central government and therefore covered by s 14(1). And s 14(5) and (6) as summarised above only refers to the immunity of the constituent territory itself (for instance, 'as if it were a separate entity'), but does not touch a separate entity or a corporation created by the constituent territory. Nor can such an entity be treated as if it were a department of the constituent territory's government. The wording is so clear that a body corporate which is separate and distinct cannot be put on the same level as its creator. Different reasoning was possible and was in fact adopted under the common law, but it is not supported by the accepted canons of statutory interpretation. Nor is there any cause for regretting that such a body as the New Brunswick Development Corporation no longer enjoys immunity in this country. International law did not at any time confer such a privilege upon it.

*Exceptions to immunity*

The Act includes 10 provisions which create exceptions to the rule of immunity established by the first section. Many of them and certainly those which in practice are the most important ones are founded upon the existence of a 'commercial transaction' or of 'commercial purposes'. They adopt the distinction between acts *jure imperii* and acts *jure gestionis*, which in 1951 the Inter-Departmental Committee had rejected as unacceptable. What is more, to a large extent they refrain from a definition, but leave it to the courts to work out the distinction. In fact 'commercial purposes' is defined in s 17(1) in somewhat circular terms, namely by reference to the definition of 'commercial transaction', in s 3. It is a field which has yielded a large harvest in foreign jurisdictions. Both the Brussels and the European Conventions as well as the recent legislation adopted by the United States of America have accepted exceptions based on the commercial character of the activity. There can be no question of foreign legal developments being a source of law governing the interpretation of an English statute. Yet where the English statute intends to codify the law in a manner consistent with international law, comparative material will have persuasive material of varying strength in construing terms that are now accepted to be common to most countries and expressive of the present state of public international law.

Another general point which requires emphasis is that it would be unjustifiable to subject ss 2 to 11 of the Act to a narrow construction on the ground that they contain exceptions to the principle laid down in s 1. The European Convention precluded any such argument by enumerating in Articles 1 to 14 the circumstances in which a state is not entitled to immunity and by providing in Article 15 for immunity 'if the proceedings do not fall within' the former group. In England it has frequently been a technique of statutory interpretation to say that an exception does not derogate from the principle to a greater extent than the words strictly require, that, in other words, in case of doubt the principle rather than the exception should be held to apply.[25] But this is not invariably so and should certainly not be so in the present case. What the legislator described as exceptions represents a very broad sector of state activity. Its limits should be so drawn as to fit the legislative purpose behind each provision rather than the drafting technique that the legislator followed. The so-called exceptions are a far-reaching group of provisions which are not subordinate, but equal to, on the

25 Such suggestions have frequently been made. See, eg Cockburn LJ in *Sowerby v Smith* [1884] LR 9 CP 524 at 532 where he said that a certain provision 'being in derogation of the freehold given by the Act … must, I think, be construed most strictly'.

same level as the so-called principle. Hence the rule usually applicable to the construction of exceptions does not fit.

The 10 exceptions and their principal implications are as follows:

1 The state which 'has submitted to the jurisdiction of the courts of the United Kingdom' is disentitled to immunity. Submission may come about in four different ways.[26]

First by prior written agreement – an important change in the law of the United Kingdom. Whether there is an agreement and how it is to be construed will be a matter for the proper law of the contract.[27] The Act states that submission of an agreement to English law is not tantamount to submission to English jurisdiction. On the other hand, if English law applies, a clause such as that authorising an English solicitor to accept service or process ought to be treated as a submission. Whether the agreement is in writing is likely to be a matter for English law, which would have no difficulty in holding that the exchange of telex or cable messages or a written reference to an unsigned document such as the identifiable printed form of a contract constitutes sufficient writing. Whether a state which repudiates the agreement to submit remains subject to jurisdiction is likely to come up for judicial decision, it is submitted that the question should be answered in the affirmative.[28]

Secondly, submission may occur 'after the dispute giving rise to the proceedings has arisen'. Here no formality would seem to be required. Once there is a dispute (and it may not always be easy to define its beginning) even an oral statement accepting jurisdiction will be sufficient; a submission in proceedings actually pending does not seem to be required.

If the state 'has intervened or taken any step in the proceedings' then it is 'deemed to have submitted'; this is the third method. If one accepts the law relating to the Arbitration Act 1950, an unconditional appearance will not be regarded as a step in the proceedings,[29] nor will the claim to immunity so be regarded, as the Act expressly states.

