argentum further responded that the silver fell under the "commercial use"

1. Argentum Exploration Ltd. v. Republic of South Africa, [2023] UKSC 32.
2. *Id.* ¶ 1.
3. *Id.* ¶ 66.
4. *Id.* ¶¶ 2-3.
5. *Id.* ¶ 67.

exception of the State Immunity Act (SIA) 1978, thus providing validity to their claim.[6]

The lower courts initially ruled against South Africa, finding that the silver was subject to the commercial use exception to state immunity; this was then appealed.[7] Argentum maintained that the transaction was commercial in nature, and therefore, immunity should not apply.[8] On further appeal, the UK Supreme Court narrowed their focus to the issue of the silver's commercial use status, attempting to parse whether the silver qualified.[9] The key legal question was whether South Africa's transaction and the manner of said transaction could be classified as a sovereign or commercial act, thus determining the applicability of sovereign immunity.[10]

In its judgment, the Supreme Court held that the silver, intended for minting purposes, was not in commercial use at the time of its loss; therefore, the transaction was sovereign in nature.[11] Consequently, South Africa was entitled to sovereign immunity under the SIA 1978, and Argentum's salvage claim was dismissed.[12] The Court emphasized that the distinction between sovereign and commercial acts must be based on the purpose of the state's actions, rather than on the nature of the contractual arrangements.[13] It rooted this decision in its interpretation of previous court decisions, customary international law theory, and parliamentary intention.[14] Thus, the Supreme Court ruled that South Africa retained its immunity and awarded it the silver from the sunken ship's cargo.[15] More specifically, the Supreme Court held that South Africa's wartime transaction was a sovereign act under the State Immunity Act 1978.[16] The United Kingdom Supreme Court *held* that the Republic of South Africa is entitled to sovereign immunity in respect of an in rem claim by salvors of World War II-era silver. *Argentum Exploration Ltd. v. Republic of South Africa* [2023] UKSC 16.

6. *Id.* ¶ 61.
7. *Id.* ¶ 58.
8. *Id.*
9. *Id.* ¶ 60.
10. *Id.*
11. *Id.* ¶ 65.
12. *Id.* ¶ 98.
13. *Id.* ¶ 96.
14. *Id.* ¶¶ 66-98.
15. *Id.* ¶ 117.
16. *Id.*

II. BACKGROUND

A. The Supreme Court's Ruling on Sovereign Immunity, Generally

After its review, the Supreme Court unanimously allowed for South Africa's appeal. It held that the silver was not in use, nor intended for use for commercial purposes at the time when the cause of action arose.[17] It concluded that South Africa was entitled to immunity from Argentum's claim against the silver.[18] Sovereign immunity, a long-standing principle of international law, shields states from being subject to the jurisdiction of foreign courts.[19]

B. The Evolution of Sovereign Immunity

Historically, sovereign immunity was applied under an absolute theory, granting states near-total immunity from foreign legal claims in disputes.[20] Over time, the concept evolved in both domestic and customary international law into a more restrictive theory of immunity which allowed for specific exceptions to previous frameworks. Restrictive immunity limits immunity to acts undertaken in a state's sovereign capacity, known as *acta jure imperii*, while excluding commercial or private acts, or *acta jure gestionis*.[21] As international commerce increased, this shift from absolute to restrictive immunity formed out of necessity, reflecting the participation of states in global commerce and a need to balance sovereign immunity with private rights.[22] While not universally adopted through treaties, this theory has increasingly fallen into customary international law, with most states adhering to this principle in some manner or interpreting the same principle when needed.[23]

C. Distinguishing Sovereign and Commercial Acts

When analyzing a sovereign immunity claim, sovereign actions must be distinguished from commercial transactions based on both their

17. *Id.*
18. *Id.*
19. *Id.* ¶ 43.
20. Baker McKenzie, *State of Immunity: Global Analysis of Sovereign Immunity and Enforcement Against State Assets* (2019), https://www.bakermckenzie.com/en/-/media/files/insight/topics/sovereigns/baker-mckenzie-state-of-immunity.pdf.
21. *Id.* at 5.
22. Germany v. Italy: Greece Intervening, Judgment, 2012 I.C.J. Rep. 99 (Feb. 3).
23. *Id.*

