violation of international law or of the domestic law of the foreign states involved, the decisions under challenge could not be impugned nor the subsequent criminal proceedings be vitiated.[182]

The US Alien Tort Claims Act[183]

Under this Act, the First Congress established original district court jurisdiction over all causes where an alien sues for a tort 'committed in violation of the law of nations or a treaty of the United States'.[184] In *Filartiga* v. *Pena-Irala*,[185] the US Court of Appeals for the Second Circuit interpreted this provision to permit jurisdiction over a private tort action by a Paraguayan national against a Paraguayan police official for acts of torture perpetrated in that state, it being held that torture by a state official constituted a violation of international law. This amounted to an important move in the attempt to exercise jurisdiction in the realm of international human rights violations, although one clearly based upon a domestic statute permitting such court competence. The relevant issues in such actions would thus depend upon the definition of the 'law of nations' in particular cases.[186]

In *Tel-Oren* v. *Libyan Arab Republic*,[187] however, the Court dismissed an action under the same statute brought by survivors and representatives of persons murdered in an armed attack on an Israeli bus in 1978 for lack of subject-matter jurisdiction. The three judges differed in their reasoning. Judge Edwards held that the law of nations did not impose liability on non-state entities like the PLO. Judge Bork, in a departure from the *Filartiga* principles, declared that 'an explicit grant of a cause of action [had to exist] before a private individual [will] be allowed to enforce principles of international law in a federal tribunal',[188] while Senior Judge Robb held that the case was rendered non-justiciable by the political question doctrine.

182 [1998] 1 WLR 652, 665–7. See also C. Warbrick, 'Judicial Jurisdiction and Abuse of Process', 49 ICLQ, 2000, p. 489.

183 28 USC, para. 1350 (1982), originally enacted as part of the Judiciary Act of 1789. See also 28 USC, para. 1331, and above, chapter 4, p. 159.

184 Cassese notes that the extensive civil jurisdiction claimed under this Act has not been challenged by other states, 'When may Senior State Officials', p. 859.

185 630 F.2d 876 (2d Cir. 1980); 77 ILR, p. 169. See also 577 F.Supp. 860 (1984); 77 ILR, p. 185, awarding punitive damages.

186 In establishing the content of the 'law of nations', the courts must interpret international law as it exists today, 630 F.2d 876, 881 (1980); 77 ILR, pp. 169, 175.

187 726 F.2d 774 (1984); 77 ILR, p. 204. See also 'Agora', 79 AJIL, 1985, pp. 92 ff. for a discussion of the case.

188 726 F.2d 801; 77 ILR, p. 230.

Further restrictions upon the *Filartiga* doctrine have also been manifested. It has, for example, been held that the Alien Tort Claims Act does not constitute an exception to the principle of sovereign immunity so that a foreign state could not be sued,[189] while it has also been held that US citizens could not sue for violations of the law of nations under the Act.[190]

In *Sanchez-Espinoza* v. *Reagan*,[191] suit was brought against a variety of present and former US executive officials for violation *inter alia* of domestic and international law with regard to the US support of the 'Contra' guerrillas fighting against the Nicaraguan government. The Alien Tort Claims Act was cited, but the Court of Appeals noted that the statute arguably only covered private, non-governmental acts that violated a treaty or customary international law and, relying on *Tel-Oren*, pointed out that customary international law did not cover private conduct 'of this sort'.[192] Thus the claim for damages could only be sustained to the extent that the defendants acted in an official capacity and, even if the Alien Tort Claims Act applied to official state acts, the doctrine of domestic sovereign immunity precluded the claim. In *Kadić* v. *Karadžić*,[193] the US Court of Appeals emphasised the 'liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations'.[194] In particular, it was noted that the proscription of genocide and war crimes and other violations of international humanitarian law applied to both state and non-state actors, although torture and summary execution (when not perpetrated in the course of genocide or war crimes) were proscribed by international law only when committed by state officials or under colour of law.[195] Even in this case, it may be that all that was required was 'the semblance of official authority' rather than establishing statehood under the formal criteria of international law.[196] The Court also held that the Torture Victim Protection Act 1992, which provides a cause of action for torture and extrajudicial killing by an individual 'under actual or apparent authority, or colour of law, of any foreign nation', was not itself a jurisdictional statute and depended upon the establishment of jurisdiction under either

[189] *Siderman* v. *Republic of Argentina* 965 F.2d 699 (1992).
[190] *Handel* v. *Artukovic* 601 F.Supp. 1421 (1985); 79 ILR, p. 397.
[191] 770 F.2d 202 (1985); 80 ILR, p. 586. [192] 770 F.2d 206–7; 80 ILR, pp. 590–1.
[193] 34 ILM, 1995, p. 1592. [194] *Ibid.*, p. 1600. [195] *Ibid.*, pp. 1602–6.
[196] *Ibid.*, p. 1607.

the Alien Tort Act or under the general federal question jurisdiction of section 1331.[197]

The Alien Tort Act was relied upon again in the *Amerada Hess* case which concerned the bombing of a ship in international waters by Argentina during the Falklands war and where it was claimed that the federal courts had jurisdiction under the Act. A divided Court of Appeals[198] held that the Act provided, and the Foreign Sovereign Immunities Act did not preclude,[199] federal subject-matter jurisdiction over suits in tort by aliens against foreign sovereigns for violations of international law. However, the Supreme Court unanimously disagreed.[200] It was noted that the Act did not expressly authorise suits against foreign states and that at the time the Foreign Sovereign Immunities Act was enacted, the 1789 Act had never provided the jurisdictional basis for a suit against a foreign state.[201] Since the Congress had decided to deal comprehensively with sovereign immunity in the Foreign Sovereign Immunities Act, it appeared to follow that this Act alone provided the basis for federal jurisdiction over foreign states. This basis was thus exclusive. The Court did note, however, that the Alien Tort Claims Act was unaffected by the Foreign Sovereign Immunities Act in so far as non-state defendants were concerned.[202] In *Alvarez-Machain* v. *United States*, the accused in the case noted above[203] commenced an action for compensation under the Act following his acquittal. The Court of Appeals for the Ninth Circuit rejected the claim that the Act required that the international law principle violated should also constitute a norm of *jus cogens.* The Court also rejected the contention that the applicant could sue for the violation of Mexican sovereignty implicit in his abduction. However, it affirmed that the applicant's rights to freedom of movement, to remain in his country and to security of his person (which are part of the 'law of nations') were violated, while his detention was arbitrary since

197 *Ibid.*, pp. 1607–8. Note, however, that since the Antiterrorism and Effective Death Penalty Act 1996 amending the Foreign Sovereign Immunities Act, an exception to immunity is created with regard to states, designated by the Department of State as terrorist states, which committed a terrorist act, or provided material support and resources to an individual or entity which committed such an act, which resulted in the death or personal injury of a US citizen.

198 *Amerada Hess Shipping Corp.* v. *Argentine Republic* 830 F.2d 421 (1987); 79 ILR, p. 8.

199 See below, chapter 13, p. 707.

200 *Argentine Republic* v. *Amerada Hess Shipping Corp.* 109 S. Ct. 683 (1989); 81 ILR, p. 658.

201 109 S. Ct. 689; 81 ILR, pp. 664–5.

202 109 S. Ct. 690. See also *Smith* v. *Libya* 101 F.3d 239 (1996); 113 ILR, p. 534.

203 See above, p. 681.

not pursuant to a Mexican warrant. Accordingly, compensation under the Act could be claimed.[204]

The Alien Tort Claims Act was further discussed by the Supreme Court in *Sosa* v. *Alvarez-Machain*, where it was held that the Alien Tort Claims Act was a jurisdictional statute creating no new causes of action and enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time, being offences against ambassadors, violation of safe conducts and piracy.[205]

Extradition[206]

The practice of extradition enables one state to hand over to another state suspected or convicted criminals who have fled to the territory of the former. It is based upon bilateral treaty law and does not exist as an obligation upon states in customary law.[207] It is usual to derive from existing treaties on the subject certain general principles, for example that of double criminality, i.e. that the crime involved should be a crime in both states concerned,[208] and that of specialty, i.e. a person surrendered may be tried and punished only for the offence for which extradition had been sought and granted.[209] In general, offences of a political

[204] 41 ILM, 2002, p. 130. See also the decision of 3 June 2003.

[205] 542 US 692, 714 ff. (2004) and see above, chapter 4, p. 160. Note that in *Rasul* v. *Bush*, the Supreme Court held that it was immaterial that the petitioners invoking the Alien Tort statute were being held in military custody in Guantanamo Bay, 542 US 466 (2004).

[206] See e.g. I. A. Shearer, *Extradition in International Law*, Leiden, 1971; M. C. Bassiouni, *International Extradition and World Public Order*, Leiden, 1974; C. Nicholls, C. Montgomery and J. B. Knowles, *The Law of Extradition and Mutual Assistance*, 2nd edn, Oxford, 2007; I. Stanbrook and C. Stanbrook, *The Law and Practice of Extradition*, 2nd edn, Oxford, 2000; M. Forde, *The Law of Extradition in the UK*, London, 1995; A. Jones and A. Doobay, *Jones and Doobay on Extradition and Mutual Assistance*, London, 2004; G. Gilbert, *Aspects of Extradition Law*, Dordrecht, 1991, and Gilbert, *Transnational Fugitive Offenders in International Law: Extradition and Other Mechanisms*, The Hague, 1998; L. Henkin, R. C. Pugh, O. Schochter and H. Smit, *International Law: Cases and Materials*, 3rd edn, St Paul, 1993, p. 1111 and *Oppenheim's International Law*, p. 958. See also Study of the Secretariat on Succession of States in Respect of Bilateral Treaties, *Yearbook of the ILC*, 1970, vol. II, pp. 102, 105.

[207] See e.g. the Joint Declaration of Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, the *Lockerbie* case, ICJ Reports, 1992, pp. 3, 24; 94 ILR, pp. 478, 507 and the Dissenting Opinion of Judge Bedjaoui, ICJ Reports, 1992, p. 38; 94 ILR, p. 521.

[208] But see now the House of Lords decisions in *Government of Denmark* v. *Nielsen* [1984] 2 All ER 81; 74 ILR, p. 458 and *United States Government* v. *McCaffery* [1984] 2 All ER 570.

[209] See e.g. *Oppenheim's International Law*, p. 961.

character have been excluded,[210] but this would not cover terrorist activities.[211] As noted above, it is common for many treaties laying down multiple bases for the exercise of jurisdiction to insist that states parties in whose territory the alleged offender is present either prosecute or extradite such person.[212] In addition, many treaties provide for the automatic inclusion within existing bilateral extradition treaties between states parties to such treaties of the offence concerned.[213] Many states will not allow the extradition of nationals to another state,[214] but this is usually in circumstances where the state concerned has wide powers to prosecute nationals for offences committed abroad. Further, the relevance of human rights law to the process should be noted in that extradition to a state that may torture or inhumanely treat the person concerned would, for example, violate the European Convention on Human Rights.[215]

210 *Ibid.*, p. 962.

211 See e.g. the European Convention on the Suppression of Terrorism, 1977, article 1 of which provides a list of offences which are not to be regarded as political offences or inspired by political motives, an approach which is also adopted in article 11 of the Convention for the Suppression of Terrorist Bombing, 1997. See also the *McMullen* case, 74 AJIL, 1980, p. 434; the *Eain* case, *ibid.*, p. 435; *Re Piperno, ibid.*, p. 683 and *US* v. *Mackin* 668 F.2d 122 (1981); 79 ILR, p. 459. A revised directive on international extradition was issued by the US Department of State in 1981: see 76 AJIL, 1982, pp. 154–9. Note also the view of the British Home Secretary, *The Times*, 25 June 1985, p. 1, that the political offences 'loophole' as it applied to violent offences was not suitable to extradition arrangements between the democratic countries 'sharing the same high regard for the fundamental principles of justice and operating similar independent judicial systems'. The UK law relating to extradition was consolidated in the Extradition Act 1989. Note in addition the Extradition Act 2003, providing *inter alia* for fast-track extradition procedures within the European Union, extended by the UK in the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003 to the US despite an assymetrical arrangement with the US under the UK–US Extradition Treaty, 2003: see e.g. Nicholls *et al.*, *Law of Extradition*, pp. 10 ff. and *Norris* v. *Secretary of State for the Home Department* [2006] UWHC 280 (Admin) and *Norris* v. *USA* [2008] UKHL 16. See also *Government of Belgium* v. *Postlethwaite* [1987] 2 All ER 985 and *R* v. *Chief Metropolitan Magistrate, ex parte Secretary of State for the Home Department* [1988] 1 WLR 1204.

212 See above, p. 673.

213 See e.g. article 8 of the Hague Convention for the Suppression of the Unlawful Seizure of Aircraft, 1970, article 8 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, article 8 of the Internationally Protected Persons Convention, 1973 and article 4 of the European Convention for the Suppression of Terrorism, 1977.

214 See e.g. article 3(1) of the French Extradition Law of 1927, and article 16 of the Basic Law of the Federal Republic of Germany.

215 See e.g. the *Soering* case, European Court of Human Rights, 1989, Series A, No. 161; 98 ILR, p. 270 and *Saadi* v. *Italy*, European Court of Human Rights, judgment of 28 February 2008.

Extraterritorial jurisdiction[216]

Claims have arisen in the context of economic issues whereby some states, particularly the United States, seek to apply their laws outside their territory[217] in a manner which may precipitate conflicts with other states.[218] Where the claims are founded upon the territorial and nationality theories of jurisdiction, problems do not often arise, but claims made upon the basis of the so-called 'effects' doctrine have provoked considerable controversy. This goes beyond the objective territorial principle to a situation where the state assumes jurisdiction on the grounds that the behaviour of a party is producing 'effects' within its territory. This is so even though all the conduct complained of takes place in another state.[219] The effects doctrine has been energetically maintained particularly by the US in the area of antitrust regulation.[220] The classic statement of the American

[216] See e.g. *Extraterritorial Jurisdiction* (ed. A. V. Lowe), London, 1983; D. Rosenthal and W. Knighton, *National Laws and International Commerce*, London, 1982; K. M. Meessen, 'Antitrust Jurisdiction under Customary International Law', 78 AJIL, 1984, p. 783; A. V. Lowe, 'Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act 1980', 75 AJIL, 1981, p. 257; Akehurst, 'Jurisdiction', pp. 190 ff.; *Extraterritorial Application of Law and Responses Thereto* (ed. C. Olmstead), Oxford, 1984; B. Stern, 'L'Extra-territorialité "Revisitée": Où Il est Question des Affaires Alvarez-Machain, Pâte de Bois et de Quelques Autres', AFDI, 1992, p. 239; Higgins, *Problems and Process*, p. 73, and *Oppenheim's International Law*, p. 466. See also P. Torremans, 'Extraterritorial Application of EC and US Competition Law', 21 *European Law Review*, 1996, p. 280.

[217] Note that there is a general presumption against the extraterritorial application of legislation: see e.g. the House of Lords decision in *Holmes* v. *Bangladesh Biman Corporation* [1989] 1 AC 1112, 1126; 87 ILR, pp. 365, 369, per Lord Bridge, and *Air India* v. *Wiggins* [1980] 1 WLR 815, 819; 77 ILR, pp. 276, 279, per Lord Bridge, and the US Supreme Court decision in *EEOC* v. *Arabian American Oil Company and Aramco Services* 113 L Ed 2d 274, 282 (1991); 90 ILR, pp. 617, 622.

[218] The UK government has stated that it opposes all assertions of extraterritorial jurisdiction by other states on UK individuals and/or companies: see Ministerial Statement, HL Deb., vol. 673, cWA277–8, 21 July 2005, UKMIL, 76 BYIL, 2006, p. 850.