The fourth case is the obvious one in which the state itself has instituted the proceedings. In such event the state is exposed to a counter-claim which 'arises out of the same legal relationship or facts as the claim'. It is not necessary that a court in the United Kingdom has (local) jurisdiction in respect of the cross-claim made by the defendant. It is possible, therefore, that the defendant may pursue a claim which he could not pursue by writ.

2 The second exception will in practice be the most important one. According to s 3 the state does not enjoy immunity 'as respects proceedings relating to (a) *a commercial transaction* entered into by the state, or (b) an obligation of the state which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom', provided that

26 Section 2.

27 This is the effect of the decision of the House of Lords in *Nova (Jersey) Knit Ltd v Kammgarnspinnerei* [1977] 1 WLR 713 where the agreement required by s 1(1) of the Arbitration Act 1975 was considered to be subject to German Law.

28 The analogy of such cases as *Heyman v Darwins* [1942] AC 356 and of the established practice of the International Court of Justice (see, eg *Fisheries Jurisdiction* case (*United Kingdom v Iceland*) [1973] *ICJ Rep* at p 3) may prove helpful.

29 Section 4.

the latter rule does not apply 'if the contract (not being a commercial transaction) was made in the territory of the state concerned and the obligation in question is governed by its administrative law'.

The rule laid down by sub-para (b) will be readily understood. It is likely to cover many cases. The legal problem which primarily causes difficulty is whether the requirement of total or partial performance in the United Kingdom is to be determined by English law or by the proper law of the contract which, so it must be assumed, is intended by the legislator to govern the existence as well as the construction of the contract, though not its commercial character. The difficulty thus alluded to has arisen in many contexts and is a famous one in the conflict of laws;[30] it led only recently to a decision of the European Court of Justice.[31] It is suggested, though with much hesitation, that it would be so artificial to subject the construction of the contract and the determination of the place of performance to different legal systems that there will be no alternative but to allow the proper law to prevail in both respects.

Nor will sub-para (a) cause much difficulty in the majority of cases, for the Act defines 'commercial transaction' in the widest terms so as to comprise all contracts (except contracts of employment) and any other transaction into which a state enters 'otherwise than in the exercise of sovereign authority'.

In effect, therefore, not only concession agreements but practically every other type of contract will be within the exception, including those contracts which have given trouble to tribunals as well as scholars. The legislator has decided in favour of the objective test of the nature of the transaction and completely disregarded the Inter-Departmental Committee which in 1951 thought[32] that the principle of *jure gestionis* (now adopted as an exception) was not one 'which, even if justified by international law ... could be incorporated into our law as a principle'. The Act of 1978 has provided a definition and made it quite clear that all the contracts which in 1951 were apparently thought to be acts done *jure imperii* are commercial transactions. Government loans, shoes for the army, warships, guns, aeroplanes – all these are the subject matter of commercial transactions in respect of which immunity cannot be claimed. As mentioned above, even a mining concession agreement, though not a contract within the category of contracts mentioned in (b), would be a commercial transaction, because it would be 'any other transaction' ... into which a state enters', unless 'the parties to the dispute are states or have otherwise agreed in writing'. A substantial limitation, however, is due to the fact that before immunity or its absence falls to be considered an English court must have (territorial) jurisdiction, and this will frequently be a serious hurdle for the plaintiff. A very important point must be emphasised: the denial of immunity is independent of the nature of the act from which the claim arises. If the transaction or activity into which a state enters or in which it engages is a commercial one, the state is disentitled to immunity even in cases in which, for instance, the breach of contract arises from an act done in the exercise of sovereign authority. All that matters is the character of the transaction or activity carried on by the state as opposed to

30 *Cf* Mann, *The Legal Aspect of Money*, 3rd edn, 1971, Oxford: Oxford University Press at pp 206–08.

31 *Etablissements A De Bloos v Etablissements Bouyet SA* [1977] 1 CMLR 60.

