AN INTERNATIONAL CONVENTION ON SOVEREIGN IMMUNITY? SOME PROBLEMS IN APPLICATION OF THE RESTRICTIVE RULE

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The United States *Foreign Sovereign Immunity Act* 1976,[1] the United Kingdom *State Immunity Act* 1978,[2] the *European Convention on State Immunity*[3] and a flood of judicial decisions from the United States, England, West Germany and elsewhere[4] justify the conclusion that state practice predominantly supports a restrictive doctrine of sovereign immunity. The confused, and often unwarranted, diversity of experience in the practical application of this modern rule suggests the need for an international convention on sovereign immunity.

This article considers the status and content of the international law of sovereign immunity with the purpose of isolating the problems which are likely to occur both when applying the rule in domestic law and considering the possibility of codifying and developing this law in an international convention. In searching for the international rule on sovereign immunity the task is hampered by the fact that evidence of state practice is derived almost exclusively from Western European, North American and Commonwealth jurisdictions.

There is little evidence of the practice of socialist and developing states on this issue. Perhaps of greater significance than the lack of evidence is a perceived ideological split between the developed and the developing and socialist states on the law of sovereign immunity.[5] While this division may

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1 Public Law 94-583, 28 U.S.C. Ss. 1,90 Stat. 2891, Ss. 1602-1611; (1976) I.L.M. 1388.

2 Commenced 22 November 1978.

3 For text see (1972) 11 I.L.M. 470; G.B.T.S. No. 74 (1979) and discussion I. M. Sinclair, "The European Convention on State Immunity", (1973) 22 I.C.L.O. 254, F. A. Mann, "New Developments in the Law of Sovereign Immunity" (1973) 36 M.L.R. 18.

4 See cases cited infra, fn. 29 and Barker J. in *Marine Steel Ltd* v. *Government of the Marshall Islands*, High Court New Zealand, 29 July 1981.

5 This split is indicated by the request of the International Law Commission that the Special Rapporteur on the Working Group on jurisdictional immunities should emphasise the practice and legislation of all states, "particularly the socialist countries and the developing countries", see Second Report A/C.N. 4/331 (1980) at 7. See also Chauhan J. in AM *Qureshi* v. *USSR* PLD 1981 SC 377, 391-5, 406-7 where the Pakistan Supreme Court unequivocally applied the restrictive theory.

be more apparent than real,[6] it suggests caution to any international lawyer attempting to generalize state practice.

Also, these are relatively early days in which to attempt a definitive assessment of the international rule on sovereign immunity. The English House of Lords[7] has only recently affirmed the common law adoption of a restrictive rule of immunity, and the *State Immunity Act* 1978 (U.K.) has not yet been subject to judicial interpretation.[8] While the *Foreign Sovereign Immunity Act* 1976 (U.S.A.) has stimulated a considerable body of litigation, most decisions have been by lower courts and inconsistencies in application are already apparent.[9]

The reasons for codifying the laws on sovereign immunity at either the domestic or international level were outlined by the Secretary General of the United Nations in 1948. In a memo concerning the work of the International Law Commission he said:

> "There would appear to be little doubt that the question—in all its aspects—of jurisdictional immunities of foreign states is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the state in many countries of the responsibility for the management of principal industries and of transport have added to the urgency of a comprehensive regulation of the subject."[10]

The divergence in state practice, the sometimes fundamental differences in approach between the United Kingdom and United States legislation, the consideration being given to domestic legislation by Australia and Canada and the preference for legislative certainty expressed by various international financial organizations,[11] indicate that the need for codification and development of the law of sovereign immunity is a continuing and possibly urgent one.

In 1977 the International Law Commission recommended that the question of jurisdictional immunity be included for consideration by the Commission.[12] This was followed by a General Assembly resolution inviting

[6] The socialist states, while adopting the absolute doctrine in theory, in fact will not accord immunity to a state which will deny immunity on a reciprocal basis. See M. M. Boguslavsky, "Foreign State Immunity: Soviet Doctrine and Practice", (1979) 10 *Netherlands* Y.B.I.L. 167, 170-1; J. Crawford, "Execution of Judgments and Foreign Sovereign Immunity", (1981) 75 A.J.I.L. 820.

[7] *I Congreso del Partido* [1981] 3 W.L.R. 328, reversing [1980] 1 Lloyd's Rep. 23, C.A., affirming [1978] Q.B. 500, Goff J.

[8] See R. Higgins, "Execution of State Property: U.K. Practice", 10 *Netherlands* Y.B.I.L., 35, 42-52.

[9] See particularly the discussion of the "direct effects" jurisdiction this text fn. 87.

[10] A./C.N. 4/1 Rev. 1, 30-1.

[11] See J. R. Stevenson and J. F. Browne, "U.S. Law of Sovereign Immunity Relating to International Financial Transactions", in R. S. Rendell (ed.), *International Financial Law: Lending, Capital Transfers and Institutions* (London, 1980).

[12] G.A.O.R., Thirty-fifth Session, Supp. 10 (A/32/10) 316 para. 99, citing *Yearbook of the International Law Commission* 1977, vol. II (Part II), 130, doc. A/32/10, para. 110.

the Commission to begin research.[13] A working group has now been set up with Mr Sompong Sucharitkul as the Special Rapporteur. The group has reported on three occasions in 1978,[14] 1979[15] and 1980.[16] However, only preliminary matters have so far been considered—possibly a result of the difficulties which have been mentioned.

While the law of sovereign immunity is clearly in a formative stage, some substantive and procedural problems have emerged which warrant examination when considering municipal legislation or an international convention. This article will discuss the following substantive problems which have arisen from recent state practice where they are sufficiently interesting and pertinent to drafting legislation or a treaty. The discussion will not cover all the problems which have emerged particularly in relation to certain procedural aspects of implementation.[17] As the significant question of the execution and enforcement of judgments against foreign sovereigns is considered elsewhere,[17a] it will not be included here. Consideration will be given to:

(i) The doctrine of sovereign immunity at international law.
(ii) Is there a workable distinction between governmental and commercial acts?
(iii) State entities and sovereign immunity.
(iv) The jurisdictional nexus between the subject matter of the dispute and the court of the forum.
(v) Waivers of sovereign immunity.
(vi) Non-commercial torts.
(vii) The impact of other substantive defences upon the restrictive immunity rule.

1. THE DOCTRINE OF SOVEREIGN IMMUNITY AT INTERNATIONAL LAW

Jurisdiction, as an aspect of sovereignty, implies judicial, legislative and administrative competence, not only to make decisions or rules but also to

[13] Res. 32/152 para. 7.
[14] A./C.N. 4/323 (1979), general survey.
[15] A./C.N. 4/331 (1980), introductory and definitional articles.
[16] A./C.N. 4/340 (1981), jurisdictional problems, status of entities of the foreign State.
[17] Problems remain including the special arrangements for service of process, discovery of documents, retrospectivity, the personal status of foreign heads of State, punitive and other remedies, delegation of sovereign functions to private entities, extension of restrictive immunity to administrative tribunals, and cross-claims and third party complaints. For a discussion of these issues see C. N. Brower, F. W. Bistline, Jr. and G. W. Loomis, Jr.; "The Foreign Sovereign Immunities Act 1976 in Practice", (1979) 73 A.J.I.L. 200.
[17a] Crawford, loc. cit. (above n. 6).

enforce them.[18] The international law doctrine of sovereign immunity operates to limit the power of a state to enforce its laws against a foreign sovereign. It does not affect the jurisdictional power of that state to prescribe the rule in the first instance. The question of sovereign immunity has not arisen, however, before any international tribunal. The defence will typically be pleaded by a sovereign before a municipal court. As a consequence, sovereign immunity will depend in practice upon whether the municipal court will impose a restriction upon its own power of enforcement. This has been described as a "self-executing responsibility".[19]

The central role of the municipal courts requires a generalization from their decisions in order to arrive at a rule of customary international law. Until after 1945 it was possible to state the customary rule in absolute terms. That is, international law required that municipal courts should accord immunity to a foreign state from local jurisdiction.[20] There are several rationalizations of this principle. They range from the view that "the perfect equality and absolute independence of sovereigns"[21] prohibit the exercise of jurisdiction by one sovereign over another, to the pragmatic acceptance by Lord Denning that jurisdiction and execution against a foreign state and its property would entail severe diplomatic embarrassment and injure inter-state relations.[22] It has been this diversity of opinion as to the underlying rationale of the immunity rule which appears to have retarded the articulation of any modern rule of immunity which may subsequently have emerged.[23]

With the increased direct involvement of foreign states and their agencies in the international commercial and trade transactions of their countries since the Second World War, state courts and legislators have developed a more restrictive theory of sovereign immunity.[24] This rests broadly upon the practice of recognizing the immunity of foreign states only with respect to their sovereign or public acts and not with respect to their private or commercial acts. Whatever the viability of this distinction, and while this issue threatens the cogency of the restrictive rule itself,[25] there remains a general acceptance among states that international law requires the

[18] I. Brownlie, *Principles of Public International Law* 3rd Ed. (1979) at 298. F. A. Mann, 111 *Hague Recueil* (1964, I) 9-162; "The Doctrine of Jurisdiction in International Law" in *Studies in International Law* (1973) at 127 ff; R. Y. Jennings, "Extraterritorial Jurisdiction and the United States Anti-Trust Laws", 33 B.Y.I.L. 146 (1957); M. Akhurst, "Jurisdiction and International Law", (1972-3) 46 B.Y.I.L. 145.

[19] J. Crawford loc. cit. (above fn. 6).

[20] For a comprehensive survey of state practice see S. Sucharitkul, *State Immunities and Trading Activities in International Law* (London, Stevens, 1959).

[21] Per Marshall C.J. in *The Schooner Exchange* v. *McFadden* U.S. Supp. Ct. (1812) 7 Cranch 116. For a discussion of the rationale see D. P. O'Connell, 2 *International Law*, (1970) 841-4.

[22] *Thai-Europe Tapioca Service Ltd* v. *Government of Pakistan Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485, 1490.

[23] This is illustrated in the decision by Goff J. in *I Congreso*, [1978] Q.B. 500.

[24] See, for example, Stevenson and Brown, loc. cit. (above fn. 11).

[25] See discussion of this issue below at pp. 84-91.

continuing immunity of foreign states from the jurisdiction in relation to certain of their activities. The difficult question is, in relation to which act may a state deny immunity without conflicting with the minimum standard required by international law? To put the question more positively, which sovereign acts must be accorded the benefit of the immunity defence?

The answer depends, as always in international law, upon an examination of state practice. Evidence of this practice, as has been noted,[26] rests primarily with the Western developed states which will generally reflect their idiosyncratic municipal application of the restrictive rule. While there is a considerable divergence as to the scope and detail of the restrictive rule the conclusion that state practice supports a limited doctrine of immunity can be supported. As there is a wealth of published writings[27] detailing this more recent practice only a brief survey seems warranted here.

European State Practice. The European States have led the move towards restrictive sovereign immunity over the last thirty years. While there are municipal variations in the scope of the doctrine no West European state currently applies an absolute rule.[28] The Swiss, West German, French, Dutch, Belgian, Austrian, Italian and Luxumbourg courts have, since 1945, developed a substantial jurisprudence of restrictive immunity.[29] This is not

[26] See above at p. 74.

[27] See, for example, O'Connell, loc. cit. (above fn. 21 at 841-86) and articles listed at 841-2; articles published in [1979] 10 *Netherlands Y.B.I.L.*; D. H. N. Johnson, "The Puzzle of Sovereign Immunity" (1974-5) 6 *Aust. Y.B.I.L.* 1; J. Crawford, Notes in (1976-7) 48 B.Y.I.L. 353; (1978) 49 B.Y.I.L. 262; (1979) 50 B.Y.I.L. 218; F. A. Weber, "The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect", (1976) 3 Yale St. in W.P.O. 1-121; I. M. Sinclair, "The European Convention on State Immunity", loc. cit.; R. B. von Mehren, "The Foreign Sovereign Immunities Act of 1976", (1978) 17 *Col. J. Trans. L.* 33; G. R. Delaume, "The State Immunity Act of the United Kingdom" (1979) 73 A.J.I.L. 185; H. H. Bracrach, "Sovereign Immunity in Belgium", (1976) 10 *Int. Lawyer* 459; C. N. Brower, F. W. Bistline and G. W. Loomis, "The Foreign Sovereign Immunities Act of 1976 in Practice", (1979) 73 A.J.I.L. 200; Note, "Execution of Judgments Against the Property of a Foreign State", (1971) 44 *Harv. L.J.* 963; C. Harlow, "Public and Private Law: Definition without Distinction", (1980) 43 M.L.R. 241; M. L. Lagod, (1980) 13 *Vanderbilt J. Transnational L.* 835; D. Schloss, Note: "Commercial Activity in the Foreign Sovereign Immunities Act of 1976", (1979-80) *J. Int'l L. & E.* 163; F. C. Rich, Recent Decisions, "Act of State and Foreign Sovereign Immunity", (1979) 19 *Virginia J. Int'l.* L. 679; T. J. Pell, Notes, "The Foreign Sovereign Immunities Act 1976: Direct Effects and Minimum Contacts", (1981) 14 *Cornell I.L.J.* 97-115; G. Triggs, "Restrictive Sovereign Immunity: The State as International Trader", (1979) 53 A.L.J. 244.