actual and intended use.[24] Generally, under the restrictive approach, states are subject to foreign jurisdiction when they engage in commercial transactions similar to those of private actors.[25] When a state's actions are materially indistinguishable from that of a private actor, it generally qualifies as a private act. The court further analyzes this intent through evaluating the predominant intended use of the cargo.[26] This concept was famously introduced in the United States with the U.S. Supreme Court's decision in *The Schooner Exchange v. McFaddon*. In this case, Chief Justice Marshall ruled that foreign sovereign vessels, such as warships, were immune from the jurisdiction of U.S. courts, particularly when their property was tied to sovereign functions.[27]As the Court noted, "The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad."[28] This principle was later echoed by the UK Supreme Court, which reaffirmed the doctrine articulated in *The Schooner Exchange*, and emphasized the immunity of foreign sovereign vessels in connection with sovereign functions.

D. The State Immunity Act 1978

With the evolution toward restrictive sovereign immunity in the UK, sovereign immunity took a more formal shift when it was codified in the State Immunity Act 1978.[29] Taking influence from international law and other nations interpretations of sovereign immunity, the SIA 1978 adopts the restrictive theory and provides a legal framework for determining whether immunity applies in specific cases.[30] Section 10 of the SIA 1978, which deals specifically with cases involving state-owned ships and their cargo, was enacted to enable the UK to ratify The Brussels Convention of 1926.[31] Section 3 of the SIA 1978 establishes that states are generally immune from the jurisdiction of UK courts, except when they engage in

24. State Immunity Act 1978, c. 33 (UK).
25. *Id.*
26. *Argentum Exploration Ltd.,* (2023) UKSC 32, ¶ 43.
27. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).
28. *Id.* at 138-139.
29. State Immunity Act 1978, c. 33 (UK).
30. *Id.*
31. Gordon A. Christenson, *The State Immunity Act of the United Kingdom*, 73 AM. J. INT'L L. 473, 477 (1979), https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/state-immunity-act-of-the-united-kingdom/25820DC65616E9410F7546AFBBFCE3A8.

commercial activities.[32] This is further delineated by UK's parliament, which states an additional threshold criteria wherein the cargo in question must either be "in use or intended for use" for commercial purposes.[33] This balance between state immunity and private claims is central to cases like *Argentum*, which explores whether specific acts undertaken by a state qualify as sovereign or commercial in rem.[34]

The SIA 1978 parliament codified Section 10(4)(a) provides that a state was not immune in an action in rem if the cargo and the ship carrying it were, at the time the cause of action arose, "in use or intended for use for commercial purposes."[35] Historically, this approach to sovereign immunity in maritime law has roots in international conventions, particularly The Brussels Convention of 1926, which aimed to balance state sovereignty with the rights of private actors in maritime disputes.[36] The restrictive theory of sovereign immunity, codified in the SIA 1978, reflects this balance by limiting immunity to sovereign acts.[37] As opposed to the U.S. system, which allows for a broader interpretation of a case's facts, the UK's SIA 1978 provided a process for sovereign immunity exception claims. This system has been widely recognized in both domestic and international law, including in key cases such as *Trendtex Trading Corp v. Central Bank of Nigeria*, where the Courts emphasized the need to assess the nature of the act rather than its purpose when determining immunity.[38] This further narrowed the UK's understanding of the commercial sovereign immunity exception, creating the system the court uses today.

E. The Role of Salvage Law

One of the key questions in Argentum is whether the recovery of a sunken vessel's cargo as part of a salvage operation falls within the scope of state immunity to begin with.[39] Salvage law traditionally involves the recovery of ships and their cargo from peril at sea, with salvors entitled to

32. State Immunity Act 1978, c. 33 (UK).

33. *Id.*

34. *Argentum Exploration Ltd.*, (2023) UKSC 32.

35. State Immunity Act 1978, c. 33, § 10(4)(a) (UK); *The Parlement Belge* (1879) 4 PD 129; *Cristina* [1938] AC 485, 497-98.

36. International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels*,* 1926, arts. 1-3.

37. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); *Congreso del Partido* [1983] 1 AC 244.