32 Paragraph 5.

the facts on which the claim or the defence is founded.[33] These facts may even constitute an act of state. As the law stands, its validity probably may not be questioned for reasons which have nothing to do with the Act of 1978, but if the court is concerned only with its effects upon what is a commercial transaction it is not precluded from considering them either by the rule of immunity or by the alleged sacrosanctity of the act of state.[34]

The puzzling feature of s 3 lies in the fact that, according to the definition, the term 'commercial transaction' includes 'any ... activity ... in which [the state] engages otherwise than in the exercise of sovereign authority'. The state is not immune 'as respects proceedings relating to' such an activity. It is submitted that the definition is such as to render it possible to sue a foreign state in respect of a tort other than those mentioned in ss 5 to 7 which has been committed in England, such a tort providing the court with (territorial) jurisdiction according to Order 11 rule 1(h) of the Rules of the Supreme Court. In this somewhat unexpected manner torts do come within the scope of the Act in such a case as *Krajina v The Tass Agency*,[35] but also other cases involving, for instance, claims for damages for fraud or conspiracy. The same applies to cases in which confidential information has been imparted to a foreign state, but misused by it or its agent – a by no means inconceivable situation. The only activity which cannot in any circumstances be a commercial activity is one exercised by virtue of sovereign authority – a phrase which, it is submitted, only qualifies the word 'activity', not the words 'any other transaction'. The term will have to be construed according to English law.[36] In other words the classification of facts alleged to satisfy a conception used by the English legislator must be provided by English law, however alien to English notions they may be. Even if by Soviet law the publication of *The Soviet Monitor* is an act of sovereign authority, this is unlikely to be so under English law.[37] According to the Report of the Inter-Departmental Committee, in 1951 an Italian court decided that the publication in Italy, by a Brazilian state, of a magazine strictly for the purpose of encouraging immigration to Brazil, was not an act done *jure imperii* in respect of which Brazil was entitled to immunity.[38] An English court ought to hold similarly that the publication of such a paper is not an act done in the exercise of sovereign authority. It would be different, for instance, if a foreign

33 The decision of Robert Goff J in *I Congeso del Partido* [1978] 1 All ER 1169 on this point could not even under the old law easily be supported. It is certainly contrary to the construction which the Act requires.

34 *Cf* the decsion of the Court of Appeal in *Buttes Gas & Oil Co v Hammer* [1975] QB 557.

35 [1949] 2 All ER 274.

36 The Head of New Scotland Yard who upon request sends a report on the Church of Scientology of California to the Federal Republic of Germany's Federal Criminal Office acts in exercise of sovereign authority and is immune in Germany: German Federal Supreme Court, 26 September 1978, *Neue Juristische Wochenschrift*, 1978, p 1101.

37 In *Yessenin-Volpin v Novosti Press Agency, Tess Agency and the Daily World* (1978) 443 F Sup 849 also (1978) *International Legal Materials* 17 at p 720, a United States district court decided that, although by publishing newspapers the defendants engaged in commercial activity, a libel published in the newspaper was not 'in connection with a commercial activity' for the newspapers were committing 'acts of inter-governmental co-operation'. The decision should not be followed for this reason, among others, that it classifies the terms of a US statute according to Soviet law and practice.

38 Paragraph 18.

state were to send a diplomatic note to the Foreign and Commonwealth Office; a libel contained in it could not be pursued by proceedings here if the defendant state raised the plea of immunity. The argument here put forward and based on the words 'proceedings relating to ... any ... activity ... in which [the state] engages otherwise than in the exercise of sovereign authority' cannot be met by a reference to ss 5 to 7, which deal with certain torts committed in England. Section 3 comprises torts wherever committed, provided the English court has (territorial) jurisdiction in respect of claim or counter-claim. A tort committed abroad may yet have been committed in England if the damage has occurred here. Furthermore, the fact that certain torts are specifically mentioned does not necessitate the conclusion that other torts are not caught by the wide terms of s 3.

It must be made clear, however, that an activity may be in the exercise of sovereign authority even if it is lawful. Property taken by force may be taken by way of sovereign authority.

The width of the exception allowed by s 3 is likely to be fully recognised only in years to come in the light of experience which practice will bring forth and which at this stage is hard to perceive and foresee.

3 The third exception relates to a *contract of employment* between the foreign state and an individual who is (only) a national of the United Kingdom or habitually resident there, provided that either the contract was made or the work is wholly or partly performed here (s 4). It is open to the parties to agree otherwise in writing, and if the employment is for work in an office, agency or establishment, maintained in the United Kingdom, the state cannot claim immunity except if, at the time when the contract was made, the individual was habitually resident in that state.

