

RECHTSPRECHUNG

Judgment of the Supreme Court, Second Petit Bench April 12, 2002, on Sovereign Immunity

Hiroshi Oda

For the first time since 1928, the Supreme Court has ruled on sovereign immunity. In 1928, the Supreme Tribunal, the pre-war predecessor to the Supreme Court, ruled on sovereign immunity in a case where the Republic of China was sued in Japan for payment of a promissory note issued by a deputy minister at the embassy in Japan. Although this was a case of *ius gestionis*, the tribunal acknowledged sovereign immunity of the defendant based upon the absolute doctrine of sovereign immunity, which does not distinguish between *ius imperii* and *ius gestionis*.

After the Second World War, some cases involving sovereign immunity emerged, but they never reached the Supreme Court. Lower court judgments more or less continued to follow the absolute doctrine, but some recent judgments have adopted the functional (restrictive) doctrine, which does not acknowledge immunity on *ius gestionis*.

In the case that was decided by the Supreme Court on April 12, 2002, the plaintiffs sought an injunction against night flights of military planes from the U.S. military base near Tokyo and claimed compensation for the infringement of their right to personality. The lower court dismissed the claim on the grounds of a treaty between Japan and the United States. The Supreme Court agreed to the conclusion of the lower court, but on different grounds.

The Supreme Court acknowledged that while the absolute doctrine of sovereign immunity was traditionally the international customary law, with the expansion of the scope of activities of the state, a view that it is inappropriate to grant immunity to acts of the state which are of private law nature or of business management of nature had emerged, and the practice of limiting immunity has accumulated in foreign countries. Nevertheless, the court proceeded to point out that the continuing existence of international customary law, which acknowledges immunity in cases where a sovereign act is involved, should not be denied. In the present case, night flights by military planes are public acts of the U.S. military force stationed in Japan, and by its purpose and the nature of the act, this is undoubtedly a sovereign act and enjoys immunity from the civil jurisdiction of Japanese courts.

This judgment is important in that for the first time, the Supreme Court has acknowledged the functional (restrictive) doctrine of sovereign immunity and also has referred to the purpose and the nature of the given act as the criteria for distinguishing *ius imperii* from *ius gestionis*, although in *obiter dictum*.