application of *B* to the present case emanated from judicial reluctance to confront the possibility that the UK was under two equal but opposite obligations, and thus to step into the realm of policy-making by making a *choice* between the two. Attempts to force a resolution of the norm conflict—by using the test derived from *B* to establish a quasi-hierarchy of norms, with 'general' international law norms superior to those of the ECHR—were both unconvincing and, ultimately, futile. The UK has been 'outed' in having to make a choice between one obligation and the other, between expediency[85] and principle.

MATTHEW E CROSS* & SARAH WILLIAMS**

II. IMMUNITY FOR HEADS OF STATE ACTING IN THEIR PRIVATE CAPACITY—*THOR SHIPPING A/S V THE SHIP 'AL DUHAIL'*

The doctrine of State immunity has undergone considerable change in modern times. No longer is it the position under customary international law, and the law of most national jurisdictions, that States and heads of State are afforded absolute immunity from the jurisdiction of international and national courts and tribunals. In particular, the prevailing practice of States today is to apply a restrictive doctrine of State immunity, whereby immunity is not afforded in relation to what can broadly be described as 'commercial transactions'.[1] The development of this practice was in part due to the explosion in the growth of international trade and investment, which led to the recognition that there would otherwise exist an unfair balance of power if private litigants were denied a judicial remedy in situations where States (or heads of State) engage in commercial activities outside of what would ordinarily be termed official governmental functions.

Despite the inroads which have been made in refining the doctrine of State immunity to meet modern demands, the law remains undeveloped in a number of important aspects. One such aspect is the situation where an application is brought *in rem* against a ship owned by a head of State, where that head of State is acting in his or her personal capacity, and where no commercial activity has occurred within the jurisdiction of the forum State. This article will examine the law on this issue in light of the recent Federal Court of Australia decision in *Thor Shipping A/S v The Ship 'Al Duhail'*.[2] The case concerned an application brought *in rem* in the Federal Court of Australia against a vessel owned by the Amir of Qatar. The Amir, as the head of State of Qatar, appeared

[85] See, eg Divisional Court judgment, para 87.

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[1] As evidenced by State practice, State immunity is often restricted in relation to commercial activity, the infringement of intellectual property rights, employment contracts, and personal injury. See H Fox QC, *The Law of State Immunity* (OUP, Oxford, 2002) 22.

[2] [2008] FCA 1842 (Dowsett J) (hereinafter, *Thor Shipping*).

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in the proceedings requesting that the ship be released on the basis that the Court's admiralty jurisdiction had not been engaged, and that the Amir had immunity from suit and execution within the jurisdiction of the Court.

A. Thor Shipping: A Tale of Two Ships

On 20 August 2008 the plaintiff commenced proceedings in the Federal Court of Australia against the ship named 'Al Duhail' (the ship). The ship had been built in New Zealand pursuant to an agreement between Amiri Yachts of Doha, Qatar and Sovereign Yachts (NZ) Ltd. The vessel 'Southern Pearl NZ', owned at all material times by the plaintiff, had been chartered by Amiri Yachts to transport the ship from New Zealand to the Seychelles. On 7 June 2008 the Master of the Southern Pearl NZ tendered notice of readiness to load. Lay time expired on 9 June 2008, the ship not having been loaded. On 11 June 2008 the plaintiff's agent purported to accept the charterer's repudiation of the charter-party, and the ship was subsequently sailed from New Zealand to Brisbane.[3]

The ship was arrested in Brisbane on the date the writ was filed. The writ initially alleged that either Amiri Yachts or Amiri Protocol was the charterer and had failed to load or pay freight in accordance with the terms of the charter-party. The plaintiff sought damages for breach of the charter-party, together with interest and costs. The writ was subsequently amended to allege that Amiri Yachts was the charterer as agent for His Highness Sheikh Hamad Bin Khalifia Al Thani (the Amir of Qatar and head of State of the State of Qatar), or on its own behalf or, alternatively, that Amiri Protocol was the charterer on behalf of the Sheikh, or on its own behalf. At the time of the amendment, the Amir was added as another relevant person, and appeared in the proceedings requesting a release of the ship on the basis that: (1) the Court's admiralty jurisdiction had not been engaged; and (2) the Amir had immunity from suit and execution.[4]

B. The Application In Rem

The plaintiff sought to proceed *in rem* against the ship pursuant to section 17 of the Admiralty Act 1988 (Cth) (Admiralty Act). Under section 17 of the Admiralty Act, such proceedings may only be commenced if a relevant person:

> (a) was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship or property; and
> (b) is, when the proceeding is commenced, the owner of the ship or property . . . .