Once again the question whether a contract was made and what its terms are must be decided by the proper law. But whether it constitutes a contract of employment, ie a contract of service rather than a contract for services, whether it was made in the United Kingdom or where the individual's habitual residence was – these are questions governed by English law. The question where a contract is made is, as one knows only too well, a particularly difficult one and it is at first sight not easy to understand where the letter of acceptance is posted. Immunity and acceptance of an offer are so different in character that to make the former subject to the latter is a little incongruous.

The section is a narrow one and may support results which will not necessarily appear justifiable. If Nigeria makes in London a contract which is governed by English law and by which a citizen and resident of the United States of America agree to serve on an oil rig on the high seas it would appear that the employer is entitled to immunity in an English court, the (territorial) jurisdiction of which may follow from Order 11.

4 The next exception applies to the case in which the foreign state causes in the United Kingdom *injury to a person or to property*: s 5. The provision and its application are fairly obvious and will only in the most exceptional cases give rise to any problems of construction. One such problem is due to the fact that the section requires the damage to or loss of property to have been caused by an act or omission in the United Kingdom, but does not require the property to be situate there. Suppose a London merchant deposits goods in a warehouse in state X on the understanding that they will be released to him or his order upon production of an authority signed by the merchant and countersigned by the Trade Delegation in London. The Trade Delegation is

contractually bound, but refuses to countersign. The loss of the goods is said to be caused by the failure of the Trade Delegation to act in London. It would seem that in such circumstances state X is not entitled to immunity in an action for damages.

5 The fifth exception, established by s 6, is in certain respects particularly interesting. Sub-sections 1 to 3 deprive the foreign state of immunity in regard to *immovable property* in the United Kingdom, any interest of the state in property of whatever kind and wherever situate if it arises by way of succession, gift or *bon vacantia*, or any interest in an estate of deceased persons, insolvent persons and others and in a trust. In the vast majority of cases the property or the estate will be in the United Kingdom. In such a case the exception is clearly justified and necessary and largely supported by earlier law. In some cases the exception would also seem to apply if the property or estate or trust is situate abroad, but they cannot often occur in an English court.

While the cases thus alluded to may seem fairly clear and even familiar, there is buried among them one particular set of facts which, one may be sure, the legislator did not contemplate but which, it is submitted, may be covered by them. It unfortunately happens quite frequently that states cause the dissolution of corporations and take over their assets and liabilities, sometimes for purposes of a confiscatory character, and that such measures are believed to protect the corporation and its property from the jurisdiction of foreign courts or arbitrators. These are instances of a universal succession and should in future come within the ambit of s 6(2), so that the state can be made personally liable in respect of the 'deceased' corporation's contracts. Such proceedings would appear to relate 'to any interest of the state in movable or immovable property, being an interest arising by way of succession ...' These are words which do not need to be limited to proprietary interests, but may be said to comprise liabilities for the discharge of which the property is, in a loose sense, a security.[39] Even where the state takes only the assets of the dissolved corporation and purports to leave its liabilities unprovided for, *ordre public* would require it to be held liable and for the reasons given it should not be entitled to immunity.[40]

Sub-section 4 reads as follows:

> A court may entertain proceedings against a person other than a state notwithstanding that the proceedings relate to property:
>
> (a) which is in the possession or control of a state; and
>
> (b) in which a state claims an interest,
>
> if the state would not have been immune had the proceedings been

39 *Cf* the French principle of the *patrimoine* of which Charbonnier, *Droit Civil*, Vol 3 section 2 has said: '*c'est la charactĕristique de la succession au patrimoine (in universum jus) ... que d'être, tout à la fois et indivisiblement, succession à l'actif et au passif*', and he quotes the maxim: *bona non sunt nisi deducto aere alieno*.

It is believed that, for the reasons given in the text, *Thai-Europe Tapioca Service Ltd v Government of Pakistan* [1975] 1 WLR 1485 should today be decided differently. On universal succession generally see *Metliss v National Bank of Greece* [1958] AC 509 and *Adams v National bank of Greece* [1961] AC 255.

40 On *ordre public* in case of universal succession see *Metliss'* case in the Court of Appeal [1957] 2 QB 33 at p 48 *per* Romer LJ; and *Adams'* case [1961] AC 255 at p 289 *per* Lord Denning.

brought against it, or in a case within para (b) above, if the claim is neither admitted nor supported by *prima facie* evidence.