[28] For admission of the case law see *Claim against the Empire of Iran*, 45 I.L.R. 57. (1963) Fed. Constitutional Court of F.R.G.

[29] *France*, J. A. Paulson, "Sovereign Immunity from Execution in France", (1979) 11 *Int. L.* 673; *Braden Copper Co.* v. *Groupement d'Importation des Metaux* (1973) 100 Clunet 227. C. J. Hamson, "Immunity of Foreign States: Practice of French Courts", (1950) 27 B.Y.I.L. 293.
Italy, L. Condorelli and L. Sbolci, "Measures of Execution Against the Property of Foreign States: The Law and Practice in Italy", (1979) 10 Netherlands Y.B.I.L. 197; *Francischiello* v. *U.S.A.* (1959) 28 I.L.R. 158; R. Gori-Montanelli and D. Botwinik, "Sovereign Immunity in Italy", (1976) 10 *Int. Lawyer* 451.
Belgium, Dhbellemes et Masural v. *Banque Centrale de la Republique de Turquie*, 94 Clunet 148 (1967); J. Verhoeven, "Immunity from Execution of Foreign States in Belgian Law", (1979) 10 *Netherlands Y.B.I.L.* 73; *Socobel* v. *Greek State*, (1951) 18 I.L.R. 3.
Federal Republic of Germany, I. Seidl-Hohenveldern, "State Immunity: Federal

surprising as the distinction between acts of a public and private character is fundamental to the Roman-based civil law systems common to these states.

The United Kingdom. The English courts, applying the common law, have moved haltingly towards the adoption of a restrictive rule. In 1981 the House of Lords in *I Congreso del Partido*[30] unanimously, though cautiously, adopted a restrictive distinction. Lord Wilberforce, for example, recognized the limits of the restrictive rule, saying "merely to state that the 'restrictive' doctrine applies is to say little more than that a state has no absolute immunity as regards commercial or trading transactions, but where immunity begins and ends has yet to be determined".[31] This decision has significance for the English courts only with regard to matters arising before the *State Immunity Act* 1978 (U.K.) was passed in 1978. It remains, however, an important persuasive authority for other Commonwealth states which do not yet have domestic legislation on the subject, and whose courts have only rarely needed to consider the question of sovereign immunity. The *State Immunity Act* 1978, while restating the general rule of absolute sovereign immunity, excludes certain acts of a commercial or private law nature.

The United States. An executive rejection of absolute immunity by the United States Department of State came in 1952 with the "Tate Letter".[32] This statement advised that it would be the policy of the Department to adopt a restrictive view of immunity in the future and to recommend that courts deny immunity to sovereigns engaged in commercial activities. The role of the State Department in this area and its tendency to resile from the restrictive view for policy reasons,[33] has now been replaced by the *Foreign*

Republic of Germany" 10 *Netherlands Y.B.I.L.* 55; decision of the District Court, Frankfurt, 2 December 1975: *Non Resident Petitioner* v. *Central Bank of Nigeria,* (1977) 16 I.L.M. 501, 503.
Austria, I. Seidl-Hohenveldern, "State Immunity Austria", (1979) 10 *Netherlands Y.B.I.L.* 97; *Dralle* v. *Republic of Czechoslovakia,* (1950) 17 I.L.R. 155.
German Democratic Republic, F. Enderlein, "The Immunity of State Property from Foreign Jurisdiction: Doctrine and Practice of the German Democratic Republic", (1979) 10 *Netherlands Y.B.I.L.* 110. Fed. Const. Ct., April 30, (1963) 45 I.L.R. 57 at 61-82, noted in (1964) 27 M.L.R. 81.
Switzerland, J. F. Lalive, "Swiss Law and Practice in Relation to Measures of Execution Against the Property of a Foreign State" (1979) 10 *Netherlands Y.B.I.L.* 152; *Kingdom of Greece* v. *Julius Bar & Co.* (1956) 23 I.L.R. 195.
Netherlands, C. C. A. Voskvil, "The International Law of State Immunity, As Reflected in the Dutch Civil Laws of Execution", (1979) 10 *Netherlands Y.B.I.L.* 245; *N.V. Exploitative—Maatschappij Bengkalis* v. *Bank of Indonesia,* (1966) 13 *Neth. Int. L.R.* 318.
For a general survey of recent state practice see Johnson loc. cit. (above fn. 27 at 1-51).

30 [1981] 3 W.L.R. 328.
31 Ibid., at 335-6.
32 Dept. of State Bull, Vol. 26 (1952) 984. It was actually a letter from the Acting Legal Adviser in the Dept., Mr Jack B. Tate, to the Acting Fed. Att.-Gen., Mr P. B. Perlman.
33 See, for example, *Chemical Natural Resources Inc.* v. *Republic of Venezuela* (1966) 420 Pa. 134; 215 A. 2d. 864; *Rich* v. *Naviera Vacuba* (1961) 197 F. Supp. 710, affirmed (1961) 295 F. 2d. 24.

Sovereign Immunity Act 1976. As with the British legislation the absolute rule is affirmed subject to a general commercial exception.

The Socialist States. The Soviet Union's theoretical position is that a state, as a "special legal subject",[34] possesses an absolute judicial immunity. This position is maintained on the ground that a state retains its sovereignty regardless of the character of its activities and that the restrictive view "creates uncertainty in practice and is not to be applied with regard to socialist states".[35] Article 61 of the *Fundamental Principles of Civil Procedure* defines the rule as follows:

> "Bringing a suit against a foreign state, provisional attachment and the levy of execution against the property of a foreign state located in the USSR, is permitted only with the consent of the competent agencies of the state in question."[36]

In practice, however, the absolute rule is dependent upon reciprocity The Council of Ministers of the USSR or other authorized organ may apply a restrictive rule by decree where a foreign state would not guarantee absolute immunity in the same circumstances to the Soviet Union.[37] The notion of reciprocity has been equally important to the practice of the Polish[38] and Yugoslavian[39] courts when applying the immunity defence.

An examination of Soviet bilateral treaties with other states also demonstrates that the Soviet Union is not committed to an absolute theory in practice.[40] In most of its international agreements Soviet Trade Delegations or separate state entities will be subject to foreign courts in relation to their commercial or private law acts. For example, the Protocol relating to the status of the USSR Trade Representatives in Belgium, July 1971, permits Belgium to enforce "final judgments which have been entered relating to commercial transactions concluded or guaranteed by the Trade representation . . . on all property of the Soviet State".[41] Again in a treaty on trade between Czechoslovakia and Switzerland, 24 November 1953, "sequestration . . . may only be ordered in relation to claims in private law having a close connection to the country in which the property is located".[42]

As these treaties purport to apply the general principles of international law, rather than to operate as waivers, they constitute significant evidence that socialist practice supports a restrictive rule of immunity.[43] The Chinese,

[34] See, M. M. Boguslavsky, op. cit. 167 (above fn. 6).
[35] Ibid., 168.
[36] Ibid., 171.
[37] Crawford, loc. cit. (above fn. 6).
[38] *S.* v. *British Treasury,* (1957) 24 I.L.R. 223.
[39] See T. Varady, "Immunity of State Property from Execution in the Yugoslav Legal System", (1979) 10 *Netherlands Y.B.I.L.* 85, 94.
[40] See, Crawford, loc. cit., (above fn. 6); M. J. Whiteman (1968) 6 *Digest of International Law* (Washington D.C., 1968) 582 ff.
[41] Cited by Verhoeven, op. cit. 75, (above fn. 29).
[42] Cited by Lalive, op. cit. 164, (above fn. 29).
[43] See e.g., Protocol to a treaty between the Soviet Union and Ghana, 2 July 1961, Art. 4, which refers to execution against state property "unless it is property which according to International Law is immune".

like the Soviets, adhere to the absolute theory of sovereign immunity but avoid the issue by insisting upon negotiations or arbitration for settling any trade disputes which arise.[44]

Developing State Practice. Evidence of Third World practice or opinion on sovereign immunity is limited. The most frequently cited statement is that included in the Report of the Asian African Legal Consultative Committee which was comprised of representatives from Burma, Ceylon, India, Indonesia, Irak, Japan, Pakistan, the Sudan, Syria and the United Arab Republic. In the *Final Report of the Committee on Immunity of States* in January-February 1960 it was recommended, with Indonesia as the sole dissentient, that

> "(i) The State Trading Organizations which have a separate juristic entity under the Municipal Laws of the country where they are incorporated should not be entitled to the immunity of the state in respect of any of their activities in a foreign state. Such organizations and their representatives could be sued in the Municipal Courts of a foreign state in respect of their transactions or activities in their State.
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> (ii) A State which enters into transactions of a commercial or private character, ought not to raise the plea of sovereignty immunity if sued in the courts of a foreign state in respect of such transactions. If the plea of immunity is raised it should not be admissible to deprive the jurisdiction of the Domestic Courts."[45]

These recommendations are of only limited value as evidence of a developing state approach to sovereign immunity, if indeed there is any such single view. This is partly because they were made twenty years ago and partly because conflicts between the New International Economic Order[46] and the extraterritorial exercise of state jurisdiction, particularly in the anti-trust area,[47] have only recently arisen.

Other States. The Japanese courts have been consistent in applying the absolute principle of immunity.[48] This may be contrasted with the practice of the Japanese government which has denied immunity to Soviet Trade

[44] See e.g., K. Wang, "Foreign Trade Policy and Apparatus of the People's Republic of China", 38 *Law & Cont. Prob.* 182, 196-9 (1973-1974); K. R. Shaney, Selected Legal Aspects of China's Conduct of Foreign Trade, 11 *Int. Lawyer* 641, 646 (1977); J. A. Cohen and Hungdah Chiu, 1 *People's China and International Law* (Princeton U.P., 1974) 891-3 (1974).

[45] M. J. Whiteman, op. cit. 572-3.

[46] See, e.g., Charter of Economic Rights and Duties of States 1974, G.A. Res. 3281, 14 I.L.M. 251 (1975); R. F. Meagher, *An International Redistribution of Wealth and Power: A Study of Charter of Economic Rights and Duties of States* (199); Chauhan, loc. cit. (above fn. 5).

[47] See, e.g., G. Triggs, "Extraterritorial Reach of United States Anti-Trust Legislation", [1979] 12 M.U.L.R. 250.

[48] See, K. Hirobe, "Immunity of State Property: Japanese Practice", (1979) 10 *Netherlands Y.B.I.L.* 232; *Jiichiro Matsumoto et al.* v. *8th Fighter-Bomber Fleet, U.S. Air Force Far East & Govt of Japan*, (1956) Case No. 27, Fatuoka High Ct.

delegations engaged in commercial transactions in Japan,[49] and with a treaty of *Friendship, Commerce and Navigation* with the United States where immunity was denied to the "commercial, industrial, shipping or other business activities" of state entities.[50] The Canadian government is at present considering enacting legislation to clarify the more limited operation of the doctrine of immunity. In the meantime the Supreme Court has supported the restrictive rule on three occasions while, on the facts, denying immunity.[51] The South African Supreme Court[52] has, consistently with its earlier dicta, recently approved and applied the restrictive approach taken by Lords Denning and Shaw in *Trendtex Trading Corporation* v. *Central Bank of Nigeria*.[52a]

International Conventions. The first multilateral attempt to deal specifically with the issue of sovereign immunity was made in the 1926 *Brussels Convention on the Immunity of State-owned Ships*.[53] This sought to limit immunity to ships and cargoes employed exclusively for public and non-commercial purposes. It was followed thirty years later by the *European Convention on State Immunities* which purported to unify the practices of the European States under the auspices of the Council of Europe. The Convention came into force in June 1976 with the ratification of Austria, Belgium and Cyprus. It has subsequently been ratified by the United Kingdom. The Convention adopts the lowest common denominator of European State practice and is consequently less liberal in its approach than that of many of the European States. Neither of these conventions purported to codify general international law and the relatively meagre number of state ratifications they have attracted[54] suggests that, at the most, they might constitute "evidence of the gradual seepage into international law of a doctrine of restrictive immunity".[55]

International Tribunals. International tribunals have only rarely con-

[49] See, e.g., "Juridical Status of the Trade Representatives of the Union of the Soviet Socialist Republic in Japan", 6 December 1957, cited by Hirobe, loc. cit. (above fn. 48 at 241).

[50] 2 April 1953, in force 30 October 1953, cited by Hirobe, loc. cit. (above fn. 48 at 241).