[219] The true 'effects' doctrine approach should be distinguished from other heads of jurisdiction such as the objective territorial principle, where part of the offence takes place within the jurisdiction: see e.g. *US* v. *Noriega* 808 F.Supp. 791 (1992); 99 ILR, p. 143. In many cases the disputes have centred upon nationality questions, the US regarding subsidiaries of US companies abroad as of US nationality even where such companies have been incorporated abroad, while the state of incorporation has regarded them as of its nationality and thus subject not to US law but to its law: see e.g. Higgins, *Problems and Process*, p. 73.

[220] See e.g. the US Sherman Antitrust Act 1896, 15 USC, paras. 1 ff. See also the controversies engendered by the US freezing of Iranian assets in 1979 and the embargo imposed under the Export Administration Act in 1981 and 1982 on equipment intended for use on the Siberian gas pipeline, R. Edwards, 'Extraterritorial Application of the US Iranian Assets Control Regulations', 75 AJIL, 1981, p. 870; J. Bridge, 'The Law and Politics of United

doctrine was made in *US* v. *Aluminum Co. of America*,[221] in which the Court declared that:

> any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.[222]

The doctrine was to some extent modified by the requirement of intention and the view that the effect should be substantial, but the wide-ranging nature of the concept aroused considerable opposition outside the US, as did American attempts to take evidence abroad under very broad pre-trial discovery provisions in US law[223] and the possibility of treble damage awards.[224] The US courts, perhaps in view of the growing opposition of foreign states, modified their approach in the *Timberlane Lumber Co.* v. *Bank of America*[225] and *Mannington Mills* v. *Congoleum Corporation*[226] cases. It was stated that in addition to the effects test, of the earlier cases, the courts had to take into account a balancing test, 'a jurisdictional rule of reason', involving a consideration of other nations' interests and the full nature of the relationship between the actors concerned and the US.[227] A series of factors that needed to be considered in the process of balancing was put forward in the latter case.[228] The view taken by the

States Foreign Policy Export Controls', 4 *Legal Studies*, 1984, p. 2, and A. V. Lowe, 'Public International Law and the Conflict of Laws', 33 ICLQ, 1984, p. 575.

221 148 F.2d 416 (1945).

222 *Ibid.*, p. 443. This approach was reaffirmed in a series of later cases: see e.g. *US* v. *Timken Roller Bearing Co.* 83 F.Supp. 284 (1949), affirmed 341 US 593 (1951); *US* v. *The Watchmakers of Switzerland Information Center, Inc.* cases, 133 F.Supp. 40 and 134 F.Supp. 710 (1963); 22 ILR, p. 168, and *US* v. *General Electric Co.* 82 F.Supp. 753 (1949) and 115 F.Supp. 835 (1953). See also *Hazeltine Research Inc.* v. *Zenith Radio Corporation* 239 F.Supp. 51 (1965), affirmed 395 US 100 (1969).

223 See e.g. the statement of the UK Attorney General that 'the wide investigating procedures under the United States antitrust legislation against persons outside the United States who are not United States citizens constitute an "extraterritorial" infringement of the proper jurisdiction and sovereignty of the United Kingdom', *Rio Tinto Zinc* v. *Westinghouse Electric Corporation* [1978] 2 WLR 81; 73 ILR, p. 296. See also Lowe, *Extraterritorial Jurisdiction*, pp. 159–60 and 165–71. But see *Société Internationale* v. *Rogers* 357 US 197 (1958); 26 ILR, p. 123; *US* v. *First National City Bank* 396 F.2d 897 (1968); 38 ILR, p. 112; *In re Westinghouse Electric Corporation* 563 F.2d 992 (1977) and *In re Uranium Antitrust Litigation* 480 F.Supp. 1138 (1979).

224 See e.g. Meessen, 'Antitrust Jurisdiction', p. 794.

225 549 F.2d 597 (1976); 66 ILR, p. 270.

226 595 F.2d 1287 (1979); 66 ILR, p. 487.

227 See particularly K. Brewster, *Antitrust and American Business Abroad*, New York, 1958.

228 595 F.2d 1287, 1297 (1979); 66 ILR, pp. 487, 496. See also the *Timberlane* case, 549 F.2d 597, 614 (1976); 66 ILR, pp. 270, 285. The need for judicial restraint in applying the effects doctrine in the light of comity was emphasised by the State Department: see 74 AJIL,

Third Restatement of Foreign Relations Law,[229] it should be noted, is that a state may exercise jurisdiction based on effects in the state, when the effect or intended effect is substantial and the exercise of jurisdiction is reasonable. It is noted that the principle of reasonableness calls for limiting the exercise of jurisdiction so as to minimise conflict with the jurisdiction of other states, particularly the state where the act takes place.[230] However, the assumption by the courts of a basically diplomatic function, that is, weighing and considering the interests of foreign states, stimulated criticism.[231]

The US courts modified their approach. In *Laker Airways* v. *Sabena*,[232] the Court held *inter alia* that once US antitrust law was declared applicable, it could not be qualified or ignored by virtue of comity. The judicial interest balancing under the *Timberlane* precedent should not be engaged in since the courts on both sides of the Atlantic were obliged to follow the directions of the executive. Accordingly, the reconciliation of conflicting interests was to be undertaken only by diplomatic negotiations. Quite how such basic and crucial differences of opinion over the effects doctrine can be resolved is open to question and international fora have been suggested as the most appropriate way forward.[233]

In the *Hartford Fire Insurance Co.* v. *California* case before the US Supreme Court,[234] Judge Souter writing for the majority stated that it

1980, pp. 179–83. See also the US Foreign Trade Antitrust Improvements Act 1982, where jurisdiction was said to be dependent on 'direct, substantial and reasonably foreseeable effect'.

229 Para. 402, p. 239 and para. 403, p. 250.

230 See also the US Department of Justice, *Antitrust Enforcement Guidelines for International Operations*, 1988, pp. 31–2. But see now the Supreme Court's decision in *Hartford Fire Insurance Co.* v. *California* 113 S. Ct. 2891 (1993), discussed below.

231 See e.g. H. Maier, 'Interest Balancing and Extraterritorial Jurisdiction', 31 *American Journal of Comparative Law*, 1983, p. 579, and Maier, 'Resolving Extraterritorial Conflicts or There and Back Again', 25 Va. JIL, 1984, p. 7; W. Fugate, 'Antitrust Aspect of the Revised Restatement of Foreign Relations Law', *ibid.*, p. 49, and Bowett, 'Jurisdiction', pp. 21–2. See also Lowe, *Extraterritorial Jurisdiction*, pp. 58–62.

232 731 F.2d 909 (1984). However, cf. the continuation of the *Timberlane* litigation, 749 F.2d 1378 (1984), which reaffirms the approach of the first *Timberlane* case.

233 See e.g. Bowett, 'Jurisdiction', pp. 24–6 and Meessen, 'Antitrust Jurisdiction', pp. 808–10. See also Lowe, *Extraterritorial Jurisdiction*, part 3.

234 113 S. Ct. 2891 (1993). See e.g. A. F. Lowenfeld, 'Conflict, Balancing of Interest, and the Exercise of Jurisdiction to Prescribe: Reflections of the *Insurance Antitrust Case*', 89 AJIL, 1995, p. 42; P. R. Trimble, 'The Supreme Court and International Law: The Demise of *Restatement* Section 403', *ibid.*, p. 53, and L. Kramer, 'Extraterritorial Application of American Law after the *Insurance Antitrust Case*: A Reply to Professors Lowenfeld and Trimble', *ibid.*, p. 750.

was well established that the relevant US legislation (the Sherman Act) 'applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States'.[235] It was felt that a person subject to regulation by two states (here the UK with regard to the London reinsurance market and the US) could comply with the laws of both and there was no need in this case to address other considerations concerning international comity.[236] The Dissenting Opinion in this case took the view that such exercise of extraterritorial jurisdiction was subject to the test of reasonableness,[237] a view that the majority did not embrace.

Foreign states had started reacting to the effects doctrine by the end of the 1970s and early 1980s by enacting blocking legislation. Under the UK Protection of Trading Interests Act 1980, for example, the Secretary of State in dealing with extraterritorial actions by a foreign state may prohibit the production of documents or information to the latter's courts or authorities. In addition, a UK national or resident may sue in an English court for recovery of multiple damages paid under the judgment of a foreign court.[238]

The Protection of Trading Interests Act was used in connection with the action by the liquidator of Laker Airways to sue various major airlines, the Midland Bank and McDonnell Douglas in the US for conspiracy to violate the antitrust laws of the United States. Two of the airlines, British Airways and British Caledonian, sought to prevent this suit in the US by bringing an action to restrain the liquidator in the UK. Thus, the effects doctrine was not actually in issue in the case, which centred upon the application of the US antitrust law in connection with alleged conspiratorial activities in the US. The UK government, holding the view that the Bermuda II agreement regulating transatlantic airline activity[239] prohibited antitrust actions against UK airlines, issued instructions under the 1980 Act forbidding compliance with any requirement imposed

[235] 113 S. Ct. 2891, at 2909. [236] *Ibid.*, at 2911. [237] *Ibid.*, at 2921.

[238] See Lowe, 'Conflict of Law', pp. 257–82; 50 BYIL, 1979, pp. 357–62 and 21 ILM, 1982, pp. 840–50. See also the Australian Foreign Proceedings (Prohibition of Certain Evidence) Act 1976, the Danish Limitation of Danish Shipowners' Freedom to Give Information to Authorities of Foreign Countries 1967 and the Finnish Law Prohibiting a Shipowner in Certain Cases to Produce Documents 1968. In some cases, courts have applied aspects of domestic law to achieve the same aim: see e.g. the *Fruehauf* case, 5 ILM, 1966, p. 476. Several states have made diplomatic protests at extraterritorial jurisdictional claims: see e.g. *Report of the 51st Session of the International Law Association*, 1964, pp. 565 ff.

[239] See *The Use of Airspace and Outer Space* (ed. Chia-Jui Cheng), The Hague, 1993, pp. 25 ff.

pursuant to US antitrust measures, including the provision of information.[240] The Court of Appeal felt that the order and directions required them in essence to prevent the *Laker* action in the US,[241] but the House of Lords disagreed.[242] It was held that the order and directions did not affect the appellant's right to pursue the claim in the US because the 1980 Act was concerned with 'requirements' and 'prohibitions' imposed by a foreign court,[243] so that the respondents would not be prohibited by the direction from paying damages on a 'judgment' given against them in the US.[244] In fact the Court refused to restrain the US action.

The Court also refused to grant judicial review of the order and directions, since the appellant had failed to show that no reasonable minister would have issued such order and directions, this being the requisite test in ministerial decisions concerning international relations.[245] The case, however, did not really turn on the 1980 Act, but it was the first time the issue had come before the courts.[246]

The dispute over extraterritoriality between the US and many other states has been apparent across a range of situations since the freezing of Iranian assets and the Siberian pipeline episode. The operation of the Western supervision of technological exports to the communist bloc through COCOM was also affected, while that system still existed, since the US sought to exercise jurisdiction with respect to exports from third states to communist states.[247] The adoption of legislation in the US imposing sanctions on Cuba, Iran and Libya has also stimulated opposition in view of the extraterritorial reach of such measures. The extension of

[240] The Protection of Trading Interests (US Anti-trust Measures) Order 1983. Two directions were issued as well.

[241] *British Airways Board* v. *Laker Airways Ltd* [1983] 3 All ER 375; 74 ILR, p. 36.

[242] [1984] 3 All ER 39; 74 ILR, p. 65. But see also *Midland Bank plc* v. *Laker Airways Ltd* [1986] 2 WLR 707; 118 ILR, p. 540.

[243] S. 1(3).

[244] [1984] 3 All ER 39, 55–6; 74 ILR, p. 84.

[245] [1984] 3 All ER 39, 54–5; 74 ILR, p. 83. See also *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corp.* [1947] 2 All ER 680.

[246] See also the statement by the Minister of State, Department of Trade and Industry, listing the statutory instruments, orders and directions made under the Protection of Trading Interests Act, 220 HC Deb., cols. 768–70, Written Answers, 12 March 1993; UKMIL, 64 BYIL, 1993, pp. 644–6.

[247] See the US and UK agreement in 1984 to consult should problems appear to arise with regard to the application of US export controls to individuals or businesses in the UK, or if the UK were contemplating resorting to the Protection of Trading Interests Act in relation to such controls, 68 HC Deb., col. 332, Written Answer, 23 November 1984, and 88 HC Deb., col. 373, Written Answer, 6 December 1985. See also Current Legal Developments, 36 ICLQ, 1987, p. 398.

sanctions against Cuba in the Cuban Democracy Act of 1992, for example, prohibited the granting of licences under the US Cuban Assets Control Regulations for certain transactions between US-owned or controlled firms in the UK and Cuba, and this led to the adoption of an order under the Protection of Trading Interests Act 1980 by the UK government.[248] The adoption of the Helms-Burton legislation in March 1996, amending the 1992 Act by further tightening sanctions against Cuba, provided *inter alia* for the institution of legal proceedings before the US courts against foreign persons or companies deemed to be 'trafficking' in property expropriated by Cuba from American nationals.[249] In addition, the legislation enables the US to deny entry into the country of senior executives (and their spouses and minors) of companies deemed by the US State Department to be so 'trafficking'. This legislation, together with the adoption of the D'Amato Act in mid-1996,[250] led to protests from many states, including the UK and Canada.[251] The Inter-American Juridical Committee of the Organisation of American States, 'directed' by the OAS General Assembly 'to examine and decide upon the validity under international law' of the Helms-Burton legislation,[252] unanimously concluded that:

> the exercise of such jurisdiction over acts of 'trafficking in confiscated property' does not conform with the norms established by international law for the exercise of jurisdiction in each of the following respects:
>
> a) A prescribing state does not have the rights to exercise jurisdiction over acts of 'trafficking' abroad by aliens unless specific conditions are fulfilled which do not appear to be satisfied in this situation.

[248] See UKMIL, 64 BYIL, 1993, p. 643. The proposed adoption of this legislation led to UK protests as well: see UKMIL, 63 BYIL, 1992, pp. 726 ff.

[249] This part of the legislation was suspended by the President for six months as from July 1996: see, as to the legislation, 35 ILM, 1996, p. 357.

[250] Intended to impose sanctions on persons or entities participating in the development of the petroleum resources of Iran or Libya. As to the legislation concerning Iran and Libya, see 35 ILM, 1996, p. 1273.

[251] Canada also announced that legislation would be introduced under the Foreign Extraterritorial Measures Act 1985 to help protect Canadian companies against the US Act: see Canadian Foreign Affairs Ministry Press Release No. 115, 17 June 1996. Note that the UN General Assembly, in resolution 50/10 (1995), called upon the US to end its embargo against Cuba. See also A. F. Lowenfeld, 'Congress and Cuba: The Helms-Burton Act', 90 AJIL, 1996, p. 419; B. M. Clagett, 'Title III of the Helms-Burton Act is Consistent with International Law', *ibid.*, p. 434; S. K. Alexander, 'Trafficking in Confiscated Cuban Property', 16 *Dickinson Journal of International Law*, 1998, p. 523, and A. V. Lowe, 'US Extraterritorial Jurisdiction: The Helms-Burton and D'Amato Acts', 46 ICLQ, 1997, p. 378.

[252] OAS Doc. OEA/SER.P AG/doc.3375/96, 4 June 1996.

b) A prescribing state does not have the rights to exercise jurisdiction over acts of 'trafficking' abroad by aliens under circumstances where neither the alien nor the conduct in question has any connnection with its territory and where no apparent connection exists between such acts and the protection of its essential sovereign interests.[253]

The European Community, in particular, took a strong stance on the US approach. It declared in a letter to the Congressional Committee considering changes in the US export control legislation in March 1984 that:

> US claims to jurisdiction over European subsidiaries of US companies and over goods and technology of US origin located outside the US are contrary to the principles of international law and can only lead to clashes of both a political and legal nature. These subsidiaries, goods and technology must be subject to the laws of the country where they are located.[254]

There was an attempt to solve such extraterritoriality conflicts in the Agreement Regarding the Application of Competition Laws signed by the European Commission on 23 September 1991 with the US.[255] This called *inter alia* for notification and co-ordination of such activities, with emphasis placed upon the application of comity. However, the European Court of Justice held that the Commission had acted *ultra vires* in concluding such an agreement.[256] The Agreement was re-introduced in the Decision of the Council and the Commission of 10 April 1995, which rectified certain competence problems arising as a result of the decision.[257] Nevetheless, it remains of uncertain value, not least because the question of private law suits in the US is not dealt with. The root problems of conflict have not been eradicated at all.