If one ignores ships, which are separately dealt with in the Act, this is the case of the Bank of England with which the state has deposited gold[41] or of Sotheby's who hold a painting sent to them by the state for sale. If proceedings are brought against the Bank of England or Sotheby's by a plaintiff who claims to be the owner or entitled to immediate possession, no Continental court, so it appears, would ever have thought of immunity coming into play, because this is conceived as a personal privilege of the defendant who, if he holds property for a state and cannot bring it before the court by interpleader proceedings, must make his own arrangements with it, but cannot confront the plaintiff with the immunity of the third party. In this country, however, the unfortunate idea grew up and was repeatedly sanctioned by the House of Lords[42] that indirect possession or control by a state involved its 'indirect interpleading' and entitled the defendant actually in possession to immunity. This, one notices with satisfaction, has been abolished in the sense that the defendant can only claim it if the state in an action against it directly could do so. One is thus directed to look again at s 3 and finds that the outcome depends on whether the proceedings relate to any transaction or activity into which the state has entered or in which it has engaged otherwise than in the exercise of sovereign authority. It would seem, therefore, that in the circumstances of the *Dollfus Mieg & Cie* case the plaintiff could not today succeed, because the state which had deposited the gold with the Bank of England had done so and, indeed, had obtained the gold in the exercise of sovereign authority, so that an action against the states which were the bailors would be stayed. If, on the other hand, the plaintiff has purchased identifiable gold bars from the state which has deposited them with the Bank of England but refuses to release them he is entitled to succeed in regard to any plea of immunity. Property which has been confiscated without compensation or, indeed, which has been taken without colour of legality cannot be recovered from the state. Accordingly it cannot be recovered from the defendant in England who is in possession of it. *Rahimtoola v Nizam of Hyderabad*[43]is now a more doubtful case. Lord Denning, whose approach is much to be preferred to that of his colleagues, put forward the attractive and, indeed, convincing thought that the facts pointed to 'an international transaction' or, as Upjohn J had said in the Court of First Instance, an 'intergovernmental transaction' between the Finance Minister of Hyderabad and the Foreign Secretary of Pakistan, a 'transaction more in the nature of a treaty than a contract or trust'.[44] On this basis the court had to deal with a transaction entered into in the exercise of sovereign authority, with the result that Pakistan or its agent, the defendant, could claim immunity and so could the Westminster Bank if the debt due from it could be said to be property in the possession or control of Pakistan or in which Pakistan claimed an interest. This condition, probably, was under the old law and would now be fulfilled, though, as Lord Denning pointed out, it remains very difficult to understand (and none of the other Law Lords satisfactorily

41 *United States of America v Dollfus Mieg & Cie* [1952] AC 582.

42 For the first time in *The Christina* [1938] AC 485.

43 [1958] AC 379.

44 At pp 422, 423.

explained) why in the *Dollfus Mieg* case the claim for damages in respect of the converted 13 gold bars was allowed to proceed, while the debt due from the Westminster Bank to the Nizam of Hyderabad as beneficial owner could not be pursued. The conclusion is not entirely fortunate: two of the most regrettable decisions of the House of Lords in the field of sovereign immunity would appear to have been sanctioned by the legislator who at the same time has done nothing to eliminate the logical inconsistency between them.

The sub-section, it will be noted, makes a curious distinction between property which is in the possession or control of a state and property in which a state claims an interest. In the former case the state will have to prove that it is in possession or control, but in the latter case the claim to immunity, unless admitted, will succeed if it is supported 'by *prima facie* evidence'. Two things have to be said about this provision. The claim to an interest in property as a basis for immunity seems to originate with Lord Wright who used the phrase in *The Christina*[45] when he spoke of interests 'lesser than a proprietary interest or even than a possessory interest'. But he probably treated them merely as illustrations of control,[46] while the section under discussion draws a sharp distinction. It is a serious question whether in a statutory text an imprecise phrase used in a judicial opinion should not be given a strict meaning. If so, 'an interest' could only denote an equitable interest as understood by the general law of England. However this may be, the effect is that from the state's point of view it may be more advantageous to allege 'an interest' rather than 'possession or control'. Moreover, the idea that *prima facie* evidence is sufficient and strict proof is not required, though it comes from an Admiralty case,[47] used to have universal validity. It is now clearly confined to the single case of a claim to 'an interest' in property other than ships.