[51] *Zokiak Intern. Products Inc.* v. *Polish People's Republic* (1978) 81 D.L.R. (3d) 656; *Government of the Democratic Republic of the Congo* v. *Venna* (1972) 22 D.L.R. (3d) 699; *Harold W.H. Smith* v. *Canadian Javelin Ltd* (1976) 12 O.R. (2d) 244.

[52] *International Science Research and Development Services (Pty) Ltd* v. *Republican Popular de Mocambique* [1980] (2) S.Af.L.R. 111, 124-5; *(T.P.D.) Kaffraria Property Co. (Pty) Ltd* v. *Government of the Republic of Zambia* [1980] 2 S.Af.L.R. 709 (E.C.).

[52a] [1977] Q.B. 529.

[53] 10 April 1926, U.K.T.S. No. 15 (1980). See also, 1952 Brussels Conv. Relating to the Arrest of Sea-Going Ships, 159 B.F.S.P. 368, and the 1958 *Geneva Convention on the Territorial Sea*, Art. 21, U.K.T.S. 3 (1965).

[54] Approximately 23 states are party to the 1926 Brussels Convention and 4 States are now party to the European Convention.

[55] Per Lord Wilberforce, *I Congreso*, [1981] 3 W.L.R. 328, 334.

sidered the doctrine of sovereign immunity and where they have done so the decision has little modern relevance.[56]

Summary

An important deficiency in this survey lies in the absence of information about the position likely to be taken by developing countries. To the extent that socialist state practice might accord with the interests of these states,[57] it may be that they too will deny immunity to trading entities while professing adherence to the absolute doctrine.

It should be noted also, that many states, both developing and developed, continue to claim the benefit of the absolute rule in foreign courts. Certainly, the recent municipal case law demonstrates that the foreign States concerned, for example, the Philippines,[58] Argentina,[59] Pakistan,[60] Spain,[61] Nigeria,[62] Japan[63] and Iran,[64] have not hesitated to plead absolute immunity. This may not, however, be evidence of anything other than an opportunistic tendency to take advantage of any argument which may be available. Further, there may be many municipal decisions, such as those of Australian courts, which have adopted the traditional common or civil law view in the past but which have not had occasion to reconsider the issue in light of recent trends. These dated decisions ought not to constitute evidence of current international law.

With these difficulties in mind, the conclusion is justified that state practice, as evidenced by municipal legislation, bilateral and multilateral treaty making practice and by predominantly European and North American judicial decisions, supports the refusal of sovereign immunity to states in relation to their commercial or private law acts. Municipal courts[65] and commentators[66] remain hesitant to state the substantive content of this rule which is presently in a formative stage of its development. It is, however, clear that international law continues to require that states accord the defence of immunity to foreign states in relation to certain of their governmental acts. The distinction between acts which attract the defence

[56] See Sucharitkul, op. cit. 14 fn. 37 (above fn. 20).
[57] Developing States often rely, in the same way as socialist States, upon centralized economies and State trading agencies to market their resources and products.
[58] *Philippine Admiral (Owners)* v. *Wallem Shipping (Hong Kong) Ltd* [1977] A.C. 373.
[59] *Swiss Israel Trade Bank* v. *Govt. of Salta* [1972] 1 Lloyd's Rep. 497.
[60] *Thai-Europe Tapioca Service Ltd* v. *Govt. of Pakistan, Directorate of Agricultural Supplies* [1975] 1 W.L.R. 1485.
[61] *Victory Transport Inc.* v. *Commissaria General de Abastecimientos y Transportes* 336 F. 2d 354 (2d Cir. 1964).
[62] *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] Q.B. 529.
[63] See Hirobe, loc. cit. (above fn. 48).
[64] *Claim Against the Empire of Iran* (1963) 45 I.L.R. 57.
[65] See, e.g., Lord Wilberforce, *I. Congreso*, [1981] 3 W.L.R. 28, 335-6; Kaufman J., *Texas Trading & Milling Cor.* v. *Fed. Rep. of Nigeria* [1981] U.S. Ct Appeal 2d Cir. 16 April, 1981.
[66] E.g., Johnson, op. cit. (59) (above fn. 27); C. Lewis, "Sovereign Immunity and the Common Law" [1979] *Lloyd's Maritime and Commercial L.Q.* 460.

and those which do not is consequently fundamental to any understanding of the modern doctrine of immunity.

2. IS THERE A WORKABLE DISTINCTION BETWEEN GOVERNMENTAL AND COMMERCIAL ACTS?

The civil law states have based the restrictive rule of sovereign immunity upon a distinction between acts *jure imperii* which attract immunity and those acts *jure gestionis* which do not. This distinction has been interpreted by the common law states as being one between governmental and commercial acts: a distinction which, in the absence of the civil law classification of state acts as public or private, is unfamiliar to common law judges.

In practice municipal courts have encountered considerable difficulties when applying the distinction.[67] As Boguslavsky[68] puts it for the Soviet Union, a sovereign does not cease to be a sovereign when it performs acts which a private citizen may perform. Difficulties in application also arise to the extent that the distinction rests upon a value judgment as to which acts are or ought to be state activities.[69] Further, there may be some instances where reliance upon the term commercial fails to take into account those acts which are neither governmental nor commercial,[70] those which are a mixture of both[71] and those where the aspect of an apparently governmental act on the basis of which liability is founded has little to do with its governmental character.[72]

It has possibly been with these problems in mind that the *State Immunity Act* 1978 (U.K.) and the *European Convention on State Immunity* have not relied exclusively upon the broad distinction between governmental and commercial acts to define the scope of the restrictive rule. Rather, they have listed the more or less precise circumstances in which the defence of immunity will be unavailable. For example, under the *European Convention on State Immunity* a state may not claim immunity in relation to contracts of employment,[73] to its rights in immovable property,[74] or to its ownership of a patent or trade mark which is protected in the state of the forum.[75] Under the *State Immunity Act* 1978 (U.K.) the catalogue of cases of non-immunity is wider than that under the Convention and includes proceedings concerning VAT, customs and excise duties, and agricultural levies.[76] The European Convention and the U.K. legislation, nonetheless,

67 The clearest example is Goff J.'s judgment in *I. Congreso*, [1978] Q.B. 500.
68 Op. cit. 169-70 (above fn. 6).
69 See discussion by Brownlie, op. cit. 330-2 (above fn. 18).
70 See, e.g., *Yessenin-Volpin* v. *Novosti Press Agency* 443 F. Supp. 845 (1980, S.D.N.Y.) discussed in text at p. 86.
71 Ibid.
72 Where, for example, a State deports an alien but in doing so negligently injuries him in the course of transit.
73 Art. 5.
74 Art. 9.
75 Art. 8(2).
76 Section 11.

employ the term commercial to limit the immunity defence in relation to certain matters. Under the Convention immunity is unavailable in relation to any "industrial, commercial or financial activity",[77] "civil or commercial matter"[78] or "industrial or commercial activity in which the state is engaged in the same manner as a private person".[79] The *State Immunity Act* 1978 excludes the immunity defence in relation to "a commercial transaction entered into by the State".[80] The term is defined to mean

"(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority."[81]

It should be noted that the term "otherwise than in the exercise of sovereign authority" introduces the distinction between sovereign and non-sovereign acts without defining it further. The legislation is presumably intended to cover cases where the act is not caught by the term commercial, but where it is nonetheless a non-sovereign act.

By contrast, the *Foreign Sovereign Immunity Act* 1976 (U.S.A.) gives considerably greater scope for judicial interpretation and flexibility, or fosters an unpredictable commercial environment, depending upon one's point of view. The legislation makes no attempt to describe specific exceptions to the absolute immunity rule. Any exception depends instead upon s. 1605 which confers jurisdiction where

"the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

A "commercial activity" is defined by s. 1603(d) as meaning

"either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

Whether a municipal court is concerned to apply the restrictive rule of immunity under common or civil law, or by virtue of the European Conven-

[77] Art. 7.
[78] Art. 12.
[79] Art. 26.
[80] S. 3(1)(a).
[81] S. 3(3).

tion or domestic legislation, the term "commercial" assumes considerable significance. Some states have looked to the purpose of the act and others to its nature. The former test has proved to be of little value as governments may always claim their business transactions have a public purpose.[82] The latter test seems to be the most favoured by states[83] and has been adopted by the *Foreign Sovereign Immunity Act* 1976 (U.S.A.).[84] It is equally unhelpful because an inquiry into the nature of an activity necessarily requires some examination of its purpose.

The difficulties municipal courts have encountered in applying the classification of governmental and commercial acts are illustrated by a number of recent decisions. In *Yessenin-Volpin* v. *Novosti Press Agency*[85] the United States District Court held that the dissemination in the U.S. by Novosti of defamatory articles published in official Soviet journals was to be classified as an "official commentary of the Soviet Government".[86] While the court conceded that Novosti's activities were substantially commercial in nature, in this instance its acts were not performed in connection with a commercial activity but were performed in connection with the operation of "intra-governmental co-operation".[87] The court affirmed the general position that the commercial activity in question must be the specific activity of the foreign State upon which the action is based. As the acts in this case had both governmental and commercial aspects the test may not always be useful. The case nonetheless demonstrates the complexities of applying the governmental/commercial distinction in such a highly political context.

The viability of the distinction was strikingly challenged in *I Congreso del Partido*,[88] an action against the Republic of Cuba for breach of contract, conversion and detinue. Here, after the overthrow of the Allende Government in Chile, the Cuban Government severed all diplomatic and commercial dealings with the new regime. It ordered the diversion of two ships, the *Playa Larga* unloading sugar in Chile, and the *Marble Islands* on the high seas approaching Chile, and the breach of their contractual obligations to the Plaintiff as owner of the sugar. The Plaintiff brought the action in the English courts through the arrest of the *I Congreso* which was being built

[82] Also, as Brownlie argues op. cit. 331 (above fn. 18), this test restates the problem, see also Lord Denning in *Rahimtoola* v. *Nizam of Hyderabad* [1958] A.C. 379, 422; Sucharitkul, op. cit., 202 et seq., 267 et seq. (above fn. 20).

[83] See, the survey of state practice by G. Delaume, *Transnational Contracts*, Vol. II, s. 11:05, fn. 3; *Trendtex* per Lord Denning, [1977] Q.B. 529, 558; *I Congreso*, per Goff J. [1978] Q.B. 500, at 530; *Claim Against the Empire of Iran* (1963) 45 I.L.R. 57, 80.

[84] Ss. 1603(d). The Section by Section Analysis, (1977) 16 *I.L.M.* 162, which accompanied the proposed legislation comments that it was thought unwise to attempt a precise definition of this term. The Analysis, nonetheless, provides a limited guide to the courts as to which acts the legislature thought should be classified as commercial in nature.

[85] 443 F.Supp. 845 (1980, S.D.N.Y.).

[86] Ibid. 856.

[87] Ibid.

[88] [1981] 3 W.L.R. 328, reversing [1980] 1 Lloyd's Rep. 23, C.A., affirming [1978] Q.B. 500.

in England and was owned by Mambisa, a Cuban trading agency. Goff J., as the judge at first instance, reasoned that in deciding to breach a commercial contract the state may nonetheless act as a sovereign. As the breach was prompted in the interests of foreign policy he concluded that the Republic was entitled to immunity.[89] The House of Lords overturned this decision by examining in detail the factual and legal differences between the two ships in question. In relation to the *Playa Larga*, which was owned by the Cuban Government and operated on its behalf by Mambisa, the House of Lords was unanimous in holding that in directing the ship back to Cuba the State did not invoke governmental authority. Lord Wilberforce, (with whose judgment in relation to the *Playa Larga* the other members of the court were in agreement) made the important point that the essential question is "what is the relevant act?"[90] He considered that while a state may have entered into a commercial transaction, that fact does not confer irrevocably a commercial status upon all subsequent acts. Limiting his inquiry to "the act upon which the claim is founded"[91] he held that although there was no commercial reason for the government's intervention, and although the dispute would not have arisen had the owner not been a state, everything done by Cuba in relation to the *Playa Larga* could have been done without reliance upon its sovereign powers.[92] He appeared to have been influenced by the policy argument that states ought not to be allowed the immunity defence for decisions which are politically inspired.[93]

The legal position of the *Marble Islands* was substantially different from that of the *Playa Larga*. The Republic did not become the ship's owner, if at all, until after the Chilean coup. It was, in fact, the issue of ownership of the *Marble Islands* which prompted the differences between the conclusions of the majority and dissenting members of the House of Lords. The majority, Lords Diplock, Keith and Bridge, accepted that Cuba became the owner of the ship when the demise charter terminated.[94] The Republic then assumed a direct contractual relationship with the plaintiff. The subsequent decision by Cuba to give the sugar to North Vietnam through its agency Mambisa was simply an exercise of a private law right.[95] Hence the conversion of the sugar was a tortious wrong at private law to which immunity would not apply. The dissenting judges, Lords Wilberforce and Edmund-Davies, dissented on the ground that the demise charter did not terminate and, as a consequence, there could be no direct commercial relationship between Cuba and the plaintiff. It followed from this point that the gift was made in a governmental capacity.