The adoption in 1992 of US legislation amending the Cuban Assets Control Regime stimulated a *démarche* from the European Community protesting against the extraterritorial application of US law,[258] as did the adoption of the Helms-Burton Act of 1996.[259] However, the EU–US

[253] CJI/SO/II/doc.67/96 rev. 5, para. 9, 23 August 1996; 35 ILM, 1996, pp. 1329, 1334. It should be noted that under article 98 of the Charter of the OAS, Opinions of the Committee have no binding effect.

[254] Cited in Current Legal Developments, 36 ICLQ, 1987, p. 399. See also UKMIL, 56 BYIL, 1985, pp. 480–1.

[255] See 30 ILM, 1991, p. 1487. See also Torremans, 'Extraterritorial', pp. 289 ff.

[256] Case C-327/91, *French Republic* v. *Commission of the European Communities* [1994] ECR I-3641.

[257] [1995] OJ L 95/45. [258] See UKMIL, 63 BYIL, 1992, p. 725.

[259] See e.g. European Commission Press Release WE 27/96, 18 July 1996 and 35 ILM, 1996, p. 397. See also Council Regulation No. 2271/96, 36 ILM, 1997, p. 127, and the Canadian

Memorandum of Understanding of 1997 provided for the continued suspension by the US of Title III so long as the EU continued efforts to promote democracy in Cuba.[260]

However, the European Community itself has wrestled with the question of exercising jurisdiction over corporations not based in the Community in the field of competition law.[261] In *ICI* v. *Commission*,[262] the European Court of Justice established jurisdiction with regard to a series of restrictive agreements to fix the price of dyestuffs on the ground that the defendant undertakings had corporate subsidiaries that were based within the Community, and declined to follow the Advocate General's suggestion[263] that jurisdiction should be founded upon direct and immediate, reasonably foreseeable and substantial effect.

The *Wood Pulp* case[264] concerned a number of non-EC companies and an association of US companies alleged to have entered into a price-fixing arrangement. The European Commission had levied fines on the jurisdictional basis that the effects of the price agreements and practices were direct, substantial and intended within the EC.[265] An action was then commenced before the European Court of Justice for annulment of the Commission's decision under article 173 of the EEC Treaty. Advocate General Darmon argued that international law permitted a state (and therefore the EC) to apply its competition laws to acts done by foreigners abroad if those acts had direct, substantial and foreseeable effects within the state concerned.[266]

The Court, however, took the view that the companies concerned had acted within the EC and were therefore subject to Community law. It was noted that where producers from third states sell directly to purchasers within the Community and engage in price competition in order to win orders from those customers, that constitutes competition within

Foreign Extraterritorial Measures Act 1996 (countering the Helms-Burton Act), *ibid.*, p. 111.

260 36 ILM, 1997, p. 529. On 18 May 1998, the Understanding with Respect to Disciplines for the Strengthening of Investment Protection was reached whereby the EU agreed to suspend action in the World Trade Organisation against the extraterritorial aspects of Helms-Burton in exchange for an EU-wide exemption by the US from the extraterritorial elements of the Act: see UKMIL, 76 BYIL, 2006, pp. 850–1.

261 But not the UK: see e.g. *Attorney General's Reference* (*No. 1 of 1982*) [1983] 3 WLR 72, where the Court of Appeal refused to extend the scope of local jurisdiction over foreign conspiracies based on the effects principle.

262 [1972] ECR 619; 48 ILR, p. 106. 263 [1972] ECR 619, 693–4.

264 *A. Ahlstrom Oy* v. *Commission* [1988] 4 CMLR 901. 265 *Ibid.*, p. 916.

266 *Ibid.*, p. 932.

the Community, and, where such producers sell at prices that are actually co-ordinated, that restricts competition within the Community within the meaning of article 85 of the EEC Treaty. It was stressed that the decisive factor was the place where the price-fixing agreement was actually implemented, not where the agreement was formulated.[267] In other words, the Court founded its jurisdiction upon an interpretation of the territoriality principle, if somewhat stretched. It did not take the opportunity presented to it by the opinion of the Advocate General of accepting the effects principle of jurisdiction. Nevertheless, the case does appear to suggest that price-fixing arrangements intended to have an effect within the Community that are implemented there would be subject to the jurisdiction of the Community, irrespective of the nationality of the companies concerned and of the place where the agreement was reached.[268]

Suggestions for further reading

M. Akehurst, 'Jurisdiction in International Law', 46 BYIL, 1972–3, p. 145

R. Donner, *The Regulation of Nationality in International Law*, 2nd edn, New York, 1995

F. A. Mann, 'The Doctrine of Jurisdiction in International Law Revisited After Twenty Years', 186 HR, 1984, p. 9

L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, Oxford, 2002

[267] *Ibid.*, pp. 940–1. Note that the Court held that the association of US companies (KEA) was not subject to Community jurisdiction on the ground that it had not played a separate role in the implementation within the Community of the arrangements in dispute, *ibid.*, pp. 942–3.

[268] See e.g. D. Lange and J. B. Sandage, 'The *Wood Pulp* Decision and its Implications for the Scope of EC Competition Law', 26 *Common Market Law Review*, 1989, p. 137, and L. Collins, *European Community Law in the United Kingdom*, 4th edn, London, 1990, p. 7. See also S. Weatherill and P. Beaumont, *EU Law*, 3rd edn, London, 1999, chapter 22.

13

Immunities from jurisdiction

In the previous chapter, the circumstances in which a state may seek to exercise its jurisdiction in relation to civil and criminal matters were considered. In this chapter the reverse side of this phenomenon will be examined, that is those cases in which jurisdiction cannot be exercised as it normally would because of special factors. In other words, the concern is with immunity from jurisdiction and those instances where there exist express exceptions to the usual application of a state's legal powers.

The concept of jurisdiction revolves around the principles of state sovereignty, equality and non-interference. Domestic jurisdiction as a notion attempts to define an area in which the actions of the organs of government and administration are supreme, free from international legal principles and interference. Indeed, most of the grounds for jurisdiction can be related to the requirement under international law to respect the territorial integrity and political independence of other states.

Immunity from jurisdiction, whether as regards the state itself or as regards its diplomatic representatives, is grounded in this requirement. Although constituting a derogation from the host state's jurisdiction, in that, for example, the UK cannot exercise jurisdiction over foreign ambassadors within its territory, it is to be construed nevertheless as an essential part of the recognition of the sovereignty of foreign states, as well as an aspect of the legal equality of all states.

Sovereign immunity[1]

Sovereignty until comparatively recently was regarded as appertaining to a particular individual in a state and not as an abstract manifestation

[1] See generally e.g. H. Fox, *The Law of State Immunity*, Oxford, 2002; A. Dickinson, R. Lindsay and J. P. Loonam, *State Immunity: Selected Materials and Commentary*, Oxford, 2004; I. Pingel-Lenuzza, *Les Immunités des États en Droit International*, Brussels, 1998; J. Bröhmer, *State Immunity and the Violation of Human Rights*, The Hague, 1997; G. M. Badr,

of the existence and power of the state.[2] The sovereign was a definable person, to whom allegiance was due. As an integral part of this mystique, the sovereign could not be made subject to the judicial processes of his country. Accordingly, it was only fitting that he could not be sued in foreign courts. The idea of the personal sovereign would undoubtedly have been undermined had courts been able to exercise jurisdiction over foreign sovereigns. This personalisation was gradually replaced by the abstract concept of state sovereignty, but the basic mystique remained. In addition, the independence and equality of states made it philosophically as well as practically difficult to permit municipal courts of one country to manifest their power over foreign sovereign states, without their consent.[3] Until recently, the international law relating to sovereign (or state) immunity relied virtually exclusively upon domestic case-law and latterly legislation, although the European Convention on State Immunity, 1972 was a notable exception. However, in 2004 the UN adopted the Convention on Jurisdictional Immunities of States and Their Property.[4]

State Immunity, The Hague, 1984; S. Sucharitkul, *State Immunities and Trading Activities in International Law*, Leiden, 1959, and Sucharitkul, 'Immunities of Foreign States before National Authorities', 149 HR, 1976, p. 87; I. Sinclair, 'The Law of Sovereign Immunity: Recent Developments', 167 HR, 1980, p. 113; A. Aust, 'The Law of State Immunity', 53 ICLQ, 2004, p. 255; UN Legislative Series, *Materials on Jurisdictional Immunities of States and Their Property*, New York, 1982; 10 Netherlands YIL, 1979; J. Candrian, *L'Immunité des États face aux Droits de l'Homme et à la Protection des Biens Culturels*, Zurich, 2005; *Droit des Immunités et Exigencies du Procès Équitable* (ed. I. Pingel), Paris, 2004; H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 BYIL, 1951, p. 220; R. Higgins, 'Certain Unresolved Aspects of the Law of State Immunity', 29 NILR, 1982, p. 265; J. Crawford, 'International Law of Foreign Sovereigns: Distinguishing Immune Transactions', 54 BYIL, 1983, p. 75; C. J. Lewis, *State and Diplomatic Immunity*, 3rd edn, London, 1990; C. H. Schreuer, *State Immunity: Some Recent Developments*, Cambridge, 1988; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 450, and *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992, p. 341. See also the cases on sovereign immunity collected in ILR, volumes 63–5; ILA, Report of the Sixtieth Conference, 1982, p. 325 and Report of the Sixty-sixth Conference, 1994, p. 452; *Annuaire de l'Institut de Droit International*, vol. 64 I, 1991, p. 84, and Report of the International Law Commission, 1991, A/46/10, p. 8.

2 See A. Watts, 'The Legal Position in International Law of Heads of State, Heads of Governments and Foreign Ministers', 247 HR, 1994 III, p. 13.

3 See also *Ex parte Pinochet (No. 3)* [2000] 1 AC 147, 201 (per Lord Browne-Wilkinson) and 268–9 (per Lord Millett); 119 ILR, pp. 152, 221–3.

4 See e.g. E. Denza, 'The 2005 UN Convention on State Immunity in Perspective', 55 ICLQ, 2006, p. 395; R. Gardiner, 'UN Convention on State Immunity: Form and Function', 55 ICLQ, 2006, p. 407; G. Hafner and L. Lange, 'La Convention des Nations Unies sur les Immunités Jurisdictionnelles des États et de Leurs Biens', 50 AFDI, 2004, p. 45, and H. Fox, 'In Defence of State Immunity: Why the UN Convention on State Immunity is Important', 55 ICLQ, 2006, p. 399.

The classic case illustrating the relationship between territorial jurisdiction and sovereign immunity is *The Schooner Exchange* v. *McFaddon*,[5] decided by the US Supreme Court. Chief Justice Marshall declared that the jurisdiction of a state within its own territory was exclusive and absolute, but it did not encompass foreign sovereigns. He noted that the:

> perfect equality and absolute independence of sovereigns . . . have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.[6]

Lord Browne-Wilkinson stated in *Ex parte Pinochet* (*No. 3*) that,

> It is a basic principle of international law that one sovereign state (the forum state) does not adjudicate on the conduct of a foreign state. The foreign state is entitled to procedural immunity from the processes of the forum state. This immunity extends to both criminal and civil liability.[7]

Lord Millett in *Holland* v. *Lampen-Wolfe* put the point as follows:

> State immunity . . . is a creature of customary international law and derives from the equality of sovereign states. It is not a self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt. It is a limitation imposed from without upon the sovereignty of the United Kingdom itself.[8]

Sovereign immunity is closely related to two other legal doctrines, non-justiciability and act of state. Reference has been made earlier to the interaction between the various principles,[9] but it is worth noting here that the concepts of non-justiciability and act of state posit an area of international activity of states that is simply beyond the competence of the domestic tribunal in its assertion of jurisdiction, for example, that the courts would not adjudicate upon the transactions of foreign sovereign states.[10] On the

[5] 7 Cranch 116 (1812).

[6] *Ibid.*, p. 137. It therefore followed that, 'national ships of war entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction'. Such rules would not apply to private ships which are susceptible to foreign jurisdiction abroad. See also *Republic of the Philippines* v. *Pimentel* 553 US_(2008), US Supreme Court, 12 June 2008, Slip Opinion, pp. 11–12.

[7] [2000] 1 AC 147, 201; 119 ILR, p. 152.

[8] [2000] 1 WLR 1573, 1588; 119 ILR, p. 367.

[9] See above, chapter 4, p. 179.

[10] See e.g. *Buttes Gas and Oil Co.* v. *Hammer (No. 3)* [1982] AC 888; 64 ILR, p. 332; *Buck* v. *Attorney-General* [1965] 1 Ch. 745; 42 ILR, p. 11 and Goff J, *I° Congreso del Partido* [1978] 1 QB 500, 527–8; 64 ILR, pp. 154, 178–9. See also Sinclair, 'Sovereign Immunity', p. 198.

other hand, the principle of jurisdictional immunity asserts that in particular situations a court is prevented from exercising the jurisdiction that it possesses. Thus, immunity from jurisdiction does not mean exemption from the legal system of the territorial state in question. The two concepts are distinct. In *International Association of Machinists & Aerospace Workers* v. *OPEC*,[11] it was declared that the two concepts were similar in that they reflect the need to respect the sovereignty of foreign states, but that they differed in that the former went to the jurisdiction of the court and was a principle of international law, whereas the latter constituted a prudential doctrine of domestic law having internal constitutional roots. Accordingly, the question of sovereign immunity is a procedural one and one to be taken as a preliminary issue,[12] logically preceding the issue of act of state.[13]

In practice, however, the distinction is not always so evident and arguments presented before the court founded both upon non-justiciability and sovereign immunity are to be expected. It is also an interesting point to consider the extent to which the demise of the absolute immunity approach has affected the doctrine of non-justiciability.

As far as the act of state doctrine is concerned in particular in this context, some disquiet has been expressed by courts that the application of that principle may in certain circumstances have the effect of reintroducing the absolute theory of sovereign immunity. In *Letelier* v. *Republic of Chile*,[14] for example, Chile argued that even if its officials had ordered

See further above, p. 182. Note also that 'a claim to state immunity is essentially a public claim that demands open litigation', *Harb* v. *King Fahd* [2005] EWCA Civ 632, para. 28, per Thorpe LJ.

11 649 F.2d 1354, 1359; 66 ILR, pp. 413, 418. Reaffirmed in *Asociacion de Reclamantes* v. *The United Mexican States* 22 ILM, 1983, pp. 625, 641–2. See also *Ramirez* v. *Weinberger* 23 ILM, 1984, p. 1274; *Goldwater* v. *Carter* 444 US 996 (1979) and *Empresa Exportadora de Azucar* v. *Industria Azucarera Nacional SA* [1983] 2 LL. R 171; 64 ILR, p. 368.

12 This has been reaffirmed by the International Court of Justice in its Advisory Opinion in the *Difference Relating to Immunity from Legal Process* case, ICJ Reports, 1999, pp. 62, 88; 121 ILR, pp. 405, 432–3. Mance LJ stated in the Court of Appeal decision in *Jones* v. *Saudi Arabia* that 'claims to state immunity should be resolved at an early stage in the proceedings', [2004] EWCA Civ 1394, para. 10; 129 ILR, p. 653. See also *Republic of the Philippines* v. *Pimentel* 553 US-(2008), US Supreme Court, 12 June 2008, Slip Opinion, p. 11, holding that consideration of the merits of the case where sovereign immunity was pleaded would itself constitute an infringement of sovereign immunity.