6 Exception 6 relates to industrial property rights in the United Kingdom. No immunity exists where the proceedings relate to any such right belonging to the foreign state and protected in the United Kingdom or to the infringement by the state of any such right belonging to someone else or to a passing-off in the United Kingdom: s 7.

These provisions, the statutory definition of which is much more detailed and precise, are unlikely to prove troublesome and do not require comment at this stage.

7 Similar remarks apply to the seventh exception. A state which is a member of a corporate or unincorporated body and involved in proceedings brought by such body or its other members cannot claim immunity: s 8. The only point which deserves emphasis is that the section applies not only to bodies created in the United Kingdom, but also to such body as 'is controlled from or has its principal place of business in the United Kingdom'. In some very special circumstances it may be possible to bring an action here against a foreign state as a member of a corporation which is formed under such state's own law, but controlled from the United Kingdom.

8 The eighth exception is designed to overturn a most unfortunate and at the

45 [1938] AC 485 at p 507.

46 This was how he was understood by Earl Jowitt in the *Dollfus Mieg & Cie* case [1952] AC 582 at p 604.

47 *Juan Ysmael & Co Inc v Indonesian Government* [1955] AC 72, noted in (1955) 18 *Modern Law Review* at p 184.

same time wholly avoidable decision of the House of Lords.[48] Where a state has agreed to arbitration, it is without immunity 'as respects proceedings in the courts of the United Kingdom which relate to the arbitration': s 9. It will be noted that the section is not limited to arbitration in the United Kingdom. English awards made against a foreign state can be turned into judgments of an English court (though this should rarely be necessary or useful) and a foreign award can be made enforceable here, though not enforced except as mentioned below. The section also gives jurisdiction to the court to make interlocutory orders for the security of costs, discovery, etc such as are provided for in the Arbitration Act 1950.

9 Exception 9 is of great practical importance in that it excludes immunity in respect of *ships* used or intended to be used for 'commercial purposes': s 10. The principle as expressed in sub-s 2 extends to cargo and other property belonging to or in the possession or control of the state or in which it claims an interest (sub-ss 4 and 5). But the whole section is applicable only in Admiralty proceedings or in proceedings which could be brought in Admiralty (sub-s 1); in such proceedings ss 3 to, that is to say, exceptions two, three and four discussed above, do not apply if the defendant state is a party to the Brussels Convention, for the Act does not intend to interfere with the latter as a self-contained code.

The main point to be made in connection with s 10 arises from the term 'commercial purposes' which occurs in many sections and which in the present context has very special significance. It is to be contrasted with 'commercial transaction' in s 3 which is determined by its objective nature rather than its possibly subjective purpose, in the same way as the American Foreign Sovereign Immunities Act 1976 which takes 'commercial activity' as a test and defines it 'by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose'.

The starting point would seem to be clear: the meaning of 'commercial purposes' should be construed according to English notions. The plaintiff has to prove the facts, but it is for English law to say whether they establish 'commercial purposes' in the English sense.

In answering this question it will be necessary to distinguish clearly between ships and cargo.

As regards a ship the state is disentitled to immunity if the ship belongs to it (in the wide sense referred to above) and is used or intended to be used for commercial purposes. Cargo does not enjoy immunity if the cargo belongs (again in the extended sense mentioned above) to the state and both the cargo and the ship are used or intended to be used for commercial purposes. The last-mentioned two words, therefore, are crucial. A warship which happens to be used for carrying motor-cars for civilian use cannot be immune, but if a trading ship carries ammunition for military purposes both the ship and the cargo are immune, at least if there is no commercial cargo on board. Cement carried in a trading ship may be immune: the result depends on the purpose for which it will be used. If the consignee intends to sell the cement to the military administration, but is not contractually bound to do so, the non-commercial purpose does not in a legally relevant sense exist. If the consignee has sold an identifiable quantity being part of the cargo of cement for the

48 *Duff Development Co v Kelantan* [1924] AC 797, on which see Cohn (1958) 34 *BYIL* at p 260, and Mann (1967) 42 *BYIL* at p 17, also (1973) *Studies in International Law* at p 276.