Pursuant to section 3 of the Admiralty Act, the term 'relevant person' 'in relation to a maritime claim, means a person who would be liable on the claim in a proceeding commenced as an action in personam . . .'.

The plaintiff submitted that its cause of action arose on 11 June 2008 when it purported to accept repudiation of the charter-party.[5] The Amir submitted that he

[3] *Thor Shipping* (n 2) 1–2. [4] ibid.

[5] His Honour was inclined to think that the cause of action arose on the date of the alleged repudiation, namely 9 June 2008, although his Honour also noted that it probably did not matter whether the cause of action arose on 9 or 11 June 2008. See *Thor Shipping* (n 2) 5.

had been the owner of the ship since 21 July 2008. Therefore, while he was the owner of the vessel at the time at which proceedings were commenced, he was not the owner on the date on which the cause of action allegedly arose. Further, it was submitted that if Amiri Yachts owned the vessel on that date, then it did not do so on the date of commencement of proceedings. Simply put, it was argued that none of the three named relevant persons satisfied the requirements of section 17 of the Admiralty Act.

As such, the principal question before the Court in this regard was whether, for the purposes of Section 17 of the Admiralty Act, the Amir was owner of the Ship as at 9 or 11 June 2008, or alternatively, whether he was then in possession or control of it. Dowsett J declined, however, to decide upon the issue of whether the act of registration in Qatar, itself, effected a change in ownership of the Ship in New Zealand.[6] His Honour was of the opinion that it was unnecessary to do so, on the basis that the Amir was entitled to head of State immunity.[7]

C. The Claim of State Immunity

Given the nature of the dispute, it was common ground between the parties that any claim to immunity by the Amir was that which he enjoyed in his private capacity. The relevant statute governing claims to State immunity in Australia is the Foreign States Immunity Act 1985 (Cth) (FSIA). As noted by Dowsett J, the Explanatory Memorandum which accompanied the Foreign States Immunities Bill 1985 (Cth) into the House of Representatives indicated that the proposed legislation was based upon a report by the Australian Law Reform Commission, which stated:

> At common law and in international law the entitlement to immunity of a head of state acting in a private capacity is *unclear*. When absolute immunity for foreign states was the general rule it seems that the head of state was always entitled to a similar immunity. But there is an absence of authority to indicate how the private position of a head of state may have been affected by the shift to restrictive immunity. Legal disputes involving sovereigns or other heads of state in their private capacity are now very rare. Of all the overseas models on foreign state immunity only the *State Immunity Act 1978* (UK) deals with the point. It does so by applying the provisions of the *Diplomatic Privileges Act 1964* (UK) with respect to a head of mission, his family and servants, to a sovereign or other head of state, members of his family forming part of his household, and his private servants. The 1964 Act, like the similar Australian legislation, largely incorporates into municipal law the terms of the Vienna Convention on Diplomatic Relations 1961.[8]

[6] His Honour was inclined to the view that the law of New Zealand (as the lex situs immediately before registration) should be applied to determine whether or not property passed to the Amir as the result of registration. His Honour suspected that the probable answer was that according to New Zealand law, it did not, but that question had not been argued. See *Thor Shipping* (n 2) 51.

[7] ibid 51.

[8] Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) [163] (hereinafter, ALRC Report), emphasis added, footnotes omitted. It was similarly apparent from the research of the many counsel in the *Pinochet case* that there is no clear customary international law relating to the precise nature and scope of the immunities of a head of state. See H Fox, 'The Pinochet Case No. 3' (1999) 48 ICLQ 687, 692.

Given the 'considerable advantages in the rarely litigated issue of the entitlement to immunity of a sovereign in his private capacity' being brought under the body of law which deals with diplomatic immunity, the ALRC Report therefore recommended that Australia adopt a similar approach to that taken in the State Immunity Act 1978 (UK) (SIA).[9] Consequently, section 36(1) of the FSIA provides:

> (1) Subject to the succeeding provisions of this section, the Diplomatic Privileges and Immunities Act 1967 extends, with such modifications as are necessary, in relation to the person who is for the time being:
>
> (a) the head of a foreign State; or
> (b) a spouse of the head of a foreign State;
>
> as that Act applies in relation to a person at a time when he or she is the head of a diplomatic mission.