13 See e.g. *Siderman* v. *Republic of Argentina* 965 F.2d 699 (1992); 103 ILR, p. 454.

14 488 F.Supp. 665 (1980); 63 ILR, p. 378. Note that the US Court of Appeals has held that the Foreign Sovereign Immunities Act 1976 does not supersede the act of state doctrine: see *Helen Liu* v. *Republic of China* 29 ILM, 1990, p. 192.

the assassination of Letelier in the US, such acts could not be the subject of discussion in the US courts as the orders had been given in Chile. This was not accepted by the Court since to do otherwise would mean emasculating the Foreign Sovereign Immunities Act by permitting a state to bring back the absolute immunity approach 'under the guise of the act of state doctrine'.[15] In somewhat different circumstances, Kerr LJ signalled his concern in *Maclaine Watson* v. *The International Tin Council*[16] that the doctrine of non-justiciability might be utilised to bypass the absence of sovereign immunity with regard to a state's commercial activities.

Of course, once a court has determined that the relevant sovereign immunity legislation permits it to hear the case, it may still face the act of state argument. Such legislation implementing the restrictive immunity approach does not supplant the doctrine of act of state or non-justiciability,[17] although by accepting that the situation is such that immunity does not apply the scope for the non-justiciability plea is clearly much reduced.[18]

The absolute immunity approach

The relatively uncomplicated role of the sovereign and of government in the eighteenth and nineteenth centuries logically gave rise to the concept of absolute immunity, whereby the sovereign was completely immune from foreign jurisdiction in all cases regardless of circumstances. However, the unparalleled growth in the activities of the state, especially with regard to commercial matters, has led to problems and in most countries to a modification of the above rule. The number of governmental agencies and public corporations, nationalised industries and other state organs created a reaction against the concept of absolute immunity, partly because it would enable state enterprises to have an advantage over private companies. Accordingly many states began to adhere to the doctrine of restrictive immunity, under which immunity was available as regards governmental activity, but not where the state was engaging in commercial activity. Governmental acts with regard to which immunity would be granted are termed acts *jure imperii*, while those relating to private or trade activity are termed acts *jure gestionis*.

15 488 F.Supp. 665, 674. 16 [1988] 3 WLR 1169, 1188; 80 ILR, pp. 191, 209.

17 See *International Association of Machinists & Aerospace Workers* v. *OPEC* 649 F.2d 1354, 1359–60; 66 ILR, pp. 413, 418. See also *Liu* v. *Republic of China* 29 ILM, 1990, pp. 192, 205.

18 See the interesting discussion of the relationship between non-justiciability and immunity by Evans J in *Australia and New Zealand Banking Group* v. *Commonwealth of Australia*, 1989, transcript, pp. 59–60.

The leading practitioner of the absolute immunity approach has been the United Kingdom, and this position was established in a number of important cases.[19]

In the *Parlement Belge* case,[20] the Court of Appeal emphasised that the principle to be deduced from all the relevant preceding cases was that every state

> declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use . . . though such sovereign, ambassador or property be within its jurisdiction.[21]

The wide principle expressed in this case gave rise to the question as to what kind of legal interest it was necessary for the foreign sovereign to have in property so as to render it immune from the jurisdiction of the British courts.

Commonly regarded as the most extreme expression of the absolute immunity doctrine is the case of the *Porto Alexandre*.[22] This concerned a Portuguese requisitioned vessel against which a writ was issued in an English court for non-payment of dues for services rendered by tugs near Liverpool. The vessel was exclusively engaged in private trading operations, but the Court felt itself constrained by the terms of the *Parlement Belge* principle to dismiss the case in view of the Portuguese government interest.

Differences of opinion as to the application of the immunity rules were revealed in the House of Lords in the *Cristina* case.[23] This followed a Spanish Republican government decree requisitioning ships registered in Bilbao which was issued while the *Cristina* was on the high seas. On its arrival in Cardiff the Republican authorities took possession of the ship, whereupon its owners proceeded to issue a writ claiming possession. The case turned on the argument to dismiss the case, by the Republican government, in view of its sovereign immunity. The majority of the House

[19] But note a series of early cases which are not nearly so clear in their adoption of a broad absolute immunity doctrine: see e.g. *The Prins Frederik* (1820) 2 Dod. 451; *Duke of Brunswick* v. *King of Hanover* (1848) 2 HLC 1 and *De Haber* v. *Queen of Portugal* (1851) 17 QB 171. See also Phillimore J in *The Charkieh* (1873) LR 4A and E 59.

[20] (1880) 5 PD 197.

[21] Brett LJ, *ibid.*, pp. 214–15. Note, of course, that the principle relates to public property destined for public, not private, use.

[22] [1920] P. 30; 1 AD, p. 146. See e.g. Sinclair, 'Sovereign Immunity', p. 126. See also *The Jupiter* [1924] P. 236, 3 AD, p. 136.

[23] [1938] AC 485; 9 AD, p. 250.

of Lords accepted this in view of the requisition decree taking over the ship.

However, two of the Lords criticised the *Porto Alexandre* decision and doubted whether immunity covered state trading vessels,[24] while Lord Atkin took more of a fundamentalist absolute approach.[25]

In *Krajina* v. *Tass Agency*[26] the Court of Appeal held that the Agency was a state organ of the USSR and was thus entitled to immunity from local jurisdiction. This was followed in *Baccus SRL* v. *Servicio Nacional del Trigo*,[27] where the Court felt that the defendants, although a separate legal person under Spanish law, were in effect a department of state of the Spanish government. How the entity was actually constituted was regarded as an internal matter, and it was held entitled to immunity from suit.

A different view from the majority was taken by Lord Justice Singleton who, in a Dissenting Opinion, condemned what he regarded as the extension of the doctrine of sovereign immunity to separate legal entities.[28]

There is some limitation to the absolute immunity rule to the extent that a mere claim by a foreign sovereign to have an interest in the contested property would have to be substantiated before the English court would grant immunity. Since this involves some submission by the foreign sovereign to the local jurisdiction, immunity is not unqualifiedly absolute. Once the court is clear that the claim by the sovereign is not merely illusory or founded on a manifestly defective title, it will dismiss the case. This was brought out in *Juan Ysmael* v. *Republic of Indonesia*[29] in which the asserted interest in a vessel by the Indonesian government was regarded as manifestly defective so that the case was not dismissed on the ground of sovereign immunity.[30]

American cases, however, have shown a rather different approach, one that distinguishes between ownership on the one hand and possession and control on the other. In two cases particularly, immunity was refused

[24] See e.g. Lord Macmillan, [1938] AC 485, 498; 9 AD, p. 260.

[25] [1938] AC 485, p. 490. See also *Berizzi Bros. C.* v. *SS Pesaro* 271 US 562 (1926); 3 AD, p. 186 and *The Navemar* 303 US 68 (1938); 9 AD, p. 176.

[26] [1949] 2 All ER 274; 16 AD, p. 129. See also Cohen LJ, [1949] 2 All ER 274, 281.

[27] [1957] 1 QB 438; 23 ILR, p. 160.

[28] [1957] 1 QB 438, 461; 23 ILR, p. 169.

[29] [1955] AC 72; 21 ILR, p. 95. See also *USA and France* v. *Dollfus Mieg et Compagnie* [1952] AC 582; 19 ILR, p. 163.

[30] See Higgins, 'Unresolved Aspects', p. 273, who raises the question as to whether this test would be rigorous in an era of restrictive immunity. See also R. Higgins, *Problems and Process*, Oxford, 1994, chapter 5.

where the vessels concerned, although owned by the states claiming immunity, were held subject to the jurisdiction since at the relevant time they were not in the possession or control of these states.[31]

Since the courts will not try a case in which a foreign state is the defendant, it is necessary to decide what a foreign state is in each instance. Where doubts are raised as to the status of a foreign entity and whether or not it is to be regarded as a state for the purposes of the municipal courts, the executive certificate issued by the UK government will be decisive.

The case of *Duff Development Company* v. *Kelantan*[32] is a good example of this point. Kelantan was a Malay state under British protection. Both its internal and external policies were subject to British direction and it could in no way be described as politically independent. However, the UK government had issued an executive certificate to the effect that Kelantan was an independent state and that the Crown neither exercised nor claimed any rights of sovereignty or jurisdiction over it. The House of Lords, to whom the case had come, declared that once the Crown recognised a foreign ruler as sovereign, this bound the courts and no other evidence was admissible or needed. Accordingly, Kelantan was entitled to sovereign immunity from the jurisdiction of the English courts.

The restrictive approach

A number of states in fact started adopting the restrictive approach to immunity, permitting the exercise of jurisdiction over non-sovereign acts, at a relatively early stage.[33] The Supreme Court of Austria in 1950, in a comprehensive survey of practice, concluded that in the light of the increased activity of states in the commercial field the classic doctrine of absolute immunity had lost its meaning and was no longer a rule of international

[31] *The Navemar* 303 US 68 (1938); 9 AD, p. 176 and *Republic of Mexico* v. *Hoffman* 324 US 30 (1945); 12 AD, p. 143.

[32] [1924] AC 797; 2 AD, p. 124. By s. 21 of the State Immunity Act 1978, an executive certificate is deemed to be conclusive as to, for example, statehood in this context. See also *Trawnik* v. *Gordon Lennox* [1985] 2 All ER 368 as to the issue of a certificate under s. 21 on the status of the Commander of UK Forces in Berlin.

[33] See e.g. Belgium and Italy, Lauterpacht, 'Problem'; Badr, *State Immunity*, chapter 2; Sinclair, 'Sovereign Immunity' and I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, pp. 323 ff. See also the Brussels Convention on the Immunity of State-owned Ships, 1926, which assimilated the position of such ships engaged in trade to that of private ships regarding submission to the jurisdiction, and the 1958 Conventions on the Territorial Sea and on the High Seas. See now articles 31, 32, 95 and 96 of the 1982 Convention on the Law of the Sea.

law.[34] In 1952, in the Tate letter, the United States Department of State declared that the increasing involvement of governments in commercial activities coupled with the changing views of foreign states to absolute immunity rendered a change necessary and that thereafter 'the Department [will] follow the restrictive theory of sovereign immunity'.[35] This approach was also adopted by the courts, most particularly in *Victory Transport Inc.* v. *Comisaria General de Abasteciementos y Transportes.*[36] In this case, the Court, in the absence of a State Department 'suggestion' as to the immunity of the defendants, a branch of the Spanish Ministry of Commerce, affirmed jurisdiction since the chartering of a ship to transport wheat was not strictly a political or public act. The restrictive theory approach was endorsed by four Supreme Court Justices in *Alfred Dunhill of London Inc.* v. *Republic of Cuba.*[37]

As far as the UK was concerned, the adoption of the restrictive approach occurred rather later.[38]

In the *Philippine Admiral* case,[39] the vessel, which was owned by the Philippine government, had writs issued against it in Hong Kong by two shipping corporations. The Privy Council, hearing the case on appeal from the Supreme Court of Hong Kong, reviewed previous decisions on sovereign immunity and concluded that it would not follow the *Porto Alexandre* case.[40] Lord Cross gave four reasons for not following the earlier case. First, that the Court of Appeal wrongly felt that they were bound by the *Parlement Belge*[41] decision. Secondly, that the House of Lords in *The Cristina*[42] had been divided on the issue of immunity for state-owned vessels engaged in commerce. Thirdly, that the trend of opinion was against the absolute immunity doctrine; and fourthly that it was 'wrong' to apply the doctrine since states could in the Western world be sued in their

[34] *Dralle* v. *Republic of Czechoslovakia* 17 ILR, p. 155. This case was cited with approval by the West German Supreme Constitutional Court in *The Empire of Iran* 45 ILR, p. 57 and by the US Court of Appeals in *Victory Transport Inc.* v. *Comisaria General de Abasteciementos y Transportes* 35 ILR, p. 110.

[35] 26 *Department of State Bulletin*, 984 (1952).

[36] 35 ILR, p. 110. See also e.g. *National City Bank of New York* v. *Republic of China* 22 ILR, p. 210 and *Rich* v. *Naviera Vacuba* 32 ILR, p. 127.

[37] 15 ILM, 1976, pp. 735, 744, 746–7; 66 ILR, pp. 212, 221, 224.

[38] See, for some early reconsiderations, Lord Denning in *Rahimtoola* v. *Nizam of Hyderabad* [1958] AC 379, 422; 24 ILR, pp. 175, 190.

[39] [1976] 2 WLR 214; 64 ILR, p. 90. Sinclair describes this as a 'historic landmark', 'Sovereign Immunity', p. 154. See also R. Higgins, 'Recent Developments in the Law of Sovereign Immunity in the United Kingdom', 71 AJIL, 1977, pp. 423, 424.

[40] [1920] P. 30; 1 AD, p. 146.

[41] (1880) 5 PD 197.

[42] [1938] AC 485; 9 AD, p. 250.

own courts on commercial contracts and there was no reason why foreign states should not be equally liable to be sued.[43] Thus, the Privy Council held that in cases where a state-owned merchant ship involved in ordinary trade was the object of a writ, it would not be entitled to sovereign immunity and the litigation would proceed.

In the case of *Thai-Europe Tapioca Service Ltd* v. *Government of Pakistan*,[44] a German-owned ship on charter to carry goods from Poland to Pakistan had been bombed in Karachi by Indian planes during the 1971 war. Since the agreement provided for disputes to be settled by arbitration in England, the matter came eventually before the English courts. The cargo had previously been consigned to a Pakistani corporation, and that corporation had been taken over by the Pakistani government. The shipowners sued the government for the sixty-seven-day delay in unloading that had resulted from the bombing. The government pleaded sovereign immunity and sought to have the action dismissed.

The Court of Appeal decided that since all the relevant events had taken place outside the jurisdiction and in view of the action being *in personam* against the foreign government rather than against the ship itself, the general principle of sovereign immunity would have to stand.

Lord Denning declared in this case that there were certain exceptions to the doctrine of sovereign immunity. It did not apply where the action concerned land situated in the UK or trust funds lodged in the UK or debts incurred in the jurisdiction for services rendered to property in the UK, nor was there any immunity when a commercial transaction was entered into with a trader in the UK 'and a dispute arises which is properly within the territorial jurisdiction of our courts'.[45]

This unfortunate split approach, absolute immunity for actions *in personam* and restrictive immunity for actions *in rem* did not, however, last long. In *Trendtex Trading Corporation Ltd* v. *Central Bank of Nigeria*,[46] all three judges of the Court of Appeal accepted the validity of the restrictive approach as being consonant with justice, comity and international practice.[47] The problem of precedent was resolved for two of the judges by declaring that international law knew no doctrine of *stare decisis*.[48] The

43 [1976] 2 WLR 214, 232; 64 ILR, pp. 90, 108. Note that Lord Cross believed that the absolute theory still obtained with regard to actions *in personam*, [1976] 2 WLR 214, 233.

44 [1975] 1 WLR 1485; 64 ILR, p. 81.

45 [1975] 1 WLR 1485, 1490–1; 64 ILR, p. 84.

46 [1977] 2 WLR 356; 64 ILR, p. 122.

47 [1977] 2 WLR 356, 366–7 (Denning MR), 380 (Stephenson LJ) and 385–6 (Shaw LJ).