building of military barracks, immunity extends to such quantity and it would probably be no counter-argument that one must not look beyond the consignee; what matter are the ultimate purposes in so far as they can be proven. Shoes for the army (to revert to an often-discussed example) are cargo for a non-commercial purpose, but if they are consigned to a private merchant who only hopes to sell them to the army, the purpose remains non-commercial. If the consignee is the state itself and intends to use the cargo for the business of a state monopoly such as a tobacco or alcohol monopoly, this is a commercial purpose, though the consignee may regard it as a public purpose. Conversely, if there exists in England a monopoly for the production and sale of certain goods (as at present is not the case) this would not prove that the similar goods carried in a foreign ship are not intended for commercial purposes: a state monopoly as such is not by any means a non-commercial venture.

10 The last exception (s 11) does not require more than mention, for it is unlikely to fall often for consideration. No immunity can be claimed by a defendant state in proceedings brought to recover value added tax, customs duty or any agricultural levy or rates in respect of premises occupied for commercial purposes.[49]

### *9.2.4 The current legal position*

It is difficult to state the current position with regard to state immunity with any clear certainty. Most writers stress the trend towards the restrictive approach in the practice of states without going as far as to claim it as an unopposed rule of customary international law. Even if the restrictive view is accepted as reflecting customary law there remains the problem of clearly distinguishing between acts *jure imperii* and acts *jure gestionis*. One aspect of the distinction is whether the deciding factor should be the nature of the activity in issue or whether it is the purpose of the transaction which is more significant. Certainly the US and the UK cases seem to favour a distinction based on the nature of the transaction involved and in the *Empire of Iran* case (1963)[50] the German Constitutional Court stated:

> As a means of determining the distinction between *actus jure imperii* and *jure gestionis* one should refer rather to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity.

In 1986 the ILC published its Draft Articles on Jurisdictional Immunities of States and Their Property, and these have since been revised in the light of the comments of states. The draft articles provide for the immunity of states subject to a number of exceptions. 'State' is defined in Article 3 and includes the organs of government, political subdivisions of the state, State agencies and representatives of the state acting in an official capacity. Of particular interest in the context of the discussion about acts *jure imperii* and acts *jure gestionis* is Article 3(2) which provides:

> In determining whether a contract for the sale or purchase of goods or the supply

49 FA Mann, 'The State Immunity Act 1978' (1979) 43–62 *BYIL* at pp 48–58.

50 (1963) 45 ILR 57.

of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that state, that purpose is relevant to determining the non-commercial character of the contract.

The latest draft was published in 1991 and the 6th Committee of the UN General Assembly is currently debating whether to recommend that the General Assembly convenes an international conference to produce a convention on the matter.

## 9.3 Foreign armed forces

Members of the armed forces usually enjoy limited immunities from local jurisdiction while in the territory of a foreign state. Obviously such immunities only apply where the forces are present with the consent of the host state. The nature and extent of the immunities generally depend on the circumstances under which they were admitted, although simple admission itself can produce legal consequences. The receiving state impliedly agrees not to exercise jurisdiction in such a way as to impair the integrity and the efficiency of the force. The general rule is that the commander of visiting forces has exclusive jurisdiction over offences committed within the area where the force is stationed or while members of the force are on duty. Usually the status and immunities of foreign troops will be the subject of specific agreement. Thus under the North Atlantic Treaty Agreement 1951 the sending state has the primary right to exercise jurisdiction over NATO troops stationed abroad in other member states.

## 9.4 Diplomatic immunity

## VIENNA CONVENTION ON DIPLOMATIC RELATIONS[51]

The States Parties to the present Convention

*Recalling* that the peoples of all nations from ancient times have recognised the status of diplomatic agents,

*Having in mind* the purposes and principle of the Charter of the United Nations concerning the sovereign equality of states, the maintenance of international peace and security, and the promotion of friendly relations among nations,

*Believing* that an international convention on diplomatic intercourse, privileges and immunities would contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

*Realising* that the purpose of such privileges and immunities is not to benefit the individuals but to ensure the efficient performance of the functions of diplomatic missions as representing states,

*Affirming* that the rules of customary international law should continue to govern

51 Adopted 16 April 1961 by the UN Conference on Diplomatic Intercourse and Immunities held in Vienna (UN Doc A/CONF 20/13). The Convention entered into force on 24 April 1964.