89 This decision has been the subject of criticism. See, e.g., Crawford, loc. cit. (above fn. 27).
90 [1981] 3 W.L.R. 328, 336.
91 Ibid. 337.
92 Ibid. 241.
93 Ibid. 342.
94 That is, when the vessel was in mid-Pacific, on its way to North Vietnam.
95 [1981] 3 W.L.R. 328, 348.

This divergence of views is not significant for present purposes. The important point is that the House of Lords determined the commercial character of the act by careful analysis of the specific activities performed by the government. In effect, Lord Denning's argument that a sovereign ceases to act as a sovereign once he enters the market place[96] has now been superseded by the more sophisticated view that immunity will depend upon an analysis of the precise act in question rather than a broad examination of the character of the transaction. Such a detailed inquiry may, at least in some cases,[97] avoid the problem of a generalized distinction between governmental and commercial acts.

The difficulties implicit in the governmental/commercial distinction have also arisen in the context of nationalizations of natural resources. In a highly controversial decision[98] a United States court upheld a claim to immunity by the Libyan National Oil Co. on the ground *inter alia* that the nationalization upon which the plaintiff's action was founded was "a quintessentially sovereign act, never viewed as having a commercial character".[99] In the court's view the acts were "deliberate weapons of foreign policy, aimed at influencing the conduct of other nations, or at least punishing undesirable conduct".[100] This decision has been echoed in a subsequent decision in *IAM* v. *O.P.E.C.*[101] in an anti-trust action by a trade union against O.P.E.C. and each of its thirteen member states. Here the plaintiffs attempted to avoid the *Foreign Sovereign Immunity Act* 1976 (U.S.A.) by arguing that the oil price fixing activities of O.P.E.C. were commercial within the meaning of the Analysis which includes "carrying on of a commercial enterprise such as a mineral extraction company . . ."[102] The court in applying "the standards recognized under international law" held that as a sovereign state has the sole power to control its natural resources it was "impossible to separate the O.P.E.C. governments as governments from their role as oil producers".[103] The nature-versus-purpose distinction was clearly of little assistance in this case and the court finally resorted to general municipal and international law precedents.[104]

It should be noted that under the *Foreign Sovereign Immunity Act* 1976 (U.S.A.) sovereign immunity, in any event, will be denied where "rights in property are taken in violation of international law".[105] The *State*

96 *Trendtex* [1977] Q.B. 529, 558.
97 This approach will not resolve the problem of mixed acts or ones which are neither governmental nor commercial.
98 *Carey* v. *National Oil Corp.* 453 F.Supp. 1097 (1978 S.D.N.Y.), affirmed No. 78-7323 (2d Cir. Jan. 24, 1979).
99 *Ibid.* 1102.
100 Ibid.
101 [1979] 2 Trade Cas, Ss. 79,002 (C.D. Cal).
102 [1976] U.C. Code Cong. & Admin. News 6614-5.
103 [1979] 2 Trade Cas. Ss. 79,011.
104 For a discussion of this decision see M. Singer, "The Act of State Doctrine of the U.K.: An Analysis, with Comparisons to U.S. Practice", [1981] 75 A.J.I.L. 283, 297-8.
105 Ss. 1605(a)(3).

Immunity Act 1978 (U.K.) makes no such provision. The question for the U.S. courts then is the particularly difficult one of ascertaining the current international law relating to expropriations.[106]

The ambiguities and uncertainties which have clouded the adoption of a restrictive immunity rule have prompted the suggestion that a more useful distinction between acts which will attract the defence and those that will not should be developed.[107] A distinction might, for example, be made between state acts performed for the public good in the interests of the country as a whole, and state acts performed in relation to a private law obligation. This distinction was employed in the domestic context in *Commissioners of Crown Lands* v. *Page*[108] where the court held that the government cannot fetter its duty to act for the public good and cannot therefore bind itself by contract not to perform that duty. A similar notion has been developed in the United States and is known as the doctrine of government contracts.[109]

Lord Denning in the Court of Appeal found the distinction valuable in *Rolimpex*,[110] where the Polish government ban on sugar exports was intended to avoid a domestic shortage rather than to evade a contractual liability. Had the entity been defined as a department of the Polish government, Lord Denning would have been prepared to hold that Poland could intervene in its own contracts for the public good so long as it paid compensation. This approach might have been equally effective had it been applied in *I Congreso*[111] where the contractual breaches were neither performed in the interests of governmental power (as was pointed out by Lord Wilberforce)[112] nor required by the breaking of diplomatic relations. In other words, once it is shown that the government intervened other than for an acceptable public purpose and where its commercial self-interest was paramount (a matter to be judged according to objective criteria as opposed to the subjective view of the foreign state), the act should not be entitled to the benefit of the immunity defence. This approach seems more consonant with the underlying rationale of the sovereign immunity doctrine by preserving the defence in relation to foreign state acts performed in the interests of the state.

Quite a different approach to the problem of classification has been suggested.[113] It is that analysis might more logically begin by first establishing the minimum standard required by international law in relation to

[106] Note, e.g., the Dupuy Arbitration in *Texaco Overseas Petroleum Co.* v. *Lybia*, translated and reprinted in (1980) 17 I.L.M. 1.
[107] Singer, op. cit. 319-23 (above fn. 104), and Crawford, loc. cit. (above fn. 6).
[108] [1960] 2 All E.R. 726, 735-36.
[109] *U.S. Trust Co.* v. *New Jersey* 431 U.S. 1 (1977); see also, J. D. B. Mitchell, *The Contracts of Public Authorities* (1954) for a discussion of the U.S. case law.
[110] [1978] 1 All E.R. 89.
[111] [1981] 3 W.L.R. 328.
[112] Ibid. 341.
[113] Crawford, loc. cit. (above fn. 6); Brownlie, op. cit. 309-10 (above fn. 18).

sovereign immunity. International law, in this area as in others, is concerned primarily to regulate the application of municipal law in cases involving foreign elements according to a minimum rather than a maximum standard. Providing this minimum standard is maintained international law allows municipal courts or legislators to ascertain for themselves which acts warrant the refusal of the immunity defence.

There are certain basic considerations which indicate how such a minimum standard might be established. First, as has been recognized in the European Convention, Swiss case-law and treaty practice, and the U.S. and U.K. legislation, international law probably requires that there be a genuine territorial connection between the state assuming jurisdiction and the subject matter of the dispute before jurisdiction can be exercised over a foreign sovereign.[114]

Secondly, the international law doctrine of non-intervention in the internal affairs of another state prohibits one state from intervening in a matter which, at international law, is within the exclusive domestic jurisdiction of another state.[115] While the question as to which acts international law regards as within the exclusive domestic competence of a state is uncertain and changing,[116] certain matters such as the grant of nationality to persons with a sufficient connection with the state,[117] or a state's exclusive right to sovereignty over its natural resources,[118] remain of domestic concern.

Thirdly, there may be some issues which as a matter of state practice are not considered justiciable before a domestic court.[119] An English court, for example, will not pronounce on the validity of a law of a foreign state[120] and will refuse to exercise jurisdiction over transactions flowing from the execution of treaties where there is no provision for enforcement in the municipal courts of either of the disputing states.[121] Canadian and English courts will typically refuse to enforce foreign penal and revenue legislation. The United States courts applying the "act of state" doctrine will not "sit in judgment on the acts of the government of another done within its own territory".[122]

114 See discussion of this point by Brownlie, op. cit. 306 (above fn. 18).
115 Ibid. 324.
116 This is particularly true in the area of human rights.
117 *The Nottebohm Case* (Lichtenstein v. Guatemala) (1953) I.C.J. Reps. 111 (Preliminary Objection), (1955) I.C.J. Reps. 4 (Judgment on Merits).
118 Resolution on Permanent Sovereignty over Natural Resources 1962, G.A. Res. 1803, see Gess, (1964) I.C.L.O. 398; see also, *I.A.M. and Aerospace Workers* v. *O.P.E.C.* 447 F.Supp. 553 (1975) (D.C., C.D. Cal.) and Note by Lagod, (1980) 13 *Vanderbilt J. Trans. L.* 835-55.
119 See, Brownlie, op. cit. 322-3 (above fn. 18) and *Buck* v. *A.G.* [1965] Ch. 745 where the Court of Appeal refused to take cognizance of the question of the validity of the constitution of Sierra Leone.
120 See, e.g., *Secretary of State* v. *Kamachee Boye Sahaba* (1839), 13 Moo. P.C. 22; *Kingdom of Greece* v. *Gamet*, 281 L.R. 153.
121 F. A. Mann, 40 Grot. Soc. (1954) 25-47.
122 Per Fuller C.J. in *Underhill* v. *Hernandez* (1887) 168 U.S. 250, 252.

Fourthly, a municipal court, when it purports to act consistently with international law, must accord immunity to a foreign state where the subject matter of the dispute is governed by the minimum standards set by international law. Any dispute concerning the execution of a treaty, for example, ought to be the subject of international, not municipal settlement.[123]

The distinction between governmental and private acts will often accommodate these four considerations. However emphasis upon them avoids the difficulties of applying the distinction by establishing the circumstances in which a state is required to refrain from exercising jurisdiction. The United Kingdom *State Immunity Act* 1978, for example, by enumerating those foreign state acts which constitute an acceptance of the local jurisdiction, thereby avoiding reliance upon the classification of acts as commercial, constitutes a useful means of formulating a workable and relatively predictable rule of sovereign immunity. It may be, however, that the *State Immunity Act* 1978 is too inflexible a solution, in which case a preferred approach would be to consider both the minimum standards set by international law and the notion of "public good".

Summary

In considering the possibility of either domestic legislation or an international convention dealing with sovereign immunity, it is clear that reliance upon the distinction between commercial and governmental acts should be avoided. The following options might be considered:

1. The distinction might be eliminated entirely and replaced with a list of instances in which immunity will be available as a defence along the lines of the *State Immunity Act* 1978 (U.K.).
2. It may be possible legislatively to incorporate the approach taken in *I Congreso* and *Texas Trading and Milling Corp.*[124] by restricting the inquiry to the relevant act upon which the action is based. The problem of mixed acts or ones which are neither governmental nor commercial remains unresolved however.
3. It might be possible to adopt the distinction employed in *Rolimpex* between acts performed in relation to private law obligations and those performed for the "public good" as assessed according to objective criteria.
4. By emphasising the minimum standard required by international law it may be possible to avoid embarking upon an inquiry to categorize the act as commercial or governmental.

[123] See, e.g., Brownlie, op. cit. 325 (above fn. 18).
[124] U.S. Ct. Appeal, 16 April 1981. This action arose out of the same facts as *Trendtex*. The Court identified its first task as being to establish the relevant contract before deciding whether the current purchase programme was a "commercial activity".

3. STATE ENTITIES AND SOVEREIGN IMMUNITY

The right of separate state instrumentalities and corporations, and political subdivisions of states, to claim sovereign immunity remains a problem regardless of the scope of the modern immunity rule. When applying the absolute doctrine municipal courts have had difficulty in distinguishing between the state, its agents and instrumentalities and separate juristic personalities. The problem is exacerbated by the fact that states conduct their activities in different ways. One state may, for example, establish a separate corporate entity to achieve a particular purpose, while another may achieve the same aim through the internal procedures of a government department. As Lord Denning has pointed out,[125] the availability of sovereign immunity ought not to depend upon such differences.

A search of the municipal case law for an international law rule delineating the extent to which a separate state entity is entitled to immunity reveals an inconsistent state practice. In *Bacchus S.R.L.* v. *Servicio Nacional del Trigo*,[126] for example, the English Court of Appeal upheld the defendant's claim to immunity, despite the fact that it was a separate legal entity and corporate body with the power to make contracts on its own behalf for the purchase and sale of grain, and could sue and be sued in its own name. The crucial factor, the court said, was that by the nature of its functions it was a department of the State of Spain. By contrast, the same court in *Trendtex Trading Corporation* v. *Central Bank of Nigeria*[127] held unanimously that the bank, as a separate legal entity capable of suing and being sued and exercising government functions under substantial government control, was not entitled to immunity. A United States District Court[128] accorded sovereign immunity to the Anglo-Iranian Oil Co., a British corporation controlled by the British Government through its ownership of a majority of the voting stock. Another District Court took the opposite view in *U.S.* v. *Deutsches Kalisyndikat Gesellschaft*[129] when it denied immunity to a French corporation whose stock was solely owned by the government, but where its function was to exploit potash mines in Alsace.