Pursuant to section 36(1), the immunity which was afforded to the Amir was therefore that which was applicable under the Diplomatic Privileges and Immunities Act 1967 (Cth) (DPIA). As his Honour noted, both the DPIA and the Diplomatic Privileges Act 1964 (UK) effectively adopt relevant provisions of the Vienna Convention on Diplomatic Relations;[10] particularly articles 1, 22–24 inclusive and 27–40 inclusive, giving them legal effect. In relation to the current proceedings, the relevant articles of the Vienna Convention were Articles 31 and 39. Article 31(1) provides:

> (1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
>
> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

His Honour found that of the exceptions identified in Article 31(1), only Article 31(1)(c) could be said to apply to the proceedings.[11] On this point it is worth noting that while Article 31(1)(a) refers to 'private immovable property situated in the territory of the receiving State', the legislation in some States allows for actions to be brought *in rem* against movable property.[12] In relation to common law countries,

[9] ALRC Report ibid. The ALRC Report recommended adopting the approach taken in the United Kingdom legislation with the exception that 'there seems to be no reason to extend similar immunities to members of the family (other, perhaps, than the spouse) or to the retinue of the head of state in his private capacity, as the United Kingdom Act does': ibid.

[10] Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95 (hereinafter, Vienna Convention).

[11] *Thor Shipping* (n 2) 64.

[12] Columbian legislation, for instance, refers to 'actions *in rem*, including possessory actions, which relate to movable or immovable property situated in the territory'. See E Denza, *Diplomatic Law* (3rd edn, OUP, Oxford, 2008) 291.

although the 'real action' exception contained in Article 31.1 of the Convention can be said to be equivalent to an action *in rem*, Denza notes that:

> The expression 'real action relating to private immovable property situated in the territory of the receiving State' is particularly likely to cause difficulty in Anglo-American jurisdictions. The old distinction in English law (now abolished) between 'real' and 'personal' actions did not correspond to what is meant in Article 31.1(a). The distinction between actions *in rem* and actions *in personam* cannot be applied precisely either since actions *in rem* are generally brought in order to establish title to vessel.[13]

In relation to Article 31(1)(c), there was no evidence before the Court to suggest that the Amir had been involved in any professional or commercial activity within the jurisdiction of the forum, or for that matter had in fact ever entered Australia. His Honour therefore found that as a head of State, the Amir enjoyed the same immunity, without exception, as that conferred upon diplomatic agents by Article 31, that is, immunity from criminal, civil and administrative jurisdiction, including immunity from execution.[14]

The plaintiff also submitted, however, that Article 39 of the Vienna Convention limited the immunity of a head of State in the same way as it limits the immunity of the head of a diplomatic mission, with such modifications as may be necessary pursuant to section 36 of the FSIA. Article 39 provides:

> (1) Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry for Foreign Affairs or such other ministry as may be agreed.
> (2) When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

The plaintiff submitted that such immunity therefore commences at the time at which a head of State enters Australia and continues until departure. Dowsett J was of the opinion that there were a number of problems with such a submission. First, implicit in this submission was the assertion that a head of State, in his or her private capacity, had no immunity from Australian process when outside of Australia. In his Honour's opinion, this would effectively mean that the actions of the head of State outside of Australia would be subject to litigation in Australia, assuming appropriate jurisdictional connection. Additionally, '[t]here would be little point in such a system' which allowed for a head of State to be sued while outside Australia, but not within Australia.[15]

Secondly, his Honour was of the opinion that there were, in any event, 'textual difficulties' in applying Article 39(1) to a foreign head of State.[16] For instance, a head of State does not enter Australia 'on proceeding to take up his post', and rarely would a person be appointed as head of State whilst in Australia.[17] Further, it would be difficult to give any meaning to Article 39(2), as the functions of a head of State will not usually come to an end whilst he or she is in Australia.[18] Finally, Article 39 did not deprive a

[13] Denza, ibid 292–293.
[14] *Thor Shipping* (n 2) 64.
[15] ibid 65.
[16] ibid 66.
[17] ibid.
[18] ibid.