38. Trendtex Trading Corp. v. Central Bank of Nigeria [1977] QB 529, 554-55.

39. *Id.* ¶ 104.

a reward based on the value of the property saved.[40] Salvage law has deep historical roots, dating back to the Roman principle of *lex Rhodia de iactu*, which recognized the rights of salvors to recover costs for goods saved from shipwreck, and has followed this principle to the present day.[41]

Today, international salvage law is largely codified in The 1989 International Convention on Salvage, which influences domestic law in many countries, including that of the UK.[42] The codification of these principles in international conventions has provided a uniform, customary framework for addressing maritime salvage across multiple jurisdictions. However, the application of salvage law becomes more complicated when the property in question is a foreign warship, especially when it concerns state action. The UK attempted to clarify this issue through the adoption of The Brussels Convention of 1926, under the 1989 International Convention on Salvage, setting out standards for interpreting issues of salvage.[43] As before, under the SIA 1978, a salvage claim under the 1989 International Convention on Salvage can be made in personam or in rem.[44] In rem claims provide certain procedural advantages that are otherwise not afforded to in personam claims.[45] Notably, in rem claims allow for the fixing of a claim form to the property itself rather than to the property's owner.[46] In salvage claims, in rem claims provide a right to secure the property in question, which can then be used as a security for their later claim.[47] With this in mind, Argentum asserted its claim in rem, as they had recovered the silver and returned to the UK without South Africa's consent.[48]

Factually, the ship at the center of the Argentum case, the *S.S. Tilawa*, was a British vessel requisitioned by the colonial South African government during World War II.[49] On November 23, 1942 the *S.S. Tilawa* was sunk in the Indian Ocean by hostile action from a Japanese

40. *Id.* ¶ 44, Jan Łopuski, *Lex Rhodia de Iactu and the Origins of Maritime Salvage Law*, 33 GDAŃSKIE STUDIA PRAWNICZE 57, 58 (2020), https://czasopisma.bg.ug.edu.pl/index.php/gdanskie_studia_prawnicze/article/download/5251/4580/7822.

41. *Id.*

42. International Convention on Salvage, 1989, INT'L MAR. ORG., https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Salvage.aspx (last visited Nov. 10, 2024).

43. *Argentum Exploration Ltd.*, (2023) UKSC 32 ¶ 41; International Convention for the Unification of Certain Rules Relating to the Immunity of State-Owned Vessels, 1926.

44. *Id.* ¶ 56.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* ¶ 1.

49. *Id.* ¶ 3.

submarine.[50] The Republic of South Africa, claiming to be the legal successor, asserted ownership over the vessel and its cargo, invoking sovereign immunity under the SIA 1978 from any claims.[51] The central issue was whether South Africa's claim to the *S.S. Tilawa* and its cargo constituted an *acta jure imperii* a sovereign act that would render the state immune from British court jurisdiction, or whether it should be considered a commercial or private act, thereby falling outside the scope of absolute immunity and the SIA 1978.[52]

South Africa argued that the wreckage, being connected to wartime activities, should be viewed as part of its sovereign operations during the war and not validly claimed under Article 25 of The International Convention on Salvage (1989).[53] However, Argentum, the private company that had located the wreck and sought to claim its cargo under salvage law, contested that the commercial nature of the transactions involving the ship and its cargo placed them outside the realm of sovereign immunity.[54] The dispute, therefore, centered on the legal classification of the shipwrecked vessel and its cargo, and whether these elements could be interpreted as state property used for purely sovereign purposes.[55]

F. Key Precedents and International Influence

This issue of sovereign immunity in salvage operations has not been extensively litigated in the UK, but relevant precedent does exist, most notably in the case of the *Cristina* (1938).[56] This case involved the seizure of a Spanish vessel during the Spanish Civil War and provided an early framework for distinguishing between sovereign and commercial acts in relation to ships under state control.[57] In *Cristina*, the House of Lords held that a warship, due to its inherent connection to the sovereign functions of the state, was entirely immune from British jurisdiction.[58] This reasoning has influenced subsequent UK cases involving naval vessels

50. *Id.* ¶ 1.
51. *Id.* ¶ 3.
52. *Id.* ¶ 30.
53. *Id.* ¶ 117.
54. *Id.*; *see also* International Convention on Salvage, 1989, INT'L MAR. ORG., https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Salvage.aspx (last visited Nov. 10, 2024).
55. *Id.* at 44.
56. Compania Naviera Vascongado v. Steamship Cristina, [1938] A.C. 485 (H.L.) (appeal taken from Eng.).
57. *Id.*
58. *Id.*

and state immunity, establishing a clear line between sovereign and commercial actions for purposes of jurisdiction. In another example, *Trendtex Trading Co. v. Central Bank of Nigeria*, the Court distinguished between sovereign and commercial actions based on the nature of the transaction itself, using a similar method.[59] Later, further developments in sovereign immunity cases, such as *Congreso del Partido* (1983) and *SerVaas Inc. v. Rafidain Bank* (2012), continued to rely on these foundational distinctions but largely kept the principle the same.[60]