While the American Law Institute Restatement of 1965[130] declares that the constituent units or political-subdivisions of a state are not entitled to

125 *Trendtex* [1977] Q.B. 529, 559.
126 [1957] 1 Q.B. 438, C.A.
127 [1977] Q.B. 529. It may be that the bank has both an official and private funtion. In *Krol* v. *Bank of Indonesia* [1958] I.L.R. 180-1, the Court of Appeal for Amsterdam accepted that the defendant might claim immunity in relation to its governmental functions but not for its work for private individuals.
128 *In Re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distributing of Petroleum*, 13 F.R.D. 280, 290-1, (D.D.C. 1952).
129 3 F. 2d 199 (1929).
130 A.L.I. Restatement of the Law, Second, Foreign Relations Law of the U.S. (1965), Ss. 62 and "comment" 203-4; see generally, M. Whiteman, 6 *Digest of International Law*, 585-611.

immunity, a New York court in 1963[131] would have given immunity to the State of Bassellande of the Confederation of Switzerland. Further, the United States Circuit Court of Appeals in 1943[132] gave immunity to the State of Sao Paulo as a unit within the State of Brazil. In 1948 the Supreme Court of Queensland[133] accorded immunity to the Netherlands Indies as part of the Kingdom of the Netherlands. However, the City Court of the City of New York[134] denied immunity to the City of Rome as a political subdivision under the substantial control of the Italian Government. The English courts have granted immunity to a provincial development corporation,[135] but more recently have denied sovereign status to a Polish state trading organization exporting and importing essential commodities.[136] In 1949 the Court of Appeal[137] held that the Soviet Tass News Agency was entitled to immunity despite its incorporation. In 1940 the French Civil Tribunal of the Seine[138] denied a plea of immunity by a Soviet Trade delegation, while in 1946 the Supreme Court of Sweden[139] allowed a similar delegation to plead the defence.

It is not easy to distinguish these cases along clear and predictable lines. It is almost impossible to deduce any rule of customary international law. The following factors emerge, nonetheless, as indicators of the approach typically adopted by municipal courts:

1. The establishment of a separate legal entity under municipal law with the power to make independent decisions, and to sue and be sued is not necessarily fatal to an immunity claim where the entity exercises governmental functions. Where, for example, the entity's function is to purchase and sell a basic commodity, this may suggest that the entity is essentially governmental. An independent and external role is suggested where the purpose of the entity is to advise the government. As the courts have tended to give primary significance to the nature of the functions exercised by the entity, the inquiry merges with that adopted when applying the restrictive immunity rule and raises the same problems.
2. Where the function is not clearly governmental, the interests of fair and predictable trade relationships require that the separate entity be denied immunity unless there is unequivocal and explicit evidence of the

131 *Johns-Marville Int. Co.* v. *Insul. Fil. Co.*, 425 N.Y. 2d 14, 15 (S.Ct. 1963).
132 *Sullivan* v. *State of Sao Paulo* 122 F. 2d 355 (2d Cir. 1941).
133 *Van Heynigen* v. *Netherlands Indies Government* [1948] Q.W.N. 19 (1949).
134 *Schneider* v. *City of Rome, Italy* 83 N.Y.S. 2d 756, 757 (1948).
135 *Mellenger* v. *New Brunswick Development Corp.* [1971] 1 W.L.R. 604, C.A. Though notice the decision by Barker J. in *Marshall Islands* loc. cit. (above fn. 1a) where sovereign status was denied to the Government of the islands.
136 *Czarnikow Ltd* v. *Centrala Handlu Zagranicznego Rolimpex* [1979] 1 Q.B. 176 (C.A.).
137 *Krajina* v. *The Tass Agency & Another* [1949] 2 All E.R. 274.
138 *Russian Trade Delegation* v. *Societe Francaise Industrielle et Commerciale de Petrole (Groupe Malopolska)* [1938-1940] Ann. Dig. 245 (No. 83).
139 *Russian Trade Delegation in Sweden* v. *Deutsche Handels-Aktiengesellschaft* [1946] Ann. Dig. 80-2 (No. 33).

> government's intention to create an entity which remains part of the state. This intention may be manifested by the terms of the statute or constitution creating the entity and defining its powers and duties, or by a declaration of government status under domestic law. Certification of government status by an ambassador, though useful evidence, is not sufficient in itself to conclude the question of the government's intention when creating the entity.[140]

Recent state practice supports the distinction at international law between the state and separate state entities for the purposes of an immunity claim. The delegates to the Asian-African Legal Consultative Committee in 1960 recommended, for example, that "State Trading Organizations which have a separate juristic entity under the Municipal Laws of the Country where they are incorporated should not be entitled to [the] immunity . . .".[141] The Soviet Union treaties distinguish between state guaranteed transactions which will be entitled to immunity and the transactions of separate instrumentalities which are not.[142]

At first glance the *European Convention on State Immunity* and the *State Immunity Act* 1978 (U.K.) on the one hand and the *Foreign Sovereign Immunity Act* 1976 (U.S.A.) on the other appear to take quite different approaches to the status of separate entities. The European Convention[143] denies immunity to any legal entity which is separate from the state and is capable of suing or being sued, even where it is entrusted with public functions. The *State Immunity Act* 1978[144] is to the same effect, although in adopting the dual test of the European Convention (does the entity have a separate existence and does it have the capacity to sue and be sued), the United Kingdom went further in adopting special rules for a state central bank or similar financial institution.[145] By contrast, the *Foreign Sovereign Immunity Act* 1976 includes within the definition of a "foreign state" political subdivisions, agencies and instrumentalities.[146] An agency or instrumentality includes corporate bodies formed under the law of the foreign state where "a majority of [their] shares or other ownership interest is owned by a foreign state or political subdivision thereof . . ."[147] The difference is more apparent than real as both the European Convention and the *State Immunity Act* 1978 accord immunity to separate entities "in

[140] *Krajina* v. *Tass Agency* [1949] 2 All E.R. 274; and *Trendtex* [1977] Q.B. 529, 559 R/P-560 per Lord Denning.
[141] See above fn. 45.
[142] See J. Crawford, loc. cit. (above fn. 6); Romania-Iraq, Exchange of Notes, 24 December 1958, 405 U.N.T.S. 263. For a discussion of Soviet Trading Organizations see B. Festerwald, "Sovereign Immunity and Soviet State Trading" (1950) 63 *Harv. L.R.* 614-42; C. M. Schmitthoff, "The Claim of Sovereign Immunity in the Law of International Trade", (1958) 7 I.C.L.O. 452, 463-7.
[143] Art. 27.
[144] S. 14.
[145] S. 14(4). Only ss. 13(1)-(3) apply to such institutions.
[146] Ss. 1603(a).
[147] Ss. 1603(b).

respect of acts performed by the entity in the exercise of sovereign authority".[148] Under the *Foreign Sovereign Immunity Act* 1976, the entity is denied immunity in relation to commercial activities. Similar results are achieved under the U.K. legislation and the European Convention, though by different means. A potentially significant difference between the two approaches is that the persuasive burden varies so that it may be more difficult for a separate entity to claim immunity under the European and United Kingdom formulations. That is, the entity will have to establish that its activities do not come within the listed exceptions to the absolute immunity rule. For this reason it may be preferable to adopt the more stringent approach.

While the *State Immunity Act*, European Convention and *Foreign Sovereign Immunity Act* rely upon the notion of separate legal entities no definition of the phrase is provided. While the earlier municipal law remains pertinent, the United States courts have considered the problem since the *Foreign Sovereign Immunity Act* came into force. Foreign state status has been accorded to the German Information Centre engaged in promoting cultural understanding between the United States and Germany,[149] and the Libyan National Oil Company, a corporation wholly owned by the Libyan Government.[150] The courts have been more cautious in relation to claims by socialist state enterprises. In *Edlow International Company* v. *Nuklearna Electrarna Kosko*[151] the court denied foreign State status to a Yugoslav workers' organization which had been established to construct and operate a nuclear power plant. In *Yessenin-Volpin* v. *Novosti Press Agency*,[152] however, the court while noting that the *Foreign Sovereign Immunity Act* was "ill-suited to concepts which exist in socialist states"[153] affirmed the foreign state status of the Soviet Novosti Press Agency. Finally, in *Broadbent* v. *O.A.S.*[154] the U.S. District Court affirmed the general position under the International Organizations Immunities Act[155] that international organizations are not subject to the *Foreign Sovereign Immunity Act.*

The suggestion has been made that the formal status of an entity is not to the point, the crucial issue being whether the government's commercial self interest is at stake.[156] If so, then the entity should be treated in the same

148 Art. 27(2), S.I.A. s. 14(2)(a).
149 *Gittler* v. *German Information Centre* 408 N.Y.S. 2d 600 (S.Ct. 1978).
150 *Carey* v. *National Oil Corp.* 453 F.Supp. 1097 (S.D.N.Y.) 1978). Note also, *Herzberger* v. *Compania de Acerode Pacifico, S.A.* 78 Cir. 2451 (S.D.N.Y., Agst 17, 1980) where the court held that a foreign sovereign is a "foreign state" where the ultimate ownership of more than 50% lies in State hands regardless of the existence of an intermediary entity.
151 441 F.Supp. 827 (D.D.C. 1977).
152 443 F.Supp. 849 (S.D.N.Y. 1978).
153 Ibid. at 852.
154 No. 77-1974 (D.D.C. March 28, 1978), appeal docketed, No. 78-1564 C.D.C. Crr. March 25, 1978). For discussion see R. P. Lewis, Note: "Sovereign Immunity and International Organizations", [1979] 13 *J. Int'l L. & E.* 675.
155 22 U.S.C. Ss. 288-288g.
156 M. Singer, op. cit. 31-9 (above fn. 104).

close connection with the forum, probably because the jurisdictional links were manifestly present on the facts.[176]

As the courts of the U.S., U.K. and civil law States had already adopted a restrictive rule of immunity, the particularly interesting aspect of the *European Convention on Sovereign Immunity, State Immunity Act* 1978 (U.K.) and *Foreign Sovereign Immunity Act* 1976 (U.S.A.) lies in the care with which a nexus between the exceptions to immunity and the jurisdictional base has been drafted. The European Convention, for example, excludes immunity where the dispute relates to a contractual obligation of the foreign state which "falls to be discharged on the territory of the state of the forum".[177] Again, immunity cannot be claimed where the dispute concerns a contract of employment between the foreign state and an individual "where the work has to be performed in the territory of the state of the forum".[178] It is necessary in each case to decide both whether the dispute lies within one of the excluded categories of acts and whether the territorial nexus is present. It is significant that the European Convention's requirement of a close jurisdictional nexus may be more restrictive than that required by the municipal law of the contracting states. It should be noted, however, that a contracting state need not recognize or enforce a judgment which has been obtained in these circumstances if the court of the forum would not have been entitled to jurisdiction under the rules operating in the state against which it has given judgment.[179] Even if, on the basis of mutuality, the court of the forum would have had jurisdiction, the obligation to recognize and enforce a judgment is subject to the jurisdictional grounds which are excluded by the Annex.[180] The *State Immunity Act* 1978 adopts a similar approach with the important exception that where the dispute relates to "a commercial transaction entered into by the state" it is not necessary to establish any jurisdictional basis other than those required by the normal Rules of Procedure.[181] Indeed, Lord Wilberforce argued in the debate on the State Immunity Bill that the jurisdictional links established by the European Convention possibly did not reflect general international law.[182] As the *State Immunity Act* 1978 was to apply in relation to other states in the international community there would be no need to limit jurisdiction as had been done under the European Convention. Further, the facts of *Trendtex* would not have fallen within the jurisdictional

[176] For a discussion of this point see I. Seidl-Hohenveldern, "State Immunity: Federal Republic of Germany" (1979) 10 *Netherlands Y.B.I.L.* 71-2; "State Immunity: Austria" ibid. 97-8.
[177] Art. 4.
[178] Art. 5.
[179] Art. 20(3).
[180] The annex, for example, includes the nationality of the plaintiff, and cases where the property constituting the security for the debt is the subject matter of the action.
[181] S. 3(1)(a). Order 11, Rules of the Supreme Court.
[182] See, R. Higgins, "Execution of State Property: U.K. Practice", (1979) 10 *Netherlands Y.B.I.L.* 35-54, at 44.

requirements of the European Convention. Consequently it was argued that the new *State Immunity Act* 1978 ought not to establish narrower links than were being established by the emerging case law.[183]

The *Foreign Sovereign Immunity Act* 1976 also establishes jurisdictional links which are in some instances more restrictive than those required under other U.S. legislation such as the "doing business" provisions of many state statutes.[184] A state will not be immune where the action

> "is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[185]

The notion of "direct effect" has stimulated much U.S. case law and academic comment.[186] The difficulty has been to balance the interests of U.S. citizens against the impropriety, and possibly the illegality, of asserting jurisdiction against a foreign sovereign in relation to its activities within its own country: the problem in other words is to weigh private rights with the requirements of international comity.[187]