48 *Ibid.*, pp. 365–6 and 380. But cf. Stephenson LJ, *ibid.*, p. 381. See further above, chapter 4, p. 145.

clear acceptance of the restrictive theory of immunity in *Trendtex* was reaffirmed in later cases,[49] particularly by the House of Lords in the *I° Congreso del Partido* case[50] and in *Alcom Ltd* v. *Republic of Colombia.*[51]

The majority of states now have tended to accept the restrictive immunity doctrine[52] and this has been reflected in domestic legislation.[53] In particular, the US Foreign Sovereign Immunities Act 1976,[54] provides in section 1605 for the grounds upon which a state may be subject to the jurisdiction (as general exceptions to the jurisdictional immunity of a foreign state), while the UK State Immunity Act 1978[55] similarly provides for a general rule of immunity from the jurisdiction of the courts with a range of exceptions thereto.[56]

49 See e.g. *Hispano Americana Mercantil SA* v. *Central Bank of Nigeria* [1979] 2 LL. R 277; 64 ILR, p. 221.

50 [1981] 2 All ER 1064; 64 ILR, p. 307, a case concerned with the pre-1978 Act common law. See also *Planmount Ltd* v. *Republic of Zaire* [1981] 1 All ER 1110; 64 ILR, p. 268.

51 [1984] 2 All ER 6; 74 ILR, p. 179. See also *Jones* v. *Saudi Arabia* [2006] UKHL 26, para. 8 (per Lord Bingham); 129 ILR, pp. 716.

52 See e.g. the *Administration des Chemins de Fer du Gouvernement Iranien* case, 52 ILR, p. 315 and the *Empire of Iran* case, 45 ILR, p. 57; see also Sinclair, 'Sovereign Immunity'; Badr, *State Immunity*; and UN, *Materials.* Note also *Abbott* v. *Republic of South Africa* before the Spanish Constitutional Court, 86 ILR, p. 512; *Manauta* v. *Embassy of Russian Federation* 113 ILR, p. 429 (Argentinian Supreme Court); *US* v. *Friedland* 182 DLR (4th) 614; 120 ILR, p. 417 and *CGM Industrial* v. *KPMG* 1998 (3) SA 738; 121 ILR, p. 472.

53 See e.g. the Singapore State Immunity Act 1979; the Pakistan State Immunity Ordinance 1981; the South African Foreign States Immunities Act 1981; the Canadian State Immunity Act 1982 and the Australian Foreign States Immunities Act 1985. See also article 5 of the UN Convention on Jurisdictional Immunities of States and Their Property, 2004. Note that this Convention, which is not in force as at the date of writing, does not apply to criminal proceedings.

54 See e.g. G. Delaume, 'Public Debt and Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976', 71 AJIL, 1977, p. 399; Sinclair, 'Sovereign Immunity', pp. 243 ff., and D. Weber, 'The Foreign Sovereign Immunities Act of 1976', 3 *Yale Studies in World Public Order*, 1976, p. 1. Note that in *Republic of Austria* v. *Altmann*, the US Supreme Court held that the Foreign Sovereign Immunities Act applied to acts which occurred prior to its enactment and even prior to the adoption by the US of the restrictive immunity approach in 1952, 541 US 677 (2004).

55 See e.g. D. W. Bowett, 'The State Immunity Act 1978', 37 *Cambridge Law Journal*, 1978, p. 193; R. C. A. White, 'The State Immunity Act 1978', 42 MLR, 1979, p. 72; Sinclair, 'Sovereign Immunity', pp. 257 ff., and M. N. Shaw, 'The State Immunity Act 1978', *New Law Journal*, 23 November 1978, p. 1136.

56 See also the 1972 European Convention on State Immunity. The Additional Protocol to the European Convention, which establishes a European Tribunal in matters of State Immunity to determine disputes under the Convention, came into force on 22 May 1985, to be composed initially of the same members as the European Court of Human Rights: see Council of Europe Press Release, C(85)39. See generally UN, *Materials*, Part I 'National Legislation', and Badr, *State Immunity*, chapter 3. See also the Inter-American

The former Soviet Union and some other countries generally adhered to the absolute immunity theory, although in practice entered into many bilateral agreements permitting the exercise of jurisdiction in cases where a commercial contract had been signed on the territory of the other state party.[57]

Sovereign and non-sovereign acts

With the acceptance of the restrictive theory, it becomes crucial to analyse the distinction between those acts that will benefit from immunity and those that will not. In the *Victory Transport* case,[58] the Court declared that it would (in the absence of a State Department suggestion)[59] refuse to grant immunity, unless the activity in question fell within one of the categories of strictly political or public acts: viz. internal administrative acts, legislative acts, acts concerning the armed forces or diplomatic activity and public loans.

However, the basic approach of recent legislation[60] has been to proclaim a rule of immunity and then list the exceptions, so that the onus of proof falls on the other side of the line.[61] This approach is mirrored in article 5

Draft Convention on Jurisdictional Immunity of States, 22 ILM, 1983, p. 292. Note that the large number of cases precipitated by the 1979 Iran Hostages Crisis and the US freezing of assets were argued on the basis of the restrictive theory, before being terminated: see e.g. R. Edwards, 'Extraterritorial Application of the US Iranian Assets Control Regulations', 75 AJIL, 1981, p. 870. See also *Dames and Moore* v. *Regan* 101 S. Ct. 1972 (1981); 72 ILR, p. 270.

[57] See, for a number of examples, UN, *Materials*, pp. 134–50. See also M. M. Boguslavsky, 'Foreign State Immunity: Soviet Doctrine and Practice', 10 Netherlands YIL, 1979, p. 167. See, as to Philippines practice, *US* v. *Ruiz and De Guzman* 102 ILR, p. 122; *US* v. *Guinto, Valencia and Others*, *ibid.*, p. 132 and *The Holy See* v. *Starbright Sales Enterprises*, *ibid.*, p. 163.

[58] 336 F.2d 354 (1964); 35 ILR, p. 110. See also P. Lalive, 'L'Immunité de Juridiction des États et des Organisations Internationales', 84 HR, 1953, p. 205, and Lauterpacht, 'Problem', pp. 237–9.

[59] Note that since the 1976 Foreign Sovereign Immunities Act, the determination of such status is a judicial, not executive, act.

[60] See e.g. s. 1 of the State Immunity Act 1978; s. 1604 of the US Foreign Sovereign Immunities Act 1976 and s. 9 of the Australian Foreign States Immunities Act 1985. See also *Saudi Arabia* v. *Nelson* 123 L Ed 2d 47 (1993); 100 ILR, p. 544.

[61] See also article 15 of the European Convention on State Immunity, 1972. Article II of the Revised Draft Articles for a Convention on State Immunity adopted by the International Law Association in 1994, Report of the Sixty-sixth Conference, 1994, p. 22, provides that: 'In principle, a foreign state shall be immune from the adjudicatory jurisdiction of a forum state for acts performed by it in the exercise of its sovereign authority, i.e. *jure imperii*. It shall not be immune in the circumstances provided in article III.'

of the UN Convention on Jurisdictional Immunities of States and Their Property, 2004, which notes that:[62]

> A state enjoys immunity in respect of itself and its property, from the jurisdiction of the courts of another state subject to the provisions of the present Convention.

In such circumstances, the way in which the 'state' is defined for sovereign immunity purposes becomes important. Article 2(1)b of the Convention declares that 'state' means: (i) the state and its various organs of government; (ii) constituent units of a federal state or political subdivisions of the state, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (iii) agencies or instrumentalities of the state or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the state; and (iv) representatives of the state acting in that capacity.[63]

With the adoption of the restrictive theory of immunity, the appropriate test becomes whether the activity in question is of itself sovereign (*jure imperii*) or non-sovereign (*jure gestionis*). In determining this, the predominant approach has been to focus upon the nature of the transaction rather than its purpose.[64]

However, it should be noted that article 2(2) of the Convention provides that:

[62] There is extensive state practice on whether immunity should be seen as a derogation from territorial sovereignty and thus to be justified in each particular case, or as a rule of international law as such, thus not requiring substantiation in each and every case: see *Yearbook of the ILC*, 1980, vol. II, part 2, pp. 142 ff.

[63] Note that the provision in point (iv) is somewhat confusing in the light of article 3 which states that the Convention is without prejudice to the privileges and immunities of diplomatic and consular missions, special missions and missions to international organisations, and the immunities granted to heads of state.

[64] See e.g. s. 1603(d) of the US Foreign Sovereign Immunities Act of 1976. The section-by-section analysis of the Act emphasises that 'the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the initially commercial nature of an activity or transaction that is critical', reproduced in UN, *Materials*, pp. 103, 107. See also the *Empire of Iran* case, 45 ILR, pp. 57, 80–1; *Trendtex Trading Corporation Ltd* v. *Central Bank of Nigeria* [1977] 2 WLR 356; 64 ILR, p. 122; *Non-resident Petitioner* v. *Central Bank of Nigeria* 16 ILM, 1977, p. 501 (a German case); *Planmount Ltd* v. *Republic of Zaire* [1981] 1 All ER 1110; 64 ILR, p. 268 and *Saudi Arabia* v. *Nelson* 123 L Ed 2d 47 (1993); 100 ILR, p. 544 (US Supreme Court). See also article I of the Revised Draft Articles for a Convention on State Immunity adopted by the International Law Association in 1994, Report of the Sixty-sixth Conference, 1994, p. 23.

> In determining whether a contract or transaction is a 'commercial transaction' . . . reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the state of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

The reason for the modified 'nature' test was in order to provide an adequate safeguard and protection for developing countries, particularly as they attempt to promote national economic development. The ILC Commentary notes that a two-stage approach is posited, to be applied successively. First, reference should be made primarily to the nature of the contract or transaction and, if it is established that it is non-commercial or governmental in nature, no further enquiry would be needed. If, however, the contract or transaction appeared to be commercial, then reference to its purpose should be made in order to determine whether the contract or transaction was truly sovereign or not. States should be given an opportunity to maintain that in their practice a particular contract or transaction should be treated as non-commercial since its purpose is clearly public and supported by reasons of state. Examples given include the procurement of medicaments to fight a spreading epidemic, and food supplies.[65] This approach, a modification of earlier drafts,[66] is not uncontroversial and some care is required. It would, for example, be unhelpful if the purpose criterion were to be adopted in a manner which would permit it to be used to effect a considerable retreat from the restrictive immunity approach. This is not to say, however, that no consideration whatsoever of the purpose of the transaction in question should be undertaken.

Lord Wilberforce in *I° Congreso del Partido*[67] emphasised that in considering whether immunity should be recognised one had to consider the whole context in which the claim is made in order to identify the 'relevant act' which formed the basis of that claim. In particular, was it an act *jure gestionis*, or in other words 'an act of a private law character such as a private citizen might have entered into'?[68] This use of the private law/public law dichotomy, familiar to civil law systems, was particularly noticeable, although different states draw the distinction at

[65] Report of the International Law Commission, 1991, pp. 29–30.

[66] *Yearbook of the ILC*, 1983, vol. II, part 2.

[67] [1983] AC 244, 267; 64 ILR, pp. 307, 318.

[68] [1983] AC 244, 262; 64 ILR, p. 314.

different points.[69] It should also be noted, however, that this distinction is less familiar to common law systems. In addition, the issues ascribed to the governmental sphere as distinct from the private area rest upon the particular political concept proclaimed by the state in question, so that a clear and comprehensive international consensus regarding the line of distinction is unlikely.[70] The characterisation of an act as *jure gestionis* or *jure imperii* will also depend upon the perception of the issue at hand by the courts. Lord Wilberforce also noted that while the existence of a governmental purpose or motive could not convert what would otherwise be an act *jure gestionis* or an act of private law into one done *jure imperii*,[71] purpose may be relevant if throwing some light upon the nature of what was done.[72]

The importance of the contextual approach at least as the starting point of the investigation was also emphasised by the Canadian Supreme Court in *United States of America* v. *The Public Service Alliance of Canada and Others* (*Re Canada Labour Code*).[73] It was noted that the contextual approach was the only reasonable basis for applying the restrictive immunity doctrine for the alternative was to attempt the impossible, 'an antiseptic distillation of a "once-and-for-all" characterisation of the activity in question, entirely divorced from its purpose'.[74] The issue was also considered by the Supreme Court of Victoria, Australia, in *Reid* v. *Republic of Nauru*,[75] which stated that in some situations the separation of act, motive and purpose might not be possible. The motive or purpose underlying particular conduct may constitute part of the definition of the act itself in some cases, while in others the nature or quality of the act performed might not be ascertainable without reference to the context within which it is carried out. The Court also made the point that a relevant factor was the perception held or policy adopted in each particular country as to the attributes of sovereignty itself.[76] The point that 'unless we can inquire into the purpose of such acts, we cannot determine their nature' was also made by the US Court of Appeals in *De Sanchez* v. *Banco Central de Nicaragua and Others*.[77]

[69] See e.g. Sinclair, 'Sovereign Immunity', pp. 210–13, and the *Empire of Iran* case, 45 ILR, pp. 57, 80. See also article 7 of the European Convention on State Immunity, 1972.
[70] See e.g. Crawford, 'International Law', p. 88, and Lauterpacht, 'Problem', pp. 220, 224–6.
[71] [1983] AC 244, 267; 64 ILR, p. 318.
[72] [1983] AC 244, 272; 64 ILR, p. 323.
[73] (1992) 91 DLR (4th) 449; 94 ILR, p. 264.
[74] [1992] 91 DLR (4th) 463; 94 ILR, p. 278.
[75] [1993] 1 VR 251; 101 ILR, p. 193.
[76] [1993] 1 VR 253; 101 ILR, pp. 195–6.
[77] 770 F.2d 1385, 1393 (1985); 88 ILR, pp. 75, 85.

The particular issue raised in the *Congreso* case was whether immunity could be granted where, while the initial transaction was clearly commercial, the cause of the breach of the contract in question appeared to be an exercise of sovereign authority. In that case, two vessels operated by a Cuban state-owned shipping enterprise and delivering sugar to a Chilean company were ordered by the Cuban government to stay away from Chile after the Allende regime had been overthrown. The Cuban government pleaded sovereign immunity on the grounds that the breach of the contract was occasioned as a result of a foreign policy decision. The House of Lords did not accept this and argued that once a state had entered the trading field, it would require a high standard of proof of a sovereign act for immunity to be introduced. Lord Wilberforce emphasised that:

> in order to withdraw its action from the sphere of acts done *jure gestionis*, a state must be able to point to some act clearly done *jure imperii*[78]

and that the appropriate test was to be expressed as follows:

> it is not just that the purpose or motive of the act is to serve the purposes of the state, but that the act is of its own character a governmental act, as opposed to an act which any private citizen can perform.[79]

In the circumstances of the case, that test had not been satisfied. One of the two ships, the *Playa Larga*, had been owned at all relevant times by the Cuban government, but the second ship, the *Marble Islands*, was owned by a trading enterprise not entitled to immunity. When this ship was on the high seas, it was taken over by the Cuban government and ordered to proceed to North Vietnam, where its cargo was eventually donated to the people of that country. The Court was unanimous in rejecting the plea of immunity with regard to the *Playa Larga*, but was split over the second ship.

Two members of the House of Lords, Lord Wilberforce and Lord Edmund-Davies, felt that the key element with regard to the *Marble Islands*, as distinct from the *Playa Larga*, where the government had acted as owner of the ship and not as governmental authority, was that the Republic of Cuba directed the disposal of the cargo in North Vietnam. This was not part of any commercial arrangement which was conducted by the demise charterer, who was thus responsible for the civil wrongs

[78] [1981] 2 All ER 1064, 1075; 64 ILR, p. 320.
[79] *Ibid.*, quoting the judge at first instance, [1978] 1 All ER 1169, 1192; 64 ILR, p. 179.

committed. The acts of the government were outside this framework and accordingly purely governmental.[80]

However, the majority held that the Cuban government had acted in the context of a private owner in discharging and disposing of the cargo in North Vietnam and had not regarded itself as acting in the exercise of sovereign powers. Everything had been done in purported reliance upon private law rights in that the demise charterers had sold the cargo to another Cuban state enterprise by ordinary private law sale and in purported reliance upon the bill of lading which permitted the sale in particular instances. It was the purchaser that donated the cargo to the Vietnamese people.[81]

In many respects, nevertheless, the minority view is the more acceptable one, in that in reality it was the Cuban government's taking control of the ship and direction of it and its cargo that determined the issue and this was done as a deliberate matter of state policy. The fact that it was accomplished by the private law route rather than, for example, by direct governmental decree should not settle the issue conclusively. In fact, one thing that the case does show is how difficult it is in reality to distinguish public from private acts.[82]

In *Littrell* v. *United States of America* (*No. 2*),[83] Hoffman LJ in the Court of Appeal emphasised that it would be facile in the case, which concerned medical treatment for a US serviceman on an American base in the UK, to regard the general military context as such as determinative. One needed to examine carefully all the relevant circumstances in order to decide whether a sovereign or a non-sovereign activity had been involved. Important factors to be considered included where the activity actually took place, whom it involved and what kind of act itself was involved.[84] In *Holland* v. *Lampen-Wolfe*, the House of Lords dealt with a case concerning

80 [1981] 2 All ER 1064, 1077 and 1081; 64 ILR, pp. 321, 327.