In addition to UK domestic law, the courts have drawn on international jurisprudence and customary international law to shape their decisions on state immunity. The International Court of Justice (ICJ) has played a vital role in reaffirming the principles of sovereign immunity in international law. For instance, in the case of *Germany v. Italy* (2012), the ICJ confirmed that breaches of jus cogens norms breach the expectations of international law.[61] In such a case, prohibitions on war crimes do not automatically nullify a state's immunity from jurisdiction, demonstrating another exception to sovereign immunity.[62] This decision further underscored a general principle of sovereign equality on an international legal scale.[63]

The Court also makes reference to The United Nations Convention on Jurisdictional Immunities of States and Their Property (2004).[64] While the UK is not a signatory to the convention, the Court acknowledged that it reflects important principles of customary international law, particularly in relation to state immunity.[65] The Convention codifies the restrictive theory of sovereign immunity similar to the approach taken by the UK's SIA 1978.[66] The Court used this convention to bolster its interpretation that sovereign immunity protects states from jurisdiction in foreign courts when their actions are sovereign, even if the transaction includes commercial elements.[67]

59. Trendtex Trading Co. v. Cent. Bank of Nigeria, (1977) 1 Q.B. 529 (Eng.)

60. Congreso del Partido, (1983) 1 A.C. 244 (H.L.), SerVaas Inc. v. Rafidain Bank, (2012) UKSC 40.

61. Germany v. Italy: Greece Intervening, Judgment, 2012 I.C.J. Rep. 99 (Feb. 3).

62. *Id.*

63. *Id.*

64. United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (2004).

65. *Argentum Exploration Ltd.*, (2023) UKSC 32, ¶ 16.

66. *Id.*

67. *Id.* ¶¶ 16-17.

G. The Foreign Sovereign Immunity Act 1976

Notably, the United States equivalent of the SIA 1978 is the Foreign Sovereign Immunities Act (FSIA) 1976 which similarly provides states with exceptions under 1605(a)(2).[68] In the United States, a different perspective is taken which instead emphasizes a more structured framework for distinguishing between commercial and sovereign acts.[69] This system often leads to different outcomes in factually similar disputes with examples such as *Republic of Argentina v. Weltover, Inc.* or *Victory Transport Inc. v. Comisaria,* where sovereign immunity exceptions were denied as the actions of the companies were akin to being private and commercial, but for different reasons.[70] The United States' FSIA 1976 emphasizes the nature of a foreign state's actions when determining immunity, focusing on whether the conduct is of a commercial character, irrespective of its purpose or the goods. In contrast, the United Kingdom's SIA 1978 traditionally considers both the nature and purpose of the transaction. This distinction is highlighted in a Chatham House briefing paper which notes that the U.S.'s FSIA 1976 adopts a "nature" test, while the UK's SIA 1978 allows for consideration of the transaction's purpose.[71]

Generally speaking, U.S. courts have been more willing to apply the commercial activity exception, even extending it to international organizations. In *Jam v. International Finance Corp.*, the U.S. Supreme Court held that international organizations possess the same immunity from lawsuits as foreign governments under the FSIA 1976. The Court stated, "The IOIA grants international organizations the 'same immunity' from suit 'as is enjoyed by foreign governments,' 22 U.S.C. §288a(b), and today, under the *FSIA 1976*, foreign governments are not immune from suits based on their commercial activities."[72]

68. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11.

69. 28 U.S.C. § 1605(a)(2) (2018), LEGAL INFO. INST., https://www.law.cornell.edu/uscode/text/28/1605 (last visited Nov. 10, 2024).

70. Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992); Victory Transport Inc. v. Comisaria General, 232 F. Supp. 294 (S.D.N.Y. 1963).

71. *State Immunity and Sovereign Debt Restructuring: A Chatham House Perspective*, Chatham House Briefing Paper, at 12 (Dec. 2013), https://www.chathamhouse.org/sites/default/files/home/chatham/public_html/sites/default/files/BPStateImmunity1213.pdf.