When considering an international agreement on immunity it will be necessary to decide whether a substantial territorial connection should be required along the lines of the U.K. and U.S. legislation, or whether a

183 Ibid. 45.
184 E.g.: N.Y. Civil Procedure Law Ss. 301 (McKinney, 1972).
185 Ss. 1605(a)(2).
186 The "direct effects" requirement has been interpreted by the Supreme Court in *World-Wide Volkswagen Corp.* v. *Woodson* 444 U.S. 490 (1980) consistently with the constitutional due process requirement of "minimum contacts". S. 18 of the Restatement was held to be insufficient to meet this test. Other cases in which the definition of "direct effects" has been considered see, *Verlinden B.V.* v. *Central Bank of Nigeria* 488 F.Supp 1284, (S.D.N.Y. 1980); *Yessenin-Volpin* v. *Novosti Press Agency* 443 F.Supp 849 (1978); *Upton* v. *Empire of Iran* 459 F.Supp. 264 (D.D.C. 1978), affirmed 607 F. 2d 494 (D.D.C. 1979); *American International Group* v. *Islamic Republic of Iran* 493 F.Supp. 522 (1980); *Harris* v. *V.A.O. Intourist, Moscow*, 481 F.Supp. 1056 (E.D.N.Y. 1979); *Carey* v. *N.I.O.C.* 453 F.Supp. 1097 (1978), see also S. J. O'Neill, "Extra-territorial Jurisdiction over Foreign States: The Direct Effect Provision of the Foreign Sovereigns Immunities Act of 1976—Carey v. N.I.O.C." 13 *J. Int's L & E* 633 (1979); *Texas Trading & Milling Corp.* v. *Federal Republic of Nigeria*, No. 78-2395 (S.D.N.Y. July 16, 1980) 500 F.Supp. 320; *East Europe Domestic International Sales Corp.* v. *Terra* 467 F.Supp. 383 (S.D.N.Y.), affirmed 610 F. 2d 806 (2d Cir. 2979); *Thomas P. Gonzalez* v. *Consejo Nacional de Producion de Costa Rica* 614 F. 2d 1247 (9th Clir. 1980); *Waukesha Engine Div.* v. *Banco Nacional de Fomento Cooperative* 485 F.Supp. 490 (F.D. Wise. 1980); *Decor by Nikkei International* v. *Fed. Rep. of Nigeria* No. 77-2348 (S.D.N.Y. 1980), 497 Fed. Supp. 893.
For a discussion of "direct effects" see J. J. Pell, "The Foreign Sovereign Immunities Act of 1976: Direct Effects and Minimum contacts" (1981) 14 *Cornell I.L.J.* 97-115; P. E. Wheeler, "Direct Effect Jurisdiction under the Foreign Sovereign Immunities Act of 1976", (1981) 13 N.Y.U.J.I.L.P. 571-615.
187 For a list of comity considerations see U.S. Restatement (Second) of Conflict of Laws Ss. 6 (1971). Note that in *Verlinden* v. *CBN* (1981) 20 I.L.M. 639 the U.S. Court of Appeal held that foreign nationals could not sue foreign States in the U.S. if the dispute was unconnected with the forum, even where there was a choice of forum clause.

lesser standard, perhaps more consonant with state practice, is appropriate. The threat to international comity implicit in a liberal standard has been apparent, and continues to be apparent, in relation to the extra-territorial reach of the U.S. anti-trust legislation.[188] One of the purposes in creating the *Foreign Sovereign Immunity Act* 1976 was, in fact, to ensure that states and their instrumentalities could not claim immunity where they were engaged in the monopolistic marketing of their resources and where the practice had an "effect" within the U.S. economy. The recent *Westinghouse*[189] litigation indicates that any proposals for an international agreement on immunity might be wise in favouring a jurisdictional nexus which is more demanding than that which might be common in state practice.

As a matter of principle it seems important to avoid a situation in which the state with the most liberal jurisdictional requirement is used by any private party to litigate a dispute against a foreign state. It is probable for this reason that the progressive development and codification of the law on sovereign immunity will need to adopt a reasonably close jurisdictional nexus.

5. WAIVERS OF SOVEREIGN IMMUNITY

Where a sovereign submits to the jurisdiction of a foreign court that court may conclude that the right to sovereign immunity has been waived and may proceed to take cognisance of the dispute on the theoretical ground that the sovereign has consented.[190] That is, the sovereign as a plaintiff may be required to give security for costs,[191] to submit to a counter claim which is sufficiently closely connected with the principal action (though not to a cross-action),[192] to permit discovery against it of all relevant documents[193] and to submit to all stages of appeal.[194] Similarly, as a defendant the sovereign may be bound to comply with all normal court orders during the proceedings.

In practice, however, municipal courts have had difficulty in deciding when the submission is genuine or whether the state has submitted to the jurisdiction generally, or has merely submitted in relation to a specific issue such as the choice of law[195] or a substantive defence.[196] The courts will

188 G. Triggs, loc. cit. (above fn. 47).
189 [1978] A.C. 547 (H.L.). This litigation has now been settled but the problem remains significant in other areas such as shipping conferences.
190 See D. P. O'Connell, op. cit. 860-6, fn. 16 (above fn. 21).
191 *Republic of Costa Rica* v. *Erlanger* (1876) 3 Ch. D. 62.
192 *High Commissioner for India* v. *Ghosh* [1960] 1 Q.B. 134; [1959] 3 All E.R. 659. See also, R. B. Looper, "Counterclaims against Foreign Sovereigns", (1956) 50 I.C.L.Q. 276-82; E.C.S.I. Art. 1(2)(a) and S.I.A. s. 2(6).
193 *Prioleau* v. *U.S. and Johnson* (1866), L.R. 2 Eq. 659.
194 *Sultan of Jahore* v. *Abubakur* [1952] A.C. 318, 19 I.L.R. Case No. 518.
195 The state might simply have agreed that the law of a certain state is to be the "proper law" of the contract. Cf. S.I.A. 2(2).
196 E.g., the act of state defence, see this text at pp. 109-12.

typically require that a waiver be strictly construed[197]—properly so if the underlying rationale for the immunity rule is accepted.[198] Even so, recently United States courts have had difficulty in deciding that a treaty between Iran and the U.S. was not sufficient to constitute an express waiver for the purposes of pre-judgment attachment of Iranian assets under s. 1610(d) of the *Foreign Sovereign Immunity Act* 1976.[199]

An international law rule on waivers is not easy to discern as State practice varies. The Anglo-American rule, Professor O'Connell argued,[200] allows greater immunity to a foreign sovereign than international law requires. While the House of Lords in *Duff Development Co.* v. *Kelantan Government*[201] decided in 1924 that submission to arbitration under the Arbitration Act 1889 did not constitute a submission to execution of the award, this narrow view was extended by *Kahan* v. *Pakistan Federation*[202] where the court held that

> "mere agreement by a foreign state to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction —a submission, as it has been termed, in the face of the court—will suffice."[203]

The civil law states have, by contrast, accepted that a waiver may be antecedent and, indeed, may be implied from the sovereign's conduct.[204] Some courts, the United States[205] and Japanese[206] for example, will imply a waiver where the sovereign agrees to submit to the jurisdiction by treaty. The English courts are less likely to do so.[207] It seems generally clear, nonetheless, that where a sovereign issues a writ in a foreign jurisdiction, enters a general appearance, or raises a substantive or procedural defence, he will be considered to have submitted to the jurisdiction.

197 E.g., *Duff Development Co.* v. *Kelantan* [1924] A.C. 797; (1923-4) 2 A.D.; Case No. 65; *Kahan* v. *Pakistan Federation* [1951] 2 K.B. 1003, 18 I.L.R.; Case No. 50; *New England Merchants National Bank* v. *Iran Power Generation & Transmission Co.* et al. 502 F.Supp. 120 (S.D.N.Y. 1980), for a discussion of this case see (1981) 75 A.J.I.L. 375. Daffy J. at 127 in this case said "[t]he consent necessary to waive [a] traditional immunity must be express and must be strictly construed".

198 That is, that all sovereigns being equal, not one of them can be subjected to another's jurisdiction without consent.

199 E.g., *New England Merchant's National Bank* v. *Iran Power Generation & Transmission Co. et al.* 502 F.Supp. 120 (S.D.N.Y. 1980). Note that the U.S., in an *amicus curiae* brief, argued that the treaty waiver applies only to the property of publicly owned or controlled commercial or business enterprises of the contracting State.

200 Op. cit. 861 (above fn. 21).

201 [1924] A.C. 797; (1923-4) 2 Ann. Dig; Case No. 65.

202 [1951] 2 K.B. 1003, 18 I.L.R., Case No. 50.

203 Ibid. 1012.

204 In discussion by D. P. O'Connell, op. cit. 862 (above fn. 21).

205 Ibid.

206 Ibid.

207 This is because a treaty can have no internal effect unless it is first implemented by domestic legislation.

The *European Convention on Sovereign Immunity, State Immunity Act* and *Foreign Sovereign Immunity Act* each provides, though in different ways, for a waiver to the jurisdiction of foreign courts, adopting in some respects the earlier municipal law position. They are consistent in providing that a State may waive its immunity by a prior agreement or treaty. The European Convention provides that a state cannot plead immunity if it has agreed to submit to the jurisdiction of the court by international agreement, an express term in a written contract, or by express consent after the dispute has arisen between the parties.[208] Similarly, the *State Immunity Act* provides that a state may submit by a prior written agreement or after the dispute has arisen.[209] The legislation includes the common law rule that an agreement to be governed by the law of the United Kingdom is not in itself sufficient to constitute a submission. The *Foreign Sovereign Immunity Act* denies immunity where the foreign state waives its immunity "explicitly or by implication"[210] and provides that all existing treaties to which the United States is a party will survive the *Foreign Sovereign Immunity Act* so that any prior waiver by agreement will continue to govern.[211]

A state will be deemed to have submitted to the jurisdiction under the *State Immunity Act* where, in the obvious case, it has instituted the proceedings,[212] or where it intervenes or takes any step in the proceedings.[213] A waiver will not be implied if the state intends merely to claim immunity,[214] or to assert an interest in property where the state would have been entitled to immunity had the proceedings been brought against it.[215] A state will not be deemed to have submitted to the jurisdiction where it was reasonably in ignorance of the facts which would have entitled it to claim immunity.[216] A similar deeming provision is made in the European Convention where a state with knowledge of the relevant facts "takes any step in the proceedings relating to the merits".[217] The *Foreign Sovereign Immunity Act* does not define the words "by implication"[218] though a United States court would presumably interpret an intervention in the proceedings as a sufficient waiver. As a matter of municipal practice, submission to the jurisdiction includes submission to any appeal from the judgment.[219] This has been

[208] Art. 2.
[209] S. 2(1) and (2).
[210] Ss. 1605(a)(a).
[211] Ss. 1604; cf. S.I.A. S. 23(3)(a) which excludes from the operation of s. 2(2) any prior agreements.
[212] S. 2(3)(a).
[213] S. 2(3)(b).
[214] S. 2(4)(a).
[215] S. 2(4)(b).
[216] S. 2(5).
[217] Art. 3.
[218] Ss. 1605(a)(1).
[219] *Sultan of Johore* v. *Abubakar* [1952] A.C. 318; 19 I.L.R. Case No. 38.

adopted expressly by the *State Immunity Act*.[220] A separate waiver remains necessary, however, in order to enforce any judgment against state property.[221]

Where a counter-claim arises out of the legal relationship or facts on which the principal action is based, it will be encompassed by the submission to the jurisdiction. The *Foreign Sovereign Immunity Act* makes an exception to this where the counter-claim seeks "relief exceeding in amount or differing in kind from that sought by the foreign state".[222]

A waiver of sovereign immunity may be withdrawn only when this is in accordance with the terms of the waiver in the agreement.[223] Where the agreement does not contemplate withdrawal, the assumption is that it cannot be withdrawn unilaterally.[224] The *State Immunity Act* makes no such provision and the English courts have consistently upheld the revocability of waivers.[225] Delaume[226] argues that the language of s. 2(1) implies the "irresistible" conclusion that submission by waiver must have the same legal effect as other forms of submission, that is, it may not be revoked. It is by no means clear, however, why the legal effect should be the same. A state may for various reasons of policy decide to resile from a contractual waiver long before any dispute arises or before the matter comes before a court.