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head of mission, who remains in post, of his or her immunity during any temporary absence from the receiving State. Consequently, it would create a strange situation whereby a head of State lost such immunity upon departure.[19]

His Honour therefore considered that the error in the plaintiff's submission was 'the characterisation of article 39 as a geographical limitation upon diplomatic immunity'.[20] His Honour stated:

> In fact, it is designed to give immunity whilst the relevant diplomatic agent is in post, whether or not he or she is in the receiving state. It commences upon arrival in that state for the purpose of taking up the post, and terminates upon completion of his or her functions and departure. The geographical references in s 39 reflect the nature of the diplomatic agent's duties which generally require that he or she be in the relevant country in order to perform them. However he or she enjoys immunity whilst in post, regardless of location. It is that degree of immunity which must be extended to heads of State pursuant to s 36 of the [Foreign] States Immunities Act.[21]

His Honour then made reference to the 'strange feature' to be found in the general application of Article 39 to a head of State acting in his or her private capacity.[22] His Honour adopted such phraseology from the reasons of Lord Browne-Wilkinson and Lord Goff in the House of Lords decision in *Pinochet (No 3)*.[23] Relevantly, Lord Browne-Wilkinson had stated:

> The correct way in which to apply Article 39(2) of the Vienna Convention to a former head of state is baffling. To what 'functions' is one to have regard? When do they cease since the former head of state almost certainly never arrives in this country let alone leaves it? Is a former head of state's immunity limited to the exercise of the functions of a member of the mission, or is that again something which is subject to 'necessary modification'? It is hard to resist the suspicion that something has gone wrong . . . Parliament cannot have intended to give heads of state and former heads of state greater rights than they already enjoyed under international law.[24]

Dowsett J inferred from Lord Browne-Wilkinson's reasons that it was the rules recognized at common law which were to apply in such circumstances. His Honour concluded that the Amir enjoyed immunity from civil suit and execution in Australia, subject to the qualifications and exceptions which appear in the SIA, the DPIA and the Vienna Convention, none of which could be said to apply to the facts of the current proceedings.[25]

D. Post Thor Shipping*: The Need for Further Reform*

It is evident from the decision in *Thor Shipping* that the current application of the doctrine of State immunity, in relation to a head of State acting in his or her private capacity, is problematic in a number of aspects. First, there are the theoretical and practical problems, which were similarly evident in *Pinochet (No 3)*, which arise in comparing heads of State with heads of a diplomatic mission. Secondly, and related to the first, it is submitted that the approach taken in the UK and Australian legislation is inadequate, in that immunity is only 'restricted' in relation to commercial activity

[19] ibid. [20] ibid 67. [21] ibid. [22] ibid 68.

[23] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International intervening) (No 3)* [2000] 1 AC 147 (hereinafter, *Pinochet (No 3)*) 202–203 (Lord Brown Wilkinson), 209 (Lord Goff).

[24] ibid 203 (Lord Browne-Wilkinson). [25] *Thor Shipping* (n 2) 69.

engaged in by the head of State within the forum State. Finally, it is argued that the current application of the law results in the incongruous situation whereby greater immunity is afforded to a head of State than that which is afforded to States themselves.

In its original form, section 20 of the SIA had the purpose of equating 'the position of a Head of State and his family while he *visits* this country as a guest or an invitee of the government with the position of an ambassador'.[26] The original clause was found, however, to be too narrow in that it failed to properly provide immunity from UK immigration laws for heads of State intending to travel to the country, and to give statutory immunity to heads of State not physically present in the UK. The legislation was therefore worded so as to provide, subject to 'any necessary modifications', a head of State with the same protections as a head of a diplomatic mission.[27]

As discussed by Fox, the approach taken in the UK of according the same treatment to heads of State as that afforded to the head of a diplomatic mission has its disadvantages, as *Pinochet (No 3)* demonstrated, as the status of a head of State and the protection required differs from that of a diplomat, who may be required to reside for long periods in the forum State.[28] The approach taken in the UK (and Australian) legislation has led to the application of a rule, which was originally designed to deal solely with physical presence in the forum state of a representative of another State, to a head of State who would rarely be present in that State.[29] As can be seen above, this incongruity was again clearly evident in the decision of Dowsett J in *Thor Shipping*.

Nor can the approach taken in the UK and Australian legislation be said to accurately represent the position in customary international law.[30]According to Denza, the 'justifications for diplomatic immunity and for state immunity are different, as are now to an increasing extent the detailed rules and the exceptions in the two areas'.[31] Fox, for one, is therefore of the view that the better approach is to treat the head of State as unique, and to place the office holder in a separate legal regime relating to their privileges and immunities.[32]

While section 36 of the FSIA provides that 'any such modifications as are necessary'[33] may be made to the application of the DPIA, the textual basis does not exist to overcome any of the problems evident in *Thor Shipping*. One such problem arises from the fact although the application related to the 'commercial activity' of the Amir 'outside of his official functions', such activity did not occur 'in the receiving State'.

One way to overcome this problem would be to reverse the approach of restricting immunity in relation to commercial activity conducted within the forum State, to instead not afford immunity in relation to *any* commercial transactions conducted by the head of State outside of his or her official functions. Indeed, the initial draft of the International Law Commission's Draft Articles on the Jurisdictional Immunities of States and Their Property included a provision which sought to restrict immunity for heads of State in this way. Relevantly, Article 25(1)(c) provided that a head of State

[26] Fox (n 1) 141, citing HL, Hansard vol. 388, col. 58 17 January 1978 (emphasis added).
[27] Fox (n 1) 141. [28] ibid 438. [29] Fox (n 8) 694.
[30] ibid 693. [31] Denza (n 12) 284. [32] Fox (n 1) 438.
[33] Similarly, s 20 of the SIA provides that subject to 'any necessary modifications' the Diplomatic Privileges Act 1964 (UK) applies to a head of State.

need not be accorded civil immunity 'in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions'.[34] However, due to the debate and criticism which followed,[35] draft Article 25 was deleted, and instead replaced with a saving clause which reads:

> The present articles are likewise without prejudice to the privileges and immunities accorded under international law to Heads of State *ratione personae*', and according to the Commentary, intended to leave the existing customary law 'untouched.[36]

As the ALRC Report indicated, however, the difficulty in this area is that there is a general absence of authority to indicate how the private position of a head of State may have been affected by the shift to restrictive immunity.[37]

Whilst the approach taken in Article 25(1)(c) may have been gone too far in seeking to restrict immunity for heads of State acting outside of their official functions for States themselves to accept, such an approach is juridically sound. Certainly, as long as a matter is properly within the territorial jurisdictional of the forum court, there appears to be little theoretical or functional basis in affording immunity to a head of State engaging in commercial activities outside of his or her official functions.[38] As stated by Lord Denning, it is the 'nature of the dispute' which should be the primary consideration in relation to the doctrine of state immunity:

> If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of the executive, the court should grant immunity if asked to do so, because it does offend the dignity if a foreign sovereign . . . but if the dispute concerns, for instance, the commercial transactions of a foreign government . . . and it arises properly within the territorial jurisdictional of our courts there is no ground for granting immunity.[39]

This is particularly so in relation to applications brought *in rem* in jurisdictions such as Australia, the UK and the United States, which have specific provisions restricting State immunity for such applications. For instance, section 18 of the FSIA provides that a foreign State 'is not immune in a proceeding commenced as an action *in rem* against a ship concerning a claim in connection with the ship if, at the time when the cause of action arose, the ship was in use for commercial purposes'.[40] As the ALRC Report noted:

> A typical action in rem combines aspects of jurisdiction, and of execution in the one step . . . Because of this characteristic it is recommended that actions in rem be dealt with in a separate provision. This will enable more precise guidance to be given to courts. In

[34] ILC, 'Jurisdictional Immunities of States and their Property' (1986) YBILC I (1) 5, para 10.

[35] Fox (n 1) 222–223.

[36] ILC, 'Draft Articles on Jurisdictional Immunities of States and Their Property' (1991) YBILC II (2) 21–22. This approach was adopted in Article 3(2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004) (2004) 44 ILM 803.

[37] ALRC Report (n 9) 163.

[38] Cf *In Skidmore Energy, Inc et al v KPMG et al* No. 3:03–CV–2138 (N.D. Tex. Dec. 3, 2004), cited in Denza (n 13) 306–308. The proceedings involved an attempt to bring proceedings in Texas against the Ambassador of Saudi Arabia to the Unites States in respect of investments made by the Ambassador in a company incorporated in Liechtenstein and which carried out business in Morocco. The Court dismissed the case on the basis that it lacked jurisdiction.

[39] *Rahimtoola v Nizam of Hyperbad* [1957] 3 All ER 441.

[40] Section 10 of the SIA and s 1605(b) of the Foreign Sovereign Immunities Act 1976 (USA) contain similarly worded provisions.

> addition actions in rem have traditionally been treated as a *distinct* category within the general topic of state immunity.[41]

As has been made apparent in *Thor Shipping*, whilst the legislation recognizes the special situation of applications brought *in rem*, it neglects such applications brought against ships owned or used by a head of State acting in his or her personal capacity. Indeed, given that the doctrine of immunity for heads of State developed under customary international law on the justification that such immunity was required for the 'independence of the State and the protection of the ability of its prime representative to carry out his international functions',[42] it seems incongruous and contrary to the development of international law (which has tended towards a more restrictive doctrine of immunity for heads of State) for a head of State acting in his or her personal capacity to be afforded *greater* immunity than the State itself. The restrictive doctrine of State immunity has developed in part due to the perceived unfairness of denying a judicial remedy to private litigants in situations where States (or heads of State) are engaging in commercial activities outside of what would ordinarily be termed official governmental functions.[43] *Thor Shipping* demonstrates, however, that there remain factual situations in which the law of State immunity remains outdated and inadequate, and consequently, that unfairness persists.

E. Concluding Comments

It remains a fundamental principle of international law that 'one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state';[44] the foreign State is entitled to procedural immunity from the processes of the forum State, and such immunity extends to the head of that State. Nonetheless, the doctrine of State immunity is not static, and has undergone enormous changes in the last hundred years.[45] No longer is State immunity seen as an absolute doctrine, particularly in the areas of what can broadly described as commercial activity. Restricting immunity in this regard has been one of the major aims of national legislation dealing with the question of state immunity.[46] As succinctly put by Lord Wilberforce:

> [T]o require a State to answer a claim based on such transactions does not involve a challenge or inquiry into any act of sovereignty or governmental act of that State. It is, in accepted phrases, neither a threat to the dignity of that State nor any interference with its sovereign functions.[47]

The problems in comparing heads of State with heads of a diplomatic mission were apparent in *Pinchot (No 3)*, and have resurfaced in *Thor Shipping*. As discussed above, the better approach is to treat the head of State as unique, and to place the office holder in a separate legal regime relating to their privileges and immunities. Furthermore, while there may be a general absence of authority to indicate how the private position

[41] ALRC Report (n 8) 139 (emphasis added).
[42] Fox (n 1) 427.
[43] ALRC Report (n 8) 11.
[44] *Pinochet (No. 3)* (n 23) 201 (Lord Browne-Wilkinson).
[45] Fox (n 1) 2.
[46] M Sornarajah, 'Problems in Applying the Restrictive Theory of Sovereign Immunity' (1982) 31 ICLQ 661, 661.
[47] *I Congresso del Partido* [1983] 1 AC 244, 262.

of a head of State may have been affected by the shift to restrictive immunity, it is the opinion of this writer that there is no longer any sound juridical basis for providing immunity to a head of State engaging in commercial transactions in his or her private capacity, and which do not affect their sovereign functions—the approach which was originally taken in Article 25(1)(C) of the ILC Draft Articles on the Jurisdictional Immunities of States and Their Property.

More specifically, in relation to applications brought *in rem*, national legislation should be amended so that the provisions relating to proceedings brought against ships owned by a State also apply to ships owned by heads of State acting in their personal capacity. The result in *Thor Shipping* appears counter-intuitive given that the juridical basis in affording immunity to heads of State is that the head of State is entitled to the *same* immunity as the State itself.[48] The law of State immunity serves a functional need: to preserve the dignity of States, and the avoidance of conflict in international relations. As recognised by legislation such as the *FSIA*, a proceeding brought *in rem* against a State-owned ship used for commercial purposes does not undermine the sovereignty of that State, and is therefore exempt from the immunity afforded to States. So too should proceedings brought *in rem* against ships owned by a head of State acting in his or her private capacity. To paraphrase Lord Browne-Wilkinson in *Pinochet (No 3)*, it is hard to resist the suspicion that, in the current application of the law, 'something has gone wrong'.[49]

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[48] *Pinochet (No 3)* (n 23) 201 (Lord Browne-Wilkinson) (emphasis added).
[49] ibid 203 (Lord Browne-Wilkinson).

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