72. Jam v. Int'l Fin. Corp., 139 S. Ct. 759 (2019), https://www.supremecourt.gov/opinions/18pdf/17-1011.mkhn.pdf.

III. COURT'S DECISION

In *Argentum Exploration Ltd. v. Republic of South Africa*, the United Kingdom Supreme Court reaffirmed the principle of sovereign immunity, focusing on its application under Section 10(4)(a) of the SIA 1978. The Court held that South Africa's wartime shipment of silver was not "in use for commercial purposes" when carried aboard the vessel in 1942, thereby entitling South Africa to immunity from Argentum's in rem salvage claim.[73] This conclusion hinged on the interpretation of the statutory phrase "in use" and the heightened threshold for in rem proceedings under the Act.[74]

Argentum argued that the silver was "in use for commercial purposes" due to the commercial arrangements surrounding its transport. However, the Court rejected this interpretation, stating that cargo stored in a ship's hold does not meet the ordinary meaning of "in use or intended for use."[75] They stated that to accept Argentum's definition would render Parliament's additional expectations for in rem claims redundant, effectively removing the distinction between in rem and in personam proceedings entirely.[76] The Court emphasized that proceedings in rem impose significantly greater intrusions on state sovereignty, as they allow for maritime liens, arrest of property, and security claims. These implications justified Parliament's more stringent criteria for denying immunity in such cases.[77]

The Court further supported its reasoning through international law, particularly The Brussels Convention of 1926, which underpinned Section 10 of the SIA 1978. The convention's provisions affirm the distinct treatment of state-owned cargo in in rem claims, reinforcing the sovereign immunity framework.[78] It articulated that this approach aligns with the restrictive theory of sovereign immunity, as outlined in *Trendtex Trading Corp v. Central Bank of Nigeria*, which originally distinguished between sovereign acts (*acta jure imperii*) and commercial activities (*acta jure gestionis*), or alternatively in *Cristina* (1938) which dealt with ships in a similar manner.[79] The Court underscored that South Africa's shipment of silver, intended for minting currency, fell squarely within the

73. *Argentum Exploration Ltd.*, (2023) UKSC 32, ¶ 1.
74. *Id.* ¶ 66.
75. *Id.* ¶ 69.
76. *Id.* ¶ 78.
77. *Id.* ¶¶ 79-87.
78. *Id.* ¶¶ 90-97.
79. *Id.* ¶ 103; Compania Naviera Vascongado v. Steamship Cristina, [1938] A.C. 485 (H.L.) (appeal taken from Eng.).

sovereign action category through any meaningful interpretation of "in use."[80]

The majority also corrected the Court of Appeal's erroneous emphasis on the potential future use of the silver. Instead, the Supreme Court focused on the use at the relevant time, determining that the shipment's sovereign purpose—in this case, fulfilling wartime obligations—was paramount.[81] The Court did not agree with Argentum's assertion that "in use" should be determined at one particular moment rather than through a general evaluation of the contract. Additionally, the Court found that the statutory framework of Section 10(4)(a) was consistent with general principles of international law and did not infringe on the right of access to a court under Article 6 of The European Convention on Human Rights.[82] The immunity applied solely to in rem proceedings and did not preclude in personam claims.[83]

The Court did review the concurrences from Lords Popplewell and Andres LJ, which further explored the significance of the sovereign nature of the transaction. Both agreed that the silver's predominant use for minting currency was decisive in establishing sovereign immunity.[84] Popplewell LJ emphasized that any incidental commercial aspects were immaterial, while Andres LJ reinforced the view that the inquiry should focus on the nature of the transaction at the time it occurred, rather than any potential future uses.[85] It is also worth noting there were no dissenting opinions in the Supreme Court's judgment. The Court concludes with an approval of the appeal. As of May 3, 2024, although the Court was made aware by the parties that a settlement had been arrived at, both parties agreed to a judgment nevertheless.[86]

IV. ANALYSIS

The UK Supreme Court's Decision in *Argentum Exploration Ltd. v. Republic of South Africa* offers a clear reaffirmation of the doctrine of sovereign immunity, particularly aligned with the SIA 1978 and principles of international law.[87] By adopting a strict interpretation of the phrase "in use for commercial purposes," the Court has reinforced

80. *Id.* ¶ 110.
81. *Id.* ¶¶ 99-110.
82. *Id.* ¶¶ 111-116.
83. *Id.* ¶¶ 114-115.
84. *Id.* ¶ 58.
85. *Id.*
86. *Id.* ¶ 117.
87. *Argentum Exploration Ltd.*, (2023) UKSC 32, ¶¶ 66-78.