The European Convention and the *State Immunity Act* have been precisely drafted to provide that any express submission to the jurisdiction of a court must be to the courts of the state before which the claim has arisen for adjudication. The *State Immunity Act*, for example, requires that the state must submit "to the jurisdiction of the courts of the United Kingdom".[227] The *Foreign Sovereign Immunity Act* more loosely provides simply that immunity does not apply in any case "in which the foreign state has waived its immunity".[228] This leaves open the possibility that a waiver before the courts of another State will provide a sufficient jurisdictional basis for a U.S. court. This possibility was acted upon by the District Court for the District of Columbia in *Ipitrade International S.A.* v. *Federal Republic of Nigeria*[229] where a waiver of the jurisdiction of the Swiss courts was held to be a sufficient waiver of immunity from the U.S. courts for the purposes of enforcing an arbitral award. This interpretation has been rejected subsequently by another District Court in *Verlinden B.V.* v. *Central Bank of Nigeria*.[230] Here the court adopted a narrower view of the legislation in the interests of protecting "sensitive foreign relations"—one at least of the

220 S. 2(6).
221 See J. Crawford, op. cit. (fn. 6).
222 Ss. 1607(c).
223 F.S.I.A. ss. 1605(a)(1).
224 *Ipitrade International S.A.* v. *Fed. Rep. of Nigeria* 465 F.Supp. 824 ((D.C.) D.C. 1978).
225 See, e.g. *Kahan* v. *Pakistan Federation* [1951] 2 K.B. 1003, 18 I.L.R. Case No. 50.
226 (1979) 73 A.J.I.L. 185, 192.
227 S. 2(1).
228 Ss. 1605(a)(1).
229 465 F.Supp. 824 (D.C.D.C. 1978).
230 488 F.Supp. 1284 (1980); affirmed on other grounds (1981) 20 I.L.M. 639.

premises upon which the traditional rule of immunity has been built. This narrower interpretation is to be preferred to avoid the extreme consequences in which a foreign sovereign, by choosing to be governed by the law of another state, would automatically come within the jurisdiction of the U.S. courts. Any international agreement on immunity should be drafted precisely to limit an express or implied submission to the jurisdiction of a foreign court so that it does not extend beyond that forum to the courts of other States.

A more difficult problem of implied waiver occurs where a plaintiff seeks to enforce an arbitral award against a State party. The European Convention and the U.K. and U.S. legislation take different approaches. The European Convention provides that immunity is not available where a State agrees in writing to submit a dispute to arbitration "on the territory or according to the law of which the arbitration has taken or will take place"[231] in relation to the validity or interpretation of the arbitral agreement, the arbitral procedure, or setting aside the award. The dispute must, however, have arisen from a civil or commercial matter. The *State Immunity Act* 1978 (U.K.) is not limited in this way. Rather immunity is denied in any case where the dispute relates to an arbitration and the state has agreed to be a party.[232] Jurisdiction will be asserted regardless of the characterization of the dispute as commercial and regardless of the fact that the dispute arose elsewhere than the United Kingdom. A party might, simply by registering the arbitral award in the U.K., enforce an award there which concerns a non-commercial matter and which has no jurisdictional nexus with the U.K.[233] The problem is not dissimilar from that raised by the *Ipitrade* decision, as by agreeing to submit to arbitration in a third state a foreign state becomes subject to the jurisdiction of the U.K. The only exceptions to this occur where the agreement is between states or where the agreement itself provides to the contrary.[234] For the same reasons of policy outlined by the court in *Verlinden* it may be preferable for the British courts to interpret s. 9(1) narrowly to encompass only those agreements which submit a dispute to arbitration by a U.K. court. This approach may be rather more difficult to justify, however, in light of the clear and apparently intentional contrast with the waiver provisions requiring that submission must be to the jurisdiction of "the courts of the United Kingdom".[235]

The *Foreign Sovereign Immunity Act* 1976 (U.S.A.) does not provide specifically for the enforcement of arbitral awards though they have, in fact,

[231] Art. 12.
[232] S. 9(1).
[233] That is, under s. 13(4) the award could, on registration, be enforced against State-owned commercial property within the jurisdiction.
[234] S. 9(2).
[235] S. 2(1).

been enforced under the general waiver provision of s. 1605(a)(1).[236] That is, a foreign state will be found to have waived immunity where it has agreed to arbitrate a dispute in the U.S. and, possibly, where the agreement provides that U.S. law is the proper law of the arbitration.[237]

In *Birch Shipping Corp.* v. *Embassy of Tanzania*[238] a District Court took the extreme view that Tanzania's submission to arbitration in New York included a submission to execution upon its property used for a commercial purpose. This is probably an incorrect view of the international law rule as considered by the Constitutional Court of the Federal Republic of Germany in 1977.[239]

The District Court in *Ipitrade* held that a waiver of immunity for the purpose of enforcement of an arbitral award might be implied from the mere fact that a state is a party to the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958.[240] Quite apart from the difficulties that the *Ipitrade* decision presents in extending unreasonably the jurisdiction of the U.S. courts, wherever there is a waiver to the jurisdiction of a third state, reliance upon the New York Convention as evidence of a waiver in the first instance is open to criticism for two reasons. First, the Convention requires the enforcement of an award against third states not parties to the Convention: clearly a provision which should take the Convention beyond the reach of the *Foreign Sovereign Immunity Act*.[241] Secondly, and in any event, the Convention may not apply to states as parties.[242]

Some commentators have raised the question of whose substantive law is to govern the determination of the validity of an express waiver.[243] They pose the problem of a state entity which might lack the authority to waive immunity, but where the law of the forum might uphold the waiver on the grounds of apparent authority. While the answer to this choice of law

[236] See *Maritime International Nominees Establishment* v. *Republic of Guinea* 505 F.Supp. 141 (D.C.D.C. 1981). An arbitral award might also be enforced under ss. 1605(a)(2) on the ground that the dispute concerned a commercial activity.

[237] In *Verlinder B.V.* v. *Central Bank of Nigeria* 488 F.Supp. 1284 (1980) the court said "we need not now decide whether the Court would have personal jurisdiction over a foreign State whose only contact with this country occurs by virtue of a private agreement in which it adopts American law or an American forum", at 1302.

[238] D.C.D.C. 18 November 1980, for a discussion of this decision see (1981) 75 A.J.I.L. 373-4.

[239] *In the Matter of the Republic of the Philippines*, 46 B. Verf. G.E. 342; see discussion (1979) 73 A.J.I.L. 305-6.

[240] 330 U.N.T.S. 3.

[241] Otherwise it would violate the rule incorporated in the Vienna Convention on the Law of Treaties 1969, Art. 34, (1969) 63 A.J.I.L. 875 that a treaty does not create either obligations or rights for a third State without its consent.

[242] Art. 1(1) of the Convention applies only to "arbitral awards . . . arising out of differences between persons, whether physical or legal". While one interpretation is that states are excluded, the travaux and a decision of the Court of Appeal of the Hague suggest that they will be included. See, G. Gaja, *International Commercial Arbitration: New York Convention* (1980), Crawford, loc. cit. (above fn. 60).

[243] C. N. Brower, F. W. Bistline, G. W. Loomis, Jr., op. cit. 206 (above fn. 27).

problem is likely to be that the governing law is that of the state of the forum, such an issue would need to be clarified in any international convention.

A final point worthy of clarification concerns the related question of who has authority to submit to proceedings in a foreign court. The *State Immunity Act* provides that "any person who has entered into a contract on behalf of and with the authority of a State shall be deemed to have authority to submit on its behalf in respect of proceedings arising out of the contract".[244] A similar provision would avoid the kind of problem which arose in *Baccus S.R.L.* v. *Servicio Nacional del Trigo*,[245] and it would also avoid the problem suggested in the previous paragraph.

Summary of points for consideration when drafting an international agreement

1. A waiver of sovereign immunity should be permitted by a prior treaty or agreement, or be able to be implied by sufficiently clear conduct.
2. A waiver relating specifically to a substantive defence or to the choice of law should not constitute a waiver of immunity from the jurisdiction generally.
3. Waivers, express or implied, should be interpreted fairly but strictly.
4. A waiver must be to the jurisdiction of the court in question rather than to those of any third state.
5. Where a State agrees in writing to submit a dispute to arbitration in the forum State:
   (a) a waiver of sovereign immunity may be implied only in relation to the validity or interpretation of the arbitral agreement or procedure. That is, the waiver should not constitute a general waiver for the purposes of sovereign immunity.
   (b) it should not necessarily be construed as an agreement to enforce any arbitral award. This is consistent with the rule that acceptance of the jurisdiction of a court does not necessarily entail acceptance of enforcement of any subsequent judgment.
6. A clarification of the role of membership of the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958 as evidence of a waiver would be useful. It might be possible, for example, to limit its relevance to enforcement against states party to the Convention.
7. A clarification of the issues of withdrawal and of the capacity of persons or entities to waive immunity would be useful.

[244] S. 2(7). See discussion of this point by G. R. Delaume, "The State Immunity Act of the U.K." [1979] 73 A.J.I.L. 185, 192.
[245] [1956] 3 All E.R. 715.

6. NON-COMMERCIAL TORTS

The restrictive rule of sovereign immunity, whether developed at common law or through municipal legislation or international treaty, has depended upon the distinction between acts *jure gestionis* and acts *jure imperii*, or between governmental and commercial acts. Those drafting the *European Convention on Sovereign Immunity, Foreign Sovereign Immunity Act* and *State Immunity Act* were concerned not only to exclude the immunity defence in relation to essentially commercial acts, but also to non-commercial torts, or more specifically, to motor traffic, personal injuries and property damage.[246] These torts do not fall within an obvious commercial exception and warrant separate treatment. The *State Immunity Act* denies immunity in actions for death or personal injury or damages to or loss of tangible property which has been caused by an act or omission in the U.K.[247] Immunity continues to apply to actions for defamation or economic loss where there is no tangible damage. The European Convention and *Foreign Sovereign Immunity Act* are to a similar effect. The European Convention, however, allows an immunity defence where the claim is based upon a discretionary function or concerns certain enumerated non-commercial torts.[248]

While the primary purpose of these provisions was to ensure recovery against sovereigns for ordinary traffic accidents their scope has been demonstrated dramatically and surprisingly in a decision of a U.S. District Court in *Letelier* v. *Republic of Chile*.[249] The facts are that a former Chilean ambassador and foreign minister Letelier, and his associate, were assassinated by a car bomb in Washington D.C. Their personal representatives sought compensation for tortious injury caused, it was later established, by the Republic of Chile, its intelligence service and officers and agents within that service. In a diplomatic note[250] Chile argued, as might be expected, first that it had no connection with the deaths and secondly, that even if it had been involved its acts as "public acts" were immune from jurisdiction. The court relied principally on the "plain language"[251] of the statute itself. It concluded that, apart from the two exceptions, neither of which applied here, immunity would be denied in any

[246] H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess. 1, (1976) 20-21, reprinted in [1976] U.S. Code Cong. and Ad. News 6604 at 6619; *Letelier* v. *Republic of Chile* 488 F.Supp 665, 671 (1980 D.C.D.C.).

[247] S. 5.

[248] Art. 11.

[249] 488 F.Supp. 665 (D.C.D.C. 1980); (1980) 19 I.L.M. 1418, discussed by H. D. Collums, "The *Letelier* Case: Foreign Sovereign Liability for Acts of Political Assassination", 21 *Va. J.I.L.* 251-68.

[250] Note No. 180 from the Embassy of Chile to the Dept. of State, 14 August 1979, and accompanying Annex, cited by Collums, op. cit. 259 (above fn. 249).

[251] 488 F.Supp. 665, 671.

action seeking money damages for "personal injury or death . . . caused by the tortious act" of a foreign state or its agents.[252]

The court rejected the Chilean argument based upon acts *jure imperii* saying

> "Nowhere is there an indication that the tortious acts to which the Act makes reference are to only be those formerly classified as 'private', thereby engrafting onto the statute, as the Republic of Chile would have the court do, the requirement that the character of a given tortious act be judicially analyzed to determine whether it was of the type heretofor denoted as *jure gestionis* or should be classified as *jure imperii*.[253]

One would not quarrel with the result of denying the immunity defence to the Chilean government if only because political assassinations are hardly an acceptable, or even necessary, state activity. If, however, *Letelier* is authority for the proposition, and it appears to be, that immunity under the *Foreign Sovereign Immunity Act* will be denied in relation to all torts including those which genuinely fall within the *jure imperii* category, then the immunity defence will have been restricted more severely than ever before. This interpretation leaves open the possibility than a plaintiff might use the U.S. courts to claim damages for, for example, human rights violations by a foreign state where the jurisdictional nexus is established and the injury or death occurs in the U.S.[254] A similar interpretation might equally be given to the corresponding provisions of the *State Immunity Act* and European Convention.

The question for present purposes is whether an international agreement ought to avoid the consequences of the *Letelier* decision by denying immunity where the non-commercial tort has been performed in the exercise of governmental functions. This may be the preferred approach on the ground of consistency with the traditional restrictive immunity rule. This, in turn, raises the question of the extent to which there is an international law rule requiring a state to grant immunity to a foreign State in respect of acts *jure imperii*. It is probably not possible to state such a rule with certainty. While the European Convention expressly preserves immunity where a foreign state acts in the exercise of sovereign authority[255] in areas other than those specifically listed, the *State Immunity Act* permits domestic

252 Ibid. 671 quoting ss. 1605(a)(5).

253 Ibid. note that the exception ss. 1605(a)(5) (A) re a "discretionary function" did not apply as "a foreign country . . . has no 'discretion' to perpetrate conduct designed to result in the assassination of an individual . . ., action that is clearly contrary to the precepts of humanity as recognized in both national and international law", at 673.