81 [1981] 2 All ER 1079–80, 1082 and 1083; 64 ILR, pp. 325, 328, 329.

82 Note that if the State Immunity Act 1978 had been in force when the cause of action arose in this case, it is likely that the claim of immunity would have completely failed: see s. 10. See also *Kuwait Airways Corporation* v. *Iraqi Airways Co.* [1995] 1 WLR 1147, where the House of Lords separated out a series of events and held that an initial sovereign act did not characterise the situation as a whole: see below, p. 714.

83 [1995] 1 WLR 82, 95; 100 ILR, p. 438. Note that the case, as it concerned foreign armed forces in the UK, fell outside the State Immunity Act 1978 and was dealt with under common law.

84 See also *Hicks* v. *US* 120 ILR, p. 606, where the Employment Appeal Tribunal held that the primary purpose of recreation facilities at an airbase was to increase the effectiveness of the central military activity of that base which was clearly a sovereign activity.

the activities of a US citizen and civilian teaching at a US military base in the UK who argued that a memorandum written by the defendant was libellous.[85] Relying upon Hoffman LJ's approach, the House of Lords emphasised that the context in which the act concerned took place was the provision of education within a military base, an activity designed 'as part of the process of maintaining forces and associated civilians on the base by US personnel to serve the needs of the US military authorities'.[86] Accordingly, the defendant was entitled to immunity.

The problem of sovereign immunity with regard to foreign bases was also addressed by the Canadian Supreme Court in *United States of America* v. *The Public Service Alliance of Canada* (*Re Canada Labour Code*).[87] The Court emphasised that employment at the base was a multifaceted activity and could neither be labelled as such as sovereign or commercial in nature. One had to determine which aspects of the activity were relevant to the proceedings at hand and then to assess the impact of the proceedings on these attributes as a whole.[88] The closer the activity in question was to undisputable sovereign acts, such as managing and operating an offshore military base, the more likely it would be that immunity would be recognised. In *Kuwait Airways Corporation* v. *Iraqi Airways Co.*,[89] Lord Goff, giving the leading judgment in the House of Lords, adopted Lord Wilberforce's statement of principle in *Congreso* and held that 'the ultimate test of what constitutes an act *jure imperii* is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform'.[90] Further, the Court held that the fact that an initial act was an act *jure imperii* did not determine as such the characterisation of subsequent acts.[91]

85 Similarly a US citizen and civilian.

86 [2000] 1 WLR 1573, 1577 (per Lord Hope, who stated that 'the context is all important', *ibid.*).

87 (1992) 91 DLR (4th) 449; 94 ILR, p. 264.

88 (1992) 91 DLR (4th) 466; 94 ILR, p. 281.

89 [1995] 1 WLR 1147, 1160; 103 ILR, p. 340. For later proceedings in this case, see 116 ILR, p. 534 (High Court); [2000] 2 All ER (Comm.) 360; [2001] 2 WLR 1117 (Court of Appeal) and [2002] UKHL 19 (House of Lords).

90 Note that in *Sengupta* v. *Republic of India* 65 ILR, pp. 325, 360, it was emphasised that in deciding whether immunity applied, one had to consider whether it was the kind of contract an individual might make, whether it involved the participation of both parties in the public functions of the state, the nature of the alleged breach and whether the investigation of the claim would involve an investigation into the public or sovereign acts of the foreign state.

91 [1995] 1 WLR 1147, 1162–3. See further below, p. 731.

State immunity and violations of human rights[92]

With the increasing attention devoted to the relationship between international human rights law and domestic systems, the question has arisen as to whether the application of sovereign immunity in civil suits against foreign states for violations of human rights law has been affected. To date state practice suggests that the answer to this is negative. In *Saudi Arabia* v. *Nelson*, the US Supreme Court noted that the only basis for jurisdiction over a foreign state was the Foreign Sovereign Immunities Act 1976 and, unless a matter fell within one of the exceptions, the plea of immunity would succeed.[93] It was held that although the alleged wrongful arrest, imprisonment and torture by the Saudi government of Nelson would amount to abuse of the power of its police by that government, 'a foreign state's exercise of the power of its police has long been understood for the purposes of the restrictive theory as peculiarly sovereign'.[94] However, the US Foreign Sovereign Immunities Act was amended in 1996 by the Antiterrorism and Effective Death Penalty Act which created an exception to immunity with regard to states, designated by the Department of State as terrorist states, which committed a terrorist act, including hostage-taking, or provided material support and resources to an individual or entity which committed such an act which resulted in the death or personal injury of a US citizen.[95] In *Simpson* v. *Libya*, the US Court of Appeals held that the hostage exception to immunity applied where three conditions had been met: where the state in question had been designated as a 'state sponsor of terrorism'; where it had been provided with a reasonable

[92] See e.g. Bröhmer, *State Immunity*; S. Marks, 'Torture and the Jurisdictional Immunity of Foreign States', 1997 CLJ, p. 8; R. van Alebeek, 'The *Pinochet* Case', 71 BYIL, 2000, pp. 49 ff., and van Alebeek, *Immunities of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford, 2008; K. Reece Thomas and J. Small, 'Human Rights and State Immunity: Is There Immunity From Civil Liability for Torture?', 50 NILR, 2003, p. 1; K. Parlett, 'Immunity in Civil Proceedings for Torture: The Emerging Exception', 2 *European Human Rights Law Review*, 2006, p. 49; H. Fox, 'State Immunity and the International Crime of Torture', 2 *European Human Rights Law Review*, 2006, p. 142; Redress, *Immunity v Accountability*, London, 2005, and L. Caplan, 'State Immunity, Human Rights and *Jus Cogens*: A Critique of the Normative Hierarchy Theory', 97 AJIL, 2003, p. 741.

[93] 123 L Ed 2d 47, 61 (1993); 100 ILR, pp. 544, 553.

[94] 123 L Ed 2d 47, 57. See also e.g. *Controller and Auditor General* v. *Sir Ronald Davidson* [1996] 2 NZLR 278 and *Princz* v. *Federal Republic of Germany* 26 F.3d 1166 (DC Cir. 1994).

[95] This provision is retroactive. See *Flatow* v. *Islamic Republic of Iran* 999 F.Supp. 1 (1998); 121 ILR, p. 618 and *Alejandre* v. *Republic of Cuba* 996 F.Supp. 1239 (1997); 121 ILR, p. 603.

opportunity to arbitrate the claim; and where the claimant or victim was a citizen of the US. The Court found it unnecessary for the plaintiff to have to show that the hostage-taker had issued a demand showing his intended purposes to a third party, since the definition of hostage-taking focused on the state of mind of the hostage-taker himself. Accordingly, third-party awareness of a hostage-taker's intent was not a required element.[96]

In *Bouzari* v. *Iran*, the Superior Court of Justice of Ontario, Canada, noted, in the light of the Canadian State Immunity Act 1982, that 'regardless of the state's ultimate purpose, exercises of police, law enforcement and security powers are inherently exercises of governmental authority and sovereignty'[97] and concluded that an international custom existed to the effect that there was an ongoing rule providing state immunity for acts of torture committed outside the forum state.[98] The English Court of Appeal in *Al-Adsani* v. *Government of Kuwait*[99] held that the State Immunity Act provided for immunity for states apart from specific listed express exceptions, and there was no room for implied exceptions to the general rule even where the violation of a norm of *jus cogens* (such as the prohibition of torture) was involved. The Court rejected an argument that the term 'immunity' in domestic legislation meant immunity from sovereign acts that were in accordance with international law, thus excluding torture for which immunity could not be claimed. In *Holland* v. *Lampen-Wolfe*, the House of Lords held that recognition of sovereign immunity did not involve a violation of the rights of due process contained in article 6 of the European Convention on Human Rights since it was argued that immunity derives from customary international law while the obligations under article 6 derived from a treaty freely entered into by the UK. Accordingly, 'The United Kingdom cannot, by its own act of acceding to the Convention and without the consent of the United States, obtain a power of adjudication over the United States which international law denies it.'[100] The European Court of Human Rights in *Al-Adsani* v. *UK*

[96] 470 F.3d 356 (2006). [97] 124 ILR, pp. 427, 435.

[98] *Ibid.*, p. 443. The Court dismissed arguments that either the Convention against Torture or the International Covenant on Civil and Political Rights imposed an obligation on states to create a civil remedy with regard to acts of torture committed abroad, or that such an obligation existed as a rule of *jus cogens*: see at pp. 441 and 443.

[99] (1996) 1 LL. R 104; 107 ILR, p. 536. But see Evans LJ in *Al-Adsani* v. *Government of Kuwait* 100 ILR, p. 465, which concerned leave to serve proceedings upon the government of Kuwait and in which it had been held that there was a good arguable case that, under the State Immunity Act, there was no immunity for a state in respect of alleged acts of torture.

[100] [2000] 1 WLR 1573, 1588 (per Lord Millett); 119 ILR, p. 384.

analysed this issue, that is whether state immunity could exist with regard to civil proceedings for torture in the light of article 6 of the European Convention.[101] The Court noted that the grant of sovereign immunity to a state in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between states through the respect of another state's sovereignty and that the European Convention on Human Rights should be interpreted in harmony with other rules of international law, including that relating to the grant of state immunity.[102] The Court concluded that it could not discern in the relevant materials before it, 'any firm basis for concluding that, as a matter of international law, a state no longer enjoys immunity from civil suit in the courts of another state where acts of torture are alleged'[103] and held that immunity thus still applied in such cases.[104]

In *Jones* v. *Saudi Arabia*, the House of Lords, faced with claims that individuals had been systematically tortured while in official custody in Saudi Arabia, held that under Part 1 of the State Immunity Act 1978, an approach reflecting that adopted in international law (particularly in the UN Convention on Jurisdictional Immunities), a foreign state was immune unless one of the exceptions provided for in the legislation applied. None of the exceptions mentioned injuries caused by torture abroad.[105] Further, the fact that torture was prohibited by a *jus cogens* rule of international law did not suffice to remove the immunity granted by international law to a state nor to confer jurisdiction to hear civil claims in respect of torture committed outside of the state where it was sought to exercise jurisdiction.[106] Particular emphasis was placed on the distinction between the prohibition of torture as a substantive rule of law and the existence of the rule of immunity which constitutes a procedural bar to the exercise of jurisdiction and does not contradict the prohibition.[107] Lord Hoffmann underlined that as a matter of international practice, no procedural rule of international law had developed enabling states to

[101] Judgment of 21 November 2001; 123 ILR, p. 24.

[102] *Ibid.*, paras. 54 and 55. [103] *Ibid.*, para. 61.

[104] *Ibid.*, para. 66. This decision was later affirmed in *Kalogeropoulou* v. *Greece and Germany*, European Court of Human Rights, judgment of 12 December 2002; 129 ILR, p. 537.

[105] [2006] UKHL 26, para. 9 (per Lord Bingham); 129 ILR, p. 717.

[106] *Ibid.*, paras. 24–8; 129 ILR, pp. 726–8.

[107] See e.g. para. 24 (Lord Bingham) and para. 44 (Lord Hoffmann), 129 ILR, pp. 726 and 732, both citing Fox, *State Immunity*, p. 525 to this effect, who further noted that the existence of immunity merely diverted any breach of the prohibition 'to a different method of settlement'.

assume civil jurisdiction over other states in cases in which torture was alleged.[108]

In the case of criminal proceedings, the situation is rather different. Part I of the State Immunity Act (the substantive part) does not apply to criminal proceedings, although Part III (concerning certain status issues) does. In *Ex parte Pinochet* (*No. 3*),[109] the House of Lords held by six votes to one that General Pinochet was not entitled to immunity in extradition proceedings (which are criminal proceedings) with regard to charges of torture and conspiracy to torture where the alleged acts took place after the relevant states (Chile, Spain and the UK) had become parties to the Convention against Torture, although the decision focused on head of state immunity and the terms of the Convention.[110]

Commercial acts

Of all state activities for which immunity is no longer to be obtained, that of commercial transactions is the primary example and the definition of such activity is crucial.[111]

Section 3(3) of the State Immunity Act 1978 defines the term 'commercial transaction' 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.

108 *Ibid.*, paras. 45 ff.; 129 ILR, pp. 732 ff. Note that the controversial case of *Ferrini* v. *Federal Republic of Germany* before the Italian Court of Cassation is to contrary effect, (2004) Cass sez un 5044/04: see P. De Sena and F. De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the *Ferrini* Case', 16 EJIL, 2005, p. 89; Fox, 'State Immunity and the Crime of Torture', and Lords Bingham and Hoffmann in *Jones* v. *Saudi Arabia* at paras. 22 and 63 respectively.

109 [2000] 1 AC 147; 119 ILR, p. 135.

110 See further below, p. 735. Note, however, that Lords Hope, Millett and Phillips held that there was no immunity for widespread and systematic acts of official torture, [2000] 1 AC 147, 246–8, 275–7, 288–92; 119 ILR, pp. 198–201, 228–31, 242–7.

111 In his discussion of the development of the restrictive theory of sovereign or state immunity in *Alcom* v. *Republic of Colombia* [1984] 2 All ER 6, 9; 74 ILR, pp. 180, 181, Lord Diplock noted that the critical distinction was between what a state did in the exercise of its sovereign authority and what it did in the course of commercial activities. The former enjoyed immunity, the latter did not. See also Schreuer, *State Immunity*, chapter 2.

Thus a wide range of transactions are covered[112] and, as Lord Diplock pointed out,[113] the 1978 Act does not adopt the straightforward dichotomy between acts *jure imperii* and those *jure gestionis.* Any contract falling within section 3 would be subject to the exercise of jurisdiction and the distinction between sovereign and non-sovereign acts in this context would not be relevant, except in so far as transactions falling within section 3(3)c were concerned, in the light of the use of the term 'sovereign authority'. The Act contains no reference to the public/private question, but the *Congreso* case (dealing with the pre-Act law) would seem to permit examples from foreign jurisdictions to be drawn upon in order to determine the nature of 'the exercise of sovereign authority'.

Section 3(1) of the State Immunity Act provides that a state is not immune 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.[114]

The scope of section 3(1)a was discussed by the Court in *Australia and New Zealand Banking Group* v. *Commonwealth of Australia.*[115] This case arose out of the collapse of the International Tin Council in 1985. The ensuing litigation sought, by various routes, to ascertain whether the member states of the ITC (which was itself an international organisation with separate personality) could be held liable themselves for the debts of that organisation – a prospect vigorously opposed by the states concerned. The case in question concerned an attempt by the brokers and banks to hold the member states of the ITC liable in tort for losses caused by misrepresentation and fraudulent trading.

It was argued by the defendants that as far as section 3(1) was concerned, the activity in question had to be not only commercial within the Act's definition but also undertaken 'otherwise than in the exercise of sovereign authority'. Evans J saw little difference in practice between the two terms in the context.[116] The defendants also argued that the term

[112] Thus, for example, the defence of sovereign immunity was not available in an action relating to a contract for the repair of an ambassador's residence, *Planmount Ltd* v. *Republic of Zaire* [1981] 1 All ER 1110; 64 ILR, p. 268.

[113] *Alcom* v. *Republic of Colombia* [1984] 2 All ER 6, 10; 74 ILR, p. 183.

[114] Note that by s. 3(3), s. 3(1) does not apply to a contract of employment between a state and an individual.

[115] 1989, transcript, pp. 52 ff.

[116] *Ibid.*, p. 54.

'activity' meant something more than a single act or sequence of acts. Evans J did not accept this, but did emphasise that the activity in question had to be examined in context. It was held that both the trading and loan contracts under discussion in the case were commercial and that, if it could be demonstrated that the member states of the ITC had authorised them, such authorisation would amount to commercial activity within the meaning of section 3.[117] However, in practice the distinction between commercial activities undertaken by a state and activities undertaken under the colour of sovereign authority may be a difficult one to draw. In *AIC Ltd* v. *Nigeria*, the High Court decided that proceedings to register a foreign judgment were not proceedings relating to a commercial transaction even if the foreign judgment concerned proceedings relating to such a transaction, so that the exception to immunity did not apply.[118] In *KJ International* v. *MV Oscar Jupiter*, the Supreme Court of South Africa held that a commercial transaction was not necessarily a transaction with a commercial purpose and that where a ship had been transferred by the Romanian government to one company which had then transferred it to another, the activities of the latter could not be seen as commercial transactions of the government. Accordingly, no loss of immunity would take place for this reason. However, the transfer of the ship by the Romanian government to the Moldovan government to be operated by the latter for profit did constitute a commercial transaction, so that immunity was lost.[119] In *Svenska Petroleum* v. *Lithuania*, the Court of Appeal emphasised that the distinction between a commercial transaction and a transaction entered into by a state in the exercise of its sovereign authority drawn in s. 3 of the State Immunity Act, which was virtually identical to article 2(1)c of the UN Convention on Jurisdictional Immunities which was accepted as reflecting the current international thinking on the topic,[120] was not an easy matter to determine.[121] It was held that s. 3 was one of a group of sections dealing with the courts' adjudicative jurisdiction and that it was therefore natural to interpret the phrase in that context as being directed to the subject-matter of the proceedings themselves rather than the source of the legal relationship which had given rise to them.[122] Accordingly, the

117 *Ibid.*, pp. 56–7.

118 [2003] EWHC 1357; 129 ILR, p. 571. This was approved by the Court of Appeal in *Svenska Petroleum* v. *Lithuania* [2006] EWCA Civ 1529, para. 137.

119 131 ILR, p. 529.

120 Citing Lord Bingham in *Jones* v. *Saudi Arabia* [2006] UKHL 26, para. 8, and see below, p. 725.

121 [2006] EWCA Civ 1529, paras. 132–3.

122 *Ibid.*, para. 137.

government of Lithuania was not immune from proceedings to enforce an arbitration award.

The scope of section 3(1)b was discussed by the Court of Appeal in *Maclaine Watson* v. *Department of Trade and Industry*,[123] which concerned the direct action by the brokers and banks against the member states of the ITC in respect of liability for the debts of the organisation on a contractual basis. It was held that the 'contract' referred to need not have been entered into by the state as such. That particular phrase was absent from section 3(1)b. Accordingly, the member states would not have been able to benefit from immunity in the kind of secondary liability of a guarantee nature that the plaintiffs were *inter alia* basing their case upon.[124] This view was adopted in the tort action against the member states[125] in the more difficult context where the obligation in question was a tortious obligation on the part of the member states, that is the authorisation or procuring of a misrepresentation inducing the creditors concerned to make a contract with another party (the ITC).[126]

Section 1603(d) of the US Foreign Sovereign Immunities Act 1976 defines 'commercial activity' as 'a regular course of commercial conduct or a particular commercial transaction or act'. It is also noted that the commercial character of an activity is to be determined by reference to the nature of the activity rather than its purpose. The courts have held that the purchases of food were commercial activities[127] as were purchases of cement,[128] the sending by a government ministry of artists to perform in the US under a US impresario[129] and activities by state airlines.[130]

The issuance of foreign governmental Treasury notes has also been held to constitute a commercial activity, but one which once validly statute-barred by passage of time cannot be revived or altered.[131]

123 [1988] 3 WLR 1033; 80 ILR, p. 49.

124 [1988] 3 WLR 1104–5 (Kerr LJ) and 1130 (Nourse LJ); 80 ILR, pp. 119, 148.

125 *Australia and New Zealand Banking Group* v. *Commonwealth of Australia*, 1989, transcript, pp. 57–9.

126 It should be noted that Evans J reached his decision on this point only with considerable hesitation and reluctance, *ibid.*, p. 59.

127 See e.g. *Gemini Shipping* v. *Foreign Trade Organisation for Chemicals and Foodstuffs* 63 ILR, p. 569 and *ADM Milling Co.* v. *Republic of Bolivia* 63 ILR, p. 56.

128 *NAC* v. *Federal Republic of Nigeria* 63 ILR, p. 137.

129 *United Euram Co.* v. *USSR* 63 ILR, p. 228.

130 *Argentine Airlines* v. *Ross* 63 ILR, p. 195.

131 *Schmidt* v. *Polish People's Republic* 742 F.2d 67 (1984). See also *Jackson* v. *People's Republic of China* 596 F.Supp. 386 (1984); *Amoco Overseas Oil Co.* v. *Compagnie Nationale Algérienne* 605 F.2d 648 (1979); 63 ILR, p. 252 and *Corporacion Venezolana de Fomenta* v. *Vintero Sales* 629 F.2d 786 (1980); 63 ILR, p. 477.

In *Callejo* v. *Bancomer*,[132] a case in which a Mexican bank refused to redeem a certificate of deposit, the District Court dismissed the action on the ground that the bank was an instrumentality of the Mexican government and thus benefited from sovereign immunity, although the Court of Appeals decided the issue on the basis that the act of state doctrine applied since an investigation of a sovereign act performed wholly within the foreign government's territory would otherwise be required. In other cases, US courts have dealt with the actions of Mexican banks consequent upon Mexican exchange control regulations on the basis of sovereign immunity.[133] However, the Supreme Court in *Republic of Argentina* v. *Weltover Inc.*[134] held that the act of issuing government bonds was a commercial activity and the unilateral rescheduling of payment of these bonds also constituted a commercial activity. The Court, noting that the term 'commercial' was largely undefined in the legislation, took the view that its definition related to the meaning it had under the restrictive theory of sovereign immunity and particularly as discussed in *Alfred Dunhill* v. *Republic of Cuba*.[135] Accordingly, 'when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA . . . the issue is whether the particular actions that the foreign state performs (whatever the motives behind them) are the *type* of actions by which a private party engages in "trade or traffic or commerce"'. In this case, the bonds in question were debt instruments that could be held by

[132] 764 F.2d 1101 (1985). See also *Chisholm* v. *Bank of Jamaica* 643 F.Supp. 1393 (1986); 121 ILR, p. 487. Note that in *Dole Food Co.* v. *Patrickson*, the US Supreme Court, in its decision of 22 April 2003, held that in order to constitute an instrumentality under the Foreign Sovereign Immunities Act, the foreign state concerned must itself own a majority of a corporation's shares. Indirect subsidiaries would not benefit from immunity since such companies cannot come within the statutory language granting instrumentality status to an entity a 'majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof': see s. 1603(b)(2). Only direct ownership would satisfy the statutory requirement. The statutory reference to ownership of 'shares' showed that Congress intended coverage to turn on formal corporate ownership and a corporation and its shareholders were distinct entities. Further, instrumentality status was to be determined as at the time of the filing of the complaint: see Case No. 01–593, pp. 4–8.

[133] See e.g. *Braka* v. *Nacional Financiera*, No. 83-4161 (SDNY 9 July 1984) and *Frankel* v. *Banco Nacional de Mexico*, No. 82-6457 (SDNY 31 May 1983), cited in 80 AJIL, 1986, p. 172, note 5.

[134] 119 L Ed 2d 394 (1992); 100 ILR, p. 509.

[135] 425 US 682 (1976); 66 ILR, p. 212. Here, the plurality stated that a foreign state engaging in commercial activities was exercising only those powers that can be exercised by private citizens, 425 US 704.

private persons and were negotiable and could be traded on the international market.[136] This approach was followed in *Guevera* v. *Peru* by the Court of Appeals for the Eleventh Circuit, which held that a foreign state's offer of a reward in exchange for information concerning a fugitive fell within the 'commercial activity' exception to immunity.[137]

The purchase of military equipment by Haiti for use by its army[138] and a military training agreement whereby a foreign soldier was in the US were held not to be commercial activities.[139] It has also been decided that Somalia's participation in an Agency for International Development programme constituted a public or governmental act,[140] while the publication of a libel in a journal distributed in the US was not a commercial activity where the journal concerned constituted an official commentary of the Soviet government.[141] Section 1604(a)4 also provides for an exception to immunity where 'rights in immovable property situated in the United States are in issue' and the Supreme Court in *Permanent Mission of India to the US* v. *City of New York* held that this provided jurisdiction over a suit brought by New York City to establish tax liens on real property owned by the governments of India and Mongolia.[142]

Many cases before the US courts have, however, centred upon the jurisdictional requirements of section 1605(a), which states that a foreign state is not immune in any case in which the action is based upon a commercial activity carried on in the US by a foreign state; or upon an act performed in the US in connection with a foreign state's commercial activity elsewhere; or upon an act outside the territory of the US in connection with a foreign state's commercial activity elsewhere, when that act causes a direct effect in the US.[143]

136 119 L Ed 2d 394, 405; 100 ILR, p. 515. Reaffirmed in *Saudi Arabia* v. *Nelson* 123 L Ed 2d 47, 61 (1993); 100 ILR, pp. 545, 553.

137 DC Docket No. 04-23223-CV-MGC, 1 November 2006.

138 *Aerotrade Inc.* v. *Republic of Haiti* 63 ILR, p. 41.

139 *Castro* v. *Saudi Arabia* 63 ILR, p. 419.

140 *Transamerican Steamship Corp.* v. *Somali Democratic Republic* 590 F.Supp. 968 (1984) and 767 F.2d 998. This is based upon the legislative history of the 1976 Act: see the HR Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976).

141 *Yessenin-Volpin* v. *Novosti Press Agency* 443 F.Supp. 849 (1978); 63 ILR, p. 127. See also Schreuer, *State Immunity*, pp. 42–3, providing a list of criteria with respect to identifying commercial transactions.

142 127 S. Ct. 2352 (2007).

143 See e.g. *International Shoe Co.* v. *Washington* 326 US 310 (1945); *McGee* v. *International Life Insurance Co.* 355 US 220 (1957); *Libyan-American Oil Co.* v. *Libya* 482 F.Supp. 1175 (1980); 62 ILR, p. 220; *Perez et al.* v. *The Bahamas* 482 F.Supp. 1208 (1980); 63 ILR,

In *Zedan* v. *Kingdom of Saudi Arabia*,[144] for example, the US Court of Appeals in discussing the scope of section 1605(a)(2) emphasised that the commercial activity in question taking place in the US had to be substantial, so that a telephone call in the US which initiated a sequence of events which resulted in the plaintiff working in Saudi Arabia was not sufficient. Additionally, where an act is performed in the US in connection with a commercial activity of a foreign state elsewhere, this act must in itself be sufficient to form the basis of a cause of action,[145] while the direct effect in the US provision of an act abroad in connection with a foreign state's commercial activity elsewhere was subject to a high threshold. As the Court noted,[146] in cases where this clause was held to have been satisfied, 'something legally significant actually happened in the United States'.[147] However, in *Republic of Argentina* v. *Weltover Inc.*,[148] the Court rejected the suggestion that section 1605(a)(2) contained any unexpressed requirement as to substantiality or foreseeability and supported the Court of Appeals' view that an effect was direct if it followed as an immediate consequence of the defendant's activity.[149] In the case, it was sufficient that the respondents had designated their accounts in New York as the place of payment and Argentina had made some interest payments into them prior to the rescheduling decision.

Article 10 of the UN Convention on Jurisdictional Immunities provides that there is no immunity where a state engages in a 'commercial transaction' with a foreign natural or juridical person (but not another state) in a situation where by virtue of the rules of private international law a dispute comes before the courts of another state, unless the parties to the commercial transaction otherwise expressly agree. However, the

p. 350 and *Thos. P. Gonzalez Corp* v. *Consejo Nacional de Produccion de Costa Rica* 614 F.2d 1247 (1980); 63 ILR, p. 370, aff'd 652 F.2d 186 (1982).

[144] 849 F.2d 1511 (1988).

[145] *Ibid.* Note that the Supreme Court in *Saudi Arabia* v. *Nelson* 123 L Ed 2d 47, 58–9; 100 ILR, pp. 545, 550–1, held that the phrase 'based on' appearing in the section, meant 'those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case'.

[146] 849 F.2d 1515.

[147] Referring to the cases of *Transamerican Steamship Corp.* v. *Somali Democratic Republic* 767 F.2d 998, 1004, where demand for payment in the US by an agency of the Somali government and actual bank transfers were held to be sufficient, and *Texas Trading & Milling Corp*. v. *Federal Republic of Nigeria* 647 F.2d 300, 312; 63 ILR, pp. 552, 563, where refusal to pay letters of credit issued by a US bank and payable in the US to financially injured claimants was held to suffice.

[148] 119 L Ed 2d 394 (1992); 100 ILR, p. 509.

[149] 119 L Ed 2d 407; 100 ILR, p. 517, citing 941 F.2d at 152.

immunity of a state is unaffected where a state enterprise or other entity established by a state which has an independent legal personality and is capable of suing or being sued and acquiring, owning or possessing and disposing of property, including property which that state has authorised it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged.

Article 2(1)c of the Convention provides that the term 'commercial transaction' means:

> (i) any commercial contract or transaction for the sale of goods or the supply of services;
> (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;
> (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.[150]

Contracts of employment

Section 4(1) of the State Immunity Act 1978 provides that a state is not immune as respects proceedings relating to a contract of employment between the state and an individual where the contract was made in the UK or where the work is to be performed wholly or in part there.[151] The section does not apply if at the time of the proceedings the individual is a national of the state concerned[152] or at the time the contract was made the individual was neither a national nor habitual resident of the UK or the parties to the contract have otherwise agreed in writing. However, these provisions do not apply with regard to members of a diplomatic mission or consular post,[153] a fact that has rendered section 4(1) significantly weaker.[154] There have been a number of cases concerning immunity and contracts of employment, particularly with regard to employment at foreign embassies. In *Sengupta* v. *Republic of India*, for example, a broad

[150] See as to earlier drafts of this provision, Report of the International Law Commission, 1991, pp. 13 and 69, and *Yearbook of the ILC*, 1986, vol. II, part 2, p. 8.

[151] See e.g. H. Fox, 'Employment Contracts as an Exception to State Immunity: Is All Public Service Immune?', 66 BYIL, 1995, p. 97, and R. Garnett, 'State Immunity in Employment Matters', 46 ICLQ, 1997, p. 81.

[152] See e.g. *Arab Republic of Egypt* v. *Gamal Eldin* [1996] 2 All ER 237.

[153] S. 16(1)a.

[154] See e.g. *Saudi Arabia* v. *Ahmed* [1996] 2 All ER 248; 104 ILR, p. 629.

decision prior to the 1978 Act, the Employment Appeal Tribunal held on the basis of customary law that immunity existed with regard to a contract of employment dispute since the workings of the mission in question constituted a form of sovereign activity.[155]

The position in other countries is varied. In *United States of America* v. *The Public Service Alliance of Canada (Re Canada Labour Code)*, for example, it was held that the conduct of labour relations at a foreign military base was not a commercial activity so that the US was entitled to sovereign immunity in proceedings before a labour tribunal,[156] while in *Norwegian Embassy* v. *Quattri*, for example, the Italian Court of Cassation referred to an international trend of restricting immunity with regard to employment contracts. The Court held that under customary international law immunity was available, but this was restricted to acts carried out in the exercise of the foreign state's public law functions. Accordingly, no immunity existed with regard to acts carried out by the foreign state in the capacity of a private individual under the internal law of the receiving state. An example of this would be employment disputes where the employees' duties were of a merely auxiliary nature and not intrinsic to the foreign public law entity.[157] In *Barrandon* v. *USA*, the French Court of Cassation (1992) and subsequently the Court of Appeal of Versailles (1995) held that immunity was a privilege not guaranteed by an international treaty to which France was a party and could only be invoked by a state which believed it was entitled to rely upon it. Immunity from jurisdiction was limited to acts of sovereign power (*puissance publique*) or acts performed in the interest of a public service. In the instant case, the plaintiff, a nurse and medical secretary at the US embassy, had performed functions clearly in the interest of a public service of the respondent state and immunity was therefore applicable.[158] However, on appeal the Court of Cassation (1998) reversed this decision and held that her tasks did not give her any special responsibility for the performance of the public

[155] 65 ILR, p. 325. See also *Military Affairs Office of the Embassy of the State of Kuwait* v. *Caramba-Coker*, EAT 1054/02/RN, Employment Appeals Tribunal (2003) and *Aziz* v. *Republic of Yemen* [2005] EWCA Civ 745.

[156] (1992) 91 DLR (4th) 449; 94 ILR, p. 264.

[157] 114 ILR, p. 525. See also *Canada* v. *Cargnello* 114 ILR, p. 559. See also a number of German cases also holding that employment functions forming part of the core sphere of sovereign activity of the foreign states would attract immunity, otherwise not, *X* v. *Argentina* 114 ILR, p. 502; the *French Consulate Disabled Employee* case, 114 ILR, p. 508 and *Muller* v. *USA* 114 ILR, p. 513.

[158] 113 ILR, p. 464.

service of the embassy, so that her dismissal was an ordinary act of administration so that immunity was not applicable.[159] Practice is far from consistent. Courts in a number of states have accepted immunity claims in such state immunity/employment situations,[160] while courts in others have rejected such claims.[161]

Other non-immunity areas

Domestic and international instruments prohibit sovereign immunity in cases of tortious activity.[162] Article 11 of the European Convention on State Immunity, 1972, for example, refers to 'redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the state of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred'.

Section 5 of the UK State Immunity Act provides that a state is not immune as respects proceedings in respect of death or personal injury, or damage to or loss of tangible property, caused by an act or omission in the UK,[163] while section 1605(a)(5) of the US Foreign Sovereign Immunities Act 1976, although basically similar, does include exceptions relating to the exercise of the state's discretionary functions and to claims arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit or interference with contractual rights. In *Letelier* v. *Chile*,[164] the Court rejected a claim that the torts exception in this

159 116 ILR, p. 622. The case was remitted to the Court of Appeal for decision.

160 See e.g. the *Brazilian Embassy Employee* case, 116 ILR, p. 625 (Portuguese Supreme Court) and *Ramos* v. *USA* 116 ILR, p. 634 (High Court of Lisbon).

161 See e.g. *Landano* v. *USA* 116 ILR, p. 636 (Labour Court of Geneva); *Nicoud* v. *USA* 116 ILR, p. 650 (Labour Court of Geneva); *M* v. *Arab Republic of Egypt* 116 ILR, p. 656 (Swiss Federal Tribunal); *R* v. *Republic of Iraq* 116 ILR, p. 664 (Swiss Federal Tribunal); *François* v. *State of Canada* 115 ILR, p. 418 (Labour Court of Brussels); *Kingdom of Morocco* v. *DR* 115 ILR, p. 421 (Labour Court of Brussels); *De Queiroz* v. *State of Portugal* 115 ILR, p. 430 (Labour Court of Brussels); *Zambian Embassy* v. *Sendanayake* 114 ILR, p. 532 (Italian Court of Cassation), and *Carbonar* v. *Magurno* 114 ILR, p. 534 (Italian Court of Cassation).

162 See e.g. Schreuer, *State Immunity*, chapter 3.

163 See also s. 6 of the Canadian State Immunity Act 1982; s. 6 of the South African Foreign Sovereign Immunity Act 1981; s. 7 of the Singapore State Immunity Act 1979; and s. 13 of the Australian Foreign States Immunities Act 1985. See also article 12 of the UN Convention on Jurisdictional Immunities.

164 488 F.Supp. 665 (1980); 63 ILR, p. 378.

legislation referred only to private acts and held that it could apply to political assassinations.[165]

Sections 6-11 of the UK Act detail the remainder of the wide-ranging non-immunity areas and include proceedings relating to immovable property (section 6)[166] except with regard to proceedings concerning a state's title to or right to possession of property used for the purposes of a diplomatic mission;[167] patents, trademarks, designs, plant breeders' rights or copyrights (section 7); proceedings relating to a state's membership of a body corporate, an unincorporated body or partnership, with members other than states which is incorporated or constituted under UK law or is controlled from or has its principal place of business in the UK (section 8); where a state has agreed in writing to submit to arbitration and with respect to proceedings in the UK courts relating to that arbitration (section 9); Admiralty proceedings with regard to state-owned ships used or intended for use for commercial purposes (section 10); and proceedings relating to liability for various taxes, such as VAT (section 11). This, together with generally similar provisions in the legislation of other states,[168] demonstrates how restricted the concept of sovereign acts is now becoming in practice in the context of sovereign immunity, although definitional problems remain.

The personality issue – instrumentalities and parts of the state[169]

Whether the absolute or restrictive theory is applied, the crucial factor is to determine the entity entitled to immunity. If the entity, in very general terms, is not part of the apparatus of state, then no immunity can arise. Shaw LJ in *Trendtex Trading Corporation Ltd* v. *Central Bank of*

165 Note that the Greek Special Supreme Court in *Margellos* v. *Federal Republic of Germany* held that in customary international law a foreign state continued to enjoy immunity in respect of a tort committed in another state in which its armed forces had participated, 129 ILR, p. 526. See also article 31 of the European Convention on State Immunity. See also the *Distomo Massacre* case, 129 ILR, p. 556.

166 The winding-up of a company is not protected by immunity where the state is not directly impleaded: see s. 6(3) and *Re Rafidain* [1992] BCLC 301; 101 ILR, p. 332.

167 S. 16(1)b.

168 See e.g. s. 1605 of the US Foreign Sovereign Immunities Act 1976 and ss. 10–21 of the Australian Foreign States Immunities Act 1985. Note in particular the inclusion in the US legislation of an exception to immunity with regard to rights in property taken in violation of international law, s. 1605(a)(3), which does not appear in other domestic legislation.

169 See e.g. Schreuer, *State Immunity*, chapter 5.

Nigeria[170] cautioned against too facile an attribution of immunity particularly in the light of the growth of governmental functions, since its acceptance resulted in a significant disadvantage to the other party.

A department of government would, however, be entitled to immunity, even if it had a separate legal personality under its own law.[171] The issue was discussed in detail in the *Trendtex* case. It was emphasised that recourse should be had to all the circumstances of the case. The fact of incorporation as a separate legal identity was noted in *Baccus SRL* v. *Servicio Nacional del Trigo*[172] and both Donaldson J at first instance and Denning MR emphasised this.[173] The question arises in analysing whether a body is a corporation or not, and indeed whether it is or is not an arm of government, as to which law is relevant. Each country may have its own rules governing incorporation, and similarly with regard to government departments. Should English law therefore merely accept the conclusions of the foreign law? The majority of the Court in *Baccus* was of the view that foreign law was decisive in questions relating to incorporation and whether corporateness was consistent with the recognition of immunity, and to a certain extent this was accepted in *Trendtex.* Shaw LJ declared that 'the constitution and powers of Nigerian corporation must be viewed in the light of the domestic law of Nigeria'.[174] However, the status on the international scene of the entity in question must be decided, it was held, by the law of the country in which the issue as to its status has been raised. The Court had to determine whether the Nigerian Bank could constitute a government department as understood in English law.[175] It was also noted that where a material difference existed between English law and the foreign law, this would be taken into account, but the Court was satisfied that this was not the case in *Trendtex.*

This position of pre-eminence for English law must not be understood to imply the application of decisions of English courts relating to immunities granted internally. These could be at best only rough guides to be utilised depending on the circumstances of each case. If the view taken by the foreign law was not conclusive, neither was the attitude adopted by the foreign government. It was a factor to be considered, again, but no more than that. In this, the Court followed *Krajina* v. *Tass Agency.*[176] The point

170 [1977] 2 WLR 356, 383; 64 ILR, pp. 122, 147.
171 *Baccus SRL* v. *Servicio Nacional del Trigo* [1957] 1 QB 438; 23 ILR, p. 160.
172 [1957] 1 QB 438, 467. 173 [1977] 2 WLR 356, 370; 64 ILR, p. 133.
174 [1977] 2 WLR 356, 385; 64 ILR, p. 149. 175 [1977] 2 WLR 356, 385; 64 ILR, p. 175.
176 [1949] 2 All ER 274.

was also made that the evidence provided by Nigerian officials, including the High Commissioner, that the Bank was a government organ, was not conclusive. This was because the officials might very well be applying a test of governmental control which would not be decisive for the courts of this country.[177]

Of more importance was the legislative intention of the government in creating and regulating the entity and the degree of its control. Stephenson LJ in fact based his decision upon this point. An express provision in the creative legislation to the effect that the Bank was an arm of government was not necessary, but the Bank had to prove that the intention to make it an organ of the Nigerian state was of necessity to be implied from the enabling Central Bank of Nigeria Act 1958 and subsequent decrees. This the Bank had failed to do and Stephenson LJ accordingly allowed the appeal.[178] It could be argued that the judge was placing too much stress upon this aspect, particularly in the light of the overall approach of the Court in applying the functional rather than the personality test. In many ways, Stephenson LJ was also looking at the attributes of the Bank but from a slightly different perspective. He examined the powers and duties of the entity and denied it immunity since the intention of the government to establish the Bank as an arm of itself could not be clearly demonstrated. The other judges were concerned with the functions of the Bank as implying governmental status *per se*.

The Court clearly accepted the functional test as the crucial guide to the determination of sovereign immunity. In this it was following the modern approach which has precipitated the change in emphasis from the personality of the entity for which immunity is claimed to the nature of the subject matter. This functional test looks to the powers, duties and control of the entity within the framework of its constitution and activities.

In such difficult borderline decisions, the proposition put forward by Shaw LJ is to be welcomed. He noted that:

> where the issue of status trembles on a fine edge, the absence of any positive indication that the body in question was intended to possess sovereign status and its attendant privileges must perforce militate against the view that it enjoys that status or is entitled to those privileges.[179]

177 [1977] 2 WLR 356, 370 and 374; 64 ILR, p. 137, 139.
178 [1977] 2 WLR 356, 374–6. See also Shaw LJ, *ibid.*, p. 384; 64 ILR, p. 149.
179 *Ibid.*

In *Czarnikow Ltd* v. *Rolimpex*,[180] the House of Lords accepted as correct the findings of the arbitrators that although Rolimpex had been established by the Polish government and was controlled by it, it was not so closely connected with the government as to be an organ or department of the state. It had separate legal personality and had considerable freedom in day-to-day commercial activities.

Under section 14(1) of the State Immunity Act of 1978, a state is deemed to include the sovereign or other head of state in his public capacity,[181] the government and any department of that government, but not any entity 'which is distinct from the executive organs of the government of the state and capable of suing or being sued'. This modifies the *Baccus* and *Trendtex* approaches to some extent. Such a separate entity would only be immune if the proceedings related to acts done 'in the exercise of sovereign authority' and the circumstances are such that a state would have been so immune.[182] In determining such a situation, all the relevant circumstances should be taken into consideration.[183] In *Kuwait Airways Corporation* v. *Iraqi Airways Co.*, the House of Lords, in discussing the position of the Iraqi Airways Company (IAC), analysed the relevant transactions as a whole but felt able to separate out differing elements and treat them discretely. In brief, aircraft of the plaintiffs (KAC) had been seized by IAC consequent upon the Iraqi invasion of Kuwait in 1990 and pursuant to orders from the Iraqi government. Revolutionary Command Council[184] resolution 369 purported to dissolve KAC and transfer all of its assets to IAC. From that point on, IAC treated the aircraft in question as part of its own fleet. The issue was whether the fact that the initial appropriation was by governmental action meant that the plea of immunity continued to be available to IAC. The House of Lords held that it was not. Once resolution 369 came into effect the situation changed and immunity was no longer applicable since the retention and use of the aircraft were not acts done in the exercise of sovereign authority. A characterisation of the appropriation of the property as a sovereign act could not be determinative of the characterisation of its subsequent retention and use.[185]

The US Foreign Sovereign Immunities Act of 1976 provides in section 1603 that 'foreign state' includes a political subdivision of such a state

[180] [1979] AC 351, 364 (Lord Wilberforce) and 367 (Viscount Dilhorne).
[181] See further below, p. 735. [182] S. 14(2).
[183] See e.g. *Holland* v. *Lampen-Wolfe* [2000] 1 WLR 1573.
[184] Essentially the Iraqi government.
[185] [1995] 1 WLR 1147, 1163 (per Lord Goff). Cf. Lord Mustill at 1174 who argued that the context should be taken as a whole so that immunity continued.

and its agencies or instrumentalities. This is defined to mean any entity which is a separate legal person and which is an organ of a foreign state or political subdivision thereof or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof and which is neither a citizen of a state of the United States nor created under the laws of any third country.[186] This issue of personality has occasioned problems and some complex decisions.[187]

In *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba* (*Bancec*),[188] for example, the Supreme Court suggested a presumption of separateness for state entities, under which their separate legal personalities were to be recognised unless applicable equitable principles mandated otherwise or the parent entity so completely dominated the subsidiary as to render it an agent of the parent.[189]

The meaning of the term 'government' as it appears in section 14(1) of the State Immunity Act was discussed in *Propend Finance* v. *Sing*. The Court of Appeal held that it must be given a broad meaning and, in particular, that it should be construed in the light of the concept of sovereign authority. Accordingly, 'government' meant more than it would in other contexts in English law where it would mean simply the government of the United Kingdom. In particular it would include the performance of police functions as part of governmental activity. Further, individual employees or officers of a foreign state were entitled to the same protection as that which envelops the state itself. The Court thus concluded that both the Australian Federal Police superintendent and Commissioner, the defendants in the case, were covered by state immunity.[190] The view that the agent of a foreign state would enjoy immunity in respect of his acts of a sovereign or governmental nature was reaffirmed in *Re P* (*No. 2*). The Court accepted that the removal from the country of the family of a diplomat based in the UK and their return to the US at the end of his mission was in compliance with a direct order from his government. This

[186] See e.g. *Gittler* v. *German Information Centre* 408 NYS 2d 600 (1978); 63 ILR, p. 170; *Carey* v. *National Oil Co.* 453 F.Supp. 1097 (1978); 63 ILR, p. 164 and *Yessenin-Volpin* v. *Novosti Press Agency* 443 F.Supp. 849 (1978); 63 ILR, p. 127. See also Sinclair, 'Sovereign Immunity', pp. 248–9 and 258–9. Note, in addition, articles 6 and 7 of the European Convention on State Immunity, 1972.

[187] See also article 2(1)b of the UN Convention on Jurisdictional Immunities: see above, p. 725.

[188] 462 US 611 (1983); 80 ILR, p. 566.

[189] See also *Foremost-McKesson Inc.* v. *Islamic Republic of Iran* 905 F.2d 438 (1990).

[190] 111 ILR, pp. 611, 667–71.