international norms such as the UN Convention on Jurisdictional Immunities of States and Their Property and upheld customary international law principles.[88] Notably, the Court's expanded scope of sovereign immunity functions to include wartime transactions, further strengthening states' relative legal positions against potentially intrusive legal claims in domestic courts. This decision underscores that actions with a sovereign purpose, especially if interwoven with commercial elements, are shielded from litigation. In an era where international corporations wield significant influence, the Court's reaffirmation of sovereign immunity serves to protect state sovereignty from being undermined through legal actions brought by private entities. The UK court's ruling sets a clear precedent that strengthens the legal immunity of states in future cases, particularly when dealing with state assets involved in complex geopolitical and wartime contexts.

However, this decision raises significant concerns for private industry, undermining the flexibility and adaptability of private industry in future international commercial transactions. Sovereign immunity, coupled with narrow interpretations of in rem claims, act as a formidable barrier, preventing private actors from seeking legal relief even when state assets are ostensibly being used for commercial purposes. The Court's strict interpretation risks setting an excessively high threshold for proving commercial use, making it challenging for private entities to assert claims against sovereign assets. In a globalized economy where state and private interests frequently intersect, this approach could stifle adaptability in international commercial transactions. By favoring state actors over private entities, the decision entrenches the divide between sovereign and commercial functions, potentially undermining the private industry's role in such transactions at all.

The ruling also carries broader policy implications, particularly in its treatment of businesses engaged in recovery operations like Argentum's. The Court's strict interpretation of "in use" for commercial purposes limits the scope of the commercial use exception to exclude the mere transportation of goods, a conclusion that aligns with a particularly narrow reading of the SIA 1978.[89] While this approach may have been legally sound, the Court notably missed an opportunity to offer a more nuanced solution that could balance state sovereignty with the legitimate interests of private actors. By failing to provide a clearer substitute legal framework, the decision risks creating uncertainty for industries that

88. United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (2004).

89. State Immunity Act 1978, c. 33 (UK).

frequently interact with state property or action. For companies like Argentum, this ruling significantly heightens the risk of bringing claims against state-owned assets. As a result, this decision could discourage private enterprises from pursuing legitimate ventures involving state property, out of a valid concern that they would be unable to recover costs due to sovereign immunity defenses. To give an example, this chilling effect could lead to fewer commercial activities that rely on the restrictive sovereign immunity theory when dealing with state-owned property. Companies involved in natural resource extraction or salvage operations similar to that of Argentum may now have a greater hesitancy to pursue such ventures due to the risk of these state immunity defenses. It is also worth noting that international investors who plan on engaging in joint ventures with state entities, may now be forced to face this same legal defense and ambiguity.

The Court understandably relied heavily on legal precedent in making its decision, turning to prior case law and international conventions to frame its understanding of sovereign immunity. However, in doing so, it may have sacrificed the opportunity to develop a more flexible legal solution. This solution could have addressed the relatively blurred line between state and commercial acts. As international commerce becomes increasingly complicated, particularly in industries where state and private interests overlap, the Court's present decision is unsatisfactory in providing a conclusion to this problem. As the Court itself admits, SIA 1978 was designed to navigate this complexity, yet the Court, by reducing the scope of the act so narrowly, has risked oversimplifying the issue.[90] The interplay between state immunity and commercial accountability requires an appropriate legal framework that matches the complexity of the issue at hand. The Court's decision creates a legal environment where states can avoid accountability by simply asserting a sovereign purpose for their actions, regardless of how entangled they may be with commercial interests, due to the unreasonably high bar private enterprises must meet to prove commercial action.

A strong argument could be made that the Court's decision misses an opportunity to reflect the realities of modern international law, which increasingly recognizes the need to hold states accountable for their actions when they participate in commercial activities. As seen in cases like *Trendtex Trading Corp v. Central Bank of Nigeria*, courts have increasingly moved toward a more restrictive theory of sovereign

90. *Id.*

immunity.[91] State actions with a commercial aspect are subjected to legal scrutiny in most other jurisdictions. The Argentum decision, by so strictly interpreting "in use," arguably regresses this trend, allowing states to escape liability even in situations where their actions are undoubtedly intertwined with commercial interests. The decision to rely on wartime context to justify sovereign immunity may also seem dated in a world where state-owned enterprises frequently deal in commercial activities that have little to do with their owners' sovereign functions. Future courts will likely need to grapple with these emerging issues, and it is unclear whether the precedent set by this decision will address the growing complexity of international commerce and state sovereignty.