254 See *Filartiga* v. *Pena-Irala*, No. 79-6090 (2d Cir. June 30, 1980) where the U.S. filed a memorandum as *amicus curiae* arguing that torture of a foreign citizen by an official of another state is a violation of international law giving rise to a judicially enforceable remedy under U.S. law—28 U.S.C. ss. 1350. See also, Note: "Toward an International Law of Human Rights Based upon the Mutual Expectation of States", 21 *Va. J.I.L.* 185 (1980).

255 Arts. 24(1), 27(2).

courts to exercise jurisdiction over the governmental act of a foreign state in areas other than commercial torts.[256] It is likely that such a rule will, nonetheless, attract closer agreement in the international community than one which permits the exercise of jurisdiction over acts *jure imperii.*

7. THE IMPACT OF OTHER SUBSTANTIVE DEFENCES UPON THE RESTRICTIVE IMMUNITY RULE

The early promise of the *Foreign Sovereign Immunity Act* and *State Immunity Act* in giving legislative certainty and form to the restrictive rule of sovereign immunity and in providing "justice" for private traders, has proved disappointing to commentators[257] in respects other than those discussed above. The foreign sovereign, on being denied the sovereign immunity defence, may be able, nonetheless, to circumvent a primary purpose of the restrictive rule by relying upon other defences. The act of state doctrine,[258] or the conflict of laws rules under which foreign acts will be "recognized" by municipal courts[259] might, for example, permit the absolute doctrine of immunity to re-enter through the back door where it is prohibited through the front.[260] As has been seen in *Rolimpex* an entity which is not classified as a state entity and hence not entitled to rely upon immunity may claim the benefit of *force majeure* or sovereign compulsion and hence avoid the enforcement jurisdiction of a municipal court. The plaintiff is in a dilemma: while the entity cannot claim immunity under the restrictive doctrine, the municipal court will not proceed to judgment where, for example, a contractual breach was required by a foreign state.

As to the first of these defences, the act of state doctrine, the U.S. Supreme Court in *Alfred Dunhill of London Inc.* v. *Republic of Cuba*[261] considered the potential loophole apparent in a rule which requires a

[256] E.g., s. 3(3)(a) and (b).

[257] See, e.g., Singer, loc. cit. (above fn. 104); F. C. Rich, "Act of State and Foreign Sovereign Immunity" (1979) 19 *Va. J.I.L.* 679; Brower, Bistline and Loomis, loc. cit. (above n. 243). Smit, (1980) *Proc. A.S.I.L.*, 49. The act of state defence has been applied: to the expropriation of oil producing facilities by Libya, *Hunt* v. *Mobil Oil* 550 F. 2d 68 (1977); the grant of oil concessions in an area already subject to grants made by another Arab State, *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, [1975] 1 Q.B. 557; and a government initiated boycott of businesses run by nationals belonging to opposition political camps, *Interamerican Refining Corp.* v. *Texaco Maracaibo Co. Inc.* 1970 Trade Cas. ss. 73,069 (D. Del. 1970). The U.S. Dept. of Justice *Anti-trust Guide for International Operations* 52 (1977).

[258] Fuller C.J. articulated this doctrine in *Underhill* v. *Hernandez* 168 U.S. 250, 252 (1897) as follows, "the courts of one country will not sit in judgment on the acts of the another done within its own territory".

[259] Common law states are more likely to rely upon municipal conflict of laws rules than international law considerations of act of state, see, e.g., *Carr* v. *Fracis Times & Co.* [1902] A.C. 176, *Luther* v. *Sagor* [1971] 3 K.B. 532; *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie A.G.* [1939] 2 K.B. 678.

[260] The U.S. brief as *amicus curiae* emphasised that to allow the act of state defence on the facts amounted to no more "than a claim of sovereign immunity in disguise", (1976) 15 I.L.M. 146, 159.

[261] 425 U.S. 682 (1976); 15 I.L.M. (1976) 735.

domestic court to refrain from exercising jurisdiction in relation to the legislative, executive and judicial acts of a foreign State. Four of the five judges in the majority went further than was necessary to dispose of the case. They expressed support for the restrictive approach to sovereign immunity and argued that the act of state doctrine "should not be extended to include the repudiation of a purely commercial obligation owed by a foreign state or by one of its commercial instrumentalities".[262] White J. said "The mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label 'Act of State' than if it is given the label 'sovereign immunity' ".[263]

While other states such as the United Kingdom,[264] Germany,[265] France,[266] Austria[267] and the Netherlands[268] have refused recognition of foreign State acts where they are in flagrant violation of international law, none has done so on the wider ground suggested in *Dunhill*. It may be that these jurisdictions would prefer the view of the dissenting judges in *Dunhill* that the restrictive immunity rule should not be applied automatically to the act of state doctrine or conflict of laws rule. For these judges the retention of the traditional act of state doctrine would allow a court to exercise flexibility in response to underlying political considerations where these may be different from those relevant to sovereign immunity.[269] This approach entails the result that although a foreign state's act may not be immune from the jurisdiction, a court will decline to inquire into its legality under the act of state doctrine. The issue for legislators is whether there are, indeed, considerations of policy which require the retention of an act of state defence but which, at the same time, warrant restricting the operation of sovereign immunity. For example, do policy considerations justify the position that a state is subject to suit in relation to its breach of a commercial obligation, while its legislation requiring the monopolistic marketing of natural resources contrary to the law of the forum is "recognized" as an act of state not properly justiciable before the court? A private trader may fail to see any significant distinction.

262 48 L. Ed. 2d 301, at 312 (1976).
263 Ibid. 318.
264 Only rarely has an English court denied recognition of a foreign decree on the grounds of public policy or international law. See, e.g., *Anglo-Iranian Oil Co.* v. *Jaffrate (Rose Mary)* [1953] 1 W.L.R. 246; *Oppenheimer* v. *Cattermole* [1975] 1 All E.R. 538 (H.L.); *In re Fried Krupp*, [1917] 2 Ch. 188; *In re Claim by Helbert Wagg & Co.* [1956] 1 Ch. 323.
265 See cases listed by O'Connell, op. cit. 808, fn. 56 (above fn. 21).
266 Ibid. 807; the French decisions are generally governed by Art. 545 of the Code, and the test appears to emphasize the question of the "justice" of the act rather than "the territoriality of the act, or its validity at international law".
267 The Austrian courts will not recognize foreign confiscatory acts, *Nationalization of Czechoslovak Enterprise (Austrian Assets) Case*, 28 I.L.R. 14.
268 *Nationale Handelsbank N.V.* v. *Kat's Handel Maatschappij* 30 I.L.R. 375; see discussion by O'Connell, op. cit. 809 (above fn. 21).
269 Per Marshall, Brennan, Stewart, Blackstone JJ. 48 L. Ed. 2d, 301, 329-30. Though note that Lord Wilberforce in *I Congreso* [1981] 3 W.L.R. 328, 339-40, approved the majority view in *Dunhill*.

While it may not be possible to harmonize the immunity and act of state doctrines in every respect,[270] the interests of commercial certainty and fairness favour the restriction of the act of state doctrine, if not along the lines of a governmental/commercial distinction, then perhaps on the basis of acts which are within the "proper" exercise of sovereign power. Any abuse of sovereign power, such as the enrichment of the state at the expense of foreign nationals, for example, would be denied recognition and the act would be a legal nullity.

The sovereign compulsion defence operates rather differently in relation to immunity than does the act of state doctrine.[271] The concept of compulsion depends in the first instance upon a finding that the defendant is neither the state itself nor a state entity or instrumentality. The danger implicit in the *Rolimpex* decision is that the state, by relying upon those sovereign immunity decisions where the courts have been quick to deny that a state entity is an organ of the government, might distribute its governmental functions and assets to separate entities which, while unable to plead immunity, can properly claim sovereign compulsion.[272] The important point is that as *Rolimpex* was not a department of the Polish government, it was entitled to rely on the *force majeure* clause providing that the contract would be void if delivery were prevented by governmental intervention beyond the seller's control. While *Rolimpex* seems a correct decision on the facts, it opens the possibility that states can avoid the restrictive rule of sovereign immunity by establishing an independent entity which is to undertake a commercial function but which is technically bound to abide by governmental decrees and is hence entitled to the sovereign compulsion defence. This circumvention might be hindered by ignoring the technical question of the status of the entity and looking instead at whether the state stands to gain from the breach of contract.[273] A second approach would be to apply relatively stringent limits to the sovereign compulsion defence. There are indications that the United States courts[274] and the Justice Department[275] are moving in this direction. A third technique would be to

[270] This is because it will not always be possible to seek damages against a foreign sovereign in a municipal court, though the individual may claim against a private defendant that the foreign decree ought not to be recognized.

[271] The defence operates when the act done by the defendant was required or compelled by the state of which he is a national. See *Continental Ore Co.* v. *Union Carbide & Carbon Corp.* 370 U.S. 690 (1962); *Mannington Mills Inc.* v. *Congoleum Corp.* 1979 1 Trade Cas. Ss. 62,547 (3rd ed.) (1979) 77,162. The state must not merely permit the act and the defendant must not be able to refuse compliance. The U.S. Justice Department has taken the position that the defence will apply only when the act was compelled within the forum government's own territory and that the defendant must have acted reasonably in complying.

[272] See also *Ralli Bros.* v. *Compania Naviera Sota y Aznar* [1920] 2 K.B. 287, where the trading enterprise could rely on government intervention to frustrate its contract.

[273] See Singer, op. cit. 322 (above fn. 104).

[274] See above, fn. 271.

[275] See U.S. Dept. of Justice Anti-Trust Guide for International Operations 52 (1977).

employ the test suggested by Lord Denning in *Rolimpex*. That is, where the sovereign compulsion or intervention is outside the proper scope of state power or "not for the public good",[276] the courts should be under no obligation to give it legal effect.

It may be, however, that as the U.S. sovereign compulsion defence and the common law defences of force majeure and frustration are not identical, different considerations apply. Where a private party contracts with a separate state entity on the basis of a force majeure clause it might be unjust to treat the entity as though it were the state as this would enable the private party to avoid the explicit terms of the contract. If these defences are considered differently, then the difficulties posed by *Rolimpex* disappear.

CONCLUSION

This discussion of the ambiguities and difficulties which remain in defining the substantive content of the restrictive immunity rule suggests the need for a unified and predictable multilateral codification of the international law rules. It is difficult to assess whether a strong case for a convention is perceived to exist in the international business community. There are some indications that a detailed treaty drafted with the benefit of the U.K. and U.S. legislative experience would be welcomed. For example, the banking institutions loaning to developing states are concerned to ensure that contract obligations can be enforced against state instrumentalities.[277] They will frequently insist upon the inclusion of waiver provisions which, while they may not have legal effect outside the U.S. or U.K., suggest a concern that the sovereign immunity defence puts the private party at a particular disadvantage.[278] Further, the interesting point was made during the debate in the House of Lords on the *State Immunity Bill* that the legislation was essential to provide business certainty and to prevent loan agreements moving from the City of London to New York where the *Foreign Sovereign Immunity Act* 1976 was in force. Certainly it would be desirable to negotiate contracts in a jurisdiction in which the sovereign immunity defence was clearly defined by legislation.

276 See this text at p. 89.

277 See, e.g., Stevenson and Brown, loc. cit. (above fn. 11).

278 Two New York banks withdrew from an agreement to loan $150 million to a Brazilian entity guaranteed by the Brazilian government in 1977 because of dissatisfaction with the contractual guarantees, *Wall Street Journal* 21 December 1977.
For example, the following waiver has been used recently by an Australian lending institution, "To the extent that the Borrower is legally able to do so the Borrower irrevocably waives any state or sovereign immunity in relation to such action or proceeding and if such advance waiver is not legally possible to the extent that the Borrower is legally able to do so the Borrower agrees to submit to such jurisdiction and to such process of execution in the face of the court".
It is doubtful, however, that such a waiver clause will be effective even under the State Immunity Act 1978 (U.K.).

On the other hand there appears to be a certain confidence that state trading organizations will, in practice, accept compulsory conciliation or arbitration in the event of a dispute.[279] On balance, however, the efforts of the International Law Commission to draft an international convention on immunity seem worthwhile in the interests of fair dealing and predictability.

[279] See, e.g., H. M. Holtzmann, "Settlement of Investment Disputes in East-West Trade", 10 *Int'l Lawyer* 123, 131 (1976); Chinese Law on Joint Ventures, 8 July 1977 (Art. 4).

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