While not perfect, adopting a more lenient approach akin to that in the FSIA 1976 would likely ease many of these problems.[92] By focusing on the nature of the act, rather than its sovereign motivations, the FSIA 1976 ensures that foreign states engaging in commercial activities are treated more similarly to private parties. This approach promotes greater market fairness, striking a better balance between foreign government interests and private companies. The FSIA 1976 establishes ideas such as "territorial nexus" and generally shows a greater willingness to hold state-owned entities accountable in a way the SIA 1978 largely fails to do.[93] If the UK court was to adopt a system more similar to that of the FSIA 1976, this framework would likely provide a more predictable and equitable legal system which generally promotes a fairer environment for both parties.

While the UK Supreme Court's decision in *Argentum* reinforces established principles of sovereign immunity, it does so at the expense of private commercial interest.[94] The decision also signals to the international community that UK courts remain committed to upholding sovereign immunity primarily in the state's favor. This could potentially have a downstream influence on other jurisdictions as well, which may embolden other states to assert sovereign immunity more frequently, especially in cases where similar dual purpose asset use is in question. The Court's narrow interpretation of "in use" sets a high bar for private actors to overcome when pursuing claims against state assets. This will inevitably stifle commercial activity linked to state property.

To address these shortcomings, the UK Parliament could consider amending the SIA 1978 to provide clearer guidelines for distinguishing

91. Trendtex Trading Co. v. Cent. Bank of Nigeria, (1977) 1 Q.B. 529 (Eng.).
92. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1602-11.
93. *Id.*
94. *Argentum Exploration Ltd.*, (2023) UKSC 32.

sovereign from commercial acts, particularly in cases involving mixed-purpose transactions. Introducing a statutory test that emphasizes the nature of the activity over its purpose, similar to the approach set by the FSIA 1976, would ensure a more balanced application of immunity. Additionally, courts could adopt a more dynamic interpretation of "in use" that reflects the complicated nature of modern commerce, thereby protecting private actors' legitimate interests without compromising state sovereignty. A more balanced framework is essential to ensure that sovereign immunity does not become a shield for states to evade accountability in an increasingly interconnected global economy.

The Court's reliance on traditional legal frameworks overlooks the complex realities of modern state involvement in commerce, where the line between sovereign and commercial functions are increasingly blurred. In the modern era of vast multinational companies, the Court's decision feels out of touch in its lack of commitment. This decision may provide clarity on state immunity in the short term, but it could have a broader negative implication for private businesses and future legal developments in international law.

V. CONCLUSION

In conclusion, the UK Supreme Court's decision in *Argentum* reaffirms the longstanding principle of sovereign immunity, but does so in a manner that seems overly protective of states' interests.[95] While legally sound, the Court's narrow interpretation of the phrase "in use for commercial purposes," particularly in regard to the status of cargo aboard ships, risks creating an unbalanced precedent that favors state actors at the expense of private enterprises. The stringent requirements for proving commercial use may dissuade companies like Argentum from engaging in legitimate recovery operations or other ventures involving state-owned assets. This creates uncertainty and discourages innovation in areas where private and public interests intersect.

The decision, though rooted in precedent, missed an opportunity to develop a more nuanced legal framework that better addresses the realities of modern commerce. By upholding such a strict distinction, the Court risks hindering future international commercial transactions and stifling legitimate private claims. To ensure a more equitable balance, legislative reform of the SIA 1978 is needed to provide clearer criteria for distinguishing sovereign from commercial acts, particularly in cases involving complicated transactions. Introducing a statutory test that aligns

95. *Id.*

with global practice, such as those under the FSIA 1976, would promote fairness and predictability in sovereign immunity claims. Ultimately, without such reforms, sovereign immunity may continue to shield states from accountability in an increasingly interconnected global economy, undermining the core principles of equality that international law seeks to represent.

William Turner*

 This Note reflects his interest in international legal frameworks and sovereign immunity doctrines. Turner is especially grateful to Professor Hayes for providing guidance during the drafting process, and he also acknowledges the hard work and dedication of his fellow *Journal* members in bringing this volume to print. He thanks his family and friends for their unwavering support throughout